

RIGHT TO COUNSEL BEFORE DHS¹

By Emily Creighton and Robert Pauw

In many encounters with immigration agencies in the non-removal context, an attorney's access to his or her noncitizen client is limited. A USCIS official may relegate the attorney to a particular place in the examining room during an interview, a CBP officer may refuse to allow an attorney to attend a deferred inspection interview, or an ICE officer may not allow an attorney to speak during an NSEERS interview. These limitations of representation may depend on a host of factors including the particular agency involved, discretionary decisions made by an interviewing officer, and the type of interview or encounter.

This paper explores the law governing an individual's right to counsel in these various non-removal settings in order to provide a framework for understanding the rights of represented individuals as well as the agency culture that continues to limit and deny representation in encounters before DHS.

LEGAL FRAMEWORK

A. The Constitution

In considering whether and to what extent individuals have a constitutional right to representation in immigration matters, courts have found that this right exists pursuant to the Fifth Amendment's Due Process Clause. While an immigrant's right to counsel of their own choice at their own expense in removal proceedings is protected by the Due Process Clause,² Due Process rights in non-removal settings are less clear. For example, with some exceptions,³ courts have found that a person seeking initial admission to the United States is requesting a privilege and has no constitutional rights regarding his or her application.⁴ Although some

¹ The authors thank Beth Werlin and Mary Kenney from The American Immigration Council's Legal Action Center for their significant contributions to this article.

² See e.g., *Gjeci v. Gonzales*, 451 F.3d 416 (7th Cir. 2006); *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005); *Rios-Berrios v. INS*, 776 F.2d 859 (9th Cir. 1985).

³ See, e.g. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (holding that a lawful permanent resident returning to the United States after a brief, casual and innocent departure is not "seeking admission" but should be treated as if continuously physically present in the United States).

⁴ See, e.g. *Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"); *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1218 (9th Cir. 2002) ("an alien in exclusion proceedings ... has no procedural due process rights regarding his admission or exclusion...").

courts have held that arriving aliens do have constitutional rights in certain circumstances,⁵ there is no binding case law addressing the right to counsel at primary and secondary inspection.⁶

Only when a person gains admission to our country and begins to develop the ties that go with permanent residence, does that person's constitutional status change.⁷ Non-citizens who are in the United States cannot be deported from the United States except in accordance with procedures that are consistent with Due Process.⁸ Further, courts explicitly have found that lawful permanent residents (LPRs) are entitled to Fifth Amendment due process before they can be denied admission.⁹ In *Landon v. Plasencia* for example, the Court rejected respondent's argument that she was denied due process when the question of her admissibility as a returning LPR was decided in an exclusion proceeding rather than in a deportation proceeding. The Court held that a determination of admissibility in exclusion proceedings did not violate the due process clause so long as the exclusion proceedings were "fair."¹⁰ The Court declined to decide whether the procedures afforded the respondent were fair, but did explain that the constitutional sufficiency of proceedings varies with the circumstances. It cited the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-37 (1976), which requires: consideration of the interests at stake for the individual; the risk of erroneous deprivation of the interests through the procedures used as well as the probable value of additional or different safeguards; and the interest of the government in using the current procedures rather than additional or different procedures.¹¹ It

⁵ See *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003) and *Guo XI v. INS*, 298 F.3d 832 (9th Cir. 2002) (arriving aliens may not be detained indefinitely after being ordered removed). These cases have been superseded by *Clark v. Martinez*, 543 U.S. 371 (2005) (holding as a matter of statutory interpretation that arriving aliens may not be detained indefinitely).

⁶ Notably, the D.C. Circuit has held that individuals in expedited removal do not have a right to counsel at the secondary inspection stage. See *AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000). Although the circuit court decision focused on an analysis of organizational standing, and dismissed the case on these grounds, it upheld the lower court's decision on the merits as to two individual plaintiffs. *Id.* at 1354. The lower court found, without specific analysis of 8 C.F.R. § 292.5(b), that two individuals' right to counsel was not violated. *AILA v. Reno*, 18 F. Supp. 2d 38, 55 (D.D.C. 1998) (concluding that the decision to "ban access to counsel during the secondary inspection stage is reasonable in view of Congress's dual purposes in providing fair procedures while creating a more expedited removal process").

⁷ *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation") (citations omitted).

⁸ See, e.g. *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903); *Bridges v. Wixon*, 326 U.S. 135, 153-154 (1945).

⁹ *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); see also *Richardson v. Reno*, 162 F.3d 1338, 1363 n. 114 (11th Cir. 1998), *vacated on other grounds*, 526 U.S. 1142 (1999) (assuming that the constitutional rights of a 30 year LPR remained unchanged by his departure and reentry even if his legal status changed to "arriving alien" under the statute).

¹⁰ 459 U.S. at 31.

¹¹ *Id.* at 34.

also found that the government’s interest in the efficient administration of the immigration laws at the border is “weighty” and that the fact that “control over matters of immigration is a sovereign prerogative” also was a heavily weighted factor.¹²

B. Statutes

1. The Immigration and Nationality Act.

Section 292 of the Immigration and Nationality Act (INA) is the primary statutory reference in the Act to the right to counsel.¹³ The statute states that a person has the "privilege" of representation, at no expense to the government, in removal proceedings before an immigration judge and in appeal proceedings before the Attorney General from any such removal proceedings. It does not provide that counsel attaches in other situations such as interviews or interactions with agencies outside of the removal context.

