United States

Deportation by Default

Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System

HUMAN RIGHTS WATCH

ACLU
AMERICAN CIVIL LIBERTIES UNION

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Printed in the United States of America
ISBN: 1-56432-665-9
Cover design by Rafael Jimenez

Human Rights Watch
350 Fifth Avenue, 34th floor
New York, NY 10118-3299 USA
Tel: +1 212 290 4700, Fax: +1 212 736 1300
hrwnyc@hrw.org

Poststraße 4-5
10178 Berlin, Germany
Tel: +49 30 2593 06-10, Fax: +49 30 2593 0629
berlin@hrw.org

Avenue des Gaulois, 7
1040 Brussels, Belgium
Tel: + 32 (2) 732 2009, Fax: + 32 (2) 732 0471
hrwbe@hrw.org

64-66 Rue de Lausanne
1202 Geneva, Switzerland
Tel: +41 22 738 0481, Fax: +41 22 738 1791
hrwgva@hrw.org

2-12 Pentonville Road, 2nd Floor
London N1 9HF, UK
Tel: +44 20 7713 1995, Fax: +44 20 7713 1800
hrwuk@hrw.org

27 Rue de Lisbonne
75008 Paris, France
Tel: +33 (1)43 59 55 35, Fax: +33 (1) 43 59 55 22
paris@hrw.org

1630 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009 USA
Tel: +1 202 612 4321, Fax: +1 202 612 4333
hrwdc@hrw.org

Web Site Address: http://www.hrw.org

JULY 2010 1-56432-665-9

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Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System

Glossary

Board of Immigration Appeals (BIA), an administrative body within the Department of Justice that hears appeals from immigration courts

Department of Homeland Security (DHS), the United States federal executive department responsible for protecting the US from terrorist attacks and securing national borders

Department of Immigrant Health Services (DIHS), a division of DHS that provides health services in some immigration detention facilities

Department of Justice (DOJ), the United States federal executive department responsible for the enforcement of the law and administration of justice

Executive Office for Immigration Review (EOIR), an office of the Department of Justice responsible for immigration courts in the US

Freedom of Information Act (FOIA), a US law allowing for the disclosure and release of information controlled by the US government

Immigration and Nationality Act (INA), created in 1952, the INA is the basic body of immigration law, governing who can enter, remain and be deported from US

Immigration and Customs Enforcement (ICE), federal law enforcement agency within the Department of Homeland Security agency responsible for the investigation and enforcement of US immigration laws

Legal permanent resident (LPR), also referred to as a "lawful permanent resident" in the Immigration and Nationality Act, a non-citizen in the US who has been officially granted the right to residence and employment in the US

Immigration Judge (IJ), a judge who adjudicates immigration cases

Notice to Appear (NTA), the charging document ordering a non-citizen to appear in immigration court and stating the alleged violations of immigration law

Summary

Alberto B. was one-and-a-half years old when his family moved to the United States from Portugal in 1967. He became a legal permanent resident, or "green card" holder, and grew up in Massachusetts with his parents and siblings, some of whom became US citizens. Alberto has been diagnosed with bipolar disorder, a mental impairment that causes severe shifts in mood, energy, and ability to function. In a letter to Human Rights Watch, Alberto wrote: "I've been on psych meds since 2004, my guess. I finally turned myself in for help, FORGET MY PRIDE, I [knew] I had a problem. SINCE A very, very, young age…"[1]

In 2008, Alberto spent 50 days in an in-patient psychiatric hospital in Massachusetts and was homeless after his release. Alberto claims that he lost his medication later that year, and was arrested for theft and trespassing a few days later.

Alberto's criminal defense lawyer did not raise his client's mental competence in court. Alberto agreed to a plea bargain, was released, and hopeful that a new attorney hired by his family would be able to vacate the criminal charges against him. But in February 2009, immigration officers arrested Alberto for deportation because of his outstanding criminal convictions, and sent him to the Port Isabel Detention Center in Harlingen, south Texas.

Alberto had been held for approximately 11 months when a Human Rights Watch researcher met him. In a letter to us, he wrote:

> [F]riends tell me just make a plea bargain with D.A. and get out of it. I didn't know IT would add up to all of these [things]…being taking to Immigration Holding and brought all the way from mass to texas when I need my family's moral support. Me needing my family moral support.[2]

Alberto spent much of his time in detention in segregated medical housing due to his mental disability. He told Human Rights Watch that he has never seen the immigration charges against him, and has been unable to obtain his medical files. Despite several hearings in immigration court before his final hearing in December 2009, Alberto said he was never represented by a lawyer, even though he made repeated efforts to find one to represent him

[1] Letter from Alberto B. (pseudonym) provided to Human Rights Watch, January 19, 2010, (on file with Human Rights Watch) (capitalizations, spelling, punctuation, and grammar as in original).

[2] Ibid.

pro bono. "I've been to immigration court 5 times and I keep asking for time to get a lawyer," he said.[3]

According to Alberto, the immigration court did not take his disabilities into account, even though they may affect the underlying charges against him, and he told the judge that he had "a lot of mental issues."[4] At his final hearing in December, a judge ordered that Alberto be deported to Portugal, where he has no family and does not speak the language. "I have no idea what I will do there," Alberto said.[5] At time of writing, Alberto was still at Port Isabel, hoping his appeal would be granted.

* * *

The US immigration court system is complicated and adversarial at the best of times. But as Alberto's experience highlights, it may be particularly confusing for people with mental disabilities, who may find it hard to follow proceedings, or provide credible evidence to lawyers and judges, especially without legal representation and adequate support.

This report—based on 104 interviews with non-citizens with mental disabilities, their family members, social workers, psychiatrists, immigration attorneys, judges and rights advocates—documents the lack of meaningful safeguards for people with mental disabilities facing possible deportation from the United States. Deficiencies exist throughout the arrest, detention, removal, and deportation process, violating the human rights of affected individuals and offending both American and international standards of justice. The shortcomings include no right to appointed counsel; inflexible detention policies; lack of substantive or operative guidance for attorneys and judges as to how courts should achieve fair hearings for people with mental disabilities; and inadequately coordinated care and social services to aid detainees while in custody and upon release.

This report also explores the implications of these failures. As immigration attorney Megan Bremer has noted, due process violations severely compromise the integrity of the US immigration justice system and undermine the ability of immigration courts to ensure accurate and just results:

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[3] Human Rights Watch interview with Alberto B. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[4] Ibid.

[5] Ibid.

> Due process is part of judicial integrity. It's a basic principle that this country has decided to prioritize. It's one of our greatest exports—we send people all over the world to talk about rule of law and how to reform judicial systems but we're not doing it here in our fastest growing judicial system [the immigration courts].[6]

Not every non-citizen with a mental disability is entitled to remain in the United States; but everyone is entitled to a fair hearing and a chance to defend his or her rights. If the US government is going to detain and deport individuals with mental disabilities, it must do so in a way that respects their human rights, honors US human rights commitments, and ensures fair and accurate court decisions.[7]

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Every year, several hundred thousand people—including people who have lived in the United States since childhood, people who have fled persecution in their homeland to seek asylum in the US, economic migrants who have entered the country without work authorization or over-stayed nonimmigrant visas to seek employment—are arrested by Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS). Their alleged violations range from violent crimes to relatively minor offenses, such as overstaying a valid visa, illegally entering the United States, and possessing small amounts of marijuana. Most (391,829 cases in 2009) are scheduled for a series of hearings in immigration court to determine if they are entitled to remain in the United States or must be deported.[8]

Some of these people have mental disabilities. While no exact official figures exist, the percentage of non-citizens in immigration proceedings with a mental disability is estimated to be at least 15 percent of the total immigrant population in detention—in other words, an estimated 57,000 in 2008.

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[6] Human Rights Watch interview with Megan Bremer, Pennsylvania Immigration Resource Center, York, PA, February 17, 2010; Human Rights Watch telephone conversation with Megan Bremer, April 2, 2010.

[7] Human Rights Watch has shown elsewhere that in deporting non-citizens with serious medical needs to countries where adequate treatment is unavailable, the US government is in violation of its human rights legal obligations under the Convention against Torture and the International Covenant on Civil and Political Liberties. Human Rights Watch, *Returned to Risk: Deportation of HIV-Positive Migrants*, September 24, 2009.

[8] Throughout this report the terms "deportation" and "removal" are used interchangeably to refer to a government's removal of a non-citizen from its territory. Human Rights Watch notes that the terms had different meanings under earlier versions of US immigration law, and that now all such governmental actions are referred to in US law as "removals." Nevertheless, for simplicity the more commonly understood term "deportation" is used wherever possible.

Most people in the United States who face detention, removal and deportation—and therefore the people who are the foci of this report—are "non-citizens," a term used here to refer to long-term permanent residents, asylum-seekers, individuals with work visas, and individuals who are undocumented. (In many cases, this report refers to "individuals" or "persons with mental disabilities" in immigration proceedings as opposed to "non-citizens" where it is not known if the individual is a US citizen.)

However, Human Rights Watch research suggests that even US citizens, particularly those with mental disabilities, have ended up in ICE custody, and that an unknown number of legal permanent residents (LPRs) and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court. Some US citizens with mental disabilities may have been deported to countries they do not know, and some of these people have not been or cannot be found.

There are also several cases documented in the press and by legal service organizations in which a US citizen with a mental disability has been deported and where family advocacy ensured their safe return. These include:

- In 2000, Sharon McKnight, a US citizen with cognitive disabilities, was arrested by immigration authorities returning to New York after visiting her family in Jamaica and deported through expedited removal procedures when immigration authorities suspected her passport was fraudulent.[9]
- In May 2007, Pedro Guzman, a 29-year-old US citizen with developmental disabilities, was apprehended by ICE at a county jail in California where he was serving a sentence for trespassing. He was deported to Mexico, where he was lost for almost three months before he was located and returned to his family in California.[10]
- In December 2008, US citizen Mark Lyttle, diagnosed with bipolar disorder and developmental disabilities, was deported to Mexico (and from there to Honduras and then Guatemala). It took four months for Lyttle to return to the US; ICE officials maintain that Lyttle signed a statement indicating he was a Mexican national.[11]

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[9] Karen Musalo, "Expedited Removal," Human Rights, American Bar Association, 2001, http://www.abanet.org/irr/hr/winter01/musalo.html (accessed July 7, 2010).

[10] "Illegally Deported U.S. Citizen Pedro Guzman Found After Nearly Three Months in Mexico," American Civil Liberties Union of Southern California, ACLU-SC press release August 7, 2007, http://www.aclu-sc.org/releases/view/102548 (accessed July 6, 2010).

[11] Kristin Collins, "Federal officials wrongly deport N.C. man," *The Charlotte Observer*, April 30, 2009.

- Human Rights Watch interviewed three individuals with then-unverified claims to US citizenship. Two men, Michael A. and Steve S., both claimed to be US citizens, and the government's proof of alienage against each of them was uncertain and inconsistent.[12] A third interviewee may have a valid claim for US citizenship according to his attorneys.[13]

Non-citizens bear a heavy burden of proof to show that they should be afforded a legal status in the United States and not deported. Although the Immigration and Nationality Act (INA)—the law governing immigration proceedings—provides that non-citizens may have legal representation, they must also find and pay for their own attorney (or find one willing to represent them on a pro bono basis).[14] As a result, 61 percent of non-citizens have no lawyer during proceedings—a figure that is likely to be significantly higher for those in detention given the remote locations of most large detention facilities.[15]

These aspects of the immigration system are particularly onerous for people with mental disabilities, who have a diminished ability to protect their rights in the legal system or provide credible and coherent information when it comes to claims or defenses.

Criminal courts recognize that it is fundamentally unfair to prosecute a person who cannot understand the case against him or her. As a result, a defendant in criminal court with a mental disability who cannot understand the charges and courtroom procedures or the fact that he or she faces punishment, often cannot be subject to that punishment.

In contrast, immigration courts have no substantive or operative guidance for how they should achieve fair hearings for people with mental disabilities, aside from a general statement in the statutes that the US attorney general must provide "safeguards" for individuals who cannot participate in proceedings by reason of their "mental incompetency."[16] However neither this statute nor any federal regulation governing immigration proceedings provides definition or standards for competency to self-represent

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[12] Human Rights Watch interview with attorney in Arizona, January 6, 2010; Human Rights Watch telephone interview with Megan Bremer, February 17, 2010.

[13] Human Rights Watch interview with Bardis Vakili, Casa Cornelia Law Center, San Diego, CA, February 8, 2010.

[14] Immigration and Nationality Act (INA), Section 292 (emphasis added).

[15] Texas Appleseed's recent report on Texas, which hosts a large immigrant detention population, found that 86 percent of immigration detainees had no lawyer. This lack of legal representation is highly significant given that the US government is always represented by an ICE trial attorney, who submits charges against the non-citizen to the immigration court and argues why he or she should be deported, and because studies show asylum seekers may be three to six times more likely to receive asylum with legal counsel than without.

[16] 8 U.S.C. Section 1229a(b)(3).

or proceed in immigration court, and does not spell out what a "reasonable opportunity" means for a non-citizen with a mental disability who may not even recognize that he or she is facing deportation.[17] Judges are not required to appoint lawyers or alter procedures to accommodate a person's limited comprehension; nor does any law or regulation instruct immigration judges to question whether a person facing deportation understands the charges against him or her, or even understands what deportation means.

Human Rights Watch documented cases of non-citizens who:

- Did not understand what the judge asked them in court (one individual did not know what a judge was).
- Were delusional or experienced hallucinations.
- Could not read or write, tell time, name their birth place, or say what day it was.
- Did not understand the concept of deportation—saying that they wanted to be deported "to New York" or "to Louisiana."
- Asked to be deported when they were not taking medication, and later regretted their request.
- Did not have an attorney.
- Did not know they were allowed to ask the judge questions or to tell the judge about their mental disabilities, and were not asked in court if they were taking medication or needed help.
- Said they feared a negative impact on the merits of their cases if they told judges or attorneys about their disabilities.

Furthermore, while fair immigration proceedings require the cooperation of ICE trial attorneys, Human Rights Watch found that in many cases the ICE attorney prosecuting the case did not inform the judge when a non-citizen facing deportation had a diagnosed or suspected mental disability—even when one had been previously adjudged by a criminal court—which clearly compromised the non-citizen's ability to understand proceedings. While individual trial attorneys may be sympathetic, ICE may have no interest in telling the court that a non-citizen's competency is in doubt if doing so could delay and complicate already-complex cases, of which there is already a significant backlog.

In other cases, ICE attorneys refused or neglected to perform competency evaluations and to supply information from evaluations to the court—even when the court ordered them to do

[17] This report uses "competence" or "competency" to refer to the legal term of art in the United States which sets a standard for a person's ability to participate in and understand the court process; 8 U.S.C. Section 1229a(b)(3).

so. Moreover, a clear conflict of interest arises from the fact that the only stipulation in immigration court for the INA for "representation" of a non-citizen with mental disabilities is a provision that if no lawyer or family member can be found to appear with the non-citizen, "the custodian" of the respondent shall be requested to appear on his or her behalf.[18] When the non-citizen is detained, this "custodian" is ICE—the same agency that detains and prosecutes non-citizens in deportation proceedings. This is akin to having a jail warden act as defense attorney for someone accused of committing a crime, and violates basic standards of fairness.

Prolonged and even indefinite detention is an additional problem faced by people with mental disabilities. In some cases, immigration judges attempt to introduce procedural safeguards by administratively closing a case—thereby placing it on hold—so the individual facing deportation can find an attorney or get a competency evaluation performed. However, even when a case is closed, the detainee is not released from detention. Rather, he or she remains in detention while the case is temporarily but indefinitely suspended as it waits to be "re-calendared" (returned to the schedule of cases to be heard). As judges have no authority to appoint lawyers, there is no guarantee that the new hearing, when and if it occurs, will have any additional safeguards. In other cases, ICE may not be able to deport a person with mental disabilities if it cannot determine the person's country of origin, or secure his or her assistance in finding a country that will receive them if the country of nationality refuses repatriation. In rare cases, a non-citizen who cannot be deported despite a court order (because ICE, for example, cannot determine his or her country of origin, or the country of nationality refuses repatriation) may be labeled "specially dangerous" due to his or her mental disability and left in detention interminably. This legal limbo violates human rights law on arbitrary and indefinite detention, as well as US law on detention based on mental disability.

Human rights and US law recognize that fair court proceedings are indispensable in protecting and fulfilling all other rights. For example, international human rights standards require that non-citizens, including those with mental disabilities, are genuinely able to present their cases in immigration court, and receive fair treatment throughout proceedings. To meet this standard it would be appear vital that this includes having a court-appointed attorney represent individuals who either cannot represent themselves, or express their interests without support; imposing firm limits on detention; and giving judges tools to adapt procedures and custody decisions to the needs of a particular individual with disabilities. Meanwhile US law recognizes that due process is essential where a non-citizen

[18] 8 C.F.R. Section 1240.4.

is facing deportation, which "can be the equivalent of banishment or exile" and can result in "poverty, persecution, even death."[19]

Consistent with these standards, Human Rights Watch calls for non-citizens with mental disabilities to be appointed counsel in immigration proceedings and to have their rights protected in the courtroom. It calls for the Immigration and Nationality Act to exempt from mandatory detention all non-citizens with mental disabilities, and to develop regulations that protect the rights of non-citizens with mental disabilities in immigration court proceedings, including directing immigration judges in appropriate cases to appoint counsel and terminate proceedings.

The Department of Homeland Security, which oversees ICE operations, should acknowledge that deportation may be costly, time-consuming, and even impossible to achieve in cases where a person's mental disability severely limits their ability to present their case, and also the government's ability to prosecute and effectuate a deportation. In such instances, alternatives to detention—even permanent termination of deportation proceedings—should be considered. However, in most cases, immigration courts will be able to hear the case, assess its merits, and make fair decisions if there are standards for competency and procedures to follow if a competency question arises; and a person with a mental disability is represented by counsel.

Immigration judges and other court participants such as ICE trial attorneys and interpreters need consistent training on recognizing mental disabilities and interacting with people with mental disabilities in a respectful and effective manner that promotes the individual's dignity and helps all parties to conduct a fair and effective hearing. In 2010, the Immigration Judge Benchbook added a short discussion of this issue, which is an encouraging step in the right direction.[20]

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[19] *Bridges v. Wixon*, 326 US 135, 147 (1945).

[20] US Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges, Chapter 1, http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html (accessed May 9, 2010).

Key Recommendations

To the United States Congress:

- Expressly provide appointed counsel for non-citizens with mental disabilities in immigration proceedings.
- Amend Section 236(c) of the Immigration and Nationality Act (INA) to exempt from mandatory detention vulnerable groups, including non-citizens with mental disabilities.

To the Department of Justice:

- Issue legal guidance, and, where necessary, utilize the rulemaking authority delegated to the Attorney General in Section 240(b)(3) and Section 103(g)(2) of the INA, to develop regulations that protect the rights of non-citizens with mental disabilities in immigration court proceedings, including directing immigration judges in appropriate cases to appoint counsel; terminate proceedings; and exempt from mandatory detention individuals with mental disabilities.

To the Executive Office for Immigration Review:

- Develop regulations and guidelines for immigration judges to ensure that the rights of people with mental disabilities are protected in the courtroom, including:
    - Set a standard for competency to proceed in an immigration hearing.
    - Eliminate the regulation that a person who is "mentally incompetent" can be represented by the "custodian," meaning the warden of the facility where he or she is detained.
    - Provide mandatory training for immigration judges to recognize mental disabilities and the judicial obligations to safeguard the rights of people who have mental disabilities.

To the Assistant Secretary of Immigration and Customs Enforcement:

- Renew the commitment to exercising prosecutorial discretion in cases involving persons with mental disabilities.
- Require ICE facility staff and ICE trial attorneys to inform the court (under a system with suitable protections) when a detainee is suspected of having a mental disability.
- Encourage and institutionalize alternatives to detention, including supervised release to families and placement in community based treatment programs.

Detailed recommendations can be found at the end of this report.

I. Methodology

This report is based on 104 interviews, including interviews with 40 non-citizens with mental disabilities. The remaining interviews are comprised of family members, social workers, psychiatrists; immigration attorneys and immigrant rights advocates; and three immigration judges. This report also includes case information about 18 non-citizens who Human Rights Watch was unable to interview, but whose stories and redacted case files were provided by their attorneys and with family permission, where family was available.

Of the 40 non-citizens with mental disabilities interviewed by Human Rights Watch, five were no longer in detention and the remaining 35 were interviewed in one of 12 immigration detention facilities spread across nine states. The facilities visited include Immigration and Customs Enforcement (ICE) detention centers run by the Department of Homeland Security (DHS) and by private corporations, local jails, and one hospital where state forensic patients as well as ICE detainees are held for treatment.

Local attorneys and non-governmental organizations assisted Human Rights Watch to identify non-citizens with mental disabilities willing to be interviewed. Seventeen of the 40 non-citizens interviewed did not have a lawyer. All interviewees provided oral and written informed consent to participate in this report. This report does not include testimony from three additional interviews where the interviewee's capacity or intent to consent to the interview was in doubt. Interviews in detention facilities were conducted in private, with no ICE or jail staff present, and individuals were assured that they could end the interview at any time and decline to answer any questions.

The identity of interviewees and of individuals whose cases Human Rights Watch learned of through their attorneys have been disguised with pseudonyms; in some cases certain other identifying information has been withheld to protect an individual's privacy and safety.

Human Rights Watch filed FOIA requests with the Executive Office for Immigration Review (EOIR) and Immigration and Customs Enforcement (ICE), in order to collect information about the population in immigration detention and deportation proceedings with mental disabilities and how immigration courts respond to cases where the person in proceedings appears to be incompetent. The responses were disappointing. EOIR said that DHS has requested certification of a person's competency in 429 cases since 2004. Except for a factsheet indicating the number of immigration judges employed each year between 1996

and 1999, EOIR did not provide any answers to the remaining 11 questions that Human Rights Watch posed for cases where mental disability was at issue. The EOIR response stated that the EOIR computer system does not maintain the information requested. (Human Rights Watch's FOIA request and EOIR's response are attached as appendices to this report). The absence of a system to record and monitor cases where a person in immigration proceedings has a mental disability is problematic as it impairs any future efforts by EOIR or advocates to improve court practices and procedures.

As of July 14, 2010, Human Rights Watch had not received a response to the FOIA that was sent to ICE in December 2009.

Human Rights Watch also filed FOIA requests for the medical records of detainees interviewed in this report who gave permission to see their medical files. Of the 20 requests filed, Human Rights Watch had received medical files for 12 cases as of July 14, 2010. In one case, Human Rights Watch received a FOIA response that included only one page that was blank and marked "referred to another government agency," and no medical forms at all for an individual whom Human Rights Watch interviewed and appeared to have a severe mental disability since he was unable to verbalize answers to interview questions.

II. Defining Mental Disability

Mental disabilities, as discussed in this report, include both mental health problems and intellectual disabilities. Persons with mental health problems also refer to themselves as having psychosocial disabilities, a term that reflects the interaction between psychological differences and social/cultural limits for behavior as well as the stigma that the society attaches to persons with mental impairments.[21] Both psychosocial and intellectual disabilities are categories that encompass a broad spectrum of symptoms and severity.

This report focuses on individuals whose disabilities significantly impair their functioning and ability to prepare their case and participate in court, while recognizing the level of impairment will vary from person to person and, in the case of mental health, may even fluctuate daily.

Serious mental health problems include diagnosable mental, behavioral, or emotional conditions that substantially interfere with or limit one or more major life activity. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (commonly referred to as the DSM-IV) provides standard criteria for identifying mental health conditions and their known causes, and is used by medical professionals to diagnose, understand and treat mental health problems. The DSM-IV defines a mental disorder as a "clinically significant behavioral or psychological syndrome or pattern that occurs in an individual" which is a "manifestation of a behavioral, psychological, or biological dysfunction in the individual."[22] The current revised edition of the DSM-IV, known as the DSM-IV-TR, organizes psychiatric diagnoses into five levels (axes) that include serious clinical disorders like schizophrenia or bipolar disorder (Axis 1), serious personality disorders such as paranoia (Axis 2) and traumatic brain injuries (Axis 3).

By contrast, intellectual or cognitive disabilities are permanent developmental limitations. The American Association on Intellectual and Development Disabilities defines intellectual disabilities as "characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability

[21] World Network of Users and Survivors of Psychiatry, Manual on Implementation of the Convention on the Rights of Persons with Disabilities, p. 9 http://www.chrusp.org/home/resources (accessed July 7, 2010).

