

ACCESS TO COUNSEL ACT OF 2020

MARCH 5, 2020.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,  
 submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 5581]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5581) to clarify the rights of all persons who are held or detained at a port of entry or at any detention facility overseen by U.S. Customs and Border Protection or U.S. Immigration and Customs Enforcement, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:  
 Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Access to Counsel Act of 2020”.

**SEC. 2. ACCESS TO COUNSEL AND OTHER ASSISTANCE AT PORTS OF ENTRY AND DEFERRED INSPECTION.**

(a) **ACCESS TO COUNSEL AND OTHER ASSISTANCE DURING INSPECTION.**—Section 235 of the Immigration and Nationality Act (8 U.S.C. 1225) is amended by adding at the end the following:

“(e) **ACCESS TO COUNSEL AND OTHER ASSISTANCE DURING INSPECTION.**—

“(1) **IN GENERAL.**—The Secretary of Homeland Security shall ensure that a covered individual has a meaningful opportunity to consult with counsel and an interested party during the inspection process.

“(2) **SCOPE OF ASSISTANCE.**—The Secretary of Homeland Security shall—

“(A) provide the covered individual a meaningful opportunity to consult with counsel and an interested party not later than one hour after the secondary inspection process commences and as necessary throughout the inspection process, including, as applicable, during deferred inspection;

“(B) allow counsel and an interested party to advocate on behalf of the covered individual, including by providing to the examining immigration officer information, documentation, and other evidence in support of the covered individual; and

“(C) to the greatest extent practicable, accommodate a request by the covered individual for counsel or an interested party to appear in-person at the secondary or deferred inspection site.

“(3) **SPECIAL RULE FOR LAWFUL PERMANENT RESIDENTS.**—

“(A) **IN GENERAL.**—The Secretary of Homeland Security may not accept Form I-407 Record of Abandonment of Lawful Permanent Resident Status (or a successor form) from a lawful permanent resident subject to secondary or deferred inspection without providing such lawful permanent resident a reasonable opportunity to seek advice from counsel prior to the submission of the form.

“(B) **EXCEPTION.**—The Secretary of Homeland Security may accept Form I-407 Record of Abandonment of Lawful Permanent Resident Status (or a successor form) from a lawful permanent resident subject to secondary or deferred inspection if such lawful permanent resident knowingly, intelligently, and voluntarily waives, in writing, the opportunity to seek advice from counsel.

“(4) **DEFINITIONS.**—In this section:

“(A) **COUNSEL.**—The term ‘counsel’ means—

“(i) an attorney who is a member in good standing of the bar of any State, the District of Columbia, or a territory or a possession of the United States and is not under an order suspending, enjoining, restraining, disbaring, or otherwise restricting the attorney in the practice of law; or

“(ii) an individual accredited by the Attorney General, acting as a representative of an organization recognized by the Executive Office for Immigration Review, to represent a covered individual in immigration matters.

“(B) **COVERED INDIVIDUAL.**—The term ‘covered individual’ means an individual subject to secondary or deferred inspection who is—

“(i) a national of the United States;

“(ii) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

“(iii) an alien seeking admission as an immigrant in possession of a valid unexpired immigrant visa;

“(iv) an alien seeking admission as a non-immigrant in possession of a valid unexpired non-immigrant visa;

“(v) a refugee; or

“(vi) an alien who has been approved for parole under section 212(d)(5)(A), including an alien who is returning to the United States in possession of a valid advance parole document.

“(C) **INTERESTED PARTY.**—The term ‘interested party’ means—

“(i) a relative of the covered individual;

“(ii) in the case of a covered individual to whom an immigrant or non-immigrant visa has been issued, the petitioner or sponsor thereof (including an agent of such petitioner or sponsor); or

“(iii) a person, organization, or entity in the United States with a bona fide connection to the covered individual.”.

(b) **EFFECTIVE DATE.**—The amendment made by subsection (a) shall take effect 180 days after the date of the enactment of this Act.

(c) SAVINGS PROVISION.—Nothing in this Act, or in any amendment made by this Act, may be construed to limit a right to counsel or any right to appointed counsel under—

(1) section 240(b)(4)(A) (8 U.S.C. 1229a(b)(4)(A)),

(2) section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), or

(3) any other provision of law, including any final court order securing such rights,

as in effect on the day before the date of the enactment of this Act.

### **Purpose and Summary**

H.R. 5581, the “Access to Counsel Act of 2020,” amends section 235 of the Immigration and Nationality Act (INA) to require the Department of Homeland Security (DHS) to ensure that certain individuals who are subjected to prolonged inspection by U.S. Customs and Border Protection (CBP) at ports of entry have a meaningful opportunity to communicate with counsel and other interested parties. H.R. 5581 does not create a “right” to counsel during the inspection process, nor does it impose any obligation on the federal government to pay for or otherwise provide counsel to individuals during CBP inspection proceedings. Instead, it will simply ensure that such individuals are not prohibited from communicating with outside parties—which may include counsel—or receiving the support and assistance of such parties during the inspection process.

Counsel and interested parties would be able to provide additional information and documentation to the inspecting officer to facilitate the inspection process and provide assistance and support to the applicant for admission. The bill also provides extra protection for lawful permanent residents (LPRs) by prohibiting DHS from accepting a Record of Abandonment of Lawful Permanent Resident Status from an LPR without first providing the LPR a reasonable opportunity to consult with counsel.

