The Identity Project

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August 10, 2010

Margo Schlanger
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Building 410, Mail Stop #0190
Washington, D.C. 20528
(by e-mail to <CRCL@dhs.gov>)

Dear Ms. Schlanger:

By letter dated July 22, 2010, Ms. Stephanie Stoltzfus, Director of the TSA Office of Traveler Specialized Screening & Outreach, has informed us that "the Department has designated the Officer for Civil Rights and Civil Liberties as the point of contact for Executive Order 13107".

The Identity Project is pleased to learn of your designation in this capacity. We would be interested to know when this designation was made, since we can find no record of any previous public announcement of it, and no mention of it in any Federal Register notice or on any DHS website including the sections of the DHS website describing you, your appointment, and your office. Only after more than seven months of correspondence with TSA were we informed by them of your designation, pursuant to Executive Order 13107, as point of contact for complaints of violations of human rights treaties by DHS and DHS component agencies. No other DHS component to whom we have submitted complaints of DHS human rights violations has ever acknowledged or responded to those complaints or referred us to you as point of contact for them.

In case they have not already been forwarded to you by their recipients at the respective DHS component agencies, we have attached copies of our pending unacknowledged and unanswered complaints of violations of the International Covenant on Civil and Political Rights (ICCPR) by DHS and DHS component agencies.

With respect to each of these complaints, we specifically request that you:

(1) If you have not done so already, enter each of these complaints in your docket of complaints of violations of human rights treaties by DHS;

(2) Advise us of the reference numbers assigned by you to each of these complaints in your docket of complaints of violations of human rights treaties by DHS;

(3) Investigate and act on each of these complaints, including correcting the continuing violations, imposing appropriate sanctions for violations (regardless of whether those violations are completed or continuing), and referring criminal violations (such as criminal violations of the Privacy Act by agency employees responsible for knowingly and willfully operating systems of records without valid System of Records Notices having been promulgated) for prosecution;

(4) Inform us of your determination with respect to the violations complained of and any other violations discovered in the course of your investigation, and of any actions taken on each of these complaints, as well as whether your determinations are administratively final and what, if any, mechanisms have been established or are available for appeal and/or judicial review of any adverse determinations;

(5) Confirm that each of these complaints, regardless of your determination or action on it, will be included in the accounting of complaints of human rights violations received by the DHS, and in the DHS portion of the next U.S. government report to the U.N. Human Rights Committee on U.S. compliance with the ICCPR, in accordance with U.S. obligations under the ICCPR to make such reports;

(6) Insure that other relevant executive agencies and U.S. Government departments are aware of this and other complaints of violations of human rights treaties by the DHS and DHS components, so that the existence or non-existence of such complaints is not misrepresented to foreign governments, the public, or others.

We are particularly concerned about this last point because of statements directed to the public and foreign governments erroneously claiming that no such complaints have been made. These false statements suggest either bad-faith intent to deceive the public and foreign governments, or a grave failure of both procedures for internal sharing and external transparency of information about complaints and points of contacts for them.

For example, in “A Report Concerning Passenger Name Record Information Derived from Flights Between the U.S. and the European Union” (December 18, 2008), the DHS Chief Privacy Officer claimed that, “The Privacy Office received no reports of misuse of PNR since the last review, conducted in 2005,” despite at least three formal complaints during that time to DHS by the Identity Project (copies of which are included in the attachments to this letter) that the use of PNR data by the DHS in the “Automated Targeting System” constitutes a violation of Article 12 of the ICCPR.

The most recent of our attached complaints is of violation of the ICCPR, the TSA Civil Rights Policy Statement, and the statutory and Constitutional obligations of DHS and the TSA by provisions of the TSA "Screening Management Standard Operating Procedures" for discriminatory treatment of travelers on the basis of national origin.

With respect to this complaint, Ms. Stoltzfus of the TSA has informed us that, "We were unable to find a human rights violation in your concern as the Standard Operating Procedures referenced were no longer effective in December 2009".

This statement by Ms. Stoltzfus of the TSA is clearly erroneous and improper. There is no statute of limitations for violations of the ICCPR. Those responsible for violations of human rights treaty obligations, including both individuals and government departments and agencies, are not immune from responsibility and liability to sanctions merely because the violations are no longer ongoing at the time they are complained of.

In practice, a policy or practice of investigating or acting only on complaints of *continuing* violations of human rights treaty obligations, and only if complaints are made while the violations are ongoing, would frustrate most legitimate complaints, and grant *de facto* impunity to the perpetrators within DHS of those violations.

Most complaints of violations human rights treaty obligations by DHS, and by TSA in particular, will of necessity be made only after the fact. TSA checkpoints, where most incidents likely to lead to complaints occur, operate 24/7/365, unlike your office. In most cases it is impossible, and in almost all cases it is impractical, for the victim to file a complaint with your office while the incident and the violation are ongoing.

Even if the DHS complied with the Freedom of Information Act, obtaining copies of DHS policies and procedures would take weeks, by which time any objectionable provisions might well have been superseded or modified. In practice, most requests for such procedures, including those by the Identity Project, have either been ignored entirely or responded to only months after the time limits prescribed by FOIA.

Further frustrating the ability of would-be complainants to obtain current policies and procedures, the FOIA offices of several DHS components, including TSA, have changed their addresses without the promulgation of a valid updated FOIA notice with current addresses. And several DHS components, including TSA and CBP, have changed the addresses of the offices designated by them to receive Privacy Act requests, without promulgating new System of Records Notices (SORNs). This has rendered the current TSA and CBP SORns invalid, and makes the knowing and willful operation of each such system of records a criminal violation of the Privacy Act on the part of the responsible agency employees. Our complaints of these violations have been ignored. See, for example, our unacknowledged, unanswered, complaint to the DHS Privacy Office and DHS Inspector General of December 16, 2009, available at <http://www.papersplease.org/wp/wp-content/uploads/2010/06/pa-complaint-16dec2009.pdf >.

Only if the DHS and its component agencies, including TSA, made their policies and procedures public – as they have vigorously resisted doing – would it be possible for a complaint that policies or procedures violate human rights treaties to be based on the versions of those policies and procedures in effect at the time of the complaint.

We request that you review and correct the TSA's misinterpretation of its obligations and those of DHS with respect to complaints of completed violations of human rights treaty obligations, and act on each of our complaints of human rights treaty violations by the DHS and DHS component agencies, in accordance with your designation as the responsible DHS officer pursuant to Executive Order 13107 and in accordance with U.S. obligations pursuant to Article 40 of the ICCPR.

Please feel free to contact us if we can assist you in your investigation and action on these complaints, or in efforts to correct the problems they reveal.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

cc: Stephanie Stoltzfus
Director, Office of Traveler Specialized Screening & Outreach
Office of Civil Rights and Liberties
Transportation Security Administration
601 S. 12th Street
Arlington, VA 20598
(by e-mail to <Stephanie.Stoltzfus@dhs.gov>)

Attachments:

A. Complaint regarding violation of the ICCPR in “United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT); Enrollment of Additional Aliens in US–VISIT ”, docket number DHS-2005-0037 (August 28, 2006).

B. Complaint regarding violation of the ICCPR in “Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere ”, docket number USCBP-2006-0097 (September 25, 2006).

C. Complaint regarding violation of the ICCPR in "Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States", docket number USCBP-2005-0003 (October 12, 2006).

D. Complaint regarding violation of the ICCPR in the creation and operation of the "Automated Targeting System" (ATS), system of records DHS/CBP–006 (December 29, 2006). Note that the Identity Project has also made additional unanswered complaints that the creation and operation of the ATS constitutes a criminal violation of the Privacy Act on the part of the responsible CBP and DHS staff, as available at:

http://hasbrouck.org/IDP/IDP-ATS-comments.pdf (December 6, 2006)
http://hasbrouck.org/IDP/IDP-ATS-comments3.pdf (September 5, 2007)

E. Complaint regarding violation of the ICCPR in "Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere ", docket number USCBP-2007-0061 (August 27, 2007).

F. Complaint regarding violation of the ICCPR by the TSA in "Secure Flight Program", docket number TSA-2007-38572 (October 22, 2007).

G. Complaint regarding violation of the ICCPR in "Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program", docket number USCBP-2008-0003 (August 8, 2008).

H. Complaint regarding violation of the ICCPR (and the Privacy Act) in the creation and operation of the "Border Crossing Information" (BCI) system of records, DHS/CBP–007 (August 25, 2008).

I. Complaint regarding violation of the ICCPR by the TSA "Screening Management Standard Operating Procedures" for discriminatory treatment of travelers on the basis of national origin (December 11, 2009) and follow-up correspondence with DHS and TSA.

Before the
OFFICE OF THE SECRETARY
DEPARTMENT OF HOMELAND SECURITY
Arlington, VA 22209

United States Visitor and Immigrant Status Indicator Technology Program (''US–VISIT''); Enrollment of Additional Aliens in US–VISIT	DHS 2005–0037 **COMMENTS OF THE IDENTITY PROJECT (IDP)**

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 42605-42611 (July 27, 2006), docket number DHS 2005–0037.

The NPRM would require, as a condition of admission to or departure from the U.S., that certain categories of "aliens" (persons who are not U.S. citizens) including lawful permanent residents (LPR's) of the U.S., refugees, asylum seekers, many Canadian visitors to the U.S., and some others, submit to fingerprinting and photographing each time they cross a U.S. border or enter, exit, or transit the U.S. – even if they do so twice daily throughout their working life, as many do.

The proposed rules would require these aliens to submit to lifetime retention by the DHS – even if they later become U.S. citizens – and sharing with other agencies, of these fingerprints and photographs, as well as the details of each entry, exit, or transit, as part of their dossier in a "biographic and biometric travel history database".

The proposed rules would be inconsistent with the obligations of the United States embodied in the International Covenant on Civil and Political Rights. The proposed rules are unjustified, devoid of utility for any lawful purpose, unauthorized by statute, and contrary to the Privacy Act. The NPRM fails to include specific assessments required by the Privacy Act and the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety. If the NPRM is not withdrawn, we request that the NPRM be republished together with the additional assessments required by the Privacy Act and the Regulatory Flexibility Act, and that a new comment period be provided.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization dedicated to protecting and promoting First Amendment rights.

II. THE PROPOSED RULES ARE INCONSISTENT WITH THE U.S. OBLIGATIONS EMBODIED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

Under Article VI, Section 2 of the U.S. Constitution, "treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land."

One of these treaties is the International Covenant on Civil and Political Rights (ICCPR), <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>, which was ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782).

The ICCPR obligates the U.S. with respect to aliens as well as citizens, and contains provisions implicated by – and inconsistent with – the proposed rules. The proposed rules are inconsistent with Article 10 (respect for the inherent dignity of the human person), Article 12 (freedom of movement), and Article 21 (freedom of assembly) of the ICCPR, and must therefore be withdrawn.

A. The proposed rules would be inconsistent with the U.S. obligation to respect the inherent dignity of the human person under Article 10 of the ICCPR.

Article 10, Paragraph 1, of the ICCPR provides that, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Once a person presents themself at a port of entry or exit, they are not free to leave. Thus, during border crossing, entry, and exit inspections and processing, international travelers are "persons deprived of their liberty" within the meaning of, and subject to the protections of, this article of the ICCPR.

Unnecessary fingerprinting and photographing, especially when repeated without limitation and done in full view of others (including those who, as U.S. citizens, are not being subjected to the same requirement), is treatment inconsistent with "humanity and with respect for the inherent dignity of the human person", as those terms are used in this article of the ICCPR.

Fingerprinting and photographing are widely-recognized international stigma of criminalization of the person. On stigmatization in general, see Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, 1963); on its specific relationship to criminal identity and the degrading character of the "booking" process including photographing and fingerprinting, see John Irwin, *The Felon*

(Prentice-Hall, 1970; Univ. of California Press 1987) and *Jail: Managing the Underclass in American Society* (Univ. of California Press, 1985).

Depiction of the acts of fingerprinting (traditionally with its literal dirtying and marking of the person with ink, and in symbolic meaning the same even when the fingerprinting is inkless) and photographing (again traditionally with its flash of light revealing and calling attention to the stigma, and again carrying the same symbolism even when the photograph is taken by ambient light) is sufficient, without words or the need for any language, to communicate that the subject is marked as criminal. In art, cartoons, graffiti, political propaganda, and elsewhere, the mere existence of images of a person in "mug shot" or "Wanted!" poster format effectively communicates the cross-cultural messages, "They are a criminal", "They are a suspect", and "They deserve to be locked up".

This is the message effectively delivered by the DHS when it separates people into two groups, one of which – aliens – is systematically photographed and fingerprinted in the manner of criminals, while the other – U.S. citizens – is allowed to proceed, literally, untouched. This treatment is degrading and disrespectful to the inherent dignity of the person, and is perceived as such, both by those so stigmatized and by U.S. citizens. See e.g. Mark Morford, "Scenes From A Sad Airport: Welcome to America. Please give us the finger. Smile for the camera. Now get the hell out", *SF Gate*, January 9, 2004, <http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2004/01/09/notes010904.DTL>: "Bring us your tired, your poor, your huddled masses yearning to have their spirits snapped like chicken bones and to be made to feel as if they are all, by default, criminals and thieves."

B. The proposed rules would be inconsistent with the U.S. obligation to respect freedom of movement under Article 12 of the ICCPR.

As applied to any person subject to the proposed rules and wishing to leave the USA, the proposed rules are inconsistent with Sections 2 and 3 of Article 12 of the ICCPR, which provide:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

As used in Section 3 of Article 12 of the ICCPR, the phrase "any restrictions" does not refer solely to outright prohibitions on departure, but includes all types of laws and administrative regulations that burden the exercise of the right of departure:

> "The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3." U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12, issued under Article 40(4) of the ICCPR*, Paragraph 10 (CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999), available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument>

To be "necessary", as is required by Section 3 of Article 12, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. "Necessity" requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of "necessity" is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

> "Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected."

Since there is no such showing of necessity in the NPRM, and in fact the DHS has not even attempted to make any such showing or asserted such a claim of necessity, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

C. The proposed rules would be inconsistent with the U.S. obligation to respect freedom of assembly under Article 21 of the ICCPR.

The proposed rules are inconsistent with Article 21 of the ICCPR, which provides that:

> "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

"To assemble" means not merely or primarily to *be* together in an assembly. "To assemble" is to gather or come together, that is, to *move* into an assembly. Movement of people – in other words, travel – is an essential element of the act of assembly. "To travel" is, in most cases, "to assemble".

The right to assemble in one's own home or premises, or in a public building, would be empty if the government could bar the door to prevent people from walking in. The right to assemble in a public commons would be empty if the government could encircle the area of the planned assembly with barricades to prevent entry, or create a checkpoint to prevent access by travel along a public right of way.

In the same way, and for the same reasons, the right to assemble internationally would be meaningless if governments could prevent people from traveling across borders.

The same analysis of the phrase "no restrictions", and of the DHS's failure to make a showing of necessity, applies with respect to this Article 21 as with respect to Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

D. U.S. obligations embodied in the ICCPR are applicable to the rights of aliens.

Justice Murphy, concurring in *Bridges v. Wixon*, 326 U.S. 135 (1945), enunciated the Constitutional protections afforded LPR's, including those implicated by international travel:

> "[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority. Indeed, this Court has previously and expressly recognized that Harry Bridges, the alien, possesses the right to free speech and free

press and that the Constitution will defend him in the exercise of that right. *Bridges v. California*, 314 U.S. 252 , 62 S.Ct. 190."

The U.S. government has specifically represented in its most recent reports to the U.N. Human Rights Committee that LPR's are protected by the First Amendment, the Constitution, and international treaties such as the ICCPR to which the U.S. is a party:

> "42. Under United States immigration law, an alien is 'any person not a citizen or national of the United States.' 8 U.S.C. § 1101(a)(3). Aliens who are admitted and legally residing in the United States, even though not U.S. citizens, generally enjoy the constitutional and Covenant [ICCPR] rights and protections of citizens, including ... freedom from ... degrading treatment ... ; freedom of movement; ...recognition as a person under the law; freedom from arbitrary interference with privacy ... ; freedom of assembly; and freedom of association." (*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, 28 November 2005, CCPR/C/USA/3, available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf>)

In the same reports, this analysis has been specifically applied by the U.S. government to freedom of movement and travel by LPR's:

> "203. As reported in the Initial Report, in the United States, the right to travel - both domestically and internationally - is constitutionally protected. The U.S. Supreme Court has held that it is 'a part of the "liberty" of which a citizen cannot be deprived without due process of law under the Fifth Amendment'. See *Zemel v. Rusk*, 381 U.S. 1 (1965). As a consequence, governmental actions affecting travel are subject to the mechanisms for judicial review of constitutional questions described elsewhere in this report. Moreover, the United States Supreme Court has emphasized that it "will construe narrowly all delegated powers that curtail or dilute citizens' ability to travel'. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958).
>
> 204. Alien travel outside the United States. Non-citizen residents are generally free to travel outside the United States.... A refugee travel document allows people who are refugees or asylees to return to the United States after travel abroad."

(*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, 28 November 2005, CCPR/C/USA/3, referring to the *Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights*, Article 12, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>).

This is consistent with *General Comment No. 15 of the U.N. Human Rights Committee on the Rights of Aliens under the International Covenant on Civil and Political Rights* (1986), available at <http://www.hrw.org/campaigns/migrants/docs/comment86.htm>:

> "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens....
>
> [O]nce aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.... If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens ... have the right to liberty of movement and free choice of residence; they shall be free to leave the country.
>
> Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3."

Refugees and asylum seekers are especially likely to have fears of possible persecution, and in many cases post-traumatic stress from past persecution from which they have fled, such that they will be chilled by the imposition of conditions or restrictions on the exercise of their rights. Regulations potentially exerting a chilling effect on the exercise of protected rights should therefore be subjected to particularly careful review where, as here, they will be applied against refugees and asylum seekers.

As has been noted, these standards of justification are not met in the NPRM, and the proposed regulations must therefore be withdrawn as inconsistent with U.S. obligations to the rights of aliens – including LPR's, refugees, and asylum seekers – as embodied in the ICCPR.

III. THE PROPOSED RULES ARE NOT JUSTIFIED.

According to the NPRM, the fingerprints and photographs recorded for LPR's on each entry to, exit from, or transit via the U.S. have no additional informational content beyond what is already available to the DHS from permanent residency (green card) or other status applications: "DHS is not proposing that LPR's submit any additional information beyond that which is currently required."

If the purpose of the repetitive fingerprinting and photographing is not, according to the NPRM itself, the obtaining by the DHS of information, what purpose does retaining additional fingerprint impressions or photographs serve (other than, as discussed above, humiliation and stigmatization)?

According to the NPRM, fingerprints and photographs will be used will be used "to verify that the person at the port of entry is the same person who received the visa". 71 Fed. Reg. 42606.

The purported justification for the proposed rules in the NPRM is concerned exclusively with this *verification* function:

> "DHS has determined that expanding US–VISIT to additional aliens will improve public safety, national security, and the integrity of the immigration process. Establishing and verifying the identity of an alien and whether that alien is admissible to the United States based on all relevant information is critical to the security of the United States and the enforcement of the United States immigration laws." (71 Fed. Reg. 42606)

But it is possible to verify whether the appearance of the person in front of the inspector matches that of the already stored photograph as accurately, and probably more accurately, by direct visual inspection than by recording another photograph to compare with the original. And nothing about this verification function – the sole declared purpose of the proposed requirement – requires, or is any material way furthered by, retaining additional photographs or fingerprints, particularly after repeated entries and exits when the DHS may already have hundreds on file for the same person.

Although it isn't mentioned in the NPRM, the requirements of the US-VISIT schema, to be applied to additional aliens by the proposed rules, would require these aliens to submit to 100 year (i.e. lifetime) retention by the DHS – even if the subject alien later become a U.S. citizen – of these fingerprints and photographs, as well as the details of each entry, exit, or transit of U.S. territory.

Each of the US-VISIT Privacy Impact Assessments and updates describes US-VISIT as including a "biographic and biometric travel history database" (see most recently *Privacy Impact Assessment Update for the US-VISIT Program*, July 1, 2005, <www.dhs.gov/interweb/assetlibrary/privacy_pia_usvisitupd1.pdf>) to be included in the Arrival Departure Information System (ADIS). The most recent System Of Records Notice (SORN) for the ADIS indicates that, "Records will be retained for 100 years." (DHS/ICE-CBP-001, 68 Fed. Reg. 69412-69414, December 12, 2003).

The NPRM does not purport to offer any justification for this repetitive recording of new photographs and fingerprints on each entry, exit, and transit, or for 100 year – or any other duration of – retention of each new impression of a photograph and fingerprint of the same person.

Recording and retention is independent of, severable from, and not required for, comparison or verification. Recording and retention of new photographs and fingerprints on each entry must be independently justified, but has not been, in this or any other rulemaking.

Recording and retention are especially significant in light of DHS plans to share this data with Federal, state, and local law enforcement agencies, as described this month by the acting director of the US-VISIT program:

> "The U.S. Department of Homeland Security plans to unveil an information-sharing program next month to give local law enforcement access to federal immigration data.
>
> Robert Mocny, acting director of the U.S. Visitor and Immigrant Status Indicator Technology program, said Homeland Security and the FBI are working to electronically combine their records on criminal and immigration offenders.
>
> 'Come September, we will be announcing the first initiative of the interoperability program where more and more of state and local law enforcement agencies will have more and more access to (immigration) information,' Mocny said on a panel discussing immigration issues at the annual meeting of the National Conference of State Legislatures last week....
>
> 'What we hope this program will do is provide that one-stop shop, where you'll see that person's criminal and immigration history,' he said."

(Erik Schelzig, "Homeland Security to share immigration data", Associated Press, August 19, 2006, <http://www.newsday.com/news/local/wire/newyork/ny-bc-ny--bordersecurity-st0819aug19,0,2345695.story?coll=ny-region-apnewyork>

(Acting Director Mocny's statements also exemplify the unjustified equation of by the DHS of the travel history of an LPR or other person's lawful movements with that person's criminal history, if any. Travel is not a crime. Travel records are not, and should not be treated as, criminal records.)

Since the DHS has submitted that it will not obtain any new information from the aspects of the proposed changes in regulations requiring repetitive recording of new photographs and fingerprints on each entry, exit, or transit of the U.S., or their retention for 100 years, and has claimed no prospective benefit from these portions of the proposed regulations, they should be withdrawn.

The DHS asserts in the NPRM that "Since US–VISIT biometric processing was initiated on January 5, 2004, the program has successfully identified a number of aliens with criminal or immigration violations that would not otherwise have been known. Between January 5, 2004, and May 25, 2006, DHS took adverse action against more than 1160 individuals based on information obtained through the US–VISIT biometric screening process." (71 Fed. Reg. 42606) But since there is no indication as to how many of these "adverse actions" proved to be justified, and how many were infringements of liberty on the basis of US-VISIT "false positives", or whether the DHS even has made any effort or has any means to determine this, it's impossible to tell whether this is evidence for or against the program.

Whether true positives or false positives, these events related to previous categories of US-VISIT enrollees. The DHS claims in the NPRM that, "Adding additional aliens to the US-VISIT program will likely result in DHS identifying additional aliens who are inadmissible or who otherwise present security and criminal threats." (71 Fed. Reg. 42606) This claim is entirely conclusionary, unsupported by any evidence or argumentation in the NPRM, and unlikely to be correct.

Since US-VISIT is, in significant part, a suspicion-generation system, it is indeed likely that it will result in the identification of suspects. But the more significant questions, neither asked nor answered in the NPRM, are (1) what proportion of those suspects will be justifiably deserving of suspicion and "adverse action" and what proportion will be false positives, and (2) how the costs of those

unwarranted adverse actions against false positives compare with the benefits, if any, from those against true positives.

LPR's are the aliens who already have been most carefully vetted, and all of them have received individualized scrutiny and have been individually determined, in advance, to be qualified for entry. LPR's are therefore the aliens least likely in fact to be inadmissible or deserving of adverse action, and those for whom the new US-VISIT requirements would be of the least incremental value, if any, in identification. The lower the percentage of true positives, the higher the likely ratio of false positives to true positives, and the lower the likelihood of net benefit – if, as it has not yet even begun to do, the DHS were to attempt a cost-benefit analysis of the proposed changes in regulations.

Since the proposed rules changes are unjustified, they should be withdrawn. If they are not withdrawn entirely, the portions requiring repetitive fingerprinting and photographing of the same persons, providing for retention of multiple photograph and fingerprint impressions for the same person, and requiring retention of photographs and fingerprints for 100 years should be withdrawn.

IV. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO INCLUDE STATUTORILY REQUIRED IMPACT ASSESSMENTS.

A. Privacy Act

For purposes of the Privacy Act of 1974, 5 U.S.C. § 552a(a)(2), "the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence."

This NPRM proposes, for the first time, to include data on "alien[s] lawfully admitted for permanent residence" in US-VISIT records systems. With this NPRM, the DHS crosses the threshold of the Privacy Act with the US-VISIT program, and is required to conduct and publish for comment a Privacy Impact Assessment (PIA) and a new or revised System of Records Notice (SORN) to disclose and evaluate the impact of the proposed new regulations on persons protected by the Privacy Act.

The previous phases of implementation of US-VISIT did not require the collection of personal information from persons protected by the Privacy Act or concerning the exercise by persons protected by the Privacy Act of their First Amendment rights, and US-VISIT data was not to be used to decide whether to permit persons protected by the Privacy Act to exercise their rights to travel, assembly, and

movement. Consequently, the provisions of the Privacy Act applicable to the collection of data "when the information may be result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs" (5 U.S.C. § 552a(e)(2)) and to records "describing how any individual exercises rights guaranteed by the First Amendment" (5 U.S.C. § 552a(e)(7)) were not addressed by any of the previous Privacy Impact Assessments (PIA's) or System Of Records Notices (SORN's) for the present US-VISIT rules.

Clearly entry to, exit from, and transit of the U.S. and processing by the DHS at borders and ports of entry are a "right, benefit, or privilege under a Federal program". And clearly data required by the proposed rule describes how individual travelers exercise the right to assemble, and other rights guaranteed by the First Amendment, when they cross U.S. borders to do so: when they assemble, where they assemble, by what means of transport they assemble, with whom they assemble, and so forth.

For these reasons, the existing SORN's and PIA's do not cover the expansion of US-VISIT requirements to lawful permanent resident aliens under the proposed rules. Both a new SORN (or SORN's, if records concerning LPR's will be maintained in more than one system of records) and a new PIA must be completed and published for comment before the proposed new rules are finalized.

B. Regulatory Flexibility Act

The DHS claims in the NPRM that "DHS has considered the impact of this rule on small entities and has determined that this will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 606(6)." 71 Fed. Reg. at 42608.

This claim is both unsupported and plainly in error. Nothing in the applicable statutory definition of "small entities" excludes aliens, or excludes self-employed independent contractors or sole proprietors from its purview. It is self-evident to any international traveler, or to anyone who observes the flow of cross-border traffic, that lawful permanent residents of the U.S. and other categories of aliens subject to the proposed regulations include substantial numbers of self-employed business travelers and sole proprietors, as well as employees of other "small entities" as defined in the applicable statutes.

Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small businesses among international travelers and specifically among those categories of aliens subject to the proposed rule changes, as well as the impact on them of having to choose either to waive their First Amendment right to assemble or to waive their Fourth Amendment right to be free of suspicionless warrantless searches and seizures of photographs and fingerprints each time they cross a U.S. border or pass through a port of entry to or from the U.S. But the number of such small business entities impacted is clearly "substantial", and the impact on them "significant", within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small entities among travelers and their employers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including the self-employed would not only be impacted, but disproportionately and negatively impacted by the proposed rule. Larger businesses would be more likely to have alternate staff able to travel, or already on site or at least on the other side of the U.S. border, and able to fulfill a contract, if one employee was unable or unwilling to travel internationally under the new conditions of the proposed regulations. The assessment under the Regulatory Flexibility Act should include, inter alia, an assessment of the degree to which the proposed regulations would disadvantage small entities in bidding on consulting, service, maintenance, or other contracts that might require international travel.

V. CONCLUSION AND RECOMMENDATIONS

The proposed regulations implicate internationally recognized human rights to dignified and humane treatment and to travel, assemble, and move about the world, including to and from the USA. The proposed regulations are inconsistent with U.S. obligations under the ICCPR, to which the U.S. is a party. The proposed rules are unjustified, and the NPRM fails to include required assessments. The proposed rules should be withdrawn in its entirety. If the NPRM is not withdrawn, the additional assessments required by the Privacy Act and the Regulatory Flexibility Act should be completed and published , and a new comment period should be provided, before any new rules are finalized.

Respectfully submitted,

The Identity Project (IDP)

http://www.PapersPlease.org

A project of the First Amendment Project

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/s/

Edward Hasbrouck

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August 28, 2006

Before the

BUREAU OF CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY

and the

BUREAU OF CONSULAR AFFAIRS
DEPARTMENT OF STATE

Washington, DC 20229

Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere	USCBP-2006-0097

COMMENTS OF
THE IDENTITY PROJECT (IDP)

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

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The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 46155-46174 (August 11, 2006), docket number USCBP-2006-0097-0001, and the associated Regulatory Assessment, "The Western Hemisphere Travel Initiative Implemented in the Air and Sea Environments", docket number USCBP-2006-0097-0002.

Under this NPRM, the Departments of State (Bureau of Consular Affairs) and Homeland Security (Bureau of Customs and Border Protection, CBP) propose two major changes to the requirements for people wishing to enter or leave the U.S., effective January 8, 2007, as follows:

First, the NPRM would rescind the current provisions of 22 C.F.R. § 53.2 (b), "A U.S. citizen is not required to bear a valid passport to enter or depart the United States: ... (b) When traveling between the United States and any country, territory, or island adjacent thereto in North, South or Central America excluding Cuba". 22 C.F.R. § 53.1(b) is an exception to the general requirement of 22 C.F.R. § 53.1(a), which would be retained, that "It is unlawful for a citizen of the United States ... to enter or depart, or attempt to enter or depart, the United States, without a valid U.S. passport."

Second, the NPRM would replace the current provisions in 8 C.F.R. § 212.1(a)(1) and (a)(2), repeated at 21 C.F.R. § 41.2 (a) and (b), "A passport is not required except after a visit outside the Western Hemisphere" for citizens and nationals of Canada and the British Overseas Territory of Bermuda with a new requirement without any such exception. The new rules would require that, "a passport is ... required for Canadian citizens [and citizens of Bermuda] arriving in the United States by aircraft or by commercial sea vessels".

These changes, imposing new requirements for passports for air travel by U.S. and Canadian citizens within the Western Hemisphere and the North American Free Trade Agreement (NAFTA) area, would be contrary to U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights (ICCPR), the Charter of the Organization of American States, NAFTA, and the NAFTA Implementation Act.

The regulatory Regulatory Assessment associated with this NPRM fails to consider significant costs, grossly underestimates those costs it does quantify, and fails to quantify the largest costs that the proposed rules would impose on travelers, travel-related businesses, and other businesses (including, and with disproportionate negative effect, small businesses) whose work involves, or might involve, cross-

border travel. Both the NPRM and the Regulatory Assessment fail to include the small business impact assessment required by the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety. If the NPRM is not withdrawn, we request that the NPRM be republished together with a revised Regulatory Assessment, taking into consideration the costs identified in these comments, and the additional analysis required by the Regulatory Flexibility Act, and that a new comment period be provided. Further, if the proposed rules are adopted, their adoption should be reported to the United Nations Human Rights Committee, in accordance with the requirements of the ICCPR.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. THE PROPOSED RULES ARE CONTRARY TO U.S. OBLIGATIONS UNDER INTERNATIONAL TREATIES AND AGREEMENTS AND U.S. STATUTES.

A. The proposed rules are inconsistent with U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR).

Under Article VI, Section 2 of the U.S. Constitution, "treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land." Executive Order 13107 on Implementation of Human Rights Treaties, 61 Fed. Reg. 68991, issued by the President on December 10, 1998, provides in Section 1(a) that, "It shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which is a party, including the ICCPR", and requires in Section 2(a) that, "All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully." The Departments which promulgated this NPRM are required to

consider in this rulemaking, and to respect and conduct themselves in accordance with, U.S. obligations under international human rights law, specifically including those in the ICCPR – but have not done so.