[22] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV-R* (4th Edition), 2000, p.xxxi.

originates before the age of 18."[23] Intellectual functioning refers to the ability to learn, reason, and problem-solve.[24] Intellectual disabilities are permanent developmental conditions that cannot be treated by medication. People with mild intellectual disabilities might benefit from additional education but are able to live independently with some support, while people with more severe disabilities may need life-long educational and social support.[25]

Although the two conditions are often confused, mental impairments and cognitive disabilities are different conditions. Mental impairments almost always include disturbances of some sort in emotional life; intellectual functioning may be intact, except where thinking breaks with reality (as in hallucinations). A person who has mental health problems, e.g. who is bipolar or suffers from schizophrenia, can have a very high intelligence quotient (I.Q.), while a person with cognitive disabilities always has a low I.Q. A person who has a mental impairment may improve or function fully with therapy or medication, but cognitive disabilities are a permanent state. Finally, mental impairments may develop during any stage of life, while cognitive disabilities (unless due to physical trauma) manifest by the age of eighteen. Many people with intellectual disabilities also have mental impairments; estimates of the number of individuals with both mental health problems and intellectual disabilities vary from 10 percent to 40 percent.[26]

Many non-citizens with mental disabilities may have been unable to access medical treatment in the community, or they may have never been diagnosed. Others may have chosen to forgo medication in light of the severe and disruptive side-effects of many psychotropic medications.[27]

Not all mental disabilities raise competency concerns. For example, a person who has depression, anxiety disorder, or schizophrenia may be able to effectively advocate for their

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[23] American Association on Intellectual and Development Disabilities, "FAQ on Intellectual Disability," http://www.aaidd.org/content_100.cfm?navID=21 (accessed May 8, 2010).

[24] Ibid.

[25] Inclusion Europe and Mental Health Europe, Mental Illness and Intellectual Disability, 2007, http://digitalcommons.ilr.cornell.edu/gladnetcollect/276 (accessed May 8, 2010).

[26] Fred J. Biasini, et al., "Mental Retardation: A Symptom And A Syndrome," in S. Netherton, D. Holmes, & C. E. Walker, eds., Comprehensive Textbook of Child and Adolescent Disorders (New York: Oxford University Press, 2000), www.uab.edu/cogdev/mentreta.htm.; U.S. Public Health Service. Closing the Gap: A National Blueprint for Improving the Health of Individuals with Mental Retardation; Report of the Surgeon General's Conference on Health Disparities and Mental Retardation, February 2001; Pomona Project, Health Indicators for People with Intellectual Disability: Using an Indicator Set (2008).

[27] This report does not address issues such as voluntary or involuntary treatment for persons with mental disabilities subject to immigration detention or rights violations related to involuntary admission to psychiatric care facilities.

rights in immigration proceedings if his or her condition does not infringe on capacity to comprehend or participate. But in other cases mental disabilities can prevent non-citizens from performing necessary tasks in presenting their case. Moreover, a non-citizen's ability to participate in proceedings is important for all parties because, in many cases, the primary evidence of deportability comes from the subject of proceedings—for example, their admission that they are not a US citizen or are unlawfully in the US. Nevertheless, there is no requirement that judges examine a non-citizen's ability to proceed in immigration court without support and legal assistance, and no procedure to follow in rare cases when such questions are raised.

Human Rights Watch documented cases of non-citizens whose mental disabilities varied considerably in nature and degree. These included the following four examples of individuals whose mental disabilities were identified by medical records:

- Mike C., a Legal Permanent Resident (LPR) from Haiti, has a cognitive disability and bipolar disorder. He is unable to read or write, and other detainees had to write his requests for medical attention.
- Arlex C., an asylum-seeker from Guatemala, was severely beaten by soldiers and has a traumatic brain injury that impairs his memory.
- Yuri S., an LPR and refugee from the Soviet Union, has post-traumatic stress syndrome. He was a prisoner of war in Afghanistan in the Soviet-Afghan war, during which he was forced to perform hard labor and was sexually assaulted in captivity. He worked with his attorney for almost a year before telling her about the abuse he experienced and the nightmares he still has.
- Denzel S., an LPR from Haiti, has schizophrenia. He was hospitalized before his arrest by ICE and has been sent to an in-patient psychiatric facility at least four times since his transfer to a Texas detention facility. He still hears voices and has attempted suicide twice while in detention.

Most non-citizens with mental disabilities interviewed for this report were long-time legal permanent residents or persons seeking asylum from persecution in their home countries. Many had come to the US as young children and had family who were US citizens; in several cases, family members in the US were helping to find legal representation and community treatment for their relatives.

While their disabilities affected their capacity to grasp legal proceedings or concepts, many had held (mostly menial labor) jobs in their adult lives. Some individuals told Human Rights

Watch they had committed petty crimes, such as shoplifting, drug use, and trespassing, after failing to take their medications, and spoke with regret about past mistakes and eagerness to start mental health treatment again. Others had lived on the margins of society, had committed more serious crimes, been homeless or unable to hold a job.

Some individuals interviewed for this report were alienated from family members who found their disabilities and their symptoms offensive or threatening. Several had been previously found incompetent to stand trial by a criminal court and were now in immigration court, without legal representation, facing deportation. Some interviewees could be difficult to interact with when delusional, aggressive, or unresponsive to questions.

III. Initiating Immigration Proceedings

Persons with Mental Disabilities in Immigration Court

Neither Immigration and Customs Enforcement (ICE) nor the immigration courts, overseen by the Executive Office for Immigration Review (EOIR), track how many non-citizens with mental disabilities appear in court and/or are held in immigration detention—a serious omission in light of the possible impact of mental disability on important issues and questions that arise for them in court.[28] Attempts by Human Rights Watch to obtain accurate figures—including submitting a Freedom of Information Act (FOIA) Request to EOIR—achieved widely divergent results.[29]

For example, EOIR provided Human Rights Watch with the number of persons for whom DHS attorneys have requested certification of mental competency. Since 2004, there were 426 requests for such certificates, an average of 71 a year.[30] This surprisingly low number does not comport with other estimates provided by other US government agencies for the number of persons with mental disabilities who appear in immigration court, although may indicate hesitation on the part of ICE attorneys —effectively the "prosecutors" in immigration cases — to act in the interest of justice and have persons assessed for competency.

The Department of Immigrant Health Services (DIHS), a division of DHS that provides health services in some immigration detention facilities, provides a higher estimate of persons with mental disabilities who appear in immigration court. Its data show that two to five percent of immigration detainees in 2008 had a "serious mental illness," while approximately 10 to 16 percent of detainees had experienced "some form of encounter with a mental health professional or the mental health system."[31] It is unclear who is included in the definition of

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[28] In response to a FOIA Request from Human Rights Watch, the Executive Office for Immigration Review said it does not keep data on the cases where a person in immigration court had or appeared to have a mental disability. Letter from Crystal Souza, Supervisory Program Specialist, Executive Office for Immigration Review, Office of General Counsel, to Human Rights Watch, March 8, 2010 ("EOIR response to HRW FOIA") (letter on file with Human Rights Watch and reproduced in the Appendix to this report).

[29] In this report, Human Rights Watch refers to ICE attorneys or trial attorneys when talking about the prosecuting authorities in court. It refers to ICE officers when discussing arrest and detention policies. Both the arresting officers and the prosecuting authorities for immigration cases are under the authority of the Department of Homeland Security.

[30] EOIR response to HRW FOIA.

[31] *Selected responses from ICE to questions posed by The Washington Post regarding the provision of mental health care to immigration detainees*, May 2008, http://media.washingtonpost.com/wp.srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif (accessed May 11, 2010).

"serious mental illness," and to what extent it includes individuals with cognitive or intellectual disabilities, if at all. But based on ICE statistics showing that 378,582 persons were detained in FY 2008, this would mean that between 7,571 and 18,929 detainees suffered from a "serious mental illness" in 2008, and between 38,000 and 60,000 detainees had some kind of encounter with the mental health system.[32] These numbers are consistent with confidential government memoranda from the same time period that placed the official estimate of detainees with mental illness at 15 percent of the detained immigrant population on any given day—approximately 57,000 people in 2008.[33]

The national criminal justice system is another important resource when trying to obtain an accurate number of persons in immigration proceedings with mental disabilities. The most recent national study on mental health in US jails and prisons found that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates had a mental disability. While these numbers do not map precisely onto the population in immigration proceedings, a significant number of individuals in immigration detention have passed through the criminal justice system, either at the end of their criminal sentence or years after completing a criminal sentence. The Department of Homeland Security (DHS) estimates that immigrants comprise 20 percent of inmates in prisons and jails.[34] And, the Federal Bureau of Prisons reports that 26.4 percent of inmates in federal prisons are non-US citizens.[35]

Human Rights Watch believes the number of persons appearing in immigration proceedings who have mental disabilities is at least 15 percent of the daily or annual total, or 57,000 people in 2008. We believethis is a fair approximation (and probably an under-estimate) based on the data cited above—including the fact that 45 percent of federal prisoners (those most likely to be non-citizens) had a mental disability—and because the number of individuals with mental disabilities in the immigration system is likely to be higher than official estimates, given that medical screening is currently heavily reliant on self-reporting and is not typically done by a medical professional with a mental health background.[36]

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[32] Dana Priest and Amy Goldstein, "Suicides Point to Gaps in Treatment," The Washington Post , May 13, 2008, (citing internal memoranda that state 15 percent of the detained population on any given day in 2008 has a mental disability)

[33] Dr. Dora Schriro, special advisor on ICE Detention and Removal, "Immigration Detention Overview and Recommendations," Department of Homeland Security, Immigration and Customs Enforcement, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed May 13, 2010) (hereinafter "Schriro Detention Report") p.2.(stating that 378,582 persons were detained by ICE in FY 2008).

[34] Steven A. Camarota and Jessica Vaughan, Center for Immigration Studies, "Immigration and Crime: Assessing a Conflicted Issue," November 2009, p.1, http://www.cis.org/ImmigrantCrime (accessed May 10, 2010).

[35] Ibid.

[36] The percentage of non-citizens in state correctional facilities is 4.6 percent; by contrast, the percentage of non-citizens in federal facilities is 14.4 percent, according to mid-year 2008 data. US Department of Justice, Bureau of Justice Statistics, "Immigration and Customs Enforcement," http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=145#pubs (accessed June 2, 2010).

Arrest and Initiation of Proceedings by ICE

Each year, several hundred thousand individuals go through immigration proceedings in the United States (391,829 cases in 2009).[37] Immigration and Customs Enforcement (ICE) brings non-citizens to immigration court when it alleges they should be deported from the country. The court proceedings are meant to clarify if an individual may remain inside the United States, or whether he or she should be deported. Some of these individuals are asylum seekers fleeing persecution in their home countries; others come to ICE's attention through referrals from local law enforcement agencies, during workplace raids or border crossings; still others, including legal permanent residents, are transferred to ICE after serving sentences for a wide variety of crimes. In rare cases, non-citizens come into ICE custody directly from mental health hospitals or before the start of court-ordered treatment.

There are several scenarios in which non-citizens may find themselves in immigration proceedings. Two of these are:

1. *Legal Permanent Residents with a Criminal Conviction*:
   When a legal permanent resident (LPR) has completed criminal justice proceedings for certain criminal convictions, ICE is authorized to begin deportation proceedings to determine whether or not he or she may remain in the United States. These are often initiated in combination with his or her detention by ICE. In some cases, ICE puts LPRs into immigration proceedings due to criminal offenses for which the person was convicted and completed a sentence many years ago. In other situations, ICE can issue an immigration detainer or "hold" prior to conviction, so that the person will be taken immediately from the custody of the criminal justice system to ICE custody. At the "master calendar hearing"— the first of several hearings that occur in removal proceedings that may take place in person or by video-conference— the judge explains the charges against the LPR and discusses whether he or she is eligible for release on bond. The LPR will then have to prepare any legal claims for the subsequent merits hearing.

Thus, there are three times as many non-citizens in federal prisons as in state prisons, which is likely due to the spike in prosecutions of people in federal court for immigration offenses (such as illegal entry). In the past, these new federal immigration crimes were immigration law violations that were handled in immigration court alone, without the additional layer of imposing federal prison sentences on people.

[37] US Department of Justice, Executive Office for Immigration Review, *FY 2009 Statistical Year Book*, (Washington, DC March 2010), http://www.justice.gov/eoir/statspub/fy09syb.pdf (accessed April 1, 2010).

2. *Asylum seeker arriving at the border:*
   A non-citizen entering the United States without legal authorization may be arrested and detained by immigration authorities at the US border. Non-citizens who indicate to the border patrol or other immigration officers that they fear returning to their country will be detained until an asylum officer conducts a "credible fear" interview to determine if the asylum claim has any merit. If the officer finds there is basis for credible fear, the non-citizen is referred to immigration court for proceedings before a judge. If the officer finds that the individual does *not* have a credible fear of persecution, he or she will be ordered returned to the country of origin without an immigration judge or other authority ever reviewing or knowing of his or her case, unless the applicant appeals against the negative credible fear finding (which required they be informed of the right to do so). If the person does appeal, the judge may either approve the removal order or allow the applicant to proceed to immigration court to present the claim for asylum. The immigration judge has no authority to rule on an arriving asylum seeker's detention or release.

Federal regulations prohibit ICE from arresting individuals in psychiatric hospitals or institutions and transferring them to ICE custody "until an order of removal has been entered and the Service is ready to remove the alien."[38] However, attorneys monitoring immigration hearings for the National Lawyers Guild recorded two cases in which ICE arrested a non-citizen at a state hospital and forcibly removed him to an immigration detention center. For example, in one case, a detainee was removed from a state hospital in Massachusetts and appeared in immigration proceedings by tele-video without a lawyer. The presiding immigration judge admonished the government for serving the charging document, or Notice to Appear (NTA), on the detainee while he was in a hospital and placing him in proceedings knowing that his mental impairment rendered him unable to participate in his hearing, as the judge could see from the detainee's conduct in court.[39]

Such reports of ICE apprehensions from mental hospitals are rare. However, eight states currently require public health staff to notify ICE if they suspect any patients or public

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[38] 8 C.F.R. Sec. 1236.2(b)(2009).

[39] Human Rights Watch telephone interview with John Pollock, National Lawyers Guild, Baltimore, MD, December 7, 2009, discussing a case before the Boston Immigration Court from October 2003. In another case documented by the National Lawyers Guild, ICE removed a man from a psychiatric care facility in Massachusetts and transferred him to a mental health hospital, Columbia Regional Care, in South Carolina. The government maintained in court that ICE removed him from the state hospital because there was not enough bed space; however, a physician from the hospital, intervening in the case as a sympathetic party, testified that the hospital did have space. Human Rights Watch telephone interview with John Pollock, National Lawyers Guild, December 7, 2009, discussing a case before the Boston Immigration Court from November 2003.

benefits applicants are in the US unlawfully.[40] In addition, Florida and South Carolina require that mental health care facilities report to a state agency, which will in turn report the individual to ICE.[41] Virginia and South Carolina both have state laws requiring state mental health facilities to inquire into the nationality and citizenship of those who are admitted in those facilities, and to notify immigration authorities if the patient is not a US citizen.[42]

Once a person is in ICE custody, regardless of the path by which an individual arrives there, they face the complex and time-consuming task of proving that he or she has a lawful basis for remaining in the country. However, some non-citizens will never go through them, or see a judge, if, for example, they are subject to an expedited deportation process.

What Happens in Immigration Proceedings

> Immigration laws have been termed second only to the Internal Revenue Code [tax law] in complexity.
> —*Baltazar-Alcazar v. INS*, 386 F. 3d 940, 948 (9th Cir. 2004)

[40] Arizona, ARIZ. REV. STAT. ANN. § 1-501(E) (2010), http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/1/00501.htm&Title=1&DocType=ARS (accessed April 2, 2010); California, Cal. Health & Safety Code § 130(b)(c)(3) (2009), http://www.leginfo.ca.gov/cgi-bin/displaycode?section=hsc&group=00001-01000&file=130 (accessed April 2, 2010); Hawaii, Haw. Rev. Stat, § 336-1 (2009), ("the director of health shall cooperate with the government of the United States in arranging for the deportation of all alien public charges admitted to or hospitalized at the state hospital"), http://www.capitol.hawaii.gov/hrscurrent/Vol06_Ch0321-0344/HRS0336/HRS_0336-0001.htm (accessed April 2, 2010); Maine, Me. Rev. Stat. Ann. 34-B, § 1433 (2008), http://www.mainelegislature.org/legis/statutes/34-B/title34-Bsec1433.htm (accessed April 2, 2010); Michigan, Mich. Comp. Laws § 404.31 (2010), http://www.legislature.mi.gov/(S(dp3du345vty02c45inrithuu))/mileg.aspx?page=getObject&objectName=mcl-404-31 (accessed April 2, 2010); Mich. Comp. Laws § 404.32 (2010), http://www.legislature.mi.gov/(S(dp3du345vty02c45inrithuu))/mileg.aspx?page=getObject&objectName=mcl-404-32 (accessed April 2, 2010) ; Minnesota, Minn. S tat. § 631.50 (2009), https://www.revisor.mn.gov/statutes/?id=631.50 (accessed April 2, 2010); New York, N.Y. Soc. Serv. Law § 131-k (2009); Rhode Island, R.I. Gen. Laws § 40.1-22-19 (2009), http://www.rilin.state.ri.us/statutes/title40.1/40.1-22/40.1-22-19.htm (accessed April 2, 2010); Virginia, Va. Code Ann. § 37.2-827 (2009), http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.2-82 (accessed April 2, 2010).

[41] Florida, An Act Relating to Immigration, S.B. 856, 2010 Leg., Reg. Sess. (Fl. 2010), http://www.flsenate.gov/data/session/2010/Senate/bills/billtext/pdf/s0856.pdf (in Florida, legislation may soon require public health staff to report undocumented immigrants in public mental health facilities to federal immigration authorities. Cristina Silva, "Crackdown urged on undocumented migrants' mental healthcare," Miami Herald , March 7, 2010, http://www.miamiherald.com/2010/03/07/1518100/crackdown-urged-on-undocumented.html (accessed March 10, 2010); South Carolina, S.C. Code Ann. § 8-29-10 (2009), http://www.scstatehouse.gov/cgi-bin/query.exe?first=DOC&querytext=alien&category=Code&conid=5367168&result_pos=10&keyval=148 and S.C. Code Ann. § 44-13-40 (2009), http://www.scstatehouse.gov/cgi-bin/query.exe?first=DOC&querytext=alien&category=Code&conid=5367168&result_pos=40&keyval=856 (accessed April 2, 2010).

[42] Va. Code Ann. § 37.2-827 (2009); S.C. Code Ann. § 44-13-40 (2009).

Immigration law and proceedings are incredibly complex, involving a series of hearings and numerous forms filled out by the government, and also the non-citizen if he or she seeks relief from deportation.

This section illustrates some of the steps that a non-citizen must navigate when he or she is arrested and placed in deportation proceedings by ICE. In 2008 (the most recent figures available), ICE officials arrested and detained 378,582 persons.[43]

When the government seeks to deport someone who has never been lawfully admitted to the country–such as someone who arrives at the border seeking asylum, or is present in the country but "entered without inspection" (EWI)—the individual has the burden of proving that he or she is entitled to admission. However, when the government seeks to remove someone who has already been lawfully admitted to the country–such as a lawful permanent resident (LPR) who has been convicted of a crime that may now make him or her deportable, or an individual who entered on a now-expired tourist visa—the government has the burden to show that the person is deportable "by clear and convincing evidence."[44] The form of proof varies somewhat depending on where ICE officers apprehend the individual.

ICE officers initiate removal proceedings against an individual by issuing a Notice to Appear (NTA), which includes reasons why ICE believes the person is subject to removal. The proceedings themselves involve two stages: first, a determination of whether the person is inadmissible or deportable; and second, determination of whether the person is eligible for any discretionary or mandatory relief from removal. An individual in removal proceedings bears the burden of "establishing that he or she is eligible for any requested benefit or privilege," and if relief is available at the discretion of an immigration judge "that it should be granted in the exercise of discretion."[45]

Non-citizens may have one or more claims for relief from removal that need to be raised in an immigration hearing. For example, both LPRs and non-LPRs can apply for a form of discretionary relief from removal called "cancellation of removal." In addition, both LPRs and non-LPRs can apply for asylum, which is also discretionary, for "withholding of removal,"

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[43] Dr. Dora Schriro, special advisor on ICE Detention and Removal, "Immigration Detention Overview and Recommendations," Department of Homeland Security, Immigration and Customs Enforcement, October 6, 2009, http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf (accessed July 7, 2010) (hereinafter "Schriro Detention Report"), p.2.This figure refers to the total number of admissions to detention over the course of the year. At any one time, the total number of persons detained is about one-tenth this figure.

[44] 8 C.F.R. Section 1240.8(a).

[45] 8 C.F.R. Section 1240.8.

and protection under the Convention against Torture. These are mandatory forms of relief, meaning the court must grant relief if the person produces facts proving eligibility.

LPR Cancellation : Cancellation of removal for LPRs is available only if the individual has been an LPR for not less than five years; has resided in the United States for not less than seven years in any status; and has not been convicted of a group of crimes defined as "aggravated felonies."[46] (See following sections for discussion of what crimes constitute "aggravated felonies"). An applicant for LPR cancellation of removal must establish all elements of the legal test to be eligible, but still depends on the immigrant judge's (IJ) discretion in granting cancellation.

Non-LPR Cancellation : A non-LPR can apply for cancellation if he or she has continuously resided in the US for at least ten years; has been of good moral character throughout this time; does not have a conviction for certain crimes (including drug possession and crimes considered either "aggravated felonies" or "crimes involving moral turpitude" (CIMT)[see below]); and can establish that deportation would result in "exceptional and extremely unusual hardship" to a spouse, parent, or child who is a US citizen or LPR.[47] Again, even when an applicant satisfies all these elements, a grant of cancellation depends on an IJ favorably exercising discretion.

Aggravated felonies and CIMTs: Despite the name, "aggravated felonies" can include offenses that are not felonies and do not even carry a sentence. Yet these offenses make non-citizens ineligible for most forms of relief from removal and can have severe consequences because many non-citizens, including LPRs, can make no argument before the court about a right to remain in the country. The Immigration and Nationality Act (INA) identifies 21 types of crimes in the aggravated felony category ranging from tax evasion to rape.[48] Moreover, in some cases, a person allowed to receive drug, alcohol, and even mental health treatment in lieu of a criminal sentence, can still be charged with an aggravated felony by accepting "guilt" in order to enter the court-ordered treatment program.

While some individuals may still be able to claim relief from deportation under the Convention against Torture, for example, a large number of people may have no opportunity

[46] Immigration and Nationality Act (INA), 240A(a).

[47] INA 240A(b).

[48] 8 U.S.C.A. Section 1101(a)(43).

to fight deportation or present any evidence about their lives in the US that may weigh against the advisability of their deportation.

Another set of crimes called "crimes involving moral turpitude" (CIMTs) are not defined by the INA, but have been interpreted by immigration courts to include a spectrum of crimes from gambling to murder. In some cases, a person may still be able to ask for relief from deportation even when charged with a CIMT.

Asylum, withholding of removal, and protection under the Convention against Torture: Non-citizens may also be eligible for mandatory relief from removal if they fear torture or persecution in the country of origin. In proceedings in which the non-citizen is claiming asylum, the non-citizen must show that he or she has a well-founded fear of persecution if sent back to the country of origin on account of race, religion, nationality, political opinion, and/or on account of membership in a particular social group.[49] A non-citizen must claim asylum within one year of arrival in the United States (unless special circumstances apply). Asylum is also a discretionary form of relief. Applicants can be denied asylum for past criminal convictions or other behavior that leads an immigration judge to deny asylum in his or her discretion. Pursuant to regulations, individuals who have been convicted of aggravated felonies are ineligible for a discretionary grant of asylum.[50]

A non-citizen can claim "withholding of removal" under the Refugee Act if the non-citizen can show he or she will "more likely than not" face persecution in the country of origin.[51] There is no filing deadline for such applications, and withholding cannot be denied as a matter of discretion. A non-citizen convicted of certain serious crimes, including many felonies, is deemed ineligible.[52]

A non-citizen who is unable to establish eligibility for withholding of removal under the Refugee Act may still be eligible for mandatory relief under the Convention against Torture (CAT) if he or she fears torture in the country of origin, either by the government or its agents. There is no filing deadline and even individuals convicted of aggravated felonies or particularly serious crimes are entitled to deferral of removal under CAT. To show that a non-

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[49] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954 (implemented in US law through INA Section 208).

[50] 8 C.F.R. Section 208.13(c)(2)(i)(D).

[51] INA 241(b)(3).

[52] A non-citizen may be mandatorily denied protection under withholding of removal if certain grounds apply, for example, if the individual has been "convicted of a particularly serious crime" and so "shall be considered to constitute a danger to the community." 8 C.F.R. Section 208.16(d)(2).

citizen should be granted relief under CAT, he or she bears the high burden of showing that it is "more likely than not" that he or she would face torture if deported.

Immigration judges have no discretion to deny relief under CAT or withholding of removal under the Refugee Act, as long as the non-citizen can show that he or she is eligible for such relief. However, unlike asylum and cancellation of removal, these forms of relief do not entitle the individual to reside in the US, they merely protect the individual from removal to a country where he or she would face persecution or torture. The government can deport such individuals to another country, and also withdraw protection if country conditions change.

