Washington Law Review Online

Volume 97 Article 2

2022

Franco I Loved: Reconciling the Two Halves of the Nation's Only Government-Funded Public Defender Program for Immigrants

Amelia Wilson

FRANCO I LOVED: RECONCILING THE TWO HALVES OF THE NATION'S ONLY GOVERNMENT-FUNDED PUBLIC DEFENDER PROGRAM FOR IMMIGRANTS

Amelia Wilson*

Abstract: Detained noncitizens experiencing serious intellectual and mental health disabilities are among the most vulnerable immigrant populations in the United States. The Executive Office for Immigration Review's (EOIR) creation of the National Qualified Representative Program (NQRP) following a class action lawsuit was an important step in finally bringing meaningful protections to this population. The EOIR pledged to ensure government-paid counsel for those facing removal who had been adjudicated "incompetent" by an immigration judge, as well as other protections for those who had been identified as having a "serious mental disorder" but who had not yet been found incompetent. The NQRP is the first of its kind, and the only appointed counsel apparatus in the immigration court system.

The year 2023 will mark the NQRP's tenth anniversary. While the program has expanded significantly over the past decade and seen an increase in federal funding, it continues to be plagued by serious limitations, gaps, and due process defects. I should know. I ran the program from 2016 to 2018.

Some of the NQRP's failings are embedded in the program's architecture and have therefore existed since its inception; other inequities flow from the evolution of the NQRP over time, and in particular, the development of its two-tiered system of classification of detained noncitizens within the Ninth Circuit, versus those outside of it. The program's deficiencies impact the due process rights—and safety—of the incompetent respondents the program pledged to safeguard; they also force many legal service providers to make ethically fraught choices as they navigate representation of their clients. And finally, the NQRP's shortcomings reduce judicial economy and inadvertently create an unequal administration of justice within our immigration courts.

In this article, I closely examine data, training material, and federal contract information obtained through two Freedom of Information Act Requests to expose critical distinctions between *Franco* and the Nationwide Policy. I then explain why the differences matter, and what consequences flow to respondents, their attorneys, and the immigration courts.

Finally, I make several recommendations for how to resolve the NQRP's inequities and weaknesses. The first set of recommendations can be implemented now as EOIR enters into a new federal contractor relationship for management of the NQRP's nationwide operations. The second set can be instituted at any time, as they are internal EOIR policy decisions that do not require Congressional approval.

* Research Scholar and Clinical Instructor at Columbia Law School, Immigrants' Rights Clinic; former program manager of the National Qualified Representative Program (NQRP) at the Executive Office for Immigration Review from 2016 to 2018.

INTRODUCTION

Immigrants facing deportation are not guaranteed an attorney before our immigration courts. Many noncitizens cannot afford an attorney and have to fight their case alone—and worse still, they must do so while detained. Immigration detention inflicts grievous harm on the mental health and wellbeing of detainees.[1] It also decreases the likelihood that a detainee will be able to secure critical evidence, witnesses, and information needed to mount a meaningful defense against removal.[2]

These cascading disadvantages are felt more acutely by detained

1. Janet Cleveland, Rachel Kronick & Cécile Roussea, *Symbolic Violence and Disempowerment as Factors in the Adverse Impact of Immigration Detention on Adult Asylum Seekers' Mental Health*, 63 INT'L J. PUBLIC HEALTH 1001 (2018).

2. Karen Berberich, Annie Chen & Emily Tucker, The Case for Universal Representation (Dec. 2018), https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1/the-problem [https://perma.cc/JEY3-NBSR] ("It is extraordinarily difficult to gather evidence in support of one's legal case from the confines of detention. Without internet access and with telephone access that is both expensive and highly restricted, it can be challenging—often impossible—for detained immigrants to obtain documents from other countries. These documents may include police reports, hospital records, local news articles, supporting affidavits, and certificates of birth, marriage, or death: the kind of evidence that is critical to securing release from detention on bond while the case is pending or establishing a defense to deportation").

noncitizens living with serious intellectual and mental health disabilities.[3] Until recently, this particularly vulnerable population was far less likely to receive the assistance of counsel as they navigated our labyrinthine immigration laws, more likely to experience prolonged detention and the attendant injuries caused by detention, and more likely to be ordered deported—sometimes to places where they faced persecution, torture, and death.[4]

The Executive Office for Immigration Review (EOIR) created the National Qualified Representative Program (NQRP) in 2013[5] following the seminal class action lawsuit in the Ninth Circuit, *Franco-Gonzalez v. Holder*.[6] EOIR pledged to provide government-paid counsel to detained persons adjudicated "mentally incompetent" by an immigration judge following a Judicial Competency Inquiry (JCI).[7] It also promised to offer protections for those identified as having a serious mental disorder but not yet found incompetent, such as bond hearings and referrals to independent mental health professionals for psychological evaluations.[8]

The NQRP represented a revolutionary and important first step in bringing meaningful protections to a uniquely vulnerable population. It was also the first (and to this day, only) appointed counsel mechanism for any noncitizen group in removal proceedings.[9] At the writing of this piece,

---

3. *See* Martha von Werthern, Katy Robjant, Zoe Chui, Rachel Schon, Livia Ottisova, Claire Mason & Cornelius Katona, *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY 382, 391 (2018), https://doi.org/10.1186/s12888-018-1945-y [https://perma.cc/ZHL9-M44G]; *see also* Leslie Wolf*, After* Franco-Gonzalez v. Holder*: The Implications of Locating a Right to Counsel Under the Rehabilitation Act,* 23 S. CAL. REV. L. & SOC. JUST. 329, 338–39 (2014)

4. *See* HUMAN RIGHTS WATCH & ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 46, 7–8, 53–56 (2010), https://www.aclu.org/report/deportation-default-mental-disability-unfair-hearings-and-indefinite-detention-us-immigration [https://perma.cc/J98U-22RV] (detailing the elevated challenges that mentally ill noncitizens face in accessing and securing counsel).

5. *See* EOIR Policy Memorandum from Brian O'Leary, Chief Immigr. Judge, U.S. Dep't of Just. Exec. Off. for Immigr. Rev., Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions (Apr. 22, 2013).

6. Franco-Gonzalez v. Holder, No. CV 10–02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

7. *See* EOIR Policy Memorandum, *supra* note 5.

8. *Id*.

9. Gregory Pleasants, *National Qualified Representative Program*, VERA INST. OF JUST., https://craft2.vera.org/projects/national-qualified-representative-program/learn-more [https://perma.cc/7S5E-L6K9] ("The NQRP is the first program in the United States to provide appointed legal representation at the federal government's expense to a specific vulnerable population facing deportation"); *see* Ingrid Eagly, *Access to Justice for Immigrants: A Lecture Presented in Memory of Breanna Boss*, 92 Colorado L. Rev. Forum 1, 6, https://lawreview.colorado.edu/digital/access-to-justice-for-immigrants-a-lecture-presented-in-memory-of-breanna-boss/, [https://perma.cc/9AVZ-2DFN] (identifying the NQRP and one other

not even immigrant children appearing in front of an immigration judge are afforded this guarantee.[10] However, serious due process concerns hobble the NQRP and imperil the program's original stated mission of safeguarding vulnerable respondents and promoting the efficacy and smooth administration of our immigration courts.

We are now approaching the NQRP's tenth anniversary.[11] In that short time, it has provided court-appointed counsel and other critical services to over 2,100 detained immigrants with mental health concerns[12]—and is active in every detained court in the United States.[13] It has managed to achieve these praiseworthy achievements thanks in large part to the contributions of its primary federal contractor, the Vera Institute of Justice.[14] Since the NQRP's inception, the Vera Institute of Justice (hereinafter "Vera") has managed many of the program's operations including the identification, onboarding, training and management of the subcontracting service providers who represent the respondents in their immigration proceedings after they have been adjudicated incompetent.[15]

---

now-ended program—justice AmeriCorps, which operated from 2015–2017—as the only government-funded appointed counsel programs); *see also* Am. Bar Ass'n Comm. on Immigr., *Summary of the justice AmeriCorps Legal Services for Unaccompanied Children Program* (2018), https://www.americanbar.org/groups/public_interest/immigration/resources/justice-americorps-legal-services-for-unaccompanied-children-pro/ [https://perma.cc/U6VB-TWV2] ("The program was administered from January 1, 2015 to August 31, 2017 through the Department of Justice's Executive Office for Immigration Review (EOIR) and the Corporation for National & Community Service (CNCS)").

10. *See* Class Action Complaint, F.L.B. v. Lynch, No. 2:14-cv-01026, 2014 WL 3753431 (W.D. Wash. July 9, 2014); *see generally* Amanda Kavita Sewanan, *The Right to Appointed Counsel: The Case for Unaccompanied Immigrant Children*, 41 CARDOZO L. REV. 317, 324 (2019).

11. *National Qualified Representative Program (NQRP)*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV. (Feb. 18, 2020), https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/X2FS-VABY] (dating the program's inception back to April 2013).

12. Michael Corradini, *National Qualified Representative* Program, VERA INST. OF JUST., https://www.vera.org/projects/national-qualified-representative-program [https://perma.cc/ANR9-2QHC] ("From its beginning in 2013 through January 2020, the NQRP has provided representation to over 2,000 detained immigrants with serious mental illness").

