

RETHINKING IMMIGRATION REMOVAL PROCEEDINGS: PROVIDING COUNSEL AT GOVERNMENT EXPENSE TO ECONOMICALLY BENEFICIAL IMMIGRANTS

Austin Wright*

I. INTRODUCTION

Marco Antonio Cortès boarded a bus in San Pedro Sulas, Honduras in January 2015, soon after his deportation from the United States.¹ Unbeknownst to him, a gunman lay in wait.² The gunman fired a single shot, and the eighteen year-old Cortès was dead in the street.³ Cortès tried to lead an honest life after returning to Honduras.⁴ He avoided the influence of local gangs and recruitment as drug dealer.⁵ Sadly, avoiding gang involvement did not bring Cortès safety, and his life was taken from him due to his pursuit of a safer life away from his violence stricken home.⁶

Josè Marvin Martínez left his hometown of San Manuel, Honduras for the safety of the United States when he was sixteen years old.⁷ He made it safely to the United States, and was employed as a mason's assistant at the time he was apprehended by a border patrol agent in Laredo, Texas. Four months after his deportation in December 2014, Martínez was killed while sitting outside of a corner shop in San Manuel.⁸ He, too, fell victim to violence perpetrated by an unknown gunman.⁹

* Austin Wright is a third-year law student at Southern Illinois University School of Law, expecting his Juris Doctor in December of 2017. He would like to thank his faculty advisor, Professor Cindy Buys, for her continued guidance and feedback throughout the writing process. He would also like to thank his friends and family for their substantial support and encouragement, as well as Professor Nancy Strohmeier for being a sounding board during the Journal process. She is sorely missed at this time by everyone at the law school, and he sends best wishes to her for improved health in the future.

1. Marta Roland & Leo R. Dobbs, *Deported Children Face Deadly New Dangers on Return to Honduras*, UNITED NATIONS HIGH COMM'R FOR REFUGEES (Jan. 29, 2015), <http://www.unhcr.org/en-us/news/latest/2015/1/54ca32d89/deported-children-face-deadly-new-dangers-return-honduras.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Sibylla Brodzinsky & Ed Pilkington, *US Government Deporting Central American Migrants to the Deaths*, GUARDIAN (Oct. 12, 2015), <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>.

8. *Id.*

9. *Id.*

Tragic events such as these are not isolated incidents.¹⁰ Frequently, children between the ages of thirteen and seventeen fall victim to violence after being sent from the United States back to their countries of origin.¹¹ Unaccompanied minor immigrants often flee from their homes towards the United States to escape “the mounting insecurity back home for the young, including threats, extortion, gang violence, and executions,” or to simply find a better life.¹²

Unfortunately, unaccompanied minor immigrants are not the only individuals to have their futures taken from them because of the harsh realities of the immigration system. Daniel Torres, an undocumented immigrant living in the United States, enlisted in the United States Marine Corps in 2007 without a green card and was deployed to Fallujah less than two years later.¹³ Torres returned to the United States after serving bravely in Iraq, and was gearing up for a deployment to Afghanistan when he lost his identification and was unable to obtain a replacement.¹⁴ Soon thereafter, Torres found himself deported to Tijuana, Mexico, abandoned by the country for which he had served, his service seemingly long forgotten.¹⁵ Like Marco Cortès and José Martínez, Torres’s story is not an isolated incident.¹⁶

“Eddie” was brought to the United States from Mexico as an unauthorized child at the age of eight.¹⁷ Since that time, he has exemplified the American dream. He has striven to become a productive member of society, including paying for his own education and maintaining an unsullied criminal record.¹⁸ He obtained master’s degrees in math and economics from California State University at Los Angeles, and desires to pursue a Ph.D. in economics.¹⁹ However, he has been unable to both pursue a Ph.D. and put his education to use to find steady work despite his advanced degrees.²⁰ This is due to the very real fear that he will be “dragged back to a country he barely knows” because of his undocumented status.²¹

These stories are representative of the shortcomings of the immigration system in the United States. It is estimated approximately 11 million

10. See generally Roland & Dobbs, *supra* note 1; see also Brodzinsky & Pilkington, *supra* note 7.

11. Roland & Dobbs, *supra* note 1.

12. *Id.*

13. Quil Lawrence, *Service Members, Not Citizens: Meet The Veterans Who Have Been Deported*, NAT’L PUB. RADIO (Jan. 13, 2016, 4:48 a.m.), <http://www.npr.org/2016/01/13/462372040/service-members-not-citizens-meet-the-veterans-who-have-been-deported>.

14. *Id.*

15. *Id.*

16. *Id.* (“[V]eterans who did not go through the process of becoming citizens—they can be deported, if they get in trouble later on, just like any other noncitizen. ‘Many people are unaware that the United States deports military veterans.’”).

17. James King & Adi Cohen, *These are the Immigrants Donald Trump Wants to Deport*, VOCATIV (Aug. 31, 2016, 11:51 p.m.), <http://www.vocativ.com/332915/donald-trump-immigration/>.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

undocumented immigrants reside within the country,²² and more than 400,000 are detained each year by the Department of Homeland Security.²³ Moreover, children comprised 240,126 of detained individuals combined in 2014 and 2015.²⁴ These numbers make the immigration system the largest detention system in the United States—larger than any state prison system or the Federal Bureau of Prisons.²⁵

Undocumented immigrants, both detained and non-detained, have the right to retain legal counsel in removal proceedings, but no counsel will be appointed at the expense of the U.S. government.²⁶ The section of the Immigration and Nationality Act that affords immigrants this right, codified at 8 U.S.C. 1362, provides no exceptions to the “no government expense rule,” not even for children.²⁷ The lack of appointed counsel effectively serves as a bar to legal representation, as only thirty-seven percent of immigrants retained counsel and only fourteen percent when only detained immigrants are examined.²⁸ Detained and unrepresented immigrants are deported ninety-seven percent of the time in immigration removal proceedings, whereas non-detained and represented immigrants are able to remain in the country seventy-four percent of the time.²⁹ This disparity clearly establishes counsel is crucial for immigrants seeking relief from detention and deportation.³⁰ In fact, courts have noted “[t]he proliferation of