Article 12, section 4 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782), provides that, "No one shall be arbitrarily deprived of the right to enter his own country."

The meaning of this section is interpreted in Paragraph 21 of U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, issued under Article 40(4) of the ICCPR, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument>:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.

As applied to U.S. citizens wishing to enter the U.S. by air or sea, the requirement for a U.S. passport in the proposed regulations fails to satisfy this standard, and is contrary to U.S. obligations under the ICCPR.

As applied to citizens of the U.S., Canada, or Bermuda (those for whom the U.S. exit requirements would be altered by the proposed rules) wishing to leave the USA by air or sea, the proposed rules are inconsistent with Sections 2 and 3 of Article 12 of the ICCPR, which provide:

> 2. Everyone shall be free to leave any country, including his own.
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

To be "necessary", as is required by Section 3 of Article 12, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. "Necessity" requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of "necessity" is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

> Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them.

> Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Since there is no such showing of "necessity" in the NPRM, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

Travel is a fundamental and internationally recognized human right, and a vital prerequisite for the exercise of other fundamental rights. "Liberty of movement is an indispensable condition for the free development of a person." United Nations Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*.

The Department of State has reiterated in its most recent report to the United Nations Human Rights Committee that, "As reported in the Initial Report, in the United States, the right to travel – both domestically and internationally – is constitutionally protected." (*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, Paragraph 203, 28 November 2005, CCPR/C/USA/3, available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf>, referring to *Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights*, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>).

In addition, the proposed rules are inconsistent with Article 21 of the ICCPR, which provides:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Face-to-face assembly between people from the U.S. and Canada, Mexico, and/or Bermuda is impossible without the ability of such people to cross the U.S. border, and in many cases (for example, to and from Bermuda) there is no alternative to air or sea travel. The NPRM would thus condition the exercise of the internationally recognized human right of assembly on the possession of a passport. The same analysis of the CBP's failure to make or support a showing of necessity applies with respect to this Article 21 as with respect to Sections 2 and 3 of Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

Finally, the ICCPR embodies reporting obligations, as interpreted by Paragraph 10 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement*:

> The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3.

Since the passport requirements in the proposed rules would be, for the U.S., one of the "legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners" within the meaning of this paragraph and of the ICCPR, they must be included in the reports by the U.S. pursuant to Article 40 of the ICCPR. Failure to include the rules proposed in this NPRM in those reports would be inconsistent with the U.S. obligations embodied in the ICCPR.

B. The proposed rules are inconsistent with U.S. obligations under the Charter of the Organization of American States.

Article 17 of the Charter of the Organization of American States (OAS), ratified by the U.S. June 15, 1951, available at <http://www.oas.org/juridico/English/charter.html>, provides that, "the State shall respect the rights of the individual". The customary international law of human rights, which defines the rights of the individual protected by this Article, includes the Universal Declaration of Human Rights, adopted with the affirmative vote of the U.S. as United Nations General Assembly Resolution G217 A (III) of 10 December 1948, available at <http://www.un.org/Overview/rights.html>.

Article 13 (2) of the Universal Declaration of Human Rights provides, without exception, that, "Everyone has the right to leave any country, including his own, and to return to his country."

The prohibition in the NPRM on departure from the U.S. by air or sea by citizens of the U.S., Canada, and Bermuda who do not have valid passports of those countries, and the prohibition on entry to the U.S. by air or sea by U.S. citizens who do not have valid U.S. passports, would, on their face, violate Article 13 (2) of the Universal Declaration of Human Rights. Since this is among "the rights of the individual" protected by Article 17 of the Charter of the OAS, these provisions of the proposed rules would be contrary to U.S. obligations under that Article of the Charter of the OAS.

C. The proposed rules are inconsistent with U.S. obligations under the North American Free Trade Agreement (NAFTA) and the NAFTA Implementation Act.

The North American Free Trade Agreement (NAFTA) between the U.S., Mexico, and Canada was signed by the U.S. on December 17, 1992, and was approved by Congress in Section 101 of the North American Free Trade Agreement Implementation Act, Public Law 103-182, available at <http://www.cbp.gov/nafta/nafta004.htm>.

NAFTA Chapter 12, "Cross-Border Trade in Services", Article 1202, available at <http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=162#A1202>, provides as follows:

> Article 1202: National Treatment
>
> 1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.
>
> 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

The proposed rules in the NPRM would impact cross-border trade in services by requiring Canadian- and Mexican-citizen service providers to have passports for on-site visits, meetings, negotiations, or provision of any type of on-site services in the territory of the U.S., while U.S.-citizen service providers would not be required to have passports to provide such on-site services within the U.S. This requirement would be, on its face, contrary to the requirements of Article 1202 of NAFTA, as approved by the NAFTA Implementation Act.

The proposed rules should be withdrawn as contrary to NAFTA. If they are not withdrawn, the Regulatory Assessment should be revised to address the costs of the sanctions that could be imposed on the U.S. for imposing such a passport requirement in violation of NAFTA.

III. THE REGULATORY ASSESSMENT GROSSLY UNDERESTIMATES THE COST OF COMPLIANCE WITH THE PROPOSED RULES.

The proposed rules would impose new direct, incidental, and consequential costs, not proposed to be reimbursed by the government ("unfunded mandates"), on travelers, travel-related businesses, and other businesses (including in particular, and with disproportionate negative effect, small businesses, especially sole proprietors and self-employed professionals, freelancers, and contractors in all industries and categories of services) whose work involves, or might involve, cross-border travel.

The Regulatory Assessment fails to consider significant direct and indirect costs of compliance with the proposed rules, grossly underestimates those costs it does quantify, and fails to quantify the largest costs that the proposed rules would impose.

A. The Regulatory Assessment grossly underestimates the cost of obtaining a passport.

The Regulatory Assessment omits significant *costs* of obtaining a passport, particularly for the first time, and underestimates how much *time* it takes an applicant to obtain a passport.

The typical process of obtaining a new passport, and our estimates of the costs, are as follows:

1. Research passport application procedures and requirements. (30 minutes)
2. Search home files for prerequisite documentary evidence of citizenship such as a birth certificate or expired passport. (30 minutes if it is kept at home; 1 hour if it is kept in another secure location such as safe deposit box, which is typically accessible only during bankers' hours and requires time off from work)
3. If you don't already have a certified copy of a birth certificate, expired passport, or other acceptable evidence of citizenship (estimated 50% of applicants), research procedures for obtaining a birth certificate or other acceptable documents. (60 minutes, more in some cases if records are difficult to locate)
4. If the vital statistics office doesn't accept personal checks or credit cards (estimated 50% of cases) go to a bank or Post Office and obtain a bank check or money order for fees. (1 hour; average $5 money order or bank fee)
5. Obtain and fill out request forms for a birth certificate. (45 minutes; average $20 fee for certified copy of birth certificate)
6. Find and go to a notary if the request for a birth certificate must be notarized. (estimated 75% of cases; 1 hour and average $20 notary fee)
7. Mail check/money order and application for a birth certificate. (30 minutes; Priority Mail $8.10 round trip for 3-4 week turnaround, Express Mail $28.80 round trip for 2 week turnaround from a typical vital records office)
8. Have passport photos taken. (30 minutes, average $15 cost)
9. Obtain and fill out passport application forms. (45 minutes)

10. Go to a Post Office or other application location and mail application, supporting documents, photos, and check for fees (1 hour, Express Mail $28.80 round trip)

The total time required is, according to this estimate, an average of 3.5-7 hours per person, plus costs of $43.80-$118.20 in addition to the Department of State fees for issuance of the passport.

Using the value of $28.60/hour in the regulatory assessment, we estimate that the average total cost of obtaining a first-time adult passport is:

$97 Department of State fee for standard service + (5 hours x $28.60/hour) + $81 other costs = $321

This optimistic scenario is more than twice the "best case" estimate of $149 for six-week service in the Regulatory Assessment, and more than 65% more than the "worst case" estimate of $194.

The Paperwork Reduction Act notice in the NPRM estimates the average burden for the respondent of completing passport application forms at 1 hour 25 minutes per person. We believe that this is a severe underestimate, and that the average total time burden is three to four times this amount. Therefore, the Regulatory Assessment should be adjusted to reflect this more realistic estimate of time and these additional costs we have identified.

B. The Regulatory Assessment fails to consider the additional direct and indirect costs of expedited passports.

The Regulatory Assessment considers only two categories of passport processing: (1) passports obtained in six weeks or more by standard mail service, and (2) passports needed in less than six weeks and issued by expedited two-week mail service for an additional fee. But there are actually four categories of urgency of need for passports. The Regulatory Assessment ignores, and fails to consider any of the additional direct or indirect costs of, (3) passports that are needed in less than two weeks and thus must be obtained in person at Passport Agency offices, or (4) passports that are needed in less than 1-4 days (depending on where the applicant lives relative to a Passport Agency, and whether the passport is needed on a weekend or weekday) and thus that cannot be obtained at all in time for the desired trip.

The Regulatory Assessment assumes that 20% of passports would be needed in less than six weeks, and thus would require an additional Department of State fee for expedited service. However, the Regulatory Assessment fails to consider the percentage of passports that would be needed in less than two weeks, and thus could only be obtained quickly enough by the applicant making an appointment, traveling to, and appearing in person at one of the 15 regional Passport Agency offices.

We estimate that half of the passports needed in less than six weeks are needed much sooner, in less than two weeks, and thus would need to be issued in person at Passport Agency offices.

We further estimate that half of those applicants would be able to make a same-trip by car and/or public transport to a Passport Agency office. Their costs, in addition to those listed above, would typically be a full day's lost income (8 hours x $28.60 = $228.80) plus transportation costs (transit fares and/or mileage, tolls, and downtown big-city parking) of perhaps $20-200 depending on location. Assuming an average of $100 in transportation costs, the total incremental cost for these applicants relatively near Passport Agencies would be $328.80 more than for two-week expedited service by mail.

The other half the applicants live further from any Passport Agency. Depending on their location, and the time of their appointment at the Passport Agency, some would need to spend one night in the city of the nearest Passport Agency, and some two nights, plus a full day's travel in each direction.

Government estimates of per diem costs of lodging, meals, and incidentals in the expensive big cities where the Passport Agencies are located range from about $150-300. Assuming an average of $200 per night, assuming that half of these applicants would only need to stay one night in the city (and lose two full days income) and the other half would have to stay two nights (and lose three days income), and assuming that their transportation costs would average $500, their incremental costs would average: (20 hours x $28.60) + (1.5 x $200) +$500 = $1372 more than for two-week expedited service by mail.

With half the rush applicants making an average $328 same-day trip into the city to a Passport Agency, and half making an average $1372 overnight trip, the overall average would be $850 in additional costs per person for less than two-week service, for this 10% of all newly required passports.

A smaller percentage of passport applicants would have to fly to the nearest Passport Agency (with less than 14 days, perhaps less than 7 days, advance purchase, and thus at higher than average fares). By far the greatest burden would be placed on residents of Alaska, which has a long border with Canada and no Passport Agency. All Alaskan residents needing to fly to Canada on short notice would first have to fly at least as far as Seattle for a day to get passports. At a minimum, if the proposed rules are adopted, a new Passport Agency should be opened in Alaska. But that will only slightly mitigate the disproportionate burden of the proposed rules on Alaskans, given the distances and the costs of airfare from points throughout the state, including those near the Canadian border, to Anchorage or whatever single location in Alaska might be chosen for a Passport Agency.

Some percentage of passports would be needed too quickly to be obtained in person at a Passport Agency. Getting a rush passport at a Passport Agency is, at best, an all-day affair, and is possible only on a weekday. Even if you live in a city with a Passport Agency, if you find out on Friday afternoon that you need to take a trip that will require a passport, you probably can't have your passport in hand until Monday afternoon, three days later, at the earliest. If you live far from any Passport Agency, and/or you suddenly need to travel around a holiday, the time to obtain a passport could stretch to four days.

In some additional percentage of cases, would-be travelers would be unable to obtain a passport in time for a desired trip, even on a weekday and even if they live near a Passport Agency, because they don't have, and could not obtain quickly enough, the prerequisite documents (such as a certified copy of a birth certificate) needed to obtain a passport. Many documents that would be sufficient, particularly in an emergency, for travel to and from Canada and/or Mexico, would not be sufficient to obtain a passport.

Turnaround time for obtaining documents by mail from a vital records office, even by Express Mail, can be two weeks or more. So a substantial percentage of trips currently taken on less than two weeks notice would have to be cancelled because of the impossibility of obtaining a passport in time.

What types of international trips are taken on such short notice? Last-minute international trips are rarely pure pleasure jaunts. Usually they are either trips to visit friends and relatives ("VFR" travel), typically because of family or personal emergencies, or unexpected urgent business trips.

What they have in common is that they are important trips, and that the costs of not taking them – emotional and/or economic – are typically high. Some of these costs are hard to quantify: How much is it worth to see a dying relative for a last time? Not being able to take a business trip, or having to postpone it by several days, may rule out some business opportunities entirely, as discussed further below in relation to the effect of the proposed rules on small business entities. But for present purposes, we estimate the average opportunity cost and other damages to the traveler of a trip that would have been taken on such short notice that there isn't time to get a passport (less than 1-4 days) as $2,000.

Similar costs for each of these four categories of urgency should be calculated for rush passports for would-be inbound travelers to the U.S. from Canada, Mexico, and Bermuda, and the Regulatory Assessment should be revised accordingly, both for inbound and outbound travel.

In addition to revising the estimates of direct costs in the Regulatory Assessment, the calculations of indirect impacts in reduced travel both from and to the U.S. should be revised, using the

estimated travel demand elasticity curves in the Regulatory Assessment and these revised and substantially higher costs for each of the categories of urgency of passport issuance.

C. The Regulatory Assessment grossly underestimates the number of people who would need passports for possible cross-border air travel within the NAFTA area.

The Regulatory Assessment erroneously equates the number of passports that would be needed with the number of people who actually travel by air and don't currently have passports. But the need for a passport is a function of the need for *preparedness and availability* for travel, not just of the need for, or actual frequency of, travel itself. A passport would be needed not merely in order to travel by air between the U.S., Canada, and Mexico, but in order to be *able and available to travel by air on short notice*, should travel be required. We estimate that at least five times as many people would need to obtain passports if the proposed rules are adopted than actually take trips that would require passports.

Many passports are never used, but are needed: people obtain them in order to be able to travel whenever it might be necessary. Some people obtain passports to be able to take international pleasure trips, but never take such a trip. Much larger numbers obtain passports in order to be prepared for possible short-notice international business travel, or possible short-notice travel to attend to family or personal matters across the border. They may need to have these passports, as an employment condition or business necessity as a sole proprietor or self-employed person, even if they never use them.

The proposed rules in the NPRM would extend this pattern – already evident with intercontinental travel – to travel within the NAFTA area between the U.S., Mexico, and Canada.

Under the proposed rules, many people who normally travel across the U.S.-Canada and/or U.S.-Mexico border by land would also need passports, in case they ever need to travel by air on shorter notice, when business, family, or personal needs don't allow time for land travel. So the appropriate question is not how many people would need passports to travel, but how many people would need passports to be *able* to travel, particularly by air at short notice.

For example, if a U.S. firm supplies manufacturing equipment to a customer who uses it in a facility in Mexico, there may be ten or more employees each of whom has unique expertise with respect to some aspect of the equipment. In the event of a failure or malfunction involving that component, any one of those ten employees might need to make a site visit, on short notice (failure of the equipment might shut down production at the customer's site) to diagnose and repair it. There might never be such

a failure, and none of them might ever be required to make such a trip. Or a single component might fail, and the one employee with knowledge of that particular component might have to make a field service trip. But in order to offer the customer a contract for on-site service within 72 hours, should it be needed, the U.S. firm would have to obtain passports for all ten of those employees.

Similarly, a self-employed freelancer would need to have a passport and be available for travel to Canada or Mexico in order to offer cross-border services and bid on work involving cross-border clients or that might require cross-border travel, even if they don't actually obtain any such cross-border contracts, or those contracts don't turn out to require cross-border travel.

Moreover, a person who normally visits their relatives in Mexico by bus, or in Canada by car, may need to get a passport in order to be able to get to their family more quickly by air in the event of a medical or other emergency. Only a fraction of such people may ever have to make such a trip, but their need for a passport for preparedness and peace of mind is real and substantial. People obtaining passports in preparation for possible air travel in the event of a personal or family emergency – including a substantial percentage of all those in the U.S. with relatives in Mexico or Canada and who don't already have U.S. passports – might be the one of the two largest categories of people (along with Canadian tourists and shoppers) required to obtain passports as a result of the proposed rules.

Again, we estimate that at least five times as many potential VFR and business travelers need to be prepared for possible cross-border U.S.-Canada and/or U.S.-Mexico travel by air on short notice as actually take such trips, and would need to obtain passports if the proposed rules are adopted. The cost estimates in the Regulatory Assessment for new passports needed by VFR and business travelers should be increased by a factor of at least five. Further investigation would be needed to determine if the actual multiple would be still greater.

D. The Regulatory Assessment underestimates the numbers of travelers who would need passports for travel between the U.S. and countries outside the NAFTA area.

The Regulatory Assessment erroneously assumes that because "Most countries in the Western Hemisphere require a valid passport for entry; thus, travelers to these countries already carry a passport and will not be affected by the new requirements for entry into the United States." There are at least three errors in this assumption, and the conclusion drawn from it in the Regulatory Assessment:

First, the fact that travelers to and/or from those countries are required by their governments to have *a passport* (if they enter or leave as U.S. citizens) does not mean that they are required to have *a U.S. passport*. A substantial percentage of travelers between the U.S. and many countries in the Western Hemisphere are dual or multiple citizens, and/or were born outside the U.S.

For example, a dual citizen of the U.S. and Brazil may, and probably does, enter and leave Brazil using a Brazilian passport, to avoid the cost and hassle of visa and entry requirements to for those using U.S. passports, which are reciprocal with those imposed on those using Brazilian passports to enter the U.S. For the same reasons, they probably enter and leave the U.S. as a U.S. citizen, not a Brazilian citizen, using any evidence of U.S. citizenship (such as a certificate of birth in the U.S. or to a U.S. parent) acceptable by the U.S. for travel within the Western Hemisphere. Currently, therefore, they can travel back and forth freely between the U.S. and Brazil, either directly or via other Western Hemisphere countries, without having a U.S. passport. That would be changed by the proposed rules.

The Regulatory Assessment fails to assess the number of dual and multiple citizens who would be required by the proposed rules to get new U.S. passports for Western Hemisphere travel.

Second, other countries' laws requiring passports, like those of the U.S., have a variety of exceptions for categories of travelers and circumstances of travel in which passports are not required. The Regulatory Assessment fails to assess how many travelers between the U.S. and any of these Western Hemisphere countries currently qualify for these exceptions, and travel without passports.

Third, a child born abroad to a U.S. parent, or adopted abroad by a U.S. parent, is entitled to U.S. citizenship. But since they never "entered" the country of their birth by crossing a border, there is no requirement for them to have had a passport from any country in order to be born there. They may or may not need a passport from the country of their birth, depending on the laws of that country, in order to leave that country. But they don't need a U.S. passport to leave the country of their birth, even if that country would require a U.S. passport for them to enter as a U.S. citizen. Nor do they currently need a U.S. passport to enter the U.S. from any country in the Western Hemisphere. That would be changed by the proposed rules: U.S. citizens born or adopted abroad would need to obtain U.S. passports before being allowed to enter the U.S., the country of their citizenship, for the first time.

The Regulatory Assessment fails to assess the numbers of U.S. citizens born or adopted abroad in countries within the Western Hemisphere that generally require passports for entry by U.S. citizens.

All of these three categories of omissions from the Regulatory Assessment are especially significant because from most of the Western Hemisphere countries impacted by the proposed rules, but erroneously dismissed as ones to and from which all travelers already need U.S. passports, there is no option of land travel as there is for the countries within the NAFTA area. There is no road across the Darien Gap. A prohibition on air and sea travel between the U.S. and any country in South America is a prohibition on all travel by all publicly available means, and is thus subject to a higher standard of justification – not yet met in this rulemaking – than a restriction on only some means of travel.

E. The Regulatory Assessment underestimates the effect of the proposed rules on travel to the U.S. from within the NAFTA area.

The Regulatory Assessment erroneously assumes that the proposed rules will affect tourist and shopping travel to the U.S. from other countries, particularly those in the NAFTA area (Canada and Mexico), solely by adding the cost of obtaining a passport to the other costs of such a visit. But, as tourism researchers have long recognized, travel and tourism demand is determined at least as much, usually more, by perceived attractiveness or unattractiveness of the destination as by the cost of travel. If things were as the Regulatory Assessment assumes them to be, the world's cheapest destinations would be the most popular and most visited. In fact, it's just the reverse: the most popular (i.e. perceived to be attractive) destinations are typically both the most visited and the most expensive.

The proposed rules would directly affect the perceived attractiveness or unattractiveness of the U.S. as a destination, especially for potential visitors from Canada, Mexico, and Bermuda newly affected by its requirements. It's irrelevant whether that is the intent of the proposed rules, and it's largely irrelevant, particularly at first, whether the proposed rules actually affect the travel experience (except, of course, to the extent that preparing for the trip, to which would be added the bureaucratic nuisance of obtaining a passport, is a part of the total experience, and is considered in choosing destinations).

Decisions of whether and to what country to travel are made in advance, on the basis of perceptions. There can be no serious doubt that the proposed rules have been widely reported in Canada and Mexico, and that they are widely perceived by the public in Canada and Mexico – again, regardless of their intent or effect – as unfriendly, unwelcoming, and indicative of a generally less attractive experience, relative to the past, that foreigners can expect as visitors to the U.S.

The Regulatory Assessment fails to assess the extent of this perception and its likely direct effect on the attractiveness of the U.S. as a destination for Canadian, Mexican, and Bermudan visitors, the degree to which they want (and are willing to jump the new documentary hurdles) to visit the U.S., and the expected visitor numbers, frequency of visits, duration of visits, and visitor spending.

We believe that, taking this factor into account, the prediction in the Regulatory Assessment of only a 1% reduction in visitors and spending by Canadians and Mexicans as a result of the proposed rules grossly underestimates the negative economic impact of the proposed rules on travel to the U.S. Further research would be required, but it should include an assessment of the reduction in demand for travel to the U.S. due to the imposition of the passport requirement, and extrapolation from the impact on visitor numbers between the U.S. and other countries of changes in whether a visa is required (typically at least an order of magnitude greater change than the 1% estimate in the NPRM).

IV. THE NPRM AND REGULATORY ASSESSMENT FAIL TO INCLUDE THE ASSESSMENT REQUIRED BY THE REGULATORY FLEXIBILITY ACT.

According to the NPRM (71 Fed. Reg. 46155, 46170-46171):

> We do not believe that small entities are subject to the requirements of the proposed rule; individuals are subject to the requirements, and individuals are not considered small entities. . . . Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. However, we welcome comments on that assumption. The most helpful comments are those that can provide specific information or examples of a direct impact on small entities.

The error in this analysis in the NPRM is the implicit and unwarranted assumption that, because individuals are not necessarily small business entities *per se*, individuals can never be small business "entities" as that term is defined for purposes of the Regulatory Flexibility Act.

A large and growing number of individual U.S. citizens: (a) are sole proprietors or self-employed professionals, freelancers, or contractors; (b) are small business "entities" as that term is defined for purposes of the Regulatory Flexibility Act; (c) engage in or seek to engage in cross-border trade in goods or services within the NAFTA area, or business activities that involve cross-border business travel for meetings or negotiations; and thus (d) would be directly affected by the proposed new passport requirement for cross-border business-related air travel within the NAFTA area.

Nothing in the language of the regulatory Flexibility Act, or the definitions incorporated in it by reference, excludes individuals if they otherwise satisfy the definition of small business entities.

Other small businesses that would need to obtain passports for their employees' cross-border air travel within the NAFTA area would also be directly affected by the proposed rules. As was intended, NAFTA has greatly increased the numbers of small businesses, including sole proprietorships and self-employed individuals, involved in cross-border business activities. For example:

- A freelance graphic artist in the U.S., bidding on a contract to design an annual report that may require on-site approval of proofs during the press run, and which is to be printed in Canada or Mexico (or for which the client has not yet sourced the printing, and wants to allow for the possibility of entertaining bids, on an equal basis, from printers with facilities throughout the NAFTA area), would be required to obtain a U.S. passport in order to bid on the job and assure the potential client that they would be able to provide the potentially required on-site services in Canada or Mexico.
- A self-employed provider of business training services in the U.S. would be required to obtain a U.S. passport in order to compete for contracts as a provider of on-site services in Mexico or Canada.
- A sole proprietor soliciting bids for fabrication or assembly of a new product, but who might need to be able to inspect questionable bidders' facilities for quality control purposes, would be required to obtain a U.S. passport in order to be able to entertain bids from throughout the NAFTA area.
- A small business producing software which might require field support would have to obtain U.S. passports for each of its U.S.-citizen employees who might be required to perform such on-site services, in order to offer potential customers a support contract valid throughout the NAFTA area.

All of these are examples, as were solicited in the NPRM, of small entities that would incur direct costs as a result of the proposed rules. Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small business among cross-border air travelers within the NAFTA area and among those whose business requires them to be able and available for such travel at short notice, should it be required. But the number of such small business entities impacted is clearly "substantial", and the impact on them "significant", within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small

entities among travelers and their employers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including sole proprietors and the self-employed would not only be impacted, but disproportionately and negatively impacted, by the proposed rule. Larger businesses would be more likely than smaller businesses to have alternate staff who already have passports, or who are based on the other side of the border, and able to fulfill a contract, if one employee doesn't have a U.S. passport.

The cost of a passport or passports for certain employees may not be "significant" for a large business, but could be significant for small entities, especially sole proprietors or self-employed business people, as an initial cost barrier to entry (or even attempted entry) into NAFTA-area cross-border trade in services or goods. This is precisely the sort of barrier to cross-border trade that NAFTA was intended to forbid. NAFTA should be leading to the elimination of passport requirements for travel within the NAFTA area, as has happened within the Schengen zone, not the imposition of new passport requirements for travel within the NAFTA area by citizens of NAFTA signatory countries.

V. CONCLUSION AND RECOMMENDATIONS

The NPRM should be withdrawn. If the NPRM is not withdrawn, the Regulatory Assessment should be revised and republished to incorporate the additional costs identified in these comments, the assessment required by the Regulatory Flexibility Act should be completed and published , and a new comment period should be provided, before any new rules are finalized. And if the proposed rules are adopted, their adoption should be reported to the Human Rights Committee of the United Nations, in accordance with the requirements of the International Covenant on Civil and Political Rights.

Respectfully submitted,

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September 25, 2006

Before the

BUREAU OF CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20229

Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States	USCBP-2005-0003 **COMMENTS OF THE IDENTITY PROJECT (IDP), WORLD PRIVACY FORUM, AND JOHN GILMORE**

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The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 71 Federal Register 40035-40048 (July 14, 2006), docket number USCBP–2005–0003-0003, and the associated "Regulatory Assessment" published July 18, 2006 on the Web site at <http://www.regulations.gov> and docketed as USCBP-2005-0003-0005.

In the guise of an NPRM alleged to propose a change only in the required timing of transmission of information already required to be provided to the Bureau of Customs and Border Protection (CBP), the CBP has actually proposed a fundamental regulatory change with far-reaching (literally and figuratively) legal, policy, and logistical implications: The NPRM would replace a requirement for *ex post facto* notice to the CBP of information about who is on each vessel (ship or plane) with an unconstitutional system of prior restraint of international travel, entirely unauthorized by statute and inconsistent with the U.S. obligations embodied in the International Covenant on Civil and Political Rights.

Under the proposed rules, orders by the CBP to common carriers not to transport specific persons would not be based on restraining orders (injunctions) issued by competent judicial authorities. Instead, they would be based on an undefined, secret, administrative permission-to-travel ("clearance") procedure subject to none of the procedural or substantive due process required for orders prohibiting or restricting the exercise of protected First Amendment rights. From the authority of law enforcement officers and agencies to *enforce* certain types of orders, once lawfully issued by competent judicial authorities, the NPRM would usurp for the CBP the authority to *issue* those orders on its own. It's as though the FBI were to construe its authority to maintain in the NCIC a list of persons for whose arrest warrants have been issued by competent judicial authorities, and execute those warrants, as authority for the FBI to issue and execute its own warrantless administrative arrest orders.

The NPRM would create a clearly invalid administrative presumption, reversing the presumptions of innocence and of entitlement to the exercise of First Amendment rights, that all those persons not affirmatively "cleared" in advance by the CBP – according to decision-making procedures and criteria specified nowhere in the NPRM – are barred from travel.

The proposed rules would burden equally, and infringe the rights to varying degrees of, U.S. citizens, resident aliens, immigrants, nonimmigrant visitors, and even those with no intention to enter the U.S. who merely wish to travel on flights that will, or might, transit through U.S. airspace. Reciprocal

adoption of similar rules by other countries would further burden travel worldwide by U.S. citizens and residents, including their international travel and their travel within the USA. Since both the current rules and the proposed rules are incompatible with current European Union privacy and data protection laws, their retention or adoption would make it impossible for airlines to operate direct flights between the USA and the E.U. without violating the laws of one or both jurisdictions, and would thus require an enormously disruptive and costly cessation of such flights.

The Regulatory Analysis published subsequent to the NPRM makes clear that the NPRM is based on clearly erroneous assumptions, fails to consider important implications and incidental and consequential costs, and grossly underestimates – by at least an order of magnitude – the burden of at least tens of billions of U.S. dollars in costs that the proposed rules would impose on the travel industry, travelers, and travelers' employers, families, and associates. Both the NPRM and the Regulatory Assessment misstate the impact and implications of the proposed rules, and fail to include specific assessments required by the Privacy Act and the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety, and instead that the CBP promptly repeal the portions of its current rules that are incompatible with current European Union law, to avoid a cessation of direct USA-E.U. flights. If the NPRM is not withdrawn, we request that the NPRM be republished together with the additional assessments required by the Privacy Act and the Regulatory Flexibility Act, and that a new comment period be provided.

I. ABOUT THE IDENTITY PROJECT AND THE WORLD PRIVACY FORUM

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

The World Privacy Forum, <http://www.worldprivacyforum.org>, is a nonprofit, non partisan 501© (3) public interest research group focused on conducting in-depth research and consumer education in the intersecting areas of technology and privacy, including identity issues.

II. THE PROHIBITIONS ON TRAVEL AND ASSEMBLY IN THE PROPOSED RULES WOULD BE UNCONSTITUTIONAL.

Under the rules proposed by this NPRM, "A carrier must not board any passenger subject to a 'not-cleared' instruction, or any other passenger, or their baggage, unless cleared by CBP." This rule would authorize prior restraint on, and presumptive denial of, the Constitutional right to travel.

A. International travel is a Constitutionally protected right.

The CBP has conceded in an earlier stage of this rulemaking that, "CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty." 68 Federal Register 292 (January 3, 2003).

The Supreme Court has long recognized that there is a Constitutional right to travel internationally. The right to travel is "not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards . . .," but "a virtually unconditional personal right." Shapiro v. Thompson, 394 U.S. 618, 642-643 (1969); see also Aptheker v.Secretary of State, 378 U.S. 500, 505 (1964); Kent v. Dulles, 357 U.S. 116, 126 (1958) ("Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic to our scheme of values.").

The U.S. government has reiterated in its most recent report to the United Nations Human Rights Committee that, "As reported in the Initial Report, in the United States, the right to travel – both domestically and internationally – is constitutionally protected." (*Second and Third Periodic Reports of the U.S. Concerning the International Covenant on Civil and Political Rights*, Paragraph 203, 28 November 2005, CCPR/C/USA/3, available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf>, referring to *Initial Report by the U.S. Concerning Its Compliance with the International Covenant on Civil and Political Rights*, July 1994, CCPR/C/81/Add.4 and HRI/CORE/1/Add.49, available at <http://dosfan.lib.uic.edu/erc/law/covenant94/Specific_Articles/12.html>).

