

The Identity Project

www.PapersPlease.org

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April 24, 2011

Ms. Hillary Rodham Clinton, Secretary of State
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Dear Secretary Clinton:

We are writing to request that the attached complaints of violations by the Department of State of U.S. obligations pursuant to international human rights treaties to which the U.S. is a party (specifically, Article 12 on freedom of movement of the International Covenant on Civil and Political Rights) be referred by you to the officer you have designated as the single contact officer for responsible for overall coordination of the implementation of Executive Order 13107 on implementation of human rights treaties, and that we be provided with responses to each of these complaints.

We have attached two complaints of separate violations of Article 12 of the ICCPR by your Department, for action and response by your Department.

The first of these complaints was included in, "Comments of the Identity Project, et al., Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates ," filed March 11, 2010, in docket DOS-2010-0035. Although our comments were specifically mentioned in the analysis of comments published by the Department along with the interim final rule, our objections on the basis of Article 12 of the ICCPR were not mentioned. ("Interim Final Rule, Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates ," 75 *Federal Register* 36522-36535, June 28, 2010.) We have received no response to this complaint.

The second attached complaint, "Comments of the Identity Project, et al., 60-Day Notice of Proposed Information Collection: DS-5513, Biographical Questionnaire for U.S. Passport, 1405-XXXX" was filed today in docket DOS-2011-0055.

Executive Order 13107 requires that "The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the

implementation of this order.... Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to ... 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."

Despite diligent research and inquiries to your Department's public contacts, we have been unable to find any public notice of who, if anyone, you have designated as the single contact officer for implementation of Executive Order 13107 by your Department, or any procedures or point of contact for submission of complaints of violations by your Department of human rights treaties.

The purpose of these provisions of Executive Order 13107 – insuring that aggrieved persons know to whom to complain, and receive a response to their complaints – is frustrated if the designation of the "single point of contact" is not made public, and if those who receive such complaints fail to refer them to that point of contact.

In addition to action on and responses to our complaints, we would be interested in meeting with your staff to discuss what steps have been, or need to be, taken by your Department to make the public and Department components aware of the single point of contact at your Department for complaints of human rights treaty violations, to ensure that such complaints received by Department components are properly referred for action including responses, and to ensure that all such complaints are responded to.

Sincerely,

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

cc: Mr. Michael H. Posner, Assistant Secretary of State
Bureau of Democracy, Human Rights, and Labor
U.S. Department of State
2201 C Street NW
Washington, DC 20520

Mr. Harold Hongju Koh, Legal Advisor
U.S. Department of State
2201 C Street NW
Washington, DC 20520

The Identity Project, Consumer Travel Alliance, Center for Financial Privacy and Human Rights, and John Gilmore submit these comments in response to the Notice of Proposed Rulemaking (NPRM), “Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates,” published at 75 *Federal Register* 6321-6330 (February 9, 2010), docket number USDOS-2010-0035, RIN 1400-AC58.

Under this NPRM, the Bureau of Consular Affairs, Department of State (“the Department”), proposes to increase fees including the application fee (from \$55 to \$70) and the “security surcharge” (from \$20 to \$40) for issuance of a passport book, the fee for adding blank visa pages to a passport book (from free to \$82), and the application fee for a passport card (from \$20 to \$30).

The signers of these comments oppose the proposed fee increases for the reasons set forth below.

The fundamental defect in this rulemaking is that the Department has failed to evaluate the impact of the proposed fee increases on the ability of U.S. citizens to exercise rights protected by the First Amendment and international treaties. In addition, the proposed increase in the fee to add pages to a passport book would violate due process and the Administrative Procedure Act. The Department has failed to justify the differences in proposed fees, in relation to costs, for passports and passport cards. And the Department has failed to consider the impact of the proposed rules on individuals as “small economic entities,” pursuant to the Regulatory Flexibility Act.

The Department should stop including RFID chips in passports and passport cards, instead of increasing fees to cover the cost of RFID chips. This would be less costly, more secure for passport holders, and less restrictive of U.S. citizens’ right to travel, assemble, and enter and leave the country, as protected by the First Amendment and international human rights treaties.

I. ABOUT THE COMMENTERS

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 Consumer Travel Alliance (CTA), <<http://www.consumertravelalliance.org>>, is a nonprofit, nonpartisan organization that works to provide consumers an articulate and reasoned voice in decisions that affect travel consumers. CTA seeks to help improve consumer understanding of the travel environment, including aviation, rail, cruising, telecommunications, banking, Internet travel services, and insurance. CTA supports an individual consumer's freedom to travel whether for business or leisure, and protection of consumers during their travel activities. Through its efforts, the focus is put on how travel rules and regulations, national laws, and corporate policies affect the consumer. CTA is one of the member organizations of the Consumer Federation of America.

The Center for Financial Privacy and Human Rights (CFPHR), <<http://www.financialprivacy.org>>, was founded in 2005 to defend privacy, civil liberties and market economics. The Center is a non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a non-governmental advocacy and research 501(c)(3) organization.

II. THE DEPARTMENT SHOULD STOP INCLUDING RFID CHIPS IN PASSPORTS, INSTEAD OF INCREASING FEES TO COVER THE COSTS OF RFID CHIPS.

According to the NPRM, “The Department is increasing the passport book security surcharge from \$20-\$40 in order to cover the costs of increased border security which includes, but is not limited to, enhanced biometric features in the document itself.” Although the NPRM does not itemize these “biometric features,” the only substantial change in biometric or other features, production, or security

since the last adjustment of passport fees is the addition of an embedded Radio Frequency Identification (RFID) transponder chip laminated within each so-called “e-passport.”

As was noted in numerous comments to the Department when it first proposed adding RFID chips to passports, RFID chips in passports are a serious security vulnerability and threat to passport holders. RFID chips in identity credentials such as passports are a surveillance and control feature, not a security feature. They facilitate both government and third-party surveillance of passport holders, whether for commercial, criminal, or terrorist purposes, through the inclusion of a globally unique identification number. There are no legal restrictions whatsoever in the U.S. on private or commercial use of RFID readers to interrogate the RFID chips in e-passports or passport cards, nor on the use of data obtained in this way. RFID chips in passports also facilitate identity theft, passport cloning, and forgery of other types of identity credentials and documents through misuse of personal data intercepted from exchanges between e-passport chips and readers in use by government agencies at border crossings, airports, etc.