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22. BRYAN BAKER & NANCY RYTINA, U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012 1 (Mar. 2013), https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.
23. See *DHS Releases End of Fiscal Year 2015 Statistics*, U.S. DEP’T OF HOMELAND SEC. (Dec. 22, 2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>; *DHS Releases End of Year Statistics*, DEP’T OF HOMELAND SEC. (Dec. 18, 2014), <https://www.ice.gov/news/releases/dhs-releases-end-year-statistics>; JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 (Dec. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf; JOHN F. SIMANSKI, U.S. DEP’T. OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 5 (Dec. 2013), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.
24. UNITED NATIONS HIGH COMM’R FOR REFUGEES, BEYOND DETENTION: A GLOBAL STRATEGY TO SUPPORT GOVERNMENTS TO END THE DETENTION OF ASYLUM-SEEKERS AND REFUGEES — 2014-2019 (Aug. 2016), <http://www.unhcr.org/57b579e47.pdf>.
25. Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 83 (2012).
26. Immigration and Nationality Act, 8 U.S.C. § 1362 (2012).
27. *Id.*
28. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> (these numbers are based on “results of the first national study of access to counsel in U.S. immigration courts. Drawing on data from over 1.2 million deportation cases decided between 2007 and 2012, the report provides much-needed information about the scope and impact of attorney representation in U.S. immigration courts.”).
29. Noferi, *supra* note 25, at 108.
30. *Id.* (“Among detained immigrants, those with representation were twice as likely as unrepresented immigrants to obtain immigration relief if they sought it (49 percent with counsel versus 23 percent

immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.”³¹

Demonstrated by the clear need for counsel in immigrant removal proceedings, it is evident the present system leads to inadequate legal representation. This flawed system is inadvertently eliminating potential economic benefits the United States could derive from immigrants if they were not detained or deported.³² Presently, minors are deported to countries ravaged by violence, undocumented soldiers who bravely fought for our freedom are deported, and the talents of highly skilled and educated immigrants go to waste because they fear deportation,³³ while thousands more immigrants languish in detention.³⁴ Combined, these children, soldiers, and highly educated and trained immigrants have the potential to make significant contributions to the American economy if they are able to succeed in their immigration proceedings.³⁵ But, without access to legal counsel, the likelihood of these individuals remaining in the country is greatly diminished.³⁶

Accordingly, this Comment demonstrates the economic opportunities the United States squanders each year by failing to provide counsel to certain immigrants in removal proceedings, and proposes a way to partially rectify the situation. Section II introduces the history of legal representation available to undocumented immigrants in the United States. Section II also examines the implications of congressional enactments and judicial opinions on immigrant representation, as well alternative proposals debated in Congress and academia. Section III discusses the potential economic benefits that can be realized from providing legal counsel in removal proceedings. Section IV proposes an amendment to the Immigration and

without.”). Represented immigrants who were never detained were nearly five times more likely than their unrepresented counterparts to obtain relief if they sought it (63 percent with counsel versus 13 percent without.)”).

31. *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).

32. *See* LAB. IMMIGR. & EMP. BENEFITS, U.S. CHAMBER OF COM., IMMIGRATION MYTHS AND FACTS (Apr. 2016), https://www.uschamber.com/sites/default/files/documents/files/022851_mythsfacts_2016_report_final.pdf.

33. *See generally* Roland & Dobbs, *supra* note 1; Brodzinsky & Pilkington, *supra* note 7; Lawrence, *supra* note 13; King & Cohen, *supra* note 17.

34. *See DHS Releases End of Fiscal Year 2015 Statistics*, U.S. DEP’T OF HOMELAND SEC. (Dec. 22, 2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>; *DHS Releases End of Year Statistics*, DEP’T OF HOMELAND SEC. (Dec. 18, 2014), <https://www.ice.gov/news/releases/dhs-releases-end-year-statistics>; JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 6 (Dec. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf; JOHN F. SIMANSKI, U.S. DEP’T. OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 5 (Dec. 2013), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.

35. *See generally* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, THE ECONOMIC BENEFITS OF FIXING OUR BROKEN IMMIGRATION SYSTEM (Jul. 2013), <https://www.whitehouse.gov/sites/default/files/docs/report.pdf>.

36. Eagley & Shafer, *supra* note 28.

Nationality Act, which would provide legal representation to unaccompanied minors and other economically valuable immigrants. Section V gives brief treatment to potential sources of funding for the amendment.

II. BACKGROUND

A. History of Legal Representation Available to Undocumented Immigrants in the U.S.

Policymakers in the United States have debated the extent to which noncitizen immigrants are entitled to the civil rights enjoyed by citizens since the passage of the first Alien and Sedition Acts.³⁷ Though, even in these early years of the United States, immigration was sometimes controversial, Congress did not stop the flow of immigrants into the country. The Naturalization Act of 1790³⁸ premised American immigration policy on the principle of free movement into the country.³⁹ In fact, there were no federal immigration restrictions put in place until the late nineteenth century.⁴⁰ Access to legal representation was available to immigrants during this time period in the form of legal aid offices.⁴¹ The first legal aid office in the United States, Deutscher Rechts-Schutz Verein, known today as The Legal Aid Society, was created to protect German immigrants from widespread attempts at exploitation.⁴² Other organizations such as the Legal Aid Bureau of the Educational Alliance of New York, which offered legal services to “a primarily Jewish-Immigrant clientele,” began to follow suit.⁴³ As their work progressed, these organizations provided assistance to “intending citizens” and prepared them for citizenship by helping them obtain the requisite immigration paperwork.⁴⁴ These pioneers of legal aid “emphasized that they were representing future citizens.”⁴⁵

For the better part of the nineteenth century, immigrants were primarily divided into two categories: Europeans who were on a presumptive path to citizenship and Asians who were the “illegal aliens of the era.”⁴⁶ The European immigrants came to the United States almost entirely

37. Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 624 (2011).

38. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790).

39. James S. Pula, *American Immigration Policy and the Dillingham Commission*, 37 POLISH AM. STUD. 5 (1980).

40. Heeren *supra* note 37, at 631.

41. *Id.* at 621.

42. *Id.*

43. *Id.* at 629.

44. *Id.*

45. *Id.* at 624.