### **Background and Need for the Legislation**

All individuals—including U.S. citizens—who seek to lawfully enter the United States are subject to “inspection” by CBP officers at ports of entry.<sup>1</sup> Most individuals who are not U.S. citizens or LPRs, but who are in possession of proper documentation, are admitted to the United States after answering a few routine questions involving the intended purpose and length of their stay in the main queue known as “primary” inspection.<sup>2</sup> However, if CBP cannot verify the individual’s identity or the validity of their documentation, or if there are questions regarding admissibility, the individual may be referred to “secondary” or “deferred” inspection.<sup>3</sup> *Secondary* inspection occurs in designated areas at ports of entry where CBP can ask the individual additional questions and continue conducting background checks and research. A person may be scheduled for *deferred* inspection if a decision regarding immigration status cannot be made due to a lack of documentation.<sup>4</sup> In

<sup>1</sup> See generally 8 C.F.R. § 235.1.

<sup>2</sup> Lisa Seghetti, *Border Security: Immigration Inspections at Ports of Entry*, Cong. Research Serv., 10 (Jan. 26, 2015).

<sup>3</sup> T. Alexander Aleinikoff et al., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 489 (8th ed. West 2016).

<sup>4</sup> U.S. Customs and Border Protection, *Deferred Inspection Sites*, <https://www.cbp.gov/contact/ports/deferred-inspection-sites>.

such cases, the individual is “paroled” into the United States and scheduled to appear at a deferred inspection site to present the requested documentation at a later date.<sup>5</sup>

The INA provides individuals in removal proceedings with the right to representation, at no expense to the government.<sup>6</sup> Although the regulations extend this right to any individual subject to an immigration-related “examination,” applicants for admission in primary or secondary inspection are specifically excluded, unless they “become the focus of a criminal investigation” and are “taken into custody.”<sup>7</sup> Yet the consequences of being denied admission to the United States can be significant. A U.S. research institution may lose the opportunity to employ a next generation cancer researcher if that researcher is denied admission despite possessing a valid O–1 nonimmigrant visa.<sup>8</sup> Individuals who are refused admission may be unable to reunite with their families, unable to receive critical medical care unavailable in their home country, or denied the opportunity to pursue higher education at a U.S. university. Although some individuals may be permitted to withdraw their applications for admission and return home without long term consequences, others may be ordered removed without a hearing or further review under “expedited removal” procedures.<sup>9</sup> An individual who receives an expedited removal order is barred from returning to the United States for five years.<sup>10</sup>

Due to the complexity of U.S. immigration law, it is not uncommon for CBP to have difficulty resolving some questions that arise during the inspection process. Such questions can involve individuals’ citizenship status, the continuing validity of their LPR status, or whether the stated purpose of their visit is compatible with their visa. Most applicants for admission are unfamiliar with the nuances of our immigration laws, are often alone, and may not be proficient in English. As a result, individuals can remain in secondary inspection for hours, largely cut off from the world while undergoing questioning by CBP.

Complicating matters further, CBP provides no public guidance on an individual’s ability to communicate with counsel and other individuals during the inspection process. In 2014, the American Immigration Council released a report summarizing the results of its request under the Freedom of Information Act (FOIA) for CBP policies on access to counsel.<sup>11</sup> According to the report, with respect to both secondary and deferred inspection, “CBP policies and practices on access to counsel vary from one office to another.”<sup>12</sup> While some ports of entry “completely bar counsel in primary or secondary inspection,” other ports provide specific procedures for interacting with counsel or provide the inspecting officer with

<sup>5</sup> 8 C.F.R. § 235.2.

<sup>6</sup> 1 INA §§ 240(b)(4)(a), 292; 8 U.S.C. §§ 1229a(b)(4)(A), 1362.

<sup>7</sup> 8 C.F.R. § 292.5(b).

<sup>8</sup> O–1 visas are available to individuals with “extraordinary ability” in the sciences, arts, education, business, or athletics. *See generally* INA § 101(a)(15)(O)(i); 8 U.S.C. § 1101(a)(15)(O)(i).

<sup>9</sup> INA §§ 235(a)(4), (b)(1); 8 U.S.C. §§ 1225(a)(4), (b)(1).

<sup>10</sup> INA § 212(a)(9)(A)(i); 8 U.S.C. § 1182(a)(9)(A)(i).

<sup>11</sup> American Immigration Council, *CBP Restrictions on Access to Counsel*, [https://www.americanimmigrationcouncil.org/sites/default/files/other\\_litigation\\_documents/final\\_cbp\\_access\\_to\\_counsel\\_foia\\_factsheet\\_2\\_1.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/final_cbp_access_to_counsel_foia_factsheet_2_1.pdf).