Appeals of IJ removal decisions: Any decision by an immigration judge—even one that finds that an individual is *not* removable and terminating proceedings—can be appealed. If either the government or a non-citizen chooses to appeal a final decision of the immigration judge, the party must appeal the decision to the Board of Immigration Appeals (BIA) within 30 days of the immigration court's decision. An individual who loses before the BIA—but not the government—may file a petition for review of this decision with the appropriate federal circuit court of appeals (circuit courts hear appeals from administrative courts like the BIA) within 30 days of the BIA decision. In very rare cases, the US Supreme Court will review decisions of a circuit court of appeals. Federal district courts, which are the federal trial courts, can only hear petitions for habeas corpus challenging unlawful detention; except in rare cases, these courts cannot hear appeals of a deportation order.[53]

[53] **REAL ID Act of 2005, Pub.L. 109-13, 119 Stat. 302.**

IV. Identifying Mental Disability in the Courtroom

> It's just because I'm sick…. If I had that hearing again, I would like to explain to the judge [that] it's not because I'm a bad person. When I was on my medication, I wasn't in any trouble…. Sometimes it's like the world is closing in on me…. Everything I worked for, the judge just took it away.
> —Paul D. (pseudonym), Florence Service Processing Center, Florence, AZ, January 6, 2010.

> [S]ince I have been classified as disabled I have been struggling with these entities that work through external devices. They have communication with me via an apparatus in outer space. They enter my mind when they try to make a connection with the United States and in that sense they invade my privacy. They use me as a guinea pig and they know how I'm doing and when I'm doing it.
> —Pacifico G. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

Why Mental Disability Matters

> How does a person with paranoid schizophrenia explain a credible fear of returning when they also are having delusional or irrational thoughts?
> —Dr. Judy Eidelson, psychologist, Philadelphia, PA, February 16, 2010.

One of the primary reasons why mental disabilities matter in the courtroom is because the impairments can be so severe that those who have them do not understand what is happening to them, or what is at stake in the hearings they must attend. For example, Human Rights Watch met people who did not know their date or place of birth; were confused about why they were in detention; and were unsure how long they had been in a detention facility.

For example, one woman was unable to understand a single question asked of her.[54] She stared into space during the interview, shook her head repeatedly, and rocked nervously in her chair. The interview was eventually terminated because it was not clear if she had granted consent. In another case, a non-citizen explained his strong belief that the immigration court was directly linked to a "company" that had allegedly stolen wages from

[54] Human Rights Watch interview with Carla F. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

him.[55] Yet another man could not verbalize answers to many questions, or tell Human Rights Watch what he said to the judge. He shook his head and looked blankly at the researcher when asked if he knew what would happen when he was deported.[56] Asked why he should stay in the US, Fernando C., an LPR from Mexico, said that he had told the judge he should stay in the US because, "…I got shot here in the US so I wasn't going to go [to Mexico] with a bullet in my head … I was shot here [points to chin] and here [points to forehead]. I think I must have died because I remember I saw children with wings."[57]

Individuals with mental disabilities also risk making statements in court and to immigration officers that are against their interests, without the ability to understand or mitigate the consequences. For example, Mamawa P., a refugee from Liberia, told Human Rights Watch that after being abused by her roommate in the US, resulting in head trauma and losing her job in Kentucky, she approached immigration officers and asked to be deported. ICE officers took her into custody and sent her to a hospital for psychiatric care for five weeks.[58] According to Mamawa P.:

> It was a mistake I made to go to immigration and ask to be sent back to my country. Now that my frustration is going down, I don't want to go back … I've been in detention for four months and I never committed any crime. It's just because I told them my problems.[59]

Some people with mental disabilities may make compromised decisions about deportation even when they have strong claims to remain in the US—including by agreeing to deportation in order to avoid ongoing detention. Such "voluntary" decisions to be deported may not be reliable when someone has a significant mental disability, and are particularly problematic when there is no lawyer.

"I'm thinking of just signing the deportation order because asylum will take too long. I'm ready to sign the deportation order because I want to get out," said Leonardo D., a non-citizen from Cuba who had been diagnosed with schizophrenia and was living in a mental

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[55] Human Rights Watch interview with Javier F. (pseudonym), Florence Service Processing Center, Florence, AZ, January 6, 2010.

[56] Human Rights Watch interview with Peter G. (pseudonym), Krome Service Processing Center, Miami, FL, March 1, 2010.

[57] Human Rights Watch interview with Fernando C. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[58] Human Rights Watch interview with Mamawa P. (pseudonym), Kenosha County Jail, Kenosha, WI, February 3, 2010.

[59] Ibid.

health care facility for five years prior to his arrest by ICE in December 2009.[60] Several detainees with mental disabilities told Human Rights Watch they would sign "whatever" or take deportation just to get out of the detention facility. In some cases these individuals did not appear to understand that deportation meant leaving the US.

There are several documented cases in which a US citizen with a mental disability has been deported.[61] In 2000, Sharon McKnight, a US citizen with cognitive disabilities, was arrested by immigration authorities returning to New York after visiting her family in Jamaica and deported through expedited removal procedures when immigration authorities suspected her passport was fraudulent.[62] In May 2007, Pedro Guzman, a 29 year old US citizen with developmental disabilities, was apprehended by ICE at a county jail in California where he was serving a sentence for trespassing and deported to Mexico. Guzman was lost in Mexico for almost three months before he was found and able to return to his family in California.[63] In December 2008, US citizen Mark Lyttle, diagnosed with bipolar disorder and developmental disabilities, was deported to Mexico (and from there to Honduras and then Guatemala.) It took four months for Lyttle to return to the US; ICE officials maintain that Lyttle signed a statement indicating he was a Mexican national.[64] Human Rights Watch interviewed three individuals with then-unverified claims to US citizenship. Two men, Michael A. and Steve S., both claimed to be US citizens, and the government's proof of alienage[65] against each of them was uncertain and inconsistent.[66] A third interviewee may have a valid claim for US citizenship according to his attorneys.[67]

In addition, mental disability may undermine claims to asylum in the United States, or to other relief available under the Convention against Torture, which rely on the applicant

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[60] Human Rights Watch interview with Leonardo D. (pseudonym), Port Isabel, Los Fresnos, TX, January 19, 2010.

[61] 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, February 13, 2008.

[62] Karen Musalo, "Expedited Removal," Human Rights, American Bar Association, 2001, http://www.abanet.org/irr/hr/winter01/musalo.html (accessed July 7, 2010).

[63] "Illegally Deported U.S. Citizen Pedro Guzman Found After Nearly Three Months in Mexico," American Civil Liberties Union of Southern California, ACLU-SC press release August 7, 2007, http://www.aclu-sc.org/releases/view/102548 (accessed July 6, 2010).

[64] Kristin Collins, "Federal officials wrongly deport N.C. man," *The Charlotte Observer*, April 30, 2009.

[65] The term "alienage" used in the immigration and Nationality Act refers to a person's legal status as a non-citizen.

[66] Human Rights Watch interview with attorney in Arizona, January 6, 2010; Human Rights Watch telephone interview with Megan Bremer, February 17, 2010.

[67] Human Rights Watch interview with Bardis Vakili, Casa Cornelia Law Center, San Diego, CA, February 8, 2010.

providing "credible" testimony to support claims to stay in the country.[68] If the testimony is inconsistent, or not in accordance with current country conditions, the court can find the testimony not credible and the asylum-seeker will be denied asylum.[69] Many individuals with mental disabilities may be unable to provide consistent and credible testimony.

Many represented individuals interviewed for this report were applying for relief from deportation under the Convention against Torture on the basis they would face persecution by police and others because of their mental disability; would not be able to receive necessary mental health treatment; or would be forced into a psychiatric facility with abysmal and dangerous conditions if deported to the country of origin. Human Rights Watch documented three cases where an asylum officer found that a non-citizen with a mental disability could not provide a credible and consistent account of his or her fear of forcible return.[70] For example, Cesar J., was unable to provide his own name, those of his parents, or cite his place of birth, and frequently answered questions with entirely unrelated responses.

> Asylum officer: What are [your] parents name [sic]?
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> CJ: I don't know … I understand my mother was from France and my father was from India. I did not know anything about them and I went to New York. And 15 years later I met people who told me they were my parents. And it was written down on the birth certificate, but it was not accepted in Texas.
>
> Asylum officer: Why didn't you ever tell immigration you were really born in Brownsville and had a different name?
>
> CJ: Because I quit because a judge wanted to return me to my sex as a woman and I got mad.
>
> Asylum officer: So you had been a woman and the judge wanted to return you to being a woman?

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[68] 8 U.S.C. Section 1158(b)(1)(B)(ii); INA Section 101(a)(42)(A); *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); 8 C.F.R. Section 1208.13(a); *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997).

[69] *Matter of S-M-J-,* 21 I&N Dec. 722, 729 (BIA 1997); According to the EOIR Benchbook for Immigration Judges, "if the applicant's testimony is the primary basis for the CAT claim and it is found not to be credible, that adverse credibility finding may provide a sufficient basis for denial of CAT relief." Department of Justice, Executive Office for Immigration Review, Benchbook for Immigration Judges: http://www.justice.gov/eoir/vll/benchbook/index.html (accessed April 20, 2010).

[70] Human Rights Watch interview with attorney Rachel Wilson, Tucson, AZ, January 8, 2010; Human Rights Watch interview with Megan Bremer, February 17, 2010; Human Rights Watch interview with Alexsa Alonzo, Florida Immigrant Advocacy Center, Miami, FL, March 2, 2010. Ms. Wilson's client ultimately won asylum in a full hearing before an immigration judge after obtaining Ms. Wilson's services and getting a psychological evaluation.

> CJ: That was what the judge told me and all my life I had been a man so I got mad. He told me that I was born a woman. And as a matter of fact the [sic] wanted me to go live in Dallas, Texas, and I refused.
>
> Asylum officer: Who wanted you to go live in Dallas, Texas?
>
> CJ: My family gave me as a gift all the states within Texas, but I did not want that.[71]

Cesar J. also recounted being the victim of gang rape and a murder in Mexico, where he had previously lived: "They attempted to change my blood. They came and killed me at once and I ended up being another person," he said. At his subsequent credible fear interview, Cesar said his medication was causing visual hallucinations: "I see things at times now, revelations and things like memories, but only sometimes." The asylum officer found Cesar's testimony not credible with regard to past mistreatment, but said Cesar could establish a reasonable possibility of future persecution "on account of his being perceived to be a homosexual, due to his being HIV+*."*[72] Despite this determination, which would require further court proceedings to finally determine legal status, Cesar accepted voluntary departure to Mexico.[73]

In another case, Michael A. claimed to be a US citizen whose extended family was killed in Nigeria. Asked by an asylum officer why he feared deportation to Nigeria, Michael said he would be tortured: "I don't know why they want to torture me. I'm a rich man. I'm god. They want to have me remove the plants from heaven to earth. Jay-Z and R-Kelly are some of them."[74] At another point in the credible fear interview, Michael claimed to hear his dead wife and President Obama speaking to him.[75] The asylum officer wrote to reviewing authorities:

> Applicant's testimony was not credible because it was implausible. His testimony was implausible because it was delusional. It should be noted that applicant appears to suffer from psychosis. Therefore, this calls into

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[71] Positive Reasonable Fear Determination, Broward Transitional Center, Pompano Beach, FL, September 17, 2009 (on file with Human Rights Watch).

[72] Ibid. (italics in original).

[73] Human Rights Watch interview with Alexsa Alonza, Florida Immigrant Advocacy Center, Miami, FL, March 2, 2010.

[74] Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, June 18, 2009 (on file with Human Rights Watch).

[75] Ibid.

> question the entire credibility of his claim. Moreover, even though applicant testified that he suffers from no physical or mental conditions, USCIS records indicate that he was on anti-psychotic medications as recently as March 2009.[76]

The officer observed in a separate memorandum to the IJ and DHS attorney that Michael was at risk of persecution and maltreatment on account of his mental disabilities if returned to Nigeria and should be allowed to present claims for relief to the immigration court.[77] Despite the concerns raised by the asylum officer, an immigration court ordered Michael A. deported to Nigeria in April 2010.[78]

Beyond the asylum context, the existence of a mental disability is relevant to how a judge reviews the merits of a non-citizen's claim that he or she should be allowed to remain in the United States. For example, an LPR or non-LPR applying for cancellation of removal in immigration court must provide evidence about his or her "good moral character" and the hardship that deportation would cause to his or her legal permanent resident or US citizen family members.[79] Although immigration judges cannot overturn a criminal conviction, the fact that a non-citizen's criminal history is related to a mental disability, is relevant in considering a person's character and prospects for rehabilitation. As attorney Raha Jorjani explained:

> In cases where judges have discretion, it should matter that someone is mentally incapacitated where two of the elements [of "good moral character"]—remorse and culpability—are affected by their mental disability.[80] Moreover, it should affect the judge's view of the hardship that a

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[76] Reasonable fear determination of Michael A. (pseudonym), June 15, 2009 (on file with Human Rights Watch).

[77] Memorandum to Immigration Judge/District Counsel from Allan Boggio, Asylum Officer, June 15, 2009 (on file with Human Rights Watch).

[78] Human Rights Watch email correspondence with Megan Bremer, Pennsylvania Immigration Resource Center, April 22, 2010.

[79] 8 U.S.C. Section 1229b. Although good moral character and hardship are supposedly only applicable to non-permanent residents, immigration judges inevitably incorporate both factors into assessing the claims of permanent residents. Margot Mendelson, "Constructing America: Mythmaking in US Immigration Courts," *Yale Law Journal*, vol. 119 (2010). Moreover, Mendelson points to the BIA decision in *In re C.V.T.*, finding that factors such as good character and hardship are applicable to the favorable exercise of discretion for legal permanent residents. *In re C.V.T.*, 22 I. & N. Dec. 7, 11 (BIA 1998). The immigration judge's role is to balance the positive factors in favor of allowing a non-citizen to stay in the US with the negative factors supporting deportation. See *In Matter of C-V-T-*, 22 I. & N. Dec. 7,11 (BIA 1998); *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978).

[80] 8 USC. Section 1229b.

person will experience if returned to their country and forced to start a new life, possibly without any mental health care.[81]

For some individuals with mental disabilities, collecting and presenting relevant biographical and factual evidence may be impracticable without support. For example, an LPR who is entitled to discretionary relief from deportation must show at least five years lawful residence in the United States, continuous residence for at least seven continuous years, and that he or she has not committed a crime considered to be an aggravated felony under immigration law.[82]

Identifying Disability in Immigration Court

Immigration court can be an overwhelming experience, irrespective of disability. Given the nature of the claims raised in immigration proceedings, it is predictable that some individuals in immigration court may have previous experiences with trauma, such as post-traumatic stress syndrome (PTSD), which may even be triggered by the courtroom experience.[83]

For example, Alex K., an LPR and refugee from the former Soviet Union with schizophrenia, broke down in court, began screaming that he wanted to be deported, and was forcibly medicated in the courthouse. Alex's doctor, in court to testify on his behalf, told the judge:

> Right now he's in a very regressed state of mind. He's in the throes of a panic attack along with depression which makes him feel horribly anxious…. And he is sitting in the room with his hands over his head, he's crying, his eyes are markedly bloodshot, which is typical of a very progressed state, and I have to bear in mind that this is a man who is abused when he was a young boy. And he is reacting as if the system is doing this all over again, only it's a different system and he just wants to run and he feels totally hopeless, and he can't see any point in going on. [84]

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[81] Human Rights Watch telephone interview with Raja Jorjani, University of California, Davis, School of Law, December 22, 2009.

[82] 8 U.S.C. Section 1229b.

[83] Human Rights Watch interview with Dr. Judy Eidelson, Philadelphia, PA, February 16, 2010.

[84] Transcript of December 22, 2004, hearing of Alex K. (pseudonym) (on file with Human Rights Watch).

Despite this stressful environment and the prevalence of people with mental disabilities, immigration courts are not designed or equipped to protect, recognize or accommodate the needs of vulnerable individuals in proceedings.[85]

A number of factors, explored in greater detail below, contribute to the difficulty of identifying disability in immigration court, including a lack of obvious symptoms; reliance on self-identification; lack of records documenting mental illness; and lack of training for judges and other court officers when it comes to identifying and working with people who have mental disabilities.

Lack of Obvious Symptoms

Many mental disabilities may not be immediately apparent; and even more recognizable forms of mental disability may not manifest symptoms in court. As Attorney Christina Powers notes, "Unless they are actually yelling at you or not participating, a person with mental illness won't be recognized."[86] As a result, judges may not recognize that an individual is struggling to understand immigration court proceedings, or has a mental disability which affects his or her comprehension.

Reliance on Self-Identification

The immigration detention system and immigration courts rely on individuals self-identifying if they have a mental disability. However, as one psychologist observed, in many cases "[p]eople don't know if they are mentally ill or not; they are not going to be the best recorders of their condition."[87] People with certain types of mental disabilities, or who have not been formally diagnosed and received treatment for a mental disability, may not be able to recognize, identify, and explain their disability. Human Rights Watch interviewed some individuals with documented mental disabilities who denied having a disability and/or resisted being defined as someone with a mental disability.

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[85] "Accommodations" as used in this report refers forms of assistance and support given to persons with disabilities to ensure their equal participation in court. For example, Dr. Denise Berte suggested that accommodations for a person with a mental disability in immigration court could include requiring judges to alter the pacing of the questions, to take time to check in periodically with the individual to make sure he or she is following what is happening, to explain who all the persons in the courtroom are, and, if a person has post-traumatic stress syndrome, consider removing guards and the gavel from the courtroom. Human Rights Watch interview with Dr. Denise Berte, Philadelphia, PA, February 15, 2010.

[86] Human Rights Watch telephone interview with Christina Powers, Pittsburg, PA, December 7, 2010.

[87] Human Rights Watch interview with Dr. Denise Berte, Lutheran Immigrants Rights Service, Philadelphia, PA, February 15, 2010.

For example, Marco C., an undocumented young man from El Salvador who saw his family killed by gang members, told Human Rights Watch that he did not suffer from any mental health difficulties or anxiety.[88] However, his attorney later informed Human Rights Watch that Marco experienced severe post-traumatic stress syndrome, including vivid nightmares and anxiety, and could not provide a linear narrative to his attorneys.[89] Javier F. from Mexico did not want to share his medical records with Human Rights Watch "because if I do those records will say that I am crazy and I do not want that because you are very intelligent…."[90] Edgar S., a victim of gang violence in Honduras, told Human Rights Watch that he saw a psychiatrist but had no mental health problems: "They [ICE] sent me to a psychiatric center and gave me medicine so I wouldn't be able to defend myself. They are taking advantage of me … immigration is making it look like I'm crazy. I'm not crazy."[91] Edgar's medical files, which Human Rights Watch acquired through a Freedom of Information Act (FOIA) request, said that at age 16, Edgar "could only spell a few words such as 'mama' and his name," was "in the mentally deficient range" in math and word recognition, and presented as "a young person who has been victimized most of his life."[92]

Lack of Records

Many individuals with mental disabilities do not have a recorded history of mental disability or documented history of treatment. Even where records do exist, they may be difficult to trace, depending on whether they followed the person from prison into detention and in transfers between detention centers. As advocates and psychologists told Human Rights Watch, immigration courts are more likely to recognize and accept that a person has a mental disability if they see extensive documentation from community treatment, hospitalization, or evidence from the person's prison and criminal record. One psychologist who has testified in immigration court said: "Often the judge will say, 'if there is a mental health problem, why aren't you going to treatment? Why do you just claim to have a mental health problem here in court?'"[93]

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[88] Human Rights Watch interview with Marco C. (pseudonym), McHenry County Jail, McHenry, IL, February 2, 2010.

[89] Human Rights Watch interview with Eleni Wolfe-Roubatis, Chicago, IL, February 2, 2010.

[90] Human Rights Watch interview with Javier F. (pseudonym), Florence Service Processing Center, Florence, AZ, January 6, 2010.

[91] Human Rights Watch interview with Edgar S. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[92] Evaluation of Edgar S. (pseudonym), Children's Hospital Los Angeles, High Risk Youth Program, December 14, 1998 (acquired through Freedom of Information Request, on file with Human Rights Watch).

[93] Human Rights Watch interview with Dr. Denise Berte, LIRS, Philadelphia, PA, February 15, 2010.

Although many individuals with mental disabilities come into immigration detention from the criminal justice system, many will not have a recorded history of mental disability or documented history of treatment. Also, where those records do exist, they may be difficult to access depending on whether the records followed the person from prison into detention and in transfers between detention centers.

Individuals with cognitive disabilities, which are not associated with the disruptive behaviors associated with some mental impairments, may not elicit the attention of ICE medical staff. As lawyer and clinical professor Troy Elder noted, "For many, contact with the court system might be the first opportunity for diagnosis."[94] Even individuals who are aware that they have a disability that affects their functioning, understanding, or participation in daily activities may not identify themselves to ICE or to the courts. Lionel C., an LPR from Jamaica with an unspecified mental disability and slow affect, told Human Rights Watch, "Sometimes I can't remember things … it gets lost … I have trouble understanding things but I've never asked to see a doctor about that because they want money."[95] Pacifico G., an LPR from Mexico with schizophrenia who says he is in contact with entities from outer space, told Human Rights Watch that he didn't seek medical help when he was homeless: "I spent years under the bridge trying to figure out what type of system I was in contact with, trying to find myself and find where my feet were."[96]

While identifying non-citizens with mental disabilities may in some instances be challenging, advocates repeatedly noted that ICE trial attorneys do not raise the issue of the respondent's mental disability even where they have such records in the non-citizen's file.[97] John Pollock, who observed immigration court proceedings in Boston for the National Lawyers Guild, recalled that in at least one case it was only after the judge remarked that the respondent appeared to have a mental disability that the ICE attorney revealed the respondent had indeed previously been found incompetent in a criminal court.[98]

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[94] Human Rights Watch telephone interview with Troy Elder, Miami, FL, December 2, 2009.

[95] Human Rights Watch interview with Lionel C. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[96] Human Rights Watch interview with Pacifico G. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

[97] Human Rights Watch interview with Alexsa Alonzo, Florida Immigrant Advocacy Center, Miami, FL, March 2, 2010; Human Rights Watch telephone interview with John Pollock, National Lawyers Guild, Baltimore, MD, December 7, 2009; Human Rights Watch interview with Dr. Judy Eidelson, Philadelphia, PA, February 16, 2010.; Human Rights Watch telephone interview with Christina Powers, Pittsburgh, PA, December 7, 2009.

[98] Human Rights Watch telephone interview with John Pollock, December 7, 2009, discussing a case witnessed in the Boston immigration court, November 2003.

Lack of Training

A fourth difficulty when it comes to identifying mental disability in immigration court is the lack of training for judges and other court officers when it comes to identifying and working with people who have mental disabilities. One immigration judge said that in the past two decades, the Executive Office for Immigration Review (EOIR) has only organized two to three trainings—including one in August 2009—for immigration judges on recognizing people with mental disabilities.[99] A psychologist observed that for people with PTSD, presenting testimony requires a tricky "balancing act" because "if the person is totally shut down, the judge may assume the person is apathetic. If the respondent is sobbing on the stand, the judge accuses them of making a scene."[100]

Even if a judge is trained to recognize a mental disability, the proceedings can make identification difficult. The first time a person sees a judge is at the master calendar hearing (the first hearing in immigration proceedings). These hearings are often only a few minutes long and offer little opportunity for judges to observe and question, or for the individuals themselves to raise their disability and request assistance. The individuals interviewed for this report generally said they were not asked questions at the master calendar hearing.

In many cases, master calendar and individual hearings are conducted by tele-video, with the individual in proceedings in a detention center, while the attorney (if there is one), the judge, and DHS government attorney are in a courtroom. There are frequent complaints about the quality of the video equipment, and the consequent difficulties in understanding what is being said. "On the TV, I can't understand nothing [the judge] says at all," said Mike C., who has a diagnosed cognitive disability.[101] Moreover, it may be difficult for a judge to recognize that a non-citizen has a mental disability when he or she appears over video. An attorney in San Diego, California observed that while video-conferencing was "commonly used for court hearings" in the city, "for some individuals who suffer from mental illnesses and experience auditory hallucinations, for example, this may not be appropriate."[102]

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[99] Human Rights Watch interview with Immigration Judge 2 (name withheld), December 4, 2009.

[100] Human Rights Watch interview with Dr. Denise Berte, Philadelphia, PA, February 15, 2010.

[101] Human Rights Watch interview with Mike C. (pseudonym), Glades County Jail, Glades, FL, March 3, 2010.

[102] Human Rights Watch interview with Elizabeth Sweet, ABA Immigration project, San Diego, CA, February 9, 2010.

Stigma and its Legal Consequences

> When people know you have mental illness, people don't see you the same.
> —Christo R. (pseudonym), Port Isabel Detention Center, Los Fresnos, Texas, January 19.