2. The Administrative Procedures Act.

The Administrative Procedures Act (APA) provides a right to counsel in proceedings before an agency under Section 555(b) of the APA. This section states that

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

For the APA right to counsel to apply, three main conditions must be met:

- (1) the agency proceedings must be the kind of proceeding to which the provision applies
- (2) the government entity must be an “agency” as defined in the APA
- (3) the person must be “compelled to appear”

Following the APA’s enactment, the Attorney General noted that the counsel provision “restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act as their spokesmen in argument and where otherwise appropriate.”¹⁴ When the APA was first enacted in 1946, the right to counsel provision was §6(a), and read “Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel, or if permitted by the agency, by other qualified representative.” In

¹² *Id.*

¹³ References to the right to counsel are also found in the Act at §208(d)(4), §238(a)(2), §238(b)(2)(B), §239(a)(1)(E), §239(a)(2)(A), §239(b), §240(b)(4)(A) and §504(c)(1). These references essentially reiterate a privilege of representation at no expense to the government in removal proceedings. Like INA §292, the references are silent as to other situations to which a right to counsel may attach.

¹⁴ Attorney General’s Manual on the Administrative Procedure Act at 61 (1947).

1966, the provision was amended: the words “is entitled” replaced “shall be accorded the right.”¹⁵

Congress has made clear that the right to counsel under the APA is near absolute, and thus, the courts often have struck down agency attempts to restrict access to counsel.¹⁶

a. The Kind of Agency Proceeding to which §555(b) Applies

Section 555 of the APA applies broadly to all agency proceedings, except as specified in the APA.¹⁷ The APA’s legislative history confirms the broad applicability of this provision, describing the right to counsel as “a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private.”¹⁸

Some courts have indicated that the APA right to counsel might apply only in adjudicatory proceedings and individuals in investigatory proceedings do not have the same right.¹⁹ For these

¹⁵ Pub. L. No. 89-554, §1, 80 Stat. 385 (Sept. 6, 1966).

¹⁶ Most of the cases challenging restrictions on the right to counsel involve challenges to agency regulations and policies governing the choice of a lawyer, and do not involve restricting access to counsel entirely. *See, e.g., Professional Reactor Operator Society v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1051-52 (D.C. Cir. 1991) (restriction on lawyer of choice conflicts with “APA-guaranteed personal right of the witness”); *SEC v. Csapo*, 533 F.2d 7, 11 (D.C. Cir. 1976) (finding that the APA’s “guarantee” of right to counsel is “phrased by the legislature in unequivocal terms” and has been “construed to imply the concomitant right to the lawyer of one’s choice. . . . The Commission’s authority to disqualify attorneys under its rule is plainly inconsistent with that latter privilege”); *Great Lakes Screw Corp. v. NLRB*, 409 F.2d 375, 381 (7th Cir. 1969) (finding that excluding a certain attorney from the proceedings violated the APA right to counsel); *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966) (holding that sequestration rule for subpoenaed witness resulted in the witness not being able to be represented by lawyer of his choice and conflicted with APA right to counsel); *see also Backer v. Commissioner of Internal Revenue*, 275 F.2d 141, 144 (5th Cir. 1960) (finding exclusion of lawyer (not based on regulation) was impermissible). *But see Kentucky West Virginia Gas Co. v. Pennsylvania PUC*, 837 F.2d 600, 617-18 (3d Cir. 1988) (where there is a potential for conflict, no violation of APA if different parties ordered to employ “separate independent counsel”); *United States v. Steel*, 238 F. Supp. 575, 577-78 (S.D.N.Y. 1965).

¹⁷ *See* 8 U.S.C. §555(a) (“This section applies, according to the provisions thereof, except as otherwise provided in this chapter.”); *Federal Communications Com. v. Schreiber*, 329 F.2d 517, 535 n.32 (9th Cir. 1964) (noting that this section of the APA applies broadly “without qualification as to the type of agency proceeding which may be involved”).

¹⁸ H.R.Rep. No. 1980, 79th Cong., 2d Sess. 31-32 (1946), reprinted in S.Doc. No. 248, 79th Cong., 2d Sess. 263-64 (1946) (cited in *Federal Communications Com. v. Schreiber*, 329 F.2d at 535 n.32).

¹⁹ *Federal Communications Com. v. Schreiber*, 329 F.2d at 526 (noting that the Supreme Court has not decided whether APA right to counsel applies in “nonadjudicative, fact-finding investigations[,]” but not deciding the issue because assuming the right applies, the agency did

courts, the distinction between investigatory and adjudicatory proceedings stems from due process case law.²⁰ However, other courts have held that the APA right to counsel is more expansive than due process rights.²¹ In addition, the APA's statutory language does not distinguish the right to counsel in investigatory proceedings from the right to counsel in adjudicatory proceedings.²² Further, some courts even have recognized that the APA right applies to investigatory proceedings.

The D.C. Circuit, relying on the plain language of the APA and its legislative history, held that the limitation on access to counsel in an agency investigation violated the APA right to counsel.²³ The court set out an expansive reading of the statutory right to counsel:

The APA establishes a "simple and standard plan of administrative procedure," S. Rep. No. 752, 79th Cong., 1st Sess. 1 (1945), one "meant to be operative 'across the board' in accordance with its terms." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 16 (1946). If the right to counsel at investigatory interviews is to expand or contract depending on the mission of the agency, Congress must say so "expressly." See 5 U.S.C. §559. Our current

not violate the right); *United States v. Steel*, 238 F. Supp. 575, 577 (S.D.N.Y. 1965) (same); *Smith v. United States*, 250 F. Supp. 803, 806 (D.N.J. 1966) (noting that the issue is undecided by the Supreme Court, but not deciding the issue).