The proposed rules would violate these Constitutional rights.

B. Travel by international air and sea vessels is, in most cases, an act of assembly protected by the First Amendment to the U.S. Constitution.

The assembly clause of the First Amendment protects "the right of the people peaceably to assemble". "To assemble" means not merely or primarily to *be* together in an assembly. "To assemble" is to gather or come together, that is, to *move* into an assembly. Movement of people – in other words, travel – is an essential element of the act of assembly. "To travel" is, in most cases, "to assemble", and as such is an act directly protected by the First Amendment.

The right to assemble in one's own home or premises, or in a public building, would be empty if the government could bar the door to prevent people from walking in. The right to assemble in a public commons would be empty if the government could encircle the area of the planned assembly with barricades to prevent entry, or create a checkpoint to prevent access by travel along a public right of way. In the same way, and for the same reasons, the right to assemble internationally would be meaningless if the government could prevent people from traveling internationally by air or sea.

The right to travel by air or sea vessel is, quite obviously, essential to the ability to assemble internationally. Unless the CBP wishes to suggest, "Let them swim", there is no available alternative way for people in the U.S. to assemble with people from most other countries, or vice versa.

C. The proposed rules would prohibit air and sea common carriers from transporting any person without the express prior permission of the CBP, creating a regime of prior restraint and presumptive denial of the right to travel and to assemble.

The title and summary in the NPRM describe the proposed changes to regulations solely in terms of changes in the requirements for common carriers to transmit passenger and crew manifest information to the CBP; that is, as mere modifications of the current requirements that notice be given to the CBP of who is on the vessel. (The implications for airlines, travelers, and civil liberties of these changes in notice and information collection requirements are discussed in a later section of these comments.)

But the essence of the NPRM is the new language proposed for 49 CFR § 122.49a (b)(1): "A carrier must not board any passenger subject to a 'not-cleared' instruction, or any other passenger, or their baggage, unless cleared by CBP." This identical language is repeated in each of the three alternative sub-sections of the proposed new 49 CFR § 122.49a (b)(1).

This is not, and cannot under any plausible interpretation be represented as, a notice requirement. This is a binding prohibitory regime of prior restraint on all available means of travel and assembly.

To the extent that, as is typically the case, no alternative means to travel or to assemble exists, this section is binding on the would-be traveler as well as the carrier.

It is important to note that the phrase, "any other passenger" in the cited portion of the proposed rule refers specifically to a would-be traveler about whom neither a "cleared" nor a "not cleared" message – nor, perhaps, any message at all – has been received from the CBP. In other words, the proposed rule forbidding the transportation by common carriers (who are required by law to transport all would-be passengers complying with the conditions in their tariff) and thus the travel and assembly, of "any other person" is, by definition, warrantless, suspicionless, and not based on probable cause or any particularized information concerning the persons being deprived of their right to travel and assemble.

D. The prior restraint on international travel and assembly in the proposed rules would be unconstitutional.

Prior restraints on the exercise of rights protected by the First Amendment, such as the right of the people to assemble at issue in this rulemaking, are subject to strict scrutiny, and to Constitutional standards both of substantive and procedural due process.

None of these standards are satisfied by the proposed regulations. Nor could they possibly be: suspicionless unwarranted non-particularized prior restraint on activity protected by the First Amendment is on its face unconstitutional. Even if the default ban on transportation, travel, and assembly by non-suspects were removed from the proposed regulations, the proposed rule would still be unconstitutional: it fails to specify anything about the substantive or procedural criteria for the issuance of such prohibitory orders, much less to provide the guarantees of due process that would Constitutionally be required for the valid issuance and enforcement of such orders.

E. The restrictions on travel and assembly in the proposed rules would unconstitutionally burden the exercise of other rights protected by the First Amendment.

In addition to its effect on activities directly protected by the assembly clause of the First Amendment, the suspicionless, unwarranted, presumptive prior restraint on travel and assembly in the proposed regulations would unconstitutionally interfere with the ability of U.S. persons to exercise other rights protected by the First Amendment.

In many circumstances, travel is essential to the exercise of other First Amendment rights. For example, it's often necessary for persons outside the U.S. – including U.S. citizens – to travel to the U.S. in order to petition U.S. legislative, judicial, or executive authorities for redress of their grievances.

In addition, travel is a significant component of many expressive activities, so that regulations which burden movement on public rights-of-way or by common carrier also burden that expressive conduct. (On the inextricability of personal movement, assembly, and expressive conduct, see e.g. Rebecca Solnit, *The Right of the People Peaceably to Assemble in Unusual Clothing: Notes on the Streets of San Francisco*, Harvard Design Magazine, April 1998, available at <http://www.gsd.harvard.edu/research/publications/hdm/back/4solnit.pdf>.)

Even when freedom of travel is not per se essential to freedom of speech, of the press, or to petition for redress of grievances, restrictions on travel – including international travel – can greatly impair the ability of U.S. persons to exercise those rights.

Travel is essential to many modes of expression and expressive conduct that depend on personal presence, and to the in-person reporting of a free press. Without the ability to travel to, and report from, places around the world where news is being made, the press in the USA would depend entirely on the news of the world reported by those "vetted" and approved to travel by the CBP. And the same would be true for U.S. citizens abroad wishing to report to the world press and public about events in the USA.

The proposed regulations fail to satisfy the standards for regulations that burden First Amendment activity, and are therefore unconstitutional.

F. The proposed rules would unconstitutionally infringe the right to anonymous association.

The Supreme Court has long recognized a right to associate anonymously. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). See also Shelton v. Tucker, 364 U.S. 479, 485 (1960). To the extent that the proposed collection of personally identifying information would enhance the government's ability to track the movements and associations of United States persons, it would clearly implicate individuals' right to travel internationally and to associate anonymously.

G. The proposed rules would exert an unconstitutional chilling effect on the exercise of rights protected by the First Amendment.

Under the proposed regulations, anyone traveling overseas, to or from the U.S., for any length of time and for any reason, risks not being "cleared" by the CBP to return by air or sea, and being stranded for life on the other side of an ocean from their family, friends, and home – unless they can walk on water, or swim home across the ocean.

There is no requirement in the proposed regulations for the CBP to respond at all, or to respond within any particular time, to a request from a common carrier for "clearance" of a manifest, or of any particular name on that manifest. There is no requirement for the CBP to tell the carrier, or the would-be passenger or crew member, why they have not been "cleared", and no defined redress or "clearance' procedure (much less one which would or could pass Constitutional muster). In the absence of any response, or in the event of a "not cleared" response, all carriers are prohibited from boarding the would-be passenger, and that would-be passenger is effectively prevented from traveling – indefinitely, unpredictably, without warrant or suspicion or probable cause, and perhaps permanently.

Since there is no requirement or procedure by which a would-be traveler can determine in advance whether they will ever be "cleared" to return, or how long it might take for them to be "cleared", the risk of being stranded for life would be inherent in any overseas journey to or from the USA.

This risk is real, not hypothetical. From April 21, 2006, until October 1, 2006, Jaber Ismail, a native-born Californian and citizen of the USA who holds no other citizenship and has never held any other citizenship, was prevented from returning to the U.S. to resume his high school studies, following a stay overseas, as a result of orders from the DHS to airline common carriers forbidding them to transport him, according to news reports. Shaun Waterman, *Analysis: From Lodi, Calif. to Pakistan,* United Press International (August 28, 2006), <http://www.upi.com/SecurityTerrorism/view.php?StoryID=20060828-105251-1148r>; Randal C. Archibold, *U.S. Blocks Men's Return to California From Pakistan,* New York Times (August 29, 2006), available at <http://www.nytimes.com/2006/08/29/us/29hayat.html>; Gina Keating, *Pakistani-American teen, father barred from U.S.*, Reuters (August 31, 2006), <http://today.reuters.com/news/articlenews.aspx?type=domesticNews&storyID=2006-08-31T002935Z_01_N30222713_RTRUKOC_0_US-SECURITY-TEENAGER.xml>.

There is no indication that any agency of the U.S. ever sought Mr. Ismail's arrest or detention as a criminal suspect or material witness, or on any other grounds, or ever sought – much less obtained – any injunction or other judicial order restricting his movements.

Reportedly, Mr. Ismail learned of the DHS administrative order prohibiting any airline from transporting him to the U.S. only when he tried to board a flight home in April 2006. He and his father, a naturalized U.S. citizen similarly barred from travel to the U.S. by DHS order, were allowed to return home only after the DHS removed their names from its "no-fly" list in October 2006, after five months they had to spend couch-surfing with relatives abroad and separated from their family in California. Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, New York Times (October 2, 2006), available at <http://www.nytimes.com/2006/10/02/us/02terror.html>; Jeff Hood, *Hayats' relatives return home after five months: Men stuck abroad when names turned up on Fed's no-fly list*, Stockton Record (October 3, 2006), available at <http://www.recordnet.com/apps/pbcs.dll/article?AID=/20061003/NEWS01/610030339/1001>.

Under the proposed rules, all U.S. citizens leaving the country will face the same risk of being unable to return to the U.S., for an indefinite period of time or forever, if the DHS does not "clear" them to come home. This would exert a dramatic chilling effect on the exercise of the First Amendment rights of travel and assembly, as well as of other First Amendment rights when they entail overseas travel.

H. The DHS has failed to provide a Consitutional justification for the proposed rules.

Commenters to the previous APIS NPRM, 68 Fed. Reg. 292 (January 3, 2003), expressed concerns on some of these issues to which the DHS issued this response:

> Several commenters remarked that collection of information through APIS would infringe on the right to travel as recognized by the Supreme Court in Kent v. Dulles, 357 U.S. 116 (1958).
>
> Response: CBP recognizes, as the Supreme Court has stated, that the right to travel is an important and long-cherished liberty. Although a passenger's refusal to supply the information required by the regulatory text will result in denying that person access to international travel on commercial vessels and aircraft, the new provisions will not violate a constitutional right to travel. The Supreme Court has recognized that the right to travel abroad is not an absolute right, and the Court has recognized that no government interest is more compelling than the security of the nation. Haig v. Agee, 453 U.S. 280, 307 (1981). The government may place reasonable restrictions on the right to travel in order to protect this compelling interest. Id.; see also Eunique v. Powell, 302 F. 3d 971, 974 (9th Cir. 2002); Hutchins v. District of Columbia, 188 F. 3d 531, 537 (D.C. Cir. 1999).

> The restrictions this final rule places on certain modes of travel (here, by effectively denying access to certain international travel if a passenger or crew member refuses to provide the information required) are reasonable and narrowly drawn to ensure accurate identification of individuals. Moreover, the restrictions imposed through the required submission of information are far more likely to promote the ability to travel than to restrict it. In fact, as recent events have shown, the ability to travel can be severely restricted by terrorist threats to our means of transportation. See National Commission on Terrorist Attacks Upon the United States, Final Report 29 (Norton 2004) (noting FAA's September 11, 2001, instruction to all aircraft to land at the nearest airport). Congress, through legislation discussed throughout this document, has required certain safeguards involving the collection of information to protect our national security. The new regulatory text published today is designed to enhance the ability to travel, not to restrict it for law-abiding U.S. citizens, lawful permanent residents (LPRs), or foreign visitors.

This "We had to burn the village in order to save it" argument that restrictions on travel enhance the ability to travel for law-abiding citizens is intellectually dishonest. It ignores the effect these restrictions have on civil liberties and human rights. The world is not a gated community in which the United States can use mass transport security as a dragnet for its law enforcement network. Until it becomes transparent who is on "no-fly" lists, and on the basis of what judicial process orders are issued that one be placed on or off these lists, the abandonment of basic due process rights in the name of "security" makes our nation's promotion of democracy and freedom seem hollow and contrived.

The argument that any identification based security measure enhances the ability to travel for law-abiding citizens is debatable (see e.g. <http://www.papersplease.org>) and ignores the effect it has on the law-abiding citizen's ability to dissent or associate. Safety is not paid for at any price. "We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country." Judge Gerald Tjoflat in Bourgeois v. Peters, 387 F.3d 1303, 1312 (11th Cir. 2002).

There is no evidence, in the NPRM or otherwise, that the proposed rules would actually have any positive effect on transportation safety or security against terrorism or other threats. Compelled identification of travelers would be relevant to the protection of passengers if and only if, inter alia, the DHS has available a complete and accurate list of identifying information which would be presented by would-be terrorists, seeking to travel by airline common carriers, who pose a threat to travel, but against whom there is insufficient evidence to support the issuance of an arrest warrant and insufficient probable cause for arrest or detention without a warrant. There is no support in the NPRM for such a claim.

The Constitutional deficiencies in the proposed rules are both substantive and procedural. These regulations impact a variety of substantive rights, and for each of those rights there are no substantive standards for the issuance or non-issuance of "clearance" messages, and no procedural safeguards against arbitrary or unjustified deprivations of the rights implicated by those decisions. Although the complete absence of defined substantive or procedural standards makes it impossible to say with certainty, the CBP's past practices suggest that any information relied on in making such decisions would be considered exempt from disclosure as "Sensitive Security Information" (SSI), precluding accountability or effective oversight of the "clearance" decision-making process.

Existing judicial mechanisms are available to serve any lawful purpose of the DHS in this rulemaking. If there is sufficient evidence that a specific person – against whom there is insufficient evidence to justify an arrest warrant or a warrantless arrest or detention – poses a danger sufficient to justify a prohibition or restriction on international travel, the CBP or other appropriate authorities can seek an injunction or temporary restraining order from a court of competent jurisdiction.

Even if the DHS were to provide evidence of the necessity and likely efficacy of restrictive or prohibitory orders to common carriers regarding the transportation of specific persons, or for access to evidence from airline reservations to enforce such orders, the DHS has made no attempt to show why those orders could not be issued, and this evidence could not be obtained, through normal legal and judicial processes (such as the issuance of injunctions and warrants), and why they would require the use of the extra-judicial orders and presumption of "non-clearance" provided for by the proposed rules. So far as we can determine, there is no precedent for the DHS ever attempting to obtain a "no-fly" injunction through existing and available judicial and law enforcement processes, and no basis for a belief that those procedures for restraining orders – relied on in thousands of cases daily of imminent threat to life in domestic violence cases – are in any way inadequate to achieve any lawful DHS goals in this rulemaking.

III. THE PROPOSED RULES ARE INCONSISTENT WITH THE U.S. OBLIGATIONS EMBODIED IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

Travel is a fundamental and internationally recognized human right, and a vital prerequisite for the exercise of other fundamental rights. "Liberty of movement is an indispensable condition for the free

development of a person." United Nations Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, issued under Article 40(4) of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument>.

Under Article VI, Section 2 of the U.S. Constitution, "treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land."

Article 12, section 4 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782), provides that, "No one shall be arbitrarily deprived of the right to enter his own country."

This right of return embodied in the ICCPR is central to the meaning of nationality and of the passport as defining the place to which the citizen is entitled to repatriation. See Mark B. Salter, *Rights of Passage: The Passport in International Relations* 4, (Lynne Rienner, 2003). It also expresses deeply-held American values of long standing, as expressed by our poet laureate Robert Frost:

> 'Home is the place where, when you have to go there,
> They have to take you in.'

"The death of the hired man", in *North of Boston* (1915), reprinted in *The Complete Poems of Robert Frost* 49-55 at 52, Holt, Rinehart and Winston, 1949.

The meaning of Section 4 of Article 12 of the ICCPR is interpreted in Paragraph 21 of U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*:

> In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.

As applied to U.S. citizens wishing to return home from overseas, the default prohibition on travel by commercial air or sea vessel in the proposed regulations, in the absence of any defined substantive or procedure criteria or safeguards and, by definition, the absence of any warrant, probable cause, suspicion, or individualized basis, constitutes on its face an arbitrary deprivation of the right of return embodied in Section 4 of Article 12 of the ICCPR.

As applied to anyone wishing to leave the USA, the proposed rules are inconsistent with Sections 2 and 3 of Article 12 of the ICCPR, which provide:

> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

To be "necessary", as is required by Section 3 of Article 12 of the ICCPR, requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. "Necessity" requires a showing that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of "necessity" is supported by the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement in Article 12*, which provides in Paragraph 14:

> Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

Paragraph 17 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement* suggests that strict scrutiny is appropriate for "rules and practice [which] include, inter alia, ... the need for ... exact description of the travel route", as in the proposed rules.

Since there is no such showing of necessity in the NPRM, and in fact the CBP has not even attempted to make any such showing or asserted such a claim of necessity, the proposed rules are flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn.

In addition, for the same reasons that they violate the assembly clause of the First Amendment to the U.S. Constitution, as discussed above, the proposed rules are inconsistent with Article 21 of the ICCPR, which provides:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The same analysis of the CBP's failure to make or support a showing of necessity applies with respect to this Article 21 as with respect to Sections 2 and 3 of Article 12, as discussed above. The proposed rules thus are inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

The lack of a deadline for the CBP to decide on a request for "clearance" (permission to travel) or any explicitly defined substantive or procedural criteria in the proposed rules for the granting or denial by the CBP of "clearance" is also inconsistent with the ICCPR, as interpreted in Paragraphs 15-16 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement* :

> The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided. . . .
>
> The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality.

Finally, the ICCPR embodies reporting obligations, as interpreted by Paragraph 10 of the U.N. Human Rights Committee, *General Comment No. 27 on Freedom of Movement*:

> The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

Since the CBP "clearance" message to the carrier required by the proposed rules would be a "document" within the meaning of this paragraph and of the ICCPR, failure to include the rules proposed in this NPRM in the reports by the U.S. pursuant to Article 40 of the ICCPR would be inconsistent with the U.S. obligations embodied in the ICCPR.

IV. ORDERS PROHIBITING TRANSPORTATION ARE NOT AUTHORIZED BY ANY OF THE STATUTES CITED AS AUTHORITY FOR THE PROPOSED RULES.

As noted above, the NPRM proposes to add to 19 CFR §122.49 a rule that, in the absence of an affirmative and individualized "clearance" message from the CBP, no air or sea common carrier may permit any person to board any vessel scheduled to travel to, from, or over the territory of the U.S.:

> "A carrier must not board any passenger subject to a 'not-cleared' instruction, or any other passenger, or their baggage, unless cleared by CBP."

The NPRM cites as authority for the proposed new 19 CFR §122.49 the following statutes:

> The general authority citation for part 122 and the specific authority citations for § 122.49a and 122.75a continue to read as follows: Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a, 2071 note. Section 122.49a also issued under 8 U.S.C. 1221, 19 U.S.C. 1431, 49 U.S.C. 44909.

It's impossible to tell which of these 17 sections of statutes is purported to provide the specific authority for orders to common carriers not to allow certain otherwise qualified would-be passengers to board, or for the presumptive prior restraint on travel and assembly embodied in the proposed new regulatory language.

These statutes contain a variety of requirements for reporting, provision of information, presentment for inspection and customs clearance on arrival, and the transportation of cargo. But none of these statutes contains any provision authorizing the CBP to issue orders prohibiting the transportation of certain would-be passengers, much less authorizing a default order against transportation of all passengers or the regime of pre-departure "clearance" checkpoints contemplated by the proposed regulations. So long as passenger and crew manifest information is provided in the prescribed form, nothing in the cited statutes authorizes the CBP, by regulation or otherwise, to order a common carrier not to transport a passenger.

Since they lack any authority in the statutory sections cited in the NPRM, the provisions of the proposed regulations ordering, and permitting the CBP to order, carriers and vessels not to transport some or all passengers must be withdrawn from any final rule.

V. BOTH THE CURRENT AND PROPOSED RULES ARE INCOMPATIBLE WITH EUROPEAN UNION PRIVACY AND DATA PROTECTION LAWS, AND WOULD REQUIRE THE CESSATION OF FLIGHTS BETWEEN THE E.U. AND THE USA.

Pursuant to the judgement of the Court of Justice of the European Communities in cases C-317/04 and C-318/04 (decided 30 May 2006; published 29 July 2006 in the Official Journal of the European Union 2006/C 178/02), the agreement between the European Community and the USA on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the CBP, and the

decision of the Council of the European Union on the adequacy of protection of personal data contained in PNR's of air passengers transferred from the E.U. to the CBP, was annulled as of September 30, 2006.

The Court of Justice found that the subject matter of the annulled agreement and decision were outside the scope of authority of the E.C. In accordance with that decision, the purposes of the agreement and decision could only be accomplished by a binding international instrument, i.e a treaty, duly adopted by the participating states. In the E.U., that would require ratification under the laws of each E.U. member state. In the USA, that would require signing by the President and ratification by the Senate.

As of October 1, 2006, since no such treaty has been ratified by the U.S. Senate and by the appropriate bodies in each E.U. member state, or has entered into force, any airline or airline database hosting service that accepts data originally collected in such an E.U. member (regardless of whether that data relates to reservations for domestic or international flights, or flights to, from within, or entirely outside the E.U.), and that complies with either the current or proposed CBP rules, is liable to sanctions under both E.U. law and the national laws of that E.U. country where it operates or from which it accepts data which it provides to the CBP.

The CBP and the Department of Homeland Security (DHS) have announced that they have negotiated a new "agreement" on this issue with the E.U., in some form other than that of a treaty. But no form of international agreement other than a treaty duly signed by the President and ratified by the Senate would or could Constitutionally be binding on the U.S. government, the DHS, or the CBP, or be enforceable in any U.S. court. No "agreement" not binding on the U.S. could satisfy the requirements of E.U. law, as interpreted by the judgement of the Court of Justice. And, most important in this context, neither the DHS nor the CBP – nor any other executive, legislative, or administrative agency of the U.S. government – has the Constitutional authority to alter or abrogate U.S. legal obligations under a treaty duly signed by the President and ratified by the Senate, such as the International Covenant on Civil and Political Rights as discussed above.

The CBP should, therefore, either withdraw the proposal and the current rule until a new treaty or treaties enters into effect, or should consider in its regulatory assessment the implications of the cessation of direct flights between the USA and E.U. members that would result from a rule incompatible with airlines' obligations under E.U. members' laws, to which they are subject as of October 1, 2006.

In addition, *Council Regulation (EEC) No 2299/89 of 24 July 1989 on a Code of Conduct for Computerized Reservation Systems* (Official Journal of the European Union L 220, 29 July 1989), as amended by Council Regulation (EEC) No 3089/93 of 29 October 1993 (Official Journal L 278 of 11 November 1993) and Council Regulation (EC) No 323/1999 of 8 February 1999 (Official Journal L 40 of 13 February 1999), Article 6(d), requires that, "personal information concerning a consumer and generated by a travel agent shall be made available to others not involved in the transaction only with the consent of the consumer." This consent requirement is categorical and admits of no exception.

Travel agents can create and enter data in PNR's for flights up to a year in advance, and it is impossible to eradicate data once it is entered in the PNR. "Deleted" data is archived permanently in the PNR "history", as are PNR's that are entirely cancelled. So to allow for those existing PNR's for which consent to transfer data to the CBP has not been granted, the CRS's that host airlines' PNR databases could not, without violating the E.U. *Code of Conduct for CRS's*, provide any PNR data to the CBP until at least one year after the complete implementation of a system under which all CRS users (travel agents, tour operators, airlines, hotels, car rental companies, etc.) obtain consent, prior to creating or entering any data in a PNR, for the transfer of that data to the CBP. Given the number of sources of data entered in PNR's, implementation of such a system would take at least 6 months, perhaps much longer.

Accordingly, the CBP should provide that the effective date of any final rule issued in this rulemaking is not until at least 18 months after the date it is finalized, or should consider in its regulatory assessment the implications of the incompatibility of the rule with the E.U. *Code of Conduct for CRS's*, which would effectively preclude airline use of CRS's for PNR hosting or reservations connectivity.

VI. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT GROSSLY UNDERESTIMATE THE COST OF COMPLIANCE WITH THE PROPOSED RULES.

The proposed rules would impose new direct, incidental, and consequential costs, not proposed to be reimbursed by the government ("unfunded mandates"), on air carriers, travelers, and travelers' friends, families, employers, and other associates.

A week after the announcement of the NPRM, the CBP posted a "Regulatory Assessment" dated April 2006 that purports to estimate those costs. The Regulatory Assessment is based on clearly and

materially erroneous assumptions and a fundamentally deficient model of the airline boarding process, omits major categories of costs and of entities on whom those costs would be imposed by the proposed rules, and grossly underestimates some of the costs it identifies.

Because of the extent of the omissions from the Regulatory Assessment, the lack of research or factual information and the fundamentally erroneous assumptions on which it is based, and the uncertainty as to how or even if it would be possible for the airline industry to comply with the proposed rules while remaining economically viable, it is impossible at this time to determine the total cost of the proposed rules. But we believe that, even if airlines find ways to continue to operate while complying with the proposed rules, the total cost to travelers, their employers and associates, and the travel industry will be, conservatively, at least an order of magnitude greater than estimated in the Regulatory Assessment. If the costs of compliance with the proposed rules would be prohibitive – as some airlines have already suggested in their comments on this NPRM – the cost of a collapse of international common carrier airline service to and from the USA would be dramatically higher still.

A. Passengers routinely board airplanes less than 15 minutes before they are pushed back from the departure gate.

The Regulatory Assessment proceeds from the false assumption that, "Carriers typically close the gate doors and do not allow any more passengers to board 10 minutes prior to scheduled departure."

In fact, as noted by Qantas in their comments on this NPRM, the final 15-minutes before the doors of the aircraft close are typically used for processing "stand-by" (and other last-minute) passengers.

Boarding typically proceeds in two distinct phases, with the second wave of passengers boarding less than 15 minutes before "departure". (We assume that the Regulatory Assessment uses the term "departure" in accordance with the definition of departure as "push-back" in the proposed rules, not in its meaning under the current rules – and in conventional industry usage – as "wheels up". We shall also use that proposed new definition in these comments, except where specifically noted otherwise.) Most of that second wave of passengers are issued boarding passes immediately before they board.

Airlines have no way to know how many would-be passengers will present themselves for boarding. Almost all airlines overbook (although sometimes only in coach/economy class, not in first or business class, as discussed further below). There are "no-shows" for almost every flight who hold confirmed reservations, and sometimes boarding passes, but who do not present themselves for boarding.

No-shows include those for whom reservations were made but for whom a ticket was never purchased (airlines cannot always tell whether a ticket has been issued for travel on a given reservation); those who cancelled or changed their plans without notifying the airline prior to the scheduled boarding time; those who failed to make connections from other flights (some of whom have already been issued boarding passes when they checked in for their originating flight, and some of whom have not); those who failed to make it to the airport in time; and those who checked in but who got diverted by urgent events or changes in plans, distracted, or drunk in the airport and missed the boarding call.

As a result, the airline cannot tell how many empty seats will be available until the initial phase of boarding is complete. Boarding passes are issued until the airline's reservation system shows that all (or, to allow a margin for error and for accommodation of last-minute VIP passengers, slightly less than all) seats have been assigned to passengers who have checked in or are expected from connecting or other flights. If there is any chance that the plane may be full, other passengers presenting themselves at the gate (with tickets, but not yet with boarding passes; some with reservations for the flight and some not), are allowed only as far as the gate, and kept waiting during the first wave of boarding.

After the first wave of boarding is complete, and shortly before departure – typically less than 15 minutes – the airline checks how many seats on the aircraft remain vacant.

For a variety of reasons that are difficult to eliminate, the actual number of seats remaining empty may be slightly different from what is shown in the airline's reservation system. A seat may be shown in the reservation system as available when it is actually taken (for example, if two passengers were issued boarding passes for the same seat, as every frequent flyer has seen happen from time to time), or may show as occupied when in fact it is empty. So if there are more passengers at the gate (and in some cases, depending on the time needed to get from the ticketing or check-in counter to the gate, at one or both of those counters as well) than there might be empty seats, and the plane might depart entirely full, the cabin crew will "count the plane" by walking the aisles to verify the count of empty seats.

Normally, the airline waits as long as possible before counting the empty seats and boarding the second wave of passengers, to avoid having to turn away connecting passengers, passengers already in the concourse who are slow in responding to the boarding call, and other expected passengers who present themselves at the gate late, but still with time to board before scheduled departure.

Only after checking the count of empty seats do the gate staff issue boarding passes to as many as possible of the would-be passengers waiting at the gate (and, if there is still time for passengers to get to the gate from the ticketing and/or check-in counters, advise the counter staff how many last-minute ticket sales and/or late check-ins to allow), as close to the departure time as possible while still allowing the second wave of passengers time to board, get seated, and stow their carry-on bags before departure.

Typically, the last few passengers board the plane less than five minutes before scheduled departure. The aircraft doors are closed almost immediately behind the last passengers, and the cockpit crew requests permission to push back as soon the last passengers to board are seated and have stowed their carry-on bags, typically less than five minuets later and frequently no more than one or two minutes.

Some passengers board almost every international flight less than 15 minutes before departure. We've boarded international flights to the USA less than two minutes before push-back, and been issued boarding passes at the check-in counter of a major international airport, for a long-haul intercontinental flight (that had been thought to be oversold) less than 10 minutes before push-back – with the admonition from the counter agent, "You must run to the gate. Your flight is waiting for you."

B. Last-minute passengers pay higher than average fares and will incur much greater costs than other passengers if they aren't allowed to board.

The second of the two waves of boarding, as described above, includes several categories of passengers: walk-up last-minute ticket purchasers (typically either business travelers with unexpected time-critical business needs or opportunities, or urgent family emergencies, and who in either case have paid much higher than average fares and will suffer much greater than average incidental and consequential damages if they are delayed or unable to be boarded); passengers with "open" tickets but no reservations (typically a feature of higher than average fares); passengers who have or had reservations on another flight, but who are seeking to change to a different flight (a type of change that is likely to be much less costly, and thus is much more likely to be sought, by those who originally bought more expensive and therefore less restricted tickets); passengers who have been involuntarily rebooked and/or rerouted as a result of cancellations, delays, missed flights, or missed connections on the same or a different airline (for whom the incremental cost of further delay is likely to be higher than average, and increasing); passengers making connections (particularly connections from one international flight to another, where the world's most common recommended minimum connecting time is 60 minutes, and

passengers routinely don't get to the departure gate of the onward flight until less than 15 minutes before scheduled departure); passengers with reservations waitlisted or "on request" (unticketed or with tickets issued with "RQ" status); and a variety of categories of standby passengers.

Last-minute passengers typically pay higher than average fares and will incur much greater than average costs if they aren't allowed to board. Last-minute walk-up fares are typically higher than tickets purchased even a few days in advance, both because of advance purchase requirements for lower fares, and because at the last minute, as the flight gets more heavily booked, the last booking classes remaining available are those corresponding to the highest fares. In addition, because airlines overbook less, if at all, in business and first class than in coach/economy class, business and/or first class often remain available well after coach class on the same flight is sold out. So a dramatically higher percentage of last-minute walk-up ticket purchasers, and of last-minute boarders, have paid business or first class fares.

C. The Regulatory Assessment grossly underestimates the cost of prohibiting boarding within 15 minutes before departure.

Depending on which option in the NPRM ("APIS 60" or "AQQ") airlines choose, the proposed rules would require them to close boarding either 15 minutes or 60 minutes prior to departure and prior to the time when they currently board the last passengers – those in the second wave of boarding, as described above. That is at least 15 minutes earlier than under current government requirements and airline operating procedures, under which passengers can be, and are, boarded up until departure.

A similar requirement for at least 15 minutes of additional time between the close of boarding and departure (depending on the time between push-back and 'wheels up", which is typically at least 15 minutes, often more, at the large, busy airports where most international flights originate) would apply to flights overflying the USA, as a consequence of the application to 19 CFR § 122.49b(a) of the proposed change in the definition of 'departure" in 19 CFR § 12249a(a).

There are only two ways that an airline could satisfy this proposed new requirement for additional time between the boarding of the last passenger and push-back of the aircraft from the gate: either move the close of boarding for each flight earlier, or move the departure of each flight later.

Airlines would have to choose either to (1) hold the flight at the gate for at least 15 (or 60) minutes before pushing back, after all passengers including the second wave of last-minute walk-up ticket purchasers, late arrivals at the gate, standby passengers, etc., have boarded; or (2) close boarding

15 minutes (or 60) before departure, which would be 15 (or 60) minutes earlier than at present, leave behind all those passengers who would have boarded in the last 15 (or 60) minutes before departure, and leave the seats that were assigned to no-shows unsold and unoccupied.