In some cases, the stigma of mental disability may prevent individuals from self-identifying in a detention facility or immigration court. Yuri S., a refugee from the former Soviet Union who later became an LPR, at first didn't tell his lawyer about the sexual assault he endured as a prisoner of war in Afghanistan, and said that for years he had difficulty recognizing his PTSD: "You don't want to admit it when you have this problem but then you have to.... I was having nightmares, flashbacks.... I didn't tell the judge about the PTSD. He's not really interested."[103] Yuri's attorney observed that while his client is "very high functioning," it was difficult for him to testify about his mental disability:

> [T]he very things that he needs to testify about are going to exacerbate his mental illness because he has PTSD. There are biological reasons [a desire not to experience stress or physical reactions to stress] for which he would be suppressing issues that he might need assistance to express.... There were a lot of things that he just didn't want to relive and face in the process. For a lot of people, left to themselves, they wouldn't have the will or the ability to face these things.[104]

Even where an individual has an attorney, he or she may be reluctant to share intimate details of his or her life, traumatic experiences, or mental health conditions that are a source of shame.

Psychologist Judy Eidelson noted that a central feature of PTSD is avoiding reminders of the trauma experience, and as a result people with PTSD have difficulty constructing a compelling case for relief:

> In the application they often leave off the part of their story that would best establish their claim. And it's hard when you don't trust the authorities. Often

[103] Human Rights Watch interview with Yuri S. (pseudonym), York Country Prison, February 17, 2010.

[104] Human Rights Watch telephone interview with Megan Bremer, Pennsylvania Immigration Resource Center, York, PA, April 2, 2010.

it is late in the case when they are able to talk about what happened, and the government accuses them of making it up.[105]

Attorneys Matthew Green and Jesse Evans-Schroeder told Human Rights Watch that they did not know about the mental health problems or sexual abuse suffered by Nat, a female client, until Evans-Schroeder, a female attorney, joined the legal team. Even then Nat only discussed details of her impairment and past experiences late in the relationship.[106] "That's the issue in working with traumatized clients—you don't always get the facts when it's convenient," said Green.[107] Although Nat's attorneys had a psychiatric evaluation completed and introduced as new evidence, they met resistance from ICE trial attorneys in getting continuances to collect and present these new claims. Even after working with her attorneys for months, Nat was uncomfortable testifying in court about traumatic events. However, her attorneys presented this evidence in the record, and the judge granted relief.[108]

Individuals with mental disabilities may legitimately fear punitive consequences if they reveal their mental disabilities to the immigration court. Lawyer Carmen Chavez observed, "People might be afraid to self-identify because they think it will affect their chances of staying here."[109] Similarly, Dr. Eidelson observed, "A lot of women are afraid that their psychological factors will be used against them—to have their kids taken away, for example."[110]

In another example, Jorge G., a 36-year-old LPR, originally from Mexico, was diagnosed with severe cognitive disabilities.[111] Jorge had lived in the United States since a young age, had LPR parents and both US citizen and LPR siblings in California, and was facing deportation based on convictions for driving without a license, drug possession and violation of probation. Jorge G. proceeded without a lawyer in his immigration hearings, and the immigration judge (IJ) never inquired into Jorge's competency or recognized that Jorge had a cognitive disability. In this case, Jorge was fortunate to find an attorney, Delia Salvatierra, to represent him on appeal, who was able to get him a psychiatric evaluation (his first evaluation ever).

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[105] Human Rights Watch interview with Dr. Judy Eidelson, Philadelphia, PA, February 16, 2010.

[106] Human Right Watch interview with Jesse Evans-Schroeder and Matthew Green, Tucson, AZ, January 8, 2010.

[107] Human Rights Watch interview with Matthew Green, Tucson, AZ, January 8, 2010.

[108] Human Rights Watch interview with Jesse Evans-Schroeder, Tucson, AZ, January 8, 2010.

[109] Human Rights Watch interview with Carmen Chavez, Casa Cornelia Law Center, San Diego, CA, February 8, 2010.

[110] Human Rights Watch interview with Dr. Judy Eidelson, Philadelphia, PA February 16, 2010.

[111] Psychological report of Jorge G. (pseudonym), October 2009 (on file with Human Rights Watch).

One of the central tensions in this case, Salvatierra observed, was her client's unwillingness to talk about his cognitive disability, which had shaped his life but had never been officially diagnosed until the mental health evaluation for immigration court: "He didn't want to tell the court about the issue that has hurt him his entire life. The last thing he wants to tell the judge is that there is something wrong with him, even though that is the one thing that might have helped."[112]

Indeed, there is some evidence to suggest that there is some basis to fears of repercussions if people in immigration proceedings reveal they have mental disabilities. For example, Human Rights Watch documented at least two incidents where ICE raised a non-citizen's disability to argue for deportation. In the case of Edwin B., a refugee from Liberia, the government affirmatively used evidence that Edwin had a mental disability to prove he was not a credible witness in his hearing and relief should be denied accordingly.[113] In another case, Pacifico G., an LPR from Mexico with schizophrenia, admitted in court that he heard voices, which sometimes told him to harm other people. The trial attorney used this evidence to argue that Pacifico was dangerous and should be denied relief, even though Pacifico has never attempted or committed a violent crime, and testified that he would never act upon what the voices told him.[114] Pacifico told Human Rights Watch that his disability was used against him:

> [T]he DA [sic] says that I am 100 percent individually responsible for my actions. That I am completely accountable for what I do. He made me sound like I was a murderer or made it look like I was a potential murderer. That I could kill at any second…. The legal system exposes me as if I am the one to blame, but I don't think this is the fact. I did my best for 17 years to be a person under control and they make it seem like I am a person who cannot control myself. As if I am a threat to society.[115]

Where individuals are afraid that disclosing mental disabilities will have repercussions for their legal claims, there is a disincentive to report mental health needs and to seek medical

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[112] Human Rights Watch interview with Delia Salvatierra, Florence, AZ, January 7, 2010; The Board of Immigration Appeals has since remanded the case to the IJ in light of this new evidence. Board of Immigration Appeals, In re Jorge G. (pseudonym), March 15, 2010, ("We find that a remand is appropriate so the Immigration Judge can evaluate the respondent's new evidence in the first instance…") (on file with Human Rights Watch).

[113] Human Rights Watch telephone interview with Megan Bremer, April 2, 2010.

[114] Human Rights Watch interview with Pacifico G.'s (pseudonym) attorney (name withheld), January 6, 2010.

[115] Human Rights Watch interview with Pacifico G. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

attention while in detention. Says attorney James Preis, "Sharing information is important to get good services but there needs [sic] to be protections so that information doesn't get misused in violation of due process."[116]

At present, there is no transparent system in place to protect this medical information and separate its use for treatment purposes from misuse in court. Since ICE oversees both the detention and prosecution of non-citizens accused of immigration violations, there is a real danger that medical information can be used against a detainee.

[116] **Human Rights Watch interview with James Preis, Mental Health Services of Los Angeles, Los Angeles, CA, February 12, 2010, and email correspondence, April 13, 2010.**

V. Violations of the Right to a Fair Hearing in Immigration Court

> I was very tired in court and it was difficult to understand…. Every time, to remember every detail—I just can't. Ten years ago, five years ago, to think back to all that—it's like reliving all of that…. In court, I said 'just deport me' because I thought I would be out of detention then but of course that wouldn't have happened. I know that now.
> —Alex K. (pseudonym), Chicago, IL, February 4, 2010.

Legal Standards Requiring Fair Immigration Hearings

A fair hearing is central to the protection of a person's rights, and is the hallmark of a functional justice system. Human rights law guarantees that all persons appearing before a judicial proceeding receive "a fair and public hearing by a competent, independent, and impartial tribunal" in a determination of rights.[117]

Specific to the deportation context, the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, states in Article 13 that an alien "lawfully in the territory" may only be deported,

> ….in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[118]

The UN Human Rights Committee, which monitors state compliance with the ICCPR, has interpreted the phrase "lawfully in the territory" to include non-citizens who wish to challenge the validity of the deportation order against them. In addition, the Human Rights

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[117] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, http://www.ohchr.org/english/countries/ratification/4.htm (accessed June 23, 2010), article 14. According to the Human Rights Committee, the requirement of a competent, independent and impartial tribunal "is an absolute right that is not subject to any exception." Human Rights Committee, General Comment 32, Right to equality before courts and tribunals and to a fair trial, U.N. Doc CCPR/C/GC/32 (2007), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement (accessed June 23, 2010), para. 19.

[118] ICCPR, art. 13.

Committee has made this clarifying statement: "if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13 … an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."[119]

Similarly, Article 8(1) of the American Convention on Human Rights, which the United States signed in 1977, states:[120]

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law … for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.[121]

Applying this standard, the Inter-American Commission on Human Rights has stated that deportation proceedings require "as broad as possible" an interpretation of due process requirements, and includes the right to a meaningful defense and to be represented by an attorney.[122]

The ICCPR provides for the right to legal representation during deportation.[123] Moreover, UN principles governing all detainees state that a detainee should receive legal assistance if he or she is unable to afford a lawyer.[124] Recognizing that individuals with mental disabilities may need additional support and assistance in court, the Convention on the Rights of Persons with Disabilities—which the United States signed in 2009 but has not ratified—provides for the right to legal assistance so that individuals with mental disabilities can

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[119] UN Human Rights Committee, "The Position of Aliens Under the Covenant," General Comment No.15, U.N. Doc. A/41/40 (1986), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument (accessed June 23, 2010), paras. 9 and 10.

[120] American Convention on Human Rights ("Pact of San José, Costa Rica"), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), http://www.oas.org/juridico/english/Sigs/b-32.html (accessed June 23, 2010).

[121] Ibid., art. 8(1).

[122] Inter American Commission on Human Rights, Report No. 49/99 Case 11.610, Loren Laroye Riebe Star, Jorge Alberto Barón Guttlein and Rodolfo Izal Elorz v. Mexico, April 13, 1999, Section 70-1.

[123] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 13.

[124] Body of Principles for the Protection of Persons Under Any Form of Detention and Imprisonment, Principle 17(2), G.A. Res. 43/173, Annex, U.N. Doc. A/Res/43/173 (Dec. 9, 1988).

participate in proceedings concerning their rights. The CRPD requires that governments "ensure effective access to justice for persons with disabilities … including through the provision of procedural and age-appropriate accommodations" and further "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[125]

Historically, US domestic law has recognized the importance of a fair immigration hearing. In 1922, the US Supreme Court observed that deportation implicates the right to liberty, property and life, "or of all that makes life worth living."[126] Moreover, US law recognizes that in light of the "drastic deprivations" that deportation may entail, "[t]here must be 'clear, unequivocal, and convincing' proof before a person can be deported."[127]

Despite this recognition of the severity of deportation, the US immigration system has no meaningful safeguards to protect the rights of persons with mental disabilities. There is no right to appointed counsel, even for indigent persons with mental disabilities who cannot represent their interests without assistance.

The absence of such safeguards in the immigration system is unique, when compared to other branches of US domestic law and particularly where a person's liberty is at stake. In the US criminal justice system, there is a constitutional right to a lawyer.[128] However even with attorney representation, a criminal defendant cannot be tried and convicted if he or she lacks the mental competence to understand and participate in the proceedings against him or her, and to assist in preparing a defense.[129]

Because immigration proceedings are not criminal, however, the same protections do not automatically apply. Outside of the immigration context, US law has recognized that in some

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[125] International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res.61/106, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 13.; Ibid., art. 12.

[126] *Ng Fung Ho v. White*, 259 US 276, 284-85 (1922).

[127] *Woodby v. INS*, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification. … There must be 'clear, unequivocal, and convincing' proof before a person can be deported.").

[128] US Constitution, Sixth Amendment. Even before the right to counsel existed in criminal court, US law recognized that "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental conditions stands helpless and alone before the court." *Massey v. Moore*, 348 U.S. 105, 108 (1954).

[129] *Dusky v. US*, 362 US 402 (1960); *Drope v. Missouri*, 420 US 162, 171 (1975).

non-criminal cases, appointing counsel may be required to protect a person's rights.[130] However, to date, the right to appointed counsel for non-citizens, including those with mental disabilities, in immigration court has not been recognized in the United States, in violation of human rights standards. Without the right to counsel and other legal safeguards, the US government violates immigrants' rights to fair immigration hearings and to counsel when they cannot represent their interests without assistance.

Access to Justice in the Absence of Law

> The problem for judges is that there is not enough guidance out there on what to do; there are few published cases and those that are [available] show only the situations where the case made it through the proceeding.
> —Immigration judge, (name withheld), interviewed December 4, 2009.

US law authorizes the Attorney General of the United States to "prescribe safeguards to protect the rights and privileges" of non-citizens with mental disabilities in deportation proceedings through his administrative rule-making authority, and, more generally, to "establish such regulations" as are necessary to implement the Immigration and Nationality Act (INA).[131] To date, however, the Attorney General has not exercised this opportunity, and persons with mental disabilities facing deportation enjoy scant protections in immigration court.[132] Individuals who need support are even more vulnerable when attempting to navigate the courtroom without an attorney, as happens in the vast majority of cases.

Federal regulations require that non-citizens have a "reasonable opportunity" to present, examine and object to evidence.[133] However, these regulations only provide one additional instruction when it comes to elaborating what a "reasonable opportunity" means for a non-citizen with a mental disability:

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[130] Under US law, courts must look to the private interests at stake, the government's interests, and the risk of an erroneous decision in the absence of counsel to determine if counsel is required in the non-criminal setting. *Mathews v. Eldridge*, 424 US 319, 33 (1976); *Lassiter v. Department of Social Services.*, 452 US 18, 26-27 (1981).

[131] 8 U.S.C. Section 1103(g)(2); INA Section 240(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).

[132] In June 29, 2009, five immigrants' advocacy organizations submitted a petition for rulemaking to the Attorney General's office, requesting the Attorney General promulgate regulations for the appointment of counsel in immigration proceedings; however, as of July 7, 2010, the Department of Justice has not developed new regulations authorizing appointment of counsel in immigration court. Catholic Legal Immigration Network, Inc. et al.,"Petition for Rulemaking To Promulgate Regulations Governing Appointment of Counsel for Immigrants in removal Proceedings," submitted to the Department of Justice, June 29, 2009, http://www.bc.edu/centers/humanrights/meta-elements/pdf/Petition_for_Rulemaking_for_Appointed_Counsel.pdf (accessed May 17, 2010).

[133] 8 C.F.R. Section 1240.10(a)(4).

> When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend … shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.[134]

This regulation does not address the majority of the instances where a person with a mental disability can still be *physically* present in the courtroom, but lacks the ability to understand or participate in the hearing without accommodations. Rather than calling for the appointment of counsel when no assistance is available, the statute authorizes the "custodian"—the warden of the detention facility, if the person is detained—to appear as a representative.[135] This regulation clearly violates the right to fair and impartial proceedings since the warden or other custodial officer is generally employed by ICE—or is acting under contractual authority to detain on behalf of ICE, which is also the prosecuting authority.[136]

Neither this section nor any other regulation or provision in the INA provides a standard for competence in an immigration proceeding. There is no procedure in place for getting a psychological evaluation and/or a competency evaluation, and no funding available for lawyers who request an evaluation of their clients.[137]

Moreover, even the existence of documented evidence that a person has a mental disability, including one that demonstrably impairs participation in a legal proceeding without support, does not trigger additional review or safeguards. For example, a man who went through immigration court proceedings after he had been found incompetent to stand trial in a criminal court, and was sent to a state hospital for mental health treatment where he remained throughout his immigration hearings, provided "no evidence in the record" that he

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[134] 8 C.F.R. Section 1240.4.

[135] Ibid.

[136] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 10.

[137] Although under current regulations, a finding that a person was not competent to proceed would not activate any legal protections, lawyers and judges may still want a psychiatric evaluation either to demonstrate whether the individual can credibly testify or to establish a person's claims where the mental disability is relevant to a person's legal argument, for example, if the individual is claiming persecution or a right to humanitarian asylum based on his or her mental disability.

was "unable to comprehend the nature of the [removal] proceedings," according to the Board of Immigration Appeals.[138]

The only other regulation that discusses a non-citizen's competence and how to proceed if it is in doubt states that immigration judges may not accept a non-citizen's statement that he or she is deportable if there is no lawyer or other representative appearing with the individual.[139] The IJ must "direct a hearing on the issues" when he or she decides not to accept a non-citizen's admission that he or she is deportable, or that he or she is a non-citizen (an "alien" under US immigration law).[140] According to one attorney in Arizona, "Citizenship issues come up a lot; often ICE doesn't have anything but the admission, and the admission isn't reliable when the person is mentally ill."[141]

The reliability of an admission may never be raised in immigration court without an attorney; however, the rule against accepting admissions of "alienage" does not apply where the individual has a lawyer. If a person with a mental disability told an immigration officer that he or she was not a US citizen, the judge could allow this statement into the record and determine that the individual was deportable so long as a lawyer was present in court—even if the lawyer was not able to communicate with the client, the statement was made outside the presence of an attorney, and in the absence of supporting documentation.

For example, Gustavo S. was a native English speaker with schizophrenia who gave inconsistent accounts of his place of birth to both his attorney and to ICE.[142] Medical records from Pike County jail, where Gustavo was held in ICE custody, state that he was "a historian of questionable reliability."[143] He was charged with illegal entry solely on the basis of his statement that he born in Honduras, a statement made in detention, outside the presence of

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[138] *Mohamed v. Gonzales,* 477 F.3d 522, 525 (8th Cir. 2007) (upholding and quoting from the Board of Immigration Affairs deportation decision).

[139] 8 C.F.R. Section 1240.10(c).

[140] Ibid. In response to a FOIA request from Human Rights Watch for the number of cases in which an immigration judge has refused to accept an admission based on the respondent's incompetence, EOIR stated that its "computer system does not maintain this information." EOIR response to Human Rights Watch Freedom of Information Request, March 8, 2010 (see Appendix).

[141] Human Rights Watch interview with Arizona immigration attorney, January 6, 2010.

[142] Respondent's Motion to Terminate Removal Proceedings, August 13, 2008 (on file with Human Rights Watch); Human Rights Watch telephone interview with Megan Bremer, Pennsylvania Immigration Resource Center, April 2, 2010; DHS Motion to Temporarily Table Respondent's Motion to Terminate Proceedings, August 28, 2008 ("A review of the respondent's New York criminal history information indicates that the respondent has provided authorities with various places of birth, including Honduras and 'Howard Island.'").

[143] Medical Summary of federal prisoner/Alien in Transit, From Marlene Van Houten, DRA to EOIR York, PA, May 8, 2007 (on file with Human Rights Watch).

a lawyer, and which he intermittently contradicted.[144] The IJ excluded Gustavo's statements as unreliable evidence in light of his mental disabilities. But after holding Gustavo for 19 months with only his unreliable admission as evidence of deportability, ICE ultimately produced a travel document from the General Consul of Honduras, to where Gustavo was subsequently deported. Gustavo's attorney noted that this document was obtained at the request of the DHS using the information provided by the DHS.[145] While it may seem incredible that a US citizen would claim to be from another country, documented cases of unlawful deportations of citizens illustrate that mental disabilities can cause profound confusion on even this fundamental issue.[146]

Beyond the regulations outlined, IJs have little guidance on how to address mental disability issues in their courtrooms, although there appears to be increasing official recognition that guidance is necessary. For example, as of April 2010, the Immigration Judge Benchbook produced by the Executive Office for Immigration Review (EOIR) includes a mental health section that outlines many constraints that IJs face in recognizing disability in court and providing assistance to non-citizens with mental disabilities—including virtually no guidance or published case law to guide judges when the individual before them is not competent, or represents him or herself without a lawyer.[147]

Similarly, a 2009 article by immigration judge Mimi Tsankov that appeared in the EOIR's legal publication listed several scenarios in which there is no guidance at all for IJs who face a non-citizen with doubtful competence, including, for example, where an individual asserts that he or she is competent to proceed despite evidence that the disability interferes with court participation.[148] Tsankov encouraged judges to develop evidence in the record that a non-citizen's competency was in doubt, which a reviewing court can consider if the case is appealed.

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[144] Human Rights Watch telephone interview with Megan Bremer, April 2, 2010.

[145] Ibid.

[146] For example, Mark Lyttle, a US citizen with bipolar disorder, was deported to Mexico after he told ICE agents while in detention that he was born in Mexico; he also said that he was a US citizen but ICE agents failed to investigate his citizenship claims. Kristin Collins, "N.C. native wrongly deported to Mexico," *Charlotte Observer*, August 30, 2009, http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html (accessed April 11, 2010).

[147] IJ Benchbook. *See also* Mimi E. Tsankov, "Incompetent Respondents in Removal proceedings," *Immigration Law Advisor*, vol. 3 no.4 (April 2009); Human Rights Watch interviews with Immigration Judge 2 (name withheld) December 4, 2009.

[148] Ibid pp.17-18.

However, in reality, few cases where the non-citizen is unrepresented and has a mental disability will reach a reviewing authority. The overwhelming majority of appeals made from immigration court are brought by non-citizens with attorneys.[149]
Moreover, while the new section of the Benchbook is a positive development—reflecting the concern of IJs that non-citizens with mental disabilities may be denied a fair hearing—it identifies few strategies that IJs can employ, and no meaningful safeguards or practices that they *must* consistently enforce to ensure a fair proceeding.

Disempowered Courts

> We are all so overwhelmed. It is truly emotionally exhausting because we are dealing with the lives of individuals whose survival skills are already so compromised.
> —Immigration Judge 1 (name withheld), interviewed February 11, 2010.

Immigration judges have no legal authority to appoint counsel, and immigration courts have no other safeguards in place to ensure that non-citizens with mental disabilities receive fair and impartial immigration hearings. It therefore falls to IJs to help unrepresented non-citizens, who often cannot afford a lawyer, understand court proceedings and procedures. This adds significantly to the already-heavy caseloads that judges face.

In 2009, for example, EOIR received 391,829 immigration cases for review and employed 232 immigration judges around the country to adjudicate these cases.[150] If distributed evenly among judges, this would require each judge to decide seven cases each day, working five days a week, full time, without any vacations.

IJs often view the challenge of coming up with ad hoc responses to their caseload of persons with mental disabilities as beyond their authority.[151] Moreover, they often lack the training, resources and time to provide sufficient assistance to individuals with mental disabilities. As a result, some have suggested creating a separate docket for cases where non-citizens have mental disabilities so that a judge with appropriate training in mental health and a smaller number of cases could provide more attention and assistance. A similar model exists for unaccompanied children in immigration proceedings, where courts provide

[149] EOIR Statistical Year Book FY2009, p.60.

[150] EOIR response to Human Rights Watch Freedom of Information Request, March 8, 2010 (see Appendix).

[151] Human Rights Watch telephone interview with Immigration Judge 1 (name withheld), February 11, 2010; Human Rights Watch telephone interview with Immigration Judge 2 (name withheld), December 4, 2009; Human Rights Watch telephone interview with Immigration Judge 3 (name withheld), December 4, 2009.

separate and specialized hearings with judges who can take more time to explain the proceedings and their purpose to juveniles.[152]

The Immigration Judge Benchbook encourages immigration judges to reach out to pro bono attorneys to secure representation for non-citizens with mental disabilities, a practice already followed by many IJs where possible. However, given the shortage of pro bono resources and the inability to appoint counsel, IJs are not able to ensure that non-citizens with mental disabilities are represented in the absence of an office of appointed counsel. Where immigration judges attempt to find solutions in the absence of formal guidance, they may find their authority questioned.[153] Moreover, both attorneys for non-citizens and immigration judges say it is difficult to compel ICE attorneys to provide psychiatric evaluations and medical records.

One immigration judge told Human Rights Watch, "When a judge suspects that there is a mental disability, there are problems with enforcing cooperation from DHS because judges have no contempt authority or tools to use to make ICE cooperate in getting documents to get external corroboration that there is an illness."[154]

The National Lawyers Guild documented one case where the government attorney, who had repeatedly failed to produce the competency evaluation requested by the IJ, told the court, "there aren't sufficient resources for us to do the evaluation."[155] Attorney Benjamin Yerger, who has struggled to get a competency evaluation for his client Miguel B. despite a request from the IJ, recalls that "DHS's position was that they were not going to do [the evaluation]," and at one point the ICE trial attorney "suggested that the judge could call the mental health counselor at the jail to order the evaluation."[156]

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[152] US Department of Justice, Executive Office for Immigration Review, Memorandum, "Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children," May 22, 2007, http://www.justice.gov/eoir/efoia/ocij/oppm07/07-01.pdf (accessed May 14, 2010); Human Rights Watch interview with Immigration Judge 1 (name withheld), February 11, 2010; Human Rights Watch interview with Immigration Judge 2 (name withheld), December 4, 2009; Human Rights Watch interview with Immigration Judge 3 (name withheld), December 4, 2009.

