



**COST OF COUNSEL IN IMMIGRATION:  
ECONOMIC ANALYSIS OF PROPOSAL PROVIDING PUBLIC  
COUNSEL TO INDIGENT PERSONS SUBJECT TO  
IMMIGRATION REMOVAL PROCEEDINGS**

**Dr. John D. Montgomery**

Senior Vice President, NERA Economic Consulting

May 28, 2014

## **I. Qualifications**

1. I am John D. Montgomery, Ph.D., a Senior Vice President at NERA Economic Consulting, a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. I direct projects and provide testimony in a range of complex commercial litigation. I have a Ph.D. in economics from Princeton University. I have held positions at the Board of Governors of the Federal Reserve System, International Monetary Fund, the President's Council of Economic Advisers (under President Clinton), and Morgan Stanley. I have published numerous articles in professional publications.<sup>1</sup>

## **II. Summary of Findings and Description of the Proposal**

2. In this report, I present my analysis of the estimated costs and offsetting savings of a proposal to create a program, entirely funded and overseen by the Federal government, to provide counsel to every respondent in immigration removal proceedings under 8 U.S.C. § 1229a who qualifies as indigent (hereinafter, the "Proposal").<sup>2</sup> I must state upfront that information and data on legal representation in immigration proceedings is incomplete, and a substantial range of uncertainty consequently is attached to the estimates in this report. However, using a range of

---

<sup>1</sup> I have been retained by the law firm Wilmer Cutler Pickering Hale & Dorr LLP on behalf of the New York City Bar Association. The opinions expressed herein do not necessarily represent the views of NERA Economic Consulting or any other NERA consultant. I thank Mark Noferi of the Center for Migration Studies, and Tiffany Payne, Sanhita Sen, and Hunter Landrum of WilmerHale for providing their insights, perspectives, comments, and research for this study. At NERA, Mitchell Chubinsky provided excellent research and analytical support, and Dr. Stephanie Plancich provided very helpful comments.

<sup>2</sup> In my analysis, I assume other immigration laws stay the same. The analysis in this report assumes that counsel will only be provided to those indigent respondents whose removal proceedings are initiated on or after the date that legislation regarding the Proposal is enacted. There is a considerable backlog of removal proceedings at various stages in the U.S. immigration court system, a majority of which, I am informed, likely involve respondents who are represented.

available numbers and background information, I have prepared what I believe to be unbiased estimates based on the best information available to me, from a variety of sources.

3. A summary of my findings is as follows:

- Primary Savings: I estimate that detention costs borne by the Federal government would decline by at least \$173 to \$174 million per year, and likely substantially more.
- Additional Savings: In addition, I estimate that other Federal outlays, including payments for legal orientation programs, transportation, and foster care would decline by between \$31 and \$34 million per year. Together with detention cost savings, I estimate total savings of between \$204 and \$208 million per year.
- Cost of Proposal: I estimate that the Proposal would cost \$208 million annually.
- Net Cost of the Proposal: Under plausible assumptions, fiscal savings could exceed the costs of providing publicly funded counsel, and the Proposal would pay for itself. The higher end of my range of estimated savings exceeds the estimated cost of the Proposal. Even at the lower end of the range, providing publicly funded counsel to indigent immigration respondents would cost the Federal government no more than \$4 million per year, with 98 percent of the cost being paid for by Federal fiscal savings.

4. Under the Proposal, counsel would be provided before a respondent's first court hearing, normally a Master Calendar Hearing, and would continue until the respondent's case is resolved by an immigration judge.<sup>3</sup> Both detained and non-detained respondents would be eligible for

---

<sup>3</sup> Removal proceedings under § 240 of the Immigration and Nationality Act ("INA") are initiated by a charging document called a Notice to Appear ("NTA"). 8 U.S.C. § 1229a; Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication, Report for the Administrative Conference of the United States*, pp. 8-21 (Section III.C, "Removal Adjudication Processes") (June 7, 2012), available at <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf> (hereinafter "Benson & Wheeler"). Upon issuance of a NTA, the respondent may be kept in custody (a.k.a. "detained"), released under a bond of \$1,500 or more, or released on conditional parole into the community. INA §236(a); 8 U.S.C. § 1226(a). During the removal process, the respondent will be asked to appear at two types of hearings—a master calendar and an individual hearing. Benson & Wheeler, pp. 15-16. The master calendar is a preliminary hearing for pleadings (somewhat analogous to a criminal arraignment). Respondents answer the charges against them and may file an application for relief from removal. There are several forms of relief from removal including asylum (8 U.S.C. § 1158); withholding of removal (8 U.S.C. § 1231(b)(3)); Convention Against Torture (8 C.F.R. § 208.16); waivers of removability or inadmissibility (e.g., 8 U.S.C. §§ 1186a(c)(4), 1227 (a)(1)(D)(ii) (certain hardship waivers)); adjustment of status (8 U.S.C. § 1255); and cancellation of removal (8 U.S.C. § 1229b(b)). If a respondent states grounds for relief, the Immigration Judge ("IJ") will schedule an individual hearing, also referred to as a merits hearing. At the individual hearing, the parties are given the opportunity to present evidence and

public counsel, and respondents would be represented during any hearings, including those to determine whether or not they should be detained.

### III. Likely Effects of the Proposal

5. My analysis indicates that the Proposal is likely to make immigration removal proceedings, and detention and deportation pursuant to them, more accurate and efficient. Generally, the involvement of counsel is likely to increase the chances that respondents who are legally entitled to be in the United States are allowed to stay. It is self-evident that respondents with legal representation are more likely to successfully argue that they are ineligible for removal

---

testimony before the IJ. Benson & Wheeler, p. 15. At the conclusion, the IJ will issue an order determining the respondent's alleged inadmissibility or deportability and decide on any requested relief. 8 U.S.C. § 1229a(b), (c). Either side can appeal the decision to the administrative Board of Immigration Appeals ("BIA") within 30 days. 8 C.F.R. § 1003.3. If the respondent loses before the BIA, he or she can then appeal within 30 days to the Federal Court of Appeals in the circuit where the case is located. 8 U.S.C. § 1252(b).

As noted above, the Proposal is limited to counsel being provided to indigent respondents from the initiation of removal proceedings through the point at which an IJ issues his or her decision. Accordingly, this report does not analyze costs and savings associated with counsel being provided to indigent respondents for any stage of appeal. The costs and benefits of such an extension to the Proposal are unclear. On the one hand, some extra costs would be borne by the government in providing for counsel to appeal to the BIA (and further costs to a Federal Court of Appeals). On the other hand, some costs would be saved as well, in that well-litigated cases in the trial courts may avoid unnecessary appeals to the BIA and a Federal Court of Appeals. An informal 2011 Department of Justice analysis based on fiscal year 2009 data estimated that it currently costs the federal government \$1,240 to litigate a BIA appeal (in prosecution and court costs), and \$17,858 to litigate an appeal to a Federal Court of Appeals (\$7,865 in prosecution costs and \$9,993 in court costs). U.S. Department of Justice, Immigration Litigation Bulletin, *What Does it Cost to Regulate Immigration? Three Measurements to Calculate Costs*, p. 6 (July 2011), available at [http://www.justice.gov/civil/docs\\_forms/ImmigrationBulletin/July\\_2011.pdf](http://www.justice.gov/civil/docs_forms/ImmigrationBulletin/July_2011.pdf). Some additional costs outlined in this report would be saved as well. Further, if parties are represented at appeals, counsel on both sides may reach settlements or stipulations that save court time or obviate the need for a full appeal.

Additionally, this Proposal would provide representation to unaccompanied juveniles, as part of providing representation to those in 8 U.S.C. § 1229a proceedings. Less is known about the fiscal impacts of representation on juveniles, though, and this analysis does not separately analyze those impacts.

or successfully claim relief from removal. Data from asylum proceedings (discussed below) demonstrate that legal representation improves outcomes for respondents. The involvement of counsel will also likely improve the efficiency of the proceedings, resulting in faster removals for those without opportunities for relief from removal.

6. I focus on two quantifiable effects of public provision of counsel in immigration removal proceedings:

- First, legal representation is likely to reduce costly detention expenditures by the Federal government for respondents who are detained while they are waiting for their cases to be adjudicated, by reducing the aggregate number of days that the government must provide food, housing, and other provisions for those detained respondents. Two factors contribute to this potential reduction in detention days. Some of the reduction is likely because cases with lawyers involved will proceed more quickly from initiation of the cases to decisions by immigration judges, either due to fewer continuances, or because a substantial number of detained respondents without any chance of relief will accept deportation more quickly if well-counseled. Additionally, other respondents with lawyers would be more likely to secure release at the outset of removal proceedings through a successful bond hearing (allowing them to continue working, supporting their families, paying taxes, etc., while waiting for their cases to be decided). Evidence supporting these effects, not all of which can be quantified, is discussed later in this report.
- Second, legal representation would likely improve the accuracy of cases by helping those individuals who are legally entitled to be in the United States to stay, some of whom otherwise may have been deported without the assistance of counsel. With counsel,

either fewer individuals would be determined eligible for removal or more of those eligible would be able to obtain relief through the avenues of relief open to them. In turn, by helping those respondents who are legally entitled to stay, counsel would help reduce social costs and spur other economic benefits. One quantifiable social cost that would likely be reduced is foster care expenditures for children of deported parents. Other economic benefits and savings in social costs would likely be realized as well, although this report does not quantify those benefits and savings. In addition, the reduced deportations of those individuals who are legally entitled to stay through the provision of counsel, would also lead to savings in transportation and travel costs incurred when individuals are deported.