13. *Id.* ("Through a nationwide network of nearly 50 legal service providers, the NQRP provides zealous, person-centered representation to its clients at any Immigration Court in the country."); *see also* EXEC. OFF. FOR IMMIGR. REV., SECOND FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (Mar. 29, 2021) (on file with author) (showing a total of 2,113 QR assignments between April 24, 2013, and January 2021).

14. The Vera Institute of Justice is a leading nationwide organization committed to ending mass incarceration, ensuring due process for immigrants, and promoting healthy communities through research and advocacy. *About Us*, VERA INST. OF JUST., https://www.vera.org/who-we-are/about-us [https://perma.cc/6TQF-YZAS] (last visited July 20, 2022).

15. Gregory Pleasants, *National Qualified Representative Program*, VERA INST. OF JUST., https://craft2.vera.org/projects/national-qualified-representative-program/learn-more [https://perma.cc/AM4H-SNFP] ("In 2014, EOIR contracted with Vera to set up program services

However, Vera's involvement in the NQRP is soon coming to an end. On August 4, 2021, Vera announced via email to its entire provider network that it would not be recompeting for the NQRP contract.[16] The contract is set to end July 31, 2022.[17]

As Vera's time draws to a close, scholars have an opportunity to take an intimate look at how the NQRP has functioned during the ten years of Vera's involvement. Recently obtained internal government documents accessed through two Freedom of Information Act (FOIA) requests yielded a trove of programmatic information related to the NQRP.[18] The FOIA results show that the NQRP evolved and expanded considerably over the past ten years. They also illuminate the genesis and ossification of some of the program's key failings as the NQRP split into two halves: one half for detainees whose cases originated inside of the Ninth Circuit (hereinafter "*Franco*"), and another for those whose cases originated outside of the Ninth Circuit (hereinafter the "Nationwide Policy").

There is a window of opportunity to address some of the NQRP's shortcomings as the program ushers in a new major programmatic partner. This article urges several of those changes, which could take effect immediately and would have far-reaching, positive effects for respondents, their attorneys, and the courts.

Part I of this article provides cursory background information on the *Franco-Gonzalez v. Holder* litigation in order to contextualize the creation of the NQRP. Part II isolates and examines some of the FOIA results—in particular, EOIR's and Vera's compensation fee structures that covered attorney rates, case funding caps, expert fees, and post-release funding, as well as internal immigration court training data and materials—to expose and identify several of the key distinctions between the NQRP's fraternal twins, *Franco* and the Nationwide Policy.

Part III explores the consequences that flow to respondents, their attorneys, and the immigration courts seated in the two jurisdictions. Specifically, the bifurcated system of identification, processing, and training is riddled with due process and liberty inequities for respondents

---

and to provide training, technical support, and program analysis"); *see also* Memorandum from Vera Inst. of Just. on Proposal for National Qualified Representative Program (QRP) (Dec. 20, 2013) (on file with author).

16. E-mail from Anne Marie Mulcahy, Dir., Vera Inst. of Just., to "NQRPnetwork@groups.io" (Aug. 4, 2021, 2:15 PM EST) (on file with author).

17. *Id.*

18. The first FOIA was filed in January 2019 by an immigration law practitioner in Kansas, Hoppock Law Firm. *See* Matthew Hoppock, *FOIA Results – EOIR's "Guidance and Publications" Site,* HOPPOCK LAW FIRM (Sept. 13, 2021), https://www.hoppocklawfirm.com/foia-results-eoirs-guidance-and-publications-site/ [https://perma.cc/F6WJ-VALH]; the second FOIA was filed on October 21, 2020, by the Harvard Immigration & Refugee Clinical Program (on file with author).

outside of *Franco*'s ambit. Non-*Franco* respondents are held in ICE custody longer, are not provided an individualized custody review, and are not guaranteed counsel throughout the pendency of their removal proceedings. Funding restrictions force lawyers practicing within the Nationwide Policy framework to make ethically problematic choices and limit the scope of their representation, contravening their fiduciary duty to their client. And finally, the two-tiered system frustrates the immigration courts by prolongating cases and creating inefficiencies during an era when the courts are sagging under a historic backlog.

Part IV provides recommendations for discreet adjustments to the NQRP that would resolve many of the major inequities. Specifically, I urge EOIR to bring the Nationwide Policy into alignment with *Franco* in terms of funding, bond hearings, immigration judge training, NQRP class membership identification, and case processing obligations. Such actions could be implemented immediately as the agency heads into a new contract agreement. Other changes are not contract-specific, but rather are a matter of internal EOIR policy that can (and should) also be adopted at any time.

These recommendations are not exhaustive. Nor does aligning the Nationwide Policy with *Franco* address the inherent problems already present in *Franco* as a whole—which are myriad and complicated, but which fall outside the article's narrow scope. True and complete protection for noncitizens with mental health disabilities would require universal representation for all immigrants, an end to our overly cumbersome competency evaluation process, and an end to ICE detention.

I. BRIEF CONTEXTUALIZING OF FRANCO-GONZALEZ V. HOLDER AND THE RISE OF THE NQRP

Deportation from the United States has long been considered a civil penalty rather than a criminal punishment.[19] Respondents in removal proceedings are not entitled to the same constitutional rights as defendants in a criminal trial—such as counsel at the government's expense.[20] Nevertheless, removal proceedings must still comport with the doctrine of

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

20. 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (*at no expense to the Government*) by such counsel, authorized to practice in such proceedings, as he shall choose." (emphasis added)).

fundamental fairness and due process guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.[21] Moreover, the immigration courts and the Board of Immigration Appeals (BIA) (which fall under the Department of Justice) have an affirmative obligation to make reasonable modifications in "policies, practices, and procedures" to ensure that persons with disabilities have meaningful access to services and programs under the Rehabilitation Act.[22]

Prior to *Franco-Gonzalez v. Holder*, a tiny constellation of federal regulations[23] and one BIA decision from 2011 called *In re M-A-M-*[24] provided the bulk of the guidance on how immigration judges (IJs) should proceed where a respondent lacked—or possibly lacked—mental competence. *In re M-A-M-* provided the first ever test for determining competence in immigration proceedings,[25] as well as suggestions on possible accommodations an IJ could implement to make the proceedings "fair."[26]

Following the 2011 *M-A-M-* decision, IJs started holding loosely-structured and unstandardized competency inquiries—commonly referred to as "M-A-M- hearings."[27] However, nothing in *In re M-A-M-* explicitly

---

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

22. 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (applying the Rehabilitation Act to the Department of Justice).

23. *See* 8 C.F.R. § 103.8(c)(2)(ii) (service of a Notice to Appear upon an incompetent noncitizen is only proper where effectuated in person upon someone with whom the individuals resides, and when possible, a near relative, guardian, committee or friend); 8 C.F.R. § 1240.10(c) (forbidding immigration judges from accepting an admission of removability from a pro se, unaccompanied respondent who lacks competence); 8 C.F.R. §§ 1240.4, 1240.43 (permitting waiver of a respondent's presence where, for reasons of incompetency, it is impracticable for the respondent to be present).

24. *In re* M-A-M-, 25 I. & N. Dec. 474 (BIA 2011) (providing the first ever guidance for immigration judges to identify possible incompetence, evaluate a respondent's competence, and proscribe safeguards where required to comport with fundamental fairness).

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

26. *Id.* at 478 ("If an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing, the Immigration Judge will evaluate which available measures would result in a fair hearing. Immigration Judges 'shall prescribe safeguards to protect the rights and privileges of the alien.'").

27. *See generally* Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1 (2013) (discussing at length an uneven, inconsistent application among IJs of *In re M-A-M-* to unrepresented respondents); *see also* Cassandra H. Chee*, Rehabilitating Our Immigration System with the Rehabilitation Act: Rejecting Video Teleconferencing and Presumptively Requiring in-Person Court Appearances as a Reasonable Accommodation for*

authorized IJs to appoint counsel following an incompetency adjudication.[28]

Then came the quantum leap that was *Franco-Gonzalez v. Holder,* the class action lawsuit and subsequent permanent injunction[29] that seismically altered the landscape for detained respondents in removal proceedings with mental health concerns.

In *Franco-Gonzalez v. Holder*, the American Civil Liberties Union of Southern California and other service providers filed suit in the Central District of California against the Department of Homeland Security and the Department of Justice on behalf of Jose Antonio Franco-Gonzalez. Mr. Franco had lived with serious cognitive disabilities his entire life.[30] An immigration judge felt that it was unfair to proceed against him without an attorney and closed his case, but such administrative closure did not require that ICE release him.[31] Mr. Franco then languished for nearly five years in various Immigration & Customs Enforcement (ICE) detention centers throughout Southern California without a hearing.[32]

The district court agreed to certify a class to include other noncitizens throughout ICE detention centers in Arizona, California, and Washington who were also without counsel, facing removal, and living with serious mental health concerns.[33] The class then branched into two subclasses: Subclass-1, whose members had been found incompetent following a formal competency hearing, and Subclass-2, whose members were incompetent and had been detained for more than six months.[34]

The district court ruled that an IJ's formation of a "bona fide doubt"

Mentally Incompetent Detainees, 70 Am. U.L. Rev. 665, 713, 716, 721 (2020) (referring to competency hearings that flow from *Matter of M-A-M-* as "*Matter of M-A-M-* hearings").