[153] IJ Benchbook, Part III Sample Orders. The IJ Benchbook attaches one order for a competency evaluation and a second, follow-up order for requesting DHS to explain its failure to produce the competency evaluation to the immigration court, which is illustrative of the difficulties immigration judges face in forcing compliance from DHS.

[154] Human Rights Watch telephone interview with Immigration Judge 3 (name withheld), December 4, 2009.

[155] Human Rights Watch telephone interview with John Pollock, December 7, 2009, discussing a case witnessed in Boston immigration court in October 2003.

[156] Human Rights Watch telephone interview with Benjamin Yerger, Pennsylvania, March 19, 2010.

In many situations, judges try to correct the imbalance and compensate for the lack of counsel by taking a more active role in proceedings, such as persuading [ICE attorneys] that a particular form of immigration relief is available in a given case.[157]

However, the DHS and Board of Immigration Appeals have both rebuked IJs for actively engaging in fact-finding and adding to the record in appellate decisions, resulting in the assumption that judges who assist an unrepresented person with diminished capacity will have their decisions overturned.[158]

In most cases that Human Rights Watch documented, immigration judges and attorneys said that ICE trial attorneys appealed decisions favorable to non-citizens with mental disabilities, and resisted efforts by judges and immigration attorneys to accommodate non-citizens with mental disabilities by providing mental health evaluations, sharing medical records with the court or attorneys, or agreeing to terminate cases where the person in proceedings cannot participate or protect his or her rights.

Nevertheless, the immigration attorneys and judges interviewed did believe that collaboration with ICE trial attorneys *was* possible and *could* produce equitable results, as in the case of an undocumented woman from Haiti with mental disabilities whom a criminal court had found incompetent. Even before an IJ ordered a status conference and "encourage[d] the parties to consider termination of proceedings without prejudice based on mental illness or administrative closure on humanitarian groups," ICE trial attorneys agreed with the non-citizen's attorney to support the request for withholding of removal.[159]

An IJ told Human Rights Watch that the immigration court was capable of working with ICE trial attorneys and immigration attorneys to terminate proceedings where necessary and to find community treatment and housing options for individuals when released.[160] The EOIR and DHS should, where appropriate, encourage efforts by ICE attorneys, judges, and immigration attorneys to ensure that individuals have the opportunity to present claims in court and obtain release.

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[157] Human Rights Watch telephone interview with Troy Elder, Miami, FL, December 2, 2009.

[158] Human Rights Watch telephone interview with Megan Bremer, April 2, 2010.

[159] In the Matter of (name withheld), Decision on a Motion Joint Status Conference, January 28, 2010 (on file with Human Rights Watch); Human Rights Watch interview with Tal Winer, Florida Immigrant Advocacy Center, Miami, FL, March 2, 2010.

[160] Human Rights Watch interview with Immigration Judge 1 (pseudonym), February 11, 2010.

Bypassing the Courtroom: Invisible Deportees

Anyone placed in deportation proceedings can sign a stipulated order of removal whereby the individual waives his or her rights to a hearing and agrees to have a final deportation order entered against them, thus bypassing any opportunity to raise claims or to get review from an immigration judge.[161] Between 2004 and 2008, immigration officers entered almost 100,000 stipulated removal orders. According to data obtained and analyzed by the Stanford Immigrants' Rights Clinic, almost 95 percent of individuals who signed stipulated orders of removal since 1999 did not have a lawyer.[162]

Attorney Maunica Sthanki, who previously represented detainees in south Texas, told Human Rights Watch that there is enormous potential for coercion in situations where a detainee never has the opportunity to see a lawyer or an immigration judge:

> What I worry about is what happens behind the scenes when an individual isn't able to understand anything and a deportation officer comes and gets them to sign a piece of paper and that's that. …ICE attorneys are under no obligation to make sure that the individual is competent to sign the order. The judge has to sign it but the individual isn't in front of them, thereby passing over any opportunity for a real evaluation.[163]

Human rights law prohibits immigration officers from taking "undue advantage" of a person's detention to either compel him or her to confess or to self-incriminate.[164] The possibility that detainees will sign stipulated orders of removal because they feel they cannot endure lengthy periods of detention may only be exacerbated for those with mental disabilities.

One detainee told Human Rights Watch, "I'm fighting for asylum but I'm not going to get it. They think because I'm alone, I'll just give up."[165] Since stipulated orders of removal are intended to get detainees deported quickly, Human Rights Watch was not able to find any individuals who had signed stipulated orders of removal.

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[161] INA Section 240.

[162] Jayashri Srikantiah, Stanford Immigrants' Rights Clinic, and Karen Tumlin, National Immigration Law Center, "Backgrounder: Stipulated Removal", November 2008, http://www.law.stanford.edu/program/clinics/immigrantsrights/pressrelease/Stipulated_removal_backgrounder.pdf (accessed July 7, 2010).

[163] Human Rights Watch telephone interview with Maunica Sthanki, Boston, MA, January 29, 2010.

[164] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted December 9, 1988, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), Principle 21.1.

[165] Human Rights Watch interview with Edgar S. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

However, detainees in Florida and Texas reported ICE officers asking them to sign "some paper" on multiple occasions, even between court hearings. These individuals were not able to identify the document or its contents, demonstrating the risk that individuals with mental disabilities in detention without support may not understand what they are signing. One detainee illustrated his confusion about what deportation means when he said he would sign the deportation order so he could return to "the streets" to fight his case.[166]

The Right to a Lawyer

> Aliens having representation, I think, could be the most positive thing for immigration courts that we can really see.
> —Julie Myers-Wood, former Assistant Secretary of Immigration and Customs Enforcement.[167]

Having legal representation is of the utmost importance for any person facing deportation or requesting asylum. However, immigration law provides non-citizens only the "privilege" of being represented by a lawyer at their own expense, and not the *right* to legal representation provided by the government.[168]

For many people in the immigration system, this "privilege" is effectively meaningless given the cost of retaining legal counsel. As one immigration judge observed, "Mental health cases involve a great deal of time and energy. Respondents with mental illness are usually poor people who cannot afford the kind of advocates who are willing to fight for alternatives to removal."[169]

Moreover, there are few legal service organizations and private practitioners who can provide assistance to the hundreds of thousands of people in immigration proceedings—particularly in the remote locations where many non-citizens are detained. EOIR data for fiscal year 2009 shows that 61 percent of non-citizens in immigration proceedings did not have a lawyer.[170] Meanwhile, 84 percent of immigration detainees in 2006-2007 did not have a lawyer, according to the Vera Institute, a non-profit research and policy institute that also

[166] Human Rights Watch interview with Leonardo D. (pseudonym), Krome Service Processing Center, Miami, FL, March 1, 2010.

[167] Jennifer Ludden, "Immigration Crackdown Overwhelms Judges," National Public Radio, February 9, 2009, transcript, http://www.npr.org/templates/transcript/transcript.php?storyId=100420476 (accessed July 7, 2010).

[168] 8 U.S.C. Section 1229a(b)(4)(A) (2006 & Supp. 2009); see also 8 USC. Section 1362 (2006).

[169] Human Rights Watch interview with Immigration Judge 1 (name withheld), February 11, 2010.

[170] EOIR Statistical Year Book FY2009, p. G1.

administers the Legal Orientation Program for EOIR.[171] Texas Appleseed, a non-profit legal services organization, found that 86 percent of immigration detainees in Texas were unrepresented in 2009.[172]

While immigration law does not afford a right to legal representation, judges, the government, lawyers and people in proceedings all recognize the importance of having a lawyer in immigration court. The US government, for example, is always represented by an ICE attorney in a deportation hearing. Several recent reports on the immigration court system all cite the need for appointed counsel as a core recommendation, and EOIR recently deemed the large number of individuals representing themselves as "of great concern…"[173]

While the government has an interest in providing counsel to improve courtroom efficiency and achieve just results, it is also clear that having a lawyer makes an enormous difference to an individual's ability to obtain relief from deportation: studies show asylum seekers may be three to six times more likely to receive asylum with legal counsel than without.[174]

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[171] Vera Institute for Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program,* May 2008, p.1http://www.vera.org/download?file=1780/LOP percent2BEvaluation_May2008_final.pdf.

[172] Texas Appleseed, *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System*, March 2010, p.13.

[173] EOIR Statistical Year Book, G1; American Bar Association, *Reforming the Immigration System: Proposals to promote Independence, Fairness, Efficiency, and professionalism in the Adjudication of Removal Cases,* February 2010; The Constitution Project, *Recommendations for Reforming our Immigration detention System and Promoting Access to Counsel in Immigration Proceedings*, *December 2009;* Texas Appleseed, *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and detention System*, March 2010.

[174] Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, "Refugee Roulette: Disparities in Asylum Adjudication," Stanford Law Review, vol. 60, November 2007, p. 340. See also, Human Rights First, "In Liberty's Shadow: US Detention of Asylum Seekers in the Era of Homeland Security," 2004, p.39, http://www.humanrightsfirst.org/about_us/events/Chasing_Freedom/asylum_report.htm (accessed April 15, 2010) (citing Georgetown University Institute for the Study of International Migration Analysis of US government statistics showing that "asylum seekers are up to six times more likely to be granted asylum when they are represented.").

Table 1 – Non-citizens (non-detained and detained) in immigration court without attorneys[175]

Fiscal Year	Percent of Non-Citizens Appearing in Immigration Court **without** Counsel
2009	61 %
2008	60 %
2007	58 %
2006	65 %
2005	65 %
2004	55 %
2003	52 %
2002	55 %
2001	59 % (approximate)
2000	58 % (approximate)

Individuals with mental disabilities that Human Rights Watch spoke to doubted they could explain their claims without a lawyer.

"If I say something stupid or I lose my papers, I just have to be careful with the judge … I want help in my case. I need help," said Angelo, a 45-year-old LPR from Mexico with an unspecified mental disability and long history of hospitalization.[176]

Sebastian, a 50-year-old non-citizen from Cuba currently taking multiple psychotropic medications, echoed the need for a lawyer. "For me court is difficult because I don't understand what they are telling me. The judge asks me questions and I have to answer because I have no one to represent me. I told the judge that I can't represent myself because of my nerves and I need an attorney," he said.[177] One man from Vietnam, Minh B., whose

[175] Source: US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2009 Statistical Year Book," Office of Planning, Analysis, and Technology, March 2010,p.5; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2008 Statistical Year Book," Office of Planning, Analysis, and Technology, March 2009, p. 5; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2007 Statistical Year Book," Office of Planning, Analysis, and Technology, April 2008, p. 5; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2006 Statistical Year Book," Office of Planning, Analysis, and Technology, February 2007, p. 6; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2005 Statistical Year Book," Office of Planning, Analysis, and Technology, February 2006, p. 6; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2004 Statistical Year Book," Office of Planning and Analysis, March 2005, p. 7; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2003 Statistical Year Book," Office of Planning and Analysis, April 2004, p. 7; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2002 Statistical Year Book," Office of Planning and Analysis, April 2003, p. 7; US Department of Justice, Executive Office for Immigration Review, "Fiscal Year 2001 Statistical Year Book," Office of Planning and Analysis, March 2002, p. 24 (fiscal years 2001 and 2000).

[176] Human Rights Watch interview with Angelo R. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[177] Human Rights Watch interview with Sebastian F. (pseudonym), Krome SPC, Miami, FL, March 1, 2010.

speech was almost incomprehensible, recalled an immigration judge asking him if he needed extra help. "I said yes. Then he didn't do anything," said Minh B., who told Human Rights Watch he was receiving medication, although a FOIA request that Human Rights Watch submitted to ICE for medical records yielded no results.[178] Fernando C., a legal permanent resident from Mexico who has been in the US for 40 years, and was unable to remember his date of birth or why he was on medication, said that he had been to see the judge five times since arriving in Port Isabel:

> I've been to see the judge 5 times since coming to Port Isabel. …I tell him I can't represent myself and I need help. The judge just gives me extensions to see if I can get a lawyer … It's hard because I have something wrong with my head, and I have trouble deciding what to tell him.[179]

Without a lawyer, many individuals with mental disabilities who have viable claims will not have the chance to present their cases and defend their rights in immigration court—even if they have reasonable grounds for a defense. A recent report from the City Bar Justice Center in New York interviewed 158 detained non-citizens without lawyers and suggested that 62 (30 percent) of those interviewed had meritorious claims for relief from deportation, mainly based on Convention against Torture-related claims.[180]

Having an attorney not only protects the rights of people facing deportation but also improves court efficiency and aids the court in reaching just and fair decisions where lawyers are able to present the legal claims and the facts. Attorney John Pollock, who monitored immigration proceedings in Boston and observed several cases of persons with mental disabilities, said, "Things went better when people had lawyers—lawyers got them evaluations, argued that the person was not competent to stand trial—arguments people otherwise could not make without judge's assistance."[181]

Attorneys play a vital role not only in crafting and investigating legal claims, examining and producing evidence, and rebutting the charges and evidence offered by the prosecution, but also in helping people to participate effectively in court. Attorney Megan Bremer said, "With

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[178] Human Rights Watch interview with Minh B. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

[179] Human Rights Watch interview with Fernando C. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[180] City Bar Justice Center, *An Innovative Pro Bono Response to the Lack of Counsel for Indigent Immigrant Detainees*, November 2009, p.11.

[181] Human Rights Watch telephone interview with John Pollock, December 7, 2009.

diminished capacity you are not effectively heard. I see myself as a support through that process so that the voice doesn't get lost."[182]

While individuals without lawyers rely on the judge's assistance, the government is always represented by counsel. The resulting inequity (where the state has legal counsel and the non-citizen does not) may have particularly severe consequences for non-citizens whose disabilities can be used against them in court.

For example, without an attorney to examine the medical evidence upon which the government is relying and to provide alternate readings of the medical history, individuals with mental disabilities are not able to explain medical history in court, and will have to contend with pejorative conclusions that trial attorneys and judges may draw from evidence of mental disability. According to attorney James Preis:

> Without counsel filtering it, information about a person's mental health could be used against the person's interest, for example by being used stereotypically to support a claim of dangerousness.[183]

In some cases, ICE attorneys also recognize that non-citizens with mental disabilities need legal assistance. Several immigration attorneys recalled ICE attorneys asking them to represent detainees with mental disabilities in merits hearings, although these requests, which often came without prior notice or an opportunity to consult with the non-citizen or investigate the case, raised ethical concerns for the attorneys who suspected the requests were primarily motivated by a desire to simply facilitate the deportation process.[184]

Individuals interviewed for this report said that having a lawyer significantly helped their cases.

Viktor G., 47-year-old refugee from Bulgaria with schizophrenia who has been in the US for 25 years said, "Now that I have a lawyer, there is a big difference in court because she understands all the legal vocabulary…. Before when I saw the judge, I didn't know that I have

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[182] Human Rights Watch telephone interview with Megan Bremer, April 2, 2010.

[183] Human Rights Watch interview with James Preis, Mental Health Services of Los Angeles, Los Angeles, CA, February 12, 2010, and email correspondence, April 13, 2010. In this context, dangerousness may be used as a reason to deport, or at least as a factor that weighs against other sympathetic factors and may be considered when immigration judges decide if an individual is entitled discretionary relief.

[184] Human Rights Watch conversations with immigration attorneys in Arizona and Texas.

a right to stay but now the judge told me that if I won my case I would be able to stay here."[185]

Mike C., a 35-year-old LPR from Haiti with bipolar disorder and limited cognitive functioning who was becoming depressed, said a lawyer prevented him from mistakenly signing whatever the immigration officers gave him so that he could get out of detention: "I was going to sign but my lawyer said don't sign, fight your case … I had seen the judge 12 times before I got my lawyer. With a lawyer it is easy in court."[186]

While it may be difficult to immediately ensure court-appointed attorneys for all persons in immigration proceedings, basic standards of fairness under human rights law require that every non-citizen with mental disabilities, whose disability prevents him or her from understanding the proceedings or meaningfully participating in them, receives counsel when they cannot afford an attorney themselves.[187]

In practice, it may be less efficient to first provide fair competency proceedings for non-citizens with mental disabilities and to separately appoint attorneys for *only* those whose disabilities raise competency concerns than it is to ensure the appointment of attorneys for all non-citizens known to have, or suspected of having, a mental disability when that person cannot afford a lawyer.

An Attorney May Not Be Enough

Attorney representation is crucial for people with mental disabilities to better navigate the complex immigration court system. But even this help may not be sufficient given the challenging, time consuming, and costly nature of presenting such a case.

For example, an attorney may need a psychiatrist to perform a mental health evaluation, and the help of family members to help fill in gaps in information—such as the client's date and place of birth—which he or she would otherwise spend time investigating.

Rachel Wilson told Human Rights Watch that her client Arlex C., an asylum-seeker from Guatemala with brain trauma and cognitive disabilities, only managed to obtain asylum because his brother could guide him through the process and provide his history to the

[185] Human Rights Watch interview with Viktor G. (pseudonym), CCA Otay Mesa, California, February 10, 2010.

[186] Human Rights Watch interview with Mike C. (pseudonym), Glades County Jail, Florida, March 3, 2010.

[187] ICCPR, art. 13; Convention on the Rights of Persons with Disabilities, art.12, section 3.

attorney; moreover, says Wilson, the judge was more inclined to credit the evidence of Arlex' mental disability when presented with a psychiatric evaluation.[188]

Attorneys may also need more extensive guidelines than currently exist, given the significant ethical challenges that can arise when representing clients who cannot understand and evaluate options and tell the lawyer how to proceed.[189] Attorney Brigit Alvarez said, "I struggled on where to go for ethical guidelines. How can you agree to a legal defense for a client who doesn't even know who you are?"[190] Most attorney bar guidelines that address the scenario of an attorney who cannot determine a client's wishes are designed for criminal defense attorneys: none address the specific dilemma of a client facing the choice of extended, even indefinite, detention on the one hand, and deportation on the other.

Additional resources, such as coordinated care, social services, and support from local groups may also be needed to supplement the help that attorneys can provide in the face of inadequate post-detention planning by ICE As attorney Sunita Patel observed, "The person doesn't just need an attorney; they need a plan for managing their care and also addressing any related issues."[191]

A non-citizen can sometimes boost his or eligibility to remain in the United States and secure release from detention if he or she can provide ICE and the court with a release plan—a time consuming task that tends to fall the attorney, when one is present.[192] However, ICE should be ultimately responsible for such planning when it releases detainees, although it often fails to adequately perform this function.

A report by the Office of Inspector General for DHS found that ICE offices did not have appropriate release planning or necessary connections to mental health treatment centers.[193] As a result, many non-citizens are released directly to the streets without any notice being given to family or lawyers, a practice roundly criticized by many advocates who

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[188] Human Rights Watch interview with Rachel Wilson, Tucson, AZ, January 8, 2010.

[189] During research for this report, some advocates suggested to Human Rights Watch that the immigration court should be able to appoint a guardian ad litem who could help the attorney make decisions on behalf of a client with mental disabilities.

[190] Human Rights Watch interview with Brigit Alvarez, Los Angeles, CA, February 12, 2010.

[191] Human Rights Watch telephone interview with Sunita Patel, Center for Constitutional Rights, New York, NY, December 21, 2009.

[192] A release plan, while not legally required, supplies the place to which an individual will be released (for example, home to their family, to a residential treatment facility, etc.) and may be provided to assure the court and ICE that a person will still participate in immigration proceedings outside of detention, if necessary.

[193] Office of Inspector General, Department of Homeland Security, *ICE's Compliance with Detention Limits for Aliens With a Final Order of Removal From the United States*, February 2007, ("OIG Final Order of Removal Report"), p.34.

referred to it as "dumping." Attorney Jordan Dollar—who says that ICE failed to notify him when it released his client with a mental disability from a rural Florida jail—says such lack of planning is endemic to the system:

> Once their time is up, ICE just dumps them with no resources. It contradicts their argument that ICE should be able to hold these detainees for a long time … [ICE claims release planning] isn't their issue but this is what happens when you detain mentally ill people—it becomes your issue.[194]

Inadequate post-release care means it often falls to local groups and attorneys to fill in the gaps. "The Deportation Officers rely on us to find solutions like programs that people can be released to," one attorney in Arizona said.[195]

In cases that Human Rights Watch documented where a non-citizen was able to return home to family and community treatment, release occurred through coordinated care and advocacy from family, attorneys, social services and, in a few cases, ICE trial attorneys and IJs who identified cases where a person in proceedings had a mental disability and a claim for relief and used appropriate discretion to terminate a case and encourage coordination between all parties.

The range and complexity of services that individuals with mental disabilities require means it is insufficient to simply expand the pro bono services of immigration attorneys, most of whom are already over-burdened. In the criminal justice system, public defender offices often contain in-house and liaison professionals who work to place people in appropriate rehabilitation and treatment programs. In the immigration system, an office of appointed counsel similar to the public defender office could provide such services, and help devise a post-release plan that ICE and IJs could weigh when evaluating and preparing for a detainee's release.

[194] Human Rights Watch telephone interview with Jordan Dollar, Catholic Legal Services, Miami, FL, March 16, 2010.

[195] Human Rights Watch interview with Arizona attorney, January 6, 2010.

Release and Rehabilitation in California

In California immigration lawyers and advocates have been able to obtain release for their clients and enroll them in community mental health treatment.

Attorney Veronica Barba represented an LPR with schizoaffective disorder in a cancellation of removal case. At the final hearing, she recalls, the IJ continued the hearing so that Barba could find her client a place to stay where he would receive proper treatment. Says Barba, "Luckily, the LA Department of Mental Health approved him for enrollment in their Adult Full Service Partnership program. After release from immigration custody, he was admitted to a board and care facility in LA, where he is still voluntarily living."[196]

In California, the Mental Health Services Act (Proposition 63) provides voluntary community-based mental health services to people with mental disabilities, irrespective of immigration status. According to James Preis, executive director of the Mental Health Advocacy Services, Inc., this "provides a model of intensive community services that wraps around the individual in the community and provides the individual with whatever it takes, including housing to aid in their recovery."[197] Not only is this model of service delivery effective, says Preis, but by providing housing, it also responds to the concerns of immigration judges and immigration officials as to where a detainee can be released. The effectiveness of this program in Los Angeles County, notes psychiatric resident Kristen Ochoa, is due to the county Mental Health Court Community Reintegration Program, which links people to treatment and provides specialized programming on rehabilitation skills and reintegration into the community.[198]

Lawyers agreed that having mental health services available in the community was both persuasive to immigration authorities and immigration judges in arguing for release, and meant people were able to reintegrate into their communities and receive treatment. Survivors of Torture, International (SOTI) in San Diego provides psychological counseling and related services to individuals coming out of immigration detention. Says Kathi Anderson, Executive Director at SOTI, "It is a huge relief for attorneys to have case management services available when people are released. There hasn't been a model to pull together the mental health and legal communities before."[199]

[196] Human Rights Watch email correspondence with Veronica Barba, ABA Immigration Project, April 15, 2010.

[197] Human Rights Watch interview with James Preis, Mental Health Services of Los Angeles, Los Angeles, CA, February 12, 2010, and email correspondence, April 13, 2010.

[198] Human Rights Watch email correspondence with Kristen Ochoa, Los Angeles, CA, April 15, 2010.

[199] Human Rights Watch interview with Kathi Anderson, Survivors of Torture International, San Diego, CA, February 8, 2010.

When Safeguards Cannot Make Proceedings Fair

Appointing counsel and providing coordinated services would ensure that most non-citizens with mental disabilities have an opportunity to defend his or her rights, and obtain a just and appropriate result in immigration court.

However, occasionally a lawyer will not be enough to safeguard the rights of a non-citizen who has a mental disability that almost completely impairs ability to communicate with counsel or the court; express interests; make key decisions even with support; comprehend the meaning of deportation; or provide basic biographical information needed to determine the correct strategy to pursue. In such cases, where no accommodation will enable a person with mental disabilities to proceed effectively in court or ensure a just and accurate result, immigration judges need power to terminate proceedings.

Immigration courts and attorneys may never be able to determine the rights, interests and identity of a person with mental disabilities in proceedings. Nor may they be able to fulfill the basic purpose of immigration law—to allow those with a lawful basis to remain in the US and deport those without such a basis. As Attorney Elizabeth Sweet observed:

> There are serious questions for an attorney when representing someone who suffers from a severe mental disability. Does the attorney know everything they should about their client and the family history? Is the attorney aware of all the legal claims that could be raised? In this type of situation, there is an argument that proceedings should be terminated.[200]

Even the assistance of a lawyer, family, case workers, ICE and DHS staff may not solve the problem that a person with significant mental disabilities cannot provide foundational information for his or her case. As one attorney told Human Rights Watch:

> [Y]ou can't say there is no basis for relief if they can't participate in the proceeding. It is impossible to tell if there is a well-founded fear of returning to the country of origin; and until courts are able to make that determination with any certainty, it is impossible to say there is no relief.[201]

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[200] Human Rights Watch interview with Elizabeth Sweet, American Bar Association Immigration Project, San Diego, CA, February 9, 2010.

[201] Human Rights Watch interview with immigration attorney in Arizona, January 6, 2010.