**A. The Proposal Is Expected to Reduce Detention Time, Leading to Significant Savings to the Federal Government**

7. Representation by counsel can lead to reduced detention expenditures of at least \$173 to \$174 million per year, and likely considerably more.

8. The impact of providing lawyers depends on the number of respondents in removal proceedings who would receive publicly funded counsel because they are indigent, meaning that they are determined to lack sufficient resources to pay for their own counsel. Typically, in non-immigration contexts, a court determines indigency based on information provided by the defendant assessed against certain criteria, which can differ from jurisdiction to jurisdiction.<sup>4</sup> I

---

<sup>4</sup> For example, in New York State criminal proceedings, individual counties determine the eligibility standards and procedures for appointed counsel to indigents. Some counties require that defendants fill out a written eligibility form. In others, the judge makes a verbal inquiry into the defendant's financial situation. In New York City (Bronx, Kings, New York, Queens, and Richmond counties), the New York City Criminal Justice Agency makes an eligibility determination pre-arraignment for bail purposes. The court then appoints counsel to indigent defendants. Indicators of indigency include income, and may include rent and outstanding debt. In

approximate the number of indigent respondents by the number of respondents who currently do not have legal representation.<sup>5</sup> I analyze this with data from the Executive Office for Immigration Review (“EOIR”) on the status of completed cases, separately for respondents detained and not detained at the completion of their proceedings. This analysis is shown in Exhibit 1. The analysis also uses data from Benson & Wheeler on the percentage of detained cases with representation (22 percent in 2011).<sup>6</sup> Updating this representation rate with 2013 data, I estimate that 28 percent of detainees would have legal representation, which means that the other 72 percent would not have legal representation and would presumably be indigent. For

---

Nassau County, for example, some judges use the 2nd Department’s discretionary guidelines, where “a defendant is presumptively eligible” if the gross household income is at or below 250% or 350% of the Federal Poverty Guidelines for misdemeanor and felony charges, respectively. *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services*, p. 95 (June 16, 2006). By contrast, in Harris County, Texas criminal proceedings, which have their own indigency criteria (e.g., income, assets, property owned), a defendant is presumed to be indigent if his or her income “is below 125 percent of the Federal Poverty Guidelines.” Harris District Court Plan, Indigency Determination Standards, available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=294>. The Federal Poverty Guidelines are set annually by the U.S. Department of Health & Human Services. 2014 Poverty Guidelines, available at <http://aspe.hhs.gov/poverty/14poverty.cfm>.

In federal criminal proceedings, under the Criminal Justice Act of 1964 (“CJA”), U.S. District Courts can appoint counsel to any “financially eligible person” in the interests of justice. 18 U.S.C. § 3006A(a)(2)(B). Financial eligibility under the CJA does not necessarily mean indigence, as “indigence connotes a greater financial need than is necessary to qualify for appointed counsel.” *Green v. United States*, 262 F.3d 715, 716 (8th Cir. 2001). A person is considered “financially unable to obtain counsel” within the meaning of the CJA (18 U.S.C. § 3006A(b)) if the person’s net financial resources are insufficient to obtain counsel. According to the Guidelines for Administering the CJA, the court will look to the “cost of providing the person and the person’s dependents with the necessities of life, and the cost of the defendant’s bail bond if financial conditions are imposed.” *Guide to Judiciary Policy*, Vol. 7, § 210.40.30(a)-(c). Eligibility information is collected by the court in a financial affidavit (Form CJA 23).

<sup>5</sup> Although some respondents may simply choose to forego counsel, it seems reasonable to assume that lack of financial resources is the main reason that respondents do not obtain a lawyer. Some indigent respondents, however, may have *pro bono* counsel.

<sup>6</sup> Benson & Wheeler, p. 57.

**Exhibit 1**  
**Estimated Representation Rates by Detention Status**

**FY 2011**

Completed Immigration Proceedings <sup>1</sup>	(a)	209,282
Detained Respondents (at completion) <sup>1</sup>	(b)	112,776
Not Detained Respondents (at completion)	(c) = (a) - (b)	96,506
Represented Respondents <sup>2</sup>	(d)	89,022
Not Represented Respondents	(e) = (a) - (d)	120,260
<b>Representation Rate for Detainees<sup>3</sup></b>	(f)	<b>22.0%</b>
Detained Represented Respondents	(g) = (b)*(f)	24,811
Not Detained Represented Respondents	(h) = (d) - (g)	64,211
<b>Estimated Representation Rate for Non-Detainees</b>	(i) = (h)/(c)	<b>66.5%</b>

**FY 2013**

Completed Immigration Proceedings <sup>1</sup>	(j)	173,018
Detained Respondents (at completion) <sup>1</sup>	(k)	63,313
Not Detained Respondents (at completion)	(l) = (j) - (k)	109,705
Expected Represented Respondents Based on 2011 Ratio:		
Detained Represented Respondents	(m) = (k)*(f)	13,929
Not Detained Represented Respondents	(n) = (l)*(i)	72,993
Total Respondents	(o) = (m) + (n)	86,922
Actual 2013 Represented Respondents <sup>2</sup>	(p)	101,365
Difference between Actual and Expected	(q) = (p) - (o)	14,443
Estimated 2013 Represented Respondents:		
Detained Represented Respondents	(r) = (m) + (q)*[(g)/(d)]	17,954
Not Detained Represented Respondents	(s) = (n) + (q)*[(h)/(d)]	83,411
<b>Estimated Representation Rate for Detainees</b>	(t) = (r)/(k)	<b>28.4%</b>
<b>Estimated Representation Rate for Non-Detainees</b>	(u) = (s)/(l)	<b>76.0%</b>

**Notes and Sources:**

<sup>1</sup> Executive Office for Immigration Review FY 2013 Statistical Year Book, p. G1.

<sup>2</sup> Executive Office for Immigration Review FY 2013 Statistical Year Book, p. F1.

<sup>3</sup> Benson, Lenni B. and Wheeler, Russell R. "Enhancing Quality and Timeliness in Immigration Removal Adjudication," Administrative Conference of the United States. June 7, 2012, p. 57.

respondents who are not detained, I estimate that 76 percent of respondents would have legal representation, and therefore 24 percent would not.

9. Detention cost savings result from the provision of publicly funded lawyers to detained respondents. Exhibit 2 presents calculations estimating the overall number of respondents that would receive counsel. This is divided according to detention status, using a random sample of 2009 EOIR cases from representative immigration courts, as reported in a 2012 Department of Justice Office of Inspector General study. That study provided a three-way break-down into never detained, partially detained, and always detained throughout the case.<sup>7</sup> Detention savings would come from the partially and always detained categories. I estimate that 72,495 always detained and 8,000 partially detained respondents, per year, would receive publicly funded counsel (based on current rates of legal representation).

---

<sup>7</sup> Respondents referred to as “partially detained” are those who are detained at the outset of their cases but released at some point prior to a determination in their cases. Those who are “always detained” are detained from the outset throughout their proceedings. I use the phrase “initially detained” to refer to the category of respondents that includes both the partially detained and the always detained.

**Exhibit 2**  
**Estimated Immigration Cases Requiring Public Counsel**

Number of Notices to Appear (FY 2014) <sup>1</sup>	(a)	189,135
<u>Executive Office for Immigration Review Case Study<sup>2</sup></u>		
Detained Respondents	(b)	955
Partially Detained Respondents	(c)	315
Never Detained (Non-Detained and Asylum) Respondents	(d)	515
Total Cases in Sample	(e)	1,785
Estimated Percent of Respondents Detained	(f)=(b)/(e)	53.5%
Estimated Percent of Respondents Partially Detained	(g)=(c)/(e)	17.6%
Estimated Percent of Respondents Never Detained	(h)=(d)/(e)	28.9%
Estimated Representation Rate for Detainees <sup>3</sup>	(i)	28.4%
Estimated Representation Rate for Partial Detainees <sup>3,4</sup>	(j)	76.0%
Estimated Representation Rate for Non-Detainees <sup>3</sup>	(k)	76.0%
Estimated Non-Represented Detained Respondents	(l)=(a)*(f)*[1-(i)]	72,495
Estimated Non-Represented Partially Detained Respondents	(m)=(a)*(g)*[1-(j)]	8,000
Estimated Non-Represented Initially Detained Respondents	(n)=(l)+(m)	80,495
Estimated Non-Represented Never Detained Respondents	(o)=(a)*(h)*[1-(k)]	13,079
<b>Estimated Respondents Requiring Public Counsel<sup>5</sup></b>	<b>(p) = (n)+(o)</b>	<b>93,573</b>

**Notes and Sources:**

<sup>1</sup> Transactional Records Access Clearinghouse, Syracuse University. "New Filings Seeking Removal Orders in Immigration Courts through March 2014", accessed May 6, 2014 ([http://trac.syr.edu/phptools/immigration/charges/apprep\\_newfilings.php](http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php)).

