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2017]

NO RESTORATION, NO REHABILITATION: SHADOW DETENTION
OF MENTALLY INCOMPETENT NONCITIZENS

SARAH SHERMAN-STOKES*

I. INTRODUCTION

ORIGINALLY from Haiti, Martin¹ immigrated to the United States as a teenager with his mother and two brothers, all of them Lawful Permanent Residents. Sometimes living with his older brother, sometimes on the street, Martin had always required extra help to perform daily tasks. He never graduated from high school, and indeed barely made it through the ninth grade. Conversations with Martin were often short and repetitive. Especially during times of stress, Martin struggled to understand concepts that his family thought were basic and routine—like how to make a cup of coffee or sign his name. His speech was difficult to understand and he could not maintain a job for more than a few weeks at a time. When Martin was twenty-nine years old, he entered a major department store and, without paying, took several packages of men’s t-shirts and underwear. He then walked to a local Dunkin’ Donuts, where he fell asleep for the night. Martin was arrested, charged with larceny, and convicted. Despite being a lawful permanent resident, Martin’s conviction, combined with a previous nonviolent larceny offense, subjected Martin to deportation. And so, after completing his sentence in criminal custody, Martin was transferred to immigration detention. Immediately aware that something about Martin was different, other detainees contacted representatives of a local nonprofit who regularly visited the detention center, pleading with them to take on Martin’s case and represent him in removal proceedings. “He talks to himself” and “he just keeps repeating his name and saying thank you,” they implored. Martin’s family did not know how to contact him, and Martin could not remember their full names or telephone numbers.

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1. “Martin” is a pseudonym for one of the author’s former clients from the Political Asylum/Immigration Representation (PAIR) Project, a nonprofit legal service provider representing detainees and asylum seekers. *See* Pair Project, <https://www.pairproject.org/> [https://perma.cc/M3S4-DR4E] (last visited Oct. 30, 2017). Identifying details have been changed to protect his identity.

During his removal proceedings, Martin was ultimately represented by attorneys at the local nonprofit organization contacted by his fellow detainees, who were able to reach one of Martin's brothers, obtain past criminal records, contact Martin's therapist, and obtain evidence that Martin had previously been found incompetent to stand trial in a criminal case. At his removal hearing, Martin seemed to have little understanding of where he was or the high stakes he was facing. He repeated his name, again and again, and explained to the judge that he "just went to Dunkin' Donuts" and didn't understand why he was there. He pleaded to go home, but did not remember his address.

Ultimately, the immigration judge found that Martin was incompetent to proceed. Reviewing the list of safeguards² he could consider in Martin's case that might help protect Martin's rights and enable the proceedings to continue, the immigration judge determined that none would be sufficient. Though the immigration judge wished to terminate removal proceedings—allowing Martin to remain a lawful permanent resident and be released from immigration custody—the Department of Homeland Security initially objected, arguing that the immigration judge lacked authority to order termination. The proceedings came, at least temporarily, to a standstill. Because he was subject to mandatory detention, Martin's detention also continued, with no foreseeable end in sight.

At present, Immigration and Customs Enforcement (ICE) detains 34,000 noncitizens on any given day.³ This number is expected to grow substantially, as President Trump has made immigration enforcement, detention, and deportation a cornerstone of his campaign and presidency.⁴ Indeed, one of President Trump's first actions as President was to announce vastly expanded enforcement efforts.⁵ With increased enforcement, detention, and deportation, the rights of the most vulnerable—in particular the mentally ill and incompetent—will only be further jeopardized. In fiscal year 2015, ICE recorded 90,276 "mental health interven-

2. See *Matter of M-A-M*, 25 I. & N. Dec. 474, 478 (B.I.A. 2011) (providing list of safeguards).

3. See Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), https://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html?utm_term=.98347bf2b290 [<https://perma.cc/SMS243S5>].

4. See Jessie Hellman, *Trump Vows to Deport Millions Immediately*, THE HILL (Nov. 13, 2016, 10:43 AM), <http://thehill.com/blogs/ballot-box/presidential-races/305774-trump-vows-to-deport-millions-of-criminal-undocumented> [<https://perma.cc/6PCK-5WJR>] (vowing to deport "probably 2 million—it could even be 3 million").

5. See Press Release, The White House, Executive Order: Border Security and Immigration Enforcement Improvements (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements> [<https://perma.cc/J9ZW-KH5G>].

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tions”⁶ for immigrant detainees in ICE custody.⁷ This is a staggering 64% increase in mental health interventions since fiscal year 2012.⁸ There is no doubt that noncitizens in immigration detention are suffering from mental illness and incompetency at significant numbers. And more than that, it is well documented that prolonged detention, and even short-term incarceration, has a negative, long-term impact on the psychological wellbeing of migrants.⁹ Fortunately, the last five years has heralded a shift—and indeed, significant advancement—in how the rights of mentally ill and incompetent noncitizens are protected. The Board of Immigration Appeals¹⁰ and federal district courts¹¹ are increasingly recognizing that extra procedural protections and safeguards must be put in place to ensure that the fundamental fairness of removal proceedings remains intact, even when noncitizens are mentally ill or incompetent. Scholars, similarly, are increasingly engaged in a conversation about what additional rights and protections are needed to ensure fairness in removal proceedings for these uniquely vulnerable noncitizens and detainees.¹² And yet, challenges persist.

6. See Max Siegelbaum, *Detention Centers, Bracing for Flood of New Arrivals, Are ‘Set up to Fail’ Immigrants with Mental Illness*, STAT NEWS (Dec. 16, 2016), https://www.statnews.com/2016/12/16/immigrants-mental-health/?s_campaign=TW [<https://perma.cc/WCH7-V2B4>] (explaining that mental health interventions in ICE custody “can include everything from relaxation exercises to cognitive behavioral therapy to prescription of psychotropic medication”).

7. See *Detainee Health Care—FY2015*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., <https://www.ice.gov/factsheets/dhc-fy15> [<https://perma.cc/P7BK-Y59J>].

8. See *A Day in the Life of ICE Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., <https://www.ice.gov/doclib/news/library/factsheets/pdf/day-in-life-ero.pdf> [<https://perma.cc/6PBW-MH29>].

9. See Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721, 1721–22 (2003); Derrick Silove et al., *Policies of Deterrence and the Mental Health of Asylum Seekers*, 284 J. AM. MED. ASS’N. 604, 605–06 (2000); Zachary Steel et al., *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 BRIT. J. PSYCHIATRY 58, 63 (2006); see also DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 7–13 (2012) (explaining that detention centers “create or aggravate psychological or psychiatric disorders” and that care available was often “insufficient or inappropriate”).

10. See, e.g., *Matter of J-R-R-A*, 26 I. & N. Dec. 609, 612 (B.I.A. 2015) (holding that where respondent’s mental health may impact their testimony, immigration judge should “generally accept that the applicant believes what he has presented”); *Matter of E-S-I*, 26 I. & N. Dec. 136, 136 (B.I.A. 2013) (requiring special protections for service of Notice to Appear where respondent’s mental incompetence is “manifest”). *But see* *Matter of G-G-S*, 26 I. & N. Dec. 339, 339 (B.I.A. 2014) (holding that mental illness is consideration to be left to criminal courts and cannot be considered in determination whether offenses are particularly serious under sections 241(b)(3)(B) of the Immigration and Nationality Act).

11. See, e.g., *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097, at *8 (C.D. Cal. Oct. 29, 2014) (requiring appropriate safeguards ensuring fairness).

12. See, e.g., Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 379–83 (2011); Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to*

Specifically, what is an immigration judge to do when a respondent is found incompetent, and no adequate safeguards are available? Nationwide data on the number of noncitizens who have been found incompetent in removal proceedings is not yet maintained or available.¹³ However, we know that the number of mentally ill and incompetent noncitizen detainees is substantial and, in many cases, their disability is profound.¹⁴

In contrast to other kinds of judicial proceedings,¹⁵ there are no mechanisms in place for the immigration court, the Department of Homeland Security, or the respondent or their counsel, to seek restoration of competency. Further, unlike in criminal proceedings, no clear, explicit authority currently exists for an immigration judge to release the respondent or dismiss the proceedings—in this case, order termination—where competency is unlikely to be restored and where no safeguards can adequately protect that respondent's rights. In these cases, largely, but not always, unrepresented, incompetent respondents languish in immigration detention, unable to pursue relief from removal or to be released from detention.¹⁶ Indeed, Mr. Franco-Gonzalez himself remained detained, and forgotten, for nearly five years after an immigration judge found him incompetent.¹⁷ This Article argues that following a finding of incompetence by an immigration judge, and where no adequate safeguards are

Mental Competence in Removal Proceedings, 65 HASTINGS L.J. 929, 696 (2013); Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J. 1023, 1058 (2016); Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 315, 340 (2015); Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1, 15–19 (2013).

13. See Conversation with Office of the General Counsel, Executive Office for Immigration Review (June 6, 2016) (notes on file with author).

14. See, e.g., First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 11, *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (describing petitioner-plaintiff in that case as mentally incompetent and suffering from mental retardation and noting that he was “forgotten in a facility for more than four and a half years” after being identified as incompetent; further noting that his case is “not unique” and going on to describe other mentally ill and incompetent detainees and class members who suffer from schizophrenia and psychosis).

15. See, e.g., MASS. GEN. LAWS ANN. ch. 123, § 16(f) (West 2015) (describing process by which incompetent defendants in criminal court in Massachusetts can secure dismissals on basis of their incompetency).

16. See, e.g., Sherman-Stokes, *supra* note 12, at 1056 (describing ICE resistance to releasing incompetent respondents even where immigration judge has ordered administrative closure; also describing immigration judge's reluctance to order termination, or even administrative closure, unless respondent was being transferred to state mental hospital).

17. See First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 4, *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

available, the immigration judge should be authorized to terminate removal proceedings and order the release of the respondent. Subjecting this subgroup of respondents to continued detention and removal proceedings in this context violates section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in programs conducted by federal agencies, in this case, the Department of Justice. Continued detention and removal proceedings—in a system which provides inadequate care and procedural protection—denies this subgroup of respondents meaningful access to the courts. Release to access adequate mental health care, and in some cases, termination of proceedings, are thus the only “reasonable accommodations” available to this subset of incompetent respondents.

While immigration judges not only have the authority to terminate proceedings where no safeguards are adequate to protect the respondent’s rights, the Executive Office for Immigration Review (EOIR) should amend the regulations to make this authority explicit, even, if necessary, over the objection of the Department of Homeland Security trial counsel. This does not require that immigration judges terminate in all cases—indeed, the author acknowledges that such a requirement could privilege detained incompetent respondents over non-detained incompetent respondents. However, in order to ensure compliance with the Rehabilitation Act, the options available should be release, and continued removal proceedings, or termination of proceedings and concomitant release. The unacceptable alternative is that incompetent respondents in custody will continue to face unconstitutional, prolonged, and indefinite detention and will be unable to meaningfully access the courts and participate in their removal proceeding. Alternative solutions, including bond hearings, habeas challenges, and congressional action are unreliable, inefficient, or implausible, leaving action by EOIR as the only suitable remedy to protect the rights of detained, incompetent respondents.¹⁸

This regulatory “fix” builds on the important and thoughtful recommendations of other scholars and advocates writing about mental competency in immigration removal proceedings.¹⁹ This Article, and the

18. Because they are uniquely vulnerable and more likely to be unrepresented by an attorney, this Article speaks only to the rights of detained, incompetent respondents. However, several of the arguments presented here in favor of regulatory change are equally applicable to non-detained, mentally incompetent respondents.

19. See, e.g., Clapman, *supra* note 12, at 394 (arguing for right to counsel for mentally ill and incompetent); Marouf, *supra* note 12, at 967 (arguing for substantive right to competence in removal proceedings); Aimee L. Mayer-Salins, *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 *CARDOZO PUB. L. POL’Y & ETHICS J.* 545, 562 (2016) (arguing that section 504 of Rehabilitation Act requires that mentally incompetent noncitizens be provided with additional protections in fast-track removal proceedings); Sherman-Stokes, *supra* note 12, at 1057 (arguing that role of the immigration judge in competency determinations must be changed and that opinion of mental health professionals should be central to determinations of mental competency in order to protect fundamental fairness of

regulatory changes it proposes, are especially timely. As discussed in greater detail in Part II of this Article, immigration courts, the Board of Immigration Appeals, and Immigration and Customs Enforcement have devoted increasing attention and guidance, as well as published, precedential case law, to issues of mental competency in the last five years. Moreover, following re-argument in October 2017, as explained in Part III, the Supreme Court is currently considering *Jennings v. Rodriguez*,²⁰ which will decide whether noncitizens held in prolonged ICE detention are eligible for a bond hearing. These two themes—mental competency and prolonged detention—are the foundation of this Article.

Part II of this Article will describe the rights and procedures present in removal proceedings for incompetent, detained respondents. This section describes the current state of the law for incompetent, detained respondents and the limited rights and remedies available to them. This section further examines the current application of section 504 of the Rehabilitation Act to certain mentally incompetent noncitizen respondents in removal proceedings. This section will also identify the current questions that remain in the competency realm, including the restoration of competency and civil commitment.

Part III of this Article will examine the prospect of prolonged and indefinite detention facing incompetent, detained respondents in removal proceedings. This section will review the case law on indefinite, prolonged, and mandatory detention in immigration removal proceedings and analyze the applicability of case law that relates specifically to the “special justifications” for the prolonged and indefinite detention of the mentally ill.²¹

Part IV of this Article will examine the role of immigration judges and their regulatory authority, which while limited in certain areas, is expansive in others. This section will explore arguments as to the sufficiency of immigration judges’ current regulatory authority to release respondents from custody and terminate proceedings, and why and where those regulations may fall short.