As discussed below, either of these methods of compliance by airlines with the proposed rule – even under the less costly 15 minute AQQ option – would have costs to airlines and travelers of at least billions of U.S. dollars per year, and tens of billions of dollars over the next ten years. Those costs would be at least an order of magnitude greater than the "low estimate" of the costs of the proposed rule in the NPRM and Regulatory Assessment, or than any estimate of the likely benefits of the proposed rule.

1. Costs of 15 minute gate hold after completion of boarding

Holding the aircraft at the gate for a minimum of 15 minutes after all passengers and crew have boarded would impose one-time rescheduling and transition costs on airlines; continuing costs in lost passenger time, lost airline and airport gate and ramp staff time, increased aircraft capital and operating costs due to reduced equipment availability, and one-time and continuing airport gate capacity expansion costs due to slower gate turnarounds.

All of the estimates in the NPRM and Regulatory Assessment of the percentages of passengers who would be delayed (cockpit and cabin crew and ground staff delays are ignored in the NPRM) are based on the erroneous assumption that no boarding is allowed within 15 minutes of departure.

Under the proposed rule, allowing any passengers to board within 15 minutes of departure would require delaying everyone on the plane, and all of the ground staff on duty during departure.

The Regulatory Assessment (Table 1, page 5) estimates the number of passengers on international flights to and from the USA as approximately 76 million in 2007, the first full year in which the proposed rule would be effective. The Regulatory Assessment ignores overflights of the USA, which we initially estimate (subject to further input from airlines and air traffic control authorities) would add at least 5 percent to the number of passengers impacted by the proposed rule, bringing the total number of passengers impacted to at least 80 million per year.

The Regulatory Assessment values passenger time at US$28.60/hour (p. 9). We believe that this estimate is too low because of the fact that, as noted in the regulatory assessment at note 10, p. 9, the average income of international air travelers is substantially greater than the average income of domestic air travelers within the USA, which in turn is higher than the average for all people in the USA.

Using the value of passenger time relied on by the Regulatory Assessment, however, the total cost to passengers of a 15 minute delay for 100% of passengers on flights to, from, via, or overflying the USA would be 0.25 hours x $28.60/passenger-hour x 80 million passengers/year = $572 million annual direct costs to passengers of time lost to newly imposed regulatory delays.

Airlines would bear the cost (or pass it on to ticket purchasers) of keeping the cockpit crew, cabin crew, gate staff, and ramp staff on duty during the 15 minutes per flight gate hold. In addition, a gate hold of 15 minutes per flight would take the aircraft out of service availability for that amount of time, increasing airlines' capital and other equipment costs proportionately.

The Regulatory Assessment assumes an average of 250 passengers per flight, and an average cost to an airline of delay of $3372 per aircraft-hour. Using these same estimates, 80 million passengers per year subject to the impacts of the proposed rule would correspond to 320,000 flights, each delayed by 15 minutes, for a total of 80,000 aircraft-hours of delay and costs of delay of 80,000 aircraft-hours/year x $3372/aircraft-hour = $270 million annual direct costs to airlines of newly imposed regulatory delays.

Assuming that the average turnaround time (gate occupancy) for aircraft in international service is 2 hours (a generous estimate to allow for slow turnaround of long-haul aircraft, compared with turnaround times of small short-haul aircraft of as little as 30 minutes), a 15-minute gate hold would increase the total gate time – and thus the gate cost – by 12.5%. Airports would incur one-time capital and transition costs, and well as ongoing maintenance, operation, and overhead costs – all likely passed on by them to airlines, and by them to ticket purchasers – to expand gate capacity proportionately.

More information from airports and airlines would be required to estimate the one-time transition costs to airlines and airports of revising flight, gate, aircraft, crew, staff, and maintenance schedules, and the one-time and continuing costs to airports of being unable to accommodate as many flights per gate per day. But added to $572 million in annual costs to passengers and $270 million in annual costs to airlines, the total costs if airlines choose the "gate hold" option would clearly total more than $1 billion per year, or more than $10 billion over the ten year period covered by the Regulatory Assessment.

2. Costs of closing boarding 15 minutes earlier than under current procedures

To retain current departure times while allowing 15 minutes after the completion of boarding before departure, airlines could close boarding 15 minutes earlier than at present. This would impose direct and consequential costs of delay on those passengers who currently board less than 15 minutes

before departure, as well as costs to the airline in lost revenue from seats left vacant by no-shows, which could no longer be filled with last-minute ticket purchasers or other passengers allowed to board within 15 minutes of departure, after no-shows have forfeited their reservations and their seats can be confirmed to be vacant and available.

We estimate that approximately 2 percent of the 80 million annual passengers on international flights to, from, via, or overflying the USA – on average, 5 people on each 250-passenger flight – currently board within 15 minutes of departure. If airlines choose this option, all of these 1.6 million passengers per year would be delayed.

The NPRM and Regulatory Assessment assume that the average delay for a passenger who misses or is not allowed to board a flight would be 4 hours. The Regulatory Assessment includes a "sensitivity analysis" for average delays up to at most 8 hours. These figures are unsupported and unsupportable: 4 hours is a "best case" delay for a small minority of passengers on some flights on a few of the international routes with the most frequent service at varied times of day and night.

Most international flights operate daily. Some operate less than daily, and only a few more frequently than daily. One of the first things airlines do when they receive permission to coordinate their schedules with other members of a marketing "alliance" is to cancel duplicate flights by alliance members. Few airlines operate international flights to the hub airports of competing airlines or alliances. Direct competition between multiple airlines on international routes is dramatically less common than on domestic routes. When multiple airlines compete on an international route, they typically schedule their flights at around the same time of day or night, making it unlikely (especially so under the proposed rules changes, which will greatly complicate, or in many cases prohibit outright, last-minute accommodation of displaced passengers) for passengers who miss one airline's flight to make it onto another airlines' flight on the same route that leaves at almost the same time.

As noted by airlines including Qantas and BMI (British Midland) in their comments on this NPRM, the modal and median delay for a missed international flight is unquestionably 24 hours. In some cases, if the next daily flight is fully booked, the delay could be more than 24 hours. It's unlikely that the small number of passengers on certain routes who could be accommodated on alternate flights in less than 24 hours would reduce the mean delay to less than 18 hours, which would still require essentially the same per diem costs of accommodation, meals, and incidentals.

Most passengers who are denied last-minute boarding under the proposed rules change will be subjected to an involuntary, unplanned 24-hour layover at an international gateway and connection hub for flights to the USA, such as London, Tokyo, Mexico City, or Toronto.

Per-diem allowances for travel in foreign areas are specified by the U.S. Department of State at <http://www.state.gov/m/a/als/prdm/69965.htm>, including the following figures (in USD) for some of the most common international gateways and hubs for flights to or overflying the USA:

London (including Heathrow Airport): $480

Paris: $440

Frankfurt: $374

Amsterdam: $350

Narita Airport (Tokyo area, but not Tokyo city): $271

Hong Kong: $392

Mexico City: $285

Toronto: $311

Montreal: $340

Vancouver: $220/290 (seasonal)

These are average figures for all trips, including trips planned in advance. Unplanned layovers in unfamiliar cities, where the traveler may have intended to do no more than change planes, may not have appropriate clothing for the climate, may be unfamiliar with how to find the cheaper accommodations, and will likely find that the less expensive accommodations are already booked in advance and/or require advance reservations for their lowest rates, are likely to be substantially more expensive. We believe that $500 is a more reasonable estimate of average per diem direct costs for an 18-24 hour layover in the event of being unable to board a planned flight in such a city.

But that's only the *direct* costs to passengers of delay. As we have noted above, last-minute boarders include a large percentage of last-minute ticket purchasers, primarily people with urgent business or urgent family emergencies. An international ticket for same-day travel is typically purchased directly from the airline, or from a travel agent, at the unrestricted full published fare (frequently in business or first class, often because those are the only seats available), and typically costs at least $1000 more than a ticket for travel even as little as a day later, when there is time to shop around and probably

time to locate a consolidator or ticket for less than full fare, or at least to confirm a full-fare coach seat and not have to pay the business or first-class fare solely because of lack of coach availability.

By buying a ticket a ticket at the full walk-up fare, a last-minute passenger has indicated that it is worth at least $1000 more to them to depart today than to wait until tomorrow, and has directly expressed that valuation in willingness to pay. Absent some reason to believe that travelers are unable properly to value their own time, that must be accepted as an appropriate valuation of the incidental, consequential, and emotional (e.g. in the case of family emergency) value to them of being delayed until the next day.

Accordingly, a reasonable estimate of total direct and consequential costs to last-minute ticket buyers of not being boarded is $500 + $1000 = $1500 per person. Total annual costs to the 1.6 million passengers delayed as a result of the proposed rule would be $1500 x 1.6 million = $2.4 billion per year.

Airlines would also suffer costs if they chose this option, including costs of rebooking passengers and rerouting their luggage as well lost revenue from seats assigned to no-shows and left vacant.

The Regulatory Assessment estimates the cost to the airline of rebooking a passenger at $4.47, but ignores the cost of locating, re-tagging, and rerouting their baggage, which is likely to be an order of magnitude greater than that even if the luggage is successfully re-routed, more if it isn't and has to be delivered to the passenger and/or if the passenger has to return to the airport, after their arrival (and perhaps after continuing on a connecting flight beyond the port of entry), to clear it through customs.

The greatest cost to airlines of this option, however, would be in lost revenue from empty seats of no-shows and reduced passenger load factors.

Even without quantifying the costs to airlines, however, we estimate the costs to passengers of this option as at least $2.4 billion per year – more each year than the "high" estimate of total costs over 10 years in the Regulatory Assessment and NPRM – or $24 billion (plus inflation) over 10 years.

Last-minute boarders include a range from non-revenue standby passengers to walk-up purchasers of full-fare coach, business class, and first class tickets. More information from airlines would be needed accurately to estimate the percentage of boarders within 15 minutes before departure, the average fares they have paid, and airlines' total passenger revenues from flights to, from, via, or overflying the USA. But given the huge over-representation of full fare coach, business class, and first class ticket purchasers among last-minute boarders, and the high ratio of full fare and front-cabin fares to advance-purchase coach ticket prices, the estimated 2 percent of passengers who board at the last minute

might represent as much as 5 percent of airline revenues – which would be lost under this option. Comments should be sought from airlines as to the direct, incidental, and consequential costs of such a revenue reduction, far greater than airlines' profit margins, on flights subject to the proposed rule.

VII. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO CONSIDER SIGNIFICANT CONSEQUENCES AND COSTS OF COMPLIANCE WITH THE PROPOSED RULES.

A. Overflights of U.S. airspace

In the NPRM (71 FR 40037) , "CBP notes the current APIS regulations providing for electronic transmission of manifest data 60 minutes prior to departure for crew and non-crew on flights to, from, continuing within, and overflying the Unites States are unchanged". And the Regulatory Assessment does not include any assessment of costs related to the impact of the proposed rules on overflights of U.S. airspace by flights not traveling to or from the USA.

But, as the NPRM itself acknowledges on the same page, "this rule proposes to revise the definition of 'departure' in 19 CFR 122.49a(a) accordingly (which will also be applicable to other APIS aircraft provisions as well: 19 CFR 122.49b, 122.75a, 122.75b)." Those sections apply to all flights that transit U.S. airspace: domestic flights within other countries – mainly within Canada (e.g. Toronto-Vancouver) but also some within Mexico (e.g. Ciudad Juarez-Tijuana) and some between points in other countries, such as within France between Metropolitan France and French Polynesia – as well as international flights between countries other than the USA.

Whatever the time relative to the "departure" of the flight at which any act (such as the termination of boarding or the transmission of APIS data) is now required, changing the definition of departure from "wheels-up" to "push-back" will move that deadline "15 to 25 or more minutes" (according to the NPRM) earlier than under the current rules.

The Regulatory Assessment assumes (page 9) that, "It is unusual for a passenger to fly from London to Miami, then switch planes and fly to Mexico City; the passenger is more likely to take a direct flight from London to Mexico City." This is unsupported in the Regulatory Assessment, and untrue.

There are few direct flights between Mexico and the U.K., and the vast majority of traffic on such routes goes via the USA in spite of the abolition by the USA of transit without visa (TWOV) and

the imposition of onerous visa and US-VISIT processing requirements for transit passengers. The example in the Regulatory Analysis is particularly inapposite, since even the few direct flights between Mexico City and London overfly U.S. airspace, and would be impacted by the proposed rules change.

There are few direct flights between Canada or Europe and Mexico, the Caribbean, Central America, and South America, and most of those few direct flights overfly U.S. airspace. There are no nonstop flights between anywhere in Asia and anywhere in Mexico, the Caribbean, Central America, and South America. The vast majority of passenger traffic on all these routes either connects in, transits, or overflies the airspace of the USA, and in any of these cases would be impacted by the proposed changes.

Further information from airlines (including, of course, airlines such as Cubana de Aviación that don't fly to or from the USA, but that overfly U.S. airspace) and air traffic control authorities is needed to determine the number of flights and passengers that overfly U.S. airspace between points in other countries, and to incorporate the impacts on those flights and passengers in the Regulatory Assessment.

B. Redirecting baggage of delayed passengers

As noted earlier in these comments, the NPRM and Regulatory Assessment include an estimate of the cost of re-booking a traveler who is unable to board a flight due to the proposed rule changes, but ignore the typically much greater cost of locating, re-tagging, and rerouting that traveler's checked luggage. Because locating and rerouting baggage is not always possible or reliable, the attempt to do so carries a substantial risk that the bag(s) may arrive at the destination or port of entry separately from the passenger, and have to be stored (if they arrive early), forwarded, or delivered to the passenger (if they arrive late). This is always costly, especially if the passenger is now far from any airport. In the worst case, the passenger may have cleared customs and continued on to a location far from any port of entry, and may have to make a new trip back to a port of entry to clear their delayed bags through customs.

C. Shorter baggage loading time

Under the current rules, the airline can begin loading bags at any time (subject to potential offloading if the corresponding passenger does not board). Typically, loading of baggage – both for originating and connecting passengers – begins well before the start of passenger boarding. Bags for ticketed connecting passengers may be on board the aircraft before those passengers receive their boarding passes at the boarding gate for the connecting flight.

Under the proposed rule, no bag could be loaded until individualized approval is given by the CBP for the corresponding passenger to board and for their luggage to be loaded. As a result, the time available to the airline for baggage loading would be substantially reduced. This would require more ramp staff for each flight, to load baggage more quickly during the shorter window of time. It would also increase the likelihood of errors in loading bags, and hence the percentage of bags left behind or misdirected, with consequential costs for airlines and passengers alike, as discussed in the preceding section. None of these costs are considered in the NPRM or the Regulatory Assessment.

D. Incompatibility with other countries' laws

As discussed earlier in these comments, both the current international APIS rules and the rules proposed in the NPRM are incompatible with current laws in the European Union and with the laws of other countries, including those of significant trade and travel partners of the USA in Latin America which have adapted their privacy and data protection laws from those of Spain and other E.U. countries, including the provisions at issue between the USA and the E.U. with respect to the APIS regulations.

Unless the current and proposed international APIS rules are withdrawn, it is now and will continue to be impossible for any airline to operate flights between the USA and the E.U. without violating the laws or regulations of the USA or of one or more E.U. member states. Enforcement of those rules awaits only complaints on which the relevant authorities will be required to act. The multi-billion dollar per year implications of the resultant cessation of direct flights between the USA and the E.U. should be considered in the Regulatory Assessment and the NPRM, but is ignored.

E. Reciprocal adoption of similar rules by other countries

Since the USA cannot reasonably object to the reciprocal imposition by other countries of rules similar to those imposed by the USA, the CBP should take into account, in its consideration of rules such as those in the NPRM, the implications of their adoption by other countries as well as the USA.

Even many domestic flights between points in the USA overfly Canada or Mexico. What would U.S. citizens think if they were required to provide complete identifying personal information to the government of Canada an hour before takeoff, and obtain individual approval from Canada in advance, before they could board a flight between Boston and Chicago scheduled to transit Canadian airspace? What if a flight between San Diego and Houston that files a pre-departure flight plan entirely over the USA were forbidden to modify its course, while en route, to transit Mexican airspace – as is often done

in response to unanticipated weather changes – unless it had obtained conditional Mexican approval for each passenger and crew member an hour before departure?

Many travelers' greatest and most legitimate fears of persecution concern the governments of countries near those to or from which they are traveling, and perhaps including countries that they will, or might, overfly en route. To what extent will travelers' exercise of their rights to free movement and assembly – under the U.S. Constitution and international human rights law and treaties – be chilled by the knowledge that their personal information, including their travel details, may be sent to governments of hostile neighbors of the country to or from which they are traveling?

International flights routinely transit the airspace of many more countries, and avoiding doing so may require detours of thousands of miles. Should personal details on all passengers and crew members on each flight between Miami and South America be provided to the government of Cuba an hour before departure, and no passengers be permitted to board until an hour after all passengers and crew have been individually approved by Cuban authorities for transit of Cuban airspace?

Long-haul intercontinental flights and flights over regions of many small countries, such as across the Caribbean or across Europe, routinely transit the airspace of a dozen or more countries. What are the implications of multiplying the cost of dealing with a single country, and instead having to send passenger data to, and receive approval from, each of those countries, before departure?

All of these costs and implications are ignored in the NPRM and Regulatory Assessment.

F. Misidentified or erroneously "not cleared" would-be travelers

Based on the most recent audits and reports on current traveler screening systems, most of those would-be travelers who will be denied boarding on the basis of "not cleared" messages will be innocent. The "not cleared" messages ordering carriers not to transport them will be the result of misidentifications by the CBP, the Terrorist Screening Center (TSC), or other sources relied on by them.

The most recent Government Accountability Office audit of watch list screening programs, including those of airline passengers, reported that of inquiries concerning matches with watch lists referred to the Terrorist Screening Center, "about half were misidentifications, according to TSC":

> During the 26-month period we studied—from December 2003 (when the Terrorist Screening Center began operations) to January 2006—the center received tens of thousands of screening-encounter referrals from frontline-screening agencies and determined that approximately half involved misidentified persons with names the same as or similar to someone whose name was contained on the terrorist watch list. The

> number of referrals to the Terrorist Screening Center does not constitute the universe of all persons initially misidentified by terrorist watch list screening because the names of many persons initially misidentified are not forwarded to the Terrorist Screening Center.

Government Accountability Office, *Terrorist Watch List Screening: Efforts to Help Reduce Adverse Effects on the Public*, GAO-06-1031 (September 2006).

Thus, including those misidentified "matches" that were not referred to the TSC, it is likely that the *majority* of persons prevented from traveling by "not cleared" messages will be innocent. (An unknown additional number, impossible to determine form the NPRM, will be denied boarding on the basis of the proposed rule against boarding in the absence of any message from the CBP.)

Further support for the likely predominance of misidentifications is provided by the contents of the "no-fly list" used as part of the basis for screening decisions:

> 60 Minutes managed to obtain a copy of the No Fly List and without giving away any national secrets, found it to be incomplete, inaccurate, outdated and a source of aggravation for thousand of innocent Americans.... The government won't divulge the criteria it uses in making up the list or even how many names are on it. But last spring, working with a government watchdog group called the National Security News Service, 60 Minutes was able to obtain a copy of the No Fly List from someone in aviation security....
>
> In paper form it is more than 540 pages long. Before 9/11, the government's list of suspected terrorists banned from air travel totaled just 16 names; today there are 44,000. And that doesn't include people the government thinks should be pulled aside for additional security screening. There are another 75,000 people on that list. With Joe Trento of the National Security News Service, 60 Minutes spent months going over the names on the No Fly List. While it is classified as sensitive, even members of Congress have been denied access to it. But that may have less to do with national security than avoiding embarrassment.....
>
> "[Y]ou've got people who are dead on the list. You've got people you know are 80 years old on the list. It makes no sense."
>
> 60 Minutes certainly didn't expect to find the names of 14 of the 19 9/11 hijackers on the list since they have been dead for five years. 60 Minutes also found a number of high profile people who aren't likely to turn up at an airline ticket counter any time soon, like convicted terrorist Zacarias Moussaoui, now serving a life sentence in Colorado, and Saddam Hussein, currently on trial for his life in Baghdad.... [S]ome of the names are among the most common in America. Like Gary Smith, John Williams or Robert Johnson.

CBS News, *Unlikely Terrorists On No Fly List: Steve Kroft Reports List Includes President Of Bolivia, Dead 9/11 Hijackers ,* "60 Minutes" (October 8, 2006), available at <http://www.cbsnews.com/stories/2006/10/05/60minutes/main2066624.shtml>.

Many countries impose strict liability and statutory damages on air carriers for denied boarding. The Regulatory Assessment should have included, but did not, an assessment of the liability of the government and of air and sea carriers, both under U.S. law and the law of other jurisdictions where flights originate and boarding might be denied, for erroneous denial of boarding as a result of misidentification – probably in the majority of cases in which would-be passengers are denied boarding as a result of "not cleared" messages.

VIII. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO INCLUDE STATUTORILY REQUIRED IMPACT ASSESSMENTS.

A. Privacy Act

The Privacy Act applies to an agency's creation and maintenance of a "system of records," which is defined as a group of records under the control of an agency "from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). The proposed collection of detailed travel information concerning United States persons clearly raises serious questions under subsection (e)(7) of the Act. The subsection provides that an agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment, unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7).

Government collection of information detailing the international travel of United States persons would appear to fun afoul of that prohibition as it documents the exercise of the right of association, a right protected by the First Amendment. Does INS contend that the creation of a system of records pertaining to United States persons exercising their right of association is exempt from 5 U.S.C. § 552a(e)(7) because it is expressly authorized by statute or is an authorized law enforcement activity?

In addition, the NPRM (71 FR at 40046) claims that:

> A Privacy Impact Assessment (PIA) was published in the Federal Register (70 FR 17857) in conjunction with the April 7, 2005, APIS final rule (70 FR 17820). As the changes proposed in this rule do not impact the data collected or the use and storage of the data, and only affect the timing of data transmission, the existing System of Records Notice (SORN) (the Treasury Enforcement Communications System (TECS) published at 66 FR 53029) and the PIA continue to cover the collection, maintenance, and use of APIS data.

This claim in the NPRM that "the changes proposed in this rule do not impact the data collected or the use and storage of the data" is clearly erroneous, for at least two reasons:

First, because APIS data under the current rule is provided only after departure, it is not and cannot be used for making decisions about whether to permit boarding, or to prevent departure from the country of origin of the flight. This use under the proposed rules for boarding and departure decision making is an entirely new use of this data, fundamentally different from the current purely informational use of APIS data, or even its potential use in determining admissibility to the USA of non-citizens.

Second, under the current rules the provision of international APIS data by passengers (or more accurately, by airlines about passengers) is "voluntary" for U.S. citizens. According to the PIA for the current rules (70 FR at 17858), "United States citizens who refuse to provide the information to the air or sea carrier may be subject to action by that particular carrier", although of course the permissible actions by the carrier would be limited by their obligation as a common carrier to transport all passengers complying with their published tariff of fares and conditions of carriage. (And the terms they could lawfully include in their conditions of carriage would be limited by the U.S. Constitution, including the First Amendment, and by international human rights law embodied in treaties ratified by the USA.) At most, "if the carrier allows the passenger to board without providing the required information, the person will be subject to security checks upon arrival." Using APIS data to decide before departure whether to allow U.S. citizens to board a flight, to depart from the place and country of origin of the flight, or to be transported by common carrier, is a fundamentally different use than using that data to decide whether to subject a U.S. citizen to additional "security checks on arrival".

Because the provision of international APIS data was not mandatory for U.S. citizens, and because the data was not to be used to decide whether to permit U.S. citizens to exercise their rights to travel, assembly, and movement, the provisions of the Privacy Act applicable to the collection of data "when the information may be result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs" (5 USC § 552a(e)(2)) and to records "describing how any individual exercises rights guaranteed by the First Amendment" were not addressed by either the PIA or the SORN for the present rule.

Clearly mandatory airline passenger screening and/or "clearance" by the U.S. government, or by airlines or other third parties acting under compulsion of the government, is a right benefit, or privilege under a Federal program. And clearly APIS data required by the proposed rule describes how individual travelers exercise the right to assemble guaranteed by the First Amendment: when they assemble, where they assemble, by what means of transport they assemble, with whom they assemble, and so forth.

For these reasons, the existing SORN and PIA do not cover the newly mandatory collection (for U.S. citizens) or new uses of APIS data under the proposed rules. Both a new SORN and a new PIA must be completed and published before the proposed new rules are finalized.

B. Regulatory Flexibility Act

The CBP claims in the NPRM (71 FR at 40045) that, "We have examined the impacts of this proposed rulemaking on small entities as required by the Regulatory Flexibility Act.... We conclude, therefore, that this rule will not have a significant impact on a substantial number of small entities."

These claims are in error, because the CBP considered only small air carriers as "small entities". As discussed in detail above, the majority of the costs of the proposed rule would be imposed on airline passengers. A substantial portion of those millions of passengers would be business travelers, and of those a substantial portion would be small business entities and their employees: self-employed independent contractors, sole proprietors, and employees of small businesses.

Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small business among international travelers and specifically among the last-minute boarders who would be most affected by the proposed rule changes, as well as the impact on them of not being able to board flights at the last minute (or not having their employees be able to board), of the carrier not receiving permission from the CBP for them or their employees to board, or of not being able to predict whether such permission will be given. But the number of such small business entities impacted is clearly "substantial", and the impact on them "significant", within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small entities among travelers and their employers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including the self-employed would not only be impacted, but disproportionately and negatively impacted by the proposed rule, particularly by the uncertainty as to whether approval for them or their employees to travel would be granted by the CBP. Larger businesses would be more likely to have alternate staff able to travel, or already on site, and able to fulfill a contract, if one employee was not given permission to travel by the CBP. The assessment under the Regulatory Flexibility Act should include, inter alia, an assessment of the degree to which inability to predict whether travel would be permitted would disadvantage small entities, especially self-employed independent contractors and sole proprietors, in bidding on consulting, service, maintenance, or other contracts that might require travel.

IX. CONCLUSION AND RECOMMENDATIONS

The current and proposed international APIS rules should be withdrawn in their entirety, effective as soon as possible, to avoid the cessation of USA-E.U. flights and the statutory and Constitutional violations, inconsistencies with treaty obligations, and economic impacts described in these comments, and to permit U.S. and foreign persons to exercise their Constitutional civil liberties and

internationally recognized human rights to travel, assemble, and move about the world, including to and from the USA and within and between other countries.

For the foregoing reasons, we also submit that if the NPRM is not withdrawn, the additional assessment required by the Regulatory Flexibility Act must be completed and published, and a new comment period must be provided, before any new rules are finalized. The DHS is also required to publish an amended notice of its proposed rulemaking, expressly addressing the matters that the Privacy Act mandates. Compliance with the Act's requirements is particularly critical here, where the agency proposes an unprecedented practice of collecting and maintaining detailed information about the international travel of United States citizens absent particularized suspicion. Upon publication of a revised notice, IDP and the public at large should be provided an opportunity to submit additional comments addressing the Privacy Act and constitutional implications of the proposed rules.

Respectfully submitted,

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Before the

PRIVACY OFFICE
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20528

Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP–006, "Automated Targeting System (ATS)"	DHS-2006-0060 **SUPPLEMENTAL COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

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The Identity Project submits these supplemental comments in response to public statements by the Department of Homeland Security concerning the Automated Targeting System (ATS), records system DHS/CBP–006, and the extension of the comment period on the Privacy Act of 1974, System of Records Notice (SORN) for the ATS, published at 71 Federal Register 71182 (December 8, 2006).

Since the filing of our original comments on this docket, focusing primarily on the fact that the SORN directly contravenes Congressional limitations placed on DHS through the DHS Appropriations Acts and on violations of the Privacy Act, available in docket DHS-2006-0060 and at <http://hasbrouck.org/IDP/IDP-ATS-comments.pdf>, public statements by the DHS concerning the ATS have revealed additional uses of the ATS records system -- not disclosed in the SORN -- which reveal substantial defects in the SORN, as well as violations of other laws. These Supplementary Comments

address these issues, and reinforce our request that the ATS system of records be eliminated, as it is illegal, and that all data contained in it and in all backups and copies be destroyed.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. NEW DHS DISCLOSURES REVEAL SERIOUS DEFICIENCIES IN THE ATS SORN.

The original SORN for the ATS record system (71 Federal Register 64543-64546, November 2, 2006) described the purposes of the ATS records system as "To perform targeting of individuals, including passengers and crew, focusing CBP resources by identifying persons who may pose a risk to border security, may be a terrorist or suspected terrorist, or may otherwise be engaged in activity in violation of U.S. law", and "To assist in the enforcement of the laws enforced or administered by DHS." There was no definition of "targeting" in the SORN, and no mention of the potential consequences to an individual of being "targeted". The implication of the SORN was that these consequences would be limited to "identification" and heightened scrutiny ("focusing CBP resources"). There was no mention in the description of "Purposes" or of "Routine uses of records" of use to prohibit entry to, or exit from, the U.S., or to prohibit travel by common carrier or along public rights-of-way.

On December 8, 2006, after the close of the original comment period, Time reported as follows:

> This week, the DHS extended the deadline for public comment on the ATS system; most of the complaints have attacked the system on privacy grounds. The Identity Project, a privacy-rights group, has alleged that the ATS data collection is illegal. It claims that "Congress has expressly forbidden the DHS from spending a penny on any system like this to assign risk scores to airline passengers, and that the Privacy Act forbids any Federal agency from collecting information about how we exercise rights protected by the First Amendment -- like our right to travel -- except as expressly directed by Congress."
>
> The outcry has grown loud enough to bring out DHS officials for an aggressive counterattack. DHS Secretary Michael Chertoff ... told TIME in an interview that the ATS program is ... "essential". ... According to DHS, ATS was the primary means used to bar 565,417 people from entering the U.S. last year; 493 of them were found to be

> inadmissible under "suspicion of terrorist or security grounds." And thousands were turned back because DHS couldn't quite be sure who they were.

Sally B. Donnelly, "Airline 'Risk Assessment': Defending the Right to Snoop", Time, December 8, 2006, available at <http://www.time.com/time/nation/article/0,8599,1568354,00.html> . We assume for purposes of these Supplementary Comments that this report in Time is true and correct, at least with respect to the statements attributed to the DHS. If true, these press statements by the DHS indicate serious deficiencies in the SORN.

These DHS comments have created confusion regarding the purpose of this system of records. Nothing in the SORN or the common usage of the word equates "targeting" with a "bar ... from entering the U.S.", or discloses denial of entry to the U.S. as a purpose, routine use, or possible consequence of the presence, absence, or particular contents of data contained in ATS records.

Inconsistencies, between public statements by DHS and those made within the format of the SORN, about the purposes of the ATS System of Records, raise serious concerns as to DHS' forthrightness and/or ability to communicate both internally and to the public at large.

DHS has claimed recently that it would "creat[e] public confusion" to disclose statements that official DHS spokespeople have previously made to journalists, and that have already been published. Letter from Catrina M. Pavlik, FOIA Officer, Transportation Security Administration, to Edward Hasbrouck, September 25, 2006, "FOIA Case Number TSA 2006-0854," available at <http://hasbrouck.org/documents/Hasbrouck-TSA-FOIA2.pdf>, reported at <http://hasbrouck.org/blog/archives/001167.html>. This is a sorry state of affairs. Disclosures concerning the purposes, uses, and consequences of data in Federal Systems of Records systems are required by the Privacy Act to be fully disclosed in a specified manner: in a SORN and published in the Federal Register. Speeches, Congressional testimony, newspaper op-eds, press releases, or other types of disclosures, while they do not fulfill the notice requirement of the Privacy Act, should at least not "cause public confusion." Inconsistency between what is contained in the SORN and public statements made by DHS is not a "hide the ball" option. Individuals are entitled by the Privacy Act to rely on the SORN, and the SORN alone, to *fully* disclose the existence and attributes of each system of records. DHS has failed to do so here.