²⁰ See, e.g., *Hannah v. Larche*, 363 U.S. 420 (1960). In *Hannah v. Larche*, the Supreme Court held that due process protections "need not be conferred upon those appearing before purely investigatory agencies...." *Id.* at 442. The Court was even reluctant to confer such protections where collateral consequences may flow from an investigation. *Id.* at 443. However, the Supreme Court subsequently qualified this position, distinguishing the situation where an investigation's consequences are not merely collateral, but have a substantial impact on a person. See *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969).

²¹ See *Backer v. Commissioner of Internal Revenue*, 275 F.2d 141, 143 (5th Cir. 1960) ("It is clear that the right to counsel guaranteed under the Administrative Procedure Act is much broader than the right to have an attorney to advise him relative to his rights under the Fifth Amendment.").

²² American Law Reports explains the difference between investigatory and adjudicatory proceedings as follows:

Generally speaking, investigatory or inquisitorial powers of an administrative agency are defined as its powers to inspect, or to secure or to require, the disclosure of information by means of accounts, records, reports, statements, testimony of witnesses, production of documents, or otherwise.

The terms "determinative" or "adjudicatory" powers of an administrative agency aim to describe powers and functions which involve the decision or determination by administrative agencies of the rights, duties, and obligations of specific individuals, the typical and most important of these powers being those which may be classified as judicial or quasi-judicial in nature.

Comment Note: Right to Assistance of Counsel in Administrative Proceedings, 33 ALR 3D 229 (April 3, 2003).

²³ *Professional Reactor Operator Soc. v. United States Nuclear Regulatory Com.*, 939 F.2d 1047, 1052 (D.C. Cir. 1991).

instruction, however, is to apply the APA prescription “equally to agencies and persons.”²⁴

Likewise, the Eleventh Circuit recognized, albeit in dicta, that the APA right to counsel applies in “investigatory interviews” with an agency’s Office of Investigator General (OIG).²⁵

b. The Government Entity Must Be an “Agency” as Defined in the APA

In order to trigger the right to counsel under the APA, a person must be compelled to appear in person before an “agency.” The APA defines “agency” to include “each authority of the Government of the United States, whether or not it is within or subject to review by another agency....”²⁶ DHS meets the definition of agency under the APA.²⁷

c. The Person Must Be “Compelled to Appear”

Further, the right to counsel depends on whether an individual is “compelled to appear” before an agency. The APA does not define the phrase “compelled to appear.” Black’s Law Dictionary defines “compel” as “[t]o cause or bring about by force or overwhelming pressure.”²⁸ According to the Attorney General, “It is clear, of course, that this provision (of counsel) relates only to persons whose appearance is *compelled or commanded*, and does not extend to persons who appear voluntarily or in response to mere request by an agency.”²⁹

There is relatively little case law addressing the meaning of “compelled” in 5 U.S.C. §555(b). The few courts that have addressed the meaning of “compelled” have looked to whether the appearance was “voluntary.” For example, in *Smith v. United States*, a district court found that the plaintiff’s appearance was voluntary, not compelled, where the IRS informed him he had an opportunity to appear for an interview regarding an investigation into his tax liability.³⁰ In *Suess v. Pugh*, a district court found that an employee was “not compelled” to appear when he appeared after receiving a notice informing him of the date and time of a hearing regarding the termination of his employment and providing him the opportunity to appear.³¹ Finally, in *Collins v. Commodity Futures Trading Com.*, a court found that the plaintiff was not compelled

²⁴ *Id.* But see *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) (finding that reinstatement of a prior order of removal is a simple ministerial task in which the respondent does not have a right to counsel).

²⁵ *Federal Labor Rels. Auth. v. NASA*, 120 F.3d 1208, 1215 (11th Cir. 1997).

²⁶ 5 U.S.C. §551 (exempting several components from the definition of agency, including Congress, the courts, and certain military authorities).

²⁷ See *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 933 (D.C. Cir. 1971) (finding that former INS is an agency under the APA).

²⁸ Black’s Law Dictionary, 7th Ed. (1999).

²⁹ See Attorney General’s Manual on the Administrative Procedure Act, at 61-62 (1947) (emphasis added).

³⁰ 250 F. Supp. 803, 806 (D.N.J. 1966).

³¹ 245 F. Supp. 661, 665-66 (N.D. W. Va. 1965).

to appear where the agency's representative came to his worksite and the plaintiff answered questions about his trading activity.³²

C. Regulations

Section 292.5(b) of CFR Title 8 sets forth when an individual is entitled to representation and when he or she is not. The regulation governing right to counsel states in its entirety:

Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. *Provided*, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.³³

The regulation provides for representation during any examination provided for in "this chapter." Thus, any person subject to an examination conducted under Chapter 1 of CFR Title 8 (regulations governing DHS) is entitled to representation, except as specified in primary and secondary inspection.

There is very little case law interpreting or applying the right to counsel under §292.5(b). At least two cases address the right to counsel during an NSEER's examination. In these cases, the courts indicated that the individual had a right to counsel, but found that the right was not violated.³⁴ A federal district court also has recognized the right to counsel during an interview for a marriage petition.³⁵ In that case, the court held that §292.5(b) "grants the person involved in an examination under that chapter 'the right' to be represented by an attorney or representative." The court found there was no violation of this right, because the plaintiff's claim was based on the agency's failure to notify her attorney in advance of the questioning, and INS did not have an affirmative duty to notify the attorney in these circumstances.³⁶ However, the court stated that if the plaintiff had "requested the presence of her attorney...or had the INS

³² 737 F. Supp. 1467, 1483 (N.D. Ill. 1990).

³³ 8 C.F.R. §292.5(b).