Discontinuing the inclusion of RFID chips in passports would enhance the security of passport holders, reduce passport production costs, and eliminate the need to increase the passport issuance fee or “security surcharge.” Rather than raising fees to cover the cost of adding a passport feature which poses a significant threat to the security of the passport holder, the Department should use this opportunity to reconsider and rescind its decision to include RFID chips in passports and passport cards.

III. THE DEPARTMENT HAS FAILED TO EVALUATE THE IMPACT OF THE PROPOSED FEE INCREASES ON THE ABILITY OF U.S. CITIZENS TO EXERCISE RIGHTS PROTECTED BY THE FIRST AMENDMENT AND INTERNATIONAL TREATIES.

When the current passport fees were established, it was still possible (although significantly encumbered) for U.S. citizens to enter or leave the U.S. without a passport or any other government issued identity credentials. Passport issuance laws and regulations were therefore evaluated, both by the

Department and by the courts, as pertaining to the issuance of credentials which were not essential for the exercise by U.S. citizens of their rights to cross U.S. borders.

That has changed, however, with the implementation of the “Western Hemisphere Travel Initiative” (WHTI), which requires a passport, passport card, other specified government issued identity credential, or a discretionary waiver of this requirement, as a prerequisite to crossing any U.S. border by any means by any U.S. citizen. See our previous objections to those requirements, “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,” USCBP-2006-0097, September 25, 2006, available at <http://hasbrouck.org/IDP/IDP-WHTI-comments.pdf>, and “Comments of the Identity Project, 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 right to assemble and the right to petition for redress of grievances are directly protected by the First Amendment. In the case of U.S. citizens born and/or residing abroad, or U.S. citizens wishing to assemble with U.S. citizens abroad, the exercise of those rights requires crossing U.S. borders. The right to freedom of movement, specifically including both the right to leave any country and the right to return to one's own country, is protected by Article 12 of the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by, and binding on, the U.S. Executive Order 13107, “Implementation of Human Rights Treaties,” directs all executive departments and agencies to “maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully.”

Now that the U.S. government requires U.S. citizens to have passports for international travel, passport fees must be considered according to the higher standard of justification applicable to regulations which burden the exercise of rights protected by both the First Amendment and the ICCPR, including a

showing that the proposed rules are the least restrictive available means of accomplishing a permissible government purpose, and would in fact achieve that purpose.

As discussed in our previous comments to U.S. Customs and Border Protection on the WHTI document requirements in dockets USCBP-2006-0097 and USCBP-2007-0061, cited above, 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](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>).

Even before the promulgation of the WHTI regulations requiring U.S. citizens to obtain passports for travel with the Western Hemisphere, the Supreme Court had long recognized that passport issuance implicates the fundamental Constitutional freedom of travel. “The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and, in effect, a prohibition against, world-wide foreign travel.” *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Strict scrutiny is required for regulations which, like those proposed by this NPRM, would burden passport issuance and thus the exercise of First Amendment rights. Strict scrutiny requires both a showing of actual effectiveness for a permissible government purpose, and that no less restrictive effective alternative is available: “[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

With respect to international treaties, 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 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*, 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](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.

Sections 2 and 3 of Article 12 of the ICCPR 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.

In addition, the proposed rules are inconsistent with Article 21 of the ICCPR, which imposes a similar standard of “necessity” on rules which burden the right of assembly:

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 Department’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.

There are clearly less restrictive alternatives to the proposed passport and passport card fee increases: elimination of the RFID chips in the passports, eliminating the need for a fee increase, and/or elimination of the requirement for U.S. citizens to have a passport to enter or leave the U.S. But the Department has failed even to consider the heightened standard of justification required as a consequence of the imposition of the WHTI requirements for government issued identity credentials for U.S. citizens.

Before any fee increase is finalized, the Department must evaluate the proposal against the standard of justification applicable to rules that burden the exercise of rights protected by the First Amendment and the ICCPR, including consideration of these less restrictive alternatives.

IV. THE DEPARTMENT HAS FAILED TO JUSTIFY THE DIFFERENCES IN PROPOSED FEES, IN RELATION TO COSTS, FOR PASSPORTS AND PASSPORT CARDS.

In this NPRM, the Department proposes to raise the fee for a passport book to \$110 (\$70 application fee plus \$40 “security surcharge”), or 104% of the estimated cost of \$105.80. At the same time, it proposes to raise the fee for a passport card only to \$30, or 39% of its estimated cost of \$77.59.

The only explanation given in the NPR and is that “the card is intended to be a substantially less expensive document.” No explanation is given as to why, if in fact it has not fulfilled that intent, passport applicants and taxpayers in general should be required to subsidize passport card issuance.

The only plausible interpretation of the proposed new fee structure is that it is intended to create artificial financial incentives for citizens (A) to be more willing obtain a passport card and, (B) to be more likely to obtain a passport card rather than a passport book, than they would be if the fee for a passport card were proportionate to its actual cost.

This is an impermissible basis for distortions to an otherwise purportedly cost-based fee structure. There is no legitimate government purpose that justifies such a scheme to promote passport card acceptance at the expense of taxpayers and applicants for passport books.

Passport cards do not comply with International Civil Aviation Organization (ICAO) standards, and as a result are not globally interoperable or acceptable to other governments. ICAO Document 9303 provides for card-format travel documents, but requires that if an RFID chip is included in any travel document it must be a shorter-range “proximity” chip complying with ISO standard 14443, rather than a longer-range ISO 18000-6C “vicinity” RFID chip as used in U.S. passport cards. ICAO considered longer-range RFID chip types, but rejected them in order to protect the security of passport holders. ICAO travel document standards in Document 9303 do not require any RFID chips in passports or passport cards, and permit RFID chips only if they comply with the shorter-range ISO 14443 standard. Passport cards deliberately violate ICAO standards, at the expense of passport security, in order to facilitate longer-range reading of the RFID chips and surveillance of movement of passport card holders.