This situation is more than theoretical. Human Rights Watch terminated an interview with one detainee because the interviewer could not obtain informed consent, and two more where informed consent was in doubt by the end of the interview; DHS representatives at one facility determined that an individual whom Human Rights Watch planned to interview was not competent to consent to or participate in an interview. The individual whose interview Human Rights Watch terminated at the outset could not understand or answer any questions; she did not understand what a court was and could not say if she wanted to stay in the US. Human Rights Watch interviewed one man with mental disabilities facing deportation who did not know his date of birth.[202] Another did not know what a judge was.[203]

The immigration system already anticipates discretion in canceling a proceeding that would otherwise waste government resources without serving government interests. For example, immigration officers can withdraw a notice to appear if the "circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government."[204] The DHS has also encouraged trial attorneys to work with ICE and other agencies to discourage issuing a Notice to Appear (NTA) (the charging document that commences immigration proceedings) where, for example, "sympathetic humanitarian factors" would instead recommend deferring prosecution.[205]

However, advocates whom Human Rights Watch interviewed said that they had not seen ICE—which retains initial responsibility for charging or not charging a non-citizen—exercise much prosecutorial discretion. They recommended that ICE incorporate an individual's mental disability into its prosecutorial decisions, particularly when it is severe and ongoing. One immigration judge told Human Rights Watch:

> There should be a screening process implemented to determine whether NTA's should be filed or if there are alternatives to removal proceedings. Systems can be put in place to protect the interests of the public and the mentally ill. We need some judicial process that is not adversarial; I don't trust ICE/DHS to determine what is best for the mentally ill.[206]

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[202] Human Rights Watch interview with Fernando C. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[203] Human Rights Watch interview with Miguel B. (pseudonym), York County Jail, York, PA, February 17, 2010.

[204] 8 CFR Section 239(7).

[205] William J. Howard, Principal Legal Advisor, Department of Homeland Security, Memorandum to All OPLA Chief Counsel, "Prosecutorial Discretion," October 24, 2005.

[206] Human Rights Watch interview with Immigration Judge 1 (name withheld), February 11, 2010.

Existing regulations and case law imply that the presence of counsel in immigration court outweighs or implicitly cures any unfairness, even if a non-citizen does not understand the proceedings against him or her.[207] "Trying to fix the regulations misses the point; these people should not be in removal proceedings in the first place," said one immigrations judge.[208]

In contrast, in the criminal justice system it is not enough to have a lawyer: the state cannot prosecute and convict 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."[209]

Immigration cases do not have a similar standard. Once the NTA has been filed, immigration judges have no discretion or authority to end proceedings if they believe it is impossible to assure their accuracy and fairness, nor have they power to decide if a case belongs in a courtroom at all. Judges are only explicitly permitted to terminate proceedings to allow a non-citizen to pursue a naturalization application, or if evidence shows the government has not proved removability.[210] Immigration judges are permitted to administratively close a case—a temporary measure—but only with the agreement of both parties.[211]

However, in practice, IJs who do try to terminate cases often find their authority questioned and their position without support from the EOIR or reviewing authority (the Board of Immigration Appeals). One immigration judge explained, "We can terminate a case but DHS can appeal; there is nothing published on the right to terminate a case in this situation."[212]

Even when trial attorneys agree to terminate proceedings or find equitable solutions, the message from DHS is often to recalendar the cases and proceed against the individual.[213] This leaves immigration judges in a bind:

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[207] Mimi E. Tsankov, "Incompetent Respondents in Removal proceedings," Immigration Law Advisor, vol. 3 no.4 (April 2009).

[208] Human Rights Watch telephone interview with Immigration Judge 1 (name withheld), February 11, 2010.

[209] *Dusky v. US*, 362 US 402 (1960); *Drope v. Missouri*, 420 US 162, 171 (1975).

[210] 8 C.F.R. Section 1239.2(f); EOIR 2009 Statistical Year Book, p.7.

[211] See *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990); and *Matter of Munoz-Santos*, 20 I&N Dec. 205 (BIA 1990). See also *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114 (9th Cir. 2009).

[212] Human Rights Watch telephone interview with Immigration Judge 2 (name withheld), December 4, 2009.

[213] Human Rights Watch telephone interview with Immigration Judge 1 (name withheld), February 11, 2010.

> …I feel so impotent and so powerless. I sit there thinking, is anybody looking at this the same way I am? Why is this person in my courtroom? Why have I been asked to do THIS?[214]

The new section on mental disability in the Immigration Judge Benchbook proposes that IJs might terminate proceedings where the non-citizen's mental disability makes participation in immigration court impossible. This section also admitted that the Board of Immigration Appeals has never upheld an immigration judge's decision to terminate a proceeding on the basis that the non-citizen's mental health condition made the proceeding unfair. However, the Benchbook states that "it remains an open question under the Fifth Amendment Due Process Clause whether proceedings could be terminated to assure fundamental fairness where an alien is severely or profoundly incompetent, and no person can be identified to protect his or her interests other than a DHS custodian."[215]

Without authority to terminate proceedings and corresponding procedures to determine that a person cannot proceed in immigration court, IJs may be powerless to ensure a fair hearing for a person with significant mental disabilities who cannot participate in hearings or understand the content and consequences of statements in court. Without a mechanism for resolving these cases, the immigration system effectively renounces these cases, allowing individuals with mental disabilities to languish in detention until the system gets it right.

[214] Human Rights Watch telephone interview with Immigration Judge 1 (name withheld), February 11, 2010.

[215] IJ Benchbook, "Mental Health Issues," April 2010.

VI. Violations of the Right to be Free from Arbitrary Detention

I don't know why I have to be here.
—Huynh B. (pseudonym), Eloy Detention Center, Eloy, AZ, January 5, 2010.

Legal Standards Requiring Freedom from Arbitrary Detention

The rights to liberty and to be free from arbitrary detention are central tenets of human rights law.

The International Covenant on Civil and Political Rights (ICCPR), which is binding law in the United States, provides that everyone has the right to liberty and must have an opportunity to challenge deprivation of liberty before a court.[216] The Human Rights Committee, which monitors compliance with the ICCPR, states that this right applies to all deprivations of liberty, including immigration detention or confinement on account of mental impairment.[217] The Convention on the Rights of Persons with Disabilities further requires that persons with mental disabilities, on an equal basis with others, "are not deprived of their liberty unlawfully or arbitrarily."[218]

US immigration law and policy violate international law, and subject non-citizens with mental disabilities to arbitrary and prolonged detention through mandatory detention laws; protracted court hearings during which most non-citizens stay in detention; and prolonged and indefinite detention of non-citizens who have already received a final order of removal.

The United Nations Working Group on Arbitrary Detention recognizes "the sovereign right of states to regulate migration." However, it also cautions that "immigration detention should gradually be abolished…. If there has to be administrative detention, the principle of proportionality requires it to be a last resort."[219] The Human Rights Committee has also

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[216] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, Article 9(1)"No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;" ICCPR, art.9(4).

[217] Human Rights Committee, General Comment No. 8, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 37th sess., Supp. No. 40, Annex V at 95 (1982).

[218] CRPD, art.14 (2).

[219] UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, January 18, 2010, para. 59.

addressed immigration detention and declared that detention is arbitrary "if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of *proportionality* becomes relevant in this context."[220] This means that immigration detention should only be used in those cases in which legitimate government interests cannot be fulfilled through any other means. Moreover, detaining persons with mental disabilities contravenes international and domestic law requiring that such individuals can access treatment and live in the community.[221] Under current US immigration law—and in violation of human rights law—detention is the default, even though alternatives to detention exist for non-citizens facing deportation. Also in violation of human rights and US law, many immigration detainees are not allowed to be released to the community to receive treatment and care during immigration proceedings.

International human rights law binding on the United States is clear that legal proceedings should not involve unnecessary delay in their final resolution. The Human Rights Committee has explained the right to a fair trial without delay "relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered…. "[222] The standards are relevant to immigration proceedings, where a person is detained, even though they were geared towards criminal defendants who face deprivation of liberty at a trial where he or she may be acquitted and released. The ICCPR states in Article 9.3:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.[223]

US law violates this international standard where non-citizens with mental disabilities are subject to prolonged detention due to inflexible detention policies during court proceedings. These individuals languish in illegal detention with no end in sight because immigration

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[220] A v. Australia Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 , April 30, 1997, para.9.2 (emphasis added).

[221] Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. res. 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991), principle 9.1; *Olmstead v. L.C.*, 527 U.S. 581 (1999) (requiring that states provide services to individuals with disabilities in the "most integrated setting"); Disability Advocates Inc. v. Paterson et al., No. 03 CV 3209, 2009 WL 2872833 (E.D.N.Y., Sept. 8, 2009); American with Disabilities Act, 42 U.S.C. Section 12101 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. Section 791 et seq.

[222] UN Human Rights Committee, General Comment no. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law, HRI/GEN/1/Rev.1 (1984) art. 14.

[223] ICCPR, art.9(3).

courts are not equipped to handle cases where a person with mental disability cannot represent themselves, and often cannot order release in the interim.

Finally, human rights law recognizes that detention must have a legal basis and justification, and that its "nature and duration" must be related to its purpose.[224] Under international law, a person is entitled to have a judicial authority promptly review their detention, and to be represented at such a hearing.[225] Detention becomes arbitrary under human rights law when it "manifestly cannot be linked to any legal basis."[226] Governments cannot create regulations to authorize detention that would be otherwise disproportionate or unjust.[227] The Human Rights Committee explicitly stated that meaningful review of the "lawfulness of detention" under article 9, paragraph 4 of the ICCPR "must include the possibility of ordering release, [and] is not limited to mere compliance of the detention with domestic law."[228]

US immigration law—in violation of international law— permits indefinite detention of non-citizens in unique circumstances after they have received a final deportation order from an immigration court. US law authorizes that a non-citizen who has been ordered removed from the US be detained for a period of time "reasonably necessary" to effectuate removal and to ensure that the individual is not a security or flight risk while awaiting deportation.[229] However, as US law acknowledges, the government's need to prevent flight is a "weak or nonexistent" justification for continued detention where removal "seems a remote possibility at best," and danger by itself is insufficient to justify prolonged and indefinite detention.[230] Still, US law on detention after a final order of removal does permit indefinite detention of persons with mental disabilities who are either classified as "specially dangerous" or accused of "obstructing" deportation. Because non-citizens with mental disabilities have no right to an appointed lawyer, these individuals may languish in detention without help to challenge their indefinite detention, or the possibility of review.

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[224] ICCPR art.9; UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/1992/20, January 21, 1992, Annex 1; *Jackson v. Indiana*, 406 US 715, 738 (1972); *Jackson v. Indiana*, 406 US 715, 738 (1972).

[225] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted December 9, 1988, G.A. Res. 43/173, annex, 43, U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988), at para. 11.1.

[226] UN Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/1992/20, January 21, 1992.

[227] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 172 (1993) ("[i]t is not enough for deprivation of liberty to be provided for by law. The law itself must not be arbitrary, and the enforcement of the law in a given case must not take place arbitrarily."); William J. Aceves, Paul L. Hoffman and Joan Fitzpatrick, Brief of Amici Curiae International Human Rights Organizations In Support of Respondent, *Demore v. Kim*, October 28, 2002.

[228] A v. Australia Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 , April 30, 1997, at para. 9.5.

[229] *Zadvydas v. Davis*, 533 US 678, 688-90 (2001).

[230] Ibid., p. 690-91.

Inflexible Detention Policies

In 1952, the Supreme Court deemed detention "necessarily" a part of the deportation procedure.[231] Since then, ICE's reliance on detention, particularly mandatory detention, has increased. In 1996, ICE detained less than 10,000 people a day;[232] as of September 1, 2009, 31,075 people were in ICE detention, 20,510 (66 percent) of whom were subject to mandatory detention.[233]

In 1996, the US Congress introduced sweeping changes to US immigration law that made many non-citizens, including LPRs, subject to mandatory detention, including if they have past convictions for a variety of offenses, including non-violent ones such as theft and drug possession.[234] Once subject to mandatory detention, non-citizens cannot be released on bond, even if there are medical or mental health concerns. Although ICE officers may have authority to use discretion to release individuals with mental disabilities from detention during their immigration hearings, this possibility is not apparent from a strict reading of the mandatory detention statute; and to the extent that discretion does exist, it is only rarely exercised.

Approximately 66 percent (20,509) of detainees were subject to mandatory detention as of September 2009, according to ICE.[235] Such detention is meant to ensure that the most violent criminal offenders are detained throughout their immigration court hearings. But data from September 1, 2009, shows that only 5.6 percent of the total detained population had committed violent crimes.[236] Ironically, this is happening at a time when the criminal justice system is moving away from a focus on incarceration, to diverting people to "problem-solving courts" like mental health and drug courts.[237]

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[231] *Carlson v. Landon*, 342 US 524, 538 (1952).

[232] Office of Inspector General, Immigration and Naturalization Service, "Contracting for Detention Space," Audit Report 97-05 (1/97), p. 2, http://www.usdoj.gov/oig/reports/INS/a9705/index.htm (accessed July 7, 2010).

[233] Schriro Report, p.2.

[234] See the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-628; Antiterrorism and Effective Death Penalty Act (AEDPA), Public Law No. 104-132, 110 Stat. 1214.

[235] Schriro Detention Report, p.2.

[236] Ibid. ("Of the aliens in detention on September 1, 66 percent were subject to mandatory detention and 51 percent were felons, of which, 11 percent had committed violent crimes. The majority of the population is characterized as low custody, or having a low propensity for violence.")

[237] The movement of people from the criminal justice system and into immigration detention has been facilitated by increased collaboration between ICE and local law enforcement officers through contractual arrangements under the 287(g) provision of the INA, which permits local police to arrest and detain non-citizens on behalf of ICE (see 8 U.S.C. Section 1357(g)). As of April 2010, ICE reported having enrolled 71 agencies in 26 states and trained 1,120 officers under the program. See Department of Homeland Security, US Immigration and Customs Enforcement, "Updated Facts on ICE's 287g Program," April 12, 2010, http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm (accessed July 7, 2010).

It is in the interest of justice, court efficiency, and reducing detention costs that non-citizens with mental disabilities are in the best position possible to participate in their cases. This is sometimes best achieved if they participate in proceedings while they receive mental health treatment in the community, and live near their families or in residential treatment centers, as several interviewees had been doing when ICE arrested them. However, US mandatory detention laws mean that they often found themselves in detention facilities, far from their families and mental health care providers. Many individuals interviewed after release from detention said their conditions had deteriorated while there, and that they were unable to participate in court, leading to delays in court hearings and sometimes, mistaken statements against their own interest (for example, saying they wanted to be deported and later regretting it.)

Denzel S., an LPR with schizophrenia, was living in New York with his family when ICE arrested him and transferred him to a facility in south Texas. By the time Human Rights Watch interviewed Denzel, ICE had sent him to a Texas hospital for emergency care on at least four occasions. As a result, he had missed multiple court hearings.[238]

> The first time was when I tried to hang myself because the voices kept telling me to…. The second time [I was taken to the hospital] was when I was banging on the door and my hands were bruised and swollen. They told me I needed to go back to the hospital where there were people like me…. Here I'm on lockdown 23 hours a day which just makes the voices much worse. And when there is too much noise, I start hearing voices … I would like to go back to the hospital.[239]

Peter G., a farmer worker from Jamaica with paranoid schizophrenia who overstayed his work visa, was living in a group home when ICE arrested him. According to Peter's attorney, ICE officers immediately took his client to a hospital because he was virtually non-responsive and needed continued medical attention at the time of his arrest.[240] In both these cases, and in many others, it would have been just and efficient for ICE to refrain from detaining these individuals in the first place, particularly where there is no flight risk.

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[238] Human Rights Watch interview with Jodi Goodwin, Los Fresnos, TX, January 19, 2010.

[239] Human Rights Watch interview with Denzel S. (pseudonym), Port Isabel Detention Center, Los Fresnos, TX, January 19, 2010.

[240] Human Rights Watch telephone interview with Jordan Dollar, Catholic Legal Services, Miami, FL, March 16, 2010.

According to an ICE memorandum, its officers are allowed to exercise discretion, and can abstain from detaining an individual "in cases of extreme or severe medical concern."[241] However, on its face, the mandatory detention statute leaves unclear whether persons subject to mandatory detention remain eligible for discretionary release, leading to confusion and inconsistencies amongst ICE field offices.

Even outside mandatory detention circumstances, research indicates that some people with mental disabilities are being unnecessarily detained.[242] Interviews conducted for this report in New York indicate that ICE sometimes apprehends and detains non-citizens who have been found incapacitated to stand trial in New York criminal court and ordered committed to a psychiatric care facility.[243]

Involuntary admission to a psychiatric care facility raises its own concerns under international human rights law. Of particular relevance to this report, however, is ICE's decision to arrest and detain a non-citizen, found incompetent to stand trial by a criminal court or ordered to receive treatment at a psychiatric facility—a decision that appears to depend on whether ICE is confident it will be able to apprehend the individual once treatment ends. For example, a non-citizen with a felony charge might not be detained by ICE (but rather permitted to receive treatment at a secure psychiatric care facility), whereas someone with a misdemeanor is likely to be arrested by ICE as soon as the court orders them to treatment because of the concern that the non-citizen will be sent to a less secure facility.[244] This approach contradicts ICE's own description of its enforcement goals, which are to prioritize the most serious criminals for deportation.[245]

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[241] John P. Torres, US Immigration and Customs Enforcement, Office of Detention and Removal Operations, Director, Memorandum, "Discretion in Cases of Extreme or Severe Medical Concern," December 11, 2006, http://www.ice.gov/doclib/foia/dro_policy_memos/discretionincasesofextremeorseveremedicalconcerndec112006.pdf (access July 7, 2010).

[242] For example, Mamawa P., a refugee from Liberia who asked to be deported, had been in detention for at least two months at the time of her interview with Human Rights Watch even though there were no charges against her. Human Rights Watch interview with Mamawa P., Kenosha County Jail, Kenosha, WI, February 3, 2010. Another individual, Nathaniel L., was removed from a residential living and treatment center and spent months in detention before ICE charged him with an aggravated felony, making him subject to mandatory detention. Human Rights Watch interview with Allison Kent, March 2, 2010. Moreover, many unrepresented individuals interviewed for this report said they had never seen the charges against them; some of these individuals may have been eligible for release on bond or under orders of supervision and, with legal assistance, may have been able to advocate for release from detention.

[243] Human Rights Watch telephone interview with Dr. Homer Venters, NYU Bellevue Hospital, March 15, 2010, and email correspondence, April 8, 2010; Human Rights Watch telephone interview with Heidi Altman, Neighborhood Defender Services, New York, NY, April 5, 2010.

[244] Human Rights Watch telephone interview with Dr. Homer Venters, NYU Bellevue Hospital, March 15, 2010, and email correspondence, April 8, 2010.

[245] John Morton, US Immigration and Customs Enforcement, Assistant Secretary, Department of Homeland Security, "Secure Communities Factsheet," September 1, 2009, http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf

While legislative reforms might better address policies and procedures on the detention of persons with mental disabilities, ICE is taking some steps to reconsider its practices at the administrative level—as suggested by the 2009 evaluation of immigration detention policies and practices. Conducted by Dr. Dora Schriro, the evaluation recommended that ICE develop "requisite management tools and informational systems to detain and supervise aliens in a setting consistent with assessed risk."[246]

For example, on June 30, 2010, ICE released a new memorandum on its priorities in the arrest, detention and deportation of non-citizens.[247] The new guidance notes that ICE officers should not detain non-citizens who have serious mental disabilities and are not subject to mandatory detention: in cases where the person is subject to mandatory detention, ICE officers should "contact their local ICE Office of Chief Counsel for guidance."[248] However, this guidance is weak, has limited enforceability, and still permits mandatory detention to be the default, even for vulnerable populations.

As of July 14, 2010, ICE was working on improving its detention decision-making. Representatives from the immigration advocacy community are working with the agency to develop a "risk assessment tool" that would take a non-citizen's vulnerabilities—for example, mental health treatment needs—into account when ICE decides whether detention is necessary in a particular case. This nascent tool, along with other policies being developed by ICE in consultation with advocates on alternatives to detention and detention reform, will eventually be used to determine whether and in what type of facility or under what alternative arrangements a vulnerable person should be held.

In accordance with human rights law prohibiting arbitrary, unnecessary and prolonged detention, the risk assessment tool should operate to divert persons with significant mental disabilities from detention, irrespective of whether or not they are subject to mandatory detention. ICE needs to clarify that a non-citizen with a mental disability should not be detained, unless there is evidence that a person poses a security threat or flight risk.

(accessed May 27, 2010)("ICE is focusing efforts first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses.")

[246] Schriro Report, p.3.

[247] John Morton, Assistant Secretary, U.S. Immigration and Customs Enforcement, "Civil Immigration enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," June 30, 2010, http://www.ice.gov/doclib/civil_enforcement_priorities.pdf (accessed July 7, 2010).

[248] Ibid., p.3-4.

While ICE will need to develop new and nuanced screening tools to appropriately identify individuals with mental disabilities, many individuals arriving in detention can easily be identified as having a mental disability based on current medication, documented history of psychiatric care, social security disability benefits, prior findings of incompetence in criminal court, jail and prison records of medical attention, and medication prescriptions. Such background information should be reviewed at intake so that staff can consider diversion or release from detention, or appropriate placement if detention is needed. However, it should remain separate from the individual's A-file and the prosecutorial branch of the Department of Homeland Security to protect the individual's privacy and to ensure that ICE does not use this information against the individual during the hearing. This process requires the input of all stakeholders, particularly persons with disabilities themselves, legal and immigration experts, and medical professionals.

Developing robust protections and enhanced screening at the front end of detention can reduce the number of people with mental disabilities placed there at the outset. Periodic review of detainees must also identify those with mental disabilities whose conditions deteriorate, or who begin to experience a mental disability, in detention. At each periodic review the burden must be on the authorities to justify the need for continuing detention. Greater regulatory guidance and legal protections must be enacted to ensure that persons with mental disabilities are not lost in detention, or indefinitely detained during or after immigration proceedings.

Failures to Provide Efficient Proceedings and to Limit Detention

Immigration courts now handle more cases, which take longer to pass through the system, than ever before.

Transactional Records Access Clearinghouse's (TRAC) May 2010 data shows that immigration courts—already overwhelmed and backed up in case management—have experienced a 30.4 percent increase in pending cases since 2008 (an increase of six percent since TRAC's March report). The average time that pending cases now wait in immigration court is currently at a record high of 443 days.[249]

Such delays are predictable when the person facing deportation cannot represent their own interests or is undergoing treatment; there are no limits on detention; and attorneys and

[249] TRAC Immigration, "Immigration Case Backlog Still Growing," May 24, 2010, http://trac.syr.edu/immigration/reports/232/ (accessed May 25, 2010).

immigration judges—who have no authority to release individuals subject to mandatory detention—lack guidance on how to proceed with such cases.

For example, detainees and immigration lawyers told Human Rights Watch that delays often occurred when IJs issued multiple continuances so that the respondent could find an attorney—a challenging task for any detainee, let alone one with a mental disability operating without an official referral system.

For example, Christopher A., a non-citizen from Kenya with bipolar disorder who had been detained for ten months when interviewed, said that he had had "four or five" court dates without a lawyer and "desperately" needed one. "The judge said if I don't have a lawyer in April he will just have to make a decision," Christopher A. said.[250]

Delays also happen when judges attempt to explain proceedings to respondents who do not have legal representation to help them.[251] In other situations, cases have been delayed to allow a competency evaluation to be produced, or a "guardian ad litem" appointed.[252] Moreover, a merits hearing—where all the legal and factual issues in a case are presented—can take several months and require intensive fact-finding, particularly if the person in proceedings has a mental disability and cannot provide his or her lawyer with relevant information. Proceedings are also delayed when a respondent cannot proceed due to medication, or is mentally unfit to respond to legal charges. Some individuals said they had missed immigration court dates when receiving treatment in psychiatric care facilities.

Of particular concern are cases where non-citizens win their cases before an immigration judge, but are detained during appeals brought by the government. An ICE guidance memorandum from 2004 confirmed the on-going policy of releasing individuals granted asylum or withholding of removal when ICE attorneys appealed the case to the Board of Immigration Appeals (BIA).[253] But compliance with this policy is, at best, inconsistent.[254]

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[250] Human Rights Watch interview with Christopher A. (pseudonym), Kenosha County Jail, Kenosha, WI, February 4, 2010.

[251] A "continuance" is the postponement of a hearing, by order of the judge, which may be requested by one of the parties. Immigration judges may issue a continuance in a number of circumstances, for example, to give a non-citizen time to find a lawyer, collect relevant documents or witnesses, or to get a competency evaluation.