<sup>2</sup> US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division. "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review", October 2012, pp. iii, 28. The cases in the study were taken as a random sample of 2009 EOIR cases from representative immigration courts.

<sup>3</sup> Exhibit 1

<sup>4</sup> Partially detained respondents are assumed to have the same representation rate as never detained respondents.

<sup>5</sup> Respondents without legal representation, and only those respondents, are assumed to be indigent.

10. While I have no data that directly measures the impact of lawyers in reducing the amount of detention time for respondents in immigration removal proceedings, one effect of lawyers is that they can make cases move more quickly. Exhibit 3 presents data on case continuances granted to respondents. Continuances are delays in proceedings granted by immigration judges for various reasons. Many such continuances are granted to permit the respondent to find representation or to prepare his or her case. For respondents who are indigent, provision of public counsel should eliminate these continuances. A survey by the Department of Justice's Inspector General found that 62 percent of continuances in immigration removal cases resulted from a request from immigrant respondents.<sup>8</sup> Of these continuances requested by respondents, 23 percent were "to allow the alien time to obtain representation," and another 21 percent were requested by respondents to prepare the case.<sup>9</sup> Fifty-three percent of cases have at least one continuance, and for such cases, the average number of continuances is 4.29, with each continuance adding roughly 20.5 days to a proceeding. An average of 0.62 continuances are requested by and granted per respondent for obtaining representation and preparing the respondent's case. This implies that the provision of counsel, by eliminating the need for these continuances alone, could shorten proceedings involving detainees by 12.7 days on average. Because cases move more quickly, I expect that the length of detention would be reduced accordingly.

---

<sup>8</sup> Other surveys have found similar results. See Benson & Wheeler, pp. 82-85 (in FY 2010, 68 percent of continuances requested by respondent; 20 percent and 14 percent of overall continuances requested for additional time and to seek representation, respectively).

<sup>9</sup> U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, *Management of Immigration Cases and Appeals by the Executive Office for Immigration Review*, pp. iii, 28-31 (October 2012), available at <http://www.justice.gov/oig/reports/2012/e1301.pdf>.

**Exhibit 3**  
**Estimated Continuance Cost Savings**

Executive Office for Immigration Review Case Study

Detained Cases (at completion)	(a)	955
Never Detained Cases	(b)	<u>515</u>
Total <sup>1</sup>	(c)=(a)+(b)	1,470
Average Detained Processing Time (Days)	(d)	48
Average Non-Detained Processing Time (Days)	(e)	526
Average Number of Days Per Continuance	(f)	92
<b>Ratio of Non-Detained Processing Time to Detained Processing Time</b>	(g)=(e)/(d)	<b>11.0</b>
Detained Cases as Percent of Total	(h)=(a)/(c)	65.0 %
Non-Detained Cases as Percent of Total	(i)=1-(h)	35.0 %
<b>Estimated Number of Days per Continuance for Detained Immigrants<sup>2</sup></b>	(j)=(f)/{(h)+[(i)*(g)]}	<b>20.5</b>
Continuances – Percent Requested by Respondents	(k)	62.0 %
Continuances Requested by Respondents – Percent for Finding Representation	(l)	23.0 %
Continuances Requested by Respondents – Percent for Preparing their Case	(m)	21.0 %
Percent of Continuances Used for Seeking Representation and Preparing their Case	(n)=(k)*[(l)+(m)]	27.3 %
Percent of All Respondents with at Least One Continuance	(o)	53.0 %
Cases Having One or More Continuances	(p)	953
Number of Continuances for those Cases Having One or More Continuance	(q)	4,091
Average Continuances per Case with at Least One Continuance	(r)=(q)/(p)	4.29
<b>Estimated Continuances per Respondent</b>		
Seeking Representation Only	(s)=(k)*(l)*(o)*(r)	0.32
Seeking Representation and Preparing their Case	(t)=(n)*(o)*(r)	0.62
<b>Estimated Continuance Days Saved per Detained Respondent</b>		
Seeking Representation Savings Only	(u)=(j)*(s)	<b>6.6</b>
Seeking Representation and Preparing their Case	(v)=(j)*(t)	<b>12.7</b>

**Source:** US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division. "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review", October 2012, pp. 28-32. The cases in the study were taken as a random sample of 2009 EOIR cases from representative immigration courts.

**Notes:**

<sup>1</sup> Total excludes partially detained cases, for which the study does not present average processing times.

<sup>2</sup> All Respondents are assumed to have the same number of continuances.

11. The EOIR provides information sessions, known as the Legal Orientation Program (“LOP”), to immigration respondents.<sup>10</sup> A LOP provides respondents with a description of their legal rights, but they are not given any direct assistance during court proceedings that take place after the LOP.<sup>11</sup>

12. An April 2012 study by the EOIR found that in fiscal year 2011, detention was reduced by an average of 11 days for those provided LOP services on or before the day of their first immigration court hearing.<sup>12</sup> According to the study, EOIR’s sample excludes any detainee who was “later released from custody,” which presumably refers to detainees released on bond.

13. This 11-day finding is a lower-bound estimate of the impact on detention length of counsel provided before the first immigration court hearing. Exhibit 4 presents these calculations. The savings would apply to indigent respondents who would not have received LOP services. Assuming that LOP services are currently provided to both indigent and non-indigent respondents, I estimate that 45,558 indigent detainees annually do not currently receive LOP services. For these detainees, the total estimated reduction in detention days would be 501,142.

---

<sup>10</sup> U.S. Department of Justice, Executive Office for Immigration Review, *Cost Savings Analysis – The EOIR Legal Orientation Program* (Apr. 4, 2012), available at [http://www.justice.gov/eoir/reports/LOP\\_Cost\\_Savings\\_Analysis\\_4-04-12.pdf](http://www.justice.gov/eoir/reports/LOP_Cost_Savings_Analysis_4-04-12.pdf) (hereinafter, “EOIR LOP Report”).

<sup>11</sup> According to the Vera Institute, “LOP provides detained persons with basic information on forms of relief from removal, how to accelerate repatriation through the removal process, how to represent themselves pro se, and how to obtain legal representation.” As part of the non-profit legal services provided, the LOP offers group orientations, individual orientations, small self-help workshops, as well as referrals to pro bono attorneys. Nina Siulc, Zhifen Cheng, Arnold Son, & Olga Byrne, *Legal Orientation Program, Evaluation and Performance and Outcome Measurement Report, Phase II*, VERA Institute of Justice, p. 1 (May 2008), available at <http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf> (hereinafter, “VERA LOP Report”).

<sup>12</sup> EOIR LOP Report, p. 2.

14. Exhibit 4 also shows my estimate that reduced continuances would save an additional 584,766 detention days. This estimate can be added to the estimate based on LOP services, yielding a total estimated savings of 1,085,908 detention days annually.<sup>13</sup>

15. Apart from reduced continuances, two other effects of providing counsel are also likely to lead to reduced detention time—(1) shorter case processing times from more detainees accepting deportation early, and (2) more detainees obtaining bond and securing release earlier. Although I do not have quantitative estimates of these effects on detention, the overlapping impacts of these factors (which are presumably greater with representation by lawyers rather than with LOPs) indicate that lawyer representation should have a greater impact on detention reduction than the 11-day impact of LOPs.

16. First, many detained without any chance of relief will accept deportation more quickly if well-counseled. Although some swift deportations of respondents who lack valid claims to stay can be attributed to LOP sessions, the impact of counsel is probably not wholly duplicative.<sup>14</sup>

---

<sup>13</sup> These two estimates are additive because indigent detainees receiving LOPs will not generally have the resources to obtain counsel, so that the benefits of obtaining counsel are not reflected in the effect of the LOPs for these individuals. If they received counsel at the outset of their proceedings, they would presumably benefit not only from the average 11-day impact of LOPs but also from additional days saved by avoiding the need for continuances to obtain counsel and prepare their cases.

<sup>14</sup> VERA LOP Report, p. 65 (“the LOP is no substitute for representation—even for people who are not pursuing relief applications.”), 67 (“the LOP reduced confusion but did not eliminate it entirely”).