<sup>12</sup> *Id.* at 1.

broad discretion to decide whether and with whom to communicate.<sup>13</sup>

#### THE IMPLEMENTATION OF EXECUTIVE ORDER 13769

On January 27, 2017, President Trump issued Executive Order (EO) 13769,<sup>14</sup> suspending the entry of nationals of seven Muslim majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—for at least 90 days.<sup>15</sup> As a result of the Administration’s quick rollout of EO 13769, widespread confusion unfolded at airports across the nation. Individuals arriving from covered countries were detained at airports for hours, and many were sent back to their home countries without the ability to contact their families or communicate with counsel.<sup>16</sup> In the days that followed, several courts issued orders blocking the federal government from continuing to implement the EO and mandating access to counsel for LPRs in secondary inspection.<sup>17</sup>

A DHS Inspector General report released on the one-year anniversary of the ban provided additional details regarding the restrictions placed on individuals due to the EO.<sup>18</sup> The Inspector General found that individuals held in secondary inspection were not afforded the opportunity to consult with counsel and, in some cases, were not permitted to make telephone calls at all.<sup>19</sup> Others had their phones confiscated by CBP.<sup>20</sup> Even after the court order mandating attorney access for LPRs was issued, CBP continued to refuse such access, arguing that the right to counsel only attaches once the inspection “becomes a custodial interrogation or a criminal investigation.”<sup>21</sup> The Inspector General concluded that CBP’s “highly aggressive stance in light of” the court orders was “questionable” and “troubling.”<sup>22</sup>

#### DETENTION OF IRANIAN-AMERICANS IN SECONDARY INSPECTION AT THE NORTHERN BORDER

In January 2020, as tensions between Iran and the United States escalated, up to 200 individuals of Iranian descent were detained and questioned in secondary inspection at the Peace Arch Border

<sup>13</sup>*Id.* at 2–3. For example, in Nevada, “[w]hen an individual in secondary inspection states that his attorney is waiting in the entry area, the officer’s only responsibility ‘is to notify a relative or friend’ if the individual is detained for more than two hours.” *Id.*

<sup>14</sup>Exec. Order No. 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 8977 (Jan. 27, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>.

<sup>15</sup>Michael D. Shear & Helen Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.

<sup>16</sup>Wesley Lowery & Josh Dawsey, *Early Chaos of Trump’s Travel Ban Set Stage For a Year of Immigration Policy Debates*, WASH. POST (Feb. 6, 2018), [https://www.washingtonpost.com/national/early-chaos-of-trumps-travel-ban-set-stage-for-a-year-of-immigration-policy-debates/2018/02/06/f5386128-01d0-11e8-8acf-ad2991367d9d\\_story.html](https://www.washingtonpost.com/national/early-chaos-of-trumps-travel-ban-set-stage-for-a-year-of-immigration-policy-debates/2018/02/06/f5386128-01d0-11e8-8acf-ad2991367d9d_story.html); Abigail Williams & Adam Edelman, *Lawyers, Activists Gear Up for Travel Ban Airport Issues*, NBC NEWS (June 29, 2017), <https://www.nbcnews.com/politics/donald-trump/u-s-defines-who-can-enter-under-travel-ban-n778031>.

<sup>17</sup>See e.g. *Washington v. Trump*, 2017 U.S. Dist. Lexis 16012 (Feb. 3, 2017).

<sup>18</sup>U.S. Dep’t of Homeland Sec., Off. of Inspector Gen., *DHS Implementation of Executive Order #13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States”* (January 27, 2017), at 5 (Jan. 18, 2018), [www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf](http://www.oig.dhs.gov/sites/default/files/assets/2018-01/OIG-18-37-Jan18.pdf).

<sup>19</sup>See, e.g. *id.* at 76.

<sup>20</sup>*Id.* at 39.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 79.

Crossing in Blaine, Washington.<sup>23</sup> These individuals—many of whom were U.S. citizens or LPRs, including seniors and children—were held for several hours, with some reportedly held for up to 12 hours.<sup>24</sup> In one case, CBP held a family of four U.S. citizens for nearly five hours even though they were already designated as “Trusted Travelers” under CBP’s NEXUS program.<sup>25</sup> Anecdotal reports indicate that attorneys who arrived on the scene to assist were refused admission, and at least some individuals were unable to make phone calls to family members and others.

#### OTHER ISSUES WITH LIMITED ACCESS TO COUNSEL

Complications in the inspection process can arise in response to sweeping changes in immigration policy or shifting world events. But the greatest impact on individuals on a day-to-day basis comes from the consistent lack of access to counsel and other assistance at ports of entry. For example, in 2017, Henry Rousso, a French historian and Holocaust scholar, was held in secondary inspection at George Bush Intercontinental Airport in Houston, Texas for more than 10 hours.<sup>26</sup> Mr. Rousso came to the United States to speak at an academic conference hosted by Texas A&M University. Upon questioning, Mr. Rousso was referred to secondary inspection, where CBP made a preliminary determination that he had violated the law by receiving a \$2,000 honorarium to speak at the conference. When Mr. Rousso failed to meet the driver who had been sent to the airport to pick him up, representatives from the university contacted an attorney.<sup>27</sup> The attorney was able to explain to CBP that Mr. Rousso’s receipt of an honorarium was proper under the immigration laws, as section 212(q) of the INA expressly allows individuals admitted to the United States on visitor visas to accept honorarium payments and associated incidental expenses for certain academic activities.<sup>28</sup> Due to the assistance of the attorney, Mr. Rousso was eventually admitted into the United States.<sup>29</sup>

Mr. Rousso was fortunate for two reasons. First, as a well-known scholar supported by faculty at an American university, he had ready access to a lawyer. Second, CBP officials in Houston were amenable to allowing counsel to assist Mr. Rousso. Most individuals, however, are not so lucky. Because access to counsel during the inspection process is not required, most applicants for admission who are referred to secondary inspection are unable to communicate with counsel or others who might be able to provide useful

<sup>23</sup> Mike Baker & Caitlin Dickerson, *Iranian-Americans Questioned at the Border: My Kids Shouldn’t Experience Such Things*, N.Y. TIMES (Jan. 6, 2019), <https://www.nytimes.com/2020/01/06/us/border-iranians-washington-patrol.html>.

