STEPS FORWARD, NOT FAR ENOUGH

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On September 25, 2015, the federal district court in *Franco-Gonzalez v. Holder* took another meaningful step toward ensuring the protection of constitutional rights to individuals with serious mental disabilities in the immigration courts.[1] As ably explained by Amelia Wilson, Natalie H. Prokop and Stephanie Robins in *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, the *Franco* case has finally forced the immigration system to provide counsel to some of the most vulnerable individuals facing deportation.[2] Beyond the provision of an attorney to immigrants in detention who are found to lack the competence to understand the proceedings, the *Franco* court has now ordered the re-opening of cases in which an immigrant with serious mental illness or impairment was unrepresented and ordered removed. Even more forceful, the court is holding the Department of Homeland Security responsible for the return of individual class members who have already been deported.

While these developments are welcome news, progress toward ameliorating the risk of deporting an immigrant suffering from a mental disability without due process is inherently limited. Provision of counsel simply happens too late in the game. In case after case, as compellingly detailed in Wilson, Prokop and Robins' article, an attorney's labor and investigation is essential to identify a particular medical or mental health impediment and provide the facts and evidence that make a competency determination possible. Absent involvement of an attorney, the immigration court is unable to have enough of a record to even trigger a competency hearing.[3] Even with *Franco*'s new opportunity to remedy past

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1. Order Granting Plaintiff's Unopposed Motion for Final Approval of Partial Class Action Settlement, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Sept. 25, 2015) (granting redress to class members who had been ordered removed and/or deported since November 21, 2011).

2. *See* Amelia Wilson, Natalie H. Prokop & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313 (2015).

3. *Id*. at 315–16, 334–35. EOIR Guidance anticipates "indicia" of a mental disorder to come from third parties not present in the courtroom, medical records, and evaluations of mental capacity not normally provided for in removal hearings. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO

oversights, it will likely take involvement of counsel to identify class members and to move to reopen their cases. The authors' call—for the provision of counsel at the earliest stage where the suggestion of a serious mental disorder exists—is well-grounded and proven by experience.

In addition to having the focused energy of an attorney to flush out information critical to the court's determination of competency, early involvement of an attorney is necessary to ensure accountability. The immigration courts are in the midst of a resource crisis. As of the end of August 2015, the courts had an almost half million case backlog.[4] Too few judges are hearing cases, with the number of available judges at risk of falling further.[5] To faithfully follow *Matter of M-A-M-*,[6] *Franco*, and the EOIR Guidelines prescriptions, the court will necessarily expend more time and resources in each case. Yet the countervailing pressure to expedite is firmly entrenched, bolstered by the $164 daily, per person cost of detention.[7] Regardless of intent, a judge facing a morning docket of twenty-five cases with a full schedule of hearings in the afternoon is less likely to notice signs of mental health impediments, let alone find time to order investigations, schedule subsequent hearings, and extend the case. All incentives in the current system push toward case conclusion, not protracted inquiry. In addition, as the authors aptly show, the Department of Homeland Security has an extremely poor track record of providing correct or complete information to the court regarding a person's mental capacity.

It is disappointing that the court in *Franco* undercut the power of its holding by requiring provision of counsel only after a finding of incompetence, and more so that the Executive Office for Immigration Review failed to go further. The gatekeepers of due process for detained immigrants with serious mental disabilities—the Department of Homeland Security and the Immigration Courts—have the least incentive to grant the process due. In addition to heeding Wilson, Prokop and Robins' recommendations, at the very least, an independent ombudsman should be designated to assist the immigration court in implementing *Franco*'s obligations and making improvements to its guidelines.

UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 4 (2013) [hereinafter EOIR GUIDANCE], https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf.

4. Transactional Records Access Clearinghouse, *Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Nov. 8, 2015).

5. Molly Hennessy-Fiske, *As Immigration Judges' Working Conditions Worsen, More May Choose Retirement*, L.A. TIMES (Nov. 8, 2015, 9:47 PM), http://www.latimes.com/nation/la-na-immigration-judges-20150818-story.html.

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

7. Det. Watch Network, *About the U.S. Detention and Deportation System*, http://www.detentionwatchnetwork.org/resources (last visited Oct. 24, 2015).