III. THE ATS SYSTEM WOULD VIOLATE THE MANDATE OF THE PRIVACY ACT THAT INFORMATION BE COLLECTED DIRECTLY FROM THE INDIVIDUAL WHEN THE INFORMATION MAY RESULT IN AN ADVERSE DETERMINATION ABOUT AN INDIVIDUAL'S RIGHTS.

The Privacy Act of 1974, 5 U.S.C. 552a(e)(2), requires that:

> Each agency that maintains a system of records shall - ... collect information to the maximum extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

The ATS system, as described in the new DHS disclosures, does not comply with this requirement. As noted above, Time has reported that, "According to DHS, ATS was the primary means used to bar 565,417 people from entering the U.S. last year". And the SORN specifically mentions that the ATS will contain information concerning, and be used to target, "passengers on any vessel, vehicle, aircraft, or train who enters or exits the United States." 71 Federal Register 64544. Presumably, at least some of those for whom "ATS was the primary means used to bar" entry to the U.S. were airline passengers or would-be passengers on airlines and perhaps other international common carriers such as Amtrak (a Federally chartered and operated entity). Information in the ATS system has thus resulted in adverse determinations about these individuals' rights, benefits, and privileges under Federal programs including airline passenger screening and transportation by Federally-licensed common carriers.

The right to assemble is a right protected under the First Amendment to the U.S. Constitution. And, as discussed below, the right of transit through the navigable airspace (including by air common carrier) and the right of carriage by common carrier (for all persons complying with the published tariff of fares and conditions of carriage), are rights guaranteed under the Federal programs for regulation of air common carriers pursuant to the Airline Deregulation Act of 1978 and the International Covenant on Civil and Political Rights (a treaty ratified by, and binding on, the U.S.).

The Airline Deregulation Act of 1978, 49 U.S.C. 40102 (a)(5), 49 U.S.C. 40102 (a)(23), 49 U.S.C. 40102 (a)(25), and 49 U.S.C. 40102 (a)(27), requires that intrastate, interstate, and international airlines respectively all be licensed only as "common carriers". By definition, a common carrier is required to transport all passengers complying with their published tariff of fares and conditions of carriage. As licensed common carriers, airlines are thereby forbidding by statute from refusing to transport an otherwise-qualified passenger, except on the basis of a binding order from a court of

competent jurisdiction. The right to travel by common carrier is thus a right protected under the Federal licensing programs for air common carriers, pursuant to the Airline Deregulation Act.

The Airline Deregulation Act at 49 U.S.C. 40101(c)(2) also requires that in issuing regulations, "the Administrator of the Federal Aviation Administration shall consider the following matters:... (2) the public right of freedom of transit through the navigable airspace." The authority and obligations of the Administrator of the FAA under that Act have since been transferred to the DHS.

There is no indication in the SORN or any other Federal Register publication we have been able to find that this "public right of freedom of transit" has been considered by the DHS in any rulemaking related to ATS. (We have been unable to find any explicit acknowledgment or consideration of this right in *any* DHS rulemaking.) And the clear implication of this clause of 49 U.S.C. 40101(c)(2) is that "the public right of freedom of transit through the navigable airspace" is a right, benefit, or privilege under Federal programs specifically including those administered under DHS regulations.

If this clause of the Airline Deregulation Act had not already been Federal law, Congress would have been required to enact it, or a similar provision, as of the entry into effect of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the U.S. Senate on April 2, 1992 (138 Congressional Record S4782). As we have discussed in our comments filed with the DHS in another current rulemaking, Article 12 of the ICCPR obligates the U.S. to respect the right of freedom of movement. And the U.S. has advised the United Nations Human Rights Committee, in reports required by the ICCPR, that Federal agencies are required to consider in rulemaking, and do in fact consider, the rights guaranteed by the ICCPR. "Comments of the Identity Project et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States" (October 12, 2006), available in docket USCBP-2005-0003 and at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>. The meaning of this clause of the Airline Deregulation Act, and the "public right of transit," required to be considered by the DHS, should therefore be interpreted in light of Article 12 of the ICCPR, to which it gives effect.

"Screening" of airline passengers is, of course, a Federal program operated by the DHS's Transportation Security Administration (TSA) and Bureau of Customs and Border Protection (CBP). Since information in the ATS system may, apparently, result in adverse determinations about an individual's rights, benefits, and privileges under each of these Federal programs, the Privacy Act thus

requires this information to be collected to the greatest extent practicable directly from the individual. According to the SORN, however, information about travelers would be obtained from airlines and other third parties, not from travelers themselves, even when travelers interact directly with TSA and/or CBP screening personnel and information could be collected from them directly.

In public statements, the DHS has claimed that information in Passenger Name Records (PNR's) is "provided by passengers". This claim is false. Any competent expert in the personal information architecture of travel reservations and the contents of PNR's knows that most information in airline PNR's is not provided to those airlines directly by passengers. The false claim by the DHS raises serious doubt as to the technical competence (or the honesty) of the DHS's experts on reservations and PNR's.

First, none of the information in PNR's is provided directly to the DHS by individual data subjects: It is provided by various entities to airlines and/or computerized reservation systems (CRS's), from which it is obtained by the DHS -- by what means and under what authority is not mentioned in the SORN. Second, much of the information in PNR's pertains to individuals other than passengers, as discussed in our original comments on the SORN for ATS. Third, with respect to passengers, almost none of the information in PNR's is even provided directly to the airlines. Only in the case of airline staff making reservations for their own travel is *any* information entered directly into a PNR by the data subject. Information in a typical PNR comes from multiple sources including third parties other than the airline and the passengers. And the information provided by passengers is typically provided through at least one, typically two or three, and sometimes half a dozen intermediaries, many of them unknown to the passenger:

1. A business associate or family member makes reservations for a party of several people to travel together. The other travelers may not know that this has been done, or what information the person making reservations that include them has provided about them. (A single PNR, of course, can contain information on one, two, or up to one hundred or more people traveling as a group.)

2. The person requesting the reservations contacts a travel agency or agent, through their Web site or by other means. The agency or agent enters some data into a CRS to which it subscribes, to create a PNR in that CRS. The agency may enter no information about the prospective traveler other than a name (which may or may not be accurate or consistent with any other reservations or other records), a little information, or a lot of personal information. Using identical formats, the agency or agent may enter contact information (telephone number, address, etc.) for the agency or for the traveler, or no such contact information at all. The information entered into a PNR for a party of more than one traveler may pertain to any one or more of the travelers, and may or may not be associated with a specific name or names. The person requesting the reservations does not know, has in most cases no legal right to know (particularly if reservations are made

in the U.S.), has no way to find out, and has no control over what information about them is entered into any PNR. In particular, we have been unable to find *any* airline or travel agency Web site that allows customers or other individuals identified in reservations to (a) view the PNR's containing information about them, (b) know at what stage in the inquiry, reservation, and ticket-purchase process a PNR will be created, (c) know what (if any) information will be entered in a PNR (and what will be stored, if at all, only in some separate record system), or (d) have any control over any of these things.

3. The CRS in which the agency PNR is created sends automated messages in AIRIMP or other mutually agreed format to the CRS(s) that host(s) the transporting airline(s) reservations. These messages typically contain only portions of the information in the agency PNR. Neither the agency nor any of the travelers generally knows or has control over exactly which data is in these messages, or how it is formatted (for example, whether associations of particular data with particular names are preserved in transmission). The receiving CRS uses this message data to create its own PNR in the airline's "partition" in its database. Presumably, although it isn't made clear in the SORN, this and not the original PNR in the booking agency's CRS is the one somehow obtained by the DHS and entered or converted, in whole or in part, into ATS records.

4. Additional data is entered into the PNR though messages to the host CRS from various third parties such as hotel and car rental companies (entering confirmations and details of service requests, such as for bedding type or other intimate personal preferences), and by airline staff. The passengers may or may not be aware of the general subjects of these messages, but rarely if ever see the exact details, especially of free-text non-printing remarks visible only to others with access to the full PNR ("became irate with customer service representative", or the like).

Yet the presence, absence, or contents of this data -- of whose contents the individual has only a vague idea if any, no right of access or correction from its commercial holders if it is collected originally in the U.S. by a U.S. entity, and little or no control -- will be relied on, and is already being relied on, by the DHS as "the primary means used to bar 565,417 people from entering the U.S. last year."

This is exactly why section (e)(2) of the Privacy Act requires that data relied on in making such significant determinations must be collected "to the maximum extent practicable" directly from the individuals whose rights are to be affected by those decisions. As this information is not collected to any extent directly from the individual, and the "practicable" issue has never been addressed, DHS has failed to comply with this requirement of the Privacy Act. If the ATS system is not eliminated, it should be modified so that any information concerning travelers is collected directly from them, and not from PNR's or other airline or third-party sources.

IV. DHS HAS EXCEEDED ITS AUTHORITY.

A SORN is a notice, not an order, which *describes* a system of records. A SORN itself does not, and cannot, create any obligations on individuals to provide information to government agencies or third

parties, authorize any particular use of information, or impose any penalties for providing or not providing information. A SORN is a necessary but not a sufficient condition for the lawful creation, maintenance, or use of a system of records. Mandatory divulgence of information as a prerequisite to the exercise of rights must be accompanied by a valid law or a valid regulation duly adopted pursuant to a valid statutory authorization. Where is this law or regulation?

Further, DHS has no authority to "bar ... people from entering the U.S." in the absence of an order from a court of competent jurisdiction. We have addressed this issue in a pending rulemakings in which the DHS has asserted such authority not merely to enforce judicial "no fly", "no board", or "no transport", orders but to issue such orders itself, without judicial process. See "Comments of the Identity Project et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States" (October 12, 2006), available in docket USCBP-2005-0003 and at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>. The total lack of judicial process when summarily depriving individuals of protected rights violates the United States Constitution and U.S. treaty obligations under the ICCPR.

V. DHS HAS AGAIN VIOLATED THE PRIVACY ACT OF 1974

The Privacy Act of 1974 requires that each individual be informed of "the effects on him, if any, of not providing all or any part of the requested information". 5 U.S.C. 552a(e)(3)(D). There is no evidence that any such notice has been, or is being, provided to any travelers or other individuals about whom the ATS records system contains information.

Finally, we note that the original SORN provided that, "The new system of records will be effective December 4, 2006, unless comments are received that result in a contrary determination." 71 Federal Register 64543. Neither the notice of extension of comment period (71 Federal Register 71182) nor any other Federal Register publication to date has disclosed any such "contrary determination." Nor is there anything necessarily contrary about putting a system of records into effect and continuing or resuming acceptance of public comments concerning it. So we must assume that this illegal system of records has been "effective" since December 4, 2006, and perhaps earlier.

As we pointed out in our original comments, maintenance of the ATS system as described in the SORN is a continuing criminal violation of the Privacy Act on the part of each officer or employee of any

agency willfully participating in such maintenance. Accordingly, we respectfully request that appropriate law enforcement agencies including the DHS Office of the Inspector General, to whom these supplementary comments and our original comments are being forwarded, immediately initiate appropriate criminal investigation and enforcement proceedings against the DHS and any other agency officers and employees responsible for putting the ATS system of records into effect and maintaining it.

VI. CONCLUSION AND RECOMMENDATIONS

As described above, the DHS has now disclosed additional purposes and routine uses, not disclosed in the SORN, of data about individuals contained in the ATS records system: as "the primary means used to bar ... people from entering the U.S." For this and all the foregoing reasons, as well as those stated in our original comments, the Identity Project respectfully requests that the ATS system of records be shut down; that all data contained in it and in all backups and copies be destroyed; that no similar system under any name be created unless and until a new SORN has been published complying with the requirements of the Privacy Act, the Airline Deregulation Act, and the International Convention on Civil and Political Rights; and that criminal investigations and enforcement proceedings under the Privacy Act be initiated promptly against the DHS and any other Federal agency officers or employees responsible for its creation or maintenance.

Respectfully submitted,

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December 29, 2006

Before the

BUREAU OF CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY

and the

BUREAU OF CONSULAR AFFAIRS
DEPARTMENT OF STATE

Washington, DC 20229

Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere	USCBP-2007-0061 **COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

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August 27, 2007

The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 72 *Federal Register* 35088-35116 (June 26, 2007), docket number USCBP-2007-0061-0001, and the associated Regulatory Assessment, "The Western Hemisphere Travel Initiative Implemented in the Land Environment", docket number USCBP-2007-0061-0002.

Under this NPRM, the Departments of State (Bureau of Consular Affairs) and Homeland Security (Bureau of Customs and Border Protection, CBP), referred to hereinafter as "the Departments", propose to extend to land and sea border crossings a new requirement, as part of the so-called "Western Hemisphere Travel Initiative" (WHTI), for all would-be cross-border travelers to possess, carry, and display to CBP inspectors at ports of entry and exit, as a precondition to being permitted to enter or to leave the U.S., passports, "passport cards", or other specified forms of government-issued travel credentials (collectively, "travel documents"). These rules would apply to U.S. citizens and lawful asylum seekers and refugees, as well as visitors, both at ports of entry and ports of exit.

These requirements are already being applied to cross-border air travel under the final rules for the "air phase" of the WHTI, as promulgated through the rulemaking in docket USCBP-2006-0097. We participated in that rulemaking, and we note that all of our prior comments regarding the requirements for travel documents for air travelers apply with equal validity, and in most cases with even greater force (because of the absence of any remaining alternate means of leaving or entering the U.S. not subject to a prerequisite of possession and display of government credentials), to the similar requirements for land and sea ports of entry in the current rulemaking. We therefore reiterate and hereby incorporate in full by reference our comments on the "air phase" of the Western Hemisphere Travel Initiative in docket USCBP-2006-0097 ("Comments of the Identity Project, Documents Required for Travelers Arriving in the United States at Air and Sea Ports-of-Entry From Within the Western Hemisphere", September 25, 2006, available at <http://hasbrouck.org/IDP/IDP-WHTI-comments.pdf>).

We also note that the Departments have not yet made any meaningful response to many of our earlier comments, and that the Departments have admitted in subsequent testimony to Congress that their responses to our comments have, in fact, proven to be incorrect.

Despite having admitted to Congress that they grossly underestimated the numbers of people who would need to obtain passports as a result of the "air phase" of the WHTI , the Departments now propose to continue to rely on those same, knowingly erroneous, underestimates as the basis for predicting the larger costs and consequences of the more significant "land phase" of the WHTI.

Such willful blindness to known reality is unconscionable and legally impermissible.

The proposed rules would be inconsistent with U.S. obligations under international human rights law, free trade agreements, and U.S. statutes, including the International Covenant on Civil and Political Rights (ICCPR), the Charter of the Organization of American States, the North American Free Trade Agreement (NAFTA), and the NAFTA Implementation Act. The Regulatory Assessment associated with this NPRM relies on estimates that the Departments have admitted that they now know to have been erroneous, fails to consider significant costs, grossly underestimates those costs it does quantify, and fails to quantify the largest costs that the proposed rules would impose on travelers, travel-related businesses, and other businesses (including, and with disproportionate negative effect, small businesses) whose work involves, or might involve, cross-border travel. Both the NPRM and the Regulatory Assessment fail to include the small business impact assessment required by the Regulatory Flexibility Act.

The Identity Project respectfully requests that the NPRM be withdrawn in its entirety. If the NPRM is not withdrawn, we request that the NPRM be republished together with a revised Regulatory Assessment, taking into consideration the costs identified in our comments, and the additional analysis required by the Regulatory Flexibility Act, and that a new comment period be provided. Further, if the proposed rules are adopted, their adoption should be reported to the United Nations Human Rights Committee, in accordance with the requirements of the ICCPR as detailed in our previous comments.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. THE ILLEGALITY AND OTHER NEGATIVE EFFECTS OF THE PROPOSED TRAVEL DOCUMENT REQUIREMENT ARE NOT SIGNIFICANTLY MITIGATED BY THE PROPOSED ADDITION OF PASSPORT CARDS AND OTHER ACCEPTABLE ALTERNATE FORMS OF GOVERNMENT-ISSUED TRAVEL CREDENTIALS .

In the current NPRM, the Departments propose to allow specified other categories of "passport cards" or other government-issued travel credentials, as an acceptable alternative to U.S. passports to satisfy the proposed documentary prerequisites for entry to or departure from the U.S.

But there is neither anything special about those travel documents called "passports", nor anything about these proposed alternate forms of travel credentials, that would alter the analysis of the illegality of document prerequisites for international travel in our previous comments. The "passport card" and all the other proposed forms of acceptable travel documents would be issued by government agencies and would require time, fees, personal presentment of the applicant at designated application places, and other prerequisite documentation to obtain. There is no evidence in the NPRM that any of these alternative credentials are, or would be, available to citizens (much less lawful non-citizen travelers, such as those refugees and asylum seekers legally entitled to entry despite the lack of any credentials) as a matter of right, or that those who lack or are denied such documents would have any legal recourse.

The only difference apparent from the NPRM between the effects of requiring a passport and requiring a "passport card" or other travel document would be that the fee for issuance of a passport card or alternate travel document *might* be less than that for a passport. But as itemized in detail in our original comments, and as proven by more recent events (ignored in the latest NPRM), the passport fee is a small minority of the typical total costs of obtaining a passport. So the impact of a reduced-fee "passport card" on the total cost of the proposed rule would be minimal.

III. THE ILLEGALITY AND OTHER NEGATIVE EFFECTS OF THE PROPOSED TRAVEL DOCUMENT REQUIREMENT ARE NOT SIGNIFICANTLY MITIGATED BY THE PROPOSED CATEGORY-SPECIFIC AND/OR DISCRETIONARY EXCEPTIONS .

In the NPRM, the Departments propose certain exceptions to the otherwise categorical requirement for all would-be border crossers to possess, carry, and present government-issued travel credentials. But while those exceptions (particularly for certain cruise ship passengers) would somewhat reduce the economic impact of the proposed rules, they would have no impact on their illegality, and minimal impact on the categories of costs (particularly costs to small economic entities such as sole proprietors and costs to those who have to postpone or cancel desired short-notice international travel because they do not have and cannot obtain, or cannot obtain quickly enough, the required travel documents) addressed in our previous comments.

The proposed exceptions are all limited to specific categories of travelers (such as, for example, certain groups of students), or are to be granted or denied at the discretion of the Departments. None of them is available as a matter of right to all those travelers entitled, as a matter of right, to enter or leave the U.S. And none of them are subject to any substantive or precedural due process, particularly as regards the manner in which the Departments exercise their "discretion" to grant or deny "waivers".

IV. THE DEPARTMENTS HAVE FAILED TO RESPOND MEANINGFULLY OR ADEQUATELY TO OUR COMMENTS ON THE INCOMPATIBILITY OF THE PROPOSED RULES WITH INTERNATIONAL TREATIES AND WITH OTHER FEDERAL STATUTES.

In their analysis of public comments ("Documents Required for Travelers Departing From or Arriving in the United States at Air Ports-of-Entry From Within the Western Hemisphere; Final Rule", 71 *Federal Register* 68412-68430, November 14, 2006, docket USCBP-2006-0097-0107) , the Departments said in response to our comments on the incompatibility of the proposed rules with international treaties and other Federal statutes only that, "By requiring a valid passport as an entry document, DHS and DOS are not denying U.S. or non-U.S. citizens the ability to travel to and from the United States. Requiring sufficient proof of identity and citizenship through presentation of a passport or other acceptable document upon entry to the United States is fully within DHS and DOS's authority pursuant to 8 U.S.C. 1182(d)(4)(B) and 1185(b)." (Although the Departments' response to our comments referred only to an "entry document", this NPRM would also impose a new requirement for an *exit* document. But as discussed in our previous comments, the right to leave any country is near absolute and not dependent on citizenship. The requirement for an exit document thus raises even more severe issues under the ICCPR.)

The first of these claims – that requiring a government-issued credential as a prerequisite to international travel would not deny anyone the ability to travel – is of course factually untrue. The clear purpose and consequence of the proposed rule would be to deny persons without such credentials the ability to travel across U.S. borders, regardless of whether they have a right to travel. And as discussed in detail in our previous comments and below, many people need to travel on too short notice to obtain a passport, do not have (and cannot obtain in time) the necessary prerequisite documents (such as a birth certificate, often available only from a vital records office in a place far from where they now live) that would be needed to obtain a passport, or are ineligible for a passport (keeping in mind that passport

issuance is not considered a matter of right and can, under the Departments' other regulations, be denied for many reasons that do not constitute a basis for denial of the right to travel).

The implications of the Departments' second claim – that the existence of any Federal statute (allegedly) authorizing a particular proposed rule obviates any need to consider whether that authority is constrained by other statutes or international treaties – are, without exaggeration, dire. That is especially true where, as here, the treaties at issue are among those that codify the most fundamental principles of international law, human rights, and U.S. relations with our most important and closest international neighbors. At best, the Departments' failure to understand the supremacy over Federal statutes of international treaties to which the U.S. is a party is evidence of gross legal incompetence. At worst, the Departments' implicit argument is that they are immune from any obligation even to consider the impact of their activities on human rights protected by explicit treaty law, even in response to specific public comments raising specific clauses of treaties they are violating. This is the claim to impunity and to being above the law that is the hallmark of totalitarian regimes, and that has been thoroughly (and deservedly) discredited by the entire body of international human rights law and global public opinion.

We remind the Departments that, as cited in our previous comments, the U.S. government is a party to the International Covenant on Civil and Political Rights (ICCPR). Federal agencies including the Departments have been specifically ordered by Presidential directive to inform themselves about and act in accordance with international human rights law, including the provisions of the ICCPR. And the U.S. has specifically reported to the U.N. Human Rights Committee that the sections of the of the ICCPR guaranteeing freedom of travel are considered and respected by U.S. agencies.

The Departments have thus failed to fulfill their obligation to take international law including the ICCPR into consideration in this and all other rulemakings, and to consider and respond to our comments concerning the (in)compatibility of the proposed rules with international treaties including the ICCPR and

with other Federal statutes. The Departments must do so before attempting to promulgate any final rule in this proceeding.

V. THE DEPARTMENTS CONTINUE TO PRESENT KNOWINGLY FALSE DATA AS THE BASIS FOR UNDERESTIMATES OF THE COSTS OF THE PROPOSED RULES AND THEIR IMPACT ON THE RIGHT TO TRAVEL.

In our comments on the Departments' proposed rules for the "air phase" of the new WHTI travel document requirements, we pointed out that the Departments had grossly underestimated the costs and consequences of the proposed rules. In particular, we pointed out that the Departments had failed to consider many of the costs in time and money, which we itemized and estimated in detail, of obtaining a passport or of being unable to travel because of inability to obtain a passport or to do so in time. We also pointed out the Departments had entirely failed to consider the particular problems and costs when a passport is needed on short notice, such as in a family emergency or for short-notice business travel.

In response, the Departments dismissed our comments out of hand: "One commenter argued that the cost to obtain a passport is significantly underestimated because the time estimated to obtain a passport is too low.... However, the commenter presented an estimate that was overly pessimistic and represented an absolute 'worst-case' scenario that would rarely, if ever, be realized."

In fact, the effects we predicted were realized within days of the effective data of the WHTI final rule for air travel, and the actual consequences have proven far worse than anything we predicted.

As a direct result of the WHTI air travel document requirement, and of the Departments' insistence on ignoring our warnings, the U.S. is now in the midst of a costly and entirely unnecessary passport issuance crisis of the Departments' own creation.

Amazingly, the Department persists in using the same estimates it formulated before the current crisis – and which it has admitted to Congress that it now knows to have been erroneous – as the basis for the Regulatory Assessment that accompanies the current NPRM.

Both the Senate and the House held hearings in recent months on the current passport crisis and the consequences of the WHTI air travel passport rule: "The Passport Backlog and the State Department's Response to the Western Hemisphere Travel Initiative", Hearing before the Committee on Foreign Relations, U.S. Senate, June 19, 2007, <http://www.senate.gov/~foreign/hearings/2007/hrg070619p.html>, and "Passport Delays: Affecting Security and Disrupting Free Travel and Trade", Hearing before the Committee on Foreign Affairs, U.S. House of Representatives, July 11, 2007, <http://foreignaffairs.house.gov/hearing_notice.asp?id=856>.

In testimony before the House and Senate hearings, Assistant Secretary of State for Consular Affairs Maura Harty admitted that (1) the Department of State had underestimated the number of additional passport applications, (2) as a result, passport processing times are substantially longer than the Department has predicted, and because of this (3) would-be travelers have, in fact, been denied the ability to travel as a result of the document requirement of the WHTI air travel final rule.

Before the Senate, she said:

> [I]n the past several months, many travelers who applied for a passport did not receive their documents in the time frame they expected. In some cases, the passports did not arrive in time for planned travel.... We simply did not anticipate [this].... The increase in demand was sharper and more compressed than we expected. Receipts far exceeded our ability to keep pace with them in our traditional timeframe. As a result, it began to take longer to process applications. Our average processing time lengthened from six weeks in December, to 10 to 12 weeks today.
> <http://www.senate.gov/~foreign/testimony/2007/HartyTestimony070619.pdf>

And before the House:

> How Did We Get Here? Passport Receipts Exceeded Expectations.... We have been planning for increased passport demand since Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA) in December of 2004. IRTPA included a provision requiring all travelers to have a passport or other combination of documents establishing identity and citizenship to travel into and out of the United States. WHTI implements that

> provision. Following passage of IRPTA, we had two years to plan for the expected increase in passport demand. We analyzed our own figures, and commissioned a survey of projected demand conducted by an independent contractor.... We did not foresee that the rapid spike in demand that occurred earlier this year would be so great.... As a result, despite our best efforts, it began to take longer to process applications. Average processing time lengthened from six weeks in December, to 12 weeks in late spring.
> <http://foreignaffairs.house.gov/110/har071107.htm>

The real cause of the crisis, of course, was not merely the Departments' own underestimates of passport application numbers and processing times, but their refusal to take seriously the comments and detailed analysis of those such as ourselves who predicted the current fiasco.

But what is truly unconscionable is the Departments' persistence in putting forward those same estimates – which they have admitted are so inaccurate that they led to a doubling of passport application processing times, and the inability of some would-be travelers to obtain passports in time for their desired trips – as the basis for the Regulatory Assessment, and the conclusions drawn from it, in the current rulemaking.

In particular, the Regulatory Assessment (section 5-7, pp. 161-162) claims that "Processing time for a passport application can take up to six weeks. However, applicants may request expedited service for an additional fee, guaranteeing that their application will be processed and the passport returned within two weeks." As the basis for this knowingly false claim, the Regulatory Assessment sites (footnotes 216 and 217) the Department of State Web page, "How Long Will It Take To Process a Passport Application", <http://www.travel.state.gov/passport/get/processing/processing_1740.html> *as viewed on September 10, 2006.* But that was before the effective date of the WHTI air travel passport rule, before the resulting increase in processing times, and before the Department admitted that it knew applications were taking longer than that. As of August 22, 2007, that same Department of State Web page makes no mention of any "guarantee" of processing in any particular time frame, and says that "expedited" applications may take 3 weeks and regular processing 12 weeks.

As a direct consequence of its reliance on these false premises , the Regulatory Assessment refers on p.31 to the "small percentage of individuals who will opt not to travel across the border", but makes no mention of those who do not "opt" not to travel but who are *unable* to travel because they *cannot* obtain a passport or obtain one in time. When the time required to process passport applications by mail increases, more people have to apply for passports, if they are to receive them in time at all, in person at the small number of Department of State passport offices in a few major cities. As a natural result, the problems resulting from the passport production backlog and the delays in processing applications submitted by mail have been most visible at these passport offices. And some of the worst problems have been invisible: because it has often been impossible to get through to the passport office scheduling system by phone, and because many passport offices have been fully booked for passport applications up to two weeks in advance, many would-be travelers have been unable even to make an appointment to apply for a passport. They have been heard from, if at all, only by the Congressional offices to which they have appealed for help.

According to Senator Lugar's statement to the Senate hearings:

> In many cases, processing times tripled from past years. This has led to a wave of desperate travelers appealing to Congressional offices for help in salvaging vacations, business trips, and other travel.
>
> Passport inquires are now the number one casework concern in my Indiana offices by a wide margin. I anticipate that this is true for most Senate offices. In recent months, I increased the number of staffers dealing with passports from one to seven and instituted e-mail and website features to help process requests and disseminate information. Although inquiries by my office to Passport Agency personnel and contractors have been treated courteously and pleasantly, the information provided to constituents and my staff was often erroneous or unhelpful. Constituents have been told that their passports were on the way only to find out days later that no meaningful progress had been made towards processing them. Other constituents reported that regardless of what time of day they called the Passport Agency, they were unable to connect with agency personnel about their application....
>
> As a last-ditch option, my staff has guided Hoosiers who were set to depart within 48 hours to the Chicago Passport Agency. There, after a long drive, they could undertake the burdensome task of waiting in a line that stretched around the building, working their way through security, and then reapplying for their passport. For constituents who were not born in Indiana, or even the United States, and who had already sent in their only birth certificate

with their original application, this option proved especially difficult.
<http://www.senate.gov/~foreign/testimony/2007/LugarStatement070619.pdf>

Representaive Lantos made similar statements to the House hearings:

[M]illions of Americans – our constituents -- have been reduced to begging and pleading, waiting for months on end, simply for the right to travel abroad....

Last week I visited the regional passport office in my congressional district in San Francisco. Hundreds of would-be travelers were lined up out the door and around the block. Many had arrived at dawn with small children in tow. Some were desperate to get the one document that would let them see ailing relatives overseas. Many university students were anxious about missing classes at the start of their programs of study abroad. One man flew I met in from Los Angeles in hope of a finding shorter line in San Francisco so he could get his passport, fly back to Los Angeles, and leave for a trip the very next day.... None of this should have been necessary....

The State Department was caught flat-footed after Congress passed a law almost three years ago requiring travelers to show passports if they were returning from anywhere in the Western Hemisphere. The Bureau of Consular Affairs had projected that demand created by this so-called Western Hemisphere Travel Initiative would rise from 12 million passports last year to 16 million in 2007. But now we hear that the demand may approach or even exceed 18 million before the year is out....

Meanwhile, congressional offices across the land are being flooded with phone calls from outraged citizens. They wonder if their passports have fallen into a black hole. In my district office alone, we have helped hundreds of people who were about to see months of careful planning go down the drain because they simply could not get their hands on an American passport. We have had to intervene, and we did so willingly, because the public's phone calls to regional passport bureaus and to Consular Affairs have gone unanswered on tens of thousands of occasions.

<http://foreignaffairs.house.gov/110/lantos071107.htm>

This NPRM and Regulatory Assessment repeat the error of the previous NPRM, which we pointed out in our previous comments, of failing to consider any of the costs of passports which cannot be obtained in time by mail – now three weeks or more for "expedited" service – and which must therefore be applied for at in person at passport offices, or not at all. The Departments should revise their Regulatory assessment to include these costs, as we estimated them in our previous comments, as well as to reflect the fact that more people have to apply at passport offices, and more are unable to obtain passports at all, when the times for processing mail applications increase, as they now have.

VI. THE NOTICE OF PROPOSED RULEMAKING AND REGULATORY ASSESSMENT FAIL TO INCLUDE STATUTORILY REQUIRED IMPACT ASSESSMENTS.

The NPRM claims that the Regulatory Flexibility Act (RFA) does not require an analysis of the impact of the proposed rule on small economic entities, because "CBP does not believe that small entities are subject to the requirements of the proposed rule; individuals are subject to the requirements, and individuals are not considered small entities."

However, as we pointed out in our previous comments in the WHTI air travel rulemaking, this claim is false in all respects. Nothing in the RFA excludes individuals from its definition of "small entities". A large proportion of cross-border travel is undertaken by sole proprietors, self-employed individuals, freelancers, and other individuals who meet the definition of "small entities" in the RFA.

The NPRM also claims that any impact on sole proprietors would not be "significant":

> The exception could be certain ''sole proprietors'' who could be considered small businesses and could be directly affected by the rule if their occupations required travel within the Western Hemisphere where a passport was not previously required. The cost to such businesses would be only $128 for a first-time passport applicant, or $195 if expedited service were requested, and would only be incurred if the individual needed a passport. We believe such an expense would not rise to the level of being a ''significant economic impact.'' We welcome comments on our assumptions. The most helpful comments are those that can provide specific information or examples of a direct impact on small entities.