³⁴ See *Rajah v. Mukasey*, 544 F.3d 427, 445 (2d Cir. 2008) (those examined without lawyers were not deprived of the right to counsel because none of the petitioners claim to have brought an attorney to the examination and a caseworker is not an attorney or a "representative" under the regulations); *Alnahham v. Holder*, No. 08-0767, 2010 U.S. App. LEXIS 6732, *7 (2d Cir. Apr. 1, 2010) (finding petitioner's right to counsel was not violated although he brought an attorney with him, "as [petitioner] did not request that an attorney accompany him to the 10th floor and never asked to speak to an attorney during questioning...").

³⁵ *Boukhris v. Perryman*, No. 01-3516, 2002 U.S. Dist. LEXIS 1913 (N.D. Ill. Feb. 7, 2002).

³⁶ *Id.* at *13.

agents who visited her told [her] that she could not have an attorney present, perhaps then [she] could state a claim...”³⁷

Despite the plain language of the regulation, two district courts have said that the regulatory right to counsel in §292.5(b) only applies to exclusion, deportation or removal proceedings, and does not ensure a right to counsel in other examinations.³⁸ In reaching this conclusion, the court in *Ali v. INS* reasoned, “[t]he regulation is promulgated under the general delegation of authority to the Attorney General to enforce the INA, 8 U.S.C. §1103, and specifically implements that portion of the INA which grants the right to be represented by counsel, at no expense to the government, at exclusion and deportation hearings.”³⁹ Likewise, in *Sidhu v. Bardini*, the court indicated that 8 C.F.R. §292.5(b) only implements INA §292, 8 U.S.C. §1362, which provides for a statutory right to counsel in removal proceedings.⁴⁰

These cases misread the regulation’s plain language and misconstrue the statutory authority for the regulation. First, nothing in the language of the regulation limits the regulation to removal proceedings. In fact, the regulatory right to counsel, by its own terms, does not even apply in removal proceedings. The right applies “[w]henever an examination is provided for in this chapter” and this chapter (Chapter 1) covers DHS proceedings, not EOIR proceedings, which are set out in Chapter 5. Separate EOIR regulations provide the right to representation for individuals in removal proceedings.⁴¹ These EOIR regulations use distinct language from the language in 8 C.F.R. §292.5(b)(5), thus further indicating that §292.5(b)(5) is not intended to apply exclusively to removal proceedings.

Moreover, even the agency (INS and DHS) has recognized that §292.5(b) applies to its own proceedings. This is evidenced by the fact that in 1980, INS amended the language in §292.5(b) to specify that the right to counsel does not apply in primary and secondary inspection.⁴² By specifically exempting these inspections from application of the right to counsel, INS demonstrated its understanding that the regulation otherwise granted the right to counsel in other INS proceedings.

Second, the courts in *Ali* and *Sidhu* failed to properly address the regulation’s authorities. The authority for the regulation is, inter alia, 8 U.S.C. §1362 and 8 U.S.C. §1103. Although 8 U.S.C. §1362 sets forth the statutory right to counsel in removal proceedings only, significantly, 8 U.S.C. §1103 grants the Secretary broad discretion to implement rules and procedures for various proceedings and thus, it is within his authority to set forth rules regarding access to

³⁷ *Id.* at *15.

³⁸ *See Ali v. INS*, 661 F. Supp. 1234, 1249 (D. Mass. 1986) (marriage interview); *Sidhu v. Bardini*, No. 08-05350, 2009 U.S. Dist. LEXIS 48808, *16-17 (N.D. Cal. June 10, 2009) (proceedings before USCIS to terminate asylum).

³⁹ 661 F. Supp. at 1249.

⁴⁰ 2009 U.S. Dist. LEXIS at *16-17.

⁴¹ 8 C.F.R. §§1003.16, 1240.3, 1292.

⁴² *See Representation and Appearances, Clarifying Right to Representation*, 45 Fed. Reg. 81733 (Dec. 12, 1980) (codified at 8 C.F.R. 292).

counsel (assuming they comply with other statutory and Constitutional mandates). As the Supreme Court has made clear, “administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”⁴³

D. Agency Manuals

1. CBP Inspectors Field Manual

The Inspectors Field Manual, Chapter 2.9 (“Dealing with Attorneys and Other Representatives”), addresses the right to representation at the border. It cites 8 CFR § 292.5(b), and indicates that in most cases, representation is at the option of the inspecting officers:

No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney—unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action. A more comprehensive treatment of this topic is contained in the *Adjudicator’s Field Manual*, Chapter 12, and 8 CFR 292.5(b).

Chapter 17.1(e) (“Attorney Representation at Deferred Inspection”) specifically limits the role of the attorney in deferred inspection, and states:

At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory CBP Officer on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant.

2. USCIS Adjudicators Field Manual

The Adjudicators Field Manual, Chapter 12.1, discusses “Representation in Immigration Proceedings.” It does not provide comprehensive treatment or add any depth to a discussion of the right to representation at the border. Chapter 12 is currently under revision, but formerly read in relevant part:

An alien or petitioner has the right to be represented by an attorney or other representative who has properly filed a notice of appearance . . . An alien does not have a right to representation during primary or secondary inspection when he or she is seeking

⁴³ *Gonzalez-Oropeza v. U.S. Attorney General*, 321 F.3d 1331, 1333 (11th Cir. 2003) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978) (quotations omitted)).

admission to the United States. In all other matters, you should allow an alien to seek counsel to the extent that doing so does not hinder or unduly delay the adjudicative process.⁴⁴

Chapter 15.8 (“Role of Attorney or Representative in the Interview Process”) describes an attorney’s role in the interview process, recognizing that “[f]requently an attorney will be present to represent a subject” and providing that when a person being interviewed is accompanied by legal counsel, the following rules should be followed:

- 1) Interviewing officers should verify that a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) is part of the record.
- 2) The attorney’s role at an interview is to ensure that the subject’s legal rights are protected. An attorney may advise his client(s) on points of law but he/she cannot respond to questions the interviewing officer has directed to the subject. The attorney’s role is even more restricted with regard to a sworn statement taken from an applicant for admission in conjunction with removal proceedings to determine admissibility, where the alien has not yet legally entered the United States.
- 3) Officers should not engage in personal conversations with attorneys during the course of an interview

Other Chapters reference attorneys and their roles in the interview process. Chapter 15.2 (“Interview Environment”) provides that “[s]ufficient seating for the officer and applicant, attorney and family members should be provided.” Chapter 15.4(a) (“Interview Procedures”) states that a “standard” to be applied to all interviews is the issuance of a “call-in notice” to an attorney (or in an unrepresented case, the interviewee(s)) that “accurately explains the purpose of the interview” and instructs the attorney to bring originals of all previously submitted documents to the interview. Subsection (b) of Chapter 15.4 provides that an adjudicator may terminate an interview even when all essential information has not been elicited, but when “[a]n attorney insists on responding to questions or coaching the person being interviewed.”

RIGHT TO COUNSEL IN PARTICULAR CONTEXTS

A. Right to Counsel before USCIS

There are two potential bases for arguing that an individual has a right to counsel in a USCIS interview or appointment. First, an individual interviewed by USCIS has a right to counsel pursuant to 8 C.F.R. § 292.5(b). As stated, the regulation applies “[w]henever an examination is provided for in this chapter” and this chapter (Chapter 1) covers DHS proceedings.⁴⁵

⁴⁴ See Adjudicator’s Field Manual, Redacted Public Version, *available at* <http://www.uscis.gov> (stating that Chapter 12, “Attorneys and Other Representatives,” is “under revision”).

⁴⁵ See Section C, *supra*; see also Section D.2 (USCIS Adjudicators Field Manual recognizes that an individual has a right to counsel under 8 C.F.R. §292.5(b) and provides guidance on the

Second, the APA also might provide this right. Where USCIS requires a person to appear for an interview, that person is “compelled to appear in person” and has a right to counsel under § 555(b) the APA. DHS regulations provide that “[a]n applicant, a petitioner, a sponsor, a beneficiary, or other individual residing in the United States at the time of filing an application or petition may be *required* to appear for fingerprinting or for an interview.”⁴⁶ If a person does not appear as required, “the application or petition shall be considered abandoned and denied” unless USCIS received a change of address or rescheduling request and the agency excuses the failure to appear.⁴⁷ USCIS’s standard interview notice (I-797C) confirms the compulsory nature of the interview. It states:

You are hereby notified to appear for the interview appointment, as scheduled below....
Failure to appear for this interview and/or failure to bring the below listed items will result in the denial of your application.

* * * *

YOU MUST APPEAR FOR YOUR INTERVIEW.

(emphasis in original).⁴⁸ Also, the “required” language, in conjunction with the threat of severe consequences for failure to appear, suggests that such an appearance is brought about by “force or overwhelming pressure.”⁴⁹ Importantly, this right to counsel attaches whether the person “required” to appear is an applicant, petitioner or beneficiary because the APA right to counsel applies to “[a] person compelled to appear,”⁵⁰ and not only a “party” to the proceedings. Thus, a beneficiary – whom DHS does not recognize as a party to the proceeding, but is required to appear for an I-130 interview - would possess the same right to counsel as the I-130 petitioner or applicant.

Such a “required” appearance is distinguishable from the appearances courts found “voluntary” in other contexts. For example, in *Smith v. United States*, the court found the plaintiff’s appearance was voluntary when the IRS informed the plaintiff that “you are being afforded an

“Proper Manner of Dealing with Attorneys” (Chapter 12.2) and on the “Role of Attorney or Representative in the Interview Process” (Chapter 15.8)).

⁴⁶ 8 C.F.R. §103.2(b)(9) (emphasis added). *See also* USCIS, Adjudicator’s Field Manual, §15.1 (stating that a person may be “required” to appear for an interview)

⁴⁷ 8 C.F.R. §103.2(b)(13)(ii).

⁴⁸ *See* Attorney General’s Manual on the Administrative Procedure Act, at 61-62 (1947) (finding that the APA’s counsel provision applies where the appearance is “compelled or commanded” but does not apply to voluntary appearances or “mere requests” by an agency).

⁴⁹ *See* Black’s Law Dictionary, 7th Ed. (1999) (defining “compel”).

⁵⁰ 5 U.S.C. §555(b)(1). The APA defines “persons” for purposes of the subchapter (including § 555(b)) as “an individual, partnership, corporation, association, or public or private organization other than an agency.” 5 U.S.C. §551.

opportunity to appear for an interview.”⁵¹ Not only did the letter not “require” his appearance, but unlike the USCIS interview context, it did not express any consequences for failure to appear.⁵²

To the extent that the adjudicatory-investigatory distinction is relevant, interviews relating to applications or petitions are adjudicatory in nature.⁵³ The agency is not merely investigating and making findings of fact, but is actually deciding the application or petition.⁵⁴ In fact, a failure to appear for an interview may cause an automatic denial.