28. *See* JAMES F. MCCARTHY, III & BRIANNA EVANS, DETERMINING MENTAL COMPETENCE & SAFEGUARDS & PROTECTIONS 13 (Apr. 5–23, 2021) (on file with the author) ("Actions an IJ Cannot Take Under *M-A-M-* . . . Order the appointment of a government-funded attorney or representative to represent respondent").

29. Franco-Gonzalez v. Holder, No. CV 10–02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

30. *Id.*

31. *Id.*

32. First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 11, Franco-Gonzalez v. Holder, No. 10-CV-02211 (C.D. Cal. Aug. 2, 2010), https://www.aclu.org/legal-document/franco-gonzales-et-al-v-holder-et-al-first-amended-class-action-complaint ("Despite the fact that there were no open removal proceedings against him, Mr. Franco remained incarcerated for approximately four and a half years"); *see also* Joseph Serna, *ICE Detainees Are Released,* DAILY PILOT (Southern California) (Mar. 31, 2010), https://www.latimes.com/socal/daily-pilot/news/tn-dpt-xpm-2010-03-31-dpt-gonzalez040110-story.html [https://perma.cc/QPS2-YMJT].

33. Third Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, Franco-Gonzalez v. Holder, No. CV 10-2211, 2011 WL 12677104 (C.D. Cal. Oct. 25, 2011).

34. *Id.* at ¶¶ 144–45.

that a respondent was possibly incompetent immediately placed the respondent in *Franco* class membership.[35] A respondent would also be placed in *Franco* class membership if ICE identified a serious mental health issue during one of its compulsory health screenings.[36] Both an IJ and ICE were expected to accept any and all relevant information related to an individual's mental status, including information from third parties.[37] *Franco* class membership and its attendant protections adhered from the moment the individual was identified until their proceedings concluded through either relief or removal,[38] even if they were released from custody or were transferred outside the Ninth Circuit.[39] ICE could not remove that individual or proceed against them until the competency question was resolved.

The order also set strict deadlines for when each defendant had to perform its obligations. For example, an IJ had to conduct a Judicial Competency Inquiry (JCI) within twenty-one days of notification that a detainee met the main class membership.[40] Then, if the IJ found that the class member was incompetent to proceed, EOIR had sixty days from the date of the determination to ensure that a Qualified Representative had

35. Order Further Implementing this Court's Permanent Injunction at 6–7 , Franco-Gonzalez v. Holder, No. CV-10-02211 (C.D. Cal. Oct. 29, 2014) ("For purposes of this Order, unrepresented immigration detainees are members of the Class certified in this case . . . if . . . (iii) an Immigration Judge finds that the evidence of record results in a bona fide doubt about the detainee's competency to represent him- or herself.").

36. *Id.* ("For purposes of this Order, unrepresented immigration detainees are members of the Class certified in this case . . . if . . . (i) a qualified mental health provider determines the detainee meets one or both of the following criteria . . . [or] (ii) a qualified mental health provider otherwise diagnoses the detainee as demonstrating significant symptoms of one of the following . . . .").

37. *Id.* at 8–9, 19 ("ICE and detention facility personnel must accept relevant information and documents from family members, social workers, or treatment providers regarding detainees' mental disorders or conditions . . ." and "[a]t or before Judicial Competency Inquiries and Competency Reviews, the ICE Office of the Chief Counsel, the Class member, and third parties (including family members, social service providers, and others) may submit to the Immigration Judge, *and the Immigration Judge shall consider*, additional mental health information or other information relevant to a detainee's mental competency or incompetency to represent him- or herself in immigration proceedings.") (emphasis added).

38. *Id.* at 3 ("Any Class member who has entered ICE custody after November 21, 2011, and who is subsequently transferred outside of Arizona, California or Washington, continues to be a Class member and entitled to all of the benefits of Class membership during the course of their immigration proceedings, including those in the Permanent Injunction [Doc. # 593] and in this Order.").

39. *Id.* at 23 ("Released Sub-Class One members are entitled to representation by Qualified Representatives pursuant to this Court's Injunction until the conclusion of their immigration proceedings, irrespective of whether their case is transferred to a venue outside of the three states in which this Order applies.").

40. *Id.* at 15 ("The Immigration Judge shall convene a Judicial Competency Inquiry no later than 21 days after receiving the notice pursuant to Section II.B that a detainee is a member of the Main Class.").

begun representation of the respondent.[41]

The district court's Implementation Order created a mechanism to assist IJs who, at the conclusion of a JCI, remained unsure whether a respondent was incompetent. They could order that an independent mental health professional perform a Forensic Competency Evaluation (FCE).[42] The timing for when an IJ should order the FCE was more vague, stating only that it had to be ordered "promptly."[43] The report needed to be completed within forty-five days following the IJ's evaluation order.[44] The IJ then had no more than thirty days to convene again for a Competency Review, at the conclusion of which the IJ was compelled to make a formal ruling as to whether the class member is incompetent.[45] EOIR had only twenty-one days to provide an incompetent class member with a QR after a Competency Review.[46] And finally, if the incompetent respondent had been detained for more than 180 days (i.e., the respondent was a Subclass-2 member) the court was required to provide the individual a bond hearing within fifteen days—and with a QR by their side.[47]

Perhaps to manage the many timing obligations set forth by the district court in *Franco-Gonzalez v. Holder*'s Implementation Order, EOIR would go on to introduce flowcharts and visual aids into its training material for court staff and judges that laid out the timelines.[48]

---

41. *Id.* at 17 ("EOIR shall have 60 days from the date of the [incompetency] determination to arrange for provision of a Qualified Representative.").

42. *Id.* at 17 ("When, at the conclusion of the Judicial Competency Inquiry, an Immigration Judge determines that he or she has insufficient evidence to determine if the Class member is competent pursuant to III.B.5.c, *supra*, the Immigration Judge shall . . . order that a Forensic Competency Evaluation of the Class member be conducted . . . .").

43. *Id.* ("Upon the conclusion of the Judicial Competency Inquiry, the Immigration Judge shall promptly order that a Forensic Competency Evaluation of the Class member be conducted and that the results of the evaluation be provided to the Immigration Judge, the ICE Office of the Chief Counsel, and the Class member.").

44. *Id.* ("A Forensic Competency Evaluation ordered by the Immigration Judge shall be completed and a written report provided to the Judge and the parties within 45 days after the date of the order . . . .").

45. *Id.* ("Within 30 days after receiving the report from the Forensic Competency Evaluation, the Immigration Judge shall convene a Competency Review, including further testimony if necessary, and shall make a determination by a preponderance of the evidence as to whether the Class member is mentally competent or incompetent to represent him- or herself.").

46. *Id.* ("EOIR shall have 21 days from the date of the determination to arrange for provision of a Qualified Representative.").

47. Franco-Gonzalez v. Holder, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

48. *See, e.g.*, EXEC. OFF. FOR IMMIGR. REV., *FRANCO-GONZALEZ V. HOLDER* COMPETENCE EVALUATION SYSTEM IN IMMIGRATION COURT, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Competence-Evaluation-Flow-Chart.pdf [https://perma.cc/R767-H2MQ] (last updated Jan. 20, 2015); *see also* EXEC. OFF. FOR IMMIGR. REV., CASE COMPETENCY TAB

On the eve of the district court's decision in *Franco*, EOIR's Chief Immigration Judge published a memorandum announcing that, by the end of that year, the agency would be implementing a new system for the treatment of cases involving potential incompetency of detained, unrepresented respondents.[49] The new system would: 1) mandate competency hearings for unrepresented, detained respondents who may have a serious mental health condition; 2) make mental competency examinations available to IJs unable to determine competency from a competency hearing alone; 3) make available a "qualified legal representative" for detained respondents who have been adjudicated incompetent; and 4) give bond hearings to incompetent respondents who have been detained six months or more.[50]

As promised, EOIR unveiled its master plan on December 31 of that year.[51] The accouchement was entitled "Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders" (hereinafter "Phase I").[52]

Phase I mirrored the district court's order in *Franco* in many important ways: the competency standard was identical to the one laid out in the district court's order;[53] a QR would be provided to any detained, unrepresented respondent who had been adjudicated incompetent following a JCI;[54] if an immigration judge was still uncertain of a respondent's competency following the JCI, they could order a Forensic Competency Evaluation.[55] Absent from Phase I, however, were the timing

---

FLOWCHART, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Case-Competency-Tab-Flowchart.pdf [https://perma.cc/4E82-P9D2] (last updated Sept. 29, 2016).

49. *See* EOIR Policy Memorandum, *supra* note 5.

50. *Id.*

51. EXEC. OFF. FOR IMMIGR. REV., PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS (Dec. 31, 2013) [hereinafter EOIR Guidance], https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf [https://perma.cc/B6Z9-HMCL].