Part V of this Article will argue that EOIR should amend the regulations to grant explicit regulatory authority to the immigration judge to release incompetent respondents or terminate removal proceedings, where no safeguards can adequately protect the rights of the respondent, in order to comply with section 504 of the Rehabilitation Act. This section

proceeding); Wilson et al., *supra* note 12, at 330 (arguing that counsel should be appointed when court is presented with “indicia” of incompetence, rather than after adjudication of incompetence); Wilson & Prokop, *supra* note 12 (arguing for provision of court appointed guardian ad litem for mentally ill Respondents appearing pro se).

20. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom.*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

21. *See, e.g., Zadydas v. Davis*, 533 U.S. 678, 690 (2001) (first citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); then citing *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

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will also respond to a critique of this suggested reform, namely the potential risks of providing release from custody for certain mentally incompetent noncitizens. Finally, this section will further explore why alternative solutions, including bond hearings, habeas challenges, and congressional action are unreliable, inefficient, or implausible.

II. MENTAL COMPETENCY IN IMMIGRATION REMOVAL PROCEEDINGS

This section will provide an overview of the state of the law on mental competency in immigration removal proceedings, as well as present application of the Rehabilitation Act to protect the rights of mentally incompetent respondents facing deportation. The Immigration and Nationality Act (INA) recognizes that noncitizens facing removal from the United States may suffer from incompetence.²² But it was not until the last five years that immigration courts have begun to engage in meaningful consideration and application of a scheme of rights and protections for mentally incompetent respondents.

A. *Mental Competency in Immigration Removal Proceedings*

Today, competency is presumed in removal proceedings²³ and courts have held that even where a respondent is incompetent, immigration removal proceedings may go forward.²⁴ The standard for mental compe-

22. See 8 U.S.C. § 1229a(b)(3) (2012); see also *Medina v. California*, 505 U.S. 437, 449 (1992) (concluding that presumption of competence does not violate the Due Process Clause).

23. See *Matter of M-A-M*, 25 I. & N. Dec. 474, 477 (B.I.A. 2011) (citing *Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008)) (finding that it is noncitizen's burden to first raise issue of competency).

24. See, e.g., *Munoz-Monsalve*, 551 F.3d at 6–8 (holding that immigration judge's failure to sua sponte order competency evaluation of represented alien did not violate alien's due process rights, as it is advocate's role, not immigration judge's, to broach issue of mental competence when alien's incompetence is not evident from record of hearing); *Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (holding that immigration judge had no obligation under either statute or regulation to consider represented alien's mental competency because procedural safeguards they envision were already in place); *Sanchez-Salvador v. I.N.S.*, 33 F.3d 59, 1994 WL 441755, at *1 (9th Cir. Aug. 15, 1994) (unpublished table decision) (“Lack of competency, however, does not prevent a judge from determining either deportability or whether to grant relief. As we held in *Nee Hao Wong v. INS* . . . an alien can obtain a full and fair hearing despite being incompetent. This was the case here. Sanchez-Salvador's incompetence did not prevent him from presenting, through counsel, a strong case that relief is warranted.”); *In re James*, A040 015 111, 2009 WL 2171712, at *2 (B.I.A. June 26, 2009) (“In this instance . . . the respondent's counsel failed to request that an evaluation of the respondent's competency be undertaken. The failure to raise the competency issue in a timely manner renders an ensuing appellate claim of error on this basis particularly weak. . . . Moreover, contrary to the substantive due process protection from trial and conviction to which a mentally incompetent criminal defendant is entitled, removal proceedings may go forward against incompetent aliens.” (internal citations omitted)); *Matter of Sanchez*, A37 616 891, 2006 WL 2008263, at *2 (B.I.A. May 24, 2006) (“The respondent was represented at the hearing; therefore, his rights

tency in immigration removal proceedings is not unlike the standard set out in the criminal court:

[t]he test for determining whether an alien 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.²⁵

Of course, one significant difference, which will be considered in greater depth in Section V of this Article, is that the mental competency standard in removal proceedings does not contemplate an attorney—or even a legal representative—in all cases, meaning that many mentally ill and incompetent respondents represent themselves, *pro se*, when facing the very real prospect of deportation.

1. *Matter of M-A-M-*

The standard for mental competency in immigration removal proceedings was set out in *Matter of M-A-M*²⁶ where, for the first time, the Board of Immigration Appeals (Board) squarely confronted the issue of mental competency head on.²⁷ In *Matter of M-A-M*, the Board set forth specific instructions for when and how immigration judges should make competency determinations when they suspect that a respondent before them is not competent to proceed.²⁸ Specifically, an immigration judge is first instructed to look for “indicia of incompetency.”²⁹ Once an immigration judge detects indicia of incompetency, the Board recommends asking the respondent simple questions about the proceedings, granting a continuance to allow parties to gather or submit relevant evidence, requesting a psychological evaluation, and allowing for a change of venue so that a respondent can receive medical care or counsel.³⁰ Finally, where an immigration judge finds that a noncitizen “lacks sufficient competency to

were adequately protected.”); *Matter of H-*, 6 I. & N. Dec. 358, 359 (B.I.A. 1954) (holding that requirements of fair hearing had not been violated in deportation proceedings involving alien of unsound mind, where notice of hearing had been served on alien and his wife, arrangements were made to protect alien’s interests by having doctor in attendance at hearing, and alien was represented by legal counsel who was given privilege of introducing evidence and cross-examining witnesses).

25. *M-A-M*, 25 I. & N. Dec. at 479.

26. 25 I. & N. Dec. 474 (B.I.A. 2011).

27. *See id.* at 474.

28. *See id.* at 479–81.

29. *See id.* at 479.

30. *See id.* at 481–82 (providing instructions for judges’ incompetency determinations).

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proceed,” then she “shall prescribe safeguards.”³¹ The Board has provided a “non-exhaustive” list of safeguards³² that an immigration judge may implement in order to ensure that the respondent’s rights are protected in the removal proceeding. These safeguards include:

refusal to accept an admission of removability from an unrepresented Respondent; identification and appearance of a family member or close friend who can assist the Respondent and provide the court with information; docketing or managing the case to facilitate the Respondent’s ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian in the proceedings; continuance of the case for good cause shown; closing the hearing to the public; waiving the Respondent’s appearance; actively aiding in the development of the record, including the examination and cross-examination of witnesses; and reserving appeal rights for the Respondent.³³

Finally, the Board suggests that where this list is insufficient, “alternatives” may be available—but notes only administrative closure among them.³⁴

2. *Application of the Rehabilitation Act and Franco Litigation*

The Rehabilitation Act of 1973³⁵ prohibits discrimination on the basis of disability in programs conducted by federal agencies and related matters.³⁶ Relevant to this discussion, “Section 504 [of the Rehabilitation Act] states that ‘no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under’ any program or activity that either receives Federal financial assistance or is conducted by any Executive agency”—for example, a removal hearing, conducted by EOIR, an agency housed within the Department of Justice.³⁷ Through section 504, the Rehabilitation Act essentially extends civil rights protections to those with disabilities and attempts

31. *See id.* at 478–81. For a more detailed discussion of the protocol around identifying competency issues and reliance on mental health evaluations, see Sherman-Stokes, *supra* note 12.

32. *See M-A-M*, 25 I. & N. Dec. at 483.

33. *Id.*

34. *See id.* (“[T]he Immigration Judge may pursue alternatives with the parties, such as administrative closure, while other options are explored, such as seeking treatment for the respondent.”).

35. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701–796l).

36. *See* CIV. RTS. DIV., U.S. DEP’T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (July 2009), <https://www.ada.gov/cguide.htm#anchor65610> [<https://perma.cc/MX3M-EDG7>].

37. *See id.*

to dismantle the many barriers faced by people with disabilities in accessing public services and institutions.

Two years after *Matter of M-A-M*, in April 2013, following a class action lawsuit brought by the ACLU and others, a federal district court issued an injunction affecting three states and countless mentally ill and incompetent respondents.³⁸ In *Franco-Gonzalez v. Holder*,³⁹ the district court held that in order to comply with section 504 of the Rehabilitation Act, ICE, the Attorney General, and EOIR are required to provide legal representation to immigrant detainees with mental disabilities who are unable to represent themselves in California, Arizona, and Washington.⁴⁰ The court articulated the nature of the legal right at stake as ensuring that disabled detainees are afforded meaningful participation in their removal proceedings.⁴¹ The court explained that provision of counsel was the reasonable accommodation by which disabled detainees could exercise this right on par with non-disabled detainees.⁴²

This Article advances the reasoning in *Franco* to further ensure that the rights of a subgroup of mentally incompetent detainees—those for whom no safeguards are adequate—are protected. Specifically, the serious mental disabilities of these detainees, detained in the custody of an agency, which has no procedures for competence restoration and concedes to the non-treatment of certain incompetent respondents,⁴³ leads to disability discrimination. For this subgroup of detainees, detention becomes prolonged and potentially indefinite—their cases are often continued pending the remote possibility of competency restoration without treatment, or their cases may be administratively closed, a scheme under which DHS is free to, and often does, continue detention.⁴⁴ This Article argues that for this group of detainees, the authority to release them or terminate proceedings is the only reasonable accommodation compliant with the Rehabilitation Act.⁴⁵

38. See *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *10 (C.D. Cal., Apr. 23, 2013).

39. No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

40. See *id.* at *20.

41. See *id.* at *15. (stating legal right at issue).

42. See *id.* at 7–8.

43. See Decision of the Immigration Judge, *Matter of K.D.* (Dec. 1, 2015) (copy on file with author) (in which DHS asserts that it, “could not and would not . . . provide treatment” of the incompetent respondent while she was detained in their custody).

44. See First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 31, *Franco-Gonzalez v. Holder*, No. 10-CV-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014).

45. Cf. *Alexander v. Choate*, 469 U.S. 287, 302 n.21 (1985) (stating that “[t]he regulations implementing Section 504 are consistent with the view that reasonable adjustments in the nature of the benefit must be made to assure meaningful access.” (citation omitted)).

3. *The Post-Franco Landscape*

Shortly after *Franco*, the EOIR provided additional guidance and instruction on the treatment of mentally ill and incompetent respondents, to be gradually implemented in courts across the country.⁴⁶ In addition to sample lists of questions that immigration judges can use when conducting a judicial inquiry into competency, this guidance includes when and how to request a mental health evaluation as well as when and how to provide a qualified representative.⁴⁷ Though announced in December 2013, at the time of writing, these additional guidelines had only been rolled out in a handful of cities across the United States.⁴⁸

Elaborating on the decisions in *Franco* and *Matter of M-A-M*, the Board of Immigration Appeals has made a number of decisions in the last four years regarding the procedure and protocol to be followed in the case of a mentally ill or mentally incompetent respondent. From credibility assessments,⁴⁹ to service of the Notice to Appear,⁵⁰ to who bears the burden of proof to establish competency,⁵¹ and the immigration judge's discretion in implementing safeguards,⁵² the Board has struggled to present a coher-

46. See EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUSTICE, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (Dec. 31, 2013) [hereinafter EOIR, Phase I], <https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf> [<https://perma.cc/EB5D-A26R>].

47. See *id.*

48. In June 2016, the Author filed a FOIA request to obtain information about the information, education and training provided to immigration judges on matters of mental competency. Freedom of Information Act Response, Executive Office for Immigration Review FOIA # 2016-23345 (July 19, 2016) (CD-ROM on file with author) [hereinafter EOIR FOIA Response] (showing that the Phase I Plan has been rolled out in Denver, Colorado; El Paso, Texas; Houston, Texas; and Miami, Florida and showing PowerPoint slides used to train immigration judges on competency matters).

49. See *Matter of J-R-R-A-*, 26 I. & N. Dec. 609, 609 (B.I.A. 2015) (addressing credibility assessments in asylum cases and holding that, “[i]f an applicant for asylum has competency issues that affect the reliability of his testimony, the Immigration Judge should, as a safeguard, generally accept his fear of harm as subjectively genuine based on the applicant’s perception of events”).

50. See *Matter of E-S-I-*, 26 I. & N. Dec. 136, 136 (B.I.A. 2013) (requiring that where evidence of incompetency is “manifest,” Notice to Appear, or immigration charging document, should be served not just on respondent, but also on “a person with whom the Respondent resides” and a relative or guardian, or someone “similarly close to the Respondent”).

51. See *Matter of J-S-S-*, 26 I. & N. Dec. 679, 683 (B.I.A. 2015) (holding that “neither party bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent” (citation omitted)).

52. See *Matter of M-J-K-*, 26 I. & N. Dec. 773, 775 (B.I.A. 2016) (holding that, in incompetency cases, immigration judges maintain discretion to implement appropriate safeguards they deem appropriate). Though outside the scope of this Article, it is worth noting that the Board, in this case, seems to fundamentally mis-

ent narrative around the rights and protections afforded to mentally incompetent respondents. Most relevant to the discussion in this Article, however, is that no precedential guidance currently exists on when, whether, and how to order termination of removal proceedings when no other safeguards can adequately protect the rights of a mentally incompetent respondent.⁵³ While administrative closure—simply removing a respondent’s case from the docket—is mentioned in the “non-exhaustive” list of safeguards enunciated by *Matter of M-A-M*, administrative closure is often an empty gesture for detained respondents. By taking their cases off the docket, administrative closure provides no mechanism for their release from custody because they remain in immigration removal proceedings. Moreover, *Matter of M-A-M* suggests administrative closure as an option “while other options are explored, such as seeking treatment for the Respondent”⁵⁴ or pursuing restoration of competency.⁵⁵ But this is inapposite for a sizeable class of detained, incompetent respondents, whose incompetency persists, unresolved, despite medication and treatment.⁵⁶ Administrative closure in such cases keeps respondents indefinitely detained, a fruitless exercise of potentially indefinite duration.⁵⁷ As one court opined, “there is something fundamentally unfair in keeping a . . . case open where the defendant, as a result of his incompetency, will never be in a position to challenge it on the merits.”⁵⁸ As explained further in Part III, in an administrative-closure-only regime, detained, men-

understand the role of an attorney, finding representation to be an adequate and sufficient safeguard of a respondent’s rights even where it is well documented that the respondent completely refuses to cooperate with the attorney or even appear at the time and place of the removal proceeding.

