

January 23, 2012

Re: **Please Co-Sponsor the Ensuring Mental Competence in Immigration Proceedings Act**

Dear Representative:

The undersigned organizations and individuals write to encourage you to support Representative Pete Stark's proposed *Ensuring Mental Competence in Immigration Proceedings Act*, which would provide explicit authority to immigration judges (IJs) to terminate proceedings and/or appoint counsel for mentally incompetent persons in immigration proceedings. This bill: (1) ensures fairness in deportation hearings; (2) saves money by expediting case processing and reducing the growing immigration case backlog; and (3) reduces unnecessary prolonged detention and its related costs of \$60,000 annually per detainee.¹

Ensuring Mental Competence in Immigration Proceedings Act

The proposed *Ensuring Mental Competence in Immigration Proceedings Act* ("the Act") is a long-overdue response to the problems experienced by the immigration detention and court system when individuals with mental disabilities are unable to participate meaningfully in immigration proceedings. Although IJs already have the authority and obligation to provide safeguards to persons with mental disabilities appearing before them, existing guidance is vague, and many IJs find their authority challenged by the government when they exercise it.

This legislation would provide IJs with explicit authority to order competency evaluations, terminate proceedings, and/or appoint counsel when a person in removal proceedings has a mental disability so severe that he or she is not competent to participate and needs additional safeguards for a fair hearing. In particular, the Act presents IJs with non-exclusive factors to consider (for example, the severity of a mental health condition and the presence of counsel) in deciding whether to terminate proceedings or to introduce additional safeguards such as a competency evaluation or appointment of counsel.

The Act strengthens due process in immigration court and empowers IJs to dismiss proceedings when continuing to reset the hearings would only prolong the case and the person's detention. This discretionary authority is a vital tool for IJs to manage their expanding backlog of cases and to ensure that immigration detainees are not "lost" in prolonged detention, or mistakenly deported.

Immigration Detainees with Mental Disabilities

Individuals with mental disabilities face enormous challenges in navigating the immigration court and detention systems.² For those with severe mental disabilities, participation in deportation proceedings is significantly limited when they are unable to provide basic information necessary to the adjudication of their claims (for example, place and date of birth, contact information for family, and basic facts about their lives). Thus, individuals with valid claims to remain in the United States—including U.S.

¹ National Immigration Forum, *The Math of Immigration Detention*, Aug. 2011.

² Department of Homeland Security, Office of Inspector General, *Management of Mental Health Cases in Immigration Detention*, Mar. 2011; Human Rights Watch and the American Civil Liberties Union, *Deportation by Default: Mental Disability, Unfair Hearings and Indefinite Detention in the U.S. Immigration System*, July 2010; Texas Appleseed, *Justice for Immigration's Hidden Population*, Mar. 2010.

citizens,³ long-time lawful permanent residents, and asylum-seekers—may be denied the opportunity to present their cases and vindicate any available claims to relief. These flawed outcomes depend not on the merits of these persons' claims, but on the impact of their disabilities. This predicament is particularly dire for those immigration detainees with severe mental disabilities who have no lawyer (an estimated 84% of detainees lack legal counsel⁴). Not only are their deportation proceedings likely to result in a significant deprivation of rights, but these individuals may also be detained unnecessarily for years, unable to argue for their release and unable to move forward with deportation proceedings. No stakeholder in the immigration system benefits from such inhumane inefficiencies.

Some of the individuals who have been caught in this Sisyphean system include:

- Jose Antonio Franco-Gonzalez, an immigrant from Mexico with severe cognitive disabilities, who was declared incompetent by an immigration court in 2005 when he was unrepresented by counsel. His case was administratively closed—which puts the case on hold but does not release the individual—and he was forgotten in detention by the Department of Homeland Security (DHS) for four-and-a-half years, at a cost likely exceeding \$300,000.
- Guillermo Gomez Sanchez, a lawful permanent resident and native of Mexico, who has paranoid schizophrenia and spent four-and-a-half years in immigration detention. An IJ administratively closed his case for two-and-a-half years after DHS failed to administer a psychiatric evaluation. When the case was reopened in June 2008, a judge ordered Mr. Gomez-Sanchez released on a \$5,000 bond. But attorneys for DHS challenged the bond order, even though Mr. Gomez-Sanchez was found to be neither a flight risk nor a danger to the community.
- Mark Lyttle, a native-born U.S. citizen of Puerto Rican descent who was deported to Mexico in 2008. Despite Mr. Lyttle's acknowledged mental disabilities (he had previously spent time in a psychiatric hospital), at his immigration court hearing no attempt was made to assess whether he was competent to proceed unrepresented. Mr. Lyttle had never been to Mexico and spoke no Spanish. He endured more than four months of living on the streets and in the shelters and prisons of Mexico, Honduras, Nicaragua, and Guatemala.
- Denzel S.,⁵ a lawful permanent resident from Haiti with schizophrenia who was hospitalized before his arrest by DHS. He was sent to an in-patient psychiatric facility at least four times while at a Texas immigration detention facility, causing him to miss several hearings. At the time he was interviewed by Human Rights Watch, he had been detained for one year and said he still heard voices and attempted suicide twice while in detention.