Potential applicants for a passport or passport card should not be given artificial financial incentives to accept a type of credential that violates international passport security standards, in order to make it easier for the government or any third party (commercial, criminal, or terrorist) to monitor and log their movements through the globally-unique identification number in their RFID chip.

Any passport card issued by the Department should be valid for travel worldwide, consistent with U.S. citizens' Constitutional and treaty right right to depart the U.S. regardless of their intended destination and to re-enter the U.S. from any other country. At a minimum, this would require the Department to replace the longer-range ISO 18000-6C "vicinity" RFID chip with a shorter-range ISO 14443 "proximity" chip. If the Department wants a cheaper passport card, it should make a cheaper passport card. The most obvious way to do so is to eliminate the RFID chip entirely. The Department cannot and should not overcharge passport-book users to subsidize undercharged passport-card users.

If the passport card has proven to be too expensive, even if the RFID chip and its costs were no longer included, the Department should consider the less restrictive, less costly alternative of rescinding or amending the WHTI regulations to eliminate the requirement for a passport, passport card, or other government issued credential for U.S. citizens to enter or leave the U.S.

V. THE PROPOSED INCREASE IN THE FEE TO ADD PAGES TO A PASSPORT BOOK WOULD VIOLATE DUE PROCESS AND THE ADMINISTRATIVE PROCEDURE ACT.

As noted in the NPRM, there has until now been no charge for the addition of blank pages to a full passport book. The Department proposes to impose a new fee of \$82 for this service.

Passport books have been issued in varying thicknesses, with anywhere from 24 to 96 blank visa pages, at the standardless, secret, discretion of the Department. There is no place on the passport application form to indicate a request for a thicker passport. Because additional blank pages could always be added later, at no charge, there was no adverse financial consequence to the applicant if, in its discretion, the Department declined to issue a thicker passport, and no due process rights were attached to that decision. No standards for the issuance of thicker passports and no procedures for administrative appeal or review of decisions as to what size passport to issue have ever been established.

For a variety of reasons (the lack of a designated place to indicate on the passport application a request for a thicker passport book; failure to notice such requests made, of necessity, in a nonstandard manner or on a cover letter or separate sheet attached or enclosed with the application; or simply the manner in which the Department has exercised its discretion – in the absence of published standards, due process, or review, it's impossible to be certain about the reasons), many applicants who have attempted to request a thicker passport have received only a standard passport with the minimum number of pages.

For example, John Gilmore, a member of the Identity Project and a co-signer of these comments, specifically asked the Department for a thicker passport when he most recently renewed his passport book. Despite his specific written request accompanying his passport application, he received a standard passport with the minimum number of pages. He received no notice of why his request for a thicker passport book was denied, who was responsible for the denial, whether the denial could be appealed, or if so, how. Numerous other individuals have reported similar experiences to the Identity Project.

The imposition of a fee to add pages to a passport book would, retroactively, attach significant financial consequences to past determinations by the Department of what size passport books to issue to which applicants – decisions which were, at the time, treated as purely discretionary and subject to no due process rights whatsoever, since additional pages could always be added later, at no charge.

It would be grossly unfair to citizens who requested a thicker passport when they first applied for it, who did not receive it, and who were unable to challenge that action or have it reviewed at the time because it was, at the time, without adverse financial consequences, now to require them to pay an additional fee to have the pages that they wanted and requested in the first place added to their passport.

Consistent with due process and the Administrative Procedure Act, those passport book holders should not be subject to any fee for the addition of pages to their current passport books.

Before imposing any fee for adding pages to any passport book, the Department should:

(A) Add a check-box or boxes to the passport application form for the applicant to indicate in a standardized manner, on the form itself, a request for a passport with more pages instead of the standard passport, up to the maximum possible number of pages;

(B) Either (1) begin issuing thicker passports, up to the maximum possible size, to all those who request them, rather than on a “discretionary” basis, or (2) promulgate regulations, after notice and comment, defining neutral standards for determining whether to issue a thicker passport, and mechanisms for due process and administrative appeal of adverse decisions not to issue a thicker passport; and

(C) Exempt from any fee for the addition of new pages those passports with less than the maximum number of pages issued prior to the effective date of the preceding changes in procedures.

VI. THE DEPARTMENT HAS FAILED TO CONSIDER THE IMPACT OF THE PROPOSED RULES ON INDIVIDUALS AS “SMALL ECONOMIC ENTITIES”

According to the NPRM, “the Department, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. 606(6).”

The definition of “small entity” does not distinguish or exclude natural persons. All or almost all sole proprietors and self-employed individuals, and most freelancers, are small economic entities as that term is defined for purposes of the Regulatory Flexibility Act. It is self-evident that the principal effects of the proposed regulations on small entities will be its effects on those self-employed individuals as applicants for passports and passport cards and payers of fees for other services. As with any other agency whose regulations affect individuals, the Department should routinely make it a practice, in reviewing whether any rulemaking is subject to the requirement for an analysis of its impact on small economic entities, and in conducting such analyses, to consider its impact on self-employed individuals.

However, the purported analysis in the NPRM gives no indication that the Department has, in fact, conducted any review of the number of self-employed or other individual “small entities” on which it would have an impact, or the potential significance of that impact. The complete omission of individuals as small entities from the purported analysis in the NPRM strongly suggests that the Department has not, in fact, adequately conducted the required review, and must do so and publish the results for comments before finalizing any regulations under this rulemaking.

VII. CONCLUSIONS AND RECOMMENDATIONS

The proposed fee increases should be withdrawn. Instead, the Department should eliminate RFID chips from passport books and cards, and eliminate the requirement for U.S. citizens to have or display a passport or other government-issued credential as a prerequisite to the exercise of their Constitutional and international treaty rights to depart from, and return to, U.S. territory, by any means and to or from any other country or territory, or to or from international waters or airspace.

