



The Institutional Hearing Program: An Overview

The Institutional Hearing Program (IHP) permits immigration judges to conduct removal proceedings for noncitizens serving criminal sentences in certain correctional facilities.¹ Unfortunately, there is little reliable, publicly accessible information about how the IHP functions.² Lack of information notwithstanding, a readily apparent problem with the IHP is that most noncitizens do not have access to attorneys who can represent them in their deportation hearings. Typically, these individuals fare much worse than those with an attorney.

This fact sheet provides an overview of the IHP's history and what is known about the way it works. It also highlights some of the due process concerns that surround the program.

History and Overview of the Institutional Hearing Program

The Institutional Hearing Program (also known as the Institutional Removal Program) was created in 1988 to identify deportable noncitizens who have been convicted of criminal offenses and initiate removal proceedings against them before they are released from federal, state, or local custody.³ The creation of the program followed enactment of the Immigration Reform and Control Act of 1986, which stated that: "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction."⁴

The publicly available information about the IHP and its scope is incomplete. According to a 2004 consultant's report prepared at the request of U.S. Immigration and Customs Enforcement (ICE), the IHP operates in "federal, state, and local jails and prisons."⁵ But a 2012 report from the Congressional Research Service states that—at least initially—the IHP "focused on a small number of federal and state prisons that held the largest number of criminal aliens," while a separate Alien Criminal Apprehension Program (ACAP) "covered other jails and prisons."⁶ Yet a 2017 Department of Justice (DOJ) press release announcing the expansion of the IHP references only "federal correctional facilities."⁷ DOJ also states that, at the federal level, the program is jointly administered by the Executive Office for Immigration Review (EOIR) and the Bureau of Prisons (BOP), both within DOJ, together with ICE, which is within the Department of Homeland Security (DHS).⁸

The number of removals conducted through the IHP grew dramatically for several years after the program's creation, starting at 1,409 in Fiscal Year (FY) 1988 and peaking at 18,018 in FY 1997. However, IHP removals plummeted after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). IIRAIRA, along with the Antiterrorism and Effective Death Penalty Act of 1996, added to the list of offenses for which a noncitizen could be deported; it also made it easier to carry out deportations without a court hearing. As a result, the number of removals conducted through the IHP dropped rapidly after FY 1997.⁹

The Trump administration is seeking to breathe new life into the IHP. On February 20, 2017, then acting Secretary of Homeland Security John Kelly issued the department-wide memorandum “Enforcement of the Immigration Laws to Serve the National Interest.”¹⁰ The memorandum reaffirms the U.S. government’s commitment to utilize the IHP to initiate removal proceedings against noncitizens “incarcerated in federal, state, and local correctional facilities.”¹¹

Roughly one month after the memorandum was issued, the Department of Justice (DOJ) announced that the IHP would expand in federal prisons to a total of 14 BOP facilities and six BOP contract facilities. DOJ gave no indication of how many federal prisons were participating in the IHP prior to the expansion.¹²