**Exhibit 4**  
**Baseline Estimated Detention Days Saved**

Number of Notices to Appear (FY 2014) <sup>1</sup>	(a)	189,135
Estimated Percent of Detained Cases (at completion) <sup>1</sup>	(b)	53.5%
Estimated Percent of Partially Detained Cases <sup>1</sup>	(c)	17.6%
Estimated Number of Detained Respondents (at completion)	(d)=(a)*(b)	101,190
Estimated Number of Detained Indigent Respondents (at completion) <sup>1</sup>	(e)	72,495
Average Reduction in ICE Detention Days Due to LOP Services for Detained Respondents (at completion) <sup>2</sup>	(f)	11
Number of Initially Detained Respondents Receiving LOP Services in FY 2013 <sup>3</sup>	(g)	50,000
Estimated Number of Detained (at completion) Receiving LOP Services <sup>4</sup>	(h)=(g)*(b)/[(b)+(c)]	37,598
Estimated Number of Indigent Detainees Receiving LOP Services <sup>4</sup>	(i)=(h)*[(e)/(d)]	26,936
Estimated Number of Indigent Detainees Not Receiving LOP Services	(j)=(e)-(i)	45,558
<b>Baseline Reduction in Detention Days Due to Legal Representation</b>	(k)=(f)*(j)	<b>501,142</b>
Estimated Number of Initially Detained Respondents	(l)=(a)*[(b)+(c)]	134,567
Estimated Percent of Respondents Who Seek but Fail to Obtain Representation <sup>5</sup>	(m)	34.2%
Estimated Continuance Days Per Detainee for Seeking Representation and Preparing their Case <sup>6</sup>	(n)	12.7
Reduction in Detention Days per Indigent Detainee from Reduction in Failed Attempts to Seek Representation	(o)=(m)*(n)	4.3
<b>Total Reduction in Detention Days From Reduction in Failed Attempts to Seek Representation<sup>7</sup></b>	(p)=(l)*(o)	<b>584,766</b>
<b>Baseline Number of Detention Days Avoided for FY 2014</b>	(q)=(k)+(o)	<b>1,085,908</b>

**Notes and Sources:**

<sup>1</sup> Exhibit 2

<sup>2</sup> "Cost Savings Analysis - The EOIR Legal Orientation Program", Executive Office for Immigration Review, April 4, 2012, p. 2. In FY 2011, the 94% of participants who received LOP services on or before their first hearing spent an average of 11 fewer days in ICE detention.

<sup>3</sup> Vera Center on Immigration and Justice, "Center Overview", (<http://www.vera.org/sites/default/files/overview-cij-v2.pdf>)

<sup>4</sup> All detained respondents are assumed to be equally likely to receive LOP services, regardless of indigent status.

<sup>5</sup> Includes cases that adjourned to seek representation and didn't find it, as well as those that withdrew adjournments. Assumes detainees are equally likely to seek and fail to obtain representation as non-detainees. "Final Report - New York Immigrant Representation (Pursuant to LOP Task Order 32, Section D)", "Table 21. Timing of Adjournment to Seek Representation and E28 Filing for Cases in NY Immigration Courts," New York Immigrant Representation Study, ([http://www.justice.gov/eoir/reports/FinalReport-NYIR-LOP\\_TO32-SecD.pdf](http://www.justice.gov/eoir/reports/FinalReport-NYIR-LOP_TO32-SecD.pdf))

<sup>6</sup> Exhibit 3

<sup>7</sup> All unrepresented respondents are assumed to be indigent, therefore the reduction in detention days from the reduction in the failed attempts of detainees to seek representation would only arise from continuances sought by indigent detainees.

17. Second, average detention time is also likely to decrease because some respondents, if they have legal representation, may be more likely to secure release at the outset of their removal proceedings through a successful bond hearing. The LOP estimates discussed above exclude individuals securing release from the estimate of the impact of a LOP on detention time.

Respondents obtaining release would spend less time in detention, thus incurring lower detention costs for the federal government and would also be able to continue working, supporting their families, paying taxes, etc., while they were waiting for their cases to be adjudicated. Evidence from criminal proceedings demonstrates the contribution legal representation makes to obtaining such release. For example, a pilot program in Baltimore that provided legal representation to lower-income criminal defendants accused of non-violent crimes found that, compared to defendants with no legal representation, those who had been randomly assigned program lawyers to make their valid arguments for release and correct mistakes fared better in their bail hearings.<sup>15</sup>

18. Even excluding the savings in paragraphs 16 and 17, which are difficult to quantify, I estimate that the decrease in detention days would reduce expenditures by the Federal government. My quantitative estimate is based on (1) the impact from extending provision of counsel to those not already receiving LOPs, and (2) the impact of shortened case times from reduced continuance requests by detainees seeking counsel and seeking time to prepare their cases. Two estimates of this reduction are presented in Exhibit 5. These estimates use the reduction in detention days from Exhibit 4, which as discussed above, is a conservatively low

---

<sup>15</sup> Colbert, Douglas L., Paternoster, Ray, & Bushway, Shawn, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, CARDOZO L. REV., Vol. 23, pp. 101-165 (2002).

estimate. In a report issued by the National Immigration Forum, the estimated detention cost per day per detained respondent is \$159. This yields an aggregate estimated annual cost of \$173 million, shown as Detention Cost Savings 1 in Exhibit 5. As an alternative, we can use the Department of Homeland Security's ("DHS") budget request for fiscal year 2014, which implies that its budget for "Custody and Operations" in 2013 was just under \$2 billion. Federal law currently mandates 34,000 detention beds, which implies a daily cost per bed of \$161. This cost per bed produces an aggregate estimated cost of about \$174 million, shown as Detention Cost Savings 2 in Exhibit 5. Exhibit 5 also shows savings for the Federal government from eliminating expenditure for LOPs, if they are replaced by publicly funded counsel. I estimate this cost savings to be \$3.5 million annually.

19. A reduction in detention is also likely to have other benefits not quantified here. The respondents will be able to work or run their businesses if they are not detained. They will also be able to care for dependents, eliminating possible government costs. And they will be able to pay taxes on their income and spending while they are not detained.

<b>Exhibit 5</b>		
<b>Detention and LOP Cost Savings from Paid Counsel for Indigent Immigrant Respondents</b>		
Number of Detention Days Avoided for FY 2014 <sup>1</sup>	(a)	1,085,908
<b>Detention Savings-Method 1</b>		
Cost of Detention per Day per Detainee (based on ICE data) <sup>2</sup>	(b)	\$ 159
<b>Detention Cost Savings 1</b>	(c)=(a)*(b)	<b>\$ 172,659,387</b>
<b>Detention Savings-Method 2</b>		
FY 2014 ICE Custody and Operations Enacted Budget <sup>3</sup>	(d)	\$ 1,993,770,000
Mandatory ICE Detention Beds <sup>4</sup>	(e)	34,000
Cost per Bed	(f)=(d)/(e)	\$ 58,640
Cost per Bed per Day (based on DHS budget figure)	(g)=(f)/365	\$ 161
<b>Detention Cost Savings 2</b>	(h)=(a)*(g)	<b>\$ 174,460,192</b>
Number of Detainees Receiving LOP Services in FY 2013 <sup>1</sup>	(i)	50,000
Cost of LOP Program per Participant <sup>5</sup>	(j)	\$ 70
<b>LOP Cost Savings</b>	(k)=(i)*(j)	<b>\$ 3,500,000</b>
<b>Notes and Sources:</b>		
<sup>1</sup> Exhibit 4		
<sup>2</sup> "The Math of Immigration Detention". National Immigration Forum, August 2013, p. 2. The National Immigration Forum estimates a cost of \$159 per daily bed, based on ICE's projected cost of \$119 per daiy bed plus detention program payroll costs.		
<sup>3</sup> "U.S. Immigration and Customs Enforcement Salaries and Expenses Fiscal Year 2015 Congressional Justification," Department of Homeland Security, p. 121.		
<sup>4</sup> Ibid., p. 42.		
<sup>5</sup> "Cost Savings Analysis - The EOIR Legal Orientation Program", Executive Office for Immigration Review, April 4, 2012, p. 8.		

## **B. The Proposal Will Help Reduce Federal Outlays for Foster Care and Travel/Transportation**

20. An additional quantifiable savings of the Proposal is the savings to the Federal government in foster care expenses for children whose parent(s) are successful in their removal

proceedings.<sup>16</sup> For various reasons, some children of respondents in immigration proceedings are placed in foster care. I assume that these placements are primarily due to parents who are deported and are unable to take their children with them. In order to estimate the savings in foster care expenditures, I must estimate the impact of legal representation for indigent respondents on the outcomes of removal proceedings. Thus, I use a two-step process. First, I estimate the impact of lawyers on the outcomes of proceedings, by estimating the impact of lawyers on the percentage of respondents who have a case outcome other than deportation. (They can have their cases dismissed or closed by DHS, they can be found by the court to be not subject to removal, or they can be found eligible for relief from removal.) I estimate that the provision of lawyers would increase successful outcomes for those who are legally entitled to be in the United States. Second, I estimate the amount of foster care expenditures saved due to a reduction in removals of those immigrant parents with a legal right to remain.

21. Step 1: Though various sources compare case outcomes for represented immigrants with those for unrepresented immigrants, they fall short of isolating the impact of defense counsel on case outcomes, because the strength of a respondent's case may determine whether he or she gets a lawyer, either through his or her own resources or from *pro bono* or non-profit organizations. While this problem cannot be eliminated given available data, I attempt to mitigate it by using data on the impact of counsel on asylum outcomes. A strong asylum case is still more likely to be picked up by an attorney than a weak one, but overall, I assume that asylum cases are more homogeneous than immigration cases *in toto*, which may reduce sample-selection bias.

---

<sup>16</sup> This report focuses on costs and benefits to the Federal government, but because foster care spending is shared by the Federal and state governments, states would also realize savings.