[252] A guardian ad litem is a person who is appointed by a court to represent an individual in need of additional assistance. Guardians have legal authority to make decisions on behalf of the individual ("ward") they represent, and courts may tailor the authority of the guardian to control of the specific interests at issue in litigation. Some advocates interviewed by Human Rights Watch researchers said they worked with legal guardians in immigration cases where they could not identify the interests or will of the client.

[253] Michael J. Garcia, US Immigration and Customs Enforcement, DHS, Assistant Secretary, Memorandum, "Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed," February 9, 2004.

Even LPRs with family in the US are subject to continued detention when the government appeals a favorable decision for the detainee. Human Rights Watch documented one case where an LPR from the Philippines who had been in the US since the age of four or five, won relief from deportation on December 7, 2009, on the grounds that her mental impairment and history of sexual victimization meant she was vulnerable to persecution and sexual exploitation if returned to the Philippines.[255] The woman, who attempted suicide while in immigration detention, was still there as of July 7, 2010, because the government appealed the grant of relief to the BIA.[256]

The inability of IJs to provide safeguards in court—for example, by appointing a lawyer—is exacerbated by the absence of firm temporal limits on detention during immigration hearings. In *Demore v. Kim*, the US Supreme Court upheld mandatory detention of certain non-citizens convicted of particular crimes, but only "for the brief period necessary for their removal proceedings," a period the court described as approximately 45 days for the 85 percent of cases in which an individual did not appeal an IJ's decision, and an additional four months for those who appealed to the BIA.[257] But the case did not establish a firm limit for how long an individual can be detained during immigration proceedings.

Fifteen of the thirty-two individuals who gave Human Rights Watch a date that they entered immigration detention had been held more than six months, thus exceeding the "brief period" anticipated by the Supreme Court in *Demore*. Nine of these individuals had been detained for over one year, two for 18 months, one for two years, and one for over four years. The individuals interviewed for this report were in different stages of their proceedings; some had not seen a judge at all; others were detained pending appeals before the BIA or the court of appeals – a process that can take months, if not years. Still others had received an order of removal but did not know when or if that would be effectuated.

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[254] Human Rights First, *U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison*, June 2009; Shelley Murphy, "Refugee jailed as US fights asylum grant: ACLU suit pushes immediate release," *The Boston Globe*, April 30, 2010, http://www.boston.com/news/local/massachusetts/articles/2010/04/30/refugee_languishes_as_us_fights_asylum_decision/ (accessed June 7, 2010).

[255] Human Rights Watch interview with Matthew Green and Jesse Evans-Schroeder, Tucson, AZ, January 8, 2010.

[256] Human Rights Watch email correspondence with Jesse Evans-Schroeder, June 22, 2010.

[257] *Demore v. Kim*, 538 US 510, 513 (2003).

Table 2 – Length of time in detention of persons with mental disabilities interviewed by HRW

Length of time in detention	Number of interviewees
Less than 1 month	2
1-3 months	9
3-6 months	6
6months-1 year	6
1-2 years	8
Over 4 years	1

Where the individual appears to have a mental disability and cannot participate in court, some IJs have administratively closed the case. Both sides must agree to this step, which removes the case from the court calendar and puts it on hold, rather than ending it altogether.[258] Administrative closure does not trigger release from detention,[259] which may even be prolonged in the absence of limits on detention during immigration hearings, and can fail to address the reasons for which the case was administratively closed—the need for treatment and/or the inability of a person to proceed in court.

"The risk with administrative closure is that the person may still remain detained and end up stuck in a legal black hole," said attorney Christina Powers.[260]

Neither case law nor immigration regulations limit the time that a person can be detained during administrative closure before the case is decided.[261] Human Rights Watch was told of cases where an IJ administratively closed cases to allow the DHS to provide competency evaluations, and in those cases, the competency evaluations were never completed even while the individuals remained detained and in ICE custody.[262]

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[258] *Matter of Amico*, 19 I&N Dec.652, 654 n. 1 (BIA 1988).

[259] As discussed in the previous chapter, administrative closure puts a case on hold but does not end the case, and in many cases, immigration judges cannot order a detainee released from detention, if he or she is subject to mandatory detention, before the case has been finally resolved.

[260] Human Rights Watch telephone interview with Christina Powers, Pittsburgh, PA, December 7, 2009.

[261] The Immigration Judge Benchbook, published by EOIR to provide guidance for immigration judges, defines administrative closure as "merely a procedural convenience that authorizes the temporary removal of proceedings from the Court's calendar while retaining the proceedings on the Court's docket," IJ Benchbook, Chapter 1, http://www.justice.gov/eoir/vll/benchbook/resources/criminal/CHAPTER percent20IJurisdiction percent20of percent20the percent20Court percent20 percent28Section percent20240 percent20Removal.htm#Administrative_Closure (accessed May 9, 2010). Published cases on administrative closure in immigration court do not offer any discussion on time limits and procedures for recalendaring a hearing. See *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996); *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990); and *Matter of Munoz-Santos*, 20 I&N Dec. 205 (BIA 1990). *See also Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114 (9th Cir. 2009).

[262] Human Rights Watch telephone interview with Immigration Judge 1 (name withheld), February 11, 2010.

Similarly, two men in southern California remained in detention for more than four years while waiting for their immigration hearings after an IJ determined they were not competent to proceed with their hearings and administratively closed the cases. The government finally agreed to release them on March 31, 2010, just days after legal service organizations in southern California filed lawsuits on the men's behalf.[263]

In other cases, immigration proceedings and detention are prolonged because of transfer for treatment. While this may be a laudable goal in some cases, these transfer decisions lack transparency and are not subject to periodic review to assess the continued necessity of treatment in this facility. While this investigation did not address rights violations based on involuntary treatment and/or involuntary admission to psychiatric care facilities, in the absence of clear and transparent regulations, ICE decisions about the necessity and allocation of mental health services may raise human rights concerns. There is no regulatory guidance or internal policy guidance relating to the criteria, transfer, care, and return, of detainees who receive in-patient mental health care, and it is unclear whether treatment is voluntary and under what circumstances and by what procedures it can be refused. Many detainees interviewed by Human Rights Watch were distressed they had been detained in an immigration detention facility (or transferred from one detention facility to another) where their medication was unavailable. On the other hand, an LPR from Laos interviewed in a private health care detention facility in South Carolina said she did not know why she was transferred from California, and did not need medical or psychiatric care.[264]

ICE currently contracts with hospitals to provide medical care, including psychiatric care, for detainees. Columbia Regional Care Center (CRCC) receives immigration detainees from facilities around the country, which may use different standards and procedures for determining if an immigration detainee should receive in-patient treatment in a designated medical facility based on available services at or near the sending facility. Dr. Homer Venters, clinical instructor at Bellevue Hospital, said, "They are supposedly taking the sickest patients to Columbia Regional Care but it's not clear how routinely they reassess patients. We've seen people with severe depression, sent to CRCC for medication and then they just

[263] "Immigration Officials Announce Release of Detainees with Mental Disabilities Who Were Lost in Detention for Years," American Civil Liberties Union of Southern California, ACLU-SC press release, March 31, 2010 (accessed July 13, 2010).

[264] Human Rights Watch interview with Noma T. (pseudonym), Columbia Regional Care Center, Columbia, SC, February 22, 2010.

sit there."[265] No memorandum of understanding exists between ICE and CRCC, so procedures by which an immigration detainee is transferred to and from CRCC remain unclear.[266]

ICE and medical staff at CRCC explained to Human Rights Watch that the decision to transfer an ICE detainee to CRCC (and back to the original facility when treatment is complete) is purely medical, made by medical (as opposed to custodial) staff at the facility. In some cases, DIHS staff at CRCC noted, return to the sending facility may be delayed or not possible if medical staff determine that an immigration detainee requires on-going treatment and care that is not available in the sending facility.[267]

Some ICE officials apparently recognize that transfers for treatment may unnecessarily prolong immigration proceedings and detention. ICE staff at CRCC are authorized to decide that a particular detainee is better suited to community mental health care than detention with psychiatric treatment. One deportation officer at CRCC told Human Rights Watch, "We push for supervised orders of release wherever possible. In my experience we release more people than we deport from CRCC…. They tend to be more successful when returned to their families."[268] ICE staff at CRCC told Human Rights Watch that they have worked out a system whereby individuals with families can be released to them under supervised release orders; ICE and DIHS assist detainees without family to find placements in South Carolina where they can receive treatment and continue to participate in immigration proceedings on the non-detained docket. These arrangements permit individuals with mental disabilities to continue with immigration proceedings without unnecessary detention, and should be encouraged at other ICE field offices.

In addition immigration judges and ICE officers in some cases appear to be working to ensure that persons with mental disabilities are able to participate in their hearings. For example, ICE may transfer a detainee to a facility like CRCC to receive requisite mental health treatment, or IJs may allow a person additional time to find a lawyer, collect evidence, or receive mental health treatment before proceeding with the case. However laudable these actions, under the current detention regime these attempts at assistance may prolong detention, sometimes without benefit to the detainee.

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[265] Human Rights Watch telephone interview with Homer Venters, New York, NY, March 15, 2010.

[266] Letter to Human Rights Watch from Department of Homeland Security, Immigration and Customs Enforcement, "ICE/ERO response to Questions from Human Rights Watch," June 18, 2010 (on file with Human Rights Watch).

[267] Human Rights Watch conversation with DIHS staff at Columbia Regional Care Center (name withheld), Columbia, SC, February 22, 2010.

[268] Ibid.

Prolonged Detention After the Final Order of Removal

> Detention is not institutionalization. Detention is jail.
>
> —Attorney Bardis Vakili, Casa Cornelia Law Center, San Diego, CA, February 9, 2010.

In some cases, a non-citizen who has been ordered deported by an immigration judge cannot be expeditiously removed to the country of origin because it does not have diplomatic relations or repatriation agreements with the US, refuses to receive the person for other reasons, or simply fails to provide travel documents.

In 2001, the US Supreme Court in *Zadvydas v. Davis* struck down the government's policy of indefinitely detaining such individuals, holding that it raised serious constitutional problems, and that the immigration statute only authorized post-final-order detention if there was a "significant likelihood of removal in the reasonably foreseeable future."[269]

Following this decision, the government promulgated regulations establishing an administrative custody review process to comply with the Court's ruling. These regulations require review of a person's custody after the 90-day "removal period," and again at the 180-day mark.[270] During the 180-day review, the government is meant to assess whether the detainee's removal is significantly likely in the reasonably foreseeable future; if it is not, and the detainee has cooperated with removal efforts, he or she should be released. But if the detainee is found to be obstructing removal—for example, by failing to apply for a travel document—regulations allow for continued indefinite detention.[271] Many individuals with mental disabilities may be unable to cooperate with the removal process by providing information needed to obtain documents, particularly when they are in detention and have no legal assistance.

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[269] Ibid., p.701. The Supreme Court set six months as the presumptively reasonable period of time for the government to effectuate removal, after which time, if a detainee can show that there are reasons to believe that removal is not significantly likely in the reasonably foreseeable future, the government must either rebut this showing or release the individual from detention. The individual can be placed under reasonable conditions of supervision, but continued detention is not authorized.

[270] If deportation cannot occur within the 90 days, the detainee must receive a post-order custody review that looks at (1) whether the person is a flight risk if released; (2) whether the individual is a danger to the community; and (3) the likelihood of obtaining travel documents. 8 C.F.R. Section 241.4. If the detainee is still in custody after 180 days, ICE must conduct a custody determination review. 8 C.F.R. Section 241.13; Gary E. Mead, Assistant Director for Management, Office of Detention and Removal Operations, Department of Homeland Security, "Guidance Relating to 8 CFR § 241.4, Continued Detention of Aliens Beyond the Removal Period and New Procedures Relating to Case Transfers to the Custody Determination Unit (CDU)," November 14, 2007, http://www.ice.gov/doclib/foia/dro_policy_memos/guidancerelatingto8cfr241.4continueddetentionofaliensbeyondtheremovalperiodnov142007.pdf (accessed April 9, 2010).

[271] 8 CFR Section 241.4. Individuals who "willfully" fail to comply can even be criminally prosecuted. 8 U.S.C. Section 1253(a).

Human Rights Watch learned of one case where an individual has been detained for nearly ten years—more of them nine of them after he received a final removal order on January 3, 2001—because he allegedly failed to cooperate with his removal.[272] Antoni P., a lawful permanent resident from East Central Europe diagnosed with multiple psychiatric disorders including bipolar disorder and borderline personality disorder, has been in detention since November 2000. He has not yet been deported as his country of origin is in dispute; Antoni claims to be Roma and is not accepting either of the countries designated by ICE for repatriation. While the government asserts that Antoni's indefinite detention is due to his failure to assist ICE in his deportation, attorneys familiar with the case say this "non-cooperation" is in all likelihood related to Antoni's mental disability.[273]

Immigration regulations also continue to authorize indefinite detention of individuals who are determined to be "specially dangerous" due to mental illness, even though US law clearly prohibits indefinite detention of an individual in a prison or jail solely on the basis of his or her mental disability.[274] According to US law, if an individual is held in custody on account of his or her mental disability, the state must hold civil commitment hearings at which the individual has legal counsel to justify continued detention.[275] But this law is not applied in the immigration system, and detention continues indefinitely even though individuals deemed "specially dangerous" by the immigration system are entitled to periodic reviews by medical practitioners and the immigration court.

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[272] Human Rights Watch email correspondence with Jennifer Stark, American Civil Liberties Union of Southern California, May 11, 2010.

[273] Human Rights Watch email correspondence with Jennifer Stark, American Civil Liberties Union of Southern California, May 11, 2010.

[274] 8 C.F.R. Section 241.14. There is currently a division among the circuit courts as to the legality of these regulations. Compare *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008) and *Thai v. Ashcroft*, 366 F.3d 790 (9th Cir. 2004) (finding that indefinite detention of a non-citizen ordered removed who the government finds "dangerous" due to a mental illness is not permissible), with *Hernandez-Carrera v. Carlson*, 547 F.3d 1237 (10th Cir. 2008) (upholding indefinite detention under the specially dangerous regulations); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)(due process "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

[275] 18 U.S.C. Section 4246 (procedures for civil commitment of a criminal defendant at the completion of his or her sentence); *Jackson v. Indiana*, 406 U.S. 715 (1972). The Court in *Jackson* held that " indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process" and required that if a person was held not competent to proceed in a criminal trial, the state must initiate civil commitment proceedings to continue detention.

"Specially Dangerous" and in Indefinite Detention

Ly K., a 44-year-old refugee from Vietnam diagnosed with chronic paranoid schizophrenia, has been detained under these provisions for the past eight years, even though his repatriation to Vietnam is not possible. In 1995, Ly K. was convicted of attempted second-degree rape and first degree burglary and sentenced to 15 years in prison. After a tele-video hearing in which he proceeded pro se, Ly received a final order of removal on April 20, 1998, and was transferred to ICE custody in 2002. He is currently detained in Etowah County Jail, Alabama. Although the United States has been repatriating citizens and nationals of Vietnam since January 2008, the policy only applies to individuals who came to the US after July 12, 1995.[276] Since Ly K. came to US in 1992, Vietnam will not take him back.

Pursuant to the "specially dangerous" regulations, Ly K. was given a custody status review in August 2004. The custody status review board issued a Decision to Continue Detention based on Ly posing a "special danger" due to his mental illness: an immigration judge affirmed the determination several months later.[277]

In 2009, Ly K. found an attorney, Tin N. Nguyen, who has since filed a habeas petition in federal district court on Ly K's behalf. [278] Nguyen says that he is the first person Ly K. could communicate with in his dialect in years; appropriate translators were not provided in either Ly K's criminal or immigration proceedings or during his mental health evaluations.[279] Individuals adjudged "specially dangerous" like Ly K. are left in a legal limbo that violates human rights law on arbitrary and indefinite detention, and US law on the detention based on mental disability.[280] In Ly K.'s case, the IJ found that Ly K. could not be released under a supervised order of release; however, the IJ noted in his decision that the regulations provided no further guidance on how to handle Ly K's case:

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[276] Department of Homeland Security, Immigration and Customs Enforcement, "ICE Assistant Secretary Myers signs historical MOU with Vietnam," January 22, 2008, http://www.ice.gov/pi/news/newsreleases/articles/080122washington.htm (accessed July 7, 2010).

[277] Office of the Assistant Secretary, Immigration and Customs Enforcement, "Decision to Continue Detention", August 12, 2004 (on file with Human Rights Watch); Matter of (name withheld), In Continued Detention Review Proceedings, Decision and Order, November 22, 2004 (on file with Human Rights Watch).

[278] Human Rights Watch telephone interview with Tin N. Nguyen, Charlotte, NC, February 18, 2010.

[279] Ibid.

[280] 8 CFR Section 241.14(f). US law allows the detention of persons with mental disabilities where the government demonstrates "by clear and convincing evidence that the individual is mentally ill and dangerous." *Jones v. US*, 463 U.S. 354, 362 (1983). In some circumstances with strict limits, a person may be detained if he or she poses a danger to others. *United States v. Salerno*, 481 US 739, 747-49 (1987) ("There is no doubt that preventing danger to the community is a legitimate regulatory goal… Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons. Thus, we have found no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings. We have also held that the government may detain mentally unstable individuals who present a danger to the public, and dangerous defendants who become incompetent to stand trial.") (internal citations omitted).

> [N]o statutory or regulatory authority exists which would allow an Immigration Judge to terminate a federal immigration proceeding by ordering the transfer of custody of the alien into the jurisdictional control of the State of residence in order for an involuntary civil commitment to a mental health facility.[281]

In the criminal justice system, a prisoner who the authorities believed should not be released at the end of his or her sentence on account of a mental disability would be entitled to a hearing and legal representation to determine whether civil commitment is necessary.[282] A person whose liberty is taken away may not recognize a difference between a secure psychiatric facility or prison. However, the purpose of civil commitment is treatment and has a different, if related, rationale from immigration detention, which under existing law may be of indefinite duration.

In exceptional cases, when a detainee with mental disabilities has completed all removal proceedings, cannot be deported, has undergone post-final-order custody reviews, and has been adjudged as having a mental disability and also potentially dangerous, there must be accommodation for the detainee's well-being and a review of the location of custody. Instead, ICE continues to hold individuals found "specially dangerous" in regular immigration detention facilities, which are not designed to be long-term care facilities for persons with severe mental disabilities.

A 2007 report from the Office of Inspector General (OIG) for DHS found that of 428 individuals detained post-final order of removal for over 360 days, only 36 were classified as specially dangerous, which suggests that the remaining 392 had either failed to comply with deportation or were being held based on a determination that their removal was "reasonably foreseeable," even as the length of their detention implied otherwise. But many more may suffer from mental disabilities that make it difficult for them to advocate for their supervised release, or result in their being classified as failing to comply with removal. The OIG report cited one public health service officer as saying that the number of detainees with violent criminal convictions related to mental health problems significantly exceeded the 36 cases where an individual was certified as "specially dangerous."[283]

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[281] In Continued Detention Review Proceedings, A-73-257-633, November 30, 2004 (on file with Human Rights Watch).

[282] 18 U.S.C. Section 4246.

[283] OIG Final Order of Removal Report, p.14 and Appendix F, p. 55.

A finding that a post-final order detainee has a mental disability, even without a finding that he or she is "specially dangerous," should trigger judicial scrutiny of his or her detention, and an obligation on the part of ICE to seek appropriate alternatives to detention, for example, by referral to Public Health Service staff for placement in community mental health treatment. However, the OIG report found that because ICE lacks training and connections with mental health facilities, placement itself can take a long time and in some cases may result in unsuitable placements or no placement at all.[284] Furthermore, many detention facilities that ICE uses are not served by PHS staff. Staffing shortages of mental health professionals at many immigration detention facilities are well documented.[285]

Where immigration detainees remain in custody after the presumptively reasonable six month removal period, one of the only avenues for relief is to file a federal habeas corpus action to contest the continued detention. The OIG report found that approximately 40 percent of post-order of removal detainees are released after a habeas action is filed, implying that, "government entities … are finding the decisions made under the existing system cannot be supported when challenged."[286]

Immigration detainees with mental disabilities may not be able to "comply" with deportation procedures, or their detention may be extended under the regulations for "specially dangerous" individuals; they may also face particular challenges in contesting prolonged detention. As a result they are effectively punished for their mental disabilities. Post-order regulations must be amended to incorporate procedural protections for them to ensure they are not inappropriately detained, in violation of human rights law, beyond the justification for their detention and without opportunity of judicial review.

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[284] Ibid., p. 20-30.

[285] Human Rights Watch, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, March 2009; Texas Appleseed, *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and detention System*, March 2010.

[286] OIG Final Order of Removal Report, p.41.

VII. Detailed Recommendations

To ensure fair immigration proceedings for people with mental disabilities:

To the United States Congress:

- Expressly authorize mandatory appointment of counsel for non-citizens with mental disabilities in immigration proceedings, and appropriate necessary funds.
- Amend the Immigration and Nationality Act (INA) to provide immigration judges with authority to order the release from detention of vulnerable non-citizens otherwise subject to mandatory detention under conditions that ensure their access to treatment.
- Amend INA to provide immigration judges with authority to terminate proceedings in cases where the severity of a person's mental disability makes ensuring fair proceedings impossible.
- Pass The Protect Citizens and Residents from Unlawful Raids and Detention Act (S.3594) to ensure that US citizens are not erroneously detained or deported.

To the Department of Justice:

- Issue police guidance and, where necessary, utilize the rulemaking authority delegated to the Attorney General in Section 240(b)(3) and Section and Section 103(g)(2) of the Immigration and Nationality Act to develop regulations that protect the rights of non-citizens with mental disabilities in immigration court proceedings, including authorizing immigration judges, in appropriate circumstances, to appoint counsel, terminate proceedings, and exempt individuals from mandatory detention.
- Create an office of appointed counsel in immigration cases that should receive specialized training on mental disabilities.

To the Executive Office for Immigration Review (EOIR):

- Develop regulations and guidelines for immigration judges to ensure that the rights of people with mental disabilities are protected in the courtroom, including by:
    - Setting a standard for competency to proceed in an immigration hearing.
    - Eliminating the regulation that a person who is "mentally incompetent" can be represented by the "custodian," meaning the warden of the facility where he or she is detained.

    - Directing immigration judges to order a mental health evaluation where competency is in question.
    - Expressly prohibiting immigration judges from relying upon admissions of alienage by people with mental disabilities as the sole basis for the charge of removability even when represented by counsel or family or other support person if made out of court and/or before the person is represented.
    - Restricting the use of video-conferencing in cases where the non-citizen has, or appears to have, a mental disability.
- Create a mental health docket, similar to the ORR juvenile docket, by which cases where a person has a mental disability can be afforded more time and specialized attention by immigration judges.
- Expand and regularize training for immigration judges and other court staff, including interpreters, on recognizing mental disability in the courtroom and providing necessary accommodations.
- Reject stipulated orders that lack protections for non-citizens with mental disabilities;
- Work with disability rights and mental health experts to develop courtroom accommodations that will assist non-citizens with mental disabilities to participate in court.

To the Assistant Secretary of ICE:

- Reinforce commitment to exercising favorable prosecutorial discretion in cases where it appears the non-citizen has a mental disability and is either incapable of presenting their case in court, or likely to prevail in his or her action for relief, including by:
    - Dismissing legally insufficient cases where the only evidence of alienage and deportability is the admission of a person with a mental disability.
    - Not opposing or appealing a grant of relief by the immigration court where the factors in an individual case favor the grant of relief.
    - Moving to terminate proceedings and withdraw the NTA in cases where the person is not able to present their case, even with legal assistance, due to the severity of his or her mental disability.
    - Joining in a "motion to reopen" in cases where a person with mental disabilities may be eligible for relief but was unable to present their claims in the prior hearing on account of their disability.
- Provide trainings for ICE trial attorneys on recognizing and interacting with individuals with mental disabilities in the courtroom, and to ensure that they implement the policies of the Principal Legal Advisor as set forth above.

- Ensure the cooperation of ICE trial attorneys in expeditiously providing the non-citizen's medical records and mental health evaluations to the court for use solely in determining competency and the need for appointment of counsel.
- Develop a firewall to protect detainee medical information so that non-citizens' medical background can be used to accurately assess treatment needs and parole eligibility but will not be provided to the immigration court except for the purpose of determining competency and the need for appointment of counsel.

To the US Citizenship and Immigration Services (USCIS):

- Develop guidance on asylum applicants to identify and accommodate individuals with mental disabilities and route appropriate cases to EOIR's mental health docket.

To ensure that immigration courts are aware when a person has a mental disability:

To the Assistant Secretary of ICE:

- Require a panel of medical professionals to conduct initial and periodic mental health screenings and evaluations in immigration detention facilities.
- Require ICE staff and trial attorneys to inform the court when a non-citizen is suspected of having a mental disability.
- Develop a firewall to protect detainee medical information so that non-citizens' medical background can be used to assess competence and need for appointment of counsel but will not otherwise be provided to the immigration court for use in removal proceedings except by the detainee or his/her counsel.
- Continue to work with advocacy organizations to develop a risk assessment tool that recognizes mental disability as identified through SSI benefits, documented history of mental disability, etc., and to explore Alternatives to Detention for those who cannot be released.

