The Heritage Foundation
LEADERSHIP FOR AMERICA

ISSUE BRIEF

No. 3932 | MAY 8, 2013

Handouts to Lawyers and Special Interest Groups Add to Immigration Bill Costs

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Language in the original Senate immigration bill (that remains in the Sponsor's Amendment) would prove to be a full-employment scheme for immigration lawyers at the expense of the U.S. taxpayer and would provide substantial federal funding for immigrant advocacy groups.[1]

In addition, these provisions create open-ended commitments of the U.S. government to aliens applying for various immigration statuses, commitments that could expose the government to costly litigation going forward.

Grants for Legal Assistance. Section 2106 of the proposed bill, entitled "Grant Program to Assist Eligible Applicants," establishes a $50 million grant program for nonprofit organizations to assist applicants under Sections 245B (registered provisional immigrant status), 245C (upgrade from registered provisional status to lawful permanent resident), and 245D (DREAM Act upgrade from registered provisional status to lawful permanent resident). These grants can be used for legal assistance and effectively commit the Department of Homeland Security (DHS) to providing grants for lawsuits against itself.

Further, Section 2537 of the bill, entitled "Initial Entry, Adjustment, and Citizenship Assistance [IEACA] Grant Program," provides federal funds for eligible nonprofits to "provide direct assistance," including legal assistance, to section 245 (permanent residence under existing law), 245B (registered provisional immigrant status), 245C (upgrade from registered provisional status to lawful permanent resident), and 245F (upgrade for agricultural workers to lawful permanent residence) applicants, as well as applicants seeking to become naturalized citizens.

The bill provides $100 million for these grants through a new publicly chartered nonprofit, the United States Citizenship Foundation. These grants may be used to provide any assistance the "grantee considers useful to aliens who are interested in applying for registered provisional status," making the use of these funds open-ended and providing a taxpayer spigot for federal funds to flow into the nonprofit advocacy world. In fact, the $100 million is just for the first five years of the program; Section 2541 authorizes such additional "sums as may be necessary for fiscal 2019 and subsequent years."

Under Section 2212 of the proposed bill, the Legal Services Corporation (LSC)—a federally funded nonprofit that provides legal services for low-income Americans—would be authorized to provide legal services to aliens related to application for Section 2211 "blue card" status (agricultural worker); under Section 2232 for such workers relating to various grievances against their employers; and any Title III, Subtitle F claims, which include a whole litany of various civil rights and employment claims as well as class-action claims. Previously, LSC funding and

This paper, in its entirety, can be found at
http://report.heritage.org/ib3932

Produced by the Center for Legal & Judicial Studies

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services were reserved by statute for U.S. citizens and aliens with legal status.[2]

In fact, Section 2104 ("Challenges to the Validity of the System") specifically authorizes class-action litigation over any "regulation, written policy, or written directive, issue or unwritten policy or practice initiated by or under the authority of the Secretary of Homeland Security." Thus, immigration lawyers who believe any particular policy or action of DHS is not lenient enough or does not give their clients everything they want will be able to use federal funding to file class-action lawsuits against the government.

Finally, in Section 3503, the U.S. Attorney General is directed to establish an Office of Legal Access Programs to educate aliens within five days of their arrival into custody "regarding administrative procedures and legal rights under United States immigration law and to establish other programs to assist in providing aliens access to legal information." Furthermore, the programs would be used to identify aliens for consideration by the Attorney General for inclusion in the appointed counsel program.

Appointed Counsel in Immigration Proceedings. This program, found in Section 3502, is entitled "Improving Immigration Court Efficiency and Reducing Costs by Increasing Access to Legal Information." Previously, aliens were allowed counsel at immigration proceedings "at no expense to the Government."[3] In other words, if the alien could afford to retain his own counsel, he was entitled to representation by that counsel during immigration proceedings.

Under the new proposed language, however, "the Attorney General may, in the Attorney General's sole and unreviewable discretion, appoint or provide counsel to aliens in" removal (deportation) proceedings. Furthermore, the Attorney General is now *required* to provide counsel for unaccompanied alien children, aliens with serious mental disabilities, and any other alien who "is considered particularly vulnerable when compared to other aliens in removal proceedings, such that the appointment of counsel is necessary to help ensure fair resolution and efficient adjudication of the proceedings."