How the Program Works

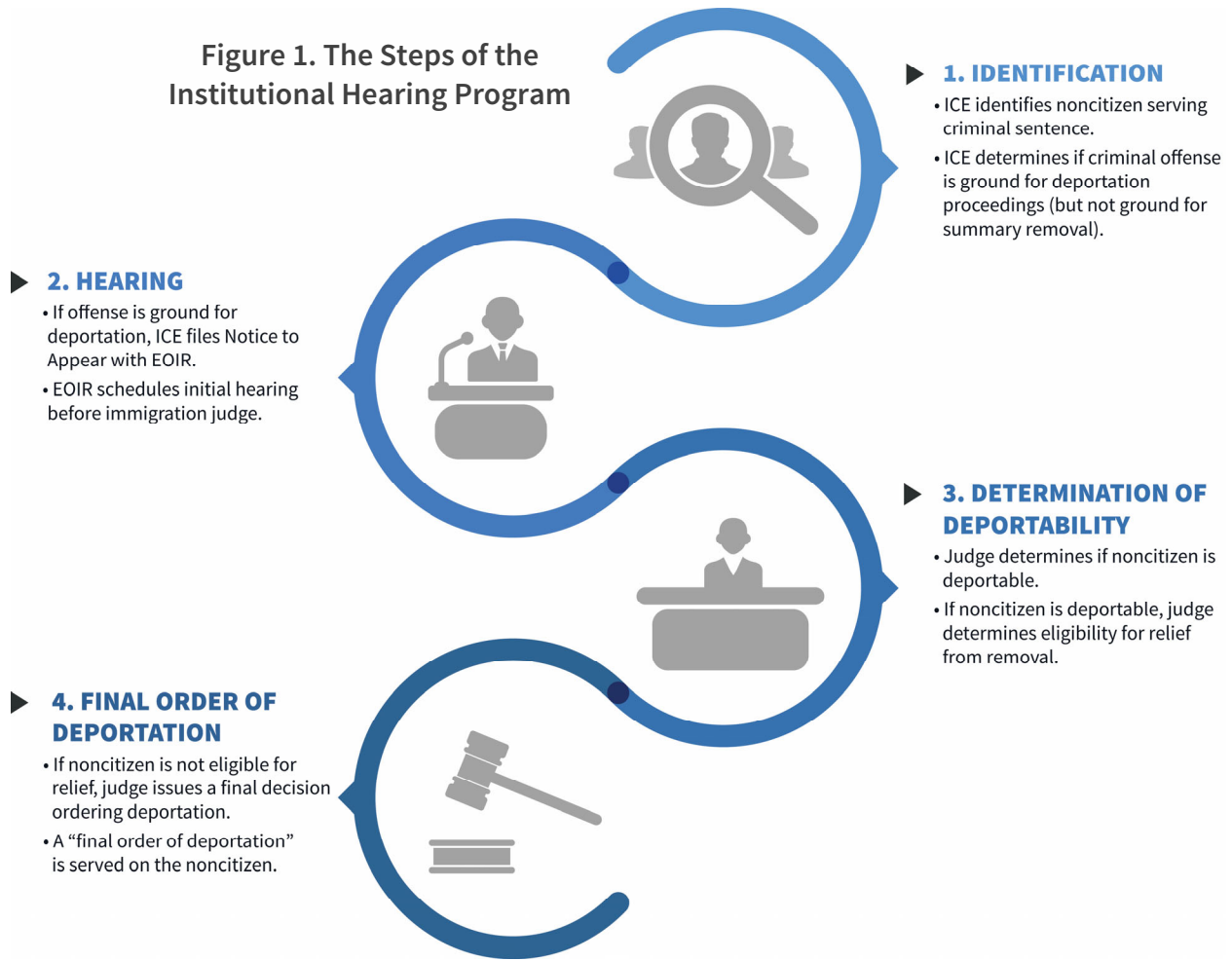
The IHP—which is part of the Criminal Alien Program (CAP)¹³—commences when designated ICE officers identify noncitizens serving criminal sentences. ICE then makes its own determination regarding whether these noncitizens have committed an offense that constitutes a ground for deportation (or whether the noncitizen is otherwise deportable).¹⁴

If the officer determines that the noncitizen is indeed deportable and can have his or her case heard before an immigration judge, rather than face summary removal under the scheme enacted in IIRAIRA,¹⁵ ICE files a “Notice to Appear (NTA)”¹⁶ with EOIR that charges the noncitizen with committing a deportable offense and initiates removal proceedings. Once ICE files the NTA with EOIR, removal proceedings ensue, according to the statute.¹⁷ EOIR schedules an initial hearing before an immigration judge and the noncitizen is notified. The immigration judge reviews the charges and if the judge determines that the noncitizen is in fact deportable, the judge will determine whether the noncitizen qualifies for any relief from removal.¹⁸

During a hearing on any application for relief from removal, a noncitizen has the right to submit evidence, review the government’s evidence, and call witnesses. Importantly, a noncitizen has a right to counsel, though the statute specifies that this right is “at no expense to the government.”¹⁹ The judge then issues a final decision. If the judge orders removal, a “final order of deportation” is served on the noncitizen²⁰ (see Figure 1).

As with all removal orders issued through this process,²¹ a noncitizen has a right to appeal the decision to the Board of Immigration Appeals (BIA)²² and, in many cases, can seek judicial review before the federal courts of appeals.²³

Figure 1. The Steps of the Institutional Hearing Program



Due Process Concerns

A key problem with the IHP is that most noncitizens lack access to attorneys who can represent them in their deportation hearings. A national study of access to counsel in immigration courts found that only 9 percent of incarcerated noncitizens in IHP removal proceedings between 2007 and 2012 were represented by an attorney, compared to 38 percent of non-IHP removal cases.²⁴

Not surprisingly, individuals in removal proceedings who do not have an attorney fare much worse than those with an attorney. The same study found that, in general, only 2 percent of detained noncitizens without attorneys achieved favorable outcomes in their cases, compared to 21 percent of those with attorneys.²⁵

At the federal level, the Justice Department reports that only four percent of the IHP cases completed in FY 2018 had representation.²⁶ Among cases without representation, 97 percent culminated in an order of removal, compared to 72 percent of cases with representation.²⁷ As the Supreme Court has noted, discerning the immigration consequences of criminal convictions is “quite complex.”²⁸ Thus, the importance of counsel is particularly acute for individuals who appear on the IHP immigration court docket.