<sup>24</sup> Abigail Hauslohner, *Advocates Allege Delays at U.S. Border for Travelers Linked to Iran, a Claim the Government Denies*, WASH. POST (Jan. 6, 2020), [https://www.washingtonpost.com/immigration/advocates-allege-delays-at-us-border-for-travelers-linked-to-iran-a-claim-the-government-denies/2020/01/06/5e7d0e3e-3093-11ea-a053-dc6d944ba776\\_story.html](https://www.washingtonpost.com/immigration/advocates-allege-delays-at-us-border-for-travelers-linked-to-iran-a-claim-the-government-denies/2020/01/06/5e7d0e3e-3093-11ea-a053-dc6d944ba776_story.html).

<sup>25</sup> Negah Hekmati, *I’m a U.S. Citizen. My Family Was Detained at the Border Because We’re From Iran*, WASH. POST (Jan. 9, 2020), <https://www.washingtonpost.com/outlook/2020/01/09/immigrant-citizen-my-family-was-detained-border-because-were-iran/>. NEXUS is a CBP “Trusted Traveler” program that allows approved individuals to enter the United States and Canada more quickly by using designated lanes and a radio frequency identification card. See U.S. Customs and Border Protection, *Benefits of NEXUS*, <https://www.cbp.gov/travel/trusted-traveler-programs/nexus/benefits-nexus>.

<sup>26</sup> Erin McCann, *French Historian Says He was Threatened with Deportation at Houston Airport*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/us/french-historian-detained-immigration-henry-rousso.html>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; INA § 212(q).

<sup>29</sup> *Id.*

information relevant to admission. Rather than having the opportunity to vindicate their rights and lawfully enter the country, most are instead refused admission or issued an expedited removal order.

### **Hearings**

For the purposes of section 103(i) of H. Res. 6 of the 116th Congress, the following hearing, held on September 24, 2019, was used to develop H.R. 5581: “Oversight of the Trump Administration’s Muslim Ban,” a joint hearing held before the House Committee on the Judiciary, Subcommittee on Immigration and Citizenship and the House Foreign Affairs Committee, Subcommittee on Oversight and Investigations. The Subcommittees heard testimony from:

- Edward J. Ramotowski, Deputy Assistant Secretary for Visa Services, Bureau of Consular Affairs, U.S. Department of State;
- Elizabeth Neumann, Assistant Secretary for Threat Prevention and Security Policy, Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security;
- Todd Hoffman, Executive Director of Admissibility and Passenger Programs (APP), Office of Field Operations (OFO), U.S. Customs and Border Protection, U.S. Department of Homeland Security;
- Dr. Abdollah “Iman” Dehzangi, Assistant Professor at Morgan State University in Baltimore, Maryland;
- Ismail Ahmed Hezam Alghazali, a U.S. citizen born in Yemen who left his job to travel to Djibouti to be with his pregnant wife;
- Farhana Khera, President and Executive Director, Muslim Advocates; and
- Andrew Arthur, Resident Fellow in Law and Policy, Center for Immigration Studies.

The hearing explored the initial implementation of the ban, including the chaos that unfolded at airports around the country, which stemmed, in part, from denying access to counsel; the impact of the ban on American families, U.S. employers, and other institutions; and the lack of transparency around the waiver process.

### **Committee Consideration**

On February 12, 2020, the Committee met in open session and ordered the bill, H.R. 5581, favorably reported with an amendment in the nature of a substitute, by a rollcall vote of 18 to 6, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall vote occurred during the Committee’s consideration of H.R. 5581.

1. The motion to report H.R. 5581, as amended, favorably was agreed to by a rollcall vote of 18 to 6.

Roll Call No. 6Date: 2/12/20

## COMMITTEE ON THE JUDICIARY

House of Representatives  
116<sup>th</sup> CongressFinal Passage on H.R. 5581 PASSED FAILED

	AYES	NOS	PRES.
Jerrold Nadler (NY-10)	✓		
Zoe Lofgren (CA-19)	✓		
Sheila Jackson Lee (TX-18)	✓		
Steve Cohen (TN-09)			
Hank Johnson (GA-04)	✓		
Ted Deutch (FL-22)			
Karen Bass (CA-37)			
Cedric Richmond (LA-02)	✓		
Hakeem Jeffries (NY-08)			
David Cicilline (RI-01)	✓		
Eric Swalwell (CA-15)	✓		
Ted Lieu (CA-33)	✓		
Jamie Raskin (MD-08)	✓		
Pramila Jayapal (WA-07)	✓		
Val Demings (FL-10)	✓		
Lou Correa (CA-46)	✓		
Mary Gay Scanlon (PA-05)	✓		
Sylvia Garcia (TX-29)	✓		
Joseph Neguse (CO-02)	✓		
Lucy McBath (GA-06)	✓		
Greg Stanton (AZ-09)	✓		
Madeleine Dean (PA-04)	✓		
Debbie Mucarsel-Powell (FL-26)			
Veronica Escobar (TX-16)			
	AYES	NOS	PRES.
Doug Collins (GA-27)		✓	
James F. Sensenbrenner (WI-05)			
Steve Chabot (OH-01)			
Louie Gohmert (TX-01)			
Jim Jordan (OH-04)			
Ken Buck (CO-04)			
John Ratcliffe (TX-04)			
Martha Roby (AL-02)			
Matt Gaetz (FL-01)		✓	
Mike Johnson (LA-04)			
Andy Biggs (AZ-05)		✓	
Tom McClintock (CA-04)			
Debbie Lesko (AZ-08)			
Guy Reschenthaler (PA-14)		✓	
Ben Cline (VA-06)		✓	
Kelly Armstrong (ND-AL)		✓	
Greg Steube (FL-17)			
	AYES	NOS	PRES.
TOTAL	19	6	