Before finalizing any fee increases under this rulemaking, the Department must evaluate the impact of the proposed rules on the ability of U.S. citizens to exercise rights protected by the First Amendment and international treaties; justify the differences in proposed fees, in relation to costs, for passports and passport cards; and conduct and publish for comment an evaluation of the impact of the proposed rules on individuals as “small economic entities”, pursuant to the Regulatory Flexibility Act.

Respectfully submitted,

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

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A project of the First Amendment Project

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_____/s/____

Edward Hasbrouck,

Consultant to IDP on travel-related issues

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John Gilmore

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March 11, 2010

Before the
BUREAU OF CONSULAR AFFAIRS
DEPARTMENT OF STATE
Washington, DC 20037

60-Day Notice of Proposed
Information Collection:
DS-5513, Biographical
Questionnaire for U.S.
Passport, 1405-XXXX

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) **COMMENTS OF THE**
) **IDENTITY PROJECT (IDP),**
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) **CENTER FOR FINANCIAL**
) **PRIVACY AND HUMAN**
) **RIGHTS (CFPHR),**
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) **KNOWLEDGE ECOLOGY**
) **INTERNATIONAL (KEI),**
)
) **CENTER FOR MEDIA AND**
) **DEMOCRACY,**
)
) **PRIVACY ACTIVISM,**
)
) **CONSUMER TRAVEL**
) **ALLIANCE (CTA),**
)
) **ROBERT ELLIS SMITH,**
)
) **AND JOHN GILMORE**
)

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The Identity Project (IDP), Center for Financial Privacy and Human Rights (CFPHR), Knowledge Ecology International (KEI), Center for Media and Democracy (CMD), Privacy Activism, Consumer Travel Alliance (CTA), Robert Ellis Smith, and John Gilmore submit these comments in response to Department of State Public Notice 7345, "60-Day Notice of Proposed Information Collection: DS-5513, Biographical Questionnaire for U.S. Passport, 1405-XXXX," published at 76 *Federal Register* 10421 (February 24, 2011), and the proposed form, supporting statement, statement of legal authorities, and regulatory assessment which were provided to us by the Department of State in response to our requests, and which we have published for the benefit of other commenters at <<http://papersplease.org/wp/2011/03/18/state-dept-proposes-biographical-questionnaire-for-passport-applicants/>>. We have posted the proposed Form DS-5513 at <<http://papersplease.org/wp/wp-content/uploads/2011/03/ds5513-proposed.pdf>>.

The Department of State (DOS) is seeking Office of Management and Budget (OMB) approval for a new collection of personal information from some subset of applicants for U.S. passports, as described in the "Notice of Proposed Information Collection" and the proposed Form DS-5513.

For the reasons discussed below, we oppose this information collection and proposed form as exceeding the statutory authority of the DOS, unconstitutional, and in violation of U.S. obligations pursuant to international human rights treaties to which the U.S. is a party. The DOS should withdraw its proposal; if it does not do so, OMB should disapprove the proposed information collection and form.

I. ABOUT THE COMMENTERS.

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 Center for Financial Privacy and Human Rights (CFPHR), <http://www.financialprivacy.org>, was founded in 2005 to defend privacy, civil liberties and market economics. The Center is a non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a non-governmental advocacy and research 501(c)(3) organization.

Knowledge Ecology International (KEI), <http://www.keionline.org>, is a not for profit nongovernmental organization that searches for better outcomes, including new solutions, to the management of knowledge resources. KEI is focused on social justice, particularly for the most vulnerable populations, including low-income persons and marginalized groups. KEI undertakes and publishes research and new ideas, engages in global public interest advocacy, provides technical advice to governments, NGOs and firms, enhances transparency of policy making, monitors actions of key actors, and provides forums for interested persons to discuss and debate Knowledge Ecology topics.

The Center for Media and Democracy (CMD), <http://www.prwatch.org>, is a national independent publisher located in Madison, Wisconsin. Our team of writers focuses on reporting that promotes informed decision-making about policies affecting our lives – our economy, our environment, our health, our liberty, our security, and the health of our democracy – and aids citizen involvement and grassroots action. Our opinion pieces and advocacy work help advance consumer rights and civil liberties, including the right to privacy, as well as the constitutional freedom to travel and freedoms of speech, press, and assembly.

Privacy Activism, <http://www.privacyactivism.org>, is a 501(c)(3) organization, based in California. We strive to help people make well-informed decisions about personal privacy and to show how privacy decisions affect society as a whole. A key element of Privacy Activism's approach is to

communicate information visually, in order to make the complexities of privacy law and policy more accessible to people with no specialized expertise in the issues. We focus primary on areas of consumer privacy, including data mining of consumer information, identity theft, medical records privacy and online behavioral advertising and tracking.

The Consumer Travel Alliance (CTA), <<http://www.consumertravelalliance.org>>, is a nonprofit, nonpartisan organization that works to provide consumers an articulate and reasoned voice in decisions that affect travel consumers. CTA seeks to help improve consumer understanding of the travel environment, including aviation, rail, cruising, telecommunications, banking, Internet travel services, and insurance. CTA supports an individual consumer's freedom to travel whether for business or leisure, and protection of consumers during their travel activities. Through its efforts, the focus is put on how travel rules and regulations, national laws, and corporate policies affect the consumer. CTA is one of the member organizations of the Consumer Federation of America.

Robert Ellis Smith, a lawyer and journalist, is a leading expert on the right to privacy in the U.S., and the founder and publisher since 1974 of *Privacy Journal*, a monthly newsletter on the individual's right to privacy. *Privacy Journal* covers new technology and its impact on privacy, useful tips for protecting your privacy, and the latest on court decisions, legislation, professional conferences, and corporate practices.