46. *Id.* at 623.

unencumbered by any federal restrictions,⁴⁷ and were largely catered to by legal aid societies.⁴⁸ From 1880 until the beginning of World War I, only one percent of the approximately twenty-five million European immigrants that came to the United States during that time period were deported.⁴⁹ Further, between 1892 and 1907, the Immigration Service only deported a few hundred immigrants a year.⁵⁰ These numbers rose slightly to a few thousand each year between 1908 and 1920, though most of those deported were from “asylums, hospitals, and jails.”⁵¹ On the other hand, Asian immigration was severely reduced and restricted during this same period. Enactments such as the Chinese Exclusion Act,⁵² Theodore Roosevelt’s “Gentlemen’s Agreement,”⁵³ as well as the Immigration Act of 1917⁵⁴ placed numerous limitations on immigration from China, Japan, and many other Asian nations.⁵⁵

Although these legal aid organizations were filling an important need, they were not providing services for the sake of altruism nor was their aim founded on a desire to aid immigrants in need.⁵⁶ Rather, these organizations endeavored to provide immigrants legal services because legal representation served to satisfy the larger societal desire of Americanizing the immigrant population.⁵⁷ According to the Boston chapter of the Legal Aid Society “the contribution of the Legal Aid society to the adjustment of the troubles of the foreign-born has great significance, because the work of the society determines . . . the attitude of these people towards the government.”⁵⁸ Improving the attitudes of the immigrants was important because “chronic grumbling” by “ignorant foreigners” produced anarchists.⁵⁹ This legal aid work was considered to be in furtherance of national policy as it was thought “to preserve and strengthen the loyalty and idealism” of the sizeable immigrant population.⁶⁰

National attitudes on Non-Asian immigration policy did not favor openness indefinitely. At the turn of the twentieth century, “the progressive movement initiated demands for an end to unrestricted immigration which it

47. *Id.*

48. *Id.*

49. *Id.* at 631–32.

50. *Id.* at 632.

51. *Id.*

52. Chinese Exclusion Act, ch. 60, 27 Stat. 25 (1892).

53. *See generally* Gentlemen’s Agreement, HISTORY, <http://www.history.com/topics/gentlemens-agreement> (last visited Nov. 6, 2017).

54. Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917).

55. *See generally* 27 Stat. 25; Charles H. Neu, *Theodore Roosevelt and American Involvement in the Far East, 1901-1909*, 35 PAC. HIST. REV. 433, 442 (1966); 39 Stat. 874.

56. *See* Heeren, *supra* note 37, at 629–30.

57. *Id.* at 629.

58. *Id.* at 630.

59. *Id.*

60. *Id.* at 632.

blamed for the growth of slums and bossism.”⁶¹ This soon led to the formation of a joint congressional committee to study immigration policy in 1907.⁶² This committee came to be known as the Dillingham Commission (“the Commission”), named after its chairman, Senator William Dillingham.⁶³ In its official report, the Commission differentiated between “new” immigration from Eastern and Southern Europe and “old” immigration that flowed from northwestern Europe, and called for the implementation of new restrictions on immigration.⁶⁴ Restrictions on the “new” immigration were said to be “demanded by economic, moral, and social conditions,”⁶⁵ and were necessary to curb an “oversupply of unskilled labor” that was detrimental to the business and economic climate.⁶⁶

One of the most prominent recommendations proffered by the Commission was a literacy test for incoming immigrants.⁶⁷ This was recommended as the “most feasible single method of restricting undesirable immigration.”⁶⁸ The Commission also recommended the first annual ceiling on immigration that was enacted in 1921,⁶⁹ and the national origins quotas enacted in 1924.⁷⁰

It is not surprising that against this backdrop of changing national public opinion, the justification for the existence of legal aid needed to adapt to the times.⁷¹ Legal problems for incoming immigrants were no longer limited to matters of “unscrupulous employers or sharpers.”⁷² The new wave of deportation and quotas, ushered in by the Dillingham Commission, now meant all immigrants, and not just those of Asian descent, were potentially

61. Pula, *supra* note 39, at 7; *See Bossism*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/us/bossism> (defining Bossism as “[a] situation whereby a political party is controlled by party managers”).

62. Heeren, *supra* note 37, at 632.

63. *Id.*

64. Pula, *supra* note 39, at 8.

65. *Id.* (quoting Oscar Handlin, *Race and Nationality in American Life* 14 (1957)).

66. ROGER DANIELS & OTIS L. GRAHAM, *DEBATING AMERICAN IMMIGRATION, 1882–PRESENT* 119 (Barry Chiswick ed., 2001).

67. Lawrence H. Fuchs, *Immigration Reform in 1911 and 1981: The Role of Select Commissions*, 3 J. AM. ETHNIC HIST. 58, 59 (1980).

68. *Id.*

69. *See* Vernon M. Briggs Jr., *Report of the Select Commission on Immigration and Refugee Policy: A Critique*, 56 TEX. BUS. REV. 11 (1982); Emergency Quota Act of 1921, 42 Stat. 5 (1921) (“[T]he number of aliens of any nationality who may be admitted under the immigration laws of the United States in any fiscal year shall be limited to 3 per centum of the number of foreign born persons of such nationality resident in the United States as determined by the United States census of 1910.”).

70. *Id.*

71. Heeren *supra* note 37, at 634. (“The era when immigrant legal aid could justify its existence by drawing on a broad national consensus in favor of Americanization was over. In the new order of quotas and deportations, the nation struggled with the question of who could be considered an American.”).

72. *Id.*; *see also Sharpers*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/sharper> (last visited Oct. 18, 2017) (defining Sharpers as “a swindler . . .”).

illegal aliens and thus subject to removal from the United States.⁷³ This made legal aid services to immigrants much more controversial, as these organizations were now assisting some “illegal alien[s] [who were to be] hunted by the U.S. government,” rather than simply poor immigrants who were “ward[s] to be protected.”⁷⁴ In this new climate, the scope of immigrant legal assistance changed from a field that formed the bulk of legal aid work into a “specialty practice handled by a much smaller group of lawyers.”⁷⁵ This change in scope was indicated by a “dramatic decrease in the number of immigrants represented by mainstream legal aid organizations.”⁷⁶

As this decrease in representation occurred, there was a simultaneous increase in the complexity of immigration law, which was “draconian, and bureaucratic; meaning that its mastery required technical specialization and a willingness to engage with and sometimes combat the federal government.”⁷⁷ At this same time, the immigrants who required legal aid services were primarily Mexicans “who were impeded from naturalization by a hostile public and new administrative strictures,” rather than Europeans who were on a path to citizenship.⁷⁸

B. The Changing Face of Immigration to the United States

By the late 1920s, new trends were developing that “change[d] the face of American Immigration.”⁷⁹ Mexican immigrants now comprised the largest single-nation share of the Immigrant Protective League’s clients.⁸⁰ This was the result of the Immigration Act of 1924 banning Asian immigration outright,⁸¹ which caused a void in the once predominately Asian low-wage workforce that was filled by Mexican labor.⁸² In time, Mexican immigrants replaced Asians in more than just the low-income professions, as they also assumed the mantle of illegality.⁸³ Mexican immigrants, unlike their Asian counterparts, were eligible to become naturalized American citizens and they came in droves due to strong demands for labor in the economic boom of the 1920s.⁸⁴

73. Heeren, *supra* note 37, at 634.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 635.

78. *Id.*

79. *Id.* at 640.