### **Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate**

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

### **Duplication of Federal Programs**

No provision of H.R. 5581 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5581 would require DHS to ensure that certain individuals who are subjected to prolonged inspection by CBP at ports of entry have a meaningful opportunity to communicate with counsel and other interested parties. The bill also provides extra protection for lawful permanent residents by prohibiting DHS from accepting a Record of Abandonment of Lawful Permanent Resident Status from an individual without first providing a reasonable opportunity for such individual to consult with counsel.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5581 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

### **Section-by-Section Analysis**

*Sec. 1. Short Title.* Section 1 sets forth the short title of the bill as the “Access to Counsel Act of 2020”.

*Sec. 2. Access to Counsel and Other Assistance at Ports of Entry and Deferred Inspection.*

*Section (2)(a)* amends section 235 of the INA to create a new subsection (e).

New subsection (e)(1) requires the Secretary of Homeland Security to ensure that “covered individuals” have a meaningful opportunity to consult with counsel or an interested party during the inspection process.

New subsection (e)(2) sets forth the scope of such access, requiring the Secretary to ensure that individuals are permitted to consult with counsel or interested parties not later than one hour after secondary inspection commences and through the end of the inspection process. Counsel and interested parties shall be allowed to advocate on behalf of the covered individual and provide supporting documentation and other information to the Customs and Border Protection (CBP) inspecting officer. CBP shall, to the greatest extent practicable, accommodate a request for counsel or an interested party to appear in-person at the secondary or deferred inspection site.

New subsection (e)(3) provides extra protection for lawful permanent residents (LPRs) by prohibiting the Secretary of Homeland Security from accepting a Record of Abandonment of Lawful Permanent Resident Status (Form I-407) from an LPR without providing the LPR with a reasonable opportunity to consult with counsel. The Secretary may, however, accept such form if the LPR waives the opportunity to seek advice from counsel in writing.

New subsection (e)(4) defines the terms “counsel,” “covered individual,” and “interested party”.

*Section (2)(b)* establishes the effective date as 180 days after the enactment of the Act.

*Section (2)(c)* clarifies that nothing in the Act may be construed to limit a pre-existing right to counsel or right to appointed counsel under the INA or any other provision of law, including a court order.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 5581, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

**IMMIGRATION AND NATIONALITY ACT**

\* \* \* \* \*

**TITLE II—IMMIGRATION**

\* \* \* \* \*

CHAPTER 4—INSPECTION, APPREHENSION, EXAMINATION,  
EXCLUSION, AND REMOVAL

\* \* \* \* \*

INSPECTION BY IMMIGRATION OFFICERS; EXPEDITED REMOVAL OF  
INADMISSIBLE ARRIVING ALIENS; REFERRAL FOR HEARING

SEC. 235. (a) INSPECTION.—

(1) ALIENS TREATED AS APPLICANTS FOR ADMISSION.—An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.

(2) STOWAWAYS.—An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 208 or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 240.

(3) INSPECTION.—All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

(4) WITHDRAWAL OF APPLICATION FOR ADMISSION.—An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) STATEMENTS.—An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) INSPECTION OF APPLICANTS FOR ADMISSION.—

(1) INSPECTION OF ALIENS ARRIVING IN THE UNITED STATES AND CERTAIN OTHER ALIENS WHO HAVE NOT BEEN ADMITTED OR PAROLED.—

(A) SCREENING.—

(i) IN GENERAL.—If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates ei-

ther an intention to apply for asylum under section 208 or a fear of persecution.

(ii) CLAIMS FOR ASYLUM.—If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 212(a)(6)(C) or 212(a)(7) and the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) APPLICATION TO CERTAIN OTHER ALIENS.—

(I) IN GENERAL.—The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) ALIENS DESCRIBED.—An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) ASYLUM INTERVIEWS.—

(i) CONDUCT BY ASYLUM OFFICERS.—An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) REFERRAL OF CERTAIN ALIENS.—If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) REMOVAL WITHOUT FURTHER REVIEW IF NO CREDIBLE FEAR OF PERSECUTION.—

(I) IN GENERAL.—Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) RECORD OF DETERMINATION.—The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the

officer's interview notes shall be attached to the written summary.

(III) REVIEW OF DETERMINATION.—The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) MANDATORY DETENTION.—Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

(iv) INFORMATION ABOUT INTERVIEWS.—The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) CREDIBLE FEAR OF PERSECUTION DEFINED.—For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208.

(C) LIMITATION ON ADMINISTRATIVE REVIEW.—Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 207, or to have been granted asylum under section 208.