B. Right to Counsel before CBP

1. Primary and Secondary Inspection

For constitutional purposes, United States law has traditionally distinguished between non-citizens at the border seeking entry and non-citizens within our borders seeking to remain in the United States. As noted, with some exceptions, courts have held that a person seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his or her application.⁵⁵ However, once a person gains admission to our country and begins to develop the ties that go with permanent residence, that person’s constitutional status change accordingly; non-citizens who are in the United States cannot be deported from the United States except in accordance with procedures that are consistent with Due Process.⁵⁶

8 C.F.R. §292.5(b) provides a right of representation in the context of an “examination”, with a proviso that the right to counsel does not apply to “any applicant for admission in either primary or secondary inspection ..., unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.” Arguably, this proviso does not apply to a person in primary or secondary inspection who is not an “applicant for admission.” Thus, a lawful permanent resident returning to the United States who is not an applicant for admission may have the right to counsel under the regulation at secondary inspection.⁵⁷

⁵¹ 250 F. Supp. 803, 805 (D.N.J. 1966).

⁵² *Id.* See also *Collins v. Commodity Futures Trading Com.*, 737 F. Supp. 1467, 1483, 1472 (N.D. Ill. 1990) (agency’s representative came to the plaintiff’s worksite and the plaintiff voluntarily answered questions about his trading activity); *Suess v. Pugh*, 245 F. Supp. at 664 (“non-compulsory” appearance at Veteran Administration hearing).

⁵³ It is particularly telling that USCIS sets out the procedures, including interview procedures, for making a decision on an application or petition in the “Adjudicator’s Field Manual.”

⁵⁴ See Adjudicator’s Field Manual, §15.1 (“The purpose of an interview is to obtain accurate and complete information from the subject and to make a determination regarding the subject’s credibility. *The fundamental objective is to obtain the facts necessary to make a correct decision.*”) (emphasis added).

⁵⁵ See Section A, *supra*.

⁵⁶ *Id.*

⁵⁷ Lawful permanent residents who are returning from a brief trip abroad are treated, as a constitutional matter, as if they have maintained continuous physical presence in the United

In addition, the proviso may not apply and thus the person may have a right to counsel under the regulation, if the person has become the focus of a criminal investigation and has been taken into custody.⁵⁸ Even if the person taken into custody in secondary inspection is not the focus of a criminal investigation, he or she also may have a right to counsel under §292.5(b). The agency has indicated that the regulation provides a right to counsel if a person is the focus of a criminal investigation *or* has been taken into custody – i.e. the term “and” should be read disjunctively.⁵⁹

Whether or not a person has a constitutional or regulatory right to counsel when he or she appears at the border, a person in secondary inspection arguably has a right to counsel under § 555(b) of the APA. Once a person is referred to secondary inspection, he or she is considered to be in “detention.”⁶⁰ Not only is the person detained, but he or she may not unilaterally withdraw

States. *See Kowng Hai Chew v. Colding*, 344 U.S. 590 (1953). These individuals are protected by procedural due process, and they arguably have a constitutional right to representation at the border. DHS has argued that under INA §101(a)(13), as a statutory matter, a lawful permanent resident who is returning to the United States will be deemed to be outside the United States “seeking admission” if one of the six conditions listed in that section applies. *See Matter of Collado*, 21 I&N Dec. 1061 (BIA 1998). However, even if that position is correct, a returning lawful permanent resident is still protected by procedural Due Process. *See, e.g. Kwong Hai Chew*, 344 U.S. at 601. A lawful permanent resident does not lose a constitutional right to counsel at the border simply because he or she is “seeking admission” according to the statute.

⁵⁸ In addition to this regulatory right to counsel, if a person is the subject of a criminal investigation and has been taken into custody, a person has a constitutional right to counsel during this custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436 (1966). However, *Miranda* does not apply per se at secondary inspection. *See, e.g., United States v. Kiam*, 432 F.3d 524 (3d Cir. 2006); *United States v. Gupta*, 183 F.3d 615 (7th Cir. 1999); *United States v. Fernandez-Ventura*, 132 F.3d 844 (1st Cir. 1998); *United States v. Moya*, 74 F.3d 1117 (11th Cir. 1996). At the point that the focus of the investigation shifts from issues of admissibility to criminal issues, *Miranda* rights may attach. *Kiam*, 432 F.3d at 530 (“If the inspector’s questions objectively cease to have a bearing on the grounds for admissibility and instead only further a potential criminal prosecution” *Miranda* may apply).

⁵⁹ *See Representation and Appearances, Clarifying Right to Representation*, 45 Fed. Reg. 81733 (Dec. 12, 1980) (“[t]o avoid possible confusion as to when the right to representation attaches, 8 C.F.R. 292.5(b) is amended to provide that an applicant for admission processing through primary or secondary inspection does not have the right to representation unless the applicant has become the focus of a criminal investigation *or* has been taken into custody”). *See also United States v. Fisk*, 70 U.S. 445, 447 (1865) (“to ascertain the clear intention of the legislature . . . courts are often compelled to construe ‘or’ as meaning ‘and,’ and again ‘and’ as meaning ‘or.’”); *Slodov v. U.S.*, 436 U.S. 238, 246-47 (1978) (construing the word “and” in a statute as disjunctive where it was the only reading consistent with the purpose of the statute); *National Railroad Passenger Corp. v. USA*, 431 F.3d 374, 376 (D.C. Cir. 2005) (“To be sure, Congress does sometimes use the word ‘and’ disjunctively”).

⁶⁰ The CBP Inspector’s Field Manual provides, “During an inspection at a port-of-entry, detention begins when the applicant is referred into secondary and waits for processing.” *See CBP Inspector’s Field Manual*, Section 17.8.

the application for admission and depart the United States.⁶¹ Given that the person is detained and thus not free to leave and not able to withdraw his application without permission, his or her appearance may be considered “compelled” for purposes of the APA, and the person has a right to counsel.