80. *Id.*

81. *Id.*; see also Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

82. Heeren, *supra* note 37, at 640 (“Before the 1924 Act, Asian laborers had filled much of the nation’s need for agricultural and other low-wage work. By banning Asian immigration outright, the Act created a void in the nation’s low-wage workforce.”).

83. *Id.* (denying visas to Mexican immigrants “led to an increase in illegal immigration along the Mexican border and a corresponding increase in deportations.”).

84. George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States* 2 (Nat’l Bureau of Econ. Research, Working Paper No. 11281, 2005),

The U.S. Department of State took measures to restrict Mexican immigration through administrative means by denying visas to prospective immigrants beginning in 1929.⁸⁵ This restriction of visas did nothing to quash the movement of Mexican immigrants across the southern border of the United States, rather it gave rise to an increase in illegal immigration.⁸⁶ The Immigration Service estimated approximately 1.4 million illegal immigrants resided in the United States in 1925,⁸⁷ and this number continued to rise despite an increase in the number of immigration restrictions.⁸⁸

The United States did not invent the practice of deportation during these years of increasing illegal immigration, however this was when deportation “came of age.”⁸⁹ The number of deportations along the southern border alone skyrocketed from 1,751 in 1925 to over 15,000 in 1929.⁹⁰ In the early 1930s, local authorities throughout the Southwest and Midwest repatriated over 400,000 Mexicans.⁹¹ It was estimated sixty percent of these deportations were children or persons that had resided in the United States for over ten years, many of whom spoke English.⁹² This period serves as an early example of potential economic benefits that were lost due to a national fervor for deportations.

The number of illegal immigrants entering the United States continued to grow with the implementation of the Bracero Program in 1942, which brought in over 200,000 immigrant workers annually to fill a need for temporary labor.⁹³ Despite this program, large numbers of aliens continued to illegally enter the country.⁹⁴ This trend developed because many farmers preferred these illegal workers, as they were even cheaper than the Bracero workers.⁹⁵ To counteract this surge, the Immigration and Naturalization Service (“INS”) initiated “Operation Wetback” in 1954, which

<http://www.nber.org/papers/w11281.pdf> (“[T]he relative number of Mexican immigrants in the U.S. workforce increased to 0.6 percent in 1920 (and continued rising until the late 1920s).”).

85. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 54 (2005).
86. Heeren, *supra* note 37, at 640.
87. Ngai, *supra* note 85, at 61; *see also* U.S. CENSUS BUREAU, U.S. DEP’T. COM., NATIONAL INTERCENSAL TABLES: 1900-1990 (1925), <https://www.census.gov/data/tables/time-series/demo/popest/pre-1980-national.html> (showing the estimated population of the United States in 1925 to be 115,829).
88. Ngai, *supra* note 85, at 61.
89. Mai M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & HIST. REV. 69, 72 (2003).
90. *Id.* at 84.
91. Heeren, *supra* note 37, at 640.
92. *Id.* (quoting MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 37-50 (2004)).
93. *Id.* at 641.
94. *Id.*
95. *Id.*

“apprehend[ed] 170,000 undocumented immigrants within its first three months of operation.”⁹⁶

C. Implications of Congressional Enactments and Judicial Opinions on Immigrant Representation

As society changed in the decades after Operation Wetback, the outlook for undocumented immigrants remained somewhat stagnant.⁹⁷ Widespread social movements such as “[t]he War on Poverty, the civil rights movement, and the anti-war movement” gave way to a legal culture that found representing “powerless” people, such as illegal immigrants, more prestigious than it had in years past.⁹⁸ However, the legal community’s newfound interests did little to stem the tide of mass deportations as the INS apprehended approximately 881,000 immigrants in 1976, 781,000 of which were Mexicans who were eventually deported.⁹⁹

The onslaught of deportations indicated inconsistent policies at the federal level, as government funding for legal services, including funds for undocumented immigrants, increased.¹⁰⁰ The federal budget for legal aid services increased from \$25 million in 1966 to \$71.5 million in 1971,¹⁰¹ a portion of which ultimately went towards providing legal aid to undocumented immigrants.¹⁰² In 1974, Congress passed the Legal Services Corporation Act which “shifted federal funding for legal aid to a private, nonprofit corporation that was controlled by an independent, bipartisan board appointed by the president and confirmed by the Senate.”¹⁰³ Under this corporation, the budget continued to grow, reaching \$321.3 million by 1981.¹⁰⁴ The Legal Services Corporation (“LSC”), as it was originally enacted, was not restricted from representing immigrants, and several of the corporation’s programs “created highly aggressive new immigration projects.”¹⁰⁵ For example, the Legal Assistance Foundation of Chicago, with funding from the LSC, secured grants “to form an immigration project that would perform law reform work, do administrative advocacy, and provide community education to Chicago immigrant communities.”¹⁰⁶

96. *Id.*

97. *See generally* Heeren, *supra* note 37, at 642–44.

98. *Id.* at 642.

99. *Id.* at 644.

100. *Id.*

101. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR L. & SOC. POL’Y, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 11 (2007), <http://www.clasp.org/resources-and-publications/files/0158.pdf>.

102. Heeren, *supra* note 37, at 644.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 645.

The movement to restrict legal aid to immigrants largely began in early 1979.¹⁰⁷ The president of the LSC, Thomas Ehrlich, was called to testify before the Courts, Civil Liberties, and the Administration of Justice subcommittee of the U.S. House of Representatives Judiciary Committee.¹⁰⁸ He was asked whether he “had a position as to whether the assistance provided [by the LSC] should be to just U.S. citizens?”¹⁰⁹ Ehrlich replied in his “own personal view [such] a limitation would be a mistake.”¹¹⁰ In reply, Representative Tom Railsback stated many poor citizens were unable to obtain legal aid, and that illegal aliens may have become the beneficiaries of the LSC’s lack of restrictions.¹¹¹ Representative Robert Kastenmeier then warned Congress could become more interested in whether illegal aliens were receiving legal aid, to the detriment of citizens.¹¹²

Representative Kastenmeier’s words were a harbinger of things to come. Just two months later, the House Appropriations Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies attached a restriction to the Fiscal Year 1980 appropriation for the LSC, which restricted the corporation’s ability to represent illegal aliens.¹¹³ This provision, although initially rejected by the Senate, was eventually included in the final version of the legislation signed by President Carter on September 28, 1979.¹¹⁴ As a result, none of the funds appropriated could be “used to carry out any activities for or on behalf of any individual who is known to be an alien in the United States in violation of the Immigration and Nationality Act or any other law.”¹¹⁵

The Reagan Administration did nothing to temper hostility towards legal aid representation of aliens upon taking office, rather it only intensified those sentiments.¹¹⁶ President Reagan proposed the federal government

107. *Id.* at 648.

