

U.S. Taxpayers Should Not Pay for Legal Counsel for Illegal Aliens

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KEY TAKEAWAYS

The Immigration and Nationality Act gives aliens the privilege of counsel—at no expense to the government—in removal proceedings and administrative appeals.

The principle of “at no expense to the government” is sound and must be maintained. Taxpayers should not pay for legal counsel for aliens who violated U.S. law.

Taxpayer-funded counsel for aliens violates the law, gives even illegal aliens a right not given U.S. citizens, and is financially unsustainable.

Who should pay the legal fees for an illegal alien? This question deserves more attention, especially given the push by some on the left to have taxpayers foot the bill.

The Immigration and Nationality Act (INA) states that an alien shall have the privilege of counsel—at no expense to the government—in removal proceedings and administrative appeals. This due process privilege is extremely generous, and it is one that some on the left have sought to expand—at taxpayer expense. Such expansion efforts give illegal aliens more benefits than U.S. citizens, who do not receive taxpayer-funded attorneys in civil matters. Citizen taxpayers should not be forced to pay for the lawyers of illegal aliens, and current (state and local) funds for legal representation for illegal aliens, should be rescinded.

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Aliens' Right to Counsel and the Cost

When an alien receives a Notice to Appear (NTA) before an immigration judge, the civil, administrative action of removal proceedings begins.¹ The INA allows an alien to have representation during these proceedings. The statute states:

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.²

Because immigration proceedings are civil, not criminal, there is no constitutional right to a publicly funded attorney in immigration court. Further, the Supreme Court has repeatedly rejected the notion that deportation is punishment, and the Sixth Amendment right to counsel is therefore not applicable in removal proceedings.³

The principle behind the “at no expense to the Government” clause is sound and must be maintained. Taxpayers should not pay for legal counsel for aliens who violated U.S. law. To do so would not only be bad policy, it would provide illegal aliens with more benefits than U.S. citizens. Furthermore, taxpayer-funded lawyers for illegal aliens would provide an incentive to aliens to litigate at will, even when they have a frivolous claim, since they will not have to foot the substantial legal bills they rack up. This makes no sense at all.

Immigration proceedings before an immigration judge can involve anywhere from two to four or more court appearances, depending on the number of continuances an alien requests. That translates to at least four hours, and usually more, of court time, plus consultation and preparation hours, per attorney, per alien. Immigration attorneys charge \$150 to \$300 per hour and a deportation defense costs from \$2,000 to \$10,000.⁴ Multiplied by the more than 504,000 cases initiated in fiscal year (FY) 2019 alone,⁵ the potential total cost for representation is significant. The Department of Justice (DOJ) reports that aliens have private representation in 65 percent of all pending cases, and in 87 percent of pending asylum cases.⁶

Aliens typically appeal negative decisions by immigration judges to the DOJ's Board of Immigration Appeals (BIA). According to the DOJ, nearly 63,000 appeals were filed in FY 2019.⁷ Filing an appeal to the BIA is a common delay tactic to spend more time in the U.S., in the hopes of

becoming eligible for another form of relief from deportation during the appeal. With almost 72,000 appeals pending at the end of FY 2019,⁸ it takes the BIA from eight months to over 18 months to complete per appeal.⁹ An appeal racks up even more hours of attorney time and is another significant expense.¹⁰

Representation for appeals to the BIA is included in aliens' "privilege of counsel" that is provided by section 292 of the INA. Accordingly, the DOJ provides a public list of private pro bono legal service providers for those aliens who cannot afford an attorney.¹¹

Attempts to Expand the Right via Minors

Despite U.S. Supreme Court rulings and clear statutory language, activist judges,¹² liberal Members of Congress,¹³ and open-borders advocates have sought to expand the bright-line rule, starting with alien minors.¹⁴ An article in the *Stanford Journal of Civil Rights and Civil Liberties* expressly states this approach:

[C]ases involving unaccompanied children present especially special circumstances, and the current state of the law thus indicates that appointing them counsel has risen to the level of being inherent in the contemporary notion of fundamental fairness. If the right to appointed counsel is to take hold in immigration proceedings, history suggests it might first find footing at a particularly vulnerable core like this one, and expand outwards from there.¹⁵

The 2019 Trafficking Victims Protection Reauthorization Act addresses the right to counsel for unaccompanied alien minors. It requires the Department of Health and Human Services (HHS) to "ensure to the greatest extent practicable, and consistent with section 292 of the [INA], that all unaccompanied alien children" in HHS custody have counsel, not only to represent them in legal proceedings, but to "protect them from mistreatment, exploitation, and trafficking."¹⁶ Congress further required that the HHS Secretary "shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge."¹⁷

The Obama Administration provided funding to legal service providers to increase such representation. The Justice AmeriCorps program awarded \$1.8 million for representation of certain minors in immigration court,¹⁸ and HHS subsequently provided an additional \$9 million for representation in FY 2014 and FY 2015.¹⁹ The FY 2020 appropriations act directed that \$160

million of HHS funds be used for legal services, child advocates, and post-release services.²⁰ Providing legal service providers federal grant money, however, violates the statutory requirement that alien representation be “at no expense to the Government.” Accordingly, the federal government should refrain from granting funds for legal counsel in immigration court.