II. THE DOS HAS GROSSLY UNDERESTIMATED THE DIFFICULTY OF COMPLETING THE PROPOSED FORM AND THE TIME REQUIRED TO DO SO.

Most people do not know the answers to all of the questions on the proposed form. Very few, if any, respondents would be able to complete the proposed form. A good-faith effort to complete as much of the form as possible would require an average of 100 hours or more per respondent, not 45 minutes as claimed by DOS in its proposal. No matter how hard or long they worked at it, even if they hired a private

investigator and/or traveled the country searching out details of past residences, past employers and supervisors, medical records, or people who might have information about them, almost nobody old enough to apply for a passport on their own would be able to locate all the requested information.

Most people don't have records of many of the items required to complete the proposed form, such as their mother's address a year before and after their birth, the dates of all of their mother's pre-natal medical appointments, all the places they have ever lived since birth, the names and addresses of all the places they have ever been employed, and all their past supervisors' names and telephone numbers. Why should they have such records, when there was never before any requirement to keep such records?

Years later, who can remember with certainty every job they have ever had, the address, the name(s) of their supervisor(s), and those supervisors' phone number(s) – even for the job you quit after a day, or the summer job you had at McDonald's back when you were in high school? Attempting to answer these questions would involve trying to track down former co-workers or other associates who might remember these details. Especially for those who have lived in widely separated places, that might require expensive and time-consuming travel, hiring a private investigator, and/or fees to commercial data brokers. And in many cases, it would still be a futile search for nonexistent records of long-vanished businesses and long-dead people.

Ask your parents – if they are still alive (and what if they aren't?) – for your mother's address a year before or after your birth, or all the addresses where you lived before you were old enough to remember, and the answer in many cases will be at most a street name, or merely a town or city, not a complete address. "I might recognize the house if I went back there and drove past, if it's still there and the neighborhood hasn't changed too much," would be a common answer. So attempting to complete as much of the form as possible would, in many cases, involve difficult trips with older and perhaps frail relatives, and door-to-door search for former family homes to identify their addresses.

The expectation that any adult would have, or be able to obtain, complete records of their mother's pre-natal medical appointments, or of who attended their birth, with sufficient certainty to be able to attest to these facts under penalty of perjury, is patently absurd. A best effort to provide as much of an answer as possible would entail commissioning a private investigator to track down medical records (retained, if at all, by whomever has inherited a medical practice perhaps two or three generations of practitioners later) and conduct a snowballing series of interviews of doctors, nurses, midwives, etc. (in many cases aged and/or failing of memory) about who inherited their records and where they might be found, who was present at the birth, or who else might know these things.

If it is recorded at all, some of the required information, such as the dates of all of one's mother's pre-natal medical appointments, is likely to be contained in health care records subject to HIPAA. In most cases, HIPAA regulations forbid the release of such records of treatment of a deceased individual except to their personal representative or for purposes of medical treatment, neither of which exception would necessarily apply in the case of a passport application by a surviving child. At best, they would be able to obtain this information for this non-treatment purpose only if they are able to identify, track down, and obtain permission from their mother's "personal representative" for HIPAA purposes. A health care provider is allowed up to 30 days to respond to a request for a copy of health records, or up to 60 days in the case of older records stored off-site. And that's if they comply with the HIPAA deadlines. Obtaining old maternal health care records could easily take months, or could be entirely precluded by HIPAA. Foreign health care providers might not be under any deadline or any obligation to provide records at all. Dealing with foreign providers, of course, could take even longer.

The older people are, and the more scattered their family is around the country or around the world, the less chance they would have of finding older living relatives able and willing to help provide or track down missing data, and the longer the search for them would be likely to take. There's no indication that passport applicants would have subpoena power to compel answers to interrogatories by relatives or

former employers or co-workers (who might have the only records of supervisors' names or phone numbers, if any such records exist) , or the production of such records as might exist. Should one, or can one lawfully, be denied a passport or the right to travel because one's estranged relatives or former employers or co-workers decline to help conduct this research? Or if they are willing to provide information only for a fee which the applicant can't afford? Of course not.

Certain groups would be even less likely than the norm to have any chance of completing the proposed form. Adoptees who aren't in touch with their birth parents would have no chance of being able to provide the required information about their mother's residence, pre-natal medical appointments, or the circumstances of their birth. People who have worked as casual laborers, who may have had a different employer and supervisor every day for months, years, or a working lifetime, would almost never be able to provide a complete list of employers' or supervisors' names, addresses, or phone numbers. Other people whose places of employment change frequently would have only slightly less extreme difficulty: agricultural and other migrant laborers, constructions workers, and so forth. People who have been institutionalized may not have known, even at the time, at exactly what address they were being held.

Refugees, especially those who were in hiding, moving from place to place often, and/or in flight from persecution for extended periods of time, may have little or no access to records of the addresses of the places where they "resided" while en route to eventual asylum in the U.S. Someone giving sanctuary to victims of persecution has good reasons, for their own security, to keep those they are sheltering from knowing the exact location of their place of refuge or the name of the person giving them refuge. Of course, refugees are among those least likely to have retained or have access to birth records, and thus most likely to be required to fill out the proposed new form.

Because the proposed form must be attested to under penalty of perjury, even a slight error or omission – a forgotten short-term job or assignment or a different supervisor, or an unrecorded pre-natal consultation between one's mother and a midwife, for example – could subject the respondent to severe

criminal penalties. The grave risk of perjury prosecution would compel respondents to err on the side of not submitting the proposed form, and withdrawing their application for a passport, in case of any uncertainty as to the responses to any of the questions, especially those which by their plain language require complete, exhaustive lists of particular categories of historical data (all addresses, all employers, etc.). The risk inherent in the requirement for submission under penalty of perjury would, in this way, further reduce the number of people who would be able to complete the form. Anyone for whom the answer to any of the questions on this form is, "I don't know," or even, "I'm not sure," would be unable to attest to the answers under penalty of perjury, and thus would be unable to obtain a passport.

III. IN THE ABSENCE OF SUBSTANTIVE AND PROCEDURAL STANDARDS FOR DECIDING WHO IS REQUIRED TO COMPLETE THE PROPOSED FORM, ITS USE WOULD BE ARBITRARY, IN VIOLATION OF STATUTORY, CONSTITUTIONAL, AND TREATY LAW.