108. *Id.* (citing *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Cts., C.L., and the Admin. Of Just., H. Common the Judiciary*, 96th Cong. 33 (1979)).

109. *Id.* (quoting *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Cts., C.L., and the Admin. Of Just., H. Common the Judiciary*, 96th Cong. 33 (1979) (statement of Rep. Railsback)).

110. *Id.* (quoting *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Cts., C.L., and the Admin. Of Just., H. Common the Judiciary*, 96th Cong. 33 (1979) (statement of Thomas Ehrlich)).

111. *Id.* (quoting *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Cts., C.L., and the Admin. Of Just., H. Common the Judiciary*, 96th Cong. 33 (1979) (statement of Rep. Railsback)).

112. *Id.* (quoting *Legal Services Corp. General Oversight: Hearing before the Subcomm. on Cts., C.L., and the Admin. Of Just., H. Common the Judiciary*, 96th Cong. 33 (1979) (statement of Rep. Kastenmeier)).

113. *Id.*

114. *Id.* at 649.

115. *Id.* (quoting Departments of State, Justice and Commerce, the Judiciary and Related Agencies Appropriations Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 433 (1979)).

116. *See generally* Heeren, *supra* note 37, at 650.

cease to fund the LSC, and those funds be redirected to block grants to the States “for judicial programs and law school clinics.”¹¹⁷ However, members of the House Judiciary Committee proposed legislation that would have codified the LSC appropriation restriction discussed above in order to save the LSC.¹¹⁸ The House of Representatives eventually passed a bill that “contained an alienage restriction that authorized representation of only four categories of aliens: lawful permanent residents; applicants for lawful permanent residency who have a U.S.-citizen parent spouse, or child; refugees and asylees; and persons granted an asylum-type remedy called ‘withholding of deportation.’”¹¹⁹ Though it was not initially enacted, the alienage restriction eventually became law in 1982.¹²⁰

The ensuing years of the 1980s gave way to further immigration reform measures. In 1986, Congress passed the Immigration Reform and Control Act (“the Act”),¹²¹ which “combined unprecedented enforcement measures to curb illegal immigration with a liberal legalization program granting amnesty to qualifying aliens already within the United States’ borders.”¹²² The Act granted “amnesty to undocumented immigrants who had resided continuously in the United States since 1982,” and “provided that immigrants granted amnesty would be ineligible” for federal financial assistance for five years.¹²³ Both the Department of Justice and the LSC initially interpreted this provision of this Act as “bar[ring] legal services from representing immigrants legalized through the amnesty,” an interpretation that was not changed until the LSC was subsequently sued over the practice.¹²⁴

As the congressional majority changed hands in 1994, the logic “that legal aid is a welfare magnet for illegal aliens” began to take hold.¹²⁵ Subsequently, Congress slashed funding and implemented new restrictions that further curtailed the ability of publicly funded legal services to provide representation to undocumented immigrants.¹²⁶ However, in 1996 a Cuban woman was killed by her common law husband outside of a family law courthouse in Riverside, California.¹²⁷ A week prior to her death, the woman had sought assistance from legal aid to gain protection, but was turned away because of the alienage restriction.¹²⁸ This prompted Congress to enact some

117. *Id.*

118. *Id.*

119. *Id.* at 651.

120. *Id.*

121. Immigration Reform and Control Act of 1986, Pub. L. No 99-603, 100 Stat. 3359 (1986).

122. Steven Anthony Torres, *Immigration Reform and Control Act of 1986—Judicial Review Under Special Agricultural Workers Program*, McNary v. Haitian Refugee Center, 11 S. Ct. 888 (1991), 16 SUFFOLK TRANSNAT’L L. REV. 304, 304 (1992).

123. Heeren, *supra* note 37, at 652.

124. *Id.*

125. *Id.*

126. *Id.* at 653.

127. *Id.* at 654.

128. *Id.*

exceptions, which included allowing representation of otherwise ineligible abuse victims on matters relating to the abuse.¹²⁹

Today, representation for indigent immigrants comes from a patchwork of pro bono attorneys, law school clinics, and nonprofit organizations, much as it has in the past.¹³⁰ However, the organizations in place today do not adequately address the needs of the undocumented immigration population. In a survey conducted by Geoffrey Heeren, now an Associate Professor of Law at Valparaiso University, “100% of the legal service providers surveyed responded that there was a need for immigrant legal aid in their area.”¹³¹ The lifting of alienage restrictions could potentially increase the availability of resources, though no such action has been taken.¹³²

The necessity of pro bono and other private forms of representation for immigrants can be attributed in part to the classification of immigration removal proceedings as civil in nature.¹³³ In the 1893 decision *Fong Yue Ting v. United States*,¹³⁴ the U.S. Supreme Court held the proceedings before an immigration judge were “in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country.”¹³⁵ The Court stated further, “the order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.”¹³⁶ The Court differentiated between deportation of an alien and a citizen stating:

[i]t is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.¹³⁷

As a result of the civil nature of removal proceedings, the Supreme Court’s landmark decision *Gideon v. Wainwright* did not extend to immigration removal hearings.¹³⁸ In *Gideon*, the Supreme Court overturned

129. *Id.*

130. *Id.* at 661.

131. *Id.*

132. *Id.*

133. Sharon Finkel, *Voice of Justice: Promoting Fairness Through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1108 (2001).

134. *See generally* *Fong Yu Ting v. United States*, 149 U.S. 698 (1893).

135. *Id.* at 730.

136. *Id.*

137. *Id.*

138. *See generally* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

its previous jurisprudence and construed the Sixth Amendment to mean that in criminal prosecutions, “counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.”¹³⁹ Thus, noncitizens in immigration proceedings are outside the Court’s holding, and the U.S. government is not required to provide legal counsel to indigent defendants in civil immigration proceedings.

D. Academic Proposals

The practice of failing to appoint counsel has been subject to criticism, and calls for reform. In 1953, a Harvard Law Review article “called for the right to counsel in deportation and exclusion proceedings.”¹⁴⁰ There has been widespread academic scholarship on this topic in the years since. One such proposal has argued due process requires the appointment of counsel.¹⁴¹ A proponent of the due process argument states the “arguments in favor of a per se right to appointed counsel for immigrants in deportation proceedings are even more persuasive today than they have been in the past.”¹⁴² The author concluded “immigrants’ strong interests in remaining in the United States and the potential for erroneously depriving them of that interest” are enough to require the appointment of counsel in deportation proceedings.¹⁴³ Another similar proposal argues in favor of a “per se rule mandating appointed counsel for children facing deportation.”¹⁴⁴ This rule would require appointed counsel “for indigent children in INS detention.”¹⁴⁵ The author, Sharon Finkel, argues the assertion of this right would benefit the federal government by producing a “more efficient administrative process for immigration hearings” and by “expedit[ing] the outcomes for many of those detained.”¹⁴⁶

Mark Noferi coined the phrase “cascading constitutional deprivation” when discussing the absence of appointed counsel in deportation proceedings.¹⁴⁷ He argues “under modern procedural due process theories... this cascading constitutional deprivation warrants appointed counsel, notwithstanding traditional plenary powers over immigration law.”¹⁴⁸ Noferi

139. *Id.* at 339–40.