2. Deferred Inspection

A person who is ordered to appear for deferred inspection also is “compelled” to appear before the agency, and therefore arguably has a right to counsel under §555(b) of the APA. Upon deferring an inspection, the CBP officer must issue an Order to Appear for Deferred Inspection, Form I-546, requiring the person to appear.⁶² If the person does not appear as ordered, CBP will issue a Notice to Appear (Form I-862), and the person will be placed in removal proceedings.⁶³ In addition, “[c]riminal penalties and the possible pursuit of a criminal warrant under 8 U.S.C. 1325 shall be pursued on a case-by-case basis. All related information shall be forwarded to the CBP Prosecutions Unit (CBP Enforcement Officers) and/or U.S. Immigration and Customs Enforcement to allow further follow-up of the case.”⁶⁴ That a person may voluntarily choose to seek admission to the United States does not alter the fact that his or her actual appearance at deferred inspection is compelled. The APA right to counsel is not qualified; it does not say that the right to counsel does not apply where the initial interaction with the government is voluntary. Such an interpretation would conflict with the plain language of 5 U.S.C. §555(b). To the extent that the adjudicatory-investigatory distinction is relevant, a “deferred inspection” is adjudicatory in nature. At the deferred inspection examination, the CBP officer will make a determination regarding the admissibility of the person.⁶⁵ This is the same determination that is made when a USCIS officer adjudicates an application for adjustment of status and determines whether or not the applicant is admissible. In both the CBP and USCIS context, the agency officer is called on to make a decision that is adjudicatory in nature.

An individual in deferred inspection, arguably, also has a right to counsel under 8 C.F.R. §292.5(b) because the individual is the subject of an “examination.”⁶⁶ Despite agency guidance to the contrary,⁶⁷ deferred inspection is not “secondary inspection” (when the right to counsel is

⁶¹ See 8 C.F.R. §235.4 (providing that “[t]he alien’s decision to withdraw his or her application for admission must be made voluntarily, but nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission.”).

⁶² See CBP Inspector’s Field Manual, Section 17.1.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See CBP Inspector’s Field Manual, Section 17.1(c).

⁶⁶ The regulation governing deferred inspection, 8 C.F.R. §235.2, is titled “[p]arole for deferred inspection.” It states that “a district director may, in his or her discretion, defer the inspection” of a person to “another Service office or port-of-entry.” 8 C.F.R. §235.2(a). Further, it provides that an “examining immigration officer may defer further examination and refer” the person’s case to the appropriate district director. 8 C.F.R. §235.2(b).

⁶⁷ Currently, CBP takes the position that deferred inspection is secondary inspection, and thus the regulatory right to counsel does not apply. See CBP Inspector’s Field Manual, Section 17.1(e).

specifically exempted under § 292.5(b)). First, deferred inspection is not among the types of inspection mentioned in § 292.5(b). Although the deferred inspection regulation, 8 C.F.R. § 235.2, was added after the promulgation of § 292.5(b),⁶⁸ the agency did not thereafter amend 8 C.F.R. § 292.5(b) to encompass deferred inspection, nor did it identify deferred inspection as secondary inspection in § 235.2. Instead, the government has merely adopted and applied the restrictions on counsel at secondary inspection to deferred inspection.⁶⁹

Second, deferred inspection has a distinct definition from secondary inspection. Secondary inspection takes place “[i]f there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection.”⁷⁰ In contrast, deferred inspection is referred to as “further examination” that occurs after a person is paroled. 8 C.F.R. § 235.2. Unlike secondary inspection, it is permitted only when the examining officer “has reason to believe” that the person can overcome a finding of inadmissibility by presenting, *inter alia*, “additional evidence of admissibility not available at the time and place of the initial examination.”⁷¹ Therefore, although secondary and deferred inspections both take place when a person must present additional evidence of admissibility, the specifically prescribed requirements for deferred inspection and the fact that it follows parole distinguish it from secondary inspection.

3. Expedited Removal

A person in expedited removal proceedings also, arguably, has a right to counsel. The entry process at the border constitutes an “agency proceeding” for purposes of the Administrative Procedures Act. The term “agency proceeding” is defined in the APA as an “agency process for the formulation of an order,” 5 U.S.C. §551(12), (7), and an “order” is defined, in turn, as “a final disposition . . . of an agency in a matter other than rulemaking . . .” 5 U.S.C. §551(6). This is broad enough to include the decisions made by DHS officers at the border to issue an expedited removal order against a person. Consequently, a person who is seeking admission to the United States and who is subjected to expedited removal proceedings is entitled to be represented by an attorney under the APA. *See* 5 U.S.C. §555(b) (“A party is entitled to appear . . . with counsel . . . in an agency proceeding”).

In addition, a person in expedited removal proceedings may also have a right under the regulations to be represented by counsel. Initially, 8 C.F.R. §292.5(b) did not contain any limitations on the right to counsel for people being examined in primary and secondary inspections; INS added these limitations in 1980.⁷² According to the rule’s supplementary

⁶⁸ Inspection and Expedited Removal of Aliens, Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10312 (Apr. 1, 1997).

⁶⁹ *See* CBP Inspector’s Field Manual, Section 17.1(e) (citing 8 CFR § 292.5(b) to support the position that an applicant for admission at deferred inspection “is not entitled to representation”).

⁷⁰ 62 Fed. Reg. at 10318.

⁷¹ 8 C.F.R. § 235.2(b)(3); *see also* CBP Inspector’s Field Manual, Section 17.1(a).