In addition to the problem of access to counsel, the manner in which many IHP deportation hearings are conducted raises other due process concerns. Increasingly, immigration judges conduct the hearings by video teleconference (VTC) rather than in person. According to the Justice Department, 54 percent of federal IHP case hearings were conducted by VTC in FY 2018.²⁹

The Trump administration wants to increase the use of VTC proceedings as part of its effort to expand and modernize the IHP.³⁰ However, a study conducted by Booz Allen Hamilton at the behest of EOIR found that “faulty VTC equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise.”³¹ Moreover, the study noted that “it is difficult for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC.”³²

In other words, noncitizens subject to VTC hearings are at a distinct disadvantage compared to those who appear before a judge in person. While the immigration statute permits that hearings be conducted by VTC, courts have reiterated that these proceedings must nonetheless comport with due process, particularly with regard to the rights to counsel and to examine evidence.³³

Endnotes

1. Marc R. Rosenblum and William A. Kandel, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens* (Washington, DC: Congressional Research Service, December 20, 2012), 11-12, <https://fas.org/sgp/crs/homsec/R42057.pdf>; Fentress Incorporated, *Institutional Removal Program National Workload Study* (Washington, DC: U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, September 2004), 1.
2. For this reason, the American Immigration Council brought a lawsuit against DHS under the Freedom of Information Act (FOIA) asking that such information be made available. *American Immigration Council, et al., v. Executive Office for Immigration Review, et al.*, No. 1:19-cv-06658 (S.D.N.Y., filed July 17, 2019).
3. Marc R. Rosenblum and William A. Kandel, *Interior Immigration Enforcement...*, 11-12; Fentress Incorporated, *Institutional Removal Program National Workload Study*, 1.
4. P.L. 99-603, § 701.
5. Fentress Incorporated, *Institutional Removal Program National Workload Study*, 1.
6. Marc R. Rosenblum and William A. Kandel, *Interior Immigration Enforcement...*, 12-13. According to CRS, the IHP and ACAP were combined into the Criminal Alien Program (CAP) between 2005 and 2007.
7. U.S. Department of Justice, Office of Public Affairs, “Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities,” March 30, 2017, <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal>.
8. *Ibid.*
9. Transactional Records Access Clearinghouse, “The Immigration Court’s Institutional Hearing Program: How Will It Be Affected” (Syracuse, NY: Syracuse University, February 22, 2017), <https://trac.syr.edu/immigration/reports/461/>.
10. Memorandum from John Kelly, Secretary, Department of Homeland Security, to Department Directors, Subj: Enforcement of the Immigration Laws to Serve the National Interest (February 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.
11. *Ibid.*
12. U.S. Department of Justice, “Attorney General Sessions Announces Expansion...”.
13. Marc R. Rosenblum and William A. Kandel, *Interior Immigration Enforcement...*, 13.
14. Prior to the creation of the Department of Homeland Security (DHS) in 2003, administration of the IHP fell to the Immigration & Naturalization Service (INS).
15. 8 U.S.C. § 1229a.
16. Prior to the enactment of IIRAIRA, a “Notice to Appear” was called an “Order to Show Cause.”
17. 8 U.S.C. § 1229a.
18. Individuals in the IHP are not eligible for an immigration bond by virtue of their federal, state, or local incarceration.
19. 8 U.S.C. § 1229a.
20. *Institutional Hearing Program: Hearing Before the Subcommittee on Immigration and Claims, Committee on the Judiciary, U.S. House of Representatives*, 105th Congress (July 15, 1997) (statement of Norman J. Rabkin, Director, Administration of Justice Issues, U.S. General Accounting Office), <https://www.gao.gov/archive/1997/gg97154t.pdf>.
21. 8 U.S.C. § 1229a.
22. 8 C.F.R. § 1003.1(b).
23. 8 U.S.C. § 1252(a).
24. Ingrid Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (December 2015), 24, <https://www.pennlawreview.com/print/index.php?id=498>.
25. *Ibid.*, 9.
26. Office of the Assistant Attorney General, U.S. Department of Justice, letter to the Honorable Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives, regarding implementation of the First Step Act, June 7, 2019, 11.
27. *Ibid.*

28. *Padilla v. Kentucky*, 559 U.S. 356, 377-78 (2010).
29. Office of the Assistant Attorney General, U.S. Department of Justice, letter to the Honorable Jerrold Nadler, 11.
30. U.S. Department of Justice, "Attorney General Sessions Announces Expansion..."
31. Booz Allen Hamilton, *Legal Case Study: Summary Report* (Washington, DC: U.S. Department of Justice, Executive Office for Immigration Review, April 6, 2017), 23, https://americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf.
32. *Ibid.*
33. *Raphael v. Mukasey*, 533 F.3d 521 (7th Cir, 2008); *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002).