140. Heeren, *supra* note 37, at 661.

141. Beth J. Werlin, Note, *Renewing the Call: Immigrants’ Right to Appointed Counsel in Deportation Proceedings*, 20 B.C. THIRD WORLD L.J. 393, 396–97 (2000).

142. *Id.* at 396.

143. *Id.* at 397.

144. Finkel, *supra* note 133, at 1107.

145. *Id.*

146. *Id.*

147. Noferi, *supra* note 25, at 64.

148. *Id.*; see also Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1986 IMMIGR. & NAT’LITY L. REV. 81 (1986) (under the plenary power doctrine “the [Supreme] Court has declined to review federal immigration statutes for compliance with substantive constitutional constraints. In an undeviating line of cases, spanning almost one

argues there are benefits to appointing counsel aside from correcting a perceived due process concern.¹⁴⁹ He stated the “costs of appointed counsel would likely be de minimis compared to the costs of detention, and the provision of counsel early in the case might well further efficiency by resolving cases more quickly, reducing detention time, and reducing court backlogs.”¹⁵⁰ Noferi also makes an interesting side argument, “if the government can now provide appointed counsel in wartime detention proceedings, it can provide counsel in peacetime immigration proceedings.”¹⁵¹

Professor Erin Corcoran stated there is “a compelling need for immigrant representation in removal proceedings.”¹⁵² She argues in favor of expanding immigrant access to qualified and trained Board of Immigration Appeals (“BIA”) accredited representatives.¹⁵³ She claims this would provide accurate counsel, increase efficiency, save money, and ensure competent representation for immigrants in need.¹⁵⁴

The federal judiciary utilized many of the principles articulated by these authors. In a case presently before the U.S. Central District of Washington, *F.L.B. v. Lynch*,¹⁵⁵ the American Immigration Council, among other organizations, brought suit seeking “to require the government to provide unrepresented children who are unable to pay for attorneys with legal representation in their immigration proceedings.”¹⁵⁶ The case is on-going, and certain jurisdictional issues have gone up to the Ninth Circuit on appeal.¹⁵⁷

The *Lynch* case is not alone; there have been other actions taken to further access to counsel through the courts. In *Franco-Gonzales v. Holder*, a judge from the U.S. Central District of California ordered U.S. Immigration and Customs Enforcement, the U.S. Attorney General, and the Executive Office of Immigration Review to “provide legal representation to immigrant detainees with mental disabilities who are facing deportation and who are

hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.”).

149. Noferi, *supra* note 25, at 72.

150. *Id.*

151. *Id.* (this comment may be aimed at provisions of the National Defense Authorization Act for Fiscal Year 2012, or another similar measure, which provides “[a]n unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.”).

152. Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 645 (2012).

153. *Id.* (noting that BIA accredited representatives are not required to be lawyers).

154. *Id.*

155. *F.L.B. v. Lynch*, 180 F. Supp. 3d 811 (W.D. Wash. 2016).

156. *Right to Appointed Counsel for Children in Immigration Proceedings*, AM. IMMIGR. COUNCIL (Jul. 2014), <https://www.americanimmigrationcouncil.org/litigation/right-appointed-counsel-children-immigration-proceedings>.

157. *Id.*

unable to adequately represent themselves in immigration hearings.”¹⁵⁸ In that case, Franco-Gonzalez was a Mexican immigrant with a cognitive disability who had been detained for almost five years without a hearing or an attorney.¹⁵⁹ The American Civil Liberties Union litigated the case on his behalf and hailed the decision as “the first of its kind for immigrant detainees, who often languish in detention facilities for years without legal representation.”¹⁶⁰

Aside from judicial action, another argument is “rather than waiting on the Supreme Court to extend its analysis to create a civil right to appointed counsel to at least some individuals in some migration matters, Congress should act in the interest of justice to create a statutory right to appointed counsel for all indigent immigrants in removal proceedings.”¹⁶¹ Following this logic, recent legislative attempts sought to provide counsel to some immigrants. The Fair Day in Court for Kids Act of 2016 is one such example.¹⁶² The Fair Day Act would amend the Immigration Code to direct the Attorney General to provide, at government expense, counsel to unaccompanied children and vulnerable aliens.¹⁶³ The proposal defines vulnerable aliens as “a person with a disability;” “a victim of abuse, torture, or violence;” or “an individual whose circumstances are such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings.”¹⁶⁴ To date, the Senate Judiciary Committee has taken no action on the Fair Day Act or any other similar measure.

III. REALIZING ECONOMIC BENEFITS FROM THE APPOINTMENT OF COUNSEL IN REMOVAL PROCEEDINGS

The United States stands to realize widespread economic benefits from the appointment of counsel in immigration removal proceedings. Representation in these proceedings is crucial to obtaining successful outcomes, such as staving off deportation and enabling individuals who would otherwise be productive members of society to remain in the country. Despite this, Congress has taken no action on the Fair Day in Court for Kids Act or any other similar legislation. Nor has Congress heeded the call of a mountain of academic proposals that implore policy makers to provide counsel out of humanitarian concerns such as due process and fairness.

158. *Franco-Gonzales v. Holder*, ACLU, <https://www.aclu.org/cases/franco-gonzalez-v-holder>, (last visited Nov. 25, 2016).

159. *Id.*

160. *Id.*

161. Caren Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in all Immigration Matters*, 17 U.D.C. L. REV. 165, 167 (2014).

162. Fair Day in Court for Kids Act of 2016, S. 2540, 114th Cong. § 2 (2016).

163. *Id.*

164. *Id.*

Given this action, academia must change the debate to demonstrate to policymakers, and the public, these economic benefits can and should be obtained through the provision of counsel to immigrants who have or will be able to provide benefits to the United States.