53. This Article does not concede that termination is, currently, impermissible. In fact, in a recent Board decision in which the Board could have explicitly held that termination was impermissible, the Board held that immigration judges have discretion to implement the safeguards they deem most suitable in a given case. *See id.*

54. *See Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

55. *See In re Benitez-Lopez*, A092 298 255, 2014 WL 3698191, at *3 (B.I.A. 2014) (“Administrative closure in cases involving competency issues may provide an opportunity for a respondent to be restored to competency.”).

56. *See, e.g.*, First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 11, *Franco-Gonzalez v. Holder*, Case No. 10-CV-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (describing petitioner-plaintiff in that case as mentally incompetent and suffering from mental retardation and noting that he was “forgotten in a facility for more than four and a half years” after being identified as incompetent; further noting that his case is “not unique” and going on to describe other mentally ill and incompetent detainees and class members who suffer from schizophrenia and psychosis); *see also* Decision of the Immigration Judge, *Matter of K.D.* (Dec. 1, 2015) (copy on file with author).

57. *See, e.g.*, Complaint at 11, *Franco-Gonzalez*, No. CV-10-02211 DMG (DTBx), 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (describing how Mr. Franco-Gonzalez was detained in ICE custody for nearly five years after finding of incompetency).

58. *See Massachusetts v. Guinta*, No. 2004-00088, 2011 WL 3480959, at *2 (Mass. Super. Ct. Mar. 31, 2011).

tally incompetent respondents face prolonged, and potentially indefinite, detention in a carceral setting where they are unlikely to receive any therapeutic treatment or meaningful attempts at competency restoration.

B. *Competency Restoration and Civil Commitment*

While there exists a technical, if evolving, framework for identifying competency issues, making competency determinations, and even implementing certain procedural safeguards, significant questions remain about other measures to be taken in the case of a mentally incompetent respondent. For example, what, if any steps can be taken to restore the respondent's competency? Who will bear the cost and responsibility? Who can order such measures? How, if at all, can or should the parallel civil commitment system interact with immigration removal proceedings? What authority, if any, does or should an immigration judge have regarding civil commitment?

First, where a respondent is found incompetent the question arises whether his or her competency can be restored. The Board in *Matter of M-A-M* hinted at this, ever so briefly, noting that "seeking treatment for the Respondent" could be a basis for administrative closure, but did not expand further.⁵⁹ Following *Matter of M-A-M*, the Board, in an unpublished and non-precedential decision, seems to further contemplate that administrative closure may be used as a safeguard in this situation in order to "provide an opportunity for the Respondent to be restored to competency."⁶⁰ In the case of non-detained respondents, the question of treatment and competency restoration presents fewer questions as to cost, resources, and procedure. However, in the case of respondents who are detained at government expense in ICE detention, many questions remain. The Board has not opined further—in a published opinion—as to whether competency restoration efforts for detained, incompetent respondents would or should be undertaken by ICE, whether a parallel civil commitment proceeding should be initiated and what, if any, authority immigration judges have in regards to these potential courses of action. In another case involving a detained, incompetent respondent, the Board remanded proceedings where the immigration judge ordered a respondent to be civilly committed to a state hospital following a finding of incompetency.⁶¹ In this case, the Board stated that the immigration judge did not have the authority to order such conditions of release but also repeated DHS's assertions that DHS "could not and would not . . . provide treatment" of the respondent while she was detained in their custody.⁶² Such assertions seem unsurprising—resources for the mentally ill in ICE

59. See *M-A-M*, 25 I. & N. Dec. at 483.

60. See *Benitez-Lopez*, 2014 WL 3698191, at *3 (citing *Matter of Avetisyan*, 25 I. & N. Dec. 688, 696 (B.I.A. 2012)).

61. See Decision of the Immigration Judge, *Matter of K.D.* (Dec. 1, 2015) (copy on file with author).

62. See *id.*

detention centers are sorely lacking.⁶³ By ICE's own admission, noncitizens with mental illness "would benefit from improved staffing, appropriate housing, access to step down services, and specialized case management" while in ICE detention.⁶⁴ But they cannot provide such services; nor can the detained noncitizen seek them out themselves. With ongoing litigation and growing uncertainty and incongruity around these issues, the Board seems interested and even poised to issue instruction, recently calling for amici to weigh in on the impact of civil commitment on immigration detention and removal proceedings.⁶⁵

Meanwhile, FOIA responses from the EOIR reveal that instruction regarding competency restoration and civil commitment is currently absent from immigration judge training, as neither are mentioned in the more than forty pages of instruction currently provided to immigration judges under the Phase I program.⁶⁶ Among other options, at the recommendation of an immigration judge, a concurrent, parallel proceeding could be undertaken in the state or probate court to pursue civil commitment for the respondent following a termination order. The immigration judge would not have the authority to herself commit the respondent but could condition her release upon a referral to probate court. This is not to suggest that the civil commitment system is without flaws. Too often, the mentally ill in civil commitment are in correctional facilities, facing punishment instead of treatment.⁶⁷ Indeed, the calls for reform of the civil commitment system are many, including changes to the legal criteria required for commitment and increasing the possibility of less restrictive al-

63. See, e.g., ACLU, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES, 6–8 https://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf [<https://perma.cc/MKD3-THCN>] (last visited Oct. 30, 2017).

64. See DORA SCHRIRO, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION: OVERVIEW AND RECOMMENDATIONS 26 (2009).

65. See *Amicus Invitation No. 16-06-21 (Commitment to Mental Health Facility)*, BD. OF IMMIGR. APPEALS (June 21, 2016), <https://www.justice.gov/eoir/file/868666/download> [<https://perma.cc/7W8Y-ATA5>] (asking "(1) Is a respondent who has been committed to a mental health treatment facility 'detain[ed] . . . in custody' or 'release[d]' within the meaning of 8 C.F.R. § 1236.1(d)(1)? Does this depend on the nature of the commitment arrangement? If so, what terms must be imposed as part of the commitment arrangement to ensure that it equates to detention?; (2) Is commitment to a mental health treatment facility appropriate where a respondent has a mental health condition that causes him or her to be a danger if at liberty in the United States? If so, what terms must be imposed as part of the commitment arrangement to reasonably assure the safety of the community?; (3) Is commitment to a mental health treatment facility appropriate where a respondent has a mental health condition that causes him or her to pose a risk of flight such that no bond could reasonably assure his or her presence? If so, what terms must be imposed as part of the commitment arrangement to reasonably assure the respondent's presence at future proceedings?").

66. See EOIR FOIA Response, *supra* note 48.

67. See, e.g., Katie Lannan, *Disability Law Group Urges Changes, Receivership for Bridgewater State Hospital*, WBUR (June 27, 2016), <http://www.wbur.org/news/2016/06/27/disability-law-group-changes-bridgewater-state-hospital> [<https://perma.cc/453X-4B8B>].

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ternative placements⁶⁸ and outpatient and community treatment options.⁶⁹

Whatever the Board decides, it is not clear that any statutory or regulatory authority currently exists to allow an immigration judge to order civil commitment, or related conditions of release, for an incompetent, detained noncitizen, and a thorough exploration of this question is outside the scope of this Article.⁷⁰ However, because at this juncture, meaningful efforts at competency restoration in ICE custody seem unlikely, and because absent a parallel state court process civil commitment remains untenable, the remainder of this Article will consider the prolonged and indefinite detention now facing incompetent, detained, noncitizen respondents.

III. THE LOOMING PROSPECT OF PROLONGED AND INDEFINITE DETENTION FOR MENTALLY INCOMPETENT RESPONDENTS

Where the immigration judge determines that no safeguards are sufficient to protect the respondent's rights, the immigration judge may be inclined to administratively close the case. As explained above, for detained respondents, this decision invites the possibility of indefinite detention in immigration custody. To fully understand the reality of this prospect for mentally incompetent detained noncitizens, it is necessary to briefly describe the history and scale of immigration detention in the United States.

A. *The Creation and Expansion of Immigration Detention*

Where previously states had used their police power to enforce immigration law and detain suspected noncitizens, federal immigration detention began in 1882 with the creation of a federal immigration inspection system.⁷¹ Immigration detention has historically been considered a civil, temporary measure—designed simply to ensure that noncitizens appear at their removal hearings and then, where applicable, to ensure their orderly

68. See, e.g., Francis J. O'Connor, *Mental Health Law and Civil Commitment: Litigation and the Need for Further Reform*, 4 BOS. BAR ASS'N HEALTH L. REP. 22, 25 (2009).

69. See, e.g., Dan Moon, *The Dangerousness of the Status Quo: A Case for Modernizing Civil Commitment Law*, 20 WIDENER L. REV. 209, 233 (2014); see also *Legal Issues*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/About-NAMI/Policy-Platform/9-Legal-Issues> [<https://perma.cc/ABU3-NZYH>] (last visited Aug. 19, 2016).

70. The Author acknowledges however, that the Board may be seeking such authority or trying to locate such authority in the already existing law. See *Amicus Invitation No. 16-06-21 (Commitment to Mental Health Facility)*, *supra* note 65.

71. See GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 19 (1996); Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 21–22 (2010).

removal or exclusion from the United States.⁷² As far back as the late 1800s, some special attention was reserved for the mentally ill.⁷³ Upholding the detention of Chinese noncitizens in 1896, the Supreme Court explained, “[w]e think it clear that detention or *temporary confinement*, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens” is valid.⁷⁴ But over the course of the twentieth century, this system of “temporary confinement” has shifted—becoming something more than temporary, it is now deeply permanent, ingrained in the fabric of our deportation regime.⁷⁵

During the twentieth century, detention expanded as immigration enforcement intensified and courts upheld detention-without-bail schemes for the undesirable noncitizens of the moment.⁷⁶ This increasing emphasis on prolonged detention was only further amplified in the 1980s and 1990s as Congress vastly expanded the detention system, enacting a regime of mandatory detention⁷⁷ and adding new grounds of removal that

72. See WILSHER, *supra* note 9, at 7–13 (discussing legal origins of immigration detention).

73. See *id.* (“Whilst ‘arrest’ of some sort, usually on ships, was entailed by inspections, longer term incarceration, motivated by both humanitarian and exclusionary impulses appears only to have occurred in cases of illness, insanity or destitution. There were in any event only a small number of beds to hold such persons.”).

74. See *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (emphasis added). But see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1016 (2002) (“[T]he Court in *Wong Wing* applied to immigration detention the same principle that it has subsequently applied in other civil detention cases: an absolute prohibition of the use of civil detention for punitive ends.”).

75. See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 228–30 (2007); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137–38 (2013) (describing dramatic expansion of immigration detention since the mid-1990s).

76. See, e.g., *Carlson v. Landon*, 342 U.S. 524, 547 (1952) (upholding, against Due Process challenge, the detention without bail of noncitizens with alleged ties to Communism); see also WILSHER, *supra* note 9, at 7–8 (describing use of immigration detention as tool of racial discrimination and to silence political dissidents); Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69, 74 (2003) (noting that “[b]etween 1892 and 1907 the Immigration Service deported only a few hundred aliens a year” but explaining that thereafter, wave of anti-communist sentiment gripped country, prompting legislation that encouraged arrest and deportation of “immigrant anarchists and communists”). These efforts “culminat[ed] in the Palmer Raids,” during which “authorities arrested 10,000 alleged anarchists and ultimately deported some five hundred. See *id.* Much of this enforcement activity was done “under the guidance of the Justice Department’s ‘alien radical’ division, headed by a young J. Edgar Hoover.” See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 995 (2002). The Immigration Act of 1924 eliminated the statute of limitations for deportation, prompting “a dramatic increase in the number of deportations.” See Ngai, *supra*, at 76.

77. See 8 U.S.C. § 1227(a) (2012). Under the mandatory detention statute, ICE may hold certain categories of noncitizens without giving them an opportunity to request review or release from custody. These categories include, among several

would automatically, and in some cases retroactively and without review, trigger such detention.⁷⁸ Largely driven by an economic downturn, the escalating war on drugs,⁷⁹ and fears of domestic terrorism,⁸⁰ the mandatory detention statute and expanded removal grounds have produced staggering results. Today, the federal government has in detention 34,000 suspected noncitizens on any given day⁸¹—up from less than 7,000 in 1994⁸² and roughly 2,200 in the 1980s.⁸³ While not all of these cases involve detained respondents, as of June 2016, there were over 500,000 immigration removal cases pending in immigration courts across the country.⁸⁴ In December 2012, the most recent year for which data was available, ICE reported 4,793 detainees who had already spent at least six months in ICE custody and still had not been released.⁸⁵ For these detainees the average length of detention was more than one year.⁸⁶ Of course,

others, noncitizens who have “committed crimes of moral turpitude”; noncitizens who have two or more criminal convictions; and noncitizens who have committed any drug related offense. *See id.* For a more detailed history of mandatory detention legislation, see generally Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, in IMMIGRATION STORIES 343, 345–54 (David A. Martin & Peter H. Schuck eds., 2005).

78. *See generally* Das, *supra* note 75, at 141; *see also generally* 8 U.S.C. § 1226.