According to the Paperwork Reduction Act submission and supporting statement, as provided to us by the DOS, 74,000 people per year would be required to complete the proposed Form DS-5513. That is only a small fraction of the number of annual passport applicants. But the DOS is silent as to how – according to what substantive standards and what procedural due process – the decision will be made as to which passport applicant will be required to complete the proposed Form DS-5513. The complete lack of substantive standards and procedural safeguards violates the due process requirements of the Administrative Procedure Act, the U.S. Constitution, and Article 12 of the International Covenant on Civil and Political Rights (ICCPR), and must therefore be withdrawn by the DOS or rejected by OMB.

The proposed form reminds us unpleasantly of the invidious historic "Jim Crow" use of a literacy or civics test of arbitrary difficulty, required as a condition of registering to vote and administered in a standardless manner. By making the test impossible to pass, voter registrars could use it as an arbitrary and discriminatory – but facially neutral – excuse to prevent any applicant to whom they chose to give a

sufficiently difficult test from registering to vote, on the ostensible basis of their having "failed" the test.

In a similar way, choosing to require an applicant for a passport to complete the proposed Form DS-5513, which few if any applicants could complete, would amount to a *de facto* decision to deny that applicant a passport. And that decision would be standardless, arbitrary, and illegal.

Standardless or "discretionary" imposition of the requirement to complete the proposed form invites and creates the potential for, and likelihood of, numerous forms of abuse.

Who will be required to complete the proposed Form DS-5513, under penalty of denial of a U.S. passport and confinement for life to the territory of the U.S. – or, if they are applying for a passport abroad (such as to replace a lost or stolen passport), *de facto* banishment for life from the U.S.?

Will standardless DOS discretion be exercised to require individuals to complete the proposed Form DS-5513 on the basis of race, religion, or national origin? On the basis of their having visited (as evident from their passport submitted with an application for renewal), or intending to visit (as stated on their passport application), particular other countries? Or on the basis of their exercise of other rights protected by the First Amendment, such as associating with certain other people, expressing certain ideas, or criticizing the U.S. government in general and/or the DOS in particular?

Will those of us who submit comments opposing this proposed new form be singled out to be required to complete this form the next time we apply for or renew our U.S. passports, if it is approved?

And how, if at all, would it be possible to detect such invidious abuses of discretion?

Because the purportedly permissible "routine uses" of this information would include disclosure to any other agency of any government, it's likely that it would be used as a means to compel answers of interest to other agencies, to questions and for purposes for which those agencies lack their own authority to compel responses. Someone exercises their right not to answer questions from police or other government agents about their family history, religious practices, or other intimate matters? Just alert the

DOS that you are interested, and the next time this person applies to renew their passport, DOS will require them to complete Form DS-5513, under penalty of perjury, and "share" the responses with you.

The proposed form, and its potential for abuse, should be evaluated as an all-purpose interrogation tool, by which any government agency on whose behalf the DOS chooses to exercise its discretion could compel answers to all the questions on the proposed form, for any purpose.

IV. THE "ROUTINE USES" OF THE INFORMATION ON THE PROPOSED FORM WOULD INCLUDE IMPROPER, EXCESSIVE, AND PRIVACY-INVASIVE DISCLOSURES.

The information collected on the proposed Form DS-5513 would be part of the "Passport Records (STATE-26)" system of records, subject to a System Of Records Notice (SORN) published at *73 Federal Register* 1660-1664 (January 9, 2008). According to the proposed form, "routine uses" of any or all of this information would include disclosure, without limitation, to "other government agencies and private contractors, ... foreign government agencies, international organizations[,] ... private persons and organizations [,]... and private employers."

No meaningful limits are placed on these "routine uses" or the disclosures they purport to authorize. For example, the SORN purports to authorize as a "routine use" disclosures to, "Federal, state, local or other agencies for use in legal proceedings as government counsel deems appropriate. " Under this provision, any lawyer employed by any government agency could authorize, at their sole discretion, disclosure of the entire DOS file on any passport applicant – including the proposed Form DS-5513 – to any agency of any government anywhere in the world, for any purpose that lawyer "deems appropriate."

Pursuant to the Privacy Act of 1974, 5 U.S.C. 552a(a)(7), "the term 'routine use' means, with respect to the disclosure of a record, the disclosure of such record for a purpose which is compatible with the purpose for which it was collected." The routine use of information collected on the proposed form "in legal proceedings as government counsel deems appropriate," does not limit the allowable disclosure

to any clear purpose. Regardless of how the imprecise term "legal proceedings" is defined, not all legal proceedings would be related to the purpose – passport issuance – for which DOS collects this information. "Deems appropriate" is standardless, and fails to address (let alone meet) the requirement of the Privacy Act for compatibility of routine uses with the purposes for which personal information is collected. Accordingly, this proposed "routine" use would violate the Privacy Act.

Crucially, no distinction is made in the applicable SORN between claimed authority to verify or divulge a person's U.S. citizenship status as a "routine use" of this data, and disclosure of the entirety of the information collected on the new "Biographical Questionnaire" for (some) passport applicants.

No explanation or justification whatsoever has been offered as to why such a range of other U.S. and foreign government agencies and private third parties would need to know all of the information submitted in support of a passport application, and not just whether a U.S. passport has been issued.

The information required on the proposed form far exceeds, in both quantity and sensitivity including religious and medical details, what is described in the SORN or required on any prior passport application form. Indeed, it appears to be comparable to the information required on an application for a security clearance for access to classified information, and to exceed that required on an application for Federal government employment. The proposed information collection exceeds the scope of the SORN, and requires the DOS to conduct and publish for comment a new SORN and a new Privacy Impact Assessment (PIA) before submitting the proposed form to OMB for approval. If that is not done, OMB should reject the proposed form as exceeding the scope of the information collection and retention disclosed in the SORN for this system of records, and therefore in violation of the Privacy Act.

V. THE DEPARTMENT HAS FAILED TO EVALUATE THE IMPACT OF THIS INFORMATION COLLECTION ON THE ABILITY OF U.S. CITIZENS TO EXERCISE RIGHTS PROTECTED BY THE FIRST AMENDMENT AND INTERNATIONAL TREATIES.