The central errors in this analysis are the false assumptions (1) that a passport could always be obtained in time for any necessary trip (which the Department has admitted has not always been possible), and (2) that the costs of obtaining a passport in time, if it is possible, would be limited to the passport application fees (ignoring, as noted above and documented by Congressional testimony, the costs of travel to a passport office). Including such costs of travel to apply for a passport, and the costs of even a small percentage of trips that cannot be taken, makes the overall impact "significant".

We remind the Departments of, and hereby incorporate by reference, the specific examples we gave in our previous comments of direct impacts on sole proprietors and self-employed individuals.

The Regulatory Assessment falsely assumes that the only costs of the proposed rule are in direct travel spending, ignoring lost business and lost business opportunities for those who cannot travel. Because of its failure to consider sole proprietors and other small businesses, or trips that cannot be taken by them, or the costs of such lost business opportunities, the Regulatory Assessment grossly underestimates the total costs of the proposed rule, particularly those to small businesses.

Further research would be needed to determine the percentage of self-employed independent contractors, sole proprietors, and employees of small businesses among international travelers. But the number of such small entities impacted is clearly "substantial", and the impact on them "significant", within the meaning of the Regulatory Flexibility Act. An assessment of the impact of the proposed rules on small entities among travelers must be completed and published, and an opportunity provided for comment, before any new rules are finalized.

Small businesses including the self-employed would not only be impacted, but disproportionately and negatively impacted by the proposed rule. Larger businesses would be more likely to have alternate staff able to travel, or already on site or at least on the other side of the U.S. border, and able to fulfill a contract, if one employee was unable or unwilling to travel internationally under the new conditions of the proposed regulations. The assessment under the Regulatory Flexibility Act should include, *inter alia*, an assessment of the degree to which the proposed regulations would disadvantage small entities in bidding on consulting, service, maintenance, or other contracts that might require international travel.

VII. CONCLUSION AND RECOMMENDATIONS

The NPRM should be withdrawn. If the NPRM is not withdrawn, the Regulatory Assessment should be revised and republished to incorporate the additional costs identified in these comments, the assessment required by the Regulatory Flexibility Act should be completed and published , and a new comment period should be provided, before any new rules are finalized. And if the proposed rules are

adopted, their adoption should be reported to the Human Rights Committee of the United Nations, in accordance with the requirements of the International Covenant on Civil and Political Rights.

Respectfully submitted,

The Identity Project (IDP)

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_____/s/_____

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August 27, 2007

Before the

TRANSPORTATION SECURITY ADMINISTRATION
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20590

Secure Flight Program	)	TSA-2007-38572
	)	**COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

The Identity Project (IDP)

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October 22, 2007

The Identity Project submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published at 72 *Federal Register* 48356-48391 (August 23, 2007), docket number TSA-2007-28572, "Secure Flight Program".

Under this NPRM, the Transportation Security Administration (TSA) proposes to impose a new requirement, for which there is no statutory basis, that each would-be passenger on any common-carrier domestic or international airline flight operating to, from, or between any point in U.S. territory, or overflying U.S. airspace, request and receive two forms of permission from government agencies before being allowed to receive a boarding pass, board an aircraft, or travel: first, a government-issued personal travel credential ("Verifying Identity Document"); and second, an explicit, individualized, per-passenger, per-flight advance "clearance" message from the TSA to the airline.

In addition, the TSA proposes to require would-be air travelers to submit to third-party private commercial search and interrogation by airlines. Would-be travelers would be required, whenever the TSA so orders, to provide specified information ("Full Name") to airlines and present specific tangible objects (ID documents) for inspection and copying by these unregulated, private commercial third parties.

The TSA has entirely failed, in the NPRM, to give any consideration to the fundamental rights of travel, movement, and assembly implicated by this proposed "permission to travel" system and the proposed requirements for submission to third-party search and interrogation. The TSA has failed to show (or even to attempt to show) that the proposed rules satisfy the substantive and procedural standards applicable -- under international human rights treaties, the

First Amendment to the U.S. Constitution, the Airline Deregulation Act of 1978, and the Privacy Act of 1974 -- to regulations burdening the exercise of these fundamental rights.

Finally, the TSA has failed to recognize most of the costs of the proposed rules, including the costs they would impose on those who are unable to travel, or have to postpone their travel, because they are unable to obtain, or to obtain in time, either of the two forms of proposed prerequisite government permissions (an acceptable travel credential and a TSA "clearance" message to the airline). The TSA also fails to recognize the costs the proposed rules would impose on travelers by compelling them to provide valuable personal information (including "full names" and the contents of travel ID documents) to airlines and other third parties who would be free to use, sell, or "share" this information for their profit, without compensation to those compelled by government order to turn over this informational property. And because the TSA both ignores these substantial costs and fails to acknowledge that a substantial portion of common-carrier air travelers are freelancers, sole proprietors, and other individual "small economic entities" within the meaning of the Regulatory Flexibility Act, the TSA has failed to conduct the economic impact analysis required by that Act.

The proposed rules are illegal and should be withdrawn, in their entirety. If the TSA or other government agencies seek to compel the provision of personal information by a specific would-be traveler, to compel third parties to provide information about a would-be traveler, or to compel a would-be traveler to submit to search of their person for tangible documents providing evidence of their identity, the TSA should request authorization for such searches or interrogatories from competent judicial authorities in the form of warrants or subpoenas. If the TSA has sufficient evidence that a particular person poses a sufficient danger to warrant a

government order restricting their movements, they should present that evidence to a judge with a motion for a restraining order, injunction, or arrest warrant. And if the proposed rules are not entirely withdrawn, the analyses required by Constitutional and international law, the Airline Deregulation Act, the Privacy Act, and the Regulatory Flexibility Act must be conducted and published for additional comment before the proposed rules or any similar rules are finalized.

I. ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

II. FREEDOM OF DOMESTIC AND INTERNATIONAL TRAVEL, MOVEMENT, AND ASSEMBLY ARE FUNDAMENTAL AND PROTECTED RIGHTS.

The central defect of this proposal is the TSA's failure to recognize that freedom of travel, movement, and assembly are fundamental and protected *rights*, not privileges granted by governments.

The starting point for this rulemaking *should* be the First Amendment "right of the people … to assemble", and Article 12 of the International Covenant on Civil and Political Rights (ICCPR), which set the standards for freedom of movement as a protected right.

As a treaty to which the U.S. is a party, the ICCPR takes precedence over Federal statutes, and has also been given effect through the Airline Deregulation Act of 1978, which requires the TSA to "consider the public right of freedom of transit", a right defined by the ICCPR. All Federal agencies have been ordered by Presidential Directive to familiarize themselves with, and act in accordance with, the ICCPR. And the government of the U.S., in its reports on compliance with the ICCPR, has certified to the United Nations Human Rights Committee that all such agencies do, in fact, consider the ICCPR in relevant rulemakings – but the TSA has entirely failed to do in this case.

We described the basis for these rights in Constitutional and international human rights treaty law in detail in our comments in the preceding and related rulemaking by the Customs and Border Protection (CBP) division of the Department of Homeland Security (DHS), in which the CBP first proposed the requirement for prior government permission ("clearance") to travel by air. See "Comments of the Identity Project, et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003" (October 12, 2006), available at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>. We hereby incorporate those comments by reference, in their entirety, in these comments and this docket.

On the same day that this NPRM was published, the CBP published a final rule purporting to impose this permission ("clearance") requirement for international flights, effective

February 19, 2008. "Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels; Final Rule, USCBP–2005–0003", 72 *Federal Register* 48345, August 23, 2007.

We note that the CBP's purported "responses" to the comments received in that rulemaking, as published with the final rule, failed to acknowledge, must less to respond to in any way, any of our comments with respect to the rights to freedom of movement under the ICCPR and other international treaties, the "common carrier" and "public right of transit" clauses of the Airline Deregulation Act of 1978, and other statutes.

Our objections on grounds of international human rights treaty law stand unrebutted, and preclude the CBP from putting into effect any final rule requiring government permission to travel, or the TSA from finalizing these proposed rules requiring government permission to travel. Until the responsible agencies have published, and provided an opportunity for public comment on, the analysis required by those treaties and statutes, including how the proposed rules satisfy the substantive and procedural standards required by the ICCPR for administrative regulations that burden the exercise of protected rights of movement and assembly, Secure Flight rules cannot be finalized.

In particular, the standards applicable under the ICCPR require that the CBP and/or TSA must show, before finalizing or putting into effect any such regulation, why any legitimate purpose of the proposed rule could not be served by measures that would impose less of a burden on protected rights, such as existing legal mechanisms to restrict the travel, movement, and assembly of demonstrably dangerous individuals, or obtain information about criminal suspects, through judicial restraining orders, injunctions, warrants, or subpoenas. There is no evidence in

this docket that the CBP, TSA, or any other Federal law enforcement agency have ever even attempted to try using judicial due process for these purposes, before abandoning it in favor of secret administrative fiat and presumptive denial of travel, movement, and assembly.

III. THE PROPOSED RULES WOULD REQUIRE EACH WOULD-BE AIR TRAVELER TO OBTAIN PRIOR PERMISSION FROM GOVERNMENT AGENCIES TO TRAVEL.

The NPRM misleadingly describes the proposed rules as being concerned with "comparing" watch lists with commercial data from airline reservations, in order to "identify" suspects. But the essence of the proposed rules is neither comparison nor identification but a default prohibition on travel, with exceptions made only for those who obtain prior government permission or for whom the TSA chooses, in its standardless, secret "discretion", to make exceptions to the default prohibitions.

The core of the proposed rule, obscured by the euphemistic language of "screening" and "matching", is a two-fold requirement for each would-be traveler by airline common carrier to obtain two forms of permission from government agencies before being allowed to travel.

Under the first of the proposed permission requirements, everyone would be forbidden to travel by air without having first obtained a government-issued credential ("Verifying Identity Document") consisting either of a passport issued by a foreign government or a document issued by a Federal, state, or tribal government agency that includes a "Full Name" (self-referentially

defined as the name that appears on a Verifying Identity Document), date of birth, and photograph:

> 1560.105 Denial of transport or sterile area access…
>
> (c) Request for identification. (1) In general. If TSA has not informed the covered aircraft operator of the results of watch list matching for an individual by the time the individual attempts to check in, or informs the covered aircraft operator that an individual has been placed in inhibited status, the aircraft operator must request from the individual a verifying identity document….
>
> (d) Failure to obtain identification. If a passenger or non-traveling individual does not present a verifying identity document when requested by the covered aircraft operator, in order to comply with paragraph (c) of this section, the covered aircraft operator must not issue a boarding pass or give authorization to enter a sterile area to that individual and must not allow that individual to board an aircraft or enter a sterile area, unless otherwise authorized by TSA.

Government-issued travel credentials would be required only when the TSA (secretly) orders the airline to require them. But the NPRM does not say who will decide when, or with respect to which would-be passengers, the TSA will issue such orders; what criteria or procedures they will use is making such decisions; or how would-be passengers can obtain judicial review of such decisions.

Absent any recognition of a presumptive right to travel, any substantive standards or procedural due process for ID document demands, and any right of judicial review, the TSA could issue such orders to airline to demand ID documents of any or all would-be passengers on any or all flights. Since the "clearance" messages will be transmitted to the airlines in secret, unbeknownst to would-be travelers, and will be specific to each flight, no one will be able to know, in advance, whether they will be required to show government ID credentials to the airline to board any particular flight. All passengers will therefore have to be prepared, each time they want to travel by air, to display such credentials to the airlines. The proposed rules should thus

be evaluated as rules requiring all would-be air travelers to show acceptable government-issued credentials to air common carriers for all air travel.

Everyone has a right to travel, and airlines are required as common carriers to transport all would-be passengers. But nothing in the proposed rules, or any other Federal statute or regulation, entitles everyone to a "Verifying Identity Document". Passports and drivers' licenses, for example, can be withheld for many reasons that do not constitute grounds for denial of freedom of movement. Since they have not previously been required as a prerequisite for the exercise of fundamental and protected rights, their issuance has not been treated as a matter of right. But under the proposal, if no government agency chooses to issue you with such a credential, or if you don't qualify for one, you can't fly. (Unless the TSA, in its secret and standardless administrative "discretion", decides to allow you this "privilege" on a one-time basis, revocable at any time.)

If you don't already have such an ID document, obtaining one can take a month or more, during which time you wouldn't be able to fly. In most states, successful applicants for new or replacement driving licenses and state identification cards (new applicants and those whose documents have been lost or stolen) are issued temporary paper documents on the spot, which do not contain photographs and thus would not satisfy the requirements in the proposed rules for "Verifying Identity Documents". Plastic cards with photographs are sent later, in several weeks to a month.

Since the paper non-photo documents are valid for the purposes for which they are issued (e.g. operating motor vehicles), there is no reason to provide an expedited means of obtaining a state photo ID more quickly, and in most cases none exists. Even if one qualifies, it's generally

impossible to obtain a new or replacement state ID document satisfying the proposed rules in less than several weeks.

Most U.S. citizens don't have passports, and obtaining a passport currently takes three weeks or more even by expedited service. See "Comments of the Identity Project, et al., Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of-Entry From Within the Western Hemisphere, USCBP-2007-0061" (August 27, 2007), available at <http://hasbrouck.org/IDP/IDP-WHTI-comments2.pdf>.

The burden would be most severe on residents of Alaska, where there is no passport office. The nearest passport office is in Seattle, which most residents of Alaska can only reach by flying (or by driving through Canada, which, under the CBP's new final rules requiring U.S. passports for citizens to travel between the U.S. and Canada, they can't do unless they already have a passport).

So the overall effect of the ID requirement would be that people who don't happen to have such documents, have never previously needed them for the other purposes for which they are issued, don't qualify for any of them, or lose them or have them stolen, will be forbidden to travel by air for up to a month or more. (Again, unless the TSA, in its secret and standardless administrative "discretion", decides to allow them this "privilege" on a one-time basis, revocable at any time.)

Under the second of the proposed permission requirements, airline common carriers would be forbidden, by default, from allowing any would-be passenger to board a plane except those with respect to whom the airline has requested and received explicit, individualized, per-

passenger, per-flight prior permission from the TSA in the form of a "matching results" or "clearance" message:

> 1560.105 Denial of transport or sterile area access…
>
> (b) Watch list matching results. A covered aircraft operator must not issue a boarding pass or other authorization to enter a sterile area to a passenger or a non-traveling individual and must not allow that individual to board an aircraft or enter a sterile area, until TSA informs the covered aircraft operator of the results of watch list matching for that passenger or non-traveling individual, in response to the covered aircraft operator's most recent SFPD [Secure Flight Passenger Data] submission for that passenger or nontraveling individual.

Again, the NPRM does not say who will decide whether to send such messages to airlines, when, or with respect to which would-be passengers; what criteria or procedures they will use is making such decisions; or how would-be passengers can obtain judicial review of such decisions. Even if they have been allowed to travel before, no would-be passenger will be able to know until they try to check in on then day of the flight whether they will be allowed to travel on that flight, or any other flight. Buying a ticket would carry the risk of being unexpectedly and inexplicably denied permission to travel. Each journey by air – even to the other side of the world, or to a place from which there is no other means of return except by air -- would involve a risk of not being permitted to fly home. As we have noted in our prior comments incorporated by reference, these fears are based on the real experiences of U.S. citizens who have been denied the right of return to the U.S. by air common carrier, the only available means.

There is no apparent statutory authority for these components of the proposed rules. The NPRM cites as authority for the proposed rules "49 U.S.C. 114, 5103, 40113, 44901-44907, 44913-44914, 44916-44918, 44935-44936, 44942, 46105". It's impossible to tell which of these

sections of statutes is purported to provide the specific authority for orders to common carriers not to allow certain otherwise qualified would-be passengers to board, to require any form of government-issued credential or permission to travel, or for the default prohibition of travel and presumptive prior restraint on travel and assembly embodied in the proposed new regulatory language.

But "matching" passengers' names (if known), or preventing travel by those who have been found (by competent judicial authorities, through the issuance of judicial orders) to pose a danger to aviation does not require, and does not connote any authority for, prohibitory default orders with respect to those who are not matched with watch lists of those against whom such orders have been issued. The NPRM provides no basis for any claim of statutory authority for the proposed rules.

IV. THE INFORMATION COLLECTION REQUIRMENTS IN THE PROPOSED RULES VIOLATE THE PRIVACY ACT.

The Privacy Act of 1974 imposes specific requirements, not considered in the NPRM and violated by the proposed rules, for the collection of information about activities protected by the First Amendment and for the collection of information through intermediaries.

The Privacy Act at 5 U.S.C. 552a(e)(7) requires that:

> Each agency that maintains a system of records shall --... maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

The "Itinerary Information" (including departure and arrival airport codes, flight dates and times, etc.) to be collected and maintained in the Secure Flight records system established under the NPRM and the associated System of Records Notice (SORN), directly describes how individuals exercise rights protected under the first Amendment, including how they exercise their right to assemble: where they assemble, when they assemble, with whom they assemble, and so forth.

Accordingly, itinerary information can be maintained only if "expressly authorized by statute". There is no such express authorization in any of the statutes cited as authority for the proposed rules.

To the extent that the TSA describes this proposed rules as a "watchlist matching" program, or relies for its authority on statutory sections related to watchlist matching, it clearly fails to have even implicit statutory authorization. The TSA could "match" names or personal data associated with would-be passengers, and inform airlines of matches, without knowing anything about which flight(s) those individuals wish to board. Itinerary data is surveillance data, not identification data.

The Privacy Act at 5 U.S.C. 552a(e)(2) also requires that:

> Each agency that maintains a system of records shall --... collect information to the maximum extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs.

The right to assemble is a right protected under the First Amendment. The right of transit through the navigable airspace (including by air common carrier) and the right of carriage by common carrier (for all persons complying with the published tariff of fares and conditions of carriage) are rights guaranteed under the Federal programs for regulation of air common carriers

pursuant to the Airline Deregulation Act of 1978. Airline passenger screening and TSA checkpoints are Federal programs.

Although the NPRM is silent as to the criteria and standards to be used by the TSA (or other unnamed decision-making agencies or entities) in deciding whether to send "clearance" messages, it appears clear from the NPRM that "Secure Flight Passenger Data", itinerary information, and other data in Secure Flight records may result in adverse determinations regarding permission to fly.

Yet under the proposed rules, *none* of this data is to be collected from the subject individuals. Instead, it is to be collected from unregulated private commercial third parties: airlines (and, although the NPRM is vague on this point, probably also airlines' agents and contractors).

The NPRM fails even to address, much less to satisfy, the TSA's statutory burden under the Privacy Act of showing that *none* of this data could be collected directly from would-be travelers, even when each air traveler interacts directly with TSA staff at a security checkpoint. (That seems implausible: If the purpose of watchlist matching is to execute warrants or subpoenas against individuals on watch lists, the ideal time to do so would seem to be when they are face to face with the TSA officers who would execute those orders.) Such an analysis must be conducted and published for public comment in a revised NPRM before any third-party information collection requirement can lawfully be finalized.

The unlawful requirement in the NPRM that would-be air travelers provide information to private commercial third parties would have serious, costly, and potentially dangerous

consequences, exemplifying the reasons for the statutory presumption in the Privacy Act against government-compelled provision of personal information to third parties.

V. THE INFORMATION COLLECTION REQUIRMENTS IN THE PROPOSED RULES VIOLATE CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

The proposal would require would-be travelers to display their ID to airlines whenever the TSA orders. But, since the orders to require a particular would-be traveler to show ID documents to the airline would be given to the airlines in secret, members of the public will have no way to verify whether a demand for ID or refusal of transportation is actually based on government orders. This violates due process.

Similarly, the identification requirement itself is secret and is designated "Sensitive Security Information" (SSI). See Gilmore v. Gonzales 435 F3d 1125. The Secure Flight proposal here states that the TSA is "considering strengthening the identification requirements at the security screening checkpoint. For example, TSA may consider requiring individuals to present a form of identification to be able to proceed through the checkpoint and enter a sterile area." How will the American people know whether the TSA has acted on its "consideration" and therefore requires individuals to present a form of identification to enter a sterile area if the rule is itself held secret? Signs posted at security checkpoints already state that identification is required, yet this proposal here states otherwise. Which is true and how do we know? This

evasive behavior by those tasked to protect our nation purposely circumvents the rule of law, which itself is our best protection against an abuse of power.

VI. VERIFICATION OF WHO IS ACTING AS TSA IS PROBLEMATIC.

It is not possible for the general public to know when and how the TSA is exercising its authority. In response to specific, documented written complaints from the signatories of these comments about demands for ID documents being made by persons in airports falsely claiming to be TSA employees, the TSA's Privacy Officer has specifically refused to provide any information as to how travelers can verify the *bona fides* of persons in airports claiming to be TSA employees or claiming to be acting on authority of orders from the TSA, or what recourse is available (through what point of contact) to travelers from whom ID documents or information are demanded under false pretenses. TSA's Freedom of Information Act (FOIA) Office has argued that, if any such information exists, it is exempt from disclosure to the public under FOIA. Edward Hasbrouck, "Unanswered Questions at Dulles Airport", June 6, 2006, <http://hasbrouck.org/blog/archives/001065.html>; Edward Hasbrouck, "Dialogue with the TSA Privacy Officer", July 16, 2006, <http://hasbrouck.org/blog/archives/001081.html>; Edward Hasbrouck, "TSA Says Their Press Releases Are Secret", October 27, 2006, <http://hasbrouck.org/blog/archives/001167.html>. This does not make traveling safer, instead it creates the ability for nefarious individuals to illegally cloak themselves in TSA's authority and perhaps then undermine security.

As a result, the proposed rules would vastly increase the danger to air travelers by leaving them hopelessly at the mercy of any identity thief in an airport who claims, unverifiably, to be an airline or TSA contractor acting on (secret) TSA orders to demand, "Your papers, please!"

The proposed rules would impose no restrictions whatsoever on airlines or other travel companies (or their agents, contractors, intermediaries, service providers, computerized reservation systems, etc.) to whom would-be travelers would be required by government order to provide personal information and display documents form which additional information could be copied, as a condition of the exercise of fundamental rights and travel by Federally licensed common carrier.

VII. THE INFORMATION COLLECTION REQUIRMENTS IN THE PROPOSED RULES WOULD BE A DATA WINDFALL FOR THE AIRLINES.

In the absence of any restrictions on the use or retention of this data by airlines, the data involuntarily obtained from travelers would become the sole legal property of the airlines, which they could keep forever, use, sell, or "share" with anyone, anywhere in the world, for any purpose.

This involuntary government-coerced transfer of personal information from travelers to travel companies would be an unconstitutional "taking" of billions of dollars worth of informational property from travelers, without due process or compensation.

VIII. THE GOVERNMENT'S SELF-IMPOSED RESTRICTIONS ON DATA RETENTION ARE MEANINGLESS.

The certainty that airlines will retain all of this information in perpetuity, in order to maximize the marketing and other commercial value of this government-coerced informational windfall, and the ability of the government to obtain it later, on demand, from those airlines or other travel data hosting and aggregation companies including computerized reservation systems, would render meaningless any restrictions on which this data is retained, or for how long, by the government itself.

IX. THE TSA HAS FAILED TO CONSIDER THE COSTS OF THE PROPOSED RULES.

According to NPRM, the TSA has provisionally concluded that the proposed rules would not impose significant costs on a substantial number of small economic entities, and thus that the regulatory Flexibility Act does not require a full analysis of these economic impacts before the proposed rules are finalized. We strongly contest this claim. The TSA has failed to consider the largest number of small economic entities affected by the proposed rules: freelancers, sole proprietors, and other small businesses whose employees travel by air. Further, the TSA has failed to consider any of the major categories of costs that the proposed rules would impose on those who are unable to travel, have to postpone travel, or are required to provide valuable information to third parties, without compensation, under government coercion or as a condition

of exercise of fundamental, protected rights.

Many travelers are self-employed freelancers and sole proprietors, and the proposal would have a significant financial impact on a substantial number of these individual "small economic entities" who have to delay air travel until they can obtain prerequisite documents, or are unable to travel because they don't qualify for any acceptable documents, government agencies don't choose to issue such documents, or they don't receive "clearance" to board flights. The costs of the proposal would also include the value of their lost liberties, and the informational property they would be forced to "give" to airlines.

Having to postpone business air travel for a month, because you don't have a passport, have moved to a new state, or your driver's license has been lost or stolen and your temporary driver's license has no photo and thus is not an acceptable "Verifying Identity Document", could costs thousands of dollars. Being unable to travel by air because you are not "cleared" could require career changes with lifetime per capita economic consequences of hundreds of thousands of dollars. The uncertainty of not knowing whether you would be permitted to travel, or not being able to travel because of the uncertainty of not knowing whether you would be permitted to return home, would impose substantial additional costs on larger numbers of travelers, including small economic entities.

Currently, airlines provide billions of dollars a year worth of transportation to members of "frequent flyer" programs, in exchange for the ability to correlate each member's trips into a travel history for that airline or its marketing partners. Compelling travelers to show government issued ID documents to airlines (who would be "free" to record ID document numbers or other unique identifiers from these documents), the proposed rules would enable airlines and travel

data aggregators to obtain and compile more comprehensive lifetime personal histories for travel on all airlines, without the need to compensate travelers the way they do now. The valuation placed on current frequent flyer programs makes clear that this more detailed data – involuntarily transferred from travelers to the airlines under the proposed rules -- would be worth billions of dollars a year. These rules could have a significant impact on the frequent flyer programs – perhaps making them obsolete. Freelancers and sole proprietors are, of course, disproportionately represented among frequent business air travelers and members of frequent flyer programs. By any measure, these consequences alone would trigger the requirement for a full analysis of economic impacts on small economic entities, pursuant to the Regulatory Flexibility Act, before any rules are finalized.

Similar behavior by DHS, also devoid of a legal explanation and failing to take into account its economic impacts, requiring employee identification verification by employers, ostensibly to curb illegal immigration, has recently resulted in judicial intervention on the matter. See article entitled "Judge Suspends Key Bush Effort on Immigration" at http://www.nytimes.com/2007/10/11/washington/11nomatch.html?em&ex=1192248000&en=79cc15d64972a11c&ei=5087%0A

For the reasons herein stated, the proposed rules are illegal and should be withdrawn in their entirety. And if the proposed rules are not entirely withdrawn, the analyses required by Constitutional and international law, the Airline Deregulation Act, the Privacy Act, and the Regulatory Flexibility Act must be conducted and published for additional comment before the proposed rules or any similar rules are finalized.

Respectfully submitted,

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Before the

BUREAU OF CUSTOMS AND BORDER PROTECTION
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20229

Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program; Interim Final Rule and Solicitation of Comments	USCBP-2008-0003 **COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

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SUMMARY

The Identity Project submits these comments in response to the Interim Final Rule and Solicitation of Comments published at 73 *Federal Register* 32440-32453 (June 9, 2008), docket number USCBP-2008-2003, "Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program", and the associated "Regulatory Assessment" published on the Web site at <http://www.regulations.gov> and docketed as USCBP-2008-0003-0003.

The essence of the ESTA rule is to require certain foreign citizens to obtain an exit permit from the United States government before they may leave their own country, or leave other countries.

In this rulemaking, the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security (DHS) is promulgating an interim final rule imposing a new requirement that "each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must ... prior to embarking on a carrier for travel to the United States", (a) provide specified data elements, in specified form and manner, to the CBP, and (b) "receive a travel authorization, which is a positive determination of eligibility to travel to the United States under the VWP, via the Electronic System for Travel Authorization (ESTA), from CBP."

Under the interim final rule, "[a]n authorization under ESTA is not a determination that the alien is admissible to the United States" and is "not a determination of visa eligibility." It would be granted, or not granted, by the CBP, in its sole, standardless, secret, and non-reviewable "discretion." It would be required as a pre-condition for foreign citizens to "embark" from foreign countries if the CBP believes that they intend to apply (at some later time) for admission to the U.S. under the VWP.

The Identity Project submits these comments because this CBP regulatory requirement that foreign citizens obtain permission from the U.S. in order to leave their own country, or a third country, (1) exceeds the statutory authority of the CBP; (2) exceeds the jurisdiction of the CBP; (3) is contrary to the obligations of the U.S. under the International Covenant on Civil and Political Rights and other

international human rights, maritime, and aviation treaties; (4) has been promulgated without complying with the procedural requirements of Executive Order 13107 regarding Implementation of Human Rights Treaties, the Airline Deregulation Act, the Regulatory Flexibility Act, and the Administrative Procedure Act; (5) fails to consider or grossly underestimates many of the major costs of the rule, including its impact on small entities, business travelers, and other travelers; (6) is impermissibly vague, and (7) would be so impractical and unenforceable as to deprive it of any of the benefits claimed by the CBP,

The Identity Project urges the CBP to withdraw the interim final rule, in its entirety. If it does not withdraw the ESTA rule entirely, the CBP must complete the actions directed by Executive Order 13107, prepare the statutorily required analyses, publish them in a full Notice of Proposed Rulemaking (NPRM) , and provide a new opportunity for public comment, before finalizing any ESTA rule.

ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

COMMENTS

I. THE ESTA RULE EXCEEDS THE CLAIMED STATUTORY AUTHORITY.

The CBP claims that the ESTA rule is authorized by the 8 U.S.C. 1103 and 8 U.S.C. 1187. But the rule would impose additional requirements on travelers beyond what is specified by statute.

Under 8 U.S.C. 1187, as amended by Public Law 110-53 (August 3, 2007), the statutory obligation of travelers with respect to the ESTA is limited to an obligation that "before applying for admission to the United States " they must "electronically provide .. information" (121 Stat. 341):

> (11) ELIGIBILITY DETERMINATION UNDER THE ELECTRONIC TRAVEL AUTHORIZATION SYSTEM .—Beginning on the date on which the electronic travel authorization system developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary....

But under the interim final rule, 8 CFR 217.5 (73 *Federal Register* 32452-32453), "each nonimmigrant alien intending to travel by air or sea to the United States under the Visa Waiver Program (VWP) must" **both** "provide the data elements specified" and "receive a travel authorization". Both of these requirements must be satisfied "prior to embarking on a carrier for travel to the United States."

Any CBP authority over aliens under this statute is limited to the authority to require only that they provide certain information. The difference between the information disclosure requirement in the statute, and the permission and receipt of permission requirement in the interim final rule, is clearly substantive and material. The proposed requirement for aliens to receive a travel authorization clearly exceeds the claimed statutory authority, and must be withdrawn.

II. THE ESTA RULE EXCEEDS THE JURISDICTION OF THE CBP.

By imposing a requirement that certain aliens receive authorization from the CBP before they may embark from foreign ports, the ESTA rule would assert U.S. jurisdiction over the actions of foreign nationals on foreign soil or on vessels (including foreign-flag vessels) in international waters or airspace. The CBP's statutory authority with respect to the ESTA begins at the time when an individual applies for admission to the U.S. under the VWP, at which point they are already at a U.S. point of entry, either on

U.S. soil or at a pre-clearance facility (such as those at airports in Canada) with defined and limited extraterritorial U.S. authority and jurisdiction.

By making the the ESTA requirement apply as of the point of "embarking on a carrier for travel to the U.S., the CBP would extend the territorial applicability of the ESTA rule to foreign locations, where neither CBP nor the U.S. government has jurisdiction over the actions of foreign citizens or any other non-U.S. persons. While the interim final rule contains no enforcement or sanctions provisions, any later attempt to add such sanctions to the ESTA rule (such as through enforcement orders to foreign travelers or foreign air or sea carriers, while they are outside the territorial jurisdiction of the U.S.) would similarly exceed U.S. jurisdiction.

We note that this issue has been raised by airlines and others in pending rulemakings before other DHS component agencies, and has not yet been responded to. See the "Comments of the International Air Transport Association, Secure Flight Program, TSA-2007-28572" (November 21, 2007), available at <http://www.regulations.gov> under document ID number TSA-2007-28572-0334.1:

> IATA and its Member Airlines are particularly concerned that the TSA's Proposed Rule seemingly invokes legal rights to control actions taken on foreign soil by airlines and others that are not supported by the normal interpretation of international law, and the relations that exist between sovereign nations.... IATA questions the legal authority, under which TSA proposes to implement binding restrictions on entities operating outside of the US.... We urge TSA to consider the extraterritoriality issue with respect to limitations being imposed on reservation processes conducted outside of US territory, and to modify the proposal accordingly.