The Immigration and Nationality Act (INA) and its corresponding federal regulations contemplate safeguards for immigrants with mental disabilities to ensure the constitutional and statutory right to a fair hearing. For example, the Attorney General is authorized to “prescribe safeguards to protect the

³ See, e.g., “ACLU Files Lawsuits After Government Wrongfully Deports U.S. Citizen With Mental Disabilities,” American Civil Liberties Union press release (Oct. 13, 2010); “Illegally Deported U.S. Citizen Pedro Guzman Found After Nearly Three Months in Mexico,” American Civil Liberties Union of Southern California press release (Aug. 7, 2007); Testimony of Rachel E. Rosenbloom, Human Rights Fellow and Supervising Attorney, Center for Human Rights and International Justice at Boston College, before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Committee on the Judiciary, United States House of Representatives, Hearing on “Problems with ICE Interrogation, Detention, and Removal Procedures,” (Feb. 13, 2008); Karen Musalo, “Expedited Removal,” *Human Rights* (American Bar Association, 2001).

⁴ American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. (2010), 5-8.

⁵ *Deportation by Default*, *supra*, at 68 (pseudonym).

rights and privileges” of immigrants with mental disabilities through his administrative rule-making authority, and, more generally, to “establish such regulations” as are necessary to implement the INA.⁶ To date, however, the Attorney General has not implemented this mandate to create safeguards. Various federal regulations also attempt to offer some assistance to immigrants with mental disabilities. For example, federal regulations require that immigrants have a “reasonable opportunity” to present, examine and object to evidence,⁷ and prevent an IJ from accepting an admission of alienage from a mentally incompetent person.⁸

These sparse regulations, however, do not provide IJs with sufficient guidance on how to treat cases where an individual’s disability is so severe that she or he is unable to participate meaningfully in proceedings. The Board of Immigration Appeals (BIA) has attempted (through case law and the Immigration Judge Benchbook) to assist IJs with additional courtroom guidance for processing these cases.⁹ Despite this direction, the government continues to question the authority of IJs when they exercise it to provide safeguards they believe are required both to ensure fairness in proceedings and to move along their burgeoning dockets. The Act would rectify one of the central problems identified by IJs by affirming their authority to terminate proceedings for those who are not mentally competent.

Authority to Terminate Proceedings

The Supreme Court of the United States has long recognized that the government cannot prosecute and punish a criminal defendant who is mentally incompetent and therefore lacks “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” a “rational as well as factual understanding of the proceedings against him,” and cannot “assist in preparing his defense.”¹⁰ This safeguard is recognized as important for both the rights of individual defendants and the integrity of the system. While similar interests are at risk in immigration proceedings, where immigrants face the loss of their homes and family lives if ordered deported, there is no rule preventing the prosecution and deportation of individuals who are mentally incompetent and cannot participate in proceedings to prove their claims and defend against deportation.

Instead, when an IJ recognizes that an individual is not competent to proceed, hearings are often continuously recalendared, delaying the proceedings, potentially indefinitely, at great cost. Unlike in the criminal justice system, neither the INA and its federal regulations nor existing case law explicitly allow IJs to terminate proceedings when an individual is not mentally competent to participate in them.

Aside from the significant delays this causes immigration courts, which are already processing a record backlog of cases,¹¹ the contested ability of IJs to terminate proceedings leads to prolonged detention of individuals with mental disabilities. Yet continuing or resetting the hearings does not guarantee that a

⁶ 8 U.S.C. §§ 1103(g)(2); 1229a(b)(3); *see also Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (noting the Attorney General’s authority to prescribe safeguards to protect the rights and privileges of non-citizens with mental disabilities in deportation proceedings).

⁷ 8 C.F.R. § 1240.10(a)(4).

⁸ *Id.* § 1240.10(c).

⁹ *See Matter of M-A-M*, 25 I. & N. Dec. 474 (BIA 2011); U.S. Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, available at <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html>.