The proposal describes the proposed form as required for receipt of a Federal benefit. But international travel, for which a passport is now required, is a right, not a mere "benefit".

The fundamental defect in this rulemaking is that the Department has failed to evaluate the impact of the proposed new requirement to complete a new form on the ability of U.S. citizens to exercise rights of assembly and freedom of movement protected by the First Amendment and international treaties.

When the current passport issuance regulations were established, it was still possible (although significantly encumbered) for U.S. citizens to enter or leave the U.S. without a passport or any other government issued identity credentials. Passport issuance laws and regulations were therefore evaluated, both by the DOS and by the courts, as pertaining to the issuance of credentials which were not essential for the exercise by U.S. citizens of their rights to cross U.S. borders.

That has changed, however, with the implementation of the "Western Hemisphere Travel Initiative" (WHTI), which requires a passport, passport card, other specified government issued identity credential, or a (standardless) "discretionary" waiver of this requirement, as a prerequisite to crossing any U.S. border by any means by any U.S. citizen. See our previous objections to those requirements, "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," USCBP-2006-0097, September 25, 2006, available at <<http://hasbrouck.org/IDP/IDP-WHTI-comments.pdf>>, and "Comments of the Identity Project, 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 right to assemble and the right to petition for redress of grievances are directly protected by the First Amendment. In the case of U.S. citizens born and/or residing abroad, or U.S. citizens wishing to assemble with U.S. citizens abroad, the exercise of those rights requires crossing U.S. borders. The right to freedom of movement, specifically including both the right to leave any country and the right to return to one's own country, is protected by Article 12 of the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by, and binding on, the U.S. The ICCPR has been effectuated, with respect to rulemaking and other activities of agencies including DOS, by Executive Order 13107, "Implementation of Human Rights Treaties," which directs all executive departments to "maintain a current awareness of United States international human rights obligations that are relevant to their functions and... perform such functions so as to respect and implement those obligations fully."

Now that the U.S. government requires U.S. citizens to have passports for international travel, conditions on passport issuance must be considered according to the higher standard of justification applicable to regulations which burden the exercise of rights protected by both the First Amendment and Article 12 of the ICCPR, including a showing that the proposed rules are the least restrictive available means of accomplishing a permissible government purpose, and would in fact achieve that purpose.

As discussed in our previous comments to U.S. Customs and Border Protection on the WHTI document requirements in dockets USCBP-2006-0097 and USCBP-2007-0061, cited above, 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](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).

Even before the promulgation of the WHTI regulations requiring U.S. citizens to obtain passports for travel with the Western Hemisphere, the Supreme Court had long recognized that passport issuance implicates the fundamental Constitutional freedom of travel. “The denial of a passport, given existing domestic and foreign laws, is a severe restriction upon, and, in effect, a prohibition against, world-wide foreign travel.” *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Strict scrutiny is required for regulations which, like the proposed requirement to complete Form DS-5513, would burden passport issuance and thus the exercise of First Amendment rights. Strict scrutiny requires both a showing of actual effectiveness for a permissible government purpose, and that no less restrictive effective alternative is available: “[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

With respect to international treaties, 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 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*, 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](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.

Sections 2 and 3 of Article 12 of the ICCPR 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 proposal for this form or any of the supporting documents, or even any evidence that less restrictive alternatives were considered, the proposal to require this form is flatly inconsistent with the U.S. obligations embodied in this article of the ICCPR, and must be withdrawn or rejected by OMB.

In addition, the proposed requirement to complete this form is inconsistent with Article 21 of the ICCPR, which imposes a similar standard of “necessity” on rules which burden the right of assembly:

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 DOS'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 information collection is thus inconsistent with Article 21 of the ICCPR as well, and must be withdrawn.

There are clearly less restrictive alternatives to the proposed requirement to complete this or any similar form, such as a form on which applicants may submit such information as they believe constitutes *prima facie* evidence of citizenship, and/or elimination of the requirement for U.S. citizens to have a passport to enter or leave the U.S. But the DOS has failed even to consider the heightened standard of justification required as a consequence of the imposition of the WHTI requirements for government issued identity credentials for U.S. citizens, which has made denial of a passport tantamount to a categorical bar on international travel (except with the discretionary and standardless case-by-case "waiver" of the passport requirement by the government, which fails to satisfy any due process standard).

Before proposing any rule to require such a form, the DOS must evaluate the proposal against the standard of justification applicable to rules that burden the exercise of rights protected by the First Amendment and the ICCPR, including consideration of these less restrictive alternatives.

We raised these issues with the DOS in our previous comments regarding passport fees: "Comments of the Identity Project, Consumer Travel Alliance, Center for Financial Privacy and Human Rights, and John Gilmore, Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates," DOS-2010-0035, March 11, 2010, available at <http://hasbrouck.org/IDP/IDP-passport-fee-comments.pdf>. Although our comments were specifically mentioned in the analysis of comments published by the DOS along with the interim final rule, our objections on the basis of the First Amendment to the U.S. Constitution and Article 12 of the ICCPR were not mentioned. ("Interim Final Rule, Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates," 75 *Federal Register* 36522-36535, June 28, 2010.) We still have received no response to our complaint that the rule violates U.S. obligations pursuant to the ICCPR.

We note that Executive Order 13107 requires that "The head of each agency shall designate a single contact officer who will be responsible for overall coordination of the implementation of this order.... Each agency shall take lead responsibility, in coordination with other appropriate agencies, for responding to ... 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."

Despite diligent inquiries, including unanswered inquiries to the designated DOS point of contact for this proposed information collection, we have been unable to determine who, if anyone, has been designated as the DOS "single contact officer" for implementation of Executive Order 13107, including responding to complaints of violations by DOS of human rights treaties.

We therefore specifically request that our prior complaint, as made in our comments cited above on DOS-2010-0035, and this complaint, be referred to the officer designated by the Secretary of State as the single contact officer for implementation of Executive Order 13107, and that we be provided with a response to each of these complaints of violations by DOS of human rights treaty obligations.