The CBP gives no basis for any claim of such U.S. and CBP extraterritorial jurisdiction over the non-U.S. places and non-U.S. persons to which the ESTA rule would apply, and we know of no basis for such a claim. The rule should be modified to limit its applicability to persons and entities within the territorial jurisdiction of the U.S. If the interim final rule is not modified, an NPRM must be published, stating a basis for the claimed extraterritorial jurisdiction over the actions of foreign nationals on foreign soil, and a new opportunity for comment on that jurisdictional claim must be provided before any ESTA rule is finalized.

III. THE ESTA RULE IS CONTRARY TO THE OBLIGATIONS OF THE U.S. UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND OTHER INTERNATIONAL HUMAN RIGHTS, MARITIME, AND AVIATION TREATIES.

The "travel authorization" required by the ESTA rule would not be an entry visa, determination of visa eligibility, or determination of admissibility to the U.S., but would be solely a determination of "eligibility to travel" which "grants the alien permission to travel".

According to the interim final rule (73 *Federal Register* 32453):

> An authorization under ESTA is a positive determination that an alien is eligible, and grants the alien permission, to travel to the United States under the VWP and to apply for admission under the VWP during the period of time the travel authorization is valid. An authorization under ESTA is not a determination that the alien is admissible to the United States. A determination of admissibility is made only after an applicant for admission is inspected by a CBP Officer at a U.S. port of entry.

As a travel permit or exit visa, required as a precondition to "embarking on a carrier for travel to the United States", this "travel authorization" would be contrary to U.S. obligations under international human rights treaties protecting the right to leave any country, and international maritime and aviation treaties requiring that air and sea common carriers be required to operate as "common carriers", obligated to transport all would-be passengers paying the fare and complying with the rules in their published tariff, and making no provision for denial of embarkation from any country on the basis of permission or lack thereof from any other country.

A. The CBP is required to consider, and operate in accordance with, U.S. obligations under international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR).

Under Article VI, Section 2 of the U.S. Constitution, "treaties made, or which shall be, made, under the authority of the United States, shall be the supreme law of the land."

The International Covenant on Civil and Political Rights (ICCPR) is a treaty which was ratified by the U.S. Senate on April 2, 1992 (138 *Congressional Record* S4782), and is binding on the U.S. As a treaty to which the U.S. is a party, the ICCPR takes precedence over Federal statutes.

The ICCPR was specifically effectuated with respect to Federal agency rulemakings by Executive Order 13107 regarding Implementation of Human Rights Treaties, 61 *Federal Register* 68991, also available at <http://clinton6.nara.gov/1998/12/1998-12-10-executive-order-13107-on-human-rights-treaties.html>, issued by the President on December 10, 1998. Executive Order 13107 provides in Section 1(a) that, "It shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which is a party, including the ICCPR", and requires in Section 2(a) that, "All executive departments and agencies . . . shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully". The obligations of U.S. government agencies including the CBP and DHS to act in accordance with the ICCPR are independent of the reservations expressed by the Senate, in ratifying the ICCPR, with respect to enforcement of the ICCPR by U.S. courts.

The ICCPR has also been effectuated by the Airline Deregulation Act of 1978, 49 U.S.C. 40101(c)(2), which requires that "the Administrator of the Federal Aviation Administration shall consider ... (2) the public right of freedom of transit through the navigable airspace. " That "right of freedom of transit" is defined by article 12 of the ICCPR, which sets the standards for freedom of travel and movement as protected human rights, and for the review of government actions which impinge on those rights. To the extent that, under the statutory terms of creation and transfer of both authority and responsibilities to the DHS and the CBP, the authority being exercised by the CBP in this rulemaking is inherited from that of the FAA under the Airline Deregulation Act, it is subject to this same requirement.

The CBP is required to consider in this rulemaking, and to conduct itself in accordance with, U.S. obligations under international human rights law, specifically including the ICCPR.

B. The ESTA rule is inconsistent with U.S. obligations under the ICCPR.

Article 12, paragraph 2 of the ICCPR provides that, "Everyone shall be free to leave any country, including his own."

The meaning of this section is interpreted in paragraphs 8-10 of U.N. Human Rights Committee, General Comment No. 27 on Freedom of Movement in Article 12, issued under Article 40(4) of the ICCPR, CCPR/C/21/Rev.1/Add.9 General Comment No.27, 02/11/1999, available at <http://www.unhchr.ch/tbs/doc.nsf/0/6c76e1b8ee1710e380256824005a10a9?Opendocument>:

> 8. Freedom to leave the territory of a State may not be made dependent on any specific purpose....
>
> 9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents....

Both of these principles of Article 12 of the ICCPR would be violated by the ESTA rule. The rule would make the requirement for a "travel authorization" dependent on a specific purpose: it would apply only to those "intending to travel to the United States by air or sea under the VWP", contrary to paragraph 8 of General Comment No. 27. And the rule would make a "travel authorization" a "necessary travel document", but would not make it available as a matter of right -- only as a matter for the standardless, secret, administrative discretion, of the CBP -- contrary to paragraph 9 of General Comment No. 27.

The validity of any such rule is governed by Article 12, paragraph 3 of the ICCPR:

> The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Key to this standard of review is the concept of "necessity". "Necessity" requires more than that a restriction on human rights be related to, or actually further, one of the enumerated purposes. "Necessity"

requires a showing by the government proposing the restriction that no less restrictive alternative could adequately serve the particular enumerated purpose.

This interpretation of "necessity" is supported by the U.N. Human Rights Committee, General Comment No. 27 on Freedom of Movement in Article 12, which provides in Paragraph 14:

> Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

The CBP has offered no such showing of "necessity", and has made no attempt to evaluate the potential use of alternatives that would be less restrictive of the right to freedom of movement. We reserve the right to comment more fully if and when the CBP conducts, and publishes for public comment, in a full NPRM, this analysis of the necessity of the SSTA program required by the ICCPR. For now, however, we note that the analysis accompanying the interim final rule fails to show either that the proposed measures would be effective, or that no less intrusive alternatives would be equally effective.

Two major factors would negate the effectiveness and claimed benefits of the ESTA rule:

First, all travelers subject to the ESTA requirement to submit information and receive a "travel authorization" are (like many more other travelers not subject to the proposed ESTA rules) already subject to the "international APIS" final rule published August 23, 2007 at 72 *Federal Register* 48320-48345, effective February 19, 2008. While the CBP describes the APIS rule as requiring airlines to transmit passenger information to CBP (73 *Federal Register* 42441, footnote 3) , the international APIS rule also require each carrier to receive an individualized "clearance" permission message with respect to each passenger, before they issue them a boarding pass or permit them to board an air or sea vessel. See "Comments of the Identity Project, et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003" (October 12, 2006), available at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>.

The APIS information submission and "clearance" requirement is applicable to all travelers subject to the proposed ESTA information submission and "travel authorization" requirement, and to a far larger number of other travelers. In the "Regulatory Assessment" accompanying the interim final rules, the CBP concedes that they are unable to quantify any security benefit of the ESTA requirements over the current international APIS requirements (73 *Federal Register* 32451):

> The APIS 30/AQQ analysis accounted for identifying a traveler of concern prior to the issuance of a boarding pass. Thus, we must not take credit for preventing a traveler from boarding an aircraft as a result of ESTA because that benefit has already been counted. We have not conducted a breakeven analysis for this rule because CBP has already accounted for preventing a traveler on a watchlist from boarding an aircraft and coming to the United States. This does not mean, however, that there are no security benefits of this rule—we simply have not quantitatively accounted for them here.

But in fact, the CBP neither identifies nor describes, even qualitatively, what any benefits of the ESTA rule over the existing APIS rule might be. We believe that there are none, and that in any case the burden is on the CBP to show what they are (in specific comparison with the current APIS "clearance" rule) and their sufficiency to satisfy the standards established Article 12, paragraph 3 of the ICCPR.

Second, the CBP fails to consider the possibility of using less intrusive measures which might achieve any legitimate desired result of the ESTA rule. In particular, the CBP has failed to consider, or to compare, the possibility of the use of existing legal and law enforcement procedures, such as requesting courts to issue injunctions or restraining orders restricting the travel of persons who can be shown to pose a risk sufficient to justify restrictions on their right to travel, or arrests and prosecutions, or requests for international law enforcement assistance in executing and enforcing such judicial orders.

As it stands, and absent the required justification of necessity, the interim final rule is flatly inconsistent with the U.S. obligations embodied in Article 12 of the ICCPR, and must be withdrawn.

C. **The ESTA rule is inconsistent with U.S. obligations under the Charter of the Organization of American States.**

Article 17 of the Charter of the Organization of American States (OAS), ratified by the U.S. June 15, 1951, available at <http://www.oas.org/juridico/English/charter.html>, provides that, "the State shall respect the rights of the individual". The customary international law of human rights, which defines the rights of the individual protected by this Article, includes the Universal Declaration of Human Rights, adopted with the affirmative vote of the U.S. as United Nations General Assembly Resolution G217 A (III) of 10 December 1948, available at <http://www.un.org/Overview/rights.html>. Article 13 (2) of the Universal Declaration of Human Rights provides, without exception, that, "Everyone has the right to leave any country, including his own, and to return to his country."

The requirement for a "travel authorization" as a condition of "embarking" or travel from any country, would violate Article 13 (2) of the Universal Declaration of Human Rights. Since this is among "the rights of the individual" protected by Article 17 of the Charter of the OAS, the ESTA rule is contrary to U.S. obligations under that Article of the Charter of the OAS.

D. **The ESTA rule is inconsistent with U.S. obligations under international maritime and aviation treaties related to the regulation and operation of air and sea "common carriers" .**

The U.S. is party to numerous international maritime and aviation treaties. While the terms of these bilateral and multilateral agreements vary, a common feature of almost all of these agreements is the requirement that the U.S. and the other states party to these agreements regulate airlines and certain ocean passenger shipping lines as "common carriers". These treaties are effectuated in the U.S. by the Airline Deregulation Act of 1978, 49 U.S.C. 40102(a)(23), which requires that airlines operating international service to and from the U.S. be licensed only as "common carriers."

By definition, a "common carrier" is required to transport all passengers complying with their published tariff of fares and conditions of carriage. Tilson v. Ford Motor Co., 130 F. Supp. 676 (D. Mich., 1955). As licensed common carriers, airlines are thereby forbidden to refuse to transport an otherwise-qualified passenger, except on the basis of a binding order from a court of competent jurisdiction.

Any attempt to restrict the obligation of airlines to transport all passengers complying with their published tariffs, such as appears to be contemplated by the "travel authorization" requirement in the ESTA rule, is contrary not only to the Airline Deregulation Act but to the treaties which it effectuates.

IV. THE CBP HAS FAILED TO COMPLY WITH APPLICABLE PROCEDURAL REQUIREMENTS AND TO CONDUCT REQUIRED ANALYSES OF THE ESTA RULE.

In promulgating the ESTA rule, the CBP has failed to comply with the procedural requirements of, and to conduct the analyses required by, Executive Order 13107 regarding Implementation of Human Rights Treaties. the Administrative Procedure Act, the Regulatory Flexibility Act, the Airline Deregulation Act.

A. The CBP has failed to carry out the actions mandated by Executive Order 13107, "Implementation of Human Rights Treaties".

Executive Order 13107, "Implementation of Human Rights Treaties", 61 *Federal Register* 68991, also available at <http://clinton6.nara.gov/1998/12/1998-12-10-executive-order-13107-on-human-rights-treaties.html>, issued by the President on December 10, 1998, imposes the following obligations on all executive agencies (including CBP and DHS) and heads of agencies:

> Sec. 2. Responsibility of Executive Departments and Agencies.
>
> (a) All executive departments and agencies (as defined in 5 U.S.C. 101-105, including boards and commissions, and hereinafter referred to collectively as "agency" or "agencies") shall maintain a current awareness of United States international human rights obligations that are relevant to their functions and shall perform such functions so as to respect and implement those obligations fully.

As discussed earlier in these comments, and in our prior comments on CBP and other DHS rules to restrict the right to travel and movement, the CBP and DHS have failed to perform their rulemaking functions so as to respect and implement their obligations to respect to the rights to freedom of movement

guaranteed by the ICCPR and other international human rights treaties. This is a failure to comply with Section 2(a) of Executive Order 13107.

Executive Order 13107, Section 2(a) continues as follows:

> The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the implementation of this order....

We can find no public indication that either CBP or DHS as a whole has designated a "single contact officer" for implementation of human rights treaties or implementation of Executive Order 13107. This is a failure to comply with Section 2(a) of Executive Order 13107.

Executive Order 13107, Section 2, continues as follows:

> (b) The heads of agencies shall have lead responsibility, in coordination with other appropriate agencies, for questions concerning implementation of human rights obligations that fall within their respective operating and program responsibilities and authorities or, to the extent that matters do not fall within the operating and program responsibilities and authorities of any agency, that most closely relate to their general areas of concern.
>
> Sec. 3. Human Rights Inquiries and Complaints.
>
> Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility or, if the matter does not fall within its areas of responsibility, referring it to the appropriate agency for response.

Neither CBP nor DHS has taken responsibility for responding to complaints about violations of human rights obligations that fall within their areas of responsibility. This is a failure to comply with Section 2(b) and Section 3 of Executive Order 13107.

For example, our specific complaint, filed with CBP, that the international APIS regulations promulgated by CBP violated U.S. obligations under Article 12 of the ICCPR has received no acknowledgment or response whatsoever. See "Comments of the Identity Project, et al., Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States, USCBP-2005-0003" (October 12, 2006), available at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>; see also the CBPs purported response to comments, failing to acknowledge or respond to our complaint of violation of the ICCPR,

"Advance Electronic Transmission of Passenger and Crew Member Manifests for Commercial Aircraft and Vessels; Final Rule, USCBP–2005–0003", 72 *Federal Register* 48345, August 23, 2007.

We note that these comments and our unacknowledged and unanswered comments regarding the APIS rulemaking are complaints about violation of U.S. obligations under human rights treaties including the ICCPR. We specifically request that these comments and our previous APIS comments be referred to the CBP and DHS contact officers designated pursuant to Section 2(a) of Executive Order 13107, and that the heads of those agencies take responsibility for responding to these complaints, as they have been ordered to do under Section 3 of that order.

The CBP and DHS should perform the actions mandated by Executive Order 13107, including publicly designating a single contact officer for human rights treaty compliance and responding to these and any other related pending complaints of violations of U.S. obligations under human rights treaties, before any rules are finalized that are the subject of such complaints.

B. **The CBP has failed to consider the "public right of freedom of transit of the navigable airspace", as required by the Airline Deregulation Act.**

As we have noted above, the Airline Deregulation Act of 1978, 49 U.S.C. 40101(c)(2), requires that "the Administrator of the Federal Aviation Administration shall consider ... (2) the public right of freedom of transit through the navigable airspace. " That obligation has been inherited by the CBP and other DHS components, along with the transfer from the FAA to the DHS of authority over aviation security. Such an analysis should be a standard part of any aviation-related rulemaking by the CBP or DHS. But we can find no record that the CBP or any DHS component has ever conducted such an analysis, or complied with this statutory obligation, in any rulemaking.

The CBP has failed, in this rulemaking, to consider the public right of freedom of transit. The ESTA rules contain no recognition of a public right of freedom of transit. On the contrary, they condition travel on a "travel authorization" that would not be guaranteed or protected as a matter of right. Instead, it

would be granted, withheld, or revoked solely as a matter of secret, standardless, nonreviewable, administrative "discretion" by the CBP.

The CBP must, by law, consider this issue before any ESTA rule is finalized.

C. **The CBP has erroneously concluded that the ESTA rule would not have a significant impact on a substantial number of small economic entities, and has failed to conduct the analysis of that impact required by the Regulatory Flexibility Act.**

As noted by the CBP, "The Regulatory Flexibility Act (RFA) ... requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required 'to publish a general notice of proposed rulemaking for any proposed rule.'" The CBP claims that this rulemaking is exempt from requirement for an NPRM under exceptions to the APA. As we discuss later in these comments, we believe these exceptions are not applicable, and that a full NPRM including an RFA analysis is required.

But according to the CBP, "Nonetheless, DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity."

In fact, many of the individuals to whom the ESTA rule applies are, in fact, small economic entities within the meaning of the RFA. Nothing in the RFA excludes individuals from its definition of "small entities". A large proportion of entries to the U.S. under the VWP are for business purposes. Of these, a large proportion are by sole proprietors, self-employed individuals, freelancers, and other individuals who meet the definition of "small entities" in the RFA.

The CBP has previously conceded, in response to our comments in other travel-related rulemakings, that individual travelers can be "small economic entities" within the meaning of the RFA. See most recently, "Documents Required for Travelers Departing From or Arriving in the United States at Sea and Land Ports-of- Entry From Within the Western Hemisphere", 73 *Federal Register* 18403 (April 3, 2008):

> *Comment:* One commenter noted several examples of individuals who would be considered small businesses, including sole proprietors, self employed individuals, and freelancers.
>
> *Response:* CBP agrees that these ''sole proprietors'' would be considered small businesses and could be directly affected by the rule if their occupation requires travel.... The number of such sole proprietors is not available from the Small Business Administration or other available business databases, but we acknowledge that the number could be considered ''substantial.''

The continued insertion in new rulemakings (such as the current one) by the CBP of a knowingly false boilerplate claim that "individuals are not small entities" raises serious doubt as to the competence, diligence, and good faith with which the rulemaking is being conducted. The CBP should retract this false claim in this rulemaking, and remove it from its templates for future rulemakings.

The ESTA rule would affect a substantial number of these individuals. The CBP assumes (73 *Federal Register* 32448) that "1 percent of ESTA applicants from current VWP travelers will subsequently need to apply for a visa", i.e. will not receive a "travel authorization through the ESTA. We know of know reason to expect this figure to be lower for sole proprietors traveling for business, and this would clearly constitute a "substantial" number of such affected "small entity" business travelers.

The only remaining question is whether the ESTA rules would have a "significant economic impact" on individual travelers in their capacity as small economic entities. We believe it would.

The impact of the ESTA rule would not be limited to the cost of obtaining a visa. In many cases, business travel is required on short notice, and business travelers are those most likely to change their intended destinations while en route, to take advantage of business opportunities or respond to events. A would-be business traveler who does not receive a "travel authorization", or whose travel authorization is revoked (as it could be, under the interim final rule, at any time without warning), may not have time to

obtain a visa. The consequences are likely to be substantial opportunity losses, including in some cases permanent loss of customers (who might deem someone unable to travel unreliable for the future).

The impact is likely to be greatest on the smallest businesses. A large business is more likely to have local staff available in country, or to have alternate staff available if any particular individual does not receive a "travel authorization". Almost by definition, a sole proprietor, self-employed person, or freelancer has no one else to send in their place, if they are personally unable to travel.

As a first estimate, we believe that typical economic consequences to a sole proprietor, self-employed person, or freelancer of failure to receive a "travel authorization", or its revocation, would be measured in thousands of dollars per person. But the mean would be skewed sharply upward by those who would lose clients or accounts worth tens or hundreds of thousands of dollars a year in business. Accordingly, we believe that $10,000 would be a reasonable initial minimum estimate of the mean per person impact of the rule. This would clearly be "significant" for such a sole proprietorship.

Accordingly, the CBP must conduct the analysis of the impact of the ESTA rule on small economic entities (including individual travelers and would-be travelers, and including the costs of being unable to travel if a visa cannot be obtained in time), as required by the RFA, and publish that analysis for public comment before any rule is finalized.

D. **The exceptions to the notice and comment requirements of the Administrative Procedure Act claimed by the CBP are not applicable to this rulemaking.**

The CBP claims (73 *Federal Register* 32444) that this rulemaking is statutorily exempt from the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. On that basis, the CBP proposes that the interim final rule be effective on short notice, before the end of the comment period, and without a full NPRM. However, none of the three statutory exceptions claimed by the CBP is applicable to the ESTA rule.

First, the CBP claims that, “This interim final rule addresses requirements that are procedural in nature and does not alter the substantive rights of aliens from VWP countries seeking admission to the United States. This interim final rule, therefore, is exempt from notice and comment requirements under 5 U.S.C. 553(b)(A). This rule is procedural because it merely automates an existing reporting requirement for nonimmigrant aliens, as captured in the 'I–94W Nonimmigrant Alien Arrival/Departure Form'.”

The error in this analysis is that the change in information submission requirements from a paper form to the ESTA is only part of the interim final rule. The rule also contains a new requirement for receipt of a “travel authorization”, an item entirely absent from the I-94W form or current CBP rules. Imposition of a new travel permission requirement cannot be characterized as a merely “procedural” change, and clearly impacts substantive rights. Submission of an I-94W form occurs only after arrival at a U.S. port of entry, and has no affect on the ability to embark or travel to the U.S., arrive on U.S. soil (which can be crucial to the other substantive and procedural rights of an alien), present oneself for admission to the U.S., or make other legal claims that can only be made once one reaches U.S. territory.

Second, the CBP claims that “This interim final rule is also exempt from APA rulemaking requirements under the ‘‘good cause’’ exception set forth at 5 U.S.C. 553(b)(3)(B).” The CBP then attempts to justify the application of this exception by the need to keep potential terrorists off aircraft, through a comparison of the ESTA rule with existing I-94W and visa application procedures.

The error in this analysis is that the comparison should be with the international APIS system, not the I-94W procedures. In its analysis of the interim final rule, the CBP concedes that airline passengers are already subject to the APIS information and “clearance” (CBP permission to travel) rules, and that the CBP is unable to quantify any security benefit to the ESTA rule when it is compared with the existing APIS rules. Since the CBP cannot quantify any benefit of the ESTA rule, and cannot even qualitatively describe such a benefit, the “good cause” exception to the APA does not apply.

Third, the CBP claims that, “This interim final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the

President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors."

The error in this analysis is that the "foreign affairs function" exception to the APA applies to relationships with foreign governments – not, as here, to a rule that affects only individual aliens. Nor does the exception apply to anything that is declared, conclusorily, to "advance ... foreign policy goals". The only potentially applicable grounds for this claim is that it "involves bilateral agreements" to which the U.S. is a party. But a binding international "agreement" can be entered into by the U.S. only through a treaty duly ratified by the Senate. The CBP does not mention, and we are not aware of, any treaties involved here – except for the ICCPR and other treaties which the ESTA rule itself would violate. Since the ESTA rule would not implement any treaty, but rather is forbidden by treaty, it is not related to carrying out any lawful foreign policy function, and is not exempt from the APA.

Accordingly, the CBP must comply with the notice and comment requirements of the APA, and postpone the effective date of any final rule until after the publication of a full NPRM, an opportunity for public comment on that full NPRM, and CBP's consideration and published response to comments.

V. THE CBP HAS FAILED TO CONSIDER MANY OF THE COSTS OF THE ESTA RULE.

Included with the interim final rule is an analysis by the CBP of the costs of implementing and complying with the ESTA rule, with further details in an accompanying "Regulatory Assessment." That analysis ignores or underestimates many of the major costs and consequences of the ESTA rule for both airlines and travelers, resulting in a gross underestimate of the total costs of the rule.

With respect to airlines, the CBP estimates (73 *Federal Register* 32445) that "35 foreign-based air carriers will be affected" by the ESTA rule. But the CBP admits in the Regulatory Assessment (pp. 2-6, 2-7) that this is likely to be an underestimate:

> For air carriers, we consulted the IATA website for member details (air carrier name and country). We then accessed individual carrier websites to determine if the carriers flew to or from the United States and if the carrier country is VWP, Roadmap, or the United States. Based on our analysis of carrier websites, we determined that 8 US-based carriers and 35 foreign-based carriers will likely have to develop ESTA capabilities. Our methodology may understate the number of affected airlines. For example, an Algerian carrier is not included in this analysis because Algeria is neither a VWP nor a Roadmap country. The Algerian carrier, however, may transport passengers to the United States who are citizens of a VWP or Roadmap country. There are no data publicly available from IATA, individual carriers, or CBP on passenger citizenship. We make the simplifying assumption that only carriers from VWP and Roadmap countries that fly to the United States and all international US carriers will have to develop ESTA capabilities. [emphasis added]

In fact, as anyone who has flown on such airlines knows, many airlines that are not based in countries that participate in the VWP, and that are not in the "Roadmap" for VWP expansion, regularly carry large numbers of passengers to the U.S. who are citizens of VWP countries. Some of these airlines even operate direct flights from VWP countries to the U.S. For example, India is neither in the VWP nor the Roadmap. But Air India operates a daily flight from Heathrow Airport in London to Kennedy Airport in New York, on which a large percentage of the passengers are UK and other European Union citizens who, on arrival at JFK, apply for admission to the U.S. under the VWP.

In fact, citizens of VWP countries arrive in the U.S. on virtually every airline that serves the U.S. from anywhere in the world. The "simplifying" assumption that they do so only on airlines based in VWP countries is not simplifying but simply wrong. We estimate that between 100 and 200 foreign airlines would be affected significantly by the ESTA rule, so that the costs to air carriers would be about five times those estimated by the CBP for only 35 foreign airlines. Even more airlines, including ones that don't serve the U.S. at all, might be affected, depending on how the ambiguous term "embarking" in the ESTA rules is defined with respect to through journeys with interline connections.

With respect to travelers who do not receive a "travel authorization" (or whose travel authorization is revoked), as we have already pointed out, the interim final rule and Regulatory Assessment erroneously limit their consideration to the costs of obtaining a visa. This ignores the likely, and much greater, costs of canceling a trip if a visa cannot be obtained in time, or delaying a trip until a visa can be obtained.

Earlier in these comments, we estimated the mean cost to each would-be business traveler who does not receive a "travel authorization" (or whose travel authorization is revoked), as $10,000.

For leisure travelers, costs would be less but still substantial. These would include the opportunity cost of lost or wasted vacation time (since a vacation scheduled in advance with an employer frequently cannot be rescheduled on short notice) as well as forfeited payments for non-refundable or non-changeable tickets, accommodations, tour packages, cruises, etc. A large and rapidly growing percentage of international airfares – particularly including the sorts of heavily discounted airfares most used by vacation travelers – are now completely nonchangeable and nonrefundable "use it or lose it" fares. The same is true of many discounted, prepaid hotel reservations. Most tour packages are 100% nonrefundable and nonchangeable once the date is within a week of the scheduled departure. Any many visitors come to the U.S. under the VWP to board cruises from the U.S., such as those to the Caribbean. If they are delayed in reaching the U.S. because they don't receive a "travel authorization", and have to get a visa, they may miss the cruise sailing entirely (and forfeit the price of the cruise), or incur large costs to fly to an intermediate port to join the cruise.

We estimate that three-fourths of those leisure travelers who do not receive a "travel authorization" might be able to obtain a visa in time to proceed to the U.S. on their originally intended schedule, and that the other one-fourth will incur change or cancellation fees, forfeited prepayments, and opportunity costs of lost vacation time averaging a total of $2000 per person. That means leisure travelers would have average costs of $500 for non-receipt or revocation of a "travel authorization".

If half the travelers who do not receive a "travel authorization" are business travelers (average cost $10,000 per person) and half are leisure travelers (average cost $500), the overall average cost would exceed $5,000 per person. The Regulatory Assessment estimates that there will be approximately 20 million VWP visitors per year, 1% of whom will not receive a "travel authorization" through the ESTA. That means 200,000 would-be travelers a year who do not receive a "travel authorization" or have it revoked, at an average cost of more than $5,000 each, for a total underestimate by the CBP of slightly

more than $1 billion a year in ESTA costs to travelers and would-be travelers. This large amount of money – indeed, this entire cost category -- was not taken into account when the CBP calculated the cost of the ESTA rule.

VI. THE INTERIM FINAL RULE IS IMPERMISSIBLY VAGUE.

Foreign citizens subject to the ESTA rule must provide information and receive a travel authorization "prior to embarking on a carrier for the United States." But the interim final rule does not define either "embarking on a carrier" or "for the United States". Each of these phrases is vague.

Under the ESTA rule, travelers will be able to submit information and receive travel authorizations over the Internet. This will make it possible for them to do so at every stage of the series of events, any of which might be deemed to constitute "embarking ... for the United States". Wireless data networks currently allow mobile Internet access from laptop computers as well as mobile phones and other handheld devices throughout airports, before and after check-in and during the boarding process, in departure lounges, on jetways, on aircraft both before and after the doors are closed, and increasingly in flight both over national territory and in international airspace. Similar networks are accessible to passengers on oceangoing vessels, at dockside, on the gangway, and on ships both in port and at sea.

In the absence of any definition, it is impossible to know whether, or if so, when, an individual would be considered to have engaged in an act of "embarking" (or to have done so "for the United States") or to be in compliance with the ESTA rule. It is impossible for an individual to know whether, and if so, by what point in time, they are required to have submitted their information and received their travel authorization. And it would often be impossible, after the fact, to determine whether they provided their information or received their travel authorization before or after "embarking ... for the United States", or without ever having engaged in such an act of "embarking ... for the United States.

Without definition, the word "embarking" is ambiguous. To embark can mean either to "board" a vessel or to "start" or "commence" a voyage. Either of these different meanings is a *process* that takes some time (during which an individual might be busy on their cell phone submitting information and attempting to obtain a travel authorization), not an event that occurs at a single point in time.

Is an individual considered to embark at the moment when they enter an airport? When they present themselves for check-in? When they receive a boarding pass (which might be revoked, for example in the case of a passenger who is "bumped" or offloaded)? When they clear outbound immigration (if any)? When they clear outbound customs (if any)? When they present themselves at the gate for boarding? When (if) their boarding pass is collected? When they step onto the jetway or stairs? When they step off the jetway or stairs through the door and into the aircraft? When the doors are closed? When the pilot receives clearance to taxi or for push-back from the gate? When the aircraft actually begins to move away from the gate? When the pilot receives clearance for takeoff? When the takeoff roll begins? At "wheels up"? When the aircraft leaves the airspace of the departure country?

When is an embarkation considered to be "for the United States"? What if the vessel is scheduled to make other stops, after the passenger boards, before reaching the U.S.? What if a passenger on a multi-stop flight or cruise changes their point of disembarkation, after they are on board? What if the destination is unknown, or unknown to the individual traveler? Cruise ship contracts of carriage invariably give the vessel operator the right to alter the itinerary and/or ports of call at any time, before or after commencement of the cruise, without notice. Airlines can and do change schedules and intermediate stopovers, sometimes without notice to those not booked for stopovers at the altered intermediate points (but whose tickets may nonetheless permit such stopovers). Aircraft are frequently diverted for technical, operational, weather, and safety reasons. An attempt to give notice may or may not be made, at any stage of the process, and travelers may or may not receive actual notice of such changes. It is common for a traveler, especially on a diverted flight or re-routed cruise, to find that their ship has docked, or their plane has landed, at an unexpected port or airport in an unexpected country, in the U.S. or elsewhere.

In such cases of changes of, or uncertainty in, the itinerary, is a traveler considered to have engaged in an act of "embarking for the United States" at all, and if so, at what point in time is that act of embarking considered to have been consummated? Consider the passenger on a cruise ship who had not planned to go ashore in Fort Lauderdale, but decides to do so while in port. Perhaps he learns of a family emergency in another country, and leaves the ship to get a flight home. Or perhaps he is just inspired by onboard advertising to join a shore excursion to Disney World. At what point in time, if any, is he considered to have engaged in an act of "embarking on a carrier for travel to the United States"?

Because of these ambiguities, an individual cannot tell whether, or if so, when they would be required to have submitted information or received a travel authorization, and the interim final rule is void for vagueness. An NPRM containing sufficiently unambiguous definitions must be published, and a new opportunity for comment on that NPRM provided, before any ESTA rule can be finalized.