Expanding the Right to Counsel and Taxpayer Funding

Some politicians on the left have sought to expand aliens’ right to counsel even beyond proceedings before an immigration judge and the BIA. These efforts include adding counsel for immigration inspection by a U.S. Customs and Border Protection agent at a port of entry. But when a person in immigration inspection is seeking admission to the United States, as a legal matter, he is *outside* the country.

The U.S. should not provide a right to counsel to aliens who are attempting to enter the country—whether legally or illegally. U.S. citizens do not have a right to counsel at ports of entry. Furthermore, if the right to counsel is extended to inspection, it could arguably then be extended to applying for a U.S. visa at an embassy or consulate abroad, which would overturn long-established and sound law.²¹

Such a requirement would also be completely unfeasible at the extremely busy ports of entry that must process thousands of travelers every day. Ports of entry do not have the space to provide private rooms for travelers to meet with counsel. Also, such counseling would cause significant and consistent delays, impeding travel and trade.²²

Another expansion-of-counsel tactic involves state and local jurisdictions using taxpayer dollars for legal defense funds for aliens facing deportation. Chicago, Denver, Los Angeles, New York City, Portland, San Francisco, Seattle, Washington, DC, and other jurisdictions have such programs.²³ The principle behind the “at no expense to the Government” language of the statute should apply to state and local taxpayers just as it does to federal tax dollars—taxpayers at any level should not have to pay legal fees for an illegal alien.

These state and local jurisdictions are taking money from important budgets, such as emergency relief, to provide legal funds for illegal aliens.²⁴ Furthermore, these legal funds are mere gestures, given their small amounts of money, as compared to the overall attorney cost for removal proceedings and the never-ending demand from the large and continuous illegal alien population in this country.²⁵ Such money should instead be spent on U.S. citizens and lawful residents of the jurisdictions.

Recommendations

Congress and the Administration should:

- **Maintain the current bright-line rule that an alien's right to counsel shall be at no expense to the government.** This rule should not be expanded to certain populations of aliens, such as minors, nor should it be expanded to functions beyond immigration proceedings before an immigration judge or the Attorney General, such as inspection of travelers at ports of entry.
- **Refrain from providing federal grant money to legal organizations that provide pro bono services for aliens in removal proceedings.** This violates the clear statutory language that such services shall be at no expense to the government.

The public should:

- **Oppose state and local jurisdictions that provide, or plan to provide, legal defense funds for illegal aliens.** Taxpayers at any level should not pay legal fees for illegal aliens. These funds should be prioritized for U.S. citizens and lawful residents.

Conclusion

An alien's right to counsel for civil deportation proceedings should not be expanded. To do so would give illegal aliens *more* privilege than that given to U.S. citizens. Rather, the federal government and Americans at the grassroots level should maintain the principle behind the current law: No public funds at any level of government should be used to fund attorneys for illegal aliens.