VI. THE DOS LACKS STATUTORY AUTHORITY TO REQUIRE PASSPORT APPLICANTS TO COMPLETE THE PROPOSED FORM, OR TO DENY PASSPORTS TO THOSE APPLICANTS WHO ARE UNABLE OR UNWILLING TO COMPLETE THE FORM.

Completion of the proposed form, in its entirety, is proposed to be mandatory for all those passport applicants who are selected (in some unspecified and apparently standardless and nonreviewable manner) to receive this additional form. The form states that, "failure to provide the information requested may result in ... the denial of your U.S. passport application. "

However, none of the statutes listed as legal authorities for the proposed form provides any actual basis for such a denial. A passport application may be denied only where there is a sufficient factual

basis for a duly-made determination that the applicant is not a U.S. citizen. In the absence of such facts, the issuance of a passport is a matter of right.

Even if there were Constitutionally valid statutory and regulatory authority for the imposition of administrative fines or other sanctions for refusal to complete the proposed "Biographical Questionnaire" – which has not been shown, and which we would question, especially since most people would be unable to complete the proposed form – any such sanctions would be independent of the entitlement of the applicant to a U.S. passport, unless there is evidence establishing that the applicant is not a U.S. citizen.

The only portions of the cited regulations that might even arguably provide authority for the proposed information collection are 22 CFR Sec. 51.28(c) ("Any official receiving an application for a passport or any Passport Issuing Office may require such additional evidence of identity as may be deemed necessary") and 22 CFR Sec. 51.54 ("Nothing contained in Secs. 51.43 through 51.53 shall prohibit the Department from requiring an applicant to submit other evidence deemed necessary to establish his or her U.S. citizenship or nationality"). But those provisions are limited to evidence actually determined, in a particular case, to be "necessary" to determining U.S. citizenship.

Similarly, the abstract in the Paperwork Reduction Act statement accompanying the proposed form is based on a claim of necessity: "This form collects information necessary to verify a respondent's citizenship and identity." But this claim is false, and the proposed information collection is not limited to information that is, in any case much less in all cases, "necessary" for such a determination. While in some cases some of the information on the proposed form might be relevant to determining citizenship, in most cases all or most of it would not even be relevant, much less essential. The suggestion that, for example, it would *never* be possible to determine whether someone is a U.S. citizen without knowing whether, when, and with what if any religious rituals they were circumcised, is obviously absurd.

Since it is not based on any determination of "necessity", the proposed information collection exceeds the regulatory authority of the DOS, and must be withdrawn or rejected by OMB.

VII. THE DOS HAS FAILED TO EVALUATE THE IMPACT OF BEING REQUIRED TO COMPLETE THE PROPOSED FORM ON INDIVIDUALS AS “SMALL ENTITIES” PURSUANT TO THE REGULATORY FLEXIBILITY ACT.

According to the supporting statement, "The collection of information does not involve small businesses or other small entities. " This is clearly incorrect. The applicable statutory definition of a "small [economic] entity" does not distinguish between corporations or sole proprietors, and does not exclude natural persons. The individual persons subject to the requirement to complete the proposed form, as a condition of issuance of a passport, will include numerous "small entities": sole proprietors, freelancers, and self-employed individuals. Given the extensive and growing prevalence of these self-employment arrangements, any rulemaking that affects a significant number of individuals is likely to involve a significant number of small entities, as this proposal would. Accordingly, the regulatory analysis is defective in failing to evaluate the impact of the proposal on these small entities.

A proper analysis of the impact of the proposed form on individuals as small entities must be prepared and published for comment before the proposal can even be considered for approval.

For those affected, the economic impact would be substantial. In a minority of the best cases, in which it is *eventually* possible for the affected individual to complete the form (after inquiries to older relatives and past co-workers, archival research, research travel to previous places of residence, and perhaps with the assistance of a private investigator) it would still cause potentially critical delay in being able to accept or fulfill any contract requiring international travel during the weeks or months required to research answers to complete the form. In the vast majority of cases, in which it is impossible ever to complete the form, being required to complete the proposed Form DS-5513 would constitute a categorical lifelong bar to any pursuit of business opportunities that might require international travel. In an increasingly global economy in which self-employed individuals, freelancers, and sole proprietors find a

growing proportion of their customers and suppliers abroad, confining them to work solely within the domestic U.S. economy will typically have a substantial lifelong negative impact on career and earnings.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The proposal for Form DS-5513 should be withdrawn by the DOS. If it is not withdrawn, it should be modified to eliminate any claim that declining to complete the proposed form – whether because of inability to do so or for any other reason – constitutes a lawful basis for denial of a passport.

If the DOS does not withdraw this proposal entirely, it must correct the estimated time required to complete it (in the rare cases when that is possible at all) to a more realistic estimate of at least 100 hours per respondent; evaluate the impact of inability to complete proposed form on the ability of U.S. citizens to exercise rights protected by the First Amendment and international treaties; promulgate valid substantive and procedural standards for determining which applicants will be required to complete the proposed form; conduct and publish for comment a new System of Records Notice and Privacy Impact Assessment; and conduct and publish for comment an evaluation of the impact of the proposed rules on individuals as “small economic entities”, pursuant to the Regulatory Flexibility Act.

If the current proposal for Form DS-5513 is not withdrawn, it must be rejected by OMB.

Pursuant to Executive Order 13107, this complaint and our previous (unanswered and still pending) duly-filed complaint of violation of U.S. human rights treaty obligations by the DOS should be referred to the officer designated by Secretary of State as the single contact officer for implementation of Executive Order 13107, and responded to in accordance with that Executive Order.

Respectfully submitted,

The Identity Project (IDP)

<<http://www.PapersPlease.org>>

A project of the First Amendment Project

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_____/s/____

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Consultant to IDP on travel-related issues

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Center for Media and Democracy

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<<http://www.prwatch.org/cmd/>>

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Consumer Travel Alliance

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<<http://www.consumertravelalliance.org>>

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Publisher, *Privacy Journal*

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