79. *See* César Cuauhtémoc Garcia Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1415 (2014) (“Congress in effect envisioned immigration detention as a central tool in the nation’s burgeoning war on drugs.”).

80. *See* Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody”*, 48 U. MICH. J.L. REFORM 879, 890 (2015) (describing how mandatory detention statute was product of several co-occurring factors, including “a slumping economy, rising crime, and terrorism”).

81. *See Regarding a Hearing on Immigration Enforcement Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 113th Cong. 4 (2013) (statement of John Morton, Director, United States Immigration and Customs Enforcement).

82. *See* DONALD KERWIN & SERENA YI-YING LIN, MIGRATION POL’Y INST., IMMIGRATION DETENTION: CAN ICE MEET ITS LEGAL IMPERATIVES AND CASE MANAGEMENT RESPONSIBILITIES? 6 (Sept. 2009), <http://www.migrationpolicy.org/research/immigrant-detention-can-ice-meet-its-legal-imperatives-and-case-management-responsibilities> [<https://perma.cc/49CE-DQWC>] (noting more than six-fold increase in detention since 1994).

83. *See Administration Presses Policy of Incarcerating Illegal Aliens*, CONG. Q. (Feb. 16, 1985), *reprinted in* Oversight Hearing before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Committee on the Judiciary, 99th Cong. 53 (Mar. 28, 1985).

84. *See* Alicia Caldwell, *Federal Immigration Court Backlog Tops 500,000 Pending Cases*, CNS NEWS (Jul. 20, 2016, 05:45 PM), <http://www.cnsnews.com/news/article/federal-immigration-court-backlog-tops-500000-pending-cases> [<https://perma.cc/7WJ2PZ8Y>] (reporting that according to EOIR, there are now 500,051 cases in backlog); *Backlog of Pending Cases in Immigration Courts as of July 2017*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php [<https://perma.cc/8DKN-YY6H>] (last visited Sept. 4, 2017).

85. *See Legal Noncitizens Receive Longest ICE Detention*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (June 3, 2013), <http://trac.syr.edu/immigration/reports/321/#f3> [<https://perma.cc/5MNT-KQ4T>].

86. *See id.*

immigration detention also has its costs—for taxpayers, the federal government, detainees and their families, and perhaps more abstractly but no less acutely, on entire communities who feel the absence of parents, caregivers, and breadwinners.⁸⁷

B. *Legal Challenges to Immigration Detention: An Overview*

As recently as 1953, the Supreme Court upheld prolonged, and even indefinite detention in the service of immigration enforcement. Ignatz Mezei, a longtime resident of the United States and cabinetmaker in Buffalo, New York, spent nineteen months abroad in Eastern Europe before attempting to return to the United States.⁸⁸ Upon his attempted reentry, he was held without charge in an Ellis Island prison and was suspected of being a Communist sympathizer. After Mezei challenged the constitutionality of his detention, the Supreme Court held that while his presence on Ellis Island gave him standing to request habeas relief, he had not actually “entered” the United States and was subject to the rules of exclusion—meaning he was not entitled to any of the due process protections available to those who have gained admission to the United States.⁸⁹

But concurrent with the expansion and increasingly prolonged nature of immigration detention in the United States, there have been significant legal challenges to the kind of detention originally permitted under *Shaughnessy v. Mezei*.⁹⁰ In 2001, in the case of two noncitizens detained for approximately seven years and four years, respectively, the Supreme Court considered whether and for how long the government may detain a noncitizen with a final order of removal under 8 U.S.C. § 1231.⁹¹ Holding that the Constitution does not allow indefinite detention of noncitizens, as such detention would raise “serious constitutional problem[s],” the Supreme Court ruled that, “the statute, read in light of the Constitution’s demands, limits an alien’s post-removal period detention to a period reasonably necessary to bring about that alien’s removal from the United States.”⁹² While the government argued that the statute set “no limit” on the length of permissible detention post-removal order, the Supreme Court set six months as the appropriate and reasonable period after which the government must rebut a showing that there is “no significant likelihood of removal in the reasonably foreseeable future.”⁹³

87. For an excellent summary of the financial impact of detention, see Das, *supra* note 75, at 143–45.

88. See *Shaughnessy v. Mezei*, 345 U.S. 206, 208 (1953); *A Haven for Mezei is Being Negotiated*, N.Y. TIMES (Apr. 25, 1953), <http://www.nytimes.com/1953/04/25/archives/a-haven-for-mezei-is-being-negotiated.html> [<https://perma.cc/S5XH-HEKX>].

89. See *Mezei*, 345 U.S. at 213 (“In sum, harborage at Ellis Island is not an entry into the United States.” (citation omitted)).

90. 345 U.S. 206 (1953).

91. See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

92. See *id.* at 689–90.

93. See *id.* at 701.

Four years later, in *Clark v. Martinez*,⁹⁴ the Supreme Court considered whether the analysis and decision in *Zadvydas v. Davis*⁹⁵ would similarly apply to an inadmissible noncitizen—that is, someone who had not yet been admitted to the United States, though was physically present inside the country.⁹⁶ Because the statute could not mean one thing in *Zadvydas* and another in *Clark*,⁹⁷ the Court concluded that there was a similar prohibition on the indefinite detention of inadmissible noncitizens.

In addition to challenges to indefinite detention, there have been increasing challenges to mandatory detention—the statute that allows ICE to detain noncitizens, including lawful permanent residents, during the pendency of their removal proceedings without the opportunity for a bond (i.e., bail) hearing or individualized custody review.⁹⁸ Initially however, the Court seemed less concerned about the constitutionality of pre-removal order mandatory detention schemes. In 2003, the Supreme Court considered *Demore v. Kim*⁹⁹ and, despite amicus briefing by four former INS officials arguing that mandatory detention was both “unfair and inefficient” while serving “no legitimate law enforcement purpose,”¹⁰⁰ ultimately came down on the side of the government. The Court upheld the mandatory detention regime, reasoning that the end goal of “preventing deportable criminal aliens from fleeing” was a sufficient rationale for detention during this “limited period.”¹⁰¹ The majority’s decision in *Demore* contains a number of misstatements of law and fact, among them that section 236(c) of the INA applies to a “limited class” or “subset of deportable criminal aliens”—a far cry from the reality of this expansive statute.¹⁰² In support of its holding, the Court averred, “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁰³

C. *Post-Order Indefinite Detention of “Specially Dangerous” Mentally Ill Noncitizens*

Because there are regulations that suggest that the indefinite detention of certain mentally ill noncitizens¹⁰⁴ is permissible, it is worth pausing

94. 543 U.S. 371 (2005).

95. 533 U.S. 678 (2001).

96. *See Clark*, 543 U.S. at 378.

97. *See id.* (“To give these same words a different meaning for each category [of aliens] would be to invent a statute rather than interpret one.”).

98. *See* 8 U.S.C. § 1227(a) (2012).

99. 538 U.S. 510 (2003).

100. *See Taylor*, *supra* note 77, at 343.

101. *See Demore*, 538 U.S. at 526, 528.

102. *See id.* at 517–18, 521; *see also Taylor*, *supra* note 77, at 354.

103. *See Demore*, 538 U.S. at 521 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976)).

104. The author acknowledges and understands that “mentally ill” and “mentally incompetent” are distinct terms with unique meanings and that the two circles may not be—and often are not—concurrent. That being said, because most re-

here to consider this prospect and its bearing on the arguments that follow. As I explain, there is a procedural void for those mentally incompetent noncitizen respondents who are detained in a pre-order context.

The Court in *Zadvydas* considered the application of 8 U.S.C. § 1231 to the detention of noncitizens following a final order of removal. The Court's holding engendered a sort of "categorical approach"—that is, there is one single factor—that the noncitizen's removal is "reasonably foreseeable"—that enters the calculus for continued detention.¹⁰⁵ However, in so holding, the Court in *Zadvydas* analyzed civil and criminal cases¹⁰⁶ involving the detention of "specially dangerous" persons—where courts have required a dangerousness rationale "be accompanied by some other special circumstance, such as mental illness."¹⁰⁷ The Supreme Court emphasized that in this instance, "strong procedural protections" would be required and distinguished the circumstances surrounding detention for noncitizens.¹⁰⁸ For example, in contrast to other civil detention, the detention of noncitizens post-order is "potentially permanent" and applies broadly not only to suspected terrorists, but to noncitizens "ordered removed for many and various reasons, including tourist visa violations."¹⁰⁹ The Court declined to find in favor of the government's position, instead holding that there was nothing special or specially dangerous about post-order noncitizens and that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."¹¹⁰

In the aftermath of *Zadvydas*, ICE promulgated a new regulation, codifying its own interpretation of 8 U.S.C. § 1231(a)(6). ICE's new regulation at 8 C.F.R. § 241.14 allows for the continued detention of noncitizens determined to be "specially dangerous" whose removal is not reasonably foreseeable because:

- (i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. § 16; (ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and (iii) No conditions of release can reasonably be expected to ensure the safety of the public.¹¹¹

spondents who are found to be mentally incompetent will have a mental health diagnosis, it is important to consider the regulations and rationale that may be offered to justify their indefinite detention.

105. See Cat A. Itaya, *Shadow Detention: The Federal Government's Parallel System for Detaining Mentally Ill Aliens*, 26 GEO. IMMIGR. L.J. 95, 100–01 (2011).

106. See *Zadvydas*, 533 U.S. at 682.

107. See *id.* at 691 (citing *Kansas v. Hendricks*, 521 U.S. 346, 358, 368 (1997)).

108. See *id.* at 691.

109. See *id.* at 691, 696.

110. See *id.* at 699.

111. 8 C.F.R. § 241.14(f)(1)(i)–(iii) (2017).

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Courts are split over the validity of this regulation. In *Tuan Thai v. Ashcroft*,¹¹² the Ninth Circuit considered the government's argument upholding the validity of 8 C.F.R. § 241.14 and argued that it carves out an exception allowing the indefinite detention of noncitizens under special circumstances, such as the existence of mental illness, which makes the respondent a danger to the community.¹¹³ The Court disputed the government's reading of *Zadvydas*—noting that in fact, “the reference in *Zadvydas* to special justifications and harm-threatening mental illnesses was not a statement of what § 1231(a)(6) authorizes. It was instead an explanation of why the Court felt it was necessary to construe the statute narrowly.”¹¹⁴ Ultimately, the Court in *Thai* held unequivocally that, “[a]n alien's ill mental health coupled with dangerousness cannot justify indefinite detention under *Zadvydas* when dangerousness alone cannot justify such detention.”¹¹⁵ Similarly, the Fifth Circuit in *Tran v. Mukasey*¹¹⁶ held that as to the question whether the Supreme Court's construction of § 1231(a)(6) in *Zadvydas* (and now *Clark*) “permits an exception for the continued and potentially indefinite detention of an alien deemed specially dangerous due to ‘a harm-threatening mental illness,’” the answer is no.¹¹⁷

In stark contrast to the holdings of the Ninth and Fifth Circuits, the Tenth Circuit in *Hernandez-Carrera v. Carlson*¹¹⁸ held that detention beyond the removal period for noncitizens satisfying the three criteria at § 241.14(f) raised “no serious constitutional question” and that the agency's interpretation of this regulation was owed *Chevron* deference.¹¹⁹ In reaching their decision, the court in *Hernandez-Carrera* concluded that “special and narrow circumstances” were present in *Hernandez-Carrera* such to avoid a constitutional problem and that the government's interest in the noncitizen's continued detention was “particularly strong.”¹²⁰ The court held that because § 241.14(f) required enhanced procedural protec-

112. 366 F.3d 790 (9th Cir. 2004).

113. *See id.* at 794.

114. *See id.* at 795 (“Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” (quoting *Zadvydas*, 533 U.S. at 699)).

115. *See id.* at 798 (citation omitted).

116. 515 F.3d 478 (5th Cir. 2008).

117. *See id.* at 482, 485; *see also* *Clark v. Martinez*, 543 U.S. 371, 377 (2005) (stating that operative language providing for potentially indefinite detention applied “without differentiation” to all three categories of noncitizens that are its subject (i.e. those noncitizens who have been ordered removed and are inadmissible, removable or, most relevant here, those who have “been determined by the [Secretary] to be a risk to the community”) (citation omitted)).

118. 547 F.3d 1237 (10th Cir. 2008).

119. *See id.* at 1256 (“Because the Attorney General's statutory interpretation raises no serious constitutional question, and therefore represents a ‘reasonable’ interpretation of the statute, it is entitled to *Chevron* deference.”).

120. *See id.* at 1251, 1253.

tions (namely the satisfaction of the three criteria mentioned above), and because the burden of proof was now on the agency to prove dangerousness (rather than on the noncitizen to show non-dangerousness), that the concerns of the *Zadvydas* court were sufficiently ameliorated.¹²¹

District courts that have considered the issue have generally found such detention to be reasonable.¹²² Needless to say, it is unsettled whether the indefinite detention of mentally ill noncitizens is permissible under the regulations, as they have not yet been ordered removed. For the purposes of this Article, the assumption is that such detention raises significant constitutional problems and provides only further support for the argument that immigration judges must be given explicit termination authority for mentally incompetent respondents for whom other safeguards are inadequate.

In short, the current regulatory structure provides criteria and a process for the continued detention of a certain subgroup of mentally ill noncitizen respondents post-order—no analogous procedure is outlined for those mentally incompetent noncitizen respondents in a pre-order context.

D. *Challenges to Prolonged Immigration Detention Without a Bond Hearing Under Section 236(c) of the INA*

Though there are several statutory bases for immigration detention under the INA, this Article will now focus on those mentally ill and incompetent respondents who are detained, subject to section 236(c) of the INA. These noncitizens are subject to “mandatory detention” and thus generally ineligible for a bond hearing. As a result, where no safeguards are sufficient to protect their rights in removal proceedings, these noncitizens have no way to request release from their seemingly indefinite detention. The remainder of this section will summarize challenges to prolonged detention under section 236(c) of the INA for respondents similarly situated to those detained noncitizens who have been found incompetent prior to an order of removal.