(D) LIMIT ON COLLATERAL ATTACKS.—In any action brought against an alien under section 275(a) or section 276, the court shall not have jurisdiction to hear any claim

attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) ASYLUM OFFICER DEFINED.—As used in this paragraph, the term “asylum officer” means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 208, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) EXCEPTION.—Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS.—Nothing in this subsection shall be construed to authorize or require any person described in section 208(e) to be permitted to apply for asylum under section 208 at any time before January 1, 2014.

(2) INSPECTION OF OTHER ALIENS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240.

(B) EXCEPTION.—Subparagraph (A) shall not apply to an alien—

- (i) who is a crewman,
- (ii) to whom paragraph (1) applies, or
- (iii) who is a stowaway.

(C) TREATMENT OF ALIENS ARRIVING FROM CONTIGUOUS TERRITORY.—In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 240.

(3) CHALLENGE OF DECISION.—The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 240.

(c) REMOVAL OF ALIENS INADMISSIBLE ON SECURITY AND RELATED GROUNDS.—

(1) REMOVAL WITHOUT FURTHER HEARING.—If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), the officer or judge shall—

- (A) order the alien removed, subject to review under paragraph (2);
  - (B) report the order of removal to the Attorney General;
  - and
  - (C) not conduct any further inquiry or hearing until ordered by the Attorney General.
- (2) REVIEW OF ORDER.—(A) The Attorney General shall review orders issued under paragraph (1).
- (B) If the Attorney General—
- (i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), and
  - (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,
- the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.
- (C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.
- (3) SUBMISSION OF STATEMENT AND INFORMATION.—The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.
- (d) AUTHORITY RELATING TO INSPECTIONS.—
- (1) AUTHORITY TO SEARCH CONVEYANCES.—Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.
  - (2) AUTHORITY TO ORDER DETENTION AND DELIVERY OF ARRIVING ALIENS.—Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—
    - (A) to detain the alien on the vessel or at the airport of arrival, and
    - (B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.
  - (3) ADMINISTRATION OF OATH AND CONSIDERATION OF EVIDENCE.—The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service.
  - (4) SUBPOENA AUTHORITY.—(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of

this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(e) *ACCESS TO COUNSEL AND OTHER ASSISTANCE DURING INSPECTION.*—

(1) *IN GENERAL.*—*The Secretary of Homeland Security shall ensure that a covered individual has a meaningful opportunity to consult with counsel and an interested party during the inspection process.*

(2) *SCOPE OF ASSISTANCE.*—*The Secretary of Homeland Security shall—*

(A) *provide the covered individual a meaningful opportunity to consult with counsel and an interested party not later than one hour after the secondary inspection process commences and as necessary throughout the inspection process, including, as applicable, during deferred inspection;*

(B) *allow counsel and an interested party to advocate on behalf of the covered individual, including by providing to the examining immigration officer information, documentation, and other evidence in support of the covered individual; and*

(C) *to the greatest extent practicable, accommodate a request by the covered individual for counsel or an interested party to appear in-person at the secondary or deferred inspection site.*

(3) *SPECIAL RULE FOR LAWFUL PERMANENT RESIDENTS.*—

(A) *IN GENERAL.*—*The Secretary of Homeland Security may not accept Form I-407 Record of Abandonment of Lawful Permanent Resident Status (or a successor form) from a lawful permanent resident subject to secondary or deferred inspection without providing such lawful permanent resident a reasonable opportunity to seek advice from counsel prior to the submission of the form.*

(B) *EXCEPTION.*—*The Secretary of Homeland Security may accept Form I-407 Record of Abandonment of Lawful Permanent Resident Status (or a successor form) from a lawful permanent resident subject to secondary or deferred inspection if such lawful permanent resident knowingly, intelligently, and voluntarily waives, in writing, the opportunity to seek advice from counsel.*

(4) *DEFINITIONS.*—*In this section:*

(A) *COUNSEL.*—*The term “counsel” means—*

(i) *an attorney who is a member in good standing of the bar of any State, the District of Columbia, or a territory or a possession of the United States and is not under an order suspending, enjoining, restraining, dis-*



barring, or otherwise restricting the attorney in the practice of law; or

(ii) an individual accredited by the Attorney General, acting as a representative of an organization recognized by the Executive Office for Immigration Review, to represent a covered individual in immigration matters.

(B) COVERED INDIVIDUAL.—The term “covered individual” means an individual subject to secondary or deferred inspection who is—

(i) a national of the United States;

(ii) an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad;

(iii) an alien seeking admission as an immigrant in possession of a valid unexpired immigrant visa;

(iv) an alien seeking admission as a non-immigrant in possession of a valid unexpired non-immigrant visa;

(v) a refugee; or

(vi) an alien who has been approved for parole under section 212(d)(5)(A), including an alien who is returning to the United States in possession of a valid advance parole document.

(C) INTERESTED PARTY.—The term “interested party” means—

(i) a relative of the covered individual;

(ii) in the case of a covered individual to whom an immigrant or non-immigrant visa has been issued, the petitioner or sponsor thereof (including an agent of such petitioner or sponsor); or

(iii) a person, organization, or entity in the United States with a bona fide connection to the covered individual.

\* \* \* \* \*

Committee Correspondence

BENNIE G. THOMPSON, MISSISSIPPI  
CHAIRMAN

MIKE ROGERS, ALABAMA  
RANKING MEMBER



One Hundred Sixteenth Congress  
Committee on Homeland Security  
U.S. House of Representatives  
Washington, DC 20515

March 4, 2020

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
2138 Rayburn House Office Building  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Nadler:

I write to you regarding H.R. 5581, the "Access to Counsel Act of 2020."