22. My calculations for the analysis of the impact of legal representation on case outcomes are done separately according to detention status. The source data, based on outcomes for asylum cases, comes from Benson & Wheeler<sup>17</sup> and is reported in Exhibit 6. Most asylum seekers secure counsel, and their outcomes range from a success (grant of asylum) rate of 24 percent for those detained, to 48 percent for those partially detained, and 59 percent for those never detained. Comparable success rates for asylum seekers without counsel are substantially lower, ranging from 6 to 38 percent.<sup>18</sup>

<b>Exhibit 6</b>				
<b>Asylum Application Grants and Denials in 2010 by Detention Status and Representation Status</b>				
	<b>Asylum-Seeking Immigrants</b>			
	<b>Not Represented</b>		<b>Represented</b>	
	<b>Grants</b>	<b>Grant Rate</b>	<b>Grants</b>	<b>Grant Rate</b>
	(a)	(b)	(c)	(d)
<b>Detained</b>	68	5.6 %	280	24.3 %
<b>Partially Detained<sup>1</sup></b>	113	32.6 %	1,083	47.8 %
<b>Never Detained</b>	277	37.5 %	6,733	58.9 %

**Source:** Benson, Lenni B. and Wheeler, Russell R. "Enhancing Quality and Timeliness in Immigration Removal Adjudication". Administrative Conference of the United States. June 7, 2012, p. 100.

**Notes:**

<sup>1</sup> Partially Detained refers to detainees who were released after some time spent in detention.

<sup>17</sup> Benson & Wheeler, p. 100.

<sup>18</sup> My calculations using these estimates assume that legal representation for an asylum seeker depends on the ability of the respondent to pay for an attorney and not on the strength of the respondent's claim.

23. Combining the data on the impact of counsel on success rates and my estimates of representation rates by detention status (in Exhibit 1) allows me to estimate the impact on success rates of providing representation to all respondents. These calculations are detailed in Exhibit 7. I assume that representation rates for partially detained respondents are the same as for respondents who are never detained. The calculations are done in terms of loss rates, which are simply 100 percent minus the success rates. I find that the impact of providing counsel to all respondents ranges from a 6.5 percent reduction in losses (*i.e.*, removals) for partially detained respondents up to 15.0 percent for detained respondents.

<b>Exhibit 7</b>				
<b>Impact of Representation on Case Win/Loss Rates by Detention Status</b>				
		<u>Detained</u>	<u>Partially</u> <u>Detained</u>	<u>Never</u> <u>Detained</u>
		(1)	(2)	(3)
Percent of Respondents Estimated to Be Represented <sup>1</sup>	(a)	28.4%	76.0% <sup>2</sup>	76.0%
<b>Respondent Win Rate</b>				
With Legal Representation <sup>3</sup>	(b)	24.3%	47.8%	58.9%
Without Legal Representation <sup>3</sup>	(c)	5.6%	32.6%	37.5%
<b>Percentage of Total Completions for Detention Status</b>				
Represented Losses	(d) = [1-(b)]*(a)	21.5%	39.7%	31.2%
Non-Represented Losses	(e) = [1-(c)]*[1-(a)]	<u>67.6%</u>	<u>16.2%</u>	<u>15.0%</u>
All Losses for Detention Status	(f) = (d)+(e)	89.1%	55.8%	46.2%
<b>If All Were Represented<sup>4,5</sup></b>				
Implied Loss Rate	(g) = 1-(b)	75.7%	52.2%	41.1%
Reduction in Failures out of Total Completions	(h) = (f)-(g)	13.4%	3.7%	5.1%
Reduction in Failures over Current Failures	(i) = (h)/(f)	15.0%	6.5%	11.1%
<b>Notes and Sources:</b>				
<sup>1</sup> Exhibit 1				
<sup>2</sup> Partially detained respondents are assumed to have the same representation rate as never detained respondents.				
<sup>3</sup> Exhibit 6				
<sup>4</sup> Analysis assumes that the populations of respondents without legal representation would, upon receiving free legal representation, have comparable win rates to respondents who obtained legal representation from other means.				
<sup>5</sup> Analysis does not account for detained respondents who would be released and become partially detained as a result of free legal representation. Including this effect in the analysis would increase the estimated impact of representation.				

24. Step 2: Many non-citizens residing in the United States are parents of children born in the United States, conferring automatic citizenship on those children. When the parents are deported, they may leave the children behind, and in some cases, those children end up in foster care. On average, an estimated 5,100 children are in foster care because their parents were deported.<sup>19</sup> I estimate that if all parents had legal representation, from 7 to 16 percent (depending on detention status, *see* Exhibit 7, line i) of the parents who would otherwise be deported would stay in the United States. Assuming these parents are proportionally distributed across detention status, 665 fewer children on average at any given time would not be in the foster care system. The number would be larger if, as seems likely, detained parents are disproportionately likely to lose their children to foster care. The calculations behind this estimate are presented in Exhibit 8.

25. As detailed in Exhibit 8, Federal expenditures total \$28,526 per child in foster care. This translates into annual savings of between \$18,028,643 and \$20,658,342 for the Federal government. In addition to these fiscal savings, there would presumably be more difficult-to-quantify benefits to families and children, such as improved educational performance and better mental and physical health.

26. An additional area of likely fiscal savings would be to the U.S. Immigration and Customs Enforcement's budget for travel and transportation of persons being deported. As shown in Exhibit 9, I estimate that deportation transportation costs an average of \$559 per person.<sup>20</sup>

---

<sup>19</sup> Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Research Center, p. 6 (Nov. 2011).

<sup>20</sup> This average transportation cost estimate is likely somewhat below actual transportation costs for those removed as a result of 8 U.S.C. § 1229a immigration proceedings. The removals covered by the cost estimate include many removals of individuals apprehended at the border and deported without immigration court proceedings, *see, e.g.*, 8 CFR 235.3 (who may cost less to remove than respondents deported from the interior of the U.S.), as well as voluntary departures, who depart at their own expense. 8 U.S.C. § 1229c(a)(1).

**Exhibit 8**  
**Estimated Foster Care Cost Savings**

		<u>Detained</u> (1)	<u>Partially Detained</u> (2)	<u>Initially Detained</u> (3) (1)+(2)	<u>Never Detained</u> (4)	<u>Total</u> (5) (3)+(4)
FY 2014 Federal Foster Care Enacted Budget <sup>1</sup>	(a)					\$ 4,278,950,000
FY 2014 Federal Monthly Foster Care Caseload Forecast <sup>2</sup>	(b)					150,000
Annual Federal Cost per Child	(c) = (a)/(b)					\$ 28,526
Number of Immigrant Children in Foster Care <sup>3</sup>	(d)					5,100
Reduction in Case Failures as a % of Current Failures <sup>4</sup>	(e)	15.0 %	6.5 %		11.1 %	
<b>Assuming Proportional Contribution<sup>5</sup></b>						
Percentage of Completed Cases <sup>6</sup>	(f)	53.5 %	17.6 %	71.1 %	28.9 %	
Number by Case Type	(g) = (d)*(f)	2,729	900	3,629	1,471	5,100
Reduction in Caseload If All Respondents were Represented	(h) = (e)*(g)	410	59	469	163	632
<b>Total Cost Savings</b>	(i) = (c)*(h)	<b>\$ 11,695,797</b>	<b>\$ 1,683,054</b>	<b>\$ 13,378,850</b>	<b>\$ 4,649,792</b>	<b>\$ 18,028,643</b>
<b>Assuming 65-10-25 Breakdown</b>						
Number by Case Type	(j)	65 %	10 %	75 %	25 %	
Reduction in Caseload If All Respondents were Represented	(k) = (d)*(j)	3,315	510	3,825	1,275	5,100
Reduction in Caseload If All Respondents were Represented	(l) = (e)*(k)	498	33	531	141	673
<b>Total Cost Savings</b>	(m) = (c)*(l)	<b>\$ 14,199,437</b>	<b>\$ 951,351</b>	<b>\$ 15,150,789</b>	<b>\$ 4,035,428</b>	<b>\$ 19,186,217</b>
<b>Assuming 85-5-10 Breakdown</b>						
Number by Case Type	(n)	85 %	5 %	90 %	10 %	
Reduction in Caseload If All Respondents were Represented	(o) = (d)*(m)	4,335	255	4,590	510	5,100
Reduction in Caseload If All Respondents were Represented	(p) = (e)*(o)	651	17	668	57	724
<b>Total Cost Savings</b>	(q) = (c)*(p)	<b>\$ 18,568,495</b>	<b>\$ 475,676</b>	<b>\$ 19,044,171</b>	<b>\$ 1,614,171</b>	<b>\$ 20,658,342</b>

**Notes and Sources:**

<sup>1</sup> "All Purpose Table FY 2013 and FY 2014," Administration for Children and Families. Excludes adoption assistance, guardianship assistance, Chafee Foster Care Independence Program, and tribal IV-E technical assistance.

<sup>2</sup> CBO Forecast. "Foster Care and Adoption Assistance – May 2013 Baseline," Congressional Budget Office.

<sup>3</sup> Applied Research Center, "Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System", November 2011, p. 23.

<sup>4</sup> Exhibit 7

<sup>5</sup> In this scenario, children of deported respondents in each case type are assumed to be equally likely to enter foster care. In the other two scenarios, children of detained respondents are assumed to be more likely than children of non-detained respondents to enter foster care.