52. *Id.*

53. *Id.* at 2 (laying out under the Phase I competency standard, a respondent must have a rational and factual understanding of the proceedings; and be able to make informed decisions about whether to waive their rights, respond to allegations and charges, present information and evidence relevant to eligibility for relief, and act upon instructions and information presented by the IJ and government counsel).

54. *Id.* at 6 (providing that an IJ will "request provision of a qualified representative, and ensure appropriate safeguards and protections are put in place" upon concluding that a respondent is not competent).

55. *Id.* at 7 ("Where, at the conclusion of the judicial inquiry, the judge has 'reasonable cause' to believe that the respondent is suffering from a mental disorder but needs additional evidence to determine whether the presumption of competence is rebutted, the judge will schedule a hearing to collect and review evidence of competency. It is at this stage that the judge will consider whether to refer the respondent for a mental health examination to inform the court's decision on competency.").

requirements. Also absent were the words "bond hearing."

EOIR then had to envision, design, scaffold, staff, and implement the entire system it promised in its April Phase I memo—and it had to do so in less than eight months. On December 20, 2013, Vera submitted its proposal and operation plan for providing legal representation under the NQRP.[56] Vera committed to providing defense counsel to "all unrepresented individuals detained by the Department of Homeland Security (DHS) and in [Immigration and Nationality Act] Section 240 immigration proceedings who are determined by EOIR to be mentally incompetent to represent themselves in their immigration proceedings."[57] In this way, EOIR and Vera joined efforts to build the NQRP.[58]

II. PEERING INTO THE NQRP'S SPLIT PERSONALITY

While Franco and the Nationwide Policy originally embodied similar structures, the fraternal twins underwent divergent evolutions. This section traces their lineage by examining programmatic, training, and internal documents.

A. Termination of Funding for Nationwide Policy Cases: The "90 Day" Clause

A significant divergence between *Franco* and the Nationwide Policy occurred early on, when the Nationwide Policy was placed under funding restrictions connected to the client's detention status that did not apply to *Franco* cases.

Programmatic documents show that, at least briefly, both *Franco* and the Nationwide Policy contained a clause that terminated EOIR's case funding ninety calendar days after an NQRP respondent's release from ICE custody.[59] The earliest identified Statement of Work (SOW) agreement between EOIR and Vera was dated December 13, 2013, and applied to three NQRP locations: one *Franco* location (the Otay Mesa detention center in San Diego, California) and two Nationwide Policy

56. Memorandum from Vera Inst. of Just., *supra* note 15.

57. *Id.* at 1.

58. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM, STATEMENT OF WORK 3 (Dec. 13, 2013) (on file with author).

59. Memorandum from Vera Inst. of Just. on Proposal for National Qualified Representative Program (QRP) app. C at 3 (Dec. 20, 2013) (on file with author) (requiring a San Diego *Franco* QR provider and an Aurora, Colorado Nationwide Policy QR provider to describe their organization's capacity to facilitate *pro bono* assistance to those "who are no longer eligible for services under the contract (*usually because the person has been released from DHS custody before his or her case is complete*)" (emphasis added)).

locations (the Krome Service Processing Facility in Miami, Florida, and the Aurora Contract Detention Facility in Aurora, Colorado).[60] In it, contract funds ended "90 calendar days from the date of release from DHS custody" for those with active cases, and thirty calendar days after the date of release for those whose cases had concluded.[61]

The only way to extend case funding past the ninety days was for a QR to make a motion before the immigration judge to withdraw as counsel of record on the basis that funding was ending, *and* for that motion to be denied.[62]

Within little time, however, the ninety-day funding provision disappeared from the language found within SOWs for *Franco*-specific NQRP providers—but remained for the Nationwide Policy providers. In an SOW dated February 5, 2014, entitled "Statement of Work (Franco Version)" between EOIR and an NQRP subcontractor in Los Angeles, no reference is made to release from DHS custody as a condition causing a termination of funding.[63] The ninety-day funding limitation for *Franco* providers is explicitly removed in an updated service contract between Vera and EOIR dated September 22, 2014: "As a general matter, Contract funds may be used to provide Contract services to a Franco Identified Individual whose covered immigration proceedings remain ongoing, *regardless of the DHS detention status of the Franco Identified Individual*."[64]

Contrast that with a September 23, 2014, SOW that controlled the NQRP programs in Miami, El Paso, Houston, and Denver. That SOW states:

> Upon an Identified Individual's release from DHS custody, and regardless of the status or posture of the Identified Individual's immigration proceedings at the time of release, Contract funds are available to provide Contract services to that Identified Individual *for up to 90 days from the date of the Identified Individual's release from DHS custody.*[65]

---

60. STATEMENT OF WORK at 3, *supra* note 58.

61. *Id.* at 4–5.

62. *Id.* at 5 ("In any case where the Identified Individual's Qualified Representative has properly moved to withdraw from representation before the Immigration Court or BIA, and that motion is denied, Contract funds may continue.").

63. EXEC. OFF. FOR IMMIGR. REV., CONTRACT TO PROVIDE LEGAL REPRESENTATION SERVICES, STATEMENT OF WORK (FRANCO VERSION) 5 (Feb. 5, 2014) (on file with author).

64. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM, STATEMENT OF WORK APP. A: PROGRAM SERVICES REQUIRED UNDER *FRANCO GONZALEZ V. HOLDER* 6 (Sept. 22, 2014) (emphasis added) (on file with author).

65. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF

The ninety-day termination clause appears annually in each Nationwide Policy Statement of Work through the end of the FOIA results, in 2020.[66] In all of those agreements, NQRP funding beyond the ninety days would continue if the QR made a motion to withdraw due to the lack of funding, and the judge denied that motion.

B. Following the Money: An Examination of Billing Models and Conditions on Providers

Franco and the Nationwide Policy billing models diverged with respect to how attorneys could secure expert witnesses and how much a QR could spend per case overall. Experts play an indispensable role in any respondent's effort to meet a complicated burden of proof while seeking relief. Experts can be historians or sociologists who contextualize a person's asylum claim; medical experts who corroborate an applicant's physical experiences; or mental health experts who confirm an applicant's trauma, PTSD, or other mental health condition. They can also be costly to enlist.

Contract documents show a different review ladder and justification process for QRs in the two sides of the NQRP. Initially, all NQRP cases (both *Franco* and the Nationwide Policy) were subject to a $6,000 per case funding cap before an immigration court, and a $3,000 per case funding cap before the BIA.[67] A singular, one-time provision of funding at the same amount could be granted under "exceptional circumstances"—but this funding was subject to final approval by EOIR.[68] This second cap was final except in "rare, extraordinary, and exigent circumstances – well in excess of the showing of 'exceptional circumstances' required for a waiver of initial case caps – [when] the Government may authorize additional funds . . . ."[69] EOIR had "sole and unreviewable discretion" to grant such requests.[70]

The per-case funding cap, however, would not endure in the *Franco* half of the NQRP. When conducting a side-by-side analysis of the NQRP Statement of Work for the 2016 fiscal year (governing NQRP cases generally), versus that same fiscal year's clarifying "Appendix A:

WORK 9 (Sept. 23, 2014) [hereinafter EOIR September 2014 Statement of Work] (on file with author) (emphasis added).

66. *See* EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF WORK (2020) (on file with author); EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF WORK (2019) (on file with author).

67. EOIR September 2014 Statement of Work, *supra* note 65, at 12.

68. *Id.* at 12.

69. *Id.* at 12–13.

70. *Id.* at 13.

Program Services Required Under *Franco Gonzalez v. Holder,*" EOIR added that funding caps could not be imposed in such a manner that would violate the district court's orders in *Franco-Gonzalez v. Holder*.[71] In practical terms, this meant that *Franco* QRs were not subject to per-case funding caps at all, as the injunction required government-paid counsel through the natural life of an incompetent respondent's proceeding before EOIR.

QRs were allowed a contractually agreed upon expert budget of $2,100.[72] Experts were defined to include any professional who provided an opinion on one or more issues relating to competency, claims for relief before EOIR, or other aspects of the case.[73] A QR was "not to exceed $2,100 per expert . . . barring exceptional circumstances *and pending EOIR approval.*"[74] Court training session documents indicate "QRs must apply for and receive pre-approval for expert funds" and that pre-approval required QRs to "demonstrate the legal and factual justification for the expert."[75]

Appendices to early program planning documents dating back to 2013 disclose the evaluation and approval process for all experts before a QR could engage an expert. The first review was conducted by Vera; the QR would submit an expert request form in which the QR had to justify the expert's added contribution to the case.[76] If an expert or expert fee exceeded $2,100, EOIR's Office of Legal Access Programs had to approve the expense after a QR satisfactorily justified the need for additional funds.[77]

---

71. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF WORK app. A at 7 (2016).

72. *See* Memorandum from Vera Inst. of Just. on Proposal for National Qualified Representative Program (QRP) app. D at 3 (Dec. 20, 2013) (on file with author).

73. *Id.* at 1.

74. *See* Memorandum from Vera Inst. of Just. on Proposal for National Qualified Representative Program (QRP) app. C at 1 (Dec. 20, 2013) (on file with author) (emphasis added).

75. EXEC. OFF. FOR IMMIGR. REV., "Assessing Competence in Immigration Proceedings", FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM 307 (May 13, 2021) (on file with author).