Studies have shown immigrants “promote productivity and innovation, both directly and indirectly through positive spillover effects on native workers.”¹⁶⁵ Immigrants establish patents at twice the rate of U.S. born citizens, a trend that continues at an above average rate when only compared to non-immigrant scientists and engineers.¹⁶⁶ This has been shown to have indirect spillover effects that increase the number of patents filed by non-immigrants.¹⁶⁷ Additionally, immigrants are more heavily represented in the fields of science, technology, engineering, and mathematics than U.S. born citizens.¹⁶⁸ Moreover, college-educated immigrants are more likely to have a scholarly work published.¹⁶⁹

Much like the documented immigrants in the United States, a sizeable portion of the undocumented immigrant population has obtained undergraduate and other advanced degrees.¹⁷⁰ Data compiled by the Migration Policy Institute indicates 1,103,000 undocumented immigrants over the age of 25 have obtained at least a bachelor’s, graduate, or professional degree.¹⁷¹ Another 1,029,000 have completed some college or an associate’s degree, and approximately 2,094,000 have a high school diploma or GED.¹⁷²

As noted above, the disparate outcomes between those immigrants who have access to counsel and those who do not are pronounced. Ninety-seven percent of those without counsel are deported, whereas those with counsel remain in the country seventy-four percent of the time.¹⁷³ Accordingly, it is paramount that at least those immigrants who have completed courses of study in higher education, or those with the ability to do so eventually, such as children, be provided legal counsel at government expense. Otherwise, they are less likely to remain in the country and contribute their productivity and innovation.

The benefits of providing counsel at government expense are not limited to increasing the ability of economically beneficial immigrants to stay

165. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, ECONOMIC BENEFITS OF FIXING OUR BROKEN IMMIGRATION SYSTEM 7 (2013).

166. *Id.*

167. *Id.* at 8.

168. *Id.* at 7.

169. *Id.* at 8.

170. *Profile of the Unauthorized Population: United States*, MIGRATION POL’Y INST. (2014), <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>.

171. *Id.*

172. *Id.*

173. Noferi, *supra* note 25, at 108.

in the country. Doing so could lead to long-term savings for the U.S. government. In fiscal year 2015, the Department of Homeland Security (“DHS”) apprehended 406,595 individuals and conducted a total of 462,463 removals and returns.¹⁷⁴ DHS regularly detains over 400,000 immigrants each year.¹⁷⁵ President Obama’s proposed 2016 budget for DHS indicated the daily cost of an individual in immigration detention was \$123.54, and the daily cost of a family in detention was \$342.73.¹⁷⁶ The President’s total budget request to maintain 34,040 beds in immigration detention was \$435.4 million.¹⁷⁷ Thus, detaining these individuals for extensive periods of time generates significant expense.

Furthermore, there are an estimated eleven million undocumented immigrants currently living within the United States.¹⁷⁸ This figure indicates there will continue to be large numbers of immigrants that pass through the detention and deportation system each year. Moreover, the economic and financial costs associated with removing the undocumented population as a whole makes doing so impractical and unwise, as one estimate places the total cost of deporting the entire population of undocumented immigrants and preventing future unlawful reentry over the next twenty years ranging from \$400 to \$600 billion.¹⁷⁹ Additionally, removing eleven million workers from the U.S. workforce would decrease real Gross Domestic Product (GDP) by \$1.6 trillion.¹⁸⁰

Scholars have been adamant for many years that the provision of counsel to all immigrants in removal proceedings would greatly increase efficiency and reduce overall costs within the immigration system.¹⁸¹ However, congressional inaction has made it clear provision of counsel to all

174. U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., DHS RELEASES END OF FISCAL YEAR 2015 STATISTICS (2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>.

175. *See id.*; U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC., DHS RELEASES END OF FISCAL YEAR 2014 STATISTICS (DEC. 2014), <https://www.ice.gov/news/releases/dhs-releases-end-year-statistics>; JOHN F. SIMANSKI, U.S. DEP’T. OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2013 6 (Dec. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf; JOHN F. SIMANSKI, U.S. DEP’T. OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012 5 (Dec. 2013), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf.

176. U.S. DEP’T OF HOMELAND SEC., BUDGET IN BRIEF, FISCAL YEAR 2016, 54 (2016).

177. *Id.*

178. Baker & Rytina, *supra* note 22.

179. BEN GITIS & LAURA COLLINS, AM. ACTION FORUM, THE BUDGETARY & ECON. COSTS OF ADDRESSING UNAUTHORIZED IMMIGR.: ALTERNATIVE STRATEGIES 1 (2015), <https://www.americanactionforum.org/research/the-budgetary-and-economic-costs-of-addressing-unauthorized-immigration-alt>.

180. *Id.* (“Removing all undocumented immigrants would cause the labor force to shrink by 6.4 percent, which translates to a loss of 11 million workers. As a result, 20 years from now the economy would be nearly 6 percent or \$1.6 trillion smaller than it would be if the government did not remove all undocumented immigrants. While this impact would be found throughout the economy, the agriculture, construction, retail and hospitality sectors would be especially strongly affected.”).

181. *See* Noferi, *supra* note 25, at 72; Finkel, *supra* note 133, at 1107; Concoran, *supra* note 152.

immigrants is not a viable option in the current politically polarized climate in the United States. In place of an all-encompassing provision of counsel, federal policymakers should act to provide counsel to those immigrants in removal proceedings who are most likely to contribute to the economy if given the representation necessary to remain in the country, and thereby reduce a portion of the costs associated with detention and deportation.

In addition to those immigrants who have completed or are pursuing higher education, another group that has the potential to benefit the U.S. economy is immigrants who have served in the U.S. armed forces. Veterans are highly desirable employees with much to contribute, often having been trained in multiple skills and possessing experience in varied tasks and responsibilities.¹⁸² A person's status as an illegal immigrant makes these characteristics no less likely. Many former members of the service are able to acquire citizenship easily, relative to other immigrants, demonstrated by the United States Immigration and Citizenship Service naturalizing over 109,000 members of the military since 2001.¹⁸³ However, too many former members of the service are being deported and forgotten. United States Immigration and Customs Enforcement does not track the number of military veterans that are deported, but the Los Angeles Times reported an estimated 2000 U.S. veterans living in Northern Mexico alone.¹⁸⁴ Brave individuals who served in the armed forces should be provided counsel in immigration proceedings as well, so long as severe or felonious criminality is not the reason the government seeks their deportation.

Minor immigrants, such as Marco Cortès and Josè Martinez, have the potential to create economic benefits as well. Between 2014 and 2015, 240,126 children were detained.¹⁸⁵ Further, it is estimated nearly 1.1 million undocumented children ages thirteen to seventeen reside in the United States, more than one million of which are enrolled in school.¹⁸⁶ Accordingly, the United States should seize the opportunity to harness the potential of undocumented minor immigrants, rather than deport them to third-world nations rife with violence, where they can be killed or otherwise have their potential wasted.