¹⁰ *Dusky v. United States*, 362 U.S. 402 (1960); *see also Drope v. Missouri*, 420 U.S. 162, 171 (1975).

¹¹ *See* TRAC, Syracuse University, “Immigration Court Backlog Rises for Another Year.” (Dec. 8, 2011).

person will be able to prepare his or her case or find a lawyer. Moreover, in some cases, a disability is so severe that a lawyer, even if found, would not be able to communicate with his or her client.

Unrepresented persons with mental disabilities are at risk of being lost in the immigration system every day when their cases are put on hold because they cannot meaningfully participate. In some instances, IJs attempt to stop proceedings from going forward by closing the case administratively where the respondent before them has a severe disability and is unrepresented. However, administrative closure does not trigger release from detention, so individuals like Mr. Franco-Gonzalez have been trapped in detention with no legal authority determining when—if ever—their cases must be heard and detention ended.

By authorizing IJs to “terminate proceedings against those aliens not competent to represent themselves in their proceedings due to mental disabilities,” and to appoint counsel for incompetent persons whose proceedings continue, the proposed Act provides IJs the support they need for cost-effective and efficient management of their dockets, avoiding costly appeals and prolonged detention when the IJs’ authority is questioned. The recent history of immigration proceedings for incompetent individuals with mental disabilities is fraught with unnecessary and expensive detention, in some cases for years on end, and hampered by the absence of basic protections such as competency evaluations. The inability of this vulnerable population to participate meaningfully in immigration proceedings has led to fundamentally unfair hearings and results, including deportation of persons with U.S. citizenship and lawful residence.

This bill would enhance the fairness of immigration proceedings for individuals with mental disabilities while simultaneously reducing detention costs and the case backlog. It would therefore benefit all stakeholders in an accurate and efficient immigration system that respects due process. We enthusiastically support its enactment and urge you to join in the effort to pass the *Ensuring Mental Competence in Immigration Proceedings Act*.

Sincerely yours,

American Civil Liberties Union

Americans for Immigrant Justice

American Immigration Lawyers Association

Asian American Justice Center, member of Asian American Center for Advancing Justice

Maria Baldini-Potermine & Associates, P.C. (IL)

Bellevue/NYU Program for Survivors of Torture

Boston University Civil Litigation Program

Brooklyn Defender Services

Capital Area Immigrants’ Rights Coalition

Casa Esperanza, Plainfield & Bound Brook, NJ

Center for Constitutional Rights

Criminal Defense Immigration Project, New York State Defenders Association

Crossing Borders (IA)

East Bay Community Law Center, Berkeley Law School

East Bay Sanctuary Covenant

Frey Law Office (MN)

Friends Committee on National Legislation

Heartland Alliance's National Immigrant Justice Center

Human Rights and Genocide Clinic at Benjamin N. Cardozo School of Law

Human Rights Watch

Immigrant Advocacy Program, Legal Aid Justice Center (VA)

Immigration Equality

IRATE & First Friends (NJ)

Kentucky Equal Justice Center

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Loyola University New Orleans College of Law, Law Clinic and Center for Social Justice

Lutheran Immigration and Refugee Service

Maxwell Street Legal Clinic (KY)

Mennonite Central Committee U.S. Washington Office

Mental Health Advocacy Services, Inc.

Middlesex County Coalition for Immigrant Rights (NJ)

MFY Legal Services, Inc. (NY)

Moriah's Gift (GA)

National Association of County Behavioral Health and Development Disability Directors (NACBHDD)

National Disability Rights Network

National Immigration Forum

New York Lawyers for Public Interest

Northwest Immigrant Rights Project

NYU Center for Health and Human Rights

Pennsylvania Council of Churches

Pennsylvania Immigration Resource Center

Physicians for Human Rights

Political Asylum/Immigration Representation Project

Public Counsel

Public Justice Center (MD)

South Asian Americans Leading Together

Southeast Asia Resource Action Center

University of Houston Immigration Clinic

Women's Refugee Commission

Joanne Ahola, M.D., P.C.

Adjunct Assistant Clinical Professor of Psychiatry, Weill Cornell Medical College

Medical Director, Cornell Center for Human Rights

Assistant Clinical Professor of Psychiatry, Columbia University College of Physicians and Surgeons

Merrill Rotter, M.D., Albert Einstein College of Medicine

Ariel Shidlo, Ph.D., Co-Director, Research Institute Without Walls

Mary H. White, M.D., Co-Director, Weill Cornell Medical College