This is a very broad standard that places almost no limits on the Attorney General's discretion to appoint counsel in such cases at taxpayer expense, since it appropriates whatever funds "as may be necessary" from the immigration bill authorization. Thus, the Department of Justice (DOJ) is given a blank check to provide whatever funds it deems appropriate to private immigration attorneys to defend against deportations, but it has no such blank check to fund its own attorneys to bring those deportation actions against aliens.[4]

Providing counsel at taxpayer expense to aliens threatens to open the DOJ up to constitutional lawsuits in at least two ways, notwithstanding the provision that the Attorney General's decisions are "unreviewable."

First, there has historically been a presumption that no due process right to counsel exists in the absence of the threat of physical confinement resulting from losing litigation.[5] The leading case in assessing what procedural process is "due" a

1. Sponsor's Amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, http://www.judiciary.senate.gov/legislation/EAS13500toMDM13313redline.pdf (accessed May 8, 2013).
2. "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity … that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and [falls within a limited class of alien with legal status]." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104–134, § 504(a)(11). While there is a long-standing presumption against extraterritorial reach of any given statute, the explicit override of this limitation makes it feasible for an LSC grantee to file a class-action lawsuit on behalf of aliens, none of whom is present in the United States, against non-U.S. employers for actions taking place wholly outside the U.S.
3. 8 U.S.C. § 1362. See also 8 U.S.C. § 1229a(4)(A).
4. Immigration judges are actually DOJ employees who conduct administrative hearings and trials in enforcements actions prosecuted by DOJ lawyers. This is similar to the type of administrative court system that the Social Security Administration runs for individuals applying for Social Security disability benefits. But citizens contesting a denial of disability benefits in a Social Security administrative hearing are not entitled to taxpayer-funded lawyers. So illegal aliens will be getting lawyers paid for by taxpayers who cannot get their own legal representation paid for if those same taxpayers end up in other administrative courts of the federal government.
5. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 26 (1981): ("[T]he Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty.").

defendant under the Due Process Clauses of the Fifth and Fourteenth Amendments is *Mathews v. Eldridge*, which sets out a three-part test in which a court must balance (1) the private interests at stake, (2) the risk of erroneous decision making, and (3) the governmental interest at stake.[6]

While this balancing is determined by whatever court is hearing a constitutional claim, the immigration bill itself, in Section 3502, arguably makes such a balancing: The Attorney General "shall appoint counsel ... [where] necessary to help ensure fair resolution and efficient adjudication of the proceedings."

Thus, the bill would send a clear signal to the courts that Congress views appointed counsel as occasionally necessary to ensure fairness and efficiency. While such a determination by Congress would not be binding on any federal court, it would be persuasive evidence and might give rise to weak, albeit colorable claims of due process violations when aliens are denied free lawyers, heaping additional costs on an already burdened federal court system.

Second, aliens denied free counsel might sue the Attorney General and claim that they were denied equal protection under the Fourteenth Amendment, since they were treated differently than those who received counsel. Further, those aliens could file class actions against the Attorney General under Section 2104 challenging his practices in appointing counsel. Again, these claims are weak, but they are real, and they could cause more litigation headaches for the Attorney General and DHS going forward.

Undocumented Costs. The Heritage Foundation has documented the long-term costs associated with these immigration proposals.[7] However, the specific bills contain additional costs, using taxpayer money to fund immigration advocacy groups, opening the federal government to future litigation, and funding and providing the lawyers who would sue the government. Such provisions are an unwise and unwelcome special-interest handout.

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6. 424 U.S. 319 (1976).
7. Robert Rector and Jason Richwine, "The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer," Heritage Foundation *Special Report* No. 133, May 6, 2013, http://www.heritage.org/research/reports/2013/05/the-fiscal-cost-of-unlawful-immigrants-and-amnesty-to-the-us-taxpayer.