Because *Demore* dealt only with a “limited period”¹²³ of mandatory detention, it fell on future courts to determine just what length of detention

121. *See id.* at 1252–57.

122. *See, e.g.,* *Reyes-Pena v. Dep’t of Homeland Sec.*, No. 3:CV-16-0042, 2016 U.S. Dist. LEXIS 49798, at *5 (M.D. Pa. Apr. 13, 2016) (finding that petitioner was properly detained under § 241.14(f)); *Marquez-Coromina v. Hollingsworth*, 692 F. Supp. 2d 565, 566, 574 (D. Md. 2010) (rejecting petitioner’s habeas petition and finding that he was properly detained under § 241.14(f)(1), and that “8 C.F.R. § 241.14(f)(1) [was] a reasonable interpretation of 8 U.S.C. § 1231(a)(6) entitled to *Chevron* deference”).

123. In its 2003 opinion, the Supreme Court cited to government data that showed that noncitizens were facing a “very limited” time in immigration detention, averaging just four months. *See Demore v. Kim*, 538 U.S. 510, 529 n.12 (2003). The Court relied on this in holding that such a time was too short to trigger any constitutional right to a bail hearing. In August 2016, the Justice De-

is authorized under section 236(c) of the INA. The three circuit courts to have considered this issue have noted the serious constitutional problems posed by prolonged mandatory detention and concluded that section 236(c) only authorizes detention for a limited period of time.

The Ninth Circuit has held that detention under section 236(c) of the INA raises serious constitutional concerns after six months and that at such time, the authority for continued detention shifts to section 236(a) of the INA, thus entitling the respondent to a bond hearing.¹²⁴ In a similar but distinct vein, the Third¹²⁵ and Sixth¹²⁶ Circuits have construed section 236(c) as permitting mandatory detention for only a “reasonable” period of time, which will clearly vary in each case. Notably, district courts in all but five circuits have acted to limit prolonged mandatory detention under section 236(c) and in such cases have either granted release from detention or a bond hearing.¹²⁷ In fact, the Supreme Court has recently ac-

partment sent a letter to the Court acknowledging that this estimate was in error, and that the average period of detention was actually more than one year. Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J. (Aug. 30, 2016, 03:48 PM), <http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756> [https://perma.cc/S8Z3-5GDM].

124. *See* *Rodriguez v. Robbins*, 715 F.3d 1127, 1135 (9th Cir. 2013); *see also* *Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (holding, in case construing section 241(a)(6) of the INA, that detention is generally prolonged at six months); *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942, 950–951 (9th Cir. 2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) (holding that where Congress intended to authorize prolonged detention, beyond six months, it did so expressly); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (holding that section 236(c) of the INA authorizes mandatory detention only during removal proceedings before the immigration judge and Board and only for “expeditious” removal proceedings, not those that exceed the brief period of time set forth in *Demore*).

125. *See* *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 231 (3d Cir. 2011); *see also* *Leslie v. Attorney Gen.*, 678 F.3d 265, 269 (3d Cir. 2012).

126. *See* *Ly v. Hansen*, 351 F.3d 263, 267 (6th Cir. 2003).

127. This includes the First Circuit. *See, e.g., Reid v. Donelan*, 991 F. Supp. 2d 275, 281 (D. Mass. 2014); *Ortega v. Hodgson*, No. 11–cv–10358–MBB, 2011 WL 4103138, at *6 (D. Mass. Sept. 13, 2011); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 475 (D. Mass. 2010); *Geegbae v. McDonald*, No. 10-10852-JLT, 2010 WL 4292734, at *2 (D. Mass. Nov. 1, 2010); *Sengkeo v. Horgan*, 670 F. Supp. 2d 116, 124 (D. Mass. 2009); *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175, 181 (D. Mass. 2009). The Second Circuit. *See, e.g., Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 545 (S.D.N.Y. 2014); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010); *Scarlett v. U.S. Dep’t of Homeland Sec.*, 632 F. Supp. 2d 214, 220 (W.D.N.Y. 2009); *Hyppolite v. Enzer*, No. 3:07-cv-00729, 2007 WL 1794096, at *1 (D. Conn. June 19, 2007); *Fuller v. Gonzales*, No. Civ. A. 3:04-CV-2039-SRU, 2005 WL 818614, at * 2 (D. Conn. Apr. 8, 2005). The Third Circuit. *See, e.g., Rodriguez-Celaya v. Attorney Gen.*, No. 1:CV–14–0514, 2014 WL 3557133, at *4–5 (M.D. Pa. July 17, 2014); *Skinner v. Bigott*, No. 13–4299 (ES), 2014 WL 70066, at *4–5 (D.N.J. Jan. 8, 2014); *Pujalt-Leon v. Holder*, 934 F. Supp. 2d 759, 765 (M.D. Pa. 2013); *Francois v. Napolitano*, No. 12–2806 (FLW), 2013 WL 4510004, at *3 (D.N.J. Aug. 23, 2013); *Banton v. Sabol*, No. 3:CV–12–1594, 2013 WL 1736804, at *4–5 (M.D. Pa. Apr. 22, 2013); *Bango v. Lowe*, No. 3:12–CV–0822, 2012 WL 5955005, at *1 (M.D. Pa. Nov. 28, 2012); *Martinez v. Muller*, No. 12–1731, 2012

cepted certiorari on this very issue.¹²⁸ In *Jennings v. Rodriguez*,¹²⁹ the Court confronts the two most salient issues that have animated the post-*Demore* detention cases—whether there is a constitutional limit on the duration of detention and who bears the burden of proof. To this end, the Court is considering the following questions:

1. Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.
2. Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.
3. Whether, in bond hearings for noncitizens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.¹³⁰

The remainder of this section will focus on the second question and explain how mentally incompetent, detained respondents are like the respondents in *Jennings*. As the respondents in *Jennings* point out, all five circuits to have considered this question have concluded that “Section 1226(c) must be read to include a limit on the length of detention it authorizes . . . [and] [n]o circuit has accepted the Government’s view that Section 1226(c) mandates detention without a hearing for the duration of

WL 4505895, at *2–3 (D.N.J. Sept. 25, 2012); *Nwozuzu v. Napolitano*, No. 12–3963, 2012 WL 3561972, at *5 (D.N.J. Aug. 16, 2012); *Bautista v. Sabol*, 862 F. Supp. 2d 375, 381 (M.D. Pa. 2012); *Pierre v. Sabol*, No. 1:11–CV–2184, 2012 WL 1658293, at *4 (M.D. Pa. May 11, 2012); *Gupta v. Sabol*, No. 1:11–CV–1081, 2011 WL 3897964, at *1 n.1 (M.D. Pa. Sept. 6, 2011). The Fourth Circuit. *See, e.g.*, *Bracamontes v. Desanti*, No. 2:09cv480, 2010 WL 2942760, at *7 (E.D. Va. June 16, 2010), *report and recommendation adopted*, No. 2:09cv480, 2010 WL 2942757 (E.D. Va. July 26, 2010). The Fifth Circuit. *See, e.g.*, *Ramirez v. Watkins*, No. Civ.A. B:10-126, 2010 WL 6269226, at *8 n.15 (S.D. Tex. Nov. 3, 2010). The Sixth Circuit. *See, e.g.*, *Uritsky v. Ridge*, 286 F. Supp. 2d 842, 845 (E.D. Mich. 2003) (granting release). The Eighth Circuit. *See, e.g.*, *Bah v. Cangemi*, 489 F. Supp. 2d 905, 916 (D. Minn. 2007) (granting release); *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 915 (D. Minn. 2006) (granting release). The Eleventh Circuit. *See, e.g.*, *Jeune v. Candameres*, 1:13-cv-22333-CMA (S.D. Fla. Dec. 11, 2013).

128. *See Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom.*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

129. *See Question Presented, Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

130. *Id.*

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an individual's removal case regardless of length."¹³¹ Indeed, as the respondents point out, the circuits have uniformly agreed that detention under section 1226(c) must be limited to a "reasonable" period and they have diverged only in when and how to determine just what constitutes a "reasonable" period of time.¹³² Despite these differences in application, the consensus among courts to have considered the issue is clear: prolonged, pre-order detention absent meaningful opportunity to request release is impermissible. On December 15, 2016, the Supreme Court issued a supplemental briefing order asking the parties to brief the constitutionality of several immigration detention provisions as well as questions related to the burden of proof.¹³³ Some scholars have suggested that such request suggests that the Supreme Court may be willing to confront head on the constitutionality of prolonged immigration detention and to consider anew the plenary power doctrine, which has previously shielded much of immigration law from meaningful judicial review.¹³⁴

While mentally incompetent, detained respondents are similar to the respondents in *Jennings*, they are different in important ways. Most notably, for incompetent respondents for whom no safeguards are adequate, a bond hearing following a reasonable period of detention is an insufficient remedy—especially if these respondents must bear the burden of proof in showing non-dangerousness and non-flight risk, a burden which will be nearly impossible for pro se respondents to satisfy.¹³⁵ In Section IV(B), this Article will examine why the potential promise of a bond or custody hearing is not enough to protect the rights and prevent the unlawful, indefinite detention of incompetent, detained respondents.

131. See Respondent's Brief in Opposition on Petition for Writ of Certiorari, at 1, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

132. See *id.* at 20 ("[E]very federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute." (citing *Reid v. Donelan*, 819 F.3d 486, 494 (1st Cir. 2016))); Joint Appendix at 75a–80a, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204); see also *Lora v. Shanahan*, 804 F.3d 601, 606 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2494 (2016); *Diop v. ICE*, 656 F.3d 221, 232–33 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003).

133. See Order in Pending Case (Dec. 15, 2016), *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204).

134. See Kevin Johnson, *Court Issues Supplemental Briefing Order in Immigration Case*, SCOTUS BLOG (Dec. 15, 2016, 08:52 PM), <http://www.scotusblog.com/2016/12/court-issues-supplemental-briefing-order-in-immigration-case/> [<https://perma.cc/RHH8-VUM8>].

135. See Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 83 (2016) (discussing bond hearings for incompetent respondents without adequate safeguards and examining burden of proof in immigration bond proceedings); see also Das, *supra* note 75, at 137 (explaining how burdens of proof in immigration proceedings "create a presumption of mandatory detention").

IV. THE ROLE AND AUTHORITY OF THE IMMIGRATION JUDGE

The role of the immigration judge is distinct and storied and has evolved significantly over the last several decades. What follows is a brief history of the role, authority, and scope of discretion exercised by immigration judges with an eye toward understanding the present-day power of the immigration judge—and limits on that power—in the mental competency context. As the Board of Immigration Appeals, in particular, grapples with what authority immigration judges have in the mental competency context, it's worth pausing to examine the evolution of this role and what power immigration judges presently possess to prevent the shadow detention of mentally incompetent noncitizens.

A. *The Role of the Immigration Judge*

It may come as a surprise to learn that until midway through the twentieth century, immigration judges were not judges at all—but senior immigration officers, acting as part of the immigration enforcement regime.¹³⁶ In fact, until 1996, they were called simply, “special inquiry officers” whose job it was to act as both enforcer and adjudicator, opposing counsel and decision maker.¹³⁷ Concerns over this dual role—and the obvious conflicts it presented—surfaced in the Supreme Court’s decision in *Wong Yang Sung v. McGrath*.¹³⁸ In *Wong Yang Sung*, the Court examined the applicability of the Administrative Procedure Act (APA) to deportation proceedings. Finding that the purpose of the APA was “to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge,” the Court held that deportation proceedings at the time did not meet such standards of impartiality.¹³⁹ Despite this decision, because the INA exempted immigration proceedings from the requirements of the APA, the special inquiry officer as opposition and arbiter remained unchanged at the time.¹⁴⁰

However, the prospect for change took root with the enactment of the INA in 1952, “which authorized the Attorney General to assign another immigration officer to present the evidence on behalf of the government and to carry cross-examination. This freed the special inquiry officer for a more passive, judge-like decision making role.”¹⁴¹ Thereafter, the 1950s, 60s, and 70s heralded a series of additional reforms and increasing professionalization of the courts. Changes included the creation of a cadre of government trial attorneys, a change in title from “special inquiry officer” to immigration judge, and the requirement that immigration

136. See THOMAS ALEXANDER ALENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 249 (5th ed. 2003).

137. See *id.*

138. 339 U.S. 33, *modified*, 339 U.S. 908 (1950).

139. See *id.* at 41, 50–51.

140. See ALENIKOFF ET AL., *supra* note 136, at 249.

141. See *id.*

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judges hold a law degree and wear black robes.¹⁴² Finally, in 1983, immigration judges were moved out from under the umbrella of the then Immigration and Naturalization Service (INS) and into the ambit of the Department of Justice (DOJ).¹⁴³ Subsequently, in 2003, the passage of the Homeland Security Act severed ties once and for all—creating Immigration and Customs Enforcement under the Department of Homeland Security, while immigration judges served under the Executive Office for Immigration Review, a division of DOJ.¹⁴⁴ However, notwithstanding this division, immigration judges today remain under the authority of the Attorney General—the nation’s highest law enforcement officer, leading to remaining questions about their perceived impartiality.¹⁴⁵

Today, immigration judges are not formally administrative law judges—despite efforts to convert their status to such¹⁴⁶—but are defined as “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings.”¹⁴⁷ Immigration judges conduct removal proceedings, administer oaths, receive evidence, may interrogate, examine, and cross-examine the noncitizen and any witnesses, and, ulti-

142. See *id.* at 250; see also Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 454 (1988); James P. Vandellos, *Perspectives of an Immigration Judge*, 80 DENV. U. L. REV. 770, 771 (2003) (noting requirement to wear robes).