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Endnotes

1. The NTA outlines why an alien is inadmissible or removable, such as entry without inspection, violating the terms of his visa, a criminal conviction, or committing fraud. See sections 212 and 237 of the INA; 8 U.S. Code §§ 1182, 1227. Aliens often do not contest that they are ineligible to be admitted or remain in the country. Instead, they quickly move to the second phase of the proceedings—requesting relief from deportation.
2. Section 292 of the INA; 8 U.S. Code § 1362.
3. See, for example, *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).
4. Thervo, “How Much Does an Immigration Lawyer Cost?” <https://thervo.com/costs/immigration-lawyer-cost> (accessed March 9, 2020).
5. U.S. Department of Justice, Executive Office for Immigration Review, “Adjudication Statistics: New Cases and Total Completions,” January 23, 2020, <https://www.justice.gov/eoir/page/file/1238741/download> (accessed March 9, 2020).
6. U.S. Department of Justice, Executive Office for Immigration Review, “Adjudication Statistics: Current Representation Rates,” January 23, 2020, <https://www.justice.gov/eoir/page/file/1062991/download> (accessed March 9, 2020).
7. U.S. Department of Justice, Executive Office for Immigration Review, “Adjudication Statistics: All Appeals Filed, Completed, and Pending,” January 23, 2020, <https://www.justice.gov/eoir/page/file/1248506/download> (accessed March 9, 2020).
8. *Ibid.*
9. Khurgel Immigration Law Firm, “Appealing an Immigration Court Removal Order or Denied I-130 to the BIA,” <https://www.khurgel.com/family-based-immigration/bia-appeals/> (accessed March 10, 2020).
10. An appeal to the BIA can cost an additional \$10,000 or more. Fitzgerald Law Company, “Our Legal Fees for Immigration Cases,” <https://www.fitzgeraldlawcompany.com/boston-immigration-lawyers/our-fees/> (accessed March 23, 2020).
11. Department of Justice, Executive Office for Immigration Review, “List of Pro Bono Legal Service Providers,” <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers> (accessed March 11, 2020).
12. For example, in *Aguilera-Enriquez v. INS*, U.S. District Judge Robert DeMascio dissented, stating “[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government’s expense. Otherwise, ‘fundamental fairness’ would be violated.” 516 F.2d 565, 569 n.3 (6th Cir. 1975).
13. Fair Day in Court for Kids Act, S. 2540, 114th Cong., 2nd Sess.
14. Benjamin Good, “A Child’s Right to Counsel in Removal Proceedings,” *Stanford Journal of Civil Rights & Civil Liberties* (January 2014), pp. 109 and 113, <https://law.stanford.edu/wp-content/uploads/2018/05/good.pdf> (accessed March 9, 2020).
15. *Ibid.*, p. 126.
16. 8 U.S. Code § 1232(c)(5).
17. *Ibid.*
18. U.S. Department of Justice, Executive Office for Immigration Review, “EOIR’s Office of Legal Access Programs,” August 2016 (revised), <https://www.justice.gov/eoir/file/882786/download> (accessed March 12, 2020).
19. American Immigration Council, “A Guide to Children Arriving at the Border: Laws, Policies and Responses,” *Special Report*, June 26, 2015, <https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses> (accessed March 10, 2020).
20. U.S. Department of Health and Human Services, Administration for Children and Families, “Fiscal Year 2021 Justification of Estimates for Appropriations Committees,” p. 59, https://www.acf.hhs.gov/sites/default/files/olab/fy_2021_congressional_justification.pdf?nocache=1581352571 (accessed March 12, 2020). In examining FY 2020 and FY 2019 HHS grant spending, however, it is clear that grant money is designated for shelter, foster care, therapeutic services, and post-release services; neither legal representation nor services are described in the award title. U.S. Department of Health and Human Services, “Tracking Accountability in Government Grants System,” https://taggs.hhs.gov/Detail/CFDADetail?arg_CFDA_NUM=93676 (accessed March 12, 2020).
21. The U.S. Supreme Court has held that excludable aliens outside the United States do not have the same due process rights as aliens inside the U.S. *Zadvydas v. Davis*, 533 U.S. 678, at 693 (2001); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); Jennifer K. Elsea, “Substantive Due Process and U.S. Jurisdiction Over Foreign Nationals,” *Fordham Law Review*, Vol. 82, No. 5 (2014), p. 2081, <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4977&context=fldr> (accessed March 10, 2020); and Legal Information Institute, “Aliens: Entry and Deportation,” Cornell Law School, <https://www.law.cornell.edu/constitution-conan/amendment-5/aliens-entry-and-deportation> (accessed March 12, 2020).
22. Hillel R. Smith, “The Department of Homeland Security’s Reported ‘Metering’ Policy: Legal Issues,” Congressional Research Service *Legal Sidebar*, August 13, 2019, <https://fas.org/spp/crs/homesecc/LSB10295.pdf> (accessed March 16, 2020).
23. Louis Casiano, “Across US, Tax Dollars Being Poured into ‘Legal Defense Fund for Illegals,’” Fox News, November 16, 2018, <https://www.foxnews.com/us/denver-to-expand-program-to-pay-for-attorneys-to-represent-immigrants-fighting-deportation> (accessed March 10, 2020).
24. Jenny Jarvie, “As Trump and Texas Crack Down on Illegal Immigration, the City of Austin Rebels,” *Los Angeles Times*, April 14, 2017, <https://www.latimes.com/nation/la-na-immigration-austin-20170414-story.html> (accessed March 16, 2020).

25. Austin's City Council used money from its emergency relief fund to pay \$200,000 to Catholic Charities of Central Texas for legal assistance. The legal defense organization saw its legal consultations double from 25 clients to 50 clients a week. *Ibid.* Washington, DC, Mayor Muriel Bowser announced a \$500,000 legal fund for DC's estimated 25,000 illegal aliens facing deportation. Aaron C. Davis, "D.C. Will Go 'Beyond Sanctuary,' Create Legal Defense Fund for Illegal Immigrants," *The Washington Post*, January 9, 2017, https://www.washingtonpost.com/local/dc-politics/dc-will-go-beyond-sanctuary-create-legal-defense-fund-for-illegal-immigrants/2017/01/09/0d6c7adc-d68e-11e6-9f9f-5cdb4b7f8dd7_story.html (accessed March 12, 2020). See also Maura Ewing, "Should Taxpayers Sponsor Attorneys for Undocumented Immigrants?" *The Atlantic*, May 4, 2017, <https://www.theatlantic.com/politics/archive/2017/05/should-taxpayers-sponsor-attorneys-for-undocumented-immigrants/525162/> (accessed March 9, 2020), stating: "It's not clear that jurisdictions can budget enough money to cover everyone, or for very long."