76. Memorandum from Vera Inst. of Just., *supra* note 72, at 1–2 (setting forth the parameters for approval including that the QR had attempted to negotiate the best possible price to reduce the expert's fee(s), whether the QR had attempted to stipulate with DHS on the issue of fact or law that the expert was going to address, and whether the expert was necessary to satisfy a legal element, burden of proof, etc.).

77. *Id.* at 3 ("In cases where the proposed [expert] cost exceeds [$2,100] (or some other reasonable amount), Vera may ask the QR to renegotiate the cost with the expert or provide additional justification. If the complexity of the case is such that an expert will have to devote considerable time and resources; that complexity is apparent from the application; and the anticipated costs in excess of $2,100 appear to be sufficiently justified, Vera may approve the application without requiring additional justification, *after consulting with OLAP*." (emphasis added)).

In 2018, the *Franco* funding structure shifted away from hourly billing to a "fully-loaded," fixed-price model that eliminated the need for QRs to justify third-party (i.e., expert) fees and did not need to seek approval to exceed the spending cap.[78] Instead, EOIR would pay one amount per case, which was to include "all costs required to provide program services," including hourly attorney rates, interpreters, incidental costs, travel, etc.[79] Up through the last FOIA result (2020), the *Franco* QRs were offered *either* an hourly billing model, or a "flat-rate" model.[80] Nationwide Policy cases were fixed-rate only.

C. Devil in the Details: Case Processing Deadlines, Hearing Types, and Identification Tags for Franco vs. Nationwide Policy Cases

EOIR created handy "competence evaluation system in immigration court" flowcharts: one for *Franco* and the other for the Nationwide Policy.[81] Physically placing them side by side creates an illusion of sameness. Both provide identical branching paths, the paths contain the same steps, and they all contain the number of days in which the court must complete each step. But on closer inspection, a major difference becomes clear. While the *Franco* flowchart explains the process and timing of a member's bond hearing, the Nationwide flowchart makes no mention of bond whatsoever.

A one-page EOIR training document makes this point even more explicit. The document, entitled, "Differences between *Franco* & EOIR's Nationwide Policy,"[82] is simple and clean, juxtaposing the two sides of the NQRP and their respective basic features. Two words jump out from a line that compares the timelines for competency hearings, Competency Reviews, and the provision of a QR under the NQRP. The deadlines are "[r]equired" for the *Franco* column and "[a]spirational" for the

78. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF WORK 13 (2018) (on file with author).

79. EXEC. OFF. FOR IMMIGR. REV., NAT'L QUALIFIED REPRESENTATIVE PROGRAM STATEMENT OF WORK 11 (2020) (on file with author).

80. *Id.*

81. *FRANCO-GONZALEZ V. HOLDER* COMPETENCE EVALUATION SYSTEM IN IMMIGRATION COURT, *supra* note 48; NATIONWIDE POLICY: DHS SCREENING, INFORMATION-GATHERING, AND INFORMATION-SHARING SYSTEM, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Nationwide-Policy-Flow-Chart.pdf [https://perma.cc/D35C-8EJE] (last updated Mar. 19, 2015).

82. EXEC. OFF. FOR IMMIGR. REV., DIFFERENCES BETWEEN *FRANCO* & EOIR'S NATIONWIDE POLICY, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Differences-Between-Franco-and-EOIRs-Nationwide-Policy.pdf [https://perma.cc/E3ZN-8M3F] (last updated Aug. 29, 2019).

Nationwide Policy.[83]

As for bond, a line item on the same one-page training document reads: "Entitlement to a bond hearing after 180 days in detention?"[84] The *Franco* column provides a simple "[y]es." The Nationwide Policy column reads: "No. Nationwide Policy does not create bond authority."[85]

EOIR provided the Harvard Immigration and Refugee Clinical Program (HIRC) with a massive spreadsheet in response to its request for information relating to the "total number of ICE detainees where the detainee received a Qualified Representative after the Immigration Judge ordered it, and the date when the Qualified Representative was assigned to the detainee."[86] Under a column designated for bond hearings under a tab entitled "Franco Master List," all Nationwide Policy cases have "N/A" in the field.[87]

It is one thing to hypothesize that suggested deadlines (versus mandated ones) may result in slower case processing, and quite another to prove it with data. To shed some light on this question, I looked at EOIR's April 14, 2021 FOIA response to HIRC's request for "[a]ll information contained in the 'Mental Competence' or 'MC' section in EOIR's database, including information that tracks decisions and results during the competency determination process, from the initial identification of indicia of mental incompetence to the ultimate decision on competence."[88]

This item contains precise dates for when important competency case processing milestones were met nationwide: the date a judge held a JCI; the date they requested a Forensic Competency Evaluation; the date that the FCE evaluation was completed and submitted to the court; the date that the IJ held a follow-up Competency Review after reviewing the FCE; and finally, the date an IJ found a respondent incompetent and ordered a QR.

For purity of sample, I isolated and compared only the cases where the data was completely and fully provided (as in, there were no gaps or obvious data entry errors[89]), where an IJ ordered an FCE, and where a

---

83. *Id.*

84. *Id.*

85. *Id.*

86. SECOND FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM, *supra* note 13.

87. *Id.* (appearing under column entitled "Bond Hearing with QR Between (Franco only)").

88. EXEC. OFF. FOR IMMIGR. REV., THIRD FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (Apr. 14, 2021) (on file with author) [hereinafter THIRD FOIA REQUEST RESPONSE].

89. An example of an obvious data entry error was where, in one case, a QR was ordered earlier in time that a competency review took place, resulting in a negative number of days elapsed.

respondent was in fact found incompetent at the conclusion of the Competency Review. I then compared the number of average days it took the *Franco* courts to complete each step, followed by the average number of days it took the Nationwide Policy courts do to the same.

The results show that at nearly each stage of the competency process, the Nationwide Policy cases took longer than the *Franco* cases. For example, the average time that elapsed between when an IJ ordered a Forensic Competency Evaluation and when it was submitted to the court was thirty-one days for *Franco* cases. For Nationwide Policy cases, the average was fifty-two days. Thereafter, the average number of days that elapsed between when a *Franco* IJ received a doctor's Forensic Competency Review and when the IJ held the final Competency Review was fourteen. For Nationwide Policy cases, that average was twenty-nine days. It also took two days longer on average for a Nationwide Policy IJ to order a QR. In the aggregate, the average time that elapsed between when a *Franco* IJ held the first JCI until when the IJ found a respondent incompetent and ordered a QR was fifty-four days. For Nationwide Policy cases, that same process took on average ninety-two days. Put another way, the *Franco* courts process competency cases in almost half the time (41% faster).

One last small but important difference exists in *Franco* and Nationwide Policy casefile identification tags. The Hoppock FOIA results netted an inside peek into EOIR's case "Case Manager" system, and specifically, the "Competency Tab."[90] These screenshots provide a glimpse into how EOIR identifies and tracks all NQRP respondents.

There is an item entitled "Case Competency Tab Flowchart" that contains a drop-down menu entitled "Franco Class Membership."[91] In the lower right-hand corner there is an instructional text-box that reminds the user that a "Respondent remains a *Franco* class member even if found competent, released, or transferred outside jurisdiction."[92] There is no corresponding "Nationwide Policy Membership" drop-down option.[93] The trainers explained that Nationwide Policy cases should always be marked "no" under the "Franco Class Membership" drop-down menu.[94] Put another way, if a *Franco* respondent is released from custody or has

90. EXEC. OFF. FOR IMMIGR. REV., CASE COMPETENCY TAB FLOWCHART – NATIONWIDE, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Case-Competency-Tab-Flowchart-Nationwide.pdf [https://perma.cc/S3QJ-JPSX] (last updated Nov. 6, 2019).

91. *Id.* ("Franco Class Membership – should be marked 'Yes' (detained and unrepresented in AZ, CA, or WA).").

92. *Id.*

93. *Id.*

94. *Id.*

their case transferred to a new jurisdiction, any court staff member—from a BIA member to an IJ to a clerk to an administrative assistant—will immediately see a "*Franco*" label in the database. If a Nationwide Policy respondent is released or has their case transferred to a new jurisdiction, there is no notification of any kind that the case involves (or once involved) competency.

D. Implementation and Training Gaps Between Franco *and the Nationwide Policy*

Significant implementation differences also exist between *Franco* and the Nationwide Policy. As revealed through EOIR's FOIA responses, the Nationwide Policy was slow to get off the ground as compared to *Franco*. Also evident is that judges sitting in the Nationwide Policy courts received less robust training than their counterparts in the *Franco* courts—and receive it less often.

Based on the review of an EOIR spreadsheet that tracks decisions and results during the competency determination process, it appears that the first *Franco* QR was ordered on September 18, 2013.[95] The first Nationwide Policy QR was ordered close to two years later, on September 15, 2015.[96]

According to that same data tracker—which ends April 1, 2021—the total number of times that an IJ or the BIA ordered a QR for a respondent since the NQRP's beginning was 1,760.[97] Of that, 1,230 orders were for *Franco* respondents, and 530 were for Nationwide Policy respondents.[98] This disparity is surprising, given that the majority of detainees in the United States are held outside the three *Franco* states in the Ninth Circuit.[99] More detainees are currently held in Georgia and Texas, for example, than any other state.[100]

What might explain the lagging Nationwide Policy case numbers is that until August 2020, the Nationwide Policy was only operational in twenty-

---

95. THIRD FOIA REQUEST RESPONSE, *supra* note 88.

96. *Id.*

97. *Id.* (examining a column entitled "QROrder" by the response "True," or alternatively, the column entitled "QROrderDate," arriving at the same result).