182. DEP'T OF VETERAN'S AFF., VETERAN'S EMPLOYMENT TOOLKIT HANDOUT: WHY VETERAN'S MAKE GOOD EMPLOYEES (2012), http://www.va.gov/vetsinworkplace/docs/em_goodemployees.html.

183. U.S. CITIZENSHIP & IMMIGR. SERV., U.S. DEP'T OF HOMELAND SEC., NATURALIZATION THROUGH MILITARY SERVICE: FACT SHEET (2015), <https://www.uscis.gov/news/fact-sheets/naturalization-through-military-service-fact-sheet>.

184. Nigel Duara, *When Serving in the U.S. Military Isn't Enough to Stop Deportation*, L.A. TIMES (Mar. 27, 2016, 3:30 AM), <http://www.latimes.com/nation/immigration/la-na-ff-deported-vets-20160327-story.html>.

185. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *supra* note 24.

186. MIGRATION POL'Y INST., *supra* note 170.

IV. PROPOSED AMENDMENT TO 8 U.S.C. § 1362: “RIGHT TO COUNSEL”

In order to maximize the potential of certain immigrants and to promote efficiency within the immigration system, this Comment proposes an amendment to the Immigration and Nationality Act, codified at 8 U.S.C. 1362. This section of the statute currently reads:

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.¹⁸⁷

This proposal leaves the current prohibition against the provision of counsel at government expense as the general rule of the statute. However, the amendment will add conditions which require the United States Attorney General to provide counsel at government expense if one of them is met. These conditions are the immigrant: (1) has obtained, or is obtaining, a degree or certificate from an institute of higher education; (2) has honorably served for a period or periods, aggregating at least one year in a branch of the military,¹⁸⁸ or (3) is an unaccompanied child under the age of eighteen. The conditions would not require the individual to be a member of a particular class of immigrant such as a refugee or asylee. Upon amendment, the statute would read:

- (a) General rule: 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.
- (b) Exceptions: When a person in a removal proceeding before an immigration judge, or in any subsequent appellate proceeding related to the initial immigration action, shall satisfy one of the following conditions, the Attorney General shall be directed to provide the person with legal representation, at government expense and without expense to the person, unless the individual is able to afford private counsel, or that individual has been convicted of a felony under the laws of the United States or any state:

187. Immigration and Nationality Act, 8 U.S.C. § 1362 (2012).

188. This time requirement equivalent to 8 U.S.C. § 1439 which expedites that naturalization process for “[a] person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating one year, and who, if separated from such service, was never separated except under honorable conditions. . .”

- (1) The person has obtained a bachelor's degree, another advanced or professional degree, or completed postsecondary vocational training, or the person is in the process of obtaining said degree, or vocational training, and has completed at least twenty-five percent of the course of study while maintaining good academic standing;
 - (2) The person has served in at least one branch of the United States military for a period or periods aggregating at least one year, and if the person has been discharged from service after said minimum period, it must have been honorably done; OR
 - (3) The person is a child under the age of eighteen who is unaccompanied by an adult guardian.
- (c) This section is applicable to all persons in removal proceedings before an immigration judge without regard to an immigration designation such as asylee, refugee, or any other similar designation.

V. FUNDING THE AMENDMENT

Questions regarding the source of funding arise with the creation of any new government program, and the proposed amendment to the Immigration and Nationality Act would be no different. Identifying specific sources of funding from an area within the federal budget, or through alterations to the U.S. Tax Code, is beyond the scope of this comment. However, this comment can provide starting points from which the funding discussion can begin.

A logical starting point is to recognize a portion of the funding necessary will be generated from increased economic activity on the part of affected immigrants. As discussed above, immigrants make significant contributions to U.S. GDP each year.¹⁸⁹ Increasing the likelihood that skilled and educated immigrants remain in the United States and make economic contributions is likely to result in increased tax revenues, a portion of which could be appropriated to provide counsel to eligible immigrants.

An alternative would be to recoup funds in the future from those immigrants who would benefit from the provision of government funded counsel. If such individuals are able to begin careers and earn incomes more than sufficient to support themselves and their families, it does not seem overly burdensome to require repayment of a portion of the expenses the government incurred on their behalf.

Further, the federal government could establish a fund that would serve as a national repository for donated funds given by individuals who wish to make donations towards immigrant representation.¹⁹⁰ The federal

189. See discussion *supra* Section III.

190. In a similar fashion, Chicago and Los Angeles announced the formation of partnerships with private organizations in December 2016 that will combine public and private funds to provide

government could make said contributions to this fund tax-deductible to incentivize giving, in order to offset a greater portion of the expense it would incur providing representation to affected immigrants.

Any number of proposals could fully fund the provision of counsel to economically beneficial immigrants in their removal proceedings. The potential sources listed above do not comprise a conclusive list, rather they represent a starting point from which the optimal funding source can be identified. The absence of a clearly identified source of funding is not indicative of an unfeasible or cost-prohibitive measure. Conversely, the vast array of potential funding sources indicates that the government could fund this measure with relative ease.

VI. CONCLUSION

Each year the United States detains and deports hundreds of thousands of immigrants. Though those immigrants who are processed through removal proceedings have a statutory right to counsel, the reality is the lack of appointed counsel frequently serves as a bar to representation. Without counsel in these complex proceedings, many individuals who would otherwise be productive members of American society are deported, never to have their potential realized. Many scholars have called for counsel to be appointed in immigration proceedings out of humanitarian and due process concerns. However, these arguments have not taken hold, and federal policymakers have not taken action to temper the outward flow of potential from the United States. Though it would be preferable to provide counsel to all persons in immigration removal proceedings, the political reality is that provision of counsel to all is not a viable option. The debate must be shifted to a discussion about the provision of counsel to immigrants who are most likely to provide long-term economic benefit to the United States. Only then will policymakers, and their constituents, see they too can benefit from assisting the multitude of immigrants who could otherwise be promoting economic activity. By advocating an amendment to the INA to provide counsel to immigrants who are college-educated, a veteran, or an unaccompanied child, this Comment aims to shift the debate in that direction and increase the likelihood that individuals similar to Marco Antonio Cortés, José Marvin Martínez, and Daniel Torres will have an opportunity to contribute to the American dream.

legal representation to illegal immigrants. See Dakota Smith & Cindy Carcamo, *Responding to Trump, L.A. proposes \$10 million legal defense fund for immigrants facing deportation*, L.A. TIMES (Dec. 19, 2016), <http://www.latimes.com/local/lanow/la-me-ln-lafund-20161219-story.html>.