

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

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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 procedural 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 date 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 inquiries 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>>

Representative 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 outside 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 I met in from Los Angeles in hope of finding a 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 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,

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