98. *Id.* (tallying the results from the column entitled "FrancoClassMemberIndicator" where the answer is "True" and the respondent was adjudicated incompetent).

99. *Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/map [https://perma.cc/D6TT-XNYA] (last visited May 3, 2022).

100. *Detention Facilities Average Daily Population*, TRAC IMMIGR., https://trac.syr.edu/immigration/detentionstats/facilities.html [https://perma.cc/R7V8-ATXT] (last visited May 3, 2022).

one detained courts.[101] Contrast that with the NQRP's complete rollout in every immigration court in Arizona, California and Washington that hears detained cases by 2014.

The FOIA results suggest that Nationwide Policy IJs receive weaker and less frequent competency training as compared to the *Franco* IJs on how to identify possible mental incompetency and how to proceed thereafter. A confidential "Notice to Immigration Judges Regarding Applicability of *Franco-Gonzalez v. Holder* in Cases Involving Mental Incompetence"[102] states that while all judges are trained to "identify and detect indicia of mental incompetence" in respondents appearing in immigration court, judges presiding over cases in Arizona, California or Washington "*will receive additional, detailed training* specific to the procedures and protections required by the Permanent Injunction and Implementation Order issued in *Franco-Gonzalez v. Holder*."[103] Put another way, EOIR created a two-tiered training system from the outset of the district court's directive.

Additional evidence that IJs sitting within the *Franco* courts were given more comprehensive, robust training is found in an April 2021 PowerPoint. There, EOIR's Office of General Counsel reminded judges that if they were in a *Franco* jurisdiction they would receive "an additional full-day Franco IJ mental competency training . . . ."[104]

Training data confirms the inconsistent education of Nationwide Policy IJs. EOIR provided HIRC with spreadsheets on July 20, 2021, relating to the competency training of 596 IJs.[105] Of those 596 IJs, 193 were identified as being specifically affiliated with the Nationwide Policy[106]

---

101. EXEC. OFF. FOR IMMIGR. REV., EOIR'S NATIONWIDE POLICY TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED ALIENS WITH SERIOUS MENTAL DISORDERS OR CONDITIONS, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/EOIRs-Nationwide-Policy-list-of-courts.pdf [https://perma.cc/46NL-4S7K] (last updated Aug. 2020).

102. EXEC. OFF. FOR IMMIGR. REV., NOTICE TO IMMIGRATION JUDGES REGARDING APPLICABILITY OF *FRANCO-GONZALEZ V. HOLDER* IN CASES INVOLVING MENTAL INCOMPETENCE, https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/Confidential-IJ-Guidance-re-Franco-Gonzalez-Settlement.pdf [https://perma.cc/HDD4-Y47B].

103. *Id.* at 1 (emphasis added).

104. JAMES F. MCCARTHY, III & BRIANNA EVANS, DETERMINING MENTAL COMPETENCE & SAFEGUARDS & PROTECTIONS 11 (Apr. 5–23, 2021), https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/April-2021-Powerpoint-on-Competency-Evaluation-Policy.pdf [https://perma.cc/UG72-42D8].

105. EXEC. OFF. FOR IMMIGR. REV., FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (July 20, 2021) (on file with author).

106. *Id.* This number was achieved by reviewing the spreadsheet's tab entitled "Non Franco Judges," then counting only IJs listed as "NWP" under Column G, "Franco/NWP/M-A-M."

(among whom 162 appeared to be actively hearing cases).[107]

The data shows that training of the judges in the Nationwide Policy contains significant gaps. Only 79 of the active 162 Nationwide Policy judges, or 49% of them, received an "Initial Competency Training."[108] Eight Nationwide Policy IJs are listed as "need NWP Training",[109] and only seven IJs (less than 5% of the total Nationwide Policy IJs), received a "refresher" training.[110]Equally concerning is that of the 252 IJs identified as "M-A-M-" IJs[111]—meaning, those handling a non-detained docket—165, or 65%, of them—are identified under a sheet entitled "IJ's need NWP Training."[112]

Woven through correspondence between Vera and EOIR's Office of Legal Access Programs are hints of EOIR's preoccupation with the *Franco* side of the NQRP and its neglectfulness of the Nationwide Policy. Vera urges EOIR, for example, to invest in increased stakeholder meetings and site visits throughout the Nationwide Policy locations.[113] Site visits, Vera states, "help facilitate, troubleshoot, and enhance program operations" through educating court personnel, DHS, and detention facility contractors about the program's main features.[114] Such measures could help EOIR "identify and resolve systemic issues."[115]

Vera implies that *Franco* benefits from a more hands-on approach from

---

107. *Id.* Judges were excluded from the analysis if, under the "Non Franco Judges" tab's Column U "Notes," they were identified as having retired or resigned (ten IJs), as having left the agency (five IJs), or as having passed away (one IJ). I also excluded the fifteen Assistant Chief Immigration Judges, who hold supervisory rather than adjudicatory roles, from the tabulation. The Assistant Chief Immigration Judges were spotted by looking under Column D, "Position," and organizing each judge by title.

108. *Id.* This number was achieved by reviewing the spreadsheet's tab entitled "Non Franco Judges," isolating those judges under Column G, "Franco/NWP/M-A-M," who are listed as "NWP," and then organizing those judges by the date that they received a training per Column H, "Initial Competency Training."

109. *Id.* This number was achieved by examining the spreadsheet's tab entitled "IJ's need NWP Training," organizing Column G, "Franco/NWP/M-A-M," by "NWP," and seeing that eight IJs were listed: Judges Tijerina, Castaneda, Newaz, Page, Pierro, Watters, Drucker, and Santander.

110. FOIA REQUEST RESPONSE, *supra* note 105. This number was discovered by examining the spreadsheet's tab entitled "Non-Franco Judges," isolating all active "NWP" IJs, and identifying who received a refresher training per Column K, "Refresher (NWP)."

111. *Id.* This number was achieved by reviewing the spreadsheet's tab entitled "Non Franco Judges," then counting only IJs listed as "M-A-M" under Column G, "Franco/NWP/M-A-M."

112. *Id.* This figure was discovered by looking at the spreadsheet's tab entitled "IJ's need NWP Training," organizing Column G, "Franco/NWP/M-A-M" by "M-A-M," and counting the resulting IJs who are listed as needing training.

113. Memorandum from Mike Corradini, et. al., Vera Inst. of Just., to Steve Lang, EXEC. OFF. FOR IMMIGR. REV. (Mar. 18, 2016) (on file with author).

114. *Id.*at 1.

115. *Id.*

EOIR. "EOIR prioritizes resolution" of issues within *Franco*, trains every *Franco* IJ on how to process competency cases, and ensures that "judge[s] and court staf[f] adher[e] to *Franco* requirements"[116] The Nationwide Policy does not enjoy such close monitoring.[117]

III. WHY THE DIFFERENCES MATTER, AND TO WHOM

The differences between *Franco* and the Nationwide Policy laid out above may seem negligible, but they are extremely consequential to incompetent respondents, their attorneys, and the courts that hear their cases.

A. The 90-Day Funding Limitation: Injurious, Nonsensical, and Contrary to the NQRP's Mission

As a threshold matter, the 90-day funding limit—which terminates funding for Nationwide Policy cases 90 days after an incompetent respondent's release from ICE custody— risks severing this extremely vulnerable population from counsel before the conclusion of their proceedings. Given the extreme vulnerability of this population, indeed the same population the NQRP is pledged to safeguard, this detail is hugely problematic.

Virtually no case before an immigration court—even a detained, expedited one—resolves in 90 days. Our immigration court system just reached a historic high of 1.6 million pending cases,[118] and cases take over three years on average to reach a final adjudication.[119] A three-month period barely suffices to conduct life-saving post-release work such as housing assistance or applying for much needed medical services, let alone conclude a case.

Respondents with certain mental health concerns, for example,

---

116. FOIA REQUEST RESPONSE, *supra* note 105, at 2.

117. Order Appointing Katherine Mahoney as Monitor, Franco-Gonzalez v. Holder, No. 10-CV02211 (C.D. Cal. March 2, 2015) at 2, https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/05/ORD.DCT_.810-Order-Appointing-Katherine-Mahoney-as-Monitor.pdf (granting the *Franco* compliance Monitor "the authority to monitor compliance *with the Permanent Injunction" [Doc. # 593] ("Permanent Injunction") and the Order Further Implementing this Court's Permanent Injunction* [Doc. # 786] ("Implementation Plan Order") (collectively, "the Implementation Documents") (emphasis added).

118. *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases,* TRAC IMMIGR. (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675/ [https://perma.cc/3CEE-3BN7].