<sup>6</sup> Exhibit 2

**Exhibit 9**  
**Removal Transportation Cost Savings from**  
**Paid Counsel for Indigent Immigrant Respondents**

ICE Transportation and Removal Program FY 2013 Revised Enacted Budget<sup>1</sup>

Travel and Transportation of Persons	(a)	\$	225,879,000
Detention Transfer Costs per Detainee <sup>2</sup>	(b)	\$	161
FY 2013 Respondents <sup>3</sup>	(c)		173,018
Estimated Percent of Detained Respondents (at completion) <sup>4</sup>	(d)		53.5%
Estimated Percent of Partially Detained Respondents <sup>4</sup>	(e)		17.6%
Estimated FY 2013 Detained Respondents	(f) = (c)*[(d)+(e)]		123,100
Estimated FY 2013 Total Detention Transfer Costs	(g) = (b)*(f)	\$	19,876,215
Estimated FY 2013 Removal Transportation Costs	(h) = (a)-(g)	\$	206,002,785
FY 2013 Total Removals and Returns <sup>5</sup>	(i)		368,644
FY 2013 Estimated Cost per Removal	(j) = (h)/(i)	\$	559
Estimated Indigent Detained Respondents <sup>4</sup>	(k)		72,495
Estimated Indigent Partially Detained Respondents <sup>4</sup>	(l)		8,000
Estimated Indigent Never Detained Respondents <sup>4</sup>	(m)		13,079
Detained Respondent Win Rate without Counsel <sup>6</sup>	(n)		5.6%
Partially Detained Respondent Win Rate without Counsel <sup>6</sup>	(o)		32.6%
Never Detained Respondent Win Rate without Counsel <sup>6</sup>	(p)		37.5%
Detained Respondent Win Rate with Counsel <sup>6</sup>	(q)		24.3%
Partially Detained Respondent Win Rate with Counsel <sup>6</sup>	(r)		47.8%
Never Detained Respondent Win Rate with Counsel <sup>6</sup>	(s)		58.9%
Estimated Detained Respondent Removals Avoided with Counsel	(t) = (k)*[(q)-(n)]		13,535
Estimated Partially Detained Respondent Removals Avoided with Counsel	(u) = (l)*[(r)-(o)]		1,219
Estimated Never Detained Respondent Removals Avoided with Counsel	(v) = (m)*[(s)-(p)]		2,797
Total Estimated Removals Avoided with Counsel	(w) = (t)+(u)+(v)		17,550
<b>Total Removal Transportation Cost Savings</b>	(x) = (j)*(w)	<b>\$</b>	<b>9,807,169</b>
<b>Initially Detained Respondent Transportation Cost Savings</b>	(y) = (j)*[(t)+(u)]	<b>\$</b>	<b>8,244,307</b>

**Notes and Sources:**

<sup>1</sup> "The Transportation and Removal program provides safe and secure transportation of aliens in ICE custody, as well as prepares for and conducts the removals of aliens from the United States, as ordered by an immigration judge." "U.S. Immigration and Customs Enforcement Salaries and Expenses Fiscal Year 2015 Congressional Justification," Department of Homeland Security, p. 136.

<sup>2</sup> Human Rights Watch estimates a total detention transfer cost of \$366,832,842 for the 2,271,911 detainees held between Oct. 1, 1998 and Apr. 30, 2010. "A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States," Human Rights Watch, pp. 17 and 29. (<http://www.hrw.org/reports/2011/06/14/costly-move-0>).

<sup>3</sup> Exhibit 1

<sup>4</sup> Exhibit 2

<sup>5</sup> "U.S. Immigration and Customs Enforcement Salaries and Expenses Fiscal Year 2015 Congressional Justification," Department of Homeland Security, p. 66.

<sup>6</sup> Exhibit 6

Based on my expectations that publicly provided counsel would lead to a 17,550 reduction in annual deportations, budgetary savings in transportation costs would total \$9.8 million annually.

**C. The Proposal Could Potentially Create Further Savings By Improving the Certainty of Outcomes and Reducing Administrative Burdens on the Immigration Court System**

27. By presumably helping to improve the certainty of outcomes for those individuals with legal rights to stay, the provision of lawyers could lead to more indirect savings and other economic benefits. Many of those added savings and benefits, such as increased tax revenues and investments, are more amorphous than detention costs or foster care. Thus, even though they have the potential to be substantial (and further support the economic defensibility of the Proposal), they are not readily quantifiable. The risk of deportation for individuals who are not legally deportable raises the general risk that legal immigrants face and reduces their willingness to make productive investments in their business, home, and education. This effect is related to the economic benefits from naturalization, in that citizenship arguably eliminates the risk of a loss in legal residency. A 2013 White House report recognized the investment benefits of citizenship.<sup>21</sup>

28. In addition, any increase in spending by immigrants who prove their legal rights to stay through removal proceedings would benefit others in the economy. The spending creates income for others, who in turn spend a portion of their income, leading to additional income to others, and so on. This effect is known as a “multiplier” effect. Estimates of multipliers vary widely; a relatively conservative estimate in the immigration field is 1.17, so that a dollar of additional

---

<sup>21</sup> The Executive Office of the President, *Fixing Our Broken Immigration System: The Economic Benefits of Providing a Path to Earned Citizenship*, pp. 9-10 (Aug. 2013), available at <http://www.whitehouse.gov/sites/default/files/our-broken-immigration-system-august-2013.pdf>.

income to immigrants leads to an aggregate income increase of \$1.17.<sup>22</sup> Some of this additional income reverts to Federal and state governments in the form of taxes. It is also likely that the longer term effects of keeping immigrants in the United States are larger than the shorter term effects. For one, as immigrants' children become educated, they become more productive adults and make bigger contributions to the economy, repeating a pattern of upward mobility seen in past waves of immigration.

29. By streamlining court proceedings, the provision of lawyers could also reduce administrative costs borne by the immigration court system. In addition to shortening the length of immigration proceedings and detention times, the reduction in continuances would also lead to a substantial decrease in the court time and resources used per case. Providing indigent respondents with legal counsel before their first hearings is likely to make court proceedings more efficient, and the need for—and length of—future hearings will likely be reduced. A legal services program in Marin County, California found that providing lawyers to self-represented defendants in civil proceedings eliminated one hearing per case and saved 5 to 15 minutes of hearing time per hearing, as well as 1 to 1.5 hours of court staff time per case.<sup>23</sup> Based on these numbers and the analysis of continuances in Exhibit 3, I estimate that the provision of legal representation to indigent respondents in immigration deportation proceedings would save about 87,000 hearings per year from the reduction in continuances, and about 115,000 hours of court

---

<sup>22</sup> Pastor, Manuel & Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, Los Angeles: Center for the Study of Immigrant Integration, University of Southern California, p. 20 (Dec. 2012), available at [http://csii.usc.edu/documents/citizen\\_gain\\_web.pdf](http://csii.usc.edu/documents/citizen_gain_web.pdf).

<sup>23</sup> Smith, Ken, Thayer, Kelly, & Garwold, Kathy, *An Assessment of the Economic and Societal Impacts of Three Legal Services Programs*, The Marin County Foundation, p. 30 (Sept. 12, 2013), available at [http://www.greatprograms.org/Economic\\_impact\\_assessment/pdfs/G\\_MCF%20Report%20by%20The%20Resource%202013.pdf](http://www.greatprograms.org/Economic_impact_assessment/pdfs/G_MCF%20Report%20by%20The%20Resource%202013.pdf).

staff time per year more generally. *See* Exhibit 10. Although I have not quantified the consequential savings, if any, to funding for the immigration court system, the system would certainly benefit from an efficiency standpoint, as judges and other court workers could focus more time on new or other cases and potentially reduce the immigration court backlog. Any economic impacts of reducing uncertainty, described in paragraph 27, would be amplified as well by quicker resolution of cases.

<b>Exhibit 10</b>		
<b>Estimated Reductions in Hearing and Court Staff Times</b>		
Estimated Number of Indigent Immigrant Respondents <sup>1</sup>	(a)	93,573
Estimated Continuances per Respondent Seeking Representation Only <sup>2</sup>	(b)	0.32
Seeking Representation and Preparing their Case <sup>2</sup>	(c)	0.62
<b>Total Estimated Hearings Avoided</b>	(d)=(a)*[(b)+(c)]	<b>88,437</b>
Average Reduction in Court Staff Time per Case from Obtaining Legal Representation (Hours) <sup>3</sup>	(g)	1.25
<b>Total Estimated Court Staff Time Saved (Hours)</b>	(h)=(a)*(g)	<b>116,967</b>
<b>Notes and Sources:</b>		
<sup>1</sup> Exhibit 2		
<sup>2</sup> Exhibit 3		
<sup>3</sup> Smith, Ken, Thayer, Kelly, and Garwold, Kathy, "An Assessment of the Economic and Societal Impacts of Three Legal Services Programs," The Marin County Foundation, Sep. 12, 2013, p. 30. The study found that the provision of legal assistance to self-represented litigants in civil matters eliminated at least one hearing and 1 to 1.5 hours of staff time per case, and saved between 5 to 15 minutes of hearing time for every hearing.		