143. See ALEINIKOFF ET AL., *supra* note 136, at 250.

144. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C. § 101).

145. For further discussion of suggested reforms to the role of immigration judges, see Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 541–42 (2011) (noting problem of decisional independence but identifying related problems and advocating for more inclusive resolution); Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 709 (2012) (suggesting “micro-level changes” related to “(1) cost and efficiency, (2) accuracy, (3) fairness, and (4) political acceptability”); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641–45 (2010); AM. BAR ASS’N COMMISSION ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 3–27 (2010), https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf [<https://perma.cc/Z9A4-HD4T>].

146. See Paul Verkuil et al., *ACUS Report Discusses Immigration Adjudicators*, 69 INTERPRETER RELEASES 775, 776 (1992); see also ADMIN. CONFERENCE OF THE U.S., 2 REPORTS AND RECOMMENDATIONS (1992), https://archive.org/stream/gov.acus.1992.rec.2/adminconf199202unse_djvu.txt [<https://perma.cc/LMB4-4MM4>] (“[I]n submitting the bill, Senator [Edward M.] Kennedy commented: ‘[C]learly, the responsibilities and duties of immigration judges are on an equal standing with that of administrative law judges, in terms of both their level of authority and complexity of issues adjudicated.’ 137 Cong. Rec. S18417 (Daily ed. Nov. 26, 1991).”).

147. See 8 C.F.R. § 1001.1(l) (2017). The regulation further specifies that “[a]n immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.” See *id.*

mately, make decisions about the inadmissibility or deportability of the respondent.¹⁴⁸ Questions about the scope of the immigration judge's authority in the realm of mental competency and in making decisions about whether, when, and how to close cases, will be taken up in the following section.

148. For a more detailed explanation of the role of the immigration judge. See 8 C.F.R. § 1240.1 (2017). The regulation reads as follows:

(a) Authority.

(1) In any removal proceeding pursuant to section 240 of the Act, the immigration judge shall have the authority to:

(i) Determine removability pursuant to section 240(a)(1) of the Act; to make decisions, including orders of removal as provided by section 240(c)(1)(A) of the Act;

(ii) To determine applications under sections 208, 212(a)(2)(F), 212(a)(6)(F)(ii), 212(a)(9)(B)(v), 212(d)(11), 212(d)(12), 212(g), 212(h), 212(i), 212(k), 237(a)(1)(E)(iii), 237(a)(1)(H), 237(a)(3)(C)(ii), 240A(a) and (b), 240B, 245, and 249 of the Act, section 202 of Pub. L. 105-100, section 902 of Pub. L. 105-277, and former section 212(c) of the Act (as it existed prior to April 1, 1997);

(iii) To order withholding of removal pursuant to section 241(b)(3) of the Act and pursuant to the Convention Against Torture; and

(iv) To take any other action consistent with applicable law and regulations as may be appropriate.

(2) An immigration judge may certify his or her decision in any case under section 240 of the Act to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges under sections 101(b)(4) and 103 of the Act.

(b) Withdrawal and substitution of immigration judges. The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. If an immigration judge becomes unavailable to complete his or her duties, another immigration judge may be assigned to complete the case. The new immigration judge shall familiarize himself or herself with the record in the case and shall state for the record that he or she has done so.

(c) Conduct of hearing. The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.

(d) Withdrawal of application for admission. An immigration judge may allow only an arriving alien to withdraw an application for admission. Once the issue of inadmissibility has been resolved, permission to withdraw an application for admission should ordinarily be granted only with the concurrence of the Service. An immigration judge shall not allow an alien to withdraw an application for admission unless the alien, in addition to demonstrating that he or she possesses both the intent and the means to depart immediately from the United States, establishes that factors directly relating to the issue of inadmissibility indicate that the granting of the withdrawal would be in the interest of justice. During the pendency of an appeal from the order of removal, permission to withdraw an application for admission must be obtained from the immigration judge or the Board.

8 C.F.R. § 1240.1.

B. *Scope of the Immigration Judge's Regulatory Authority*

As detailed above, immigration judges have only that authority delegated to them by the Attorney General.¹⁴⁹ The matters over which immigration judges have jurisdiction are, in some ways, limited and narrowly circumscribed, providing that immigration judges may determine removability and adjudicate certain applications for relief from removal.¹⁵⁰ The Board has further clarified the limited regulatory power of immigration judges. For example, an immigration judge may not order discovery¹⁵¹ or waive certain application fees.¹⁵²

Citing typically to the (non-binding) EOIR Immigration Judge Benchbook, some have suggested—and this Article agrees—that immigration judges do have the, albeit nonbinding, authority to terminate removal proceedings in the case of a respondent's incompetence.¹⁵³ Others have cited to the regulations themselves¹⁵⁴—in particular, 8 C.F.R. § 1240.12(c) which states clearly that, “[t]he order of the immigration judge shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate.”¹⁵⁵ Though 8 C.F.R. § 1240.12(c) seems clear on its face, there is no Board precedent—or more precise statute or regulation—that

149. See *Matter of Fede*, 20 I. & N. Dec. 35, 35–36 (B.I.A. 1989) (“The Board and immigration judges . . . only have such authority as is created and delegated by the Attorney General.” (footnote omitted)).

150. See 8 C.F.R. § 1240.1(a)(i) (describing matters over which immigration judges have jurisdiction); see also *Matter of Hernandez-Puente*, 20 I. & N. Dec. 335, 339 (B.I.A. 1991) (stating that immigration judges “have no jurisdiction unless it is affirmatively granted by the regulations”).

151. See *Matter of Henriquez Rivera*, 25 I. & N. Dec. 575, 579 (B.I.A. 2011) (holding that immigration judge erred when ordering DHS to provide respondent's complete United States Citizenship and Immigration Services record to immigration court).

152. See 8 C.F.R. §§ 103.7, 1103.7 (2017).

153. See EXEC. OFF. OF IMMIGR. REV., U.S. DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK (2016), <https://www.justice.gov/eoir/immigration-judge-benchbook-mental-health-issues> [<https://perma.cc/BLZ3-D49Q>] (explaining that termination may be appropriate “where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards, as required by section 240(b)(3) of the Act.”). But see *Yao v. I.N.S.*, 2 F.3d 317, 319 (9th Cir. 1993) (“As the B.I.A. points out, the IJ was not empowered to terminate or suspend proceedings once initiated.” (citation omitted)); *Matter of Wong*, 13 I. & N. Dec. 701, 703 (B.I.A. 1971) (finding no discretionary authority to terminate); *Matter of Vizcarra-Delgadillo*, 13 I. & N. Dec. 51, 52 (B.I.A. 1968) (holding that special inquiry officer could terminate proceedings only where both parties agreed).

154. See *Decision of Immigration Judge, Matter of K.D.* (Feb. 26, 2015) (copy on file with author).

155. See 8 C.F.R. § 1240.12(c) (emphasis added); see also 8 C.F.R. § 1240.50(c) (“The order of the immigration judge shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. . . . [T]he immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.”).

provides that an immigration judge may terminate a case to ensure fundamental fairness in the event of an incompetent respondent. Even so, some immigration judges are exercising their discretion to order termination based on a respondent's incompetence, though, at least anecdotally, this practice varies widely by judge and court.¹⁵⁶ While an immigration judge does have clear regulatory authority to terminate removal proceedings in some instances,¹⁵⁷ the case of a respondent's incompetence is less clear. On the other hand, and relevant here, the Board has said that "seeking treatment for the Respondent" could be a basis for administrative closure, but did not expand further.¹⁵⁸ Release to treatment or termination of proceedings in order to seek the treatment that is demonstrably unavailable in immigration custody is a logical advancement of the Board's guidance.

Despite the Board's narrow interpretation of an immigration judge's authority to terminate,¹⁵⁹ federal courts have held that, in fact, removal proceedings should be terminated when regulatory violations impact a respondent's fundamental rights in the removal proceeding.¹⁶⁰ In *Montilla*

156. See generally *Sherman-Stokes*, *supra* note 12, at 1055–57 (2016) (describing vastly different experiences and outcomes of practitioners seeking termination in case of mentally incompetent respondent at ten sites across country); see also generally *Franco-Gonzalez v. Holder*, 767 F. Supp. 2d 1034, 1048 (C.D. Cal. 2010) (suggesting that immigration judge did right thing when she correctly "terminated the removal proceedings" in the case of lawful permanent resident respondent, Ever Franco Martinez-Rivas, whose schizophrenia rendered him incompetent and unable to proceed).

157. See 8 C.F.R. § 1235.3(b)(5)(iv) ("If the immigration judge determines that the alien was once so admitted as a lawful permanent resident or as a refugee, or was granted asylum status, or is a U.S. citizen, and such status has not been terminated by final administrative action, the immigration judge will terminate proceedings and vacate the expedited removal order"); 8 C.F.R. § 1239.2(f) ("An immigration judge may terminate removal proceedings to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors; in every other case, the removal hearing shall be completed as promptly as possible notwithstanding the pendency of an application for naturalization during any state of the proceedings."); see also *Matter of Hidalgo*, 24 I. & N. Dec. 103, 103 (B.I.A. 2007) (holding that "[b]ecause the Board of Immigration Appeals and the Immigration Judges lack jurisdiction to adjudicate applications for naturalization, removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) (2006) where the Department of Homeland Security has presented an affirmative communication attesting to an alien's prima facie eligibility for naturalization" (citation omitted)).

158. See *Matter of M-A-M*, 25 I. & N. Dec. 474, 483 (B.I.A. 2011).

159. See, e.g., *Matter of Sanchez-Herbert*, 26 I. & N. Dec. 43, 45, (B.I.A. 2012) (noting immigration judge's improper termination of proceedings and explaining that, "[o]nce jurisdiction vests with the Immigration Judge, neither party can compel the termination of proceedings without a proper reason for the Immigration Judge to do so").

160. See *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Montilla v. I.N.S.*, 926 F.2d 162, 166–70 (2d Cir. 1991).

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v. I.N.S.,¹⁶¹ the then INS failed to adhere to its own regulations concerning a noncitizen's right to counsel. *Montilla*, a long time lawful permanent resident, was detained and facing removal for a drug conviction. During his removal proceedings, the immigration judge advised the respondent of his right to counsel, but there was no waiver and no clear answer as to whether the respondent wished to avail himself of this right. Ultimately, the Court in *Montilla* held that because the right to counsel is a fundamental right—tracing its roots back to original schemes of Due Process—then where such a right is violated, proceedings may be terminated.¹⁶² Additionally, some scholars have suggested that immigration judges possess the statutory and regulatory authority to engage in proportionality review.¹⁶³ Professor Wishnie has argued that 8 U.S.C. § 1229a(c)(1)(A) should be construed to include a restriction on the imposition of a removal order where such imposition would be “excessive.”¹⁶⁴ Applying the canon of constitutional doubt, Professor Wishnie argues that, “a statute permitting the immigration judge to enter a removal order that was grossly disproportional to the underlying misconduct would raise a serious constitutional problem.”¹⁶⁵

Though the authority of the immigration judge is restricted in certain areas, in the realm of mental competency, the opposite is true. In fact, immigration judges presently exercise broad authority and discretion to make decisions and determinations regarding the mental competency of a respondent—without the benefit of a mental health evaluation or the opinion or testimony of a mental health professional—as well as what safeguards might be adequate to protect the respondent's rights in removal proceedings.¹⁶⁶ In these instances, the authority of the immigration judge is vast. They can allow a friend or family member to sit with the respondent during their proceedings, can waive the respondent's presence, or help the respondent to reserve their appeal rights.¹⁶⁷ An immigration judge can also alone be the decider of mental competency, without the benefit of a mental health evaluation, power that, for example, is not exercised by a criminal court judge.¹⁶⁸

Despite an immigration judge's substantial authority and discretion when it comes to matters of mental competency, immigration judges re-

161. 926 F.2d 162 (2d Cir. 1991).

162. *See id.* at 170.

163. *Cf.* 8 U.S.C. § 1229a(c)(1)(A) (2012).

164. *See* Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 445 (2012).

165. *See id.* at 444 (footnote omitted).

166. *See, e.g.*, *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1047–48 (C.D. Cal. 2010); *Matter of M-A-M*, 25 I. & N. Dec. 474, 477 (B.I.A. 2011); Sherman-Stokes, *supra* note 12, at 1045; EOIR, Phase I, *supra* note 46.

167. *See M-A-M*, 25 I. & N. Dec. at 483 (listing suggestions of safeguards that immigration judge can implement).

168. *See* EOIR, Phase I, *supra* note 46; *see also M-A-M*, 25 I. & N. Dec. at 474, 477. For further discussion see Sherman-Stokes, *supra* note 12.

main, in many cases, unclear on their authority. When an incompetent respondent is required to go forward in a proceeding where their fundamental rights cannot be adequately safeguarded, termination is appropriate and immigration judges should be explicitly authorized to render such a decision. However, absent clear and unequivocal regulatory authority to terminate in the case of a respondent's mental incompetence (and often over DHS objection), immigration judges are reluctant to act.

