

April 6, 2017

Juan P. Osuna
Director
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Suite 1902
Falls Church, VA 20530

Re: Institutional Hearing Program Expansion; Request for Information and Meeting

Dear Director Osuna:

We write to express concerns regarding the recently announced expansion of the Institutional Hearing Program (IHP).¹ We fear the program's expansion will further undermine due process rights for men and women with viable defenses to deportation. This letter serves to request information and a meeting to discuss these concerns and recommendations with you and other government officials charged with implementing this expansion as soon as practicable.

It is our understanding that the IHP aims to facilitate the commencement and completion of removal proceedings for individuals while they complete their criminal sentence. Individuals facing removal through the IHP are entitled to the same due process rights every non-citizen is guaranteed by the Immigration and Nationality Act and the Constitution of the United States. Yet the U.S. Department of Justice's announcement regarding the expansion of the IHP presumes a removal order as the desired outcome for all cases processed through the program, identifying the IHP's goal as "speed[ing] the process of deporting incarcerated criminal aliens."² We hope you agree that the pursuit of just outcomes and protection of due process rights are more appropriate goals for any judicial hearing program.

We urge you to halt any expansion of the IHP until and unless the agency has developed—with stakeholder engagement—specific plans to ensure meaningful access to counsel and due process protections for each facility.

¹ Department of Justice, "Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities," Mar. 30, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal>.

² *Id.*

I. Many individuals processed through the IHP have meritorious claims to relief, including asylum. Expansion of the IHP into Bureau of Prison facilities will lead to a dramatic increase in these numbers.

Many individuals currently processed through the IHP have meritorious claims to protection and/or relief under United States law.³ An expansion of the IHP into the Bureau of Prisons will mean that new cases heard through the program will be those of men and women serving time stemming from federal prosecutions. The majority of prosecutions brought through the federal system are for migration-related offenses such as unlawful entry and reentry,⁴ offenses that do not preclude eligibility for many types of relief from removal. Furthermore, these prosecutions are frequently brought against migrants whose only “offense” was flight to the United States to seek refuge from violent persecution in their home country.⁵ We expect, therefore, that the percentage of individuals processed through the IHP with meritorious claims to asylum and other forms of protection will increase dramatically as the program expands into the federal prison system.

II. The IHP poses unique obstacles to due process.

Individuals processed through the IHP face daunting challenges to asserting their due process rights. *Only nine percent* of respondents in the IHP are represented, compared to a 37 percent representation rate for all adults facing removal.⁶ These low rates likely result from a confluence of factors that make it difficult if not impossible for indigent non-citizens to obtain representation from inside a correctional facility. These factors include the inability to harness the resources to pay for counsel while serving out a criminal sentence, the intensity of resources and expertise needed for immigration attorneys to take on detained deportation defense matters, and—perhaps most importantly—the remote nature of most IHP dockets.⁷

Federal law provides non-citizens in removal proceedings the right to obtain counsel.⁸ However, this right is rendered meaningless when individuals face removal proceedings while detained in

³ In fiscal year 2015, approximately 5% of individual cases completed through the IHP resulted in a grant of relief or termination by the Immigration Judge. Executive Office for Immigration Review, FY 2015 Statistics Yearbook, Apr. 2016, at H2, <https://www.justice.gov/eoir/page/file/fysb15/download>. The percentage of individuals processed through the IHP with viable claims for relief is certain to be markedly higher than this, however, given that only 9% of individuals processed through IHP are represented and detained pro se respondents are far less likely than their non-detained represented counterparts to pursue relief, even if eligible. See Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” Univ. of Pennsylvania Law Review, Vol. 164 No. 1, Dec. 2015, at p. 50, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

⁴ See Immigration Now 52 Percent of All Federal Criminal Prosecutions, TRAC, Nov. 28, 2016, <http://trac.syr.edu/tracreports/crim/446/>.

⁵ See DHS Office of the Inspector General, Streamline: Measuring Its Effect on Illegal Border Crossing, OIG-15-95, May 15, 2015, at p. 16, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

⁶ See Eagly and Shafer, *supra* n. 3, at p. 24.

⁷ See *id.* at pp. 31-32.

⁸ 8 U.S.C. § 1362 (West 2016).

locations that are remote from experienced immigration attorneys, non-profit immigration service providers, and family and loved ones able to assist in mounting a defense. Many Bureau of Prison facilities are located in just such remote areas of the country.

III. Any expansion of the IHP must include robust planning to ensure meaningful due process rights and access to counsel.

All men and women processed through the IHP must be given their full and fair day in court to present their claims to relief with the attendant rights due to them, including representation. In order to achieve this goal, **the following four recommendations should be implemented:**

1. If the IHP is expanded, the Executive Office for Immigration Review should develop a plan to ensure meaningful access to counsel and due process protections with input from national and local stakeholders, as well as immigration judges currently serving on IHP dockets.
2. IHP hearings should be conducted in person, not by video conference.
3. The IHP should only be expanded into facilities where the U.S. Department of Justice has identified a free competent immigration legal service provider who has agreed to provide ongoing and consistent know your rights programming and direct representation to those individuals on the IHP docket with viable claims to relief.
4. On all IHP dockets, immigration judges should provide every respondent with a list of Pro Bono Legal Service Providers and grant generous continuances to allow respondents to find counsel. The list should be formulated and updated with input from local and national stakeholders.

We request a meeting as soon as possible to discuss ways we can work collaboratively toward these objectives. In advance of this meeting we respectfully request the following information:

1. A list of the 14 Bureau of Prison facilities and six Bureau of Prison contract facilities where the IHP will be expanded;
2. The mechanism by which cases will be heard in each facility (i.e. in person or by video conference, and if by video conference the name of the court where the immigration judge will preside in person);
3. A timeline by which the IHP courts will be up and running in each facility;
4. An analysis of the availability and proximity of immigration attorneys and/or immigration legal service providers competent to provide pro bono or low cost deportation defense at each of the twenty facilities; and
5. Drafts of the Pro Bono Legal Service Provider list that will be made available to individuals processed through the IHP at each of the new facilities, as well as a timeline for stakeholder input.

We appreciate your time and consideration of this request. Please contact Heidi Altman at the National Immigrant Justice Center at haltman@heartlandalliance.org or 312-718-5021 in regard to the meeting request or any other questions or concerns.

Sincerely,

Detention Watch Network

Immigrant Defense Project

Immigrant Legal Resource Center

National Immigrant Justice Center

National Immigration Law Center

National Immigration Project of the National Lawyers Guild