119. *Average Time Pending Cases Have Been Waiting in Immigration Courts as of February 2022,* TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (last visited April 27, 2022).

paranoid personality disorder, may have a hard time forming trusting relationships.[120] For respondents like these, losing their QR might be disorienting or even psychologically harmful. Other respondents may not understand or remember that their attorney is no longer defending them, and in turn, detrimentally rely on their no-longer-present attorney to file necessary court documents or applications, or to tell them of future hearing dates. Individuals with serious mental health disabilities are more likely to experience housing insecurity,[121] which may in turn cause them to miss a hearing notice mailed to their last known address. Failure to appear in court could trigger an *in abstentia* removal order,[122] re-detention by ICE, and ultimately, deportation.[123]

The ninety-day funding termination most absurdly militates against the respondent being released from detention, where they risk being unrepresented, and in favor of remaining in detention where they at least have the benefit of counsel.[124]

QRs are also harmed by the ninety-day funding limit. They are placed in the ethically fraught position of having to either abandon their clients after ninety days due to budget constraints or continue in their representation *pro bono* at the expense of other potential clients. Most

---

120. Diagnostic and Statistical Manual of Mental Disorders (5th ed.; DSM–5; American Psychiatric Association, 2013) 649-650, http://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20%28%20PDFDrive.com%20%29.pdf ("The essential feature of paranoid personality disorder is a pattern of pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent . . . . Individuals with paranoid personality disorder are reluctant to confide in or become close to others because they fear that the information they share will be used against them (Criterion A3).").

121. Lilanthi Balasuriya, Eliza Buelt & Jack Tsai, *The Never-Ending Loop: Homelessness, Psychiatric Disorder, and Mortality*, PSYCHIATRIC TIMES (May 29, 2020), https://www.psychiatrictimes.com/view/never-ending-loop-homelessness-psychiatric-disorder-and-mortality [https://perma.cc/7A4D-LQVV].

122. 8 CFR § 1241.1(e) ("An order of removal made by the immigration judge at the conclusion of proceedings under section 240 of the Act shall become final . . . If an immigration judge orders an alien removed in the alien's absence . . . ."); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, MEASURING *IN ABSENTIA* REMOVAL IN IMMIGRATION COURT 18 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf [https://perma.cc/4X9S-WKNH] (showing that respondents with counsel appeared for their court hearings 96% of the time).

123. Immigr. Cust. Enforc., *Removal*, https://www.ice.gov/remove/removal ("ICE ERO removes noncitizens from the United States who are subject to a final order of removal. ERO facilitates the processing of undocumented noncitizens through the immigration court system and coordinates their departure from the United States.").

124. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 15–20 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [perma.cc/JV78-G459].

QRs work in nonprofit legal service organizations,[125] where funding is already scarce. Burnout, secondary trauma, and quality of life concerns permeant the practice, particularly for nonprofit attorneys.[126] It is unfair to force QRs into a position where they must continue representing a client, but without compensation. The funding termination also creates a conflict of interest between a QR's best interest (compensation) and their client's best interest (release from detention).

Further, forcing a QR to identify and secure alternative legal counsel for their NQRP clients is unrealistic, overly cumbersome, and unlikely to succeed. Yet, each Nationwide Policy subcontractor application asks that the provider describe their "capacity for utilizing and facilitating pro bono representation and other pro bono services for NQRP clients who are no longer eligible for Program Services . . . ."[127]

Some QR organizations are large and well-funded, and avowed that they had the capacity to absorb the cost and continue representation beyond the 90-day funding period.[128] Other organizations were located in underserved and geographically remote regions where legal resources are already stretched thin. As one Nationwide Policy QR provider in New Orleans stated in their 2019 application: "one of the main deterrents to pro bono representation for detained immigrants is the location of the detention facilities (typically about 3-4 hours from major metropolitan centers) . . . ."[129] They stated that their strategy would be to solicit *pro bono* case placement with large firms and private practitioners. Another provider in rural Pennsylvania, however, avowed they simply "[did] not have the staffing capacity to represent non-detained respondents in removal proceedings . . . ."[130]

The efficacy of the courts is diminished by the 90-day funding rule as well. EOIR itself acknowledged that immigration judges are hampered in "carry[ing] out their adjudicatory duties" when forced to proceed against

125. EXEC. OFF. FOR IMMIGR. REV., FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (Aug. 12, 2021) (on file with author) (providing a complete list of QRs and organizations).

126. Lindsay Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733 (2021).

127. VERA INST. OF JUST., FY2019 NQRP Supplemental Program Operation Plan (SPOP), Nationwide Policy Providers, New Orleans, app. B at 4 (Feb. 26, 2019) (on file with author).

128. VERA INST. OF JUST., FY2020 NQRP Supplemental Program Operation Plan (SPOP), Nationwide Policy Providers, Chicago, app. B at 3 (Aug. 15, 2019) (on file with author).

129. VERA INST. OF JUST., FY2019 NQRP Supplemental Program Operation Plan (SPOP), Nationwide Policy Providers, New Orleans, app. B at 4 (Feb. 26, 2019) (on file with author).

130. VERA INST. OF JUST., FY2020 NQRP Supplemental Program Operation Plan (SPOP), Nationwide Policy Providers, York, app. B at 3 (Oct. 29, 2019) (on file with author).

pro se respondents with mental health concerns.[131] IJs overwhelmingly agreed in a 2011 survey that cases move more efficiently when a respondent is represented by counsel.[132] Having an attorney present promotes judicial economy by reducing the number of continuances and by accelerating key procedural stages such as pleadings and tendering of relief.[133]

B. Bad for Business: How the NQRP's Billing Structures Create Conflicts of Interest and False Choices

Both the hourly billing and fixed-rate funding structures employed by EOIR are problematic.

The advantage of hourly billing is that a provider is fully compensated for the work they perform—unless there is (as here) an uppermost cap. Hourly billing also allows a QR organization to bill for paralegal, social worker, interpreter, and support staff time.

The hourly billing funding structure has disadvantages as well. For example, it was wholly inappropriate for EOIR—the agency that adjudicates immigration law cases and which occupies the role of a neutral arbiter—to know of, review, and then approve or deny any aspect of a legal representative's defense strategy. It is equally problematic that, under this model, a QR must justify the pursuit of certain evidence (e.g., the use of an expert). Such contractual features place counsel in a subordinate position to EOIR while subverting the integrity and independence of the public defender model.

EOIR might counter that the component responsible for adjudicating a QR's billing requests (the Office of Legal Access Programs) is separate from the component that adjudicates the actual merits of the case (the Office of the Chief Immigration Judge). But such organizational nuances are not intuitive or widely known—and regardless, the process creates an appearance of impropriety and risks intimidating counsel.

Another disadvantage to hourly billing is that nonprofit providers are unable to budget over the long-term and are therefore unable to hire

---

131. EOIR Policy Memorandum, *supra* note 5, at 1("For those of you who have had unrepresented detained aliens with serious mental disorders or conditions appear in your courtrooms, you are more than aware of the many unique challenges encountered in conducting removal proceedings involving such individuals.").

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

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

permanent staff. This is especially true in the Nationwide Policy, where funding ends ninety days after a client's release from ICE custody.

The flat-rate system EOIR adopted in 2018 appears, at first blush, to be an improvement. At a minimum, EOIR is no longer reviewing a QR's litigation decision-making. The flat-rate system also gives providers the security of a long-term contract while allowing them to staff appropriately over a given year. It does not, however, account for extreme case fluctuations, such as where a released *Franco* member's case endures for years and requires multiple court appearances, or where a respondent has criminal convictions and requires expensive, lengthy post-conviction relief. And finally, a flat-rate system encourages cost containment over quality by creating incentives to move cases out quickly rather than fully litigate them.

The hourly billing versus flat-rate models presents *Franco* QRs with a Hobson's Choice—but a choice, nevertheless. The Nationwide Policy QRs are not even allowed that; they are confined to a flat-rate arrangement.

C. Timing Really Is Everything: Constitutional Deprivations for Nationwide Policy Respondents

Timing differences between the Nationwide Policy versus *Franco* courts[134] implicate detainees' liberty interest. With no pressure on the Nationwide Policy immigration courts to comply with the strict mandates of *Franco*—and with EOIR's own training materials telling judges that competency timeframes are "aspirational"[135]—respondents face prolonged and unnecessary detention periods. As demonstrated through an analysis of the case processing times between the two sides of the program, unenforced timing deadlines mean that respondents languish longer in harmful ICE custody.[136]

The fact that Nationwide Policy respondents are not entitled to a custody review with a QR present after an incompetence determination is utterly illogical and violates EOIR's own stated policy.[137] In practical terms, and as articulated by the district court in *Franco*, an incompetence determination means that any prior bond hearing without a QR present is effectively invalid and must be done again with counsel by the

134. *See supra* notes 29–31 and accompanying text.

135. *Supra* note 82 and accompanying text.

136. *Supra* Part II.C and accompanying text.

137. *See* EOIR Policy Memorandum, *supra* note 5 and accompanying text.

incompetent respondent's side.[138] To not permit a Nationwide Policy respondent a new bond hearing with counsel present is to adhere the first bond hearing's validity—when in fact it should have been invalidated as a matter of law by the subsequent incompetence ruling.