V. REGULATORY CHANGES SHOULD BE UNDERTAKEN

To varying degrees, where courts have considered the issue, they have concluded that whether pre- or post-removal order, prolonged and indefinite detention of noncitizens is suspect. Moreover, prolonged and indefinite detention is an even greater risk for this subgroup of mentally incompetent detained noncitizens, for whom there are no satisfactory safeguards. In order to maintain compliance with the Rehabilitation Act, regulatory changes should be undertaken to ensure that immigration judges have clear authority to order the release or termination of proceedings for certain mentally incompetent respondents for whom no adequate safeguards are available. While a reasonable accommodation does not require an organization to make a "fundamental" or "substantial" alteration to its programs, reasonable adjustments may be required to assure "meaningful access."¹⁶⁹ Such a reasonable adjustment in the nature of the benefit can help ensure that these respondents have meaningful access to the courts, in compliance with section 504.¹⁷⁰ Though the role and authority of immigration judges is constrained in some areas, immigration judges maintain broad and unique authority and discretion in the context of mental competence.¹⁷¹

This Article proposes that the regulations be amended to clarify an immigration judge's explicit authority to release a respondent or to terminate removal proceedings, where a respondent's mental competency prevents the imposition of adequate safeguards and where, in the absence of such safeguards, prolonged and indefinite detention will result. Simply put, the Department of Justice and the EOIR should write regulations stating that where a respondent is incompetent and competency restoration is not reasonably foreseeable then the immigration judge has the authority to release the respondent or terminate the proceedings, even over an objection by DHS trial counsel assigned to the case—such is the "reasonable accommodation."

169. See *Alexander v. Choate*, 469 U.S. 287, 300–01 (1985).

170. See *id.* at 302 n.21.

171. See *Matter of M-J-K*, 26 I. & N. Dec. 773, 773 (B.I.A. 2016) (holding that, "[i]n cases involving issues of mental competency, an Immigration Judge has the discretion to select and implement appropriate safeguards"); *M-A-M*, 25 I. & N. Dec. at 477, 481–82 ("Based on the statutory and regulatory parameters, we conclude that Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.").

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A. *The Regulations Should Be Amended to Prevent the Prolonged and Indefinite Detention of Mentally Incompetent Respondents*

Immigration statutes and regulations that explicitly address the presence of mental illness or mentally ill and incompetent respondents are not novel. Indeed, the INA has long excluded the mentally ill, in vulgar terms,¹⁷² since at least the late nineteenth century. Moreover, the power and authority of the United States to exclude noncitizens on this basis has repeatedly been upheld.¹⁷³ Today, although a mental disorder cannot be the sole basis for exclusion from the United States, it remains a ground of inadmissibility when coupled with associated harmful behaviors.¹⁷⁴ The regulations also contemplate the presence of mentally ill and incompetent respondents in removal proceedings by excusing the presence of a mentally incompetent respondent and suggesting safeguards to protect respondent's rights and privileges.¹⁷⁵ To amend the regulations to specifically contemplate the possibility of release or termination in certain, narrow circumstances, would be both prudent and with precedent. As discussed above, the prospect of prolonged and indefinite detention is very real for those detained incompetent respondents for whom no safeguards are adequate. Without regulatory change,¹⁷⁶ the mentally incompetent

172. See Immigration Act of 1891 § 1, ch. 551, 26 Stat. 1084 (1891) (excluding large classes of noncitizens including, “[a]ll idiots, insane persons, paupers or persons likely to become a public charge”); see also Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.) (prohibiting entry of those “afflicted with psychopathic personality, sexual deviation, or a mental defect”); Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) (banning those immigrants with “psychopathic personalities”); Immigration and Nationality Act of 1917 § 3, Pub. L. No. 301, 39 Stat. 874 (repealed 1952) (targeting intending gay and lesbian immigrants and prohibiting admission of “person[s] of constitutional psychopathic inferiority” who were certified by physician to be mentally ill). For a more thorough discussion of the history of exclusion of noncitizens based on mental illness, see Jennifer Blakeman, *The Exclusion of Mentally Ill Aliens Who May Pose A Danger to Others: Where Does the Real Threat Lie?*, 31 U. MIAMI INTER-AM. L. REV. 287, 288 (2000); Polly J. Price, *Infecting the Body Politic: Observations on Health Security and the “Undesirable” Immigrant*, 63 U. KAN. L. REV. 917, 919 (2015) (examining exclusion of “undesirable” immigrants through case study comparing exclusion of those suspected of Ebola and mentally ill); Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153, 155 (2004) (describing history of disability based exclusion immigration policy).

173. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10–11 (2002) (noting Supreme Court's repeated assertions of the doctrine of inherent powers “over immigrants in entry and exclusion proceedings”).

174. See 8 U.S.C. § 1182(a)(1)(A)(iii) (2012).

175. See *id.* § 1229a(b)(3) (“If it is impracticable by reason of an alien’s mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”); 8 C.F.R. §§ 1240.4, 1240.43 (2017).

176. Of course, in the context of administrative law, change can happen both by notice and comment rulemaking and regulation or by adjudication. There is a

will be subject to a kind of shadow detention, wherein their rights are unprotected and their confinement is potentially indefinite.¹⁷⁷ Their resultant inability to meaningfully exercise their rights and access the courts violates section 504 of the Rehabilitation Act.

Critics are apt to point out that a regulation allowing for termination by the immigration judge is only a partial solution—termination of removal proceedings will mean the likely immediate release of some mentally incompetent noncitizens, which could be seen as “preferential treatment.” It’s worth noting that the Rehabilitation Act contemplates and allows for such results—indeed, the Act acknowledges “*that preferences will sometimes prove necessary to achieve the Act’s basic equal opportunity goal.*”¹⁷⁸ Moreover, critics may point out that some of those released may have criminal convictions.¹⁷⁹ While this is true, there are potential safeguards to ensure the provision of mental health care, as well as ICE supervision if appropriate.

In the first instance, in considering the subset of mentally incompetent respondents impacted by these changes, there may be room for some kind of additional procedure, namely coordination with state mental health services. For example, under amended regulations, immigration judges could potentially condition release or termination of removal proceedings on the respondent—or, more likely, a friend, family member, guardian ad litem, or health care provider¹⁸⁰—petitioning the state for

possibility then that the Board of Immigration Appeals could solve this problem by issuing a precedential decision. Though very likely to be quicker, a notable downside of this approach is that adjudication can be undone by the stroke of the Attorney General’s pen.

177. For a discussion of one version of what this might look like, see Itaya, *supra* note 105, at 105 (examining application of 8 C.F.R. § 241.14 and arguing that such regulation allows noncitizens to be detained under shadow federal scheme that bypasses civil commitment procedures which would grant more procedural protections to mentally incompetent respondents).

178. See *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (emphasis added); see also *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1150 (9th Cir. 2003) (applying *Barnett* to hold that accommodation may result in preference for disabled individuals over otherwise similarly situated nondisabled individuals).

179. This Article does not endorse the myth that the mentally ill are more likely to be violent or commit crimes. Indeed, the research bears out that the mentally ill are, in fact, not any more likely than the general population to offend. See Press Release, American Psychological Association, *Mental Illness Not Usually Linked to Crime, Research Finds* (Apr. 21, 2014), <http://www.apa.org/news/press/releases/2014/04/mental-illness-crime.aspx> [https://perma.cc/DGX6-45X5]. However, this Article does recognize that the mentally ill in mandatory ICE detention have typically been convicted of crimes and that there may exist concerns about their likelihood of recidivism if released. *But see* Mark Noferi, *Mandatory Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, in *IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS* 215, 232–33 (Maria João Guia et al. eds., 2016) (noting that, “[A] criminal conviction is not necessarily a ‘reliable indicator’ of dangerousness—particularly minor convictions, many of which trigger mandatory immigration detention.” (footnote omitted)).

180. See, e.g., MASS. GEN. LAWS ANN. ch. 201D, § 6 (West 1990). For example, in Massachusetts, an applicant of any age may apply for Department of Mental

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services through a department of mental health (DMH).¹⁸¹ In Massachusetts, for example, this requirement would trigger a state level examination of the respondent's mental disorder(s), their duration, and any resultant functional impairment, potentially resulting in care and treatment provided by the state.¹⁸² Because the Department of Homeland Security has made clear that it has no intention of effectively treating certain incompetent respondents,¹⁸³ and a recent yearlong investigation determined that "the [immigration] detention system often fails to protect vulnerable immigrants with psychiatric disorders,"¹⁸⁴ a requirement to at least begin the process of soliciting state services prior to release or termination could provide a safety net of care and treatment for this vulnerable group.

Additionally, ICE could act to require post-release supervision. In the *Zadvydas* context, the statute and regulations provide for post-release supervision, including the terms and conditions of such supervision.¹⁸⁵ Though specific to the post-order context in which prolonged detention has resulted from DHS's inability to repatriate a noncitizen, the statute and regulations seem to contemplate mental illness—making reference to conditions of release that include rehabilitative programming and "psychiatric examination."¹⁸⁶ This Article does not suggest that continued post-release supervision of mentally incompetent noncitizens is necessarily desirable or practical; however, if narrowly tailored and implemented with an eye toward rehabilitation rather than enforcement, it may ameliorate concerns about the release of mentally incompetent noncitizens. That be-

Health services and a program or facility, or health care agent, may also apply on the applicant's behalf. *See id.*

181. Similar questions are being considered in a case currently pending before the Board of Immigration Appeals. *See Amicus Invitation No. 16-06-21 (Commitment to Mental Health Facility)*, *supra* note 65 (considering relationship between civil commitment and release from immigration detention where respondent's mental illness suggests that she poses both danger and flight risk if released).

182. *See* 104 MASS. CODE REGS. 29.04 (2009). In Massachusetts, to be approved for Department of Mental Health (DMH) services, an individual must meet the clinical criteria as described at sections 29.04 (2)(a) or (2)(b) of title 104 of the Code of Massachusetts Regulations, be determined in need of DMH services, and have no other means for obtaining the services, as described at sections 29.04 (3)(a), (b), (c), and (d) of title 104 of the Code of Massachusetts Regulations, and DMH has available capacity to provide the services as described at section 29.04 4(b) of title 104 of the Code of Massachusetts Regulations. *See id.*

183. Decision of the Immigration Judge, Matter of K.D. (Dec. 1, 2015) (copy on file with author) (in which DHS asserts that it, "could not and would not . . . provide treatment" of the incompetent Respondent while she was detained in their custody).

184. Siegelbaum, *supra* note 6.

185. *See* 8 U.S.C. § 1227(a)(3) (2012); 8 C.F.R. § 241.13(h) (2017).

186. *See* 8 C.F.R. § 241.13(h) ("The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety . . ., including, but not limited to, attendance at any rehabilitative/sponsorship program or submission for medical or psychiatric examination, as ordered."); *see also* 8 U.S.C. § 1227(a)(3) (referencing same).

ing said, it is also worth considering whether the immigration detention and removal regime really has the expertise and competence to be making decisions at the crossroads of mental illness and criminal behavior. For example, in special immigrant juvenile cases, we leave the decision as to whether a child has been abused, abandoned, or neglected to state authorities, due to their unique training and experience in this realm.¹⁸⁷ Analogously, it is worth considering whether decisions about competency, mental illness, rehabilitation, deterrence, and recidivism should be left to the systems explicitly designed to consider these issues.¹⁸⁸

B. *Alternate Solutions Are Unreliable, Inefficient, or Implausible*

DOJ and the EOIR should amend the regulations because an amendment to the regulations is the only viable solution to ensure compliance with section 504 of the Rehabilitation Act. Alternate solutions to the prospect of prolonged and indefinite detention of the mentally incompetent are unreliable, inefficient, or implausible.

First, as detailed in Section III, challenges to mandatory detention without a bond hearing under section 236(c) of the Act have been increasingly successful and have now reached the Supreme Court. While the potential of a newly created right to a bond hearing after six months¹⁸⁹ will provide a promising opportunity for many detained noncitizens, the Supreme Court's decision in *Jennings* is still unknown. While it is easy to assume that the Court will come down on the side of the circuit courts to have considered the issue—finding that there is a limit to the length of detention authorized by section 1226(c)—the Court could rule otherwise. For example, the Court could hold that prolonged pre-hearing detention is permissible. This would not resolve the problem facing mentally incompetent respondents who cannot be afforded adequate safeguards. These respondents cannot proceed to a hearing, seek appeal, or otherwise pursue relief because there are no safeguards sufficient to protect their rights, but if the Court held this way, they would also be ineligible for a bond hearing because they are detained prior to the entry of an order of removal, or “pre-order.”

187. See 8 U.S.C. § 1101(a)(27)(J); see also Laila Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 267 (2014) (describing process in juvenile, family, or probate court for youth seeking Special Immigrant Juvenile Status).

188. Whether or not these systems—civil commitment and the criminal justice system, respectively—are adequately addressing and responding to these issues is a topic well outside the scope of this Article. Moreover, the success or efficacy of these systems is likely to vary greatly, from state to state and even county to county, throughout the United States.

189. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), cert. granted sub nom., *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016); see also *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at 10 (C.D. Cal. Apr. 23, 2013).

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Even if the Court in *Jennings* upholds the right to a bond hearing after six months, a bond hearing in itself does not guarantee release. Bond procedures and determinations rely on the statute, regulations, and Board case law.¹⁹⁰ In *Matter of Patel*,¹⁹¹ the Board held that a noncitizen “is not and should not be detained or required to post bond except on a finding that he is a threat to the national security, . . . or that he is a poor bail risk.”¹⁹² In *Patel*, and a number of subsequent early cases, the Board made clear that liberty was the default.¹⁹³ But, as a result of changes in the statute and regulations, it is now clear in law and in practice that the detainee—in this case, a mentally incompetent detainee who may be proceeding pro se—bears the burden of proof in bond proceedings to prove that she is neither a danger to persons or property.¹⁹⁴ In making this determination, an immigration judge can consider a number of factors including whether the respondent has a criminal history of any kind, as well as criminal charges that did not result in a conviction.¹⁹⁵ Scholars have noted the many problems with this allowance, for example that hearsay from police reports is often introduced in bond hearings without making police officers available for cross examination.¹⁹⁶ If, after a consideration of the evidence presented, the immigration judge finds that the respondent is a danger to persons or property, the analysis concludes and the respondent will remain detained.¹⁹⁷ If, however, the immigration judge finds that the respondent is not a danger, then the immigration judge may proceed to consider whether the respondent is a flight risk. In making a flight risk determination, an immigration judge may consider multiple fac-

190. See 8 U.S.C. § 1226; 8 C.F.R. §§ 1003.19, 1236.1; *In re D-J*, 23 I. & N. Dec. 572 (U.S. Atty. Gen. 2003); *Matter of Guerra*, 24 I. & N. Dec. 37, 39 (B.I.A. 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1103 (B.I.A. 1999); *Matter of Patel*, 15 I. & N. Dec. 666, 667 (B.I.A. 1976).