#### **IV. Cost of the Proposal**

30. The simplest approach to estimating the cost of the Proposal is presented in Exhibit 11. This approach assumes that both sides of a removal proceeding should involve similar amounts of attorney and support-staff time. Therefore, the average costs per case of a public-counsel system for immigration cases should be similar to those borne by DHS to prosecute these cases. The total DHS budget for this activity is about \$205,584,000. Assuming 49.5 percent of respondents annually (93,573 out of 189,135) need publicly provided counsel, this implies that publicly provided defense counsel would cost about \$102 million per year.<sup>24</sup>

31. Despite the appeal of this simple approach to cost estimation, my conversations with lawyers active in representing immigrants indicate that it is plausible that defense costs will be higher than prosecution costs. The immigration court process can place greater demands on defense time than on prosecution time, particularly in cases where the noncitizen has viable claims to avoid deportation, because the defense bears the burden on key elements of the claims, among other reasons.

32. As an alternative, a cost estimate can be prepared using information about the mix of cases in immigration proceedings, attorney time needed to defend those cases, and the cost of those attorneys. We have no direct data on any of those items, but we can estimate the different data points from various other data on immigration proceedings and from information on civil legal services. I present this analysis below.

---

<sup>24</sup> This approach assumes that providing counsel to respondents would not increase DHS's cost of prosecution. This is consistent with the general idea that defense counsel will make immigration proceedings more efficient. If prosecution costs increase, however, the cost estimate for this approach would need to be increased somewhat, making the estimates for this approach somewhat closer to those for the more detailed approach that follows. This might also necessitate an addition to the more detailed approach, to reflect additional costs borne by DHS.

<b>Exhibit 11</b>		
<b>Estimated Cost of Publicly Provided Counsel for Indigent Immigration Cases</b>		
<b>Based on Immigration and Customs Enforcement Legal Budget</b>		
<b>Assuming Parity in Staffing and Costs</b>		
<u>ICE Legal Proceedings FY 2014 Enacted Budget<sup>1</sup></u>		
Personnel and Compensation Benefits	(a)	\$ 164,814,000
Overhead Costs and Other Expenses <sup>2</sup>	(b)	\$ <u>40,770,000</u>
Total Budget	(c)=(a)+(b)	\$ 205,584,000
Estimated Immigration Cases Requiring Public Counsel <sup>3</sup>	(d)	93,573
Number of Notices to Appear (FY 2014) <sup>3</sup>	(e)	189,135
<b>Cost of Indigent Immigration Defense Staffing</b>	(f)=(c)*[(d)/(e)]	<b>\$ 101,711,506</b>
Estimated Initially Detained Indigent Respondents <sup>3</sup>	(g)	80,495
<b>Cost of Indigent Immigration Defense Staffing for Initially Detained Respondents</b>	(h)=(f)*[(g)/(d)]	<b>\$ 87,495,084</b>
<b>Notes and Sources:</b>		
<sup>1</sup> "U.S. Immigration and Customs Enforcement Salaries and Expenses Fiscal Year 2015 Congressional Justification," Department of Homeland Security, p. 102. ICE Legal Proceedings "is the DHS legal component within ICE that is authorized to represent the Government in immigration proceedings that end up in immigration courts."		
<sup>2</sup> These include items such as travel, rent, and supplies expenses.		
<sup>3</sup> Exhibit 2		

33. The first step in this approach is to estimate the number of respondents that would receive publicly provided counsel. As discussed above, in the absence of direct data on the indigency rates of immigrant respondents, I use data on the representation rates by detention status, shown in Exhibit 1. I estimate that 28.4 percent of respondents who are detained at the completion of their case are represented and 76.0 percent of respondents who are not detained at completion are represented. Assuming that the population of respondents who are not represented is the same as

the population who are indigent, means that an annual total of 93,573 respondents receiving notices to appear annually would be indigent and would therefore receive publicly funded counsel (*see* Exhibit 2).<sup>25</sup>

34. A key determinant of the cost of providing counsel to these indigent respondents is the number of hours required to defend each respondent. My discussions with lawyers active in representing immigrants indicate that many cases (particularly detained respondents with no viable options for contesting deportation) require relatively little attorney time. A minority of cases, on the other hand, can take a substantial number of hours. I therefore choose to model lawyers' hours assuming that cases can be divided into "short" cases and "long" cases. To estimate this model, I estimate the average hours required for these two types of cases and the proportion of each type of case in the population of indigent respondents.

35. I turn first to estimating the proportion of short cases in the population. Exhibit 12 presents data from the EOIR 2009 sample on the number of cases with and without applications for relief. I make the assumption that cases without applications for relief are short cases, while cases with applications for relief are long cases.<sup>26</sup> The results of these calculations are estimates

---

<sup>25</sup> Some respondents currently receive *pro bono* representation. I am assuming that providers of *pro bono* representation would continue their current level of activities. If not, this could raise the number of indigent respondents receiving counsel.

<sup>26</sup> I understand that voluntary departures are sometimes considered a form of "relief" in immigration courts, although these cases presumably require less attorney time than a fully-litigated case, and are more likely to be short cases. It is unclear, however, how voluntary departures are classified in the EOIR sample, so using the sample may cause an overstatement of the number of "long" cases. On the other hand, terminations, in which the case is terminated without a removal order, presumably take substantial attorney time (even if perhaps less than a case involving a full-blown merits hearing). But, some terminations do not include an application for relief and may possibly be classified as such in the EOIR data. This could lead to an understatement of the number of "long" cases. The net impact of these two sources of possible imprecision is unknown.

that 72.4 percent of always detained cases are short cases, requiring minimal attorney time, and 34.6 percent of partially detained cases and 40.6 percent of never detained cases are short cases.

<b>Exhibit 12</b>		
<b>Estimated Number of "Short" Cases for Initially Detained Indigent Respondents</b>		
<u>Executive Office for Immigration Review Case Study<sup>1</sup></u>		
Detained Cases (at completion) without Applications for Relief	(a)	691
Detained Cases (at completion) with Applications for Relief	(b)	264
Partially Detained Cases without Applications for Relief	(c)	109
Partially Detained Cases with Applications for Relief	(d)	206
Never Detained Cases without Applications for Relief	(e)	209
Never Detained Cases with Applications for Relief	(f)	306
<b>Estimated Percent of "Short" Cases</b>		
<b>Estimated Percent of Detained (at completion) "Short" Cases</b>		
Percent of Detained Cases (at completion) without Applications for Relief	$(g)=(a)/[(a)+(b)]$	<b>72.4%</b>
<b>Estimated Percent of Partially Detained "Short" Cases</b>		
Percent of Partially Detained Cases without Applications for Relief	$(h)=(c)/[(c)+(d)]$	<b>34.6%</b>
<b>Estimated Percent of Never Detained "Short" Cases</b>		
Percent of Never Detained Cases without Applications for Relief	$(i)=(e)/[(e)+(f)]$	<b>40.6%</b>
<b>Notes and Sources:</b>		
<sup>1</sup> US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division. "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review", October 2012, pp. iii, 57. The cases in the study were taken as a random sample of 2009 EOIR cases from representative immigration courts.		

36. Another ingredient of my estimates is the cost of an attorney. As Exhibit 13 shows, I base my estimates on data from the Legal Services Corporation, which is a Federal-government sponsored provider of “civil legal aid for low-income Americans.”<sup>27</sup> I add up the costs of all staff time that appears relevant to providing legal services, including staff attorneys, management, paralegals, and other support staff. I also add 25% in costs for benefits and other overhead. This

<sup>27</sup> See “What is LSC?,” available at <http://www.lsc.gov/about/what-is-lsc> (accessed May 8, 2014).

yields a total estimated cost of \$128,850 per attorney. The calculations include Managing Attorneys and Supervising Attorneys as attorneys available for case work. (The estimates of hours per long case presented below implicitly allow for supervisory time.)

<b>Exhibit 13</b>				
<b>Estimated Cost per Attorney</b>				
<b>Based on Legal Services Corporation Salary Costs for Grantees</b>				
<u>Position</u>	<u>Number of Positions</u>	<u>Number per Case Attorney</u>	<u>Average Salary</u>	<u>Cost per Case Attorney</u>
(1)	(2)	(3)	(4)	(5)
		(2)/3,648		(3)*(4)
Staff Attorney	2,587		\$ 56,361	
Managing Attorney	616		74,707	
Supervising Attorney	445		74,958	
Total Case Attorneys	<u>3,648</u>	1.00	\$ 61,727	\$ 61,727
Executive Director	134	0.04	\$ 115,075	\$ 4,227
Deputy Director	87	0.02	95,185	2,270
Director of Litigation	57	0.02	91,519	1,430
Paralegal	1,410	0.39	39,656	15,328
Information Technology Staff	120	0.03	57,809	1,902
Administrative Assistant	306	0.08	41,311	3,465
Secretarial/Clerical	1,381	0.38	33,631	12,731
Total Salary Cost per Case Attorney				<u>\$ 103,080</u>
Benefits and Overhead Allowance (25%)				<u>\$ 25,770</u>
Total Case Attorney Cost				<u>\$ 128,850</u>
<b>Notes and Sources:</b>				
Legal Services Corporation 2012 Fact Book, p. 32.				
PAI coordinators, financial professionals, management professionals, and the costs of other staff are assumed to be irrelevant to the provision of counsel to indigent immigrant respondents and are thus excluded from this analysis.				