H.R. 5581 contains provisions that fall within the jurisdiction of the Committee on Homeland Security. I recognize and appreciate your desire to bring this legislation before the House in an expeditious manner and, accordingly, I will not seek a sequential referral of the bill. However, agreeing to waive consideration of this bill should not be construed as the Committee on Homeland Security waiving, altering, or otherwise affecting its jurisdiction over subject matters contained in the bill which fall within its Rule X jurisdiction.

Further, I request your support for the appointment of Homeland Security conferees during any House-Senate conference convened on this or similar legislation. I also ask that a copy of this letter and your response be included in the legislative report on H.R. 5581 and in the *Congressional Record* during floor consideration of this bill.

I look forward to working with you as we prepare to pass this important legislation.

Sincerely,

A handwritten signature in cursive script that reads "Bennie G. Thompson".  
Bennie G. Thompson  
Chairman

cc: The Honorable Nancy Pelosi, Speaker  
The Honorable Michael Rogers, Ranking Member  
The Honorable Tom Wickham, Parliamentarian

JERROLD NADLER, New York  
CHAIRMAN

DOUG COLLINS, Georgia  
RANKING MINORITY MEMBER

**U.S. House of Representatives**  
**Committee on the Judiciary**  
Washington, DC 20515-6216  
One Hundred Sixteenth Congress

March 4, 2020

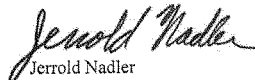
The Honorable Bennie G. Thompson  
Chairman  
Committee on Homeland Security  
U.S. House of Representatives  
H2-176 Ford House Office Building  
Washington, DC 20515

Dear Chairman Thompson:

I am writing to acknowledge your letter dated March 4, 2020 responding to our request to your Committee that it waive any jurisdictional claims over the matters contained in H.R. 5581, the "Access to Counsel Act of 2020," that fall within your Committee's Rule X jurisdiction. The Committee on the Judiciary confirms our mutual understanding that your Committee does not waive any jurisdiction over the subject matter contained in this or similar legislation, and your Committee will be appropriately consulted and involved as the bill or similar legislation moves forward so that we may address any remaining issues within your Committee's jurisdiction.

I will ensure that this exchange of letters is included in the *Congressional Record* during floor consideration of the bill. I appreciate your cooperation regarding this legislation and look forward to continuing to work with you as this measure moves through the legislative process.

Sincerely,

  
Jerrold Nadler  
Chairman

cc: The Honorable Doug Collins, Ranking Member, Committee on the Judiciary  
The Honorable Mike Rogers, Ranking Member, Committee on Homeland Security  
The Honorable Thomas J. Wickham, Jr., Parliamentarian

## Dissenting Views

H.R. 5581<sup>1</sup> would amend section 235 of the Immigration and Nationality Act to provide a right to consult with counsel or an “interested party” during mere secondary inspections of travelers to the United States at any port of entry by Customs and Border Protection (“CBP”) officials.<sup>2</sup> Despite agency concerns, no legislative hearing was held on this bill prior to markup, and there are serious operational and practical implications to providing a right to consult with counsel or an “interested party” during the inspections process.

Pursuant to H.R. 5581, “[T]o the greatest extent practicable”, the Department of Homeland Security (“DHS”) is directed to “accommodate a request by the covered individual for counsel or an interested party to appear in-person at the secondary or deferred inspection site.”<sup>3</sup> If the DHS is unable to accommodate in-person counsel at a port of entry, the DHS must provide for some other meaningful consultation “not later than one hour after the secondary inspection process commences and as necessary throughout the inspection process. . . .”<sup>4</sup> What constitutes meaningful consultation is undefined, but presumably would require the ability of counsel or “interested party” to “advocate on behalf of the covered individual, including by providing to the examining immigration officer information, documentation, and other evidence in support of the covered individual.”

These requirements would apply at any port of entry, including land, air, and sea ports: wherever secondary inspections are conducted. There are 328 U.S. ports of entry.<sup>5</sup> Although the bill applies to aliens who are applicants for admission,<sup>6</sup> it also applies to nationals of the United States, returning Lawful Permanent Residents, aliens seeking admission with unexpired immigrant or non-immigrant visas, refugees, and aliens approved for parole or in possession of an advance parole document.<sup>7</sup> The bill also prohibits the DHS from accepting an abandonment of Lawful Permanent Resident status unless the individual has the ability to consult with counsel or waives that right.<sup>8</sup>

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<sup>1</sup> Amendment in the Nature of a Substitute to H.R. 5581, 116th Cong. (Access to Counsel Act of 2020)

<sup>2</sup> *Id.* at § 2(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Information Provided by U.S. Customs and Border Protection.

<sup>6</sup> See INA § 235(a)(3) (“All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.”)

<sup>7</sup> Access to Counsel Act of 2020, H.R. 5581, 116th Cong. at § 2(a).