191. 15 I. & N. Dec. 666 (B.I.A. 1976).

192. See *id.*

193. See, e.g., *Matter of Andrade*, 19 I. & N. Dec. 488, 489 (B.I.A. 1987); *Matter of Shaw*, 17 I. & N. Dec. 177, 178 (B.I.A. 1979); *Matter of Spiliopoulos*, 16 I. & N. Dec. 561, 563 (B.I.A. 1978); *Patel*, 15 I. & N. Dec. at 666; see also Holper, *supra* note 135 (describing changing history of burden of proof in bond proceedings).

194. See Holper, *supra* note 135 (describing changing history of burden of proof in bond proceedings and examining both laws of 1996 and follow-on regulation in 1997 in which the then INS “flip[ped] the presumption of freedom for its initial custody determinations for all detainees” and not just those in certain, specified categories, and arguing that in order to ensure that detention comports with Due Process, it should be Government’s burden, by clear and convincing evidence, to prove that detainee is dangerous and flight risk); see also 8 U.S.C. § 1536(a)(2) (placing burden on detainee to prove they are not flight risk); 8 C.F.R. § 236.1.

195. See *Guerra*, 24 I. & N. Dec. at 38.

196. See Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 732 (2015) (arguing that, “blind reliance on police reports has pervaded immigration judges’ decisions to deny bond, to deny discretionary relief, and, in some cases, to find noncitizens removable”).

197. See *Matter of Urena*, 25 I. & N. Dec. 140, 141–42 (B.I.A. 2009) (holding that only if judge finds that detainee is not dangerous, can judge then go on to consider flight risk).

tors¹⁹⁸ including whether the respondent has a fixed address in the United States;¹⁹⁹ the respondent's length of residence in the United States;²⁰⁰ family ties in the United States;²⁰¹ employment history in the United States, including length and stability of such employment;²⁰² as well as the respondent's immigration record.²⁰³ It is worth noting that several of these factors are very likely to prejudice the mentally ill and incompetent, who are less likely to maintain a fixed address²⁰⁴ and stable employment²⁰⁵ and whose mental illness may have distanced them from family members in the United States.²⁰⁶ With these factors working against them, the mentally ill and incompetent are, it would seem, in every way less likely to receive a favorable bond determination.²⁰⁷ Finally, a bond hearing requires substantial documentation and advocacy, a tall or-

198. See generally *Matter of Sugay*, 17 I. & N. Dec. 637, 639 (B.I.A. 1981) (noting that factors to consider when analyzing bond case include "employment history"; "length of residence the in community"; "family ties"; "record of nonappearance"; criminal violations; immigration violations; and eligibility for relief from removal).

199. See, e.g., *Guerra*, 24 I. & N. Dec. at 40; *Matter of Patel*, 15 I. & N. Dec. 666, 666 (B.I.A. 1979).

200. See, e.g., *Guerra*, 24 I. & N. Dec. at 40; *Matter of Andrade*, 19 I. & N. Dec. 488, 489–90 (B.I.A. 1987); *Matter of Shaw*, 17 I. & N. Dec. 177, 178 (B.I.A. 1979).

201. See, e.g., *Guerra*, 24 I. & N. Dec. at 40; *Andrade*, 19 I. & N. Dec. at 489; *Shaw*, 17 I. & N. Dec. at 178; *Patel*, 15 I. & N. Dec. at 667.

202. See, e.g., *Guerra*, 24 I. & N. Dec. at 40; *Andrade*, 19 I. & N. Dec. at 489–90; *Shaw*, 17 I. & N. Dec. at 178–79; *Patel*, 15 I. & N. Dec. at 666–67.

203. See, e.g., *Guerra*, 24 I. & N. Dec. at 40; *Andrade*, 19 I. & N. Dec. at 489; *Shaw*, 17 I. & N. Dec. at 178; *Matter of San Martin*, 15 I. & N. Dec. 167, 168 (B.I.A. 1974); *Matter of Moise*, 12 I. & N. Dec. 102, 103 (B.I.A. 1967).

204. See U.S. DEP'T OF HOUSING AND URB. DEV., THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS iii, 18 (2010), <https://www.hudexchange.info/resources/documents/2010HomelessAssessmentReport.pdf> [<https://perma.cc/BR78-R56W>] (noting that, "[m]ore than half of adults in PSH [Permanent Supportive Housing] had a substance abuse problem, a mental illness, or both" and "an estimated 46 percent of sheltered adults . . . had a chronic substance abuse problem and/or a severe mental illness")

205. See Judge David L. Bazelon, *Getting to Work: Promoting Employment of People with Mental Illness*, BAZELON CTR. FOR MENTAL HEALTH L. (Sept. 2014), <http://www.bazelon.org/wp-content/uploads/2017/01/Getting-to-Work.pdf> [<https://perma.cc/7GGF-SB2P>] (noting that, "[t]he likelihood of a person with a serious mental illness having full-time employment is approximately 1 in 10" (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., FEDERAL FINANCING OF SUPPORTED EMPLOYMENT AND CUSTOMIZED EMPLOYMENT FOR PEOPLE WITH MENTAL ILLNESS: FINAL REPORT vii (2011), <http://aspe.hhs.gov/daltcp/reports/2011/supempFR.pdf>. [<https://perma.cc/7484-D9ZX>])); see also Bazelon, *supra*, at 2 n.5 (noting that only 16.9% of all people served by state mental health systems were employed).

206. Social disconnectedness is a hallmark of mental illness. See, e.g., Erin York Cornwell & Linda J. Waite, *Social Disconnectedness, Perceived Isolation, and Health Among Older Adults*, 50 J. HEALTH SOC. BEHAV. 31, 32–33 (2009).

207. But see *Guerra*, 24 I. & N. Dec. at 37 (holding that "the Immigration Judge has wide discretion in deciding the factors that may be considered" which arguably could mean that immigration judges could consider, and give significant weight to, respondents' mental illness as positive factor favoring release).

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der if a mentally incompetent, detained respondent is seeking bond pro se.²⁰⁸

A second alternative for indefinitely detained noncitizens could be habeas proceedings. After all, the Respondents in *Zadvoydas* and *Clark* brought successful habeas challenges to their indefinite detention. But habeas challenges are complex and time consuming.²⁰⁹ Moreover, habeas review takes custody determinations out of the immigration court—where immigration judges arguably have the unique “institutional competence and individualized knowledge to efficiently conduct the review.”²¹⁰ Especially considering that mentally incompetent respondents, who are generally not entitled to counsel,²¹¹ would be required to write and file habeas petitions from detention,²¹² the promise of habeas producing timely or successful results seems illusory. Additionally, federal court involvement can be slow, cumbersome and “wastefully duplicative.”²¹³

208. See *Das*, *supra* note 75, at 157 (describing many hurdles faced by pro se immigration detainees trying to secure evidence in support of their request for bond).

209. See Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 603 (2010) (explaining that, “[f]ederal [habeas] litigation is complex, resource-intensive, and time-consuming. Moreover, the legal framework for mandatory detention is a fluid network of statutes, and courts are apt to deem cases moot when the legal authority for detention shifts from one statute to another” (footnote omitted)).

210. See Respondent’s Brief in Opposition on Petition for Writ of Certiorari at 23, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204); see also *Ly v. Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (noting that habeas approach raises “a question of institutional competence” since “federal courts are obviously less well situated to know how much time is required to bring a removal proceeding to conclusion”).

211. *But see Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034, 1061 (C.D. Cal. 2010) (awarding plaintiffs “Qualified Representative(s) who is willing and able to represent Plaintiffs during all phases of their immigration proceedings, including appeals and/or custody hearings”); see also EOIR FOIA Response, *supra* note 48 (showing that the Phase I Plan has been rolled out in Denver, Colorado; El Paso, Texas; Houston, Texas; and Miami, Florida). Even so, it is not at all clear that this representation would extend beyond immigration court and into federal district court, which is where the habeas challenge would be brought.

212. See, e.g., Respondent’s Brief in Opposition on Petition for Writ of Certiorari at 23–24, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204). Respondents in *Jennings* argued that bond is preferable to habeas because it “ensures that noncitizens—many of whom are unrepresented and lacking in the legal sophistication needed to file a habeas petition—are in fact able to obtain review of whether their detention remains reasonable despite its length.” See *id.* (citing *Lora v. Shanahan*, 804 F.3d 601, 615–16 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2494 (2016)).

213. See *Reid v. Donelan*, 819 F.3d 486, 498 (1st Cir. 2016) (explaining that, “Not only may ‘the underlying removal proceedings justifying detention . . . be nearing resolution by the time a federal court of appeals is prepared to consider them,’ but it is also likely that the evidence and arguments presented in a ‘reasonableness’ hearing before a federal court are likely to overlap at the margins with the evidence and arguments presented at a bond hearing before an immigration court. This inefficient use of time, effort, and resources could be especially bur-

Finally, congressional action could amend the statute to provide clearly for termination in the case of a mentally incompetent respondent. Unfortunately, in today's congressional climate, such action seems improbable. Of course, congressional inaction is not new—Truman's campaign against a "Do-Nothing Congress" is well documented.²¹⁴ But congressional inaction and obstructionism is, in some areas, unprecedented today.²¹⁵ On immigration matters in particular, congressional inaction, intransigence, and obstructionism is now the norm.²¹⁶ Given these realities, and the increasingly polarized political climate on immigration matters in particular, it seems implausible to expect that congressional action would or could remedy this problem.

VI. CONCLUSION

In a recent case involving an incompetent, detained respondent, for whom no safeguards were adequate, the immigration judge concluded, "[t]he Court has serious reservations about the practical implications of the Respondent's continued detention in DHS custody."²¹⁷ It is the case of detainee Martin, whose story is described in the introduction, and it seems that the immigration judge shared these concerns. After significant advocacy, and prolonged detention for Martin during which time little to no treatment was provided him, his removal proceedings took a rare and unusual turn. With the tacit agreement of the attorney for the Department of Homeland Security, Martin's proceedings *were* ultimately terminated and Martin was released from custody. Martin's case was unusual. The prolonged, and indeed potentially indefinite, detention of mentally incompetent noncitizens pre-removal order and in violation of the Rehabilitation Act is a growing reality. Courts across the country have consistently struck down prolonged, pre-order detention and have read a "reasonableness" limitation into the statute, requiring a custody review

densome in jurisdictions with large immigration dockets." (quoting *Lora*, 804 F.3d at 615–16 (internal citation omitted)).

214. See President Harry S. Truman, Speech in Elizabeth, New Jersey: Know Nothing, Do Nothing Congress (Oct. 7, 1948), http://www.speeches-usa.com/Transcripts/harry_truman-nothing.html [<https://perma.cc/PQL5-XR76>].

215. See, e.g., Patrick Caldwell, *Senate Republicans Are Blocking Obama's Judges at a Nearly Unprecedented Rate*, MOTHER JONES (Nov. 4, 2015, 11:00 AM), <http://www.motherjones.com/politics/2015/11/senate-republicans-block-obama-judge-nominations/> [<https://perma.cc/K4MJ-JECU>]. But see Megan Mcardle, *Unprecedented Congressional Obstructionism Is Actually Quite Precedented*, ATLANTIC (Oct. 11, 2011), <https://www.theatlantic.com/business/archive/2011/10/unprecedented-congressional-obstructionism-is-actually-quite-precedented/246513/> [<https://perma.cc/4U5L-87GL>].

216. See, e.g., Jonathan Capehart, *Boehner Refuses to Act on Immigration Reform*, WASH. POST (Nov. 6, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/06/boehner-refuses-to-act-on-immigration-reform/> [<https://perma.cc/7MPP-TCRC>].

217. See Decision of the Immigration Judge, Matter of K.D. (Dec. 1, 2015) (copy of decision on file with author).

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hearing when detention exceeds this limit. Indeed, in *Jennings*, the Supreme Court has recently accepted certiorari on this issue. As the United States continues to detain record numbers of noncitizens facing deportation, it is unlikely that the number of mentally ill and incompetent in detention will decline. Actions by the EOIR and decisions at the BIA, as well as the success of class action litigation, have resulted in some positive strides in recognizing that this vulnerable population requires specially tailored procedural protections to ensure their rights are safeguarded—both under the United States Constitution and the Rehabilitation Act. And while these measures have certainly provided some significant additional protection, the risk of prolonged and indefinite detention, and denial of meaningful access to the courts, remains. The EOIR should amend the regulations to grant immigration judges explicit authority to order release or termination of removal proceedings for mentally incompetent, detained noncitizens where there are no safeguards available that can adequately protect their rights. Alternatives, including bond hearings, habeas challenges, or congressional action, are either unreliable, inefficient, or implausible. Without this critical regulatory fix, incompetent, detained Respondents like Martin and others—many of whom are longtime lawful permanent residents—face potentially prolonged and indefinite detention in ICE custody, where they will be unable to access meaningful treatment, rehabilitation, or the opportunity for release.