To reduce unnecessary detention during immigration proceedings:

To the United States Congress:

- Amend Section 236(c) of the Immigration and Nationality Act to permit an exception to mandatory detention for vulnerable groups, including non-citizens with mental disabilities.

To the Assistant Secretary of ICE:

- Ensure all policies on classification and detention of persons with mental disabilities require placement in the least restrictive setting during their immigration proceedings, in accordance with federal and human rights law.
- Ensure that ICE officers adhere to federal law barring arrests of non-citizens receiving treatment at psychiatric facilities.
- Ensure that the policy favoring release when asylum is granted but ICE takes an appeal is applied, particularly in cases of persons with mental disabilities.
- Require involvement of medical professionals in facility mental health screenings who can recommend alternative placements to detention for individuals with significant mental disabilities.
- Clarify that dispositions by "problem-solving courts" such as mental health courts and the effect of these decisions on the charges against a non-citizen will not be considered to be convictions for purposes of the INA.
- Discontinue arrests of non-citizens with mental disabilities ordered to in-patient mental health treatment by criminal courts after finding a non-citizen defendant to be mentally incompetent.
- Encourage and institutionalize the use of release on one's own recognizance and, when necessary, bond where a detainee has a mental disability.
- Ensure that detainees' family and attorney are promptly informed when a detainee is removed from a detention center for emergency, short-term or long-term mental health treatment.
- Ensure that a detainee's family and attorney have access to any detainee transferred to a psychiatric facility for mental health treatment.
- Develop procedures to be used at every facility where ICE detainees are held that identify detainees in need of in-patient psychiatric care.
- Prohibit transfers of immigration detainees with mental disabilities away from family and community mental health services.

To the Executive Office for Immigration Review (EOIR):

- Establish guidelines for administrative closure where a judge determines that a person in immigration proceedings is incompetent so that administrative closure would include:
    - The authority to order release of an individual from detention.
    - Periodic review by a court if the non-citizen remained in detention with the authorities required to justify continuing detention.

- Require individualized hearings to determine whether detention is appropriate for individuals with mental disabilities once the court is on notice that a person has a mental disability, notwithstanding any otherwise-applicable laws mandating the detention of such individual.

To limit prolonged detention after deportation has been ordered:

To the Assistant Secretary of ICE:

- Monitor and enforce the 90-day and 180-day post order custody review process for all detainees, especially those with mental disabilities who may not be able to advocate for their own release.
- Ensure that people with mental disabilities are not indefinitely detained for "failing to cooperate" with removal by:
    - Providing appointed counsel throughout the post-order custody review process.
    - Clearly communicating to detainees what is expected of them during the post-order process and providing accommodations to detainees with mental disabilities.
    - Exercising discretion not to charge a person with "failure to cooperate" or refer for federal prosecution where the person's mental competency is in question, and not continuing detention on that basis.
    - Training DRO staff on how mental disabilities may affect the ability to comply.
- Work with local mental health facilities and NGOs, including state protection and advocacy organizations, ahead of the 180-day post-order custody review to find placements in the community for people with mental disabilities not otherwise referred to an immigration judge for classifications as "specially dangerous."
- Rescind regulations that authorize indefinite detention for non-citizens judged to be to be "specially dangerous," and replace with procedures for transferring such individuals to appropriate, secure psychiatric facilities after a civil commitment hearing at which the individual's wishes are taken into account and he or she is represented by appointed counsel. If a civil commitment hearing finds that a non-citizen does not require in-patient psychiatric care, he or she should be released to appropriate community care.

Acknowledgements

This report was researched and written by Sarah Mehta, Aryeh Neier fellow at Human Rights Watch and the American Civil Liberties Union. This report was edited by Alison Parker, US program director; Bill Frelick, refugee policy director; Meghan Rhoad, researcher in the women's rights division; Shantha Rau Barriga, disability rights researcher in the health and human rights division; Joseph Amon, health and human rights director; Clive Baldwin, senior legal advisor; Danielle Haas, program editor, and Joe Saunders, deputy program director. Layout and production were coordinated by Grace Choi, publications director, Fitzroy Hepkins, mail manager, and Kyle Knight, associate for the children's rights division.

Human Rights Watch would like to thank Jeannie Han, legal intern with the US program of Human Rights Watch, for her research assistance. We are grateful to Megan Bremer, Judy Rabinovitz, Jim Felakos, Jamil Dakwar, and Brittney Nystrom for providing expert review of draft sections of this report. We would also like to thank ICE and EOIR for providing us with the information we requested. Finally, we appreciate the assistance of the many psychiatrists and mental health specialists who helped us to prepare our interview methodology.

This report is indebted to the local advocacy organizations and their teams of pro bono attorneys as well as the many immigration attorneys throughout the US who made our research possible and who shared their invaluable expertise with Human Rights Watch. We particularly appreciate the assistance and time of family members, social workers, court officers, disability rights advocates and mental health practitioners who provided Human Rights Watch with invaluable information, insights and expertise.

Most importantly, Human Rights Watch wishes to thank each of the individuals who shared their experiences in immigration court and detention, and who spoke with courage and dignity about their mental disabilities, personal histories, and concerns.

HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300

HUMAN RIGHTS WATCH

www.hrw.org

Appendix A

RE: FREEDOM OF INFORMATION ACT REQUEST

VIA EMAIL AND US POSTAL SERVICE

Ms. Catrina M. Pavlik-Keenan
Director, Freedom of Information Office
U.S. Immigration and Customs Enforcement
800 North Capitol St., NW
5th Floor, Suite 585
Washington, DC 20536-5009
ice-foia@dhs.gov

December 4, 2009

Dear Ms. Pavlik-Keenan:

This letter constitutes a request to U.S. Immigration and Customs Enforcement ("ICE") pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), submitted on behalf of Human Rights Watch ("HRW," or "Requester").

HRW seeks records concerning noncitizens with mental disabilities or mental illness[287] in immigration removal and asylum proceedings and who are or have been held in detention facilities[288] at any time from September 1, 2004 until the present.

To facilitate ICE's search for records and the utility of the information provided, HRW requests that if the information requested is available as electronic data, electronic copies of the data be provided to HRW pursuant to 5 U.S.C § 552 (a)(3)(C). To the extent that ICE has not compiled any of the requested information in electronic databases, then HRW requests any other records containing the requested information. Additionally, if the specific information requested below, or portions of that information, is available in summary or report form, HRW requests access to the summary or report records, rather than the individual records from which that summary data was generated.

[287] Noncitizens or respondents with "mental disabilities" or "mental illness" refer to any individuals who have been diagnosed with, display symptoms of, are suspected of having a mental impairment.

[288] "Detention facility" or "detention facilities" refer to all federal immigration detention facilities; facilities at Guantanamo Bay, Cuba; and all state, county and local jails and prisons under contract with the federal government to house immigration detainees at any point after September 30, 1998.

Specifically, HRW requests the following records:

1. All records identifying in which detention facilities ICE detainees receive mental health treatment.

2. All records identifying where ICE detainees receive inpatient mental health treatment.

3. All records identifying where ICE detainees receive outpatient mental health treatment.

4. All records identifying the number and percentage of cases in which a competence evaluation has been requested by the immigration court or by any of the parties [for a respondent] since 2004.

5. All records identifying the number and percentage of immigration detainees receiving mental health treatment since September 1, 2004.

6. All records identifying the number and percentage of immigration detainees receiving mental health treatment in in-patient medical facilities and the facilities in which they were housed during treatment on September 1, 2004 and on September 1st of the previous five years.

7. All records identifying the number of detainees currently receiving ICE-provided mental health treatment whose cases have been administratively closed.

8. All records identifying the number of individuals whose cases have been administratively closed who have been released on the condition that they receive mental health treatment since 2004.

9. All records identifying the number of individuals who have been released from detention since 2004 on the condition that they receive mental health treatment.

10. All records identifying the number and percentage of detainees who have a past record of mental illness, hospitalization, or treatment for mental illness at some point prior to detention by ICE since 2004.

11. All records identifying the number and percentage of cases where ICE has released a detainee on grounds of mental disability at a post-final order custody review hearing since 2004.

12. All training guides or other records containing procedures, protocols, or guidelines used by detention staff or contractors to identify individuals exhibiting symptoms of mental illness, distress or disability in detention.

13. All records containing general policies and screening procedures for identifying individuals with mental disabilities or a past record of mental illness.

Request for Public Interest Fee Waiver

FOIA allows for fee waivers if "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure of the information is not primarily in the commercial interest of the requester." 28 C.F.R. § 16.11(k)(i)-(ii).

Pursuant to DOJ regulations, fee waivers are appropriate if four factors are satisfied: (1) the subject of the requested records must concern identifiable operations or activities of the federal government; (2) the disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities; (3) the disclosure must contribute to a reasonably

broad audience of persons interested in the subject - a requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered; and (4) the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. 28 CFR §16.11 (k)(2)(i)-(iv).

HRW satisfies all of these factors:

1. Operations or Activities of Government

HRW's request deals directly with the operations or activities of the federal government because it relates to policies for the detection and recording of mental disability, as well as provision of mental health treatment, among immigration detainees held in different detention facilities, jails, and prisons run by or under contract to the Department of Homeland Security. In addition, according to the ICE website, the agency is the result of "combining the law enforcement arms of the former Immigration and Naturalization Service and the former U.S. Customs Service, to more effectively enforce our immigration and customs laws… by targeting illegal immigrants: the people, money and materials that support terrorism and other criminal activities." One of the key methods of fulfilling this stated mission is to "manage [aliens] while in custody." This Request undoubtedly deals with the operation of DHS and ICE as it expressly deals with the agency's mission.

2. Contributing to the Public's Understanding

This request concerns information that is of significant value to informing the public. The information is not already in the public domain, so its disclosure will provide new and important information about the enforcement of the nation's immigration and detention laws. *See* 28 CFR §16.11 (k)(2)(ii). The information requested will increase the public's understanding of the federal government's operations, as noted above, because it will reveal individual and statistical information about the rights and treatment of immigration detainees with mental disabilities, which, especially in light of legislative changes to immigration law in 1996, the attacks of September 11, 2001, and recent public debate over detention of aliens in U.S. facilities, is of particular interest to the public.

3. Reasonably Broad Audience of Persons Interested in Subject

This factor concerns an organization's ability to disseminate information. HRW employs over 150 professionals, among them lawyers, journalists, and academics. These professionals work to uncover and report on human rights issues around the world. In order to reach the broadest audience possible, the organization publishes detailed reports on human rights issues of interest to a broad spectrum of people. These reports are made available in print and on HRW's website. HRW also uses its extensive contacts in the media to draw greater attention to the issues, and HRW employees often comment on issues in the media. On average, forty citations to HRW appeared in publications around the world on each day from December 1, 2008 to December 1, 2009.[289]

[289] In the past year Human Rights Watch has appeared in Agence France Presse 1,157 times; Reuters News 817 times; 604 Associated Press Newswires; All Africa 573 times; States News Service 559 times; Targeted New Service 539 times; The

HRW intends to publish a report using the information provided in response to this request.

4. Enhancement of Level of Public Understanding

This factor generally deals with the availability of the information in the public domain, including how readily available information of a similar nature is to the general public. As discussed above, no comprehensive report of this nature currently exists in the public domain. Currently, there is little public understanding of the procedural challenges facing noncitizens with mental disabilities in immigration removal and asylum proceedings. Without information from the disclosure requested, it is difficult, if not impossible, to have true public understanding of the experiences of noncitizens with mental disabilities in navigating immigration legal proceedings. The report HRW plans to publish will enhance the public understanding of the challenges facing immigration respondents with mental disabilities because the breadth of analysis is not something currently available to the public.

This request meets all the statutory and regulatory requirements for a fee waiver. Consequently, we request that you disclose the requested information without charge.

* * *

We thank you for your attention in this matter and look forward to your response within 20 business days. 5 U.S.C. §552(a)(6)(A)(i). Please respond to Sarah Mehta, Aryeh Neier Fellow at US Program/Human Rights Watch, 350 Fifth Ave, 34th Floor, New York, NY 10118-3299, telephone (212) 377-9437, email mehtas@hrw.org.

Signed:

Sarah L. Mehta
Aryeh Neier Fellow
Human Rights Watch/American Civil Liberties Union
350 Fifth Ave, 34th Floor
New York, NY 10118-3299
tel: 212-377-9437
mehtas@hrw.org

Guardian 315 times; 300 Reuters Daybook Reports; The Gulf Daily News 260; and The Canadian Press 255 times. Additionally, Human Rights Watch has appeared in major US Papers such as The Wall Street Journal, The New York Times, USA Today, The Los Angeles Times, The Daily News, The Washington Post, The Houston Chronicle, The Philadelphia Inquirer, The San Francisco Chronicle, The Boston Globe, The Denver Post, The Arizona Republic, The Star Tribune, The Detroit Free Press, The Dallas Morning News, and The Chicago Tribune. Internationally, Human Rights Watch has been cited by Der Spiegel (Germany), The Daily Nation (Kenya), The Buenos Aires Herald (Argentina), Folha de São Paulo (Brazil), Emol (Chile), El Mundo (Mexico), El Universal (Venezuela), Express India, The Times of India, The Guardian (Nigeria), eKantipur (Nepal), Al-Ahram (Egypt), The Bangkok Post (Thailand), Haaretz (Israel), The Korea Times (South Korea), The Japan Times, The Sydney Morning Herald (Australia), The Herald Sun (Australia), Al Jazeera (Qatar), as well as hundreds of other news sources in print and online around the world.

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350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
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Appendix B

RE: FREEDOM OF INFORMATION ACT REQUEST

Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

December 4, 2009

To Whom It May Concern:

This letter constitutes a request to the Executive Office for Immigration Review ("EOIR") pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), submitted on behalf of Human Rights Watch ("HRW," or "Requester").

HRW seeks records concerning noncitizens with mental disabilities or mental illness[290] in immigration removal and asylum proceedings from September 1, 2004 until the present. To facilitate EOIR's search for records and the utility of the information provided, HRW requests that if the information requested is available as electronic data, electronic copies of the data be provided to HRW pursuant to 5 U.S.C § 552 (a)(3)(C). To the extent that EOIR has not compiled any of the requested information in electronic databases, then HRW requests any other records containing the requested information. Additionally, if the specific information requested below, or portions of that information, is available in summary or report form, HRW requests access to the summary or report records, rather than the individual records from which that summary data was generated.

[290] Noncitizens or respondents with "**mental disabilities**" or "**mental illness**" refer to any individuals who have been diagnosed with, display symptoms of, are suspected of having a mental impairment.

Specifically, HRW requests the following records:

1. All records identifying the number of immigration judges that have been employed by EOIR each year since 1996.
2. All records identifying the number of people who go through an immigration removal or an asylum proceeding each year since 2004.
3. All records identifying in how many cases immigration judges have refused to accept admissions from noncitizen respondents on the basis of mental incompetence since 2004.
4. All records identifying the number and/or percentage of cases in which a competency evaluation has been ordered for a respondent by the court since 2004.
5. All records identifying the number and percentage of cases in which a competency evaluation has been requested for a respondent any of the parties since 2004.
6. All records identifying the number of cases in which EOIR has conducted a competency hearing since 2004.
7. All documents, guidelines, communications or protocols for immigration judges indicating the procedures for handling a case where the respondent has or is suspected of having mental disabilities.
8. All records identifying the number and/or percentage of cases that have been administratively closed due to respondent's mental illness or mental incompetence since 2004.
9. All records identifying the number and/or percentage of cases that have been administratively closed for any reason since 2004.
10. all records identifying the number of individuals whose cases have been administratively closed and who have subsequently been given a competency evaluation.
11. All records identifying the number of motions to reopen or reconsider that have been filed on the basis of a litigant's incompetence since 2004, and all records identifying how many of those motions to reopen/reconsider have been granted.
12. All records identifying the number and percentage of removable noncitizens since 2004 with criminal convictions (for immigration removal purposes) who were previously found incompetent at some point in their criminal proceedings.

Request for Public Interest Fee Waiver

FOIA allows for fee waivers if "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure of the information is not primarily in the commercial interest of the requester." 28 F.R. § 16.11(k)(i)-(ii).

Pursuant to DOJ regulations, fee waivers are appropriate if four factors are satisfied: (1) the subject of the requested records must concern identifiable operations or activities of the federal government; (2) the disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities; (3) the disclosure must contribute to a reasonably broad audience of persons interested in the subject - a requester's expertise in the subject area and

ability and intention to effectively convey information to the public shall be considered; and (4) the public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. 28 CFR §16.11 (k)(2)(i)-(iv).

HRW satisfies all of these factors:

1. Operations or Activities of Government

HRW's request deals directly with the operations or activities of the federal government because it relates to procedural safeguards in place for noncitizens with mental disabilities in immigration removal and asylum proceedings conducted by the EOIR. In addition, according to the EOIR website, the agency "interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings." One of the agency's stated responsibilities is a commitment to "providing fair, expeditious, and uniform application of the nation's immigration laws in all cases." This Request undoubtedly deals with the operation of EOIR as it expressly deals with the agency's mission.

2. Contributing to the Public's Understanding

This request concerns information that is of significant value to informing the public. The information is not already in the public domain, so its disclosure will provide new and important information about the enforcement of the nation's immigration and detention laws. *See* 28 CFR §16.11 (k)(2)(ii). The information requested will increase the public's understanding of the federal government's operations, as noted above, because it will reveal individual and statistical information about procedural safeguards in immigration proceedings, which, especially in light of legislative changes to immigration law in 1996, the attacks of September 11, 2001, and recent public debate over detention of aliens in U.S. facilities, is of particular interest to the public.

3. Reasonably Broad Audience of Persons Interested in Subject

This factor concerns an organization's ability to disseminate information. HRW employs over 150 professionals, among them lawyers, journalists, and academics. These professionals work to uncover and report on human rights issues around the world. In order to reach the broadest audience possible, the organization publishes detailed reports on human rights issues of interest to a broad spectrum of people. These reports are made available in print and on HRW's website. HRW also uses its extensive contacts in the media to draw greater attention to the issues, and HRW employees often comment on issues in the media. On average, forty citations to HRW appeared in publications around the world on each day from December 1, 2008 to December 1, 2009.[291]

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[291] In the past year Human Rights Watch has appeared in Agence France Presse 1,157 times; Reuters News 817 times; 604 Associated Press Newswires; All Africa 573 times; States News Service 559 times; Targeted New Service 539 times; The Guardian 315 times; 300 Reuters Daybook Reports; The Gulf Daily News 260; and The Canadian Press 255 times. Additionally, Human Rights Watch has appeared in major US Papers such as The Wall Street Journal, The New York Times, USA Today, The Los Angeles Times, The Daily News, The Washington Post, The Houston Chronicle, The Philadelphia Inquirer, The San Francisco Chronicle, The Boston Globe, The Denver Post, The Arizona Republic, The Star Tribune, The Detroit Free Press, The

HRW intends to publish a report using the information provided in response to this request.

4. Enhancement of Level of Public Understanding

This factor generally deals with the availability of the information in the public domain, including how readily available information of a similar nature is to the general public. As discussed above, no comprehensive report of this nature currently exists in the public domain. Currently, there is little public understanding of the procedural challenges facing noncitizens with mental disabilities in immigration removal and asylum proceedings. Without information from the disclosure requested, it is difficult, if not impossible, to have true public understanding of the experiences of noncitizens with mental disabilities in navigating immigration legal proceedings. The report HRW plans to publish will enhance the public understanding of the challenges facing immigration respondents with mental disabilities because the breadth of analysis is not something currently available to the public.

This request meets all the statutory and regulatory requirements for a fee waiver. Consequently, we request that you disclose the requested information without charge.

* * *

We thank you for your attention in this matter and look forward to your response within 20 business days. 5 U.S.C. §552(a)(6)(A)(i). Please respond to Sarah Mehta, Aryeh Neier Fellow at US Program/Human Rights Watch, 350 Fifth Ave, 34th Floor, New York, NY 10118-3299, telephone (212) 377-9437, email mehtas@hrw.org.

Signed:

Sarah L. Mehta
Aryeh Neier Fellow
Human Rights Watch/American Civil Liberties Union
350 Fifth Ave, 34th Floor
New York, NY 10118-3299
tel: 212-377-9437
mehtas@hrw.org

Dallas Morning News, and The Chicago Tribune. Internationally, Human Rights Watch has been cited by Der Spiegel (Germany), The Daily Nation (Kenya), The Buenos Aires Herald (Argentina), Folha de São Paulo (Brazil), Emol (Chile), El Mundo (Mexico), El Universal (Venezuela), Express India, The Times of India, The Guardian (Nigeria), eKantipur (Nepal), Al-Ahram (Egypt), The Bangkok Post (Thailand), Haaretz (Israel), The Korea Times (South Korea), The Japan Times, The Sydney Morning Herald (Australia), The Herald Sun (Australia), Al Jazeera (Qatar), as well as hundreds of other news sources in print and online around the world.

Appendix C

U.S. Department of Justice

Executive Office for Immigration Review

Office of the General Counsel

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041
March 8, 2010

Sarah L. Mehta
Aryeh Neier Fellow
Human Rights Watch/American Civil Liberties Union
350 Fifth Ave., 34th Floor
New York, NY 10118-3299

RE: Freedom of Information Act Request For Information Concerning Noncitizens With Mental Disabilities or Mental Illness in Immigration Removal and Asylum Proceedings from September 1, 2004 to the Present

Dear Ms. Mehta:

This is in response to your Freedom of Information Act (FOIA) request, which was received in this office on December 7, 2009. Your FOIA request seeks several items as noted below.

Item number one of your FOIA request seeks all records which identify the number of Immigration Judges that have been employed by the Executive Office for Immigration Review (EOIR) since 1996. Enclosed is the information responsive to your FOIA request.

Items numbered two and nine of your FOIA request seek removal or asylum statistics for each year since 2004, and the number and/or percentage of cases that have been administratively closed since 2004. Please be advised this information is publically available on EOIR's website located within the Statistical Yearbook at http://www.justice.gov/eoir/statspub/syb2000main.htm. Pursuant to 5 U.S.C. Section 552(a)(2), agencies are not required to provide FOIA requesters with records which are already made available to the public on the agency's website.

Item number five of your FOIA request seeks all records which identify the number and percentage of cases in which a competency evaluation has been requested for a respondent since 2004. EOIR only maintains such information if the Department of Homeland Security (DHS) requests certification of mental competency as referenced in Operation Policy and Procedure Memorandum (05-07). EOIR's computer system indicates that in 426 cases since 2004 DHS has requested certification of mental competency. For additional information regarding competency determinations, please see 8 C.F.R. §§1240.4 and 1240.43. Other related information can be accessed from the DOJ Office of Immigration Litigation website at http://www.justice.gov/civil/oil/; EOIR's website at: http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202009/vol3no4.pdf; and http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf.

RE: Freedom of Information Act Request on Control No. 2010-3175

As for items numbered three, four, six, seven, eight, ten, eleven, and twelve of your FOIA request, EOIR's computer system does not maintain this information. Therefore, we are unable to provide this information to you.

If you are not satisfied with the foregoing, you may appeal within 60 days to the Office of Information Policy, U.S. Department of Justice, 1425 New York Ave., N.W., Suite 11050, Washington, D.C. 20530. The procedures for appeal are stated at 28 C.F.R. Section 16.9.

Sincerely,

Crystal Souza
Supervisory Program Specialist

Enclosure

Control Number: 2010-3175

Executive Office for Immigration Review
Immigration Judges from 1996 through 2009

Fiscal Year	Immigration Judges
1996	170
1997	199
1998	203
1999	209
2000	206
2001	208
2002	214
2003	217
2004	215
2005	213
2006	223
2007	210
2008	222
2009	232

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004-2400

www.aclu.org

HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299

www.hrw.org

Deportation by Default

Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System

Every year, several hundred thousand people in the United States are arrested for possible deportation by Immigration and Customs Enforcement (ICE). The vast majority are held in immigration detention, both during and even after their deportation hearings in immigration court. At least 15 percent of these immigration detainees—an estimated 57,000 people in 2008—are thought to have a mental disability, some so severe that they do not know their own names or do not understand that deportation means removal from the country.

Despite these large numbers, the immigration system lacks meaningful safeguards for people with mental disabilities—including US citizens— throughout the arrest, detention, deportation hearing, and removal process. *Deportation by Default* highlights these deficiencies, including no right to appointed counsel; inflexible detention policies that can result in lengthy and arbitrary detention, sometimes for years; lack of substantive or operative guidance for attorneys and judges when people with mental disabilities are unable to present claims to remain in the US without support.

The current immigration system violates US and international human rights standards of fairness and protections against arbitrary and indefinite detention, and puts people with mental disabilities—including US citizens— at risk of erroneous deportation.

Personal belongings of undocumented immigrants being loaded into an ICE plane as part of the deportation process.