⁷² 45 Fed. Reg. at 81733.

information, the new version of the rule was intended to “clarify when the right to representation attaches” and “to avoid possible confusion” as to when the right attaches.⁷³ Specifically, the provision was amended to “provide that an applicant for admission processing through primary or secondary inspection does not have the right to representation unless the applicant has become the focus of a criminal investigation or has been taken into custody.”⁷⁴ Significantly, INS justified its limitation on the right to counsel during primary and secondary inspection by pointing out that no immigration official could “finally bar” an individual from entry during primary or secondary inspection.⁷⁵ A determination as to whether a person is excludable could only be made during “[s]ubsequent administrative proceedings,” “*and it is at this point that the alien has the right to representation.*”⁷⁶ This explanation reflects the agency’s view of a two-fold process at the time the regulation was promulgated.⁷⁷ If upon inspection, the immigration officer determined a person was entitled to enter, he had authority to grant admission to the United States.⁷⁸ However, if the official was not satisfied that the person was entitled to enter, the official was not “authorized to finally bar the alien or to waive causes for exclusion.”⁷⁹ The second stage of the process – “[s]ubsequent administrative proceedings” – would determine whether or not the person was admissible or excludable.⁸⁰ The right to representation attached at this second stage, where a decision could be made to “finally bar” the applicant.⁸¹

In providing that an individual in primary and secondary inspection did not have a right to counsel, INS contemplated a system where the applicant could not be ordered removed in primary or secondary inspection. However, that system changed with the enactment of IIRIRA in 1996. In IIRIRA, Congress established a system for expedited removal of individuals who arrive at the border but are not eligible for admission.⁸² Now, individuals can be ordered removed at secondary inspection without a hearing, pursuant to INA §235(b)(1)(A), 8 U.S.C. §1225, if an immigration officer determines the person is inadmissible because he or she possesses fraudulent documentation, INA §212(a)(6)(c), 8 U.S.C. §1182(a)(6)(C) or has no valid documentation, INA §212(a)(7), 8 U.S.C. §1182(a)(7).⁸³ As border procedures for removal have

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis added).

⁷⁷ Prior to IIRIRA, if an immigration official could not establish an individual’s admissibility at secondary inspection, the person was entitled to a hearing before an immigration judge. 8 U.S.C. §§1225(b) and 1226(a) (1994). The statute provided a right to counsel during the proceeding before an immigration judge. INA §292, 8 U.S.C. 1362.

⁷⁸ 45 Fed. Reg. at 81733.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² H.R. Conf. Rep. No. 104-208, at 209 (1996) (expedited removal process was intended to “expedite the removal from the United States of aliens who indisputably have no authorization to be admitted...”).

dramatically changed since the promulgation of §292.5(b), the regulation arguably should not be applied to bar counsel where the person is subjected to expedited removal.

Moreover, in addition to the statutory and regulatory arguments above, a constitutional right of access to counsel in expedited removal proceedings may also exist. Although it has been held that border officials may be able to inspect and turn away a non-citizen without any due process limits,⁸⁴ expedited removal proceedings are designed not just to turn a person away at the border but to penalize the applicant. In expedited removal proceedings under §235, the applicant is not just turned away, but in addition the government's goal is to penalize the applicant by barring him or her from reentry into the United States for five years or more. An applicant for admission at the border may not have a constitutional Due Process right to an attorney regarding the decision to turn her away. But he or she arguably does have a Due Process right to an attorney when the government goes further and attempts to penalize the person by imposing a bar preventing reentry for five years or more.⁸⁵

4. U.S. Citizens and Businesses

Many decisions at the border affect U.S. citizens and U.S. businesses. Although a non-citizen at the border may not have Due Process rights vis-à-vis his or her entry into the United States, it is arguable that sponsoring U.S. citizens and businesses do.⁸⁶ It is clear that sponsoring U.S. citizens and U.S. businesses often have significant interests at stake in the issuance of visas, including family visas, TN-visas, L-visas, and other employment-related visas, for the benefit of family members, workers, and other non-citizens seeking admission into the United States. When a DHS official makes a decision at the border affecting this interest, the U.S. citizen or

⁸³ DHS has since expanded expedited removal to apply to persons present in the U.S. who have not been admitted or paroled who are encountered within 100 miles of the border, and who cannot establish that they have been physically present in the U.S. continuously for the preceding 14 days. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

⁸⁴ See note 4, *supra*, and accompanying text.

⁸⁵ *But see AILA v. Reno*, 18 F. Supp. 2d 38, 55 (D.D.C. 1998), *aff'd* 199 F.3d 1352 (D.C. Cir. 2000) (concluding that the decision to “ban access to counsel during the secondary inspection stage is reasonable in view of Congress's dual purposes in providing fair procedures while creating a more expedited removal process”).

⁸⁶ See, e.g. *Kleindienst v. Mandel*, 408 U.S. 753, 764-765 (1972) (recognizing that U.S. professors have constitutionally protected First Amendment rights to bring in non-citizens for academic purposes); *Fiallo v. Bell*, 430 U.S. 787, 794-795 (1977) (accepting that U.S. citizens have constitutionally protected rights to live with family members, and reviewing the statute to determine whether there is a “facially legitimate and bona fide reason” for the exclusion of a family member). See also *Lesbian/Gay Freedom Day Comm. v. INS*, 541 F.Supp. 569, 583-588 (N.D.Cal. 1982) (INS policy of excluding homosexuals violates plaintiffs' constitutional rights of freedom of speech and association), vacated in light of INS's change in policy sub nom. *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). Cf. *Morrison v. Jones*, 607 F.2d 1269, 1276 (9th Cir. 1979), cert. denied 445 U.S. 962 (1980) (court recognizes §1983 action by mother against county for interference with constitutional right to live with her minor son, where county took custody of the child and transported him to his grandparents in Germany).

U.S. business arguably has a constitutional right to be represented by counsel. No case holds that an attorney cannot appear in a proceeding at the border on behalf of a U.S. citizen spouse or U.S. business to represent the citizen's interest.