Additionally, detained proceedings are expensive for the courts and ICE,[139] especially as the cost to detain a single individual is around $140 a day.[140] More importantly, longer detention times are harmful to respondents who risk decompensation,[141] self-harm,[142] solitary confinement,[143] or inadequate and inappropriate care for their mental health concerns.[144]

EOIR's failure to permanently track Nationwide Policy respondents as they do their *Franco* respondents risks harming respondents in two ways. First, Nationwide Policy respondents caught anywhere between an IJ's bona fide doubt finding and a competency hearing risk unlawful deportation. They run this risk if they either accept their own removal

---

138. Franco-Gonzalez v. Holder, No. 10-CV02211, Partial Judgment and Permanent Injunction of Apr. 23, 2013, 4 (C.D. Cal. Apr. 23, 2013) ("That a Sub-Class Two member has had a prior bond hearing shall not be sufficient to satisfy the requirements of this Order and Judgment unless that bond hearing complied with the requirements of *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011). For Sub-Class Two members who are also Sub-Class One members, *the individual must also have been represented by a Qualified Representative at that hearing*." (emphasis added)); *see also Franco v. Gonzalez v. Holder Case Processing and Logistics – Quick Reference*, SIXTH FOIA REQUEST RESPONSE TO THE HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (June 1, 2021) (on file with author) ("A *Franco* class member is entitled to a bond hearing after 180 days in detention, and with their QR present after being found incompetent, even if they were previously provided with a bond hearing.").

139. *See* Eagly & Shafer, *supra* note 133, at 60.

140. AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY 6 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/5G3D-LKNL].

141. E. FULLER TORREY, JOAN STIEBER, JONATHAN EZEKIEL, SIDNEY M. WOLFE, JOSHUA SHARFSTEIN, JOHN H. NOBLE & LAURIE M. FLYNN., NAT'L ALL. FOR THE MENTALLY ILL & PUBLIC CITIZEN'S HEALTH RSCH. GRP., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 62–64 (providing testimonials from impacted individuals and their families regarding a severe psychiatric and medical deterioration during periods of incarceration).

142. *Id.* at 61 (referencing studies that find approximately half of all inmate suicides are committed by persons suffering from serious mental health disorders).

143. AZZA ABUDAGGA, SIDNEY WOLFE, MICHAEL CAROME, AMANDA PHATDUOANG & E. FULLER TORREY, PUBLIC CITIZEN'S HEALTH RESEARCH GROUP & THE TREATMENT ADVOCACY CTR., INDIVIDUALS WITH SERIOUS MENTAL ILLNESSES IN COUNTY JAILS: A SURVEY OF JAIL STAFF'S PERSPECTIVES 11–12 (2016) (surveying jails around the U.S., nearly 70% of which reported segregating individuals with serious mental health disabilities).

144. OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., MANY FACTORS HINDER ICE'S ABILITY TO MAINTAIN ADEQUATE MEDICAL STAFFING AT DETENTION FACILITIES (2021), https://www.oig.dhs.gov/sites/default/files/assets/2021-11/OIG-22-03-Oct21.pdf [https://perma.cc/3ET6-HGC9].

order proposed by ICE or withdraw their request to see an immigration judge—acts they may not be competent to do.

Second, if a Nationwide Policy respondent is released from detention prior to the conclusion of their competency proceedings, none of the class membership benefits adhere to their casefile as they would if the respondent was identified as *Franco.*[145] This means that, despite possibly being incompetent, they will never have the benefit of appointed counsel.[146]

Instead, released respondents will have their competency evaluated under the *Matter of M-A-M-* standard[147]—which is a lower competency standard than that set out in *Franco.*[148] It is easier to be competent under *M-A-M-* because *M-A-M-* requires that a respondent perform fewer functions than *Franco* requires in order to be competent.[149] And, because IJs applying *M-A-M-* do not have the authority to order a forensic competency evaluation to assist them in understanding a respondent's mental condition,[150] more respondents will fall through the cracks.

D. A Hard Enough Job as It Is: Inconsistent Training Imperils EOIR as a Whole

The NQRP is complicated—not only in terms of case processing, but because adjudicating competence for a neurologically diverse range of respondents is extremely challenging in and of itself. Untrained or inadequately trained court staff might account for slowed case

145. *Supra* notes 34–35 and accompanying text.

146. *Supra* note 7 and accompanying text.

147. *Matter of M-A-M-,* 25 I. & N. Dec. (BIA 2011) at 479 ("[T]he test for determining whether an [individual] is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.").

148. *See* EXEC. OFF. FOR IMMIGR. REV., PowerPoint: Determining Mental Competence & Safeguards & Protections (Aug. 5-23, 2021) (on file with the author), at slide 6 ("*M-A-M-* applies to any case where there is indicia that the respondent lacks competency, but *Franco* and the *Nationwide Policy* would not apply.").

149. Franco Implementation Order, *supra* note 35 at 13–14 (holding that a respondent must not only have a rational and factual understanding of the proceedings, but also be able to make informed decisions about whether to waive their rights, respond to allegations and charges, present information and evidence relevant to eligibility for relief, and act upon instructions and information presented by the IJ and government counsel).

150. *See* EXEC. OFF. FOR IMMIGR. REV., PowerPoint: Determining Mental Competence & Safeguards & Protections (Aug. 5-23, 2021) (on file with the author), at slide 13 ("Actions an IJ Cannot Take under *M-A-M-* . . . Order that a psychologist conduct an evaluation of the respondent . . . .").

processing,[151] a disproportionately low rate of QR orders in the Nationwide Policy regions,[152] and slow programmatic rollout.[153] Increased case processing times unduly burdens an already bowing immigration court system.

Failure to adequately train immigration judges to identify and treat competency in their courtrooms implicates due process concerns; if an IJ fails to fully evaluate or understand a respondent's mental health concerns, there is a risk that a respondent with disabilities will fall outside the NQRP's scope and will therefore be deprived of their constitutional right to a fair hearing with counsel by their side.

First, as EOIR assumes a new contractual relationship with its next partner, it must eliminate the ninety-day funding limitation for non-*Franco* cases. It is fundamentally unfair to proceed against an unrepresented incompetent respondent—regardless of their detention status—and respondents' due process and statutory rights must be guaranteed during the entire pendency of their proceeding as long as incompetency continues. The ninety-day limitation is harmful to respondents who now risk proceeding *pro se*, harmful to QRs who must make ethically fraught and unfair choices related to their continued representation, and harmful to the judicial economy of the courts.

Second, EOIR should change its compensation model to enable QR subcontractors to elect—according to their institutional needs—hourly or flat-rate billing. Further, EOIR should eliminate funding caps and line of review by its main contractor. This compensation structure removes conflicts of interest while promoting the financial health of the QR organizations.

Third, EOIR must safeguard the liberty interests of Nationwide Policy respondents by imposing strict adherence to the case timetables and obligations laid out in *Franco* to shorten detention periods. This will move cases forward more consistently and quickly, while promoting the liberty interests of respondents with mental health concerns.

Fourth, EOIR must finally fulfill its promise to provide all detained, mentally incompetent respondents with a custody review after 180 days of detention. Any prior bond hearing without counsel was invalid, as in *Franco*, and must be conducted anew with a QR by the respondent's side.

Finally, EOIR should tackle the enormity of its training gaps by simply introducing a designated "competency docket" in each court. If an IJ determines that a respondent's competency is implicated, they would refer

151. *Supra* notes 99–105 and accompanying text.

152. *Supra* notes 81–88 and accompanying text.

153. *Id.*

that case to a specialized weekly calendar presided over by a small group of IJs with expertise in competency. Those IJs would receive regular, intensified training on the complex and shifting nature of mental health and its intersection with immigration law. Upon completion of the competency evaluation process, the case would return to the original IJ for adjudication on the merits. A designated competency docket would create transparency for the public, promote judicial economy by reducing scheduling delays, and eliminate the need for large-scale, EOIR-wide judge training and refresher courses.

EOIR has successfully created designated dockets for other groups—such as families and unaccompanied children—and has seen the benefits of concentrating and developing expertise among a select number of judges for a discreet population.

Adding a "Nationwide Policy" identification label to each respondent's internal case file will ensure that future courts—from non-detained dockets to the BIA—are aware the respondent requires counsel before further action, and that the case needs to be placed on the competency designated docket rather than with an undertrained or untrained IJ.

CONCLUSION

The above recommendations are emergency and "stopgap" in nature. Our immigration system is far from being just, complete, and humane for those with mental health disabilities. For example, this article does not begin to discuss the problems with *Franco* as a whole, and specifically, those who are entirely left behind by the *Franco* court order. Nor does this article add to abolitionist conversations, which promote the dismantling of our detention and deportation systems rather than the incremental improvement of them.

Suggesting alterations to the Nationwide Policy does not validate the systems that exist but ameliorates some of the harm created by them in practical, attainable ways. Measures such as eliminating funding limits, allowing bond hearings for all detained incompetent respondents, addressing gaps in immigration judge training, and applying a consistent case tracking and case processing system across the United States will offer immediate gains for noncitizens with mental health disabilities and can be pursued alongside long-term goals of repairing our damaged immigration landscape.