VII. THE ESTA RULE WOULD BE SO IMPRACTICAL AND UNENFORCEABLE AS TO DEPRIVE IT OF ANY OF THE BENEFITS CLAIMED BY THE CBP.

The interim final rule specifies no penalties, sanctions, or enforcement mechanisms. Addition of any such sanctions, penalties, or enforcement orders – such as orders to common carriers purporting to direct them to prevent "embarking for the United States" by persons believed to be subject to, but believed not to be in compliance with, the ESTA rule -- would fundamentally change the nature of the rule, and would require a new NPRM and a new opportunity for public comment on the proposed penalties, sanctions, or enforcement orders before they could be finalized. Any such sanctions, penalties, or orders would, on their face, restrict rights protected by Article 12, paragraph 2 of the ICCPR ("Everyone shall be free to leave any country, including his own"), and the NPRM for any such sanctions, penalties, or orders would have to show that they satisfy the standards applicable under Article 12, paragraph 3 of the ICCPR to regulations that restrict that right. We reserve our right to comment further on any such proposal when it is made.

Even if such measures were to be proposed, however, the ESTA rule would be impractical and unenforceable, depriving it of any of the benefits claimed by the CBP.

Whether a person is required to obtain an ETA depends on their "intending to travel to the United States by air or sea under the VWP", as of the moment of their "embarking on a carrier to the United States." Only those with that specific intent, at that specific time, would be required to have submitted the required information or received the required "travel authorization."

Any enforcement or compliance mechanism would thus depend on the ability to ascertain the intentions of travelers, as of the moment of their "embarking", with respect to subsequent travel to and application for entry to the U.S. under the VWP. Those who, at that time, lack that intent, are not subject to any requirement of these ESTA rule – regardless of whether they subsequently, on arrival at a U.S. port of entry, form such an intent and/or actually apply for admission to the U.S. under the VWP.

Regardless of how "embarking .. to the United States" is defined, most visitors to the U.S., including most visitors who eventually apply for admission to the U.S. under the VWP, do not have such a specific intent at the time of their "embarking." Many arrive in the U.S., and actually apply for admission under the VWP, without ever forming such a specific intent.

Those who lack such specific intent (as of the time of their embarking), and therefore who are not subject to the ESTA rule, include the following:

1. Travelers who do not intend to travel "to" the US, but intend to travel merely "through" the U.S. in transit, en route to another country. The U.S. no longer makes any provision for such transit without visa (TWOV) and without formal entry "to" the U.S.. But it's the international norm, and every country currently participating in the VWP allows transit without visa by U.S. citizens. So a great many foreigners, quite reasonably if mistakenly, expect the U.S. to reciprocate, and present themselves at points of embarkation for the U.S. without intending to travel "to", or to "enter", the U.S. Some already have onward tickets from the U.S. to other countries before embarking,

but some intend to buy tickets for the onward portion of their journey while in transit through the U.S. So these travelers are indistinguishable by any of their documents, at the time of embarking, from travelers intending to enter the U.S.

2. Travelers who intend to seek to enter the U.S. under any program or category other than the VWP. As long as their belief is sincere, it doesn't matter whether any such program actually exists, much less whether they would be admissible under it. Someone, for example, who knows that they are unlikely to be admitted as a refugee, but who says sincerely, "I intend to apply as a refugee, and take my chances", is not subject to the proposed ESTA requirement, as is someone whose intent is to apply for a visa on arrival (regardless, as long as their intention is sincere, of the fact that the U.S. doesn't issue visas on arrival).
3. Travelers who lack any specific intention with respect to the particular program or category, if any, under which they will attempt, once they arrive, to be admitted to the U.S. U.S. citizens can be admitted to almost any of countries participating in the VWP without prior arrangement and without requesting admission under any particular program. Many citizens of such countries reasonably expect reciprocal treatment when they visit the U.S., and embark on trips to the U.S. without giving any particular thought to whether they will be admitted (they assume that they will), much less under which particular provision of U.S. law. Someone who intends to tell the immigration officer on arrival, "I'm a tourist" or "I'm here on business", and let the officer figure out how to categorize them under U.S. law, lacks the intent with respect to the VWP that would subject them to the ESTA requirement. Even someone generally aware of the procedures for entry to the U.S. without a visa, but unaware at the time of their embarking that they comprise something called the "Visa Waiver Program" (something most visitors learn, if at all, only from in-flight literature and videos, and are unlikely to remember by name from one trip to the next), lacks the specific intent that would make them subject to the ESTA requirements.

4. Travelers who form an intention to apply for admission to the U.S. under the VWP only after embarking, perhaps after reading or viewing in-flight information materials.
5. Travelers who believe that the VWP is an entry program, not a travel program, and who therefore do not possess the requisite intent to "travel to the United States under the VWP". If they have any specific intention with respect to their travel to the U.S., it is that they intend to travel to the U.S. under the terms of their contract of carriage with a common carrier, the regulations governing the operation and obligations of common carriers, and/or their rights under the ICCPR and/or customary international law. Their intentions, if any, with respect to the VWP, are limited to intentions with respect to actions on arrival at a U.S. port of entry.

We believe that most visitors who apply for admission under the VWP fall into one or another of the classes we have just listed, and that only a minority of VWP travelers possess such specific intent, as of the time of their embarking, as would make them subject to the ESTA requirements.

A determination by the CBP with respect to a person who applies for a travel authorization through the ESTA would be exempt from judicial review. But whether someone who did not apply for an ESTA is subject to the ESTA requirements -- and thus could be subjected to any such sanctions, enforcement measures, or orders as might be proposed in a later rulemaking – is and would remain subject to judicial review.

The issue is whether a person has, at the moment of embarking, an actual intent to travel to the U.S. under the VWP, and whether there is sufficient evidence to establish such an intent. And all that matters is the genuineness of their intentions, not whether those intentions might be unreasonable, ill-founded, mistaken, or incapable of realization (for example, if they sincerely intend to enter the U.S. on some other nonexistent or inapplicable basis, rather than under the VWP). And of course, many travelers' intentions (if any) change in the course of their travels, *especially* during the process of "embarking", making the determination of specific intent *at a specific time* crucial to the rule.

Enforcement of the ESTA rule would thus depend on the ability of the CBP to (1) identify the minority of travelers with such intent, at the point of embarking, as to make them subject to the proposed ESTA requirements, and (2) obtain sufficient evidence to make a *prima facie* showing of such intent.

The CBP lacks any staff at most foreign ports. And even in places where they are present (for example, at "preclearance" stations in Canada for U.S.-bound travelers) their authority is limited (both by U.S. law and by the agreements with Canada and other countries under which the preclearance facilities operate) to questioning relevant to admissibility to the U.S.. Since a travel authorization is not a determination of admissibility to the U.S., questions about ESTA status are irrelevant to admissibility to the U.S. and outside the scope of authority of CBP preclearance officers. Travelers thus may lawfully decline to answer such questions from preclearance officers, without penalty.

As we have already noted, airlines have already questioned DHS jurisdiction over their actions on foreign soil. And as we have also noted, U.S. laws (such as the Airline Deregulation Act), and a plethora of international maritime and aviation treaties, classify airlines and and ocean transportation lines as "common carriers" and require them to transport anyone paying the fare in their published tariff and complying with their general conditions of carriage, as filed with the governments between which they operate and as applied equally to all would-be passengers Nothing in existing law or treaties, or typical conditions of carriage, grants airlines the investigatory authority of law enforcement officers, authorizes them to compel passengers to respond to interrogatories as to what they intend to do after they arrive at their destination, or authorizes them to refuse passage to those who decline to specify any particular intention or do not have a "travel authorization". Such authority could not be granted by U.S. statute, but would require signing and ratification of amendments to numerous treaties.

Neither the ESTA rule nor any statute obligates travelers to declare, either to the U.S. government or anyone else, their intentions (if any) for whether, or on what basis, they intend to seek entry to the U.S., until they actually arrive at a a U.S. port of entry and present themselves for admission.

So even if the CBP assigned officers to all foreign ports from which visitors might embark to the U.S., the ESTA rule could be enforced only against those who volunteered, at the point of embarking, that they possess the specific intent to "travel to the United States ... under the VWP."

Would-be terrorists or any other minimally skilled and knowledgeable malefactors, of course, would either keep mum about their intentions, disclaim any particular intention, claim to intend merely to transit the U.S. without entry, or profess some plausible intention, other than entry under the VWP, the sincerity of which would be difficult or impossible for anyone at the point of embarking to disprove. As a result, they would not be subject to the proposed information submission and "travel authorization" requirements. So whatever else it would do, the ESTA rule will have absolutely no effect on any but the most inept terrorists or criminals, and will not achieve any meaningful security benefits.

CONCLUSION

The ESTA interim final rule exceeds the statutory authority and jurisdiction of the CBP; is contrary to the obligations of the U.S. under the International Covenant on Civil and Political Rights and other treaties; has been promulgated by the CBP without complying with the procedural requirements of Executive Order 13107 regarding Implementation of Human Rights Treaties, the Airline Deregulation Act, the Regulatory Flexibility Act , and the Administrative Procedure Act; fails to consider or grossly underestimates many of the major costs of the rule; is impermissibly vague; and would be so impractical and unenforceable as to deprive it of any of the benefits claimed by the CBP.

The Identity Project urges the CBP to withdraw the interim final rule, in its entirety. If it does not withdraw the ESTA rule entirely, the CBP must complete the actions directed by Executive Order 13107, prepare the statutorily required analyses, publish them in a full Notice of Proposed Rulemaking (NPRM) , and provide a new opportunity for public comment, before finalizing any ESTA rule.

Respectfully submitted,

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The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

_____/s/_____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

James P. Harrison

Staff Attorney, First Amendment Project

Director, IDP

John Gilmore

Post Office Box 170608

San Francisco, CA 94117

Before the

PRIVACY OFFICE
DEPARTMENT OF HOMELAND SECURITY

Washington, DC 20528

Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP–007, "Border Crossing Information (BCI)"	)))))))	DHS-2007-0040 **COMMENTS OF THE IDENTITY PROJECT (IDP) AND JOHN GILMORE**

The Identity Project (IDP)

<http://www.PapersPlease.org>

A project of the First Amendment Project

1736 Franklin St., 9th Floor

Oakland, CA 94612

August 25, 2008

SUMMARY

The Identity Project submits these comments in response to the "Privacy Act of 1974, System of Records Notice (SORN) for records system DHS/CBP–007, Border Crossing Information (BCI)," published at 73 *Federal Register* 43457-43459 (July 25, 2008), docket number DHS–2007-0040.

The SORN is fundamentally flawed, as it is based on materially false claims about the prior notice, or lack thereof, of the types and sources of data included in BCI records. The proposed records system would be a relabeling of illegally collected records. Those records be destroyed. The SORN describes a system of records containing travel and assembly information, in violation of the Privacy Act prohibition on collecting such records of First Amendment activities without statutory authorization. While the SORN claims "greater transparency"in the disclosure of records, it would in fact make it more difficult for travelers to obtain access to their travel records. In effect, DHS is running a "shell game" by repeatedly changing the names of the systems of records that requesters have to invoke to gain access to their travel records.

The SORN should be withdrawn. All DHS records of travel itineraries and other lawful, protected, First Amendment activities should be purged, regardless of which system(s) of records they are considered to be part of. And DHS should promptly process the backlog of outstanding Privacy Act requests and appeals for these records.

ABOUT THE IDENTITY PROJECT

The Identity Project (IDP), <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

COMMENTS

The SORN for the BCI system of records falsely claims that notice of the collection of third-party commercial travel itinerary records was provided by the 2001 SORN for the Treasury Enforcement Communications System (TECS). The BCI SORN, 73 *Federal Register* 43457, reads:

> CBP creates a record of the fact that the individual has been admitted or paroled into the United States at a particular time and port of entry. This record was previously covered by TECS system of records notice and will now be maintained in accordance with the privacy rules of this newly created Privacy Act System of Records Notice, BCI. The border crossing information identified below may be collected in a number of different ways. For example, information may be collected: ... (2) from carriers who submit information in advance of travel, through the Advance Passenger Information System (APIS).... For records first collected through APIS, the BCI record will contain all the data of the APIS record.

The notice proved by the TECS SORN was limited to information from government sources and travelers themselves. The TECS SORN did not give any notice of DHS retention of APIS or other itinerary and travel records obtained from airlines or other commercial third parties. The first notice of this massive collection of dossiers on the travel of innocent Americans was the SORN for records system DHS/CBP–006, the Automated Targeting System (ATS), on November 2, 2006 (71 *Federal Register* 64543-64546). As we have pointed out in our prior comments to DHS concerning the ATS travel surveillance and travel history records program.

The data now being relabeled as BCI is part of the same data that was previously labeled as ATS. The collection and retention of this data was and is illegal. See "Comments of the Identity Project and John Gilmore, Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP–2006-0060, Automated Targeting System (ATS)", December 4, 2006, available at <http://hasbrouck.org/IDP/IDP-ATS-comments.pdf>, and "Supplemental Comments of the Identity Project and John Gilmore, Privacy Act of 1974, System of Records Notice (SORN), DHS/CBP–2006-0060, Automated Targeting System (ATS)", December 29, 2006, available at <http://hasbrouck.org/IDP/IDP-ATS-comments2.pdf>.

Changes to the name of the system of records containing this data neither make it legal nor address our prior comments regarding its illegality. As when such data was considered a part of ATS,

collection and retention of travel history data in BCI is prohibited by 5 U.S.C. 552a(e)(7). This section of the Privacy Act restricts the collection or retention of records of the exercise of rights protected by the First Amendment. See "Comments of the Identity Project and John Gilmore, Privacy Act of 1974: Implementation of Exemptions; Automated Targeting System", docket DHS-2007-0043, available at <http://hasbrouck.org/IDP/IDP-ATS-comments3.pdf>.

As for APIS data included in BCI, we have also noted in prior comments that this information is being collected in violation of the Privacy Act, and used for an illegal purpose – to decide whether to impose restrictions on rights to travel and assembly protected by the First Amendment and international treaties including Article 12 of the International Covenant on Civil and Political Rights (ICCPR). See "Passenger Manifests for Commercial Aircraft Arriving in and Departing From the United States; Passenger and Crew Manifests for Commercial Vessels Departing From the United States", Comments of the Identity Project, et al., before the Bureau of Customs and Border Protection, Department of Homeland Security, docket USCBP-2005-0003 (October 12, 2006), available at <http://hasbrouck.org/IDP/IDP-APIS-comments.pdf>. APIS data is also collected from commercial third parties: airlines, travel agents, computerized reservation systems, and other intermediaries. This violates the requirement of the Privacy Act that data used as a basis for government decisions be collected, whenever feasible (as it is at both airports and land borders, where travelers interact directly with DHS staff) directly from data subjects. Inclusion of APIS data or other travel records in the proposed BCI system of records is prohibited for the same reasons that it was, and is, illegal to include this data in ATS or APIS records systems.

Rather than trying *again*, as they did with the ATS SORN, to provide retroactive notice and yet more new excuses for this illegal travel surveillance dragnet and system of "historical" travel records about the activities of innocent Americans, DHS should entirely expunge these illegal records of lawful activities protected by the First Amendment and international human rights treaties.

In addition, DHS claims in the BCI SORN that, "the Department is providing additional notice and transparency with respect to the handling of an existing collection of information." Under the Privacy Act, "notice" must be provided by a SORN published *before* a system of records is created. The creation and operation of the systems of records containing this third-party commercial travel data, without a prior SORN, was a crime. We reiterate our complaint of this crime, and request that it be referred to, and acted upon by, appropriate criminal law enforcement authorities.

Under the Privacy Act, "transparency" is provided by the right to obtain records about oneself. This SORN will make it more difficult to exercise that right, since to obtain the records of their travels held by DHS an individual will now need to request records from even more systems of records: at a minimum, TECS, ATS, APIS, and now also BCI. Given the absence of a clear separation or well-defined distinctions between these "systems" within DHS – as is made clear by the succession of redefined SORNs which DHS claims cover the "same" records -- greater transparency would be provided by recognizing that these are all parts of a single system of "Travel Records", and allowing individuals to obtain all such records held by all DHS components with a single request.

That right, and the transparency it should provide, are meaningless unless DHS actually responds to requests for access. Rather than issuing new SORNs that complicate the task of obtaining DHS records, the DHS Privacy Office should concentrate on processing the backlog of requests that has accumulated since the public learned of the existence of these travel records through news reports about ATS. The Identity Project has received numerous reports from individuals who have been waiting months without any response to their Privacy Act requests and appeals for ATS records (portions of which would, under this SORN, be recategorized as BCI records). One of our own appeals of the failure to provide requested ATS records has gone almost a year without any acknowledgment, assignment of a docket number, or reply. (Freedom of Information Act/Privacy Act Appeal on behalf of Edward Hasbrouck, appeal of CBP request file number 200F1676, September 13, 2007)

CONCLUSION

The Identity Project urges that the SORN be withdrawn. All DHS records of travel itineraries and other lawful, protected, First Amendment activities should be purged, regardless of which system(s) of records they are considered to be part of. And DHS should promptly process the backlog of outstanding Privacy Act requests and appeals for any of those records that are retained.

Respectfully submitted,

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The Identity Project (IDP)

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A project of the First Amendment Project

1736 Franklin St., 9th Floor

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_____/s/_____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

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December 11, 2009

Transportation Security Administration
Office of Civil Rights and Liberties (TSA-6)
External Compliance Division
601 S. 12th Street
Arlington, VA 20598

Department of Homeland Security
Office for Civil Rights and Civil Liberties
Review and Compliance
245 Murray Lane, SW
Building 410, Mail Stop #0800
Washington, DC 20528

According to the TSA "Civil Rights Policy Statement" at:
http://www.tsa.gov/assets/pdf/civil_rights_policy.pdf

"[T]he public we serve are to be treated in a fair, lawful, and nondiscriminatory manner, without regard to ... national origin".

However, according to Appendix 2A-2.C.1(b)(iv) of the TSA "Screening Management SOP" (Revision: 3, Date: May 28, 2008, Implementation Date: June 30, 2008), as posted at fbo.gov, and as we have discussed at:

http://www.papersplease.org/wp/2009/12/10/tsa-discloses-discriminatory-and-improperly-withheld-procedures/

"If the individual’s photo ID is a passport issued by the Government of Cuba, Iran, North Korea, Libya, Syria, Sudan, Afghanistan, Lebanon, Somalia, Iraq, Yemen, or Algeria, refer the individual for selectee screening unless the individual has been exempted from selectee screening by the FSD or aircraft operator."

As applied to dual U.S. citizens or permanent U.S. residents from these countries traveling domestically within the U.S., this provision of the SOP imposing "selectee

screening" (more intrusive search and/or interrogation) on the overt basis of national origin is, on its face, in flagrant violation of the TSA Civil Rights Policy Statement, statutory and Constitutional obligations, and obligations of compliance with Article 12 of the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by and binding on the U.S., and which all federal agencies have been specifically instructed to comply with by Executive Order 13107 on Implementation of Human Rights Treaties (61 Federal Register 68991).

Accordingly, the Identity Project requests that appropriate investigation, enforcement, and corrective action be taken against the agency and the personnel responsible for these illegally discriminatory procedures.

Please reply to confirm your receipt and docketing of this complaint as a complaint of a civil rights violation and a complaint of violation of the ICCPR, in accordance with Section 3 of Executive Order 13107:

"Sec. 3. Human Rights Inquiries and Complaints. Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to inquiries, requests for information, and complaints about violations of human rights obligations that fall within its areas of responsibility or, if the matter does not fall within its areas of responsibility, referring it to the appropriate agency for response."

We also specifically request that this complaint be included in your next report of complaints of violations of the ICCPR to the U.N. Human Rights Committee, as is required by Article 40 of that treaty.

If your office is not the office within DHS and/or TSA designated pursuant to Section 3 of Executive Order 13107 as responsible for responding to complaints of violations of human rights treaties including the ICCPR, we request that you refer this complaint to that office (in addition to your own action on this complaint of violation of domestic civil rights law), and inform us of the contact information for that office to which it has been referred and from which we can expect a response.

Should you have any questions or wish further information, please don't hesitate to contact me by phone at 415-824-0214 or by e-mail at <edward@hasbrouck.org>.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

p.s. The address at <http://www.tsa.gov/what_we_do/civilrights/travelers.shtm> appears to be incorrect. I believe that the TSA zip code is now 20598, not 22202.

Office of the Assistant Secretary

U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 22202-4220

FEB 15 2003

Transportation Security Administration

Civil Rights Policy Statement

The Transportation Security Administration's (TSA) vision is excellence in transportation security through our people, processes, and technology. With this vision, comes a commitment that all TSA employees and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner. It is TSA's policy that:

- TSA employees, applicants for employment, and the public we serve are to be treated in a fair, lawful, and nondiscriminatory manner, without regard to race, color, national origin, religion, age, sex, disability, sexual orientation, status as a parent, or protected genetic information.

- TSA's equal employment opportunity policy applies to all personnel and employment programs and management practices and decisions.

- TSA will comply with all applicable Federal laws and Executive Orders regarding civil rights protections.

- TSA has no tolerance for harassment in the workplace or in the treatment of the public we serve.

- TSA will not tolerate reprisal against those who exercise their rights under the civil rights laws.

- TSA will scrutinize processes, review results, and work to remove any barriers that may impede equal opportunity for recruitment, hiring, promotion, reassignment, career development, or other employment benefits.

- TSA will review and analyze from a civil rights perspective how its programs , policies, and operations impact the public we serve.

TSA has achieved much in its first few years of existence but much remains to be done. This includes continued self-analysis and improvement and constant awareness. We must recruit the best; hire, mentor, and retain the best; and provide the best service and security to our customers. Finally, I am committed to integrating our adherence to the nation's civil rights laws and civil liberties into all TSA activities and processes.

Kip Hawley

Kip Hawley
Assistant Secretary

AVIATION SECURITY

SCREENING MANAGEMENT

STANDARD OPERATING PROCEDURES

Transportation Security Administration

Transportation Security Administration (TSA) personnel and contractors must use and implement these standard operating procedures in carrying out their functions related to security screening of passengers, accessible property and checked baggage. Nothing in these procedures is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by prospective or actual witnesses or parties. See United States v. Caceres, 440 U.S. 741 (1979).

B. Advisements and Assessments

1) If passenger flow permits, the TDC may assist with divesting advisements to include: prohibitions regarding liquids, gels, and aerosols; removal of footwear and outer coats/jackets; and separation of electronic equipment from its carrying case in accordance with Screening Checkpoint SOP, Section 2.1.B.5.f.

2) When positioned in close proximity to the end of the screening checkpoint divesting tables, the TDC may assist in the queuing of accessible property into the x-ray system if passenger flow permits.

C. Travel Document and ID Checking Procedures

1) Authorization to access the sterile area is limited to those categories of individuals listed in Section 1.9.1 of the Screening Checkpoint SOP. For each authorized individual seeking access to the screening checkpoint, the TDC must ask to see the individual's travel document and, if the passenger appears to be 18 years of age or older, a valid form of ID.

a. Check the travel document for valid information, for example, departing flight number, correct date, and selectee marking.

b. If the TDC determines that the individual appears to be 18 years of age or older, check the individual's ID for the following:

i. The ID is either a photo ID issued by a Government authority, an airport issued SIDA or sterile area airport ID card, or aircraft operator issued RAMP or CREW ID. The TDC must verify the photo on the ID is a true representation of the person presenting the ID. If a passenger does not have a photo ID, the TDC may accept two other forms of ID, at least one of which must be issued by a Government authority. See Subsection 4.2.1.B. of this SOP for a description of these ID types. An expired ID is not valid for the purposes of this check.

ii. The name on the ID substantially matches the name on the travel document. Initials, common nicknames, or abbreviated names (for example, Beth for Elizabeth, Chuck for Charles) should not preclude acceptance. If the name on the travel document does not substantially match the name on the photo ID, designate and process the individual as a selectee.

iii. The ID shows no signs of tampering.

iv. If the individual's photo ID is a passport issued by the Government of Cuba, Iran, North Korea, Libya, Syria, Sudan, Afghanistan, Lebanon, Somalia, Iraq, Yemen, or Algeria, refer the individual for selectee screening unless the individual has been exempted from selectee screening by the FSD or aircraft operator.

v. At screening checkpoints equipped with ultraviolet lights and magnifying loupes, expose the ID to an ultraviolet light (black light) source.

1. If the correct Federal, State, or local government, airport, or aircraft operator ultraviolet security feature is present, the ID is clear.

2. If the ID does not contain ultraviolet security features, or the TDC is unfamiliar with the ID's ultraviolet security features, or the ID fluoresces when exposed, use a magnifying loupe to determine if correct micro printing security features are present. If the correct Federal, State, or local government, airport, or aircraft operator micro printing security features are present, the ID is clear.

3. If the ID does not contain micro printing security features or the TDC is unfamiliar with the ID's micro printing security features, use a magnifying loupe to inspect the ID for signs of tampering and the presence of inkjet dots throughout the ID to include the photograph. If the ID is free of inkjet dots and signs of tampering, the ID is clear.

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

JAN 22 2010

Edward Hasbrouck
Radetsky & Hasbrouck
1130 Treat Avenue
San Francisco, CA 94110

Dear Mr. Hasbrouck:

Thank you for contacting the U.S. Department of Homeland Security's (DHS) Office for Civil Rights and Civil Liberties. We received your correspondence on December 30, 2009. Under 6 U.S.C. 345 and 42 U.S.C. 2000ee-1, this Office is responsible for reviewing and assessing information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by employees and officials of DHS.

In your letter, dated December 11, 2009, addressed to this Office and the Transportation Security Administration Office of Civil Rights and Liberties (TSA OCRL), you express concerns regarding the screening of travelers on the basis of national origin, as it applies to dual U.S. citizens or permanent U.S. residents who are carrying passports from certain countries.

This Office discussed your concerns with TSA OCRL this week, and TSA OCRL advised us that they are preparing a written response to you addressing the issues you raised. The Office for Civil Rights and Civil Liberties has determined that we have no basis for any further action at this time. Further inquiries regarding this matter may be addressed to TSA OCRL. Thank you again for contacting us.

Sincerely,

William P. McKenney
Director for Review and Compliance
Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security

U.S. Department of Homeland Security

Office of Civil Rights and Liberties
601 South 12th Street
Arlington, VA 20598-6006

Transportation Security Administration

FEB 4 2010

Mr. Edward Hasbrouck
The Identity Project
1736 Franklin Street, 9th Floor
Oakland, CA 94612

Dear Mr. Hasbrouck:

Thank you for your letter of December 11, 2009, expressing concern about recent press reports pertaining to certain TSA screening management procedures that appeared on the internet. Specifically, you believe that referring passengers who hold passports issued by certain foreign governments for additional screening is a possible civil rights violation and requires appropriate investigation, enforcement and corrective action.

TSA works in close conjunction with the Department of State and other U.S. Government agencies to strengthen alliances to defeat global terrorism and prevent attacks against the United States and its partners. Security measures are subject to constant review and revision.

In developing and implementing security measures to ensure the safety of the traveling public and the movement of people and commerce, TSA takes every effort to ensure the civil rights and liberties of all travelers are respected and safeguarded. It is TSA's expectation that all people will be treated properly and respectfully while ensuring the security of international civil aviation and the U.S. transportation system. This is also true with respect to the additional screening requirement for holders of passports issued by the countries of interest that you identified in your e-mail. Please note that a passport-issuing country is not coextensive with a person's national origin.

We appreciate that you took the time to share your concerns with us and hope that this information is helpful. If we may be of further assistance, please call the Office of Civil Rights and Liberties at (877) 336-4872.

Sincerely yours,

Jennifer K. Carmichael

Jennifer Carmichael
Director

The Identity Project
www.PapersPlease.org

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February 19, 2010 (by e-mail and U.S. Postal Service)

Jennifer K. Carmichael, Director
Office of Civil Rights and Liberties (TSA-6)
Transportation Security Administration
601 S. 12th Street
Arlington, VA 20598-6901
TSA.OCR-ExternalCompliance@dhs.gov

William P. McKenney, Director for Review and Compliance
Office for Civil Rights and Civil Liberties
Department of Homeland Security
245 Murray Lane, SW, Building 410, Mail Stop #0800
Washington, DC 20528-0190
civil.liberties@dhs.gov

On December 11, 2009, we submitted a formal complaint to you that certain TSA practices, as described in the TSA's "Screening Management Standard Operating Procedures", violate published TSA civil rights policy, Federal statutes, Constitutional rights, and rights guaranteed by international human rights treaties binding on the USA, specifically the International Covenant on Civil and Political Rights (ICCPR).

Our complaint was submitted by e-mail to the addresses on your websites, <TSA.OCR-ExternalCompliance@dhs.gov> and <civil.liberties@dhs.gov>, and sent the same day by postal mail. Those e-mail messages should have been received that day.

We have received no indication that our e-mail was ever received. Indeed, the letter we eventually received from Mr. McKenney suggests that our e-mail was never received, and that our letter was severely delayed within DHS, since he said that, "We received your correspondence on December 30, 2009." Similarly, Ms. Carmichael's letter to us refers solely to "your letter". We urge you to take immediate steps to ensure that your postal and e-mail messages are reliably and promptly received. Not all complainants will have sent copies of their e-mail messages by postal mail, so your records of complaints made are likely to be incomplete, and not up to date.

In Mr. McKenney's letter dated January 22, 2010, he said, "TSA OCRL advised us that they are preparing a written response to you addressing the issues you raised."

Unfortunately, we have not yet received such a written response from TSA OCRL or anyone else.

Our only written communication from TSA OCRL has been a letter from Ms. Carmichael dated February 4, 2010 but postmarked February 16, 2010. Her letter refers in general terms to "our letter expressing concerns about recent press reports,", but makes no mention of our complaint that specific TSA practices and procedures are illegal.

Despite the unambiguous language of our complaint, Ms. Carmichael's letter gives no acknowledgment or indication that our complaint has been docketed, logged, or will be included in your reporting and statistics of complaints received. It gives no indication of what, if any, investigation, fact-finding, enforcement, or corrective action has been taken on our complaint. It does not say what, if any, determination you or any office or officer within TSA or DHS has made with respect to whether the practices we complained of are in fact permitted by Federal law, the Constitution, and international human rights treaties. It does not say who is responsible for any such determination, whether any such determination is administratively final, or if not, what mechanisms for administrative appeal to an administrative law judge or otherwise are available to us.

Neither of your letters mentions international human rights treaties, the TSA's obligation to comply with them and to investigate and respond to complaints of violations of them, or our complaint of violation of the ICCPR by the TSA. Your letters do not acknowledge that we have made such a complaint, or that the fact that we have made such a compliant to you will be included in your next report to the U.N. Human Rights Committee, in accordance with Article 40 of the ICCPR. They do not say what, if anything, has been done to investigate this complaint. They do not say whether either of you or your offices are those designated pursuant to Section 3 of Executive Order 13107 as responsible for responding to such complaints, or if not, what office or officer has been so designated by DHS and/or TSA, and that our complaint has been referred to them.

We continue to await your action on, and response to, our complaint.

Should you have any questions or wish further information, please don't hesitate to contact me by phone at 415-824-0214 or by e-mail at <edward@hasbrouck.org>.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

U.S. Department of Homeland Security

Office of Civil Rights and Liberties
601 South 12th Street
Arlington, VA 20598

Transportation Security Administration

July 22, 2010

Edward Hasbrouck
The Identity Project
edward@hasbrouck.org

Re: OTSSO-10-0016

Dear Mr. Hasbrouck,

I write in response to your February 19, 2010, letter to the Transportation Security Administration's (TSA) Office of Civil Rights and Liberties. This correspondence was in follow-up to the February 4, 2010, letter you received from the Director of the Office of Civil Rights and Liberties, responding to your December 11, 2009, complaint. You questioned whether your correspondence had been logged as a complaint, whether there was a finding on your complaint alleging human rights violations by TSA's defunct standard operating procedures, and you questioned who the point of contact is at the agency for Executive Order 13107.

Your correspondence was logged as complaint number OTSSO-10-0016. We were unable to find a human rights violation in your concern as the standard operating procedures referenced were no longer effective in December 2009. Lastly, the Department has designated the Officer for Civil Rights and Civil Liberties as the point of contact for Executive Order 13107. We hope this information addresses your concerns.

Sincerely,

Stephanie Stoltzfus
Director, Office of Traveler Specialized Screening & Outreach
Office of Civil Rights and Liberties