<sup>8</sup> *Id.*

Under current regulations adopted in 1980, applicants for admission are not entitled to representation in primary or secondary inspections unless the applicant has become the focus of a *criminal* investigation and has been taken into custody.<sup>9</sup> The right to counsel only attaches once the screening turns from questions of admissibility of people or goods to a custodial interrogation relating to a criminal offense.<sup>10</sup> An alien seeking admission to the United States has no due process right to counsel except insofar as Congress would provide,<sup>11</sup> and there is no right to counsel in secondary inspection.<sup>12</sup> However, the CBP Adjudicator’s Field Manual does provide that the inspecting officer may, at their discretion, permit a relative, friend, or representative access to the inspection area to provide assistance.<sup>13</sup>

H.R. 5581 upends that current practice by guaranteeing anyone the right to consult with counsel or an “interested party” if they are referred to secondary inspection. Secondary inspection—as opposed to primary inspection where travelers are quickly screened for admissibility<sup>14</sup> and customs<sup>15</sup> purposes—is a tool used by customs officers to conduct additional screening and vetting of certain individuals without causing delays for other travelers.<sup>16</sup> A person “referred to secondary” is usually<sup>17</sup> directed to wait at an adjacent inspections location for additional questioning by a customs officer, physical searches, or to give customs officers time to research the applicant in law enforcement databases.<sup>18</sup> CBP conducts over 17 million secondary inspections of persons each year at various ports of entry.<sup>19</sup> CBP also uses secondary inspections to adjudicate applications at land ports of entry for advance parole, immigrant visas, and nonimmigrant NAFTA Professional (TN) visas.

<sup>9</sup> 8 C.F.R. § 292.6 (“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.”)

<sup>10</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>11</sup> See *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”).

<sup>12</sup> *American Immigration Lawyer’s Assn. v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) (affirming lower court’s determination that “ban[ning] 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”); *AILA v. Reno*, 18 F. Supp. 2d 38, 55 (D.D.C. 1998).

<sup>13</sup> CBP Inspector’s Field Manual, Chapter 2.9, available at <https://www.aila.org/File/Related/11120959A.pdf>.

<sup>14</sup> INA § 235(a)(3) (“All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.”)

<sup>15</sup> 19 C.F.R. § 162.6 (“All persons, baggage and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection by a CBP officer.”)

<sup>16</sup> See Privacy Impact Assessment, U.S. Customs and Border Protection, TECS, (Dec. 22, 2010), available at <https://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-cbp-tecs.pdf> (“At primary, CBP obtains information directly from the traveler via his or her presented travel documents (e.g., passport) and/or verbal communication between the CBP officer and the traveler . . . . If the CBP officer at primary determines that additional inspection is needed, the traveler will be referred to secondary.”)

<sup>17</sup> Note that in some ports of entry, primary and secondary will occur at the same time with the same CBP officer.

<sup>18</sup> Saghetti, Lisa: *Border Security: Immigration Inspections at Ports of Entry*, (Jan. 26, 2015) Congressional Research Service, available at <https://fas.org/sgp/crs/homesecc/R43356.pdf>.

<sup>19</sup> Data provided by CBP to Committee Staff on February 7, 2020.

Suddenly giving anyone the right to counsel in secondary inspections would have serious logistical and practical consequences for CBP's ability to quickly and efficiently screen travelers and carry out the mission of facilitating lawful trade and travel. CBP enforces nearly 500 U.S. trade laws and regulations on behalf of 49 different government agencies.<sup>20</sup> CBP processed more than 410 million travelers at ports of entry in fiscal year 2019, including almost 136 million at airports.<sup>21</sup> Every day, CBP inspects over one million people at the various land, air, and sea ports of entry.<sup>22</sup> In FY2019, CBP's Office of Field Operations (the component which conducts immigration and customs inspections) deemed 288,523 individuals inadmissible, a number which includes individuals who withdrew their application for admission.<sup>23</sup> CBP officials have indicated that H.R. 5581 could increase the length of secondary inspections and drastically delay processing, which would have an upstream effect on primary inspection as well. They also note that CBP does not have physical space in its ports to accommodate in-person attorney visits for everyone referred to secondary. CBP will thus be required to build out facilities to accommodate in-person attorney consultations and will have to dedicate countless additional manhours holding individuals in secondary waiting for counsel or interested parties to show up at the port and spend time consulting.

Under H.R. 5581, CBP would now be required to permit every individual referred to secondary access to counsel within the first hour of their referral to secondary, regardless of the time of day, and without regard to staffing levels or other concerns which may impact CBP's ability to ensure efficient and thorough inspections of all travelers, not only those referred to secondary inspection. One would expect the time spent in secondary inspection to increase as the inspections process would now have to allow time for attorney consultation. Instead of quickly conducting any required physical search or additional questioning or vetting, CBP officers will now need to determine if the individual wants to consult with counsel and give them time to do so. Furthermore, attorneys unfamiliar with the expansive legal authorities exercised by CBP during customs and immigration inspections—which are significantly broader than those exercised by other law enforcement officers in the interior of the United States—could cause unnecessary inspections delays by counseling clients to not provide required information or to resist submitting to lawful inspections.

Notwithstanding these concerns, the Access to Counsel Act was marked up without any legislative hearing to receive input from CBP stakeholders.

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<sup>20</sup> *CBP Trade and Travel Report: Fiscal Year 2019*, (Jan. 2020), available at <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/CBP%20FY2019%20Trade%20and%20Travel%20Report.pdf>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> CBP Enforcement Statistics Fiscal Year 2020, available at <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

Because the Majority has failed to conduct legislative due diligence on this bill, and because of the ramifications to CBP's ability to facilitate lawful trade and travel, I do not support this bill and urge my colleagues to reject it.

Signed,

DOUG COLLINS,  
*Ranking Member.*

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