37. Exhibit 14 shows estimates of total costs of the public provision of immigration counsel.

I assume that short cases take 1.5 hours each (on average) and long cases take 85 hours each (on

average).<sup>28</sup> I also assume that each publicly funded lawyer spends 1,799 hours annually on case work, in line with the average hours worked by attorneys at U.S. law firms.<sup>29</sup> This implies that providing counsel to initially detained indigent respondents would cost about \$160 million per year and providing counsel to never detained indigent respondents would cost about \$48 million per year, for a total annual cost of about \$208 million.

---

<sup>28</sup> The estimate that long cases will require 85 hours of attorney time derives from reports by the Legal Aid Society of New York (“LAS”) of removal defense caseload and staffing, published by the New York Immigrant Representation Study. New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, p. 34 (Table 10), 44 (2011). LAS reported that its 7 full-time attorneys, as well as 6 part-time attorneys at 25% full-time (1.5 additional attorney’s time), handle 150-225 cases per year—including a broad range of cases, such as detained cases and criminal-based immigration cases. This attorney time appears to include any necessary supervisory time. Each case is likely long because LAS (like all nonprofit immigration providers) screens out cases without viable claims for relief, to triage their limited resources to focus on winnable cases. *Ibid.*, p. 21-22. If one assumes these attorneys work 1,800 hours per year on cases, given LAS’ 150-225 cases per year, each case would require an average of 68 to 102 hours per case, with a midpoint of 85 hours. (This may be an overestimate, as these LAS estimates include appeals, not included in our model.)

We use LAS’ statistics because its model is closest to that of a public defender removal-defense model, of the eight major New York City removal defense providers the NYIRS Study surveyed. *Ibid.* pp. 28-36, 43-46. Six of those removal defense providers do not accept detained adults as clients. (All six report statistics that imply much higher hours/case.) A seventh provider, the Central American Legal Assistance Group (“CALA”), does accept detained adults, although 60 percent of its caseload is asylum cases. *Ibid.*, p. 43. CALA’s reported statistics imply that each case it handles would require 36 to 41 hours/case. Again, it may be that estimates based on LAS’ statistics over-estimate hours.

<sup>29</sup> We assume that attorneys at public or nonprofit immigration service providers would work comparable hours to private attorneys, in performance of their services representing clients. Indeed, a 2011 RAND Corporation study of federal criminal public defenders declined to assume a 40-hour work week as a prior federal study had done, because of “evidence that far more time was being expended, especially on nights and weekends, by salaried legal staff in performance of their constitutionally mandated duties.” RAND also noted that that prior study was likely significantly inaccurate because of its 40-hour assumption. RAND Corporation, *Case Weights for Federal Defender Organizations*, p. 6 (2011), available at [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2011/RAND\\_TR1007.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR1007.pdf).

**Exhibit 14**  
**Estimated Cost of Publicly Provided Counsel for Indigent Immigration Cases**  
**Based on Legal Services Corporation Costs**

		<u>Detained</u>	<u>Partially Detained</u>	<u>Initially Detained</u>	<u>Never Detained</u>	<u>Total</u>
		(1)	(2)	(3) (1)+(2)	(4)	(5) (3)+(4)
Estimated Number of Indigent Immigrant Respondents	(a)	72,495 <sup>1</sup>	8,000 <sup>1</sup>	80,495	13,079 <sup>1</sup>	93,573
Percentage of "Short" Cases	(b)	72.4% <sup>2</sup>	34.6% <sup>2</sup>		40.6% <sup>2</sup>	
Number of "Short" Cases	(c) = (a)*(b)	52,454	2,768	55,222	5,308	60,530
Average Attorney Time per "Short" Case <sup>3</sup>	(d)	1.5	1.5	1.5	1.5	1.5
Percentage of "Long" Cases	(e) = 1-(b)	27.6%	65.4%		59.4%	
Number of "Long" Cases	(f) = (a)*(e)	20,040	5,232	25,272	7,771	33,043
Average Attorney Time per "Long" Case <sup>4</sup>	(g)	85	85	85	85	85
Total Attorney Hours	(h)=(c)*(d) + (f)*(g)	1,782,119	448,837	2,230,955	668,512	2,899,467
Case Hours per Attorney per Year <sup>5</sup>	(i)	1,799	1,799	1,799	1,799	1,799
Number of Attorneys Needed	(j) = (h)/(i)	991	249	1,240	372	1,612
Cost per Attorney per Year <sup>6</sup>	(k)	\$128,850	\$128,850	\$128,850	\$128,850	\$128,850
<b>Total Cost</b>	(l) = (j)*(k)	<b>\$ 127,641,319</b>	<b>\$ 32,147,183</b>	<b>\$ 159,788,502</b>	<b>\$ 47,881,085</b>	<b>\$ 207,669,587</b>

**Notes and Sources:**

<sup>1</sup> Exhibit 2

<sup>2</sup> Exhibit 12

<sup>3</sup> This estimate is based on anecdotal evidence from several sources, as well as parallel comparisons to estimated attorney time for criminal cases, in which the outcome is typically less clear-cut than for many immigration cases.

<sup>4</sup> The Legal Aid Society of New York handles 150 to 225 immigration cases per year, screening out those without viable claims for relief ("short" cases). Based on 1,799 case hours per attorney per year, each case would require 68 to 102 hours. I assume the midpoint, 85 hours. New York Immigrant Representation Study, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings (2011), p. 34 (Table 10), 44.

<sup>5</sup> In its most recent survey published in February 2012, the National Association for Law Placement found that associates billed an average of 1,799 hours per year and worked an average of 2,044 hours per year. ([http://www.nalp.org/billable\\_hours\\_feb2012](http://www.nalp.org/billable_hours_feb2012)).

<sup>6</sup> Exhibit 13

38. With total estimated Federal fiscal savings of \$204 to \$208 million from providing lawyers to indigent respondents, lawyers would either entirely or almost entirely pay for themselves through federal cost savings. Using the simpler cost estimation method of Exhibit 11, the cost savings would greatly exceed the cost of providing lawyers. If the cost estimate from Exhibit 14 is used, estimated cost savings would exceed estimated costs, based on the upper end of the cost savings range.<sup>30</sup> Alternatively, based on the lower end of the cost savings range, the net federal cost would be about \$4 million, implying that at least 98 percent of the higher cost estimate of the Proposal would be paid for by federal fiscal savings.

39. As a possible alternative, I also analyzed the cost of providing counsel at public expense only to respondents who begin proceedings in detention. These calculations are summarized in Exhibit 15. The cost of providing such counsel would be about \$160 million using the detailed calculations based on attorney cost data from LSC and estimates of attorney time for different cases. Fiscal savings for providing counsel to initially detained respondents would include all of the detention costs savings presented above, along with all of the savings from elimination of the LOPs and a portion of the savings from foster care and transportation. These savings would total an estimated \$198 million. Thus, I estimate that providing counsel for detainees would more than pay for itself in terms of fiscal cost savings.

---

<sup>30</sup> To be more precise, the upper end of the range of cost savings is \$208,425,703, compared with the estimated cost of \$207,669,587.

<b>Exhibit 15</b>		
<b>Estimated Benefits and Costs of Publicly Provided Counsel For Initially Detained Indigent Respondents</b>		
<b>Cost Savings from Provision of Counsel to Initially Detained Indigent Respondents</b>		
Detention Cost Savings <sup>1</sup>	(a)	\$172,659,387
LOP Cost Savings <sup>1</sup>	(b)	\$3,500,000
Foster Care Cost Savings <sup>2</sup>	(c)	\$13,378,850
Removal Transportation Cost Savings <sup>3</sup>	(d)	\$8,244,307
Total Cost Savings	(e)=(a)+(b)+(c)+(d)	\$197,782,544
<b>Costs of Provision of Counsel to Initially Detained Indigent Respondents</b>		
Based on Legal Services Corporation Costs <sup>4</sup>	(f)	\$159,788,502
<b>Net Benefits from Provision of Counsel to Initially Detained Indigent Respondents</b>		
<b>Based on Legal Services Corporation Costs</b>	<b>(g)=(e)-(f)</b>	<b>\$37,994,043</b>
<b>Notes and Sources:</b>		
<sup>1</sup> Exhibit 5		
<sup>2</sup> Exhibit 8		
<sup>3</sup> Exhibit 9		
<sup>4</sup> Exhibit 14		

## V. Conclusion

40. I have analyzed the costs and savings/benefits of a program, funded by the Federal government, that would provide counsel for all indigent respondents in immigration removal proceedings. Based on calculations using available data and reasonable assumptions, fiscal savings to the Federal government (between approximately \$204 and \$208 million) would pay for most if not all of the entire cost of the Proposal (approximately \$208 million). These positive fiscal effects are above and beyond the qualitative aspects of the Proposal, which are

improvements to the accuracy and efficiency of immigration removal proceedings and reduction in uncertainty for respondents.