



April 25, 2011

Alexys Garcia
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Re: Form DS-5513 Biographical Questionnaire for US Passport

Dear Ms. Garcia:

On behalf of the American Civil Liberties Union (“ACLU”), America’s oldest and largest civil liberties organization, and its more than half a million members, countless additional supporters and activists, and 53 affiliates across the country, we write to express our concerns regarding the Department of State’s proposed promulgation of Form DS-5513 for further supplementing existing passport applications. 76 Fed. Reg. 10421. This form imposes an enormous burden on passport applicants, is overbroad, and contains few limitations on widespread sharing of information.

The breadth of information and level of detail required by Form DS-5513 is striking. For example it requires:

- A complete list of name, date of birth, and place of birth for everyone in the applicant’s immediate family including siblings and children;
- The applicant’s mother’s residence one year before applicant’s birth, at the time of applicant’s birth, and one year after applicant’s birth;
- The applicant’s mother’s place of employment at the time of applicant’s birth, the employer’s address, and the mother’s dates of employment;
- The hospital where the applicant’s mother received pre- or post-natal care, the name of her doctor, and the dates of the appointments for this care;
- The name of individuals present at the applicant’s birth (and addresses and phone numbers);
- Religious or institutional recordings of the applicant’s birth;

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- The addresses of all of the applicant’s residences from birth until present;
- All of the applicant’s current and former places of employment (including duration and address);
- Names of supervisors at current and former places of employment; and
- All of the educational institutions the applicant attended.

According to its paperwork reduction act statement, the Department estimates that all of this information can be collected and compiled in 45 minutes. It would apply to approximately 74,000 Americans. While we have no comment as to the number of people impacted, it is laughable to suggest that such information – particularly that relating to the facts and circumstances of birth – could be completed in 45 minutes. To the contrary, we imagine that many people would not be able to compile such information at all, even if the applicant’s mother is available for consultation.

It is difficult to overstate the burden this form would represent to an applicant. The form clearly states at its outset “please complete this form in its entirety” and an applicant is required to answer fully and truthfully under penalty of federal law making any false statement a felony. 22 U.S.C.A. § 213. This is a task that could be impossible for many applicants. If an applicant is not in close contact with his or her family, it would be very difficult to compile much of this information. It is hard to see how anyone could expect an applicant’s mother to remember a series of doctor’s appointments that may have happened decades ago, or a decades-old employer. It is equally difficult to imagine easily compiling a list of every employer or residence. If the applicant’s parents or childhood caregivers are deceased, it would be practically impossible. While such information might be difficult for many to provide, the burden would be often impossible for those raised in circumstances involving something other than one biological mother and father. Accordingly, those who were adopted, fostered, or the product of surrogacy or insemination – including, in particular, those who are the children of same-sex couples or single parents – will carry the largest burden of inability to comply with the information requirements.

It is hard to square the burden presented by this form with existing constitutional protections. The right to travel outside the United States is a liberty secured to United States citizens and is not subject to restriction without due process of law under the Fifth Amendment. *Haig v. Agee*, 453 U.S. 280. It is not a mere privilege but rather a right available, with some carefully crafted restrictions, to most citizens. *Boudin v. Dulles*, 136 F. Supp. 218 (D. D.C. 1955). Given this established law it is hard to see how access to a passport could be denied to tens of thousands of Americans though what amounts to administrative fiat, the creation of a Kafkaesque form almost impossible to complete.

Further the information collected in this form is substantially overbroad. In order to receive a passport under existing regulation, an applicant “has the burden of proving that he or she is a U.S. citizen or non-citizen national.” 22 C.F.R. 51.40. In some cases, then, it is understandable that an applicant might need to provide some portion of this information, such as a hospital record or, in the absence of other information, limited work or residence history. Notwithstanding such a need for limited information in

limited circumstances, it is difficult to understand how **all** of this information would be necessary or useful, especially given the extreme burden to the applicant in disclosing it and the fundamental nature of the right at stake. Particularly irrelevant would seem to be the long list of employment history, residential addresses, and educational institutions. None of this would conclusively establish birth in the United States and much of it seems only tangentially related to proving that an individual is a citizen or non-citizen national.

Exacerbating these content and procedural deficiencies are the privacy threats associated with the few limitations imposed on sharing the required information. Pursuant to a System of Records Act Notice, the Department listed the agencies and organizations to whom this information could be disclosed and ways it could be used. 73 Fed. Reg. 1660. These authorized disclosures of private information include:

- Department of Homeland Security for border patrol, screening, and security purposes; law enforcement, counterterrorism, and fraud prevention activities; and for verification of passport validity to support employment eligibility and identity corroboration for public and private employment;
- Department of Justice, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the U.S. Marshals Service, and other components, for law enforcement, counterterrorism, border security, fraud prevention, and criminal and civil litigation activities;
- Internal Revenue Service for the current addresses of specifically identified taxpayers in connection with pending actions to collect taxes accrued, examinations, and/or other related tax activities;
- INTERPOL and other international organizations for law enforcement, counterterrorism, fraud prevention, criminal activities related to lost and stolen passports;
- National Counterterrorism Center to support strategic operational planning and counterterrorism intelligence activities;
- Office of Personnel Management (OPM), other federal agencies, or contracted outside entities to support the investigations OPM, other federal agencies, and contractor personnel conduct for the federal government in connection with verification of employment eligibility and/or the issuance of a security clearance;
- Social Security Administration to support employment- eligibility verification for public and private employers, and for support in verification of social security numbers used in processing U.S. passport applications;
- Federal, state, local or other agencies for use in legal proceedings as government counsel deems appropriate, in accordance with any understanding reached by the agency with the U.S. Department of State; and
- Foreign governments, to permit such governments to fulfill passport control and immigration duties and their own law enforcement, counterterrorism, and fraud

prevention functions and to support U.S. law enforcement, counterterrorism, and fraud prevention activities. 73 Fed. Reg. 1661-1662.

While not every piece of information from Form DS-5513 may be shared with each of these entities, this is certainly a wide-ranging and troubling list. Innocent Americans who have done nothing to warrant a suspicion of wrongdoing should fear the creation of a detailed intelligence dossier filled with what amounts to a life history simply because they are seeking passports. The flow of information from passport applications to other agencies for this wide array of purposes suggests at least the possibility that the information could ultimately be re-purposed for other more controversial goals, such as IRS audits or employment eligibility screening. At a minimum, there should be specific assurances that the collected information would not be used for such other purposes and that the information should not be retained beyond the time needed to make an accurate passport issuance determination.

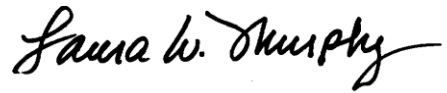
In the past, we have seen a troubling pattern of government misuse of innocent misstatements on immigration forms as the basis for unjust prosecutions. For example, one individual was arrested and convicted of making a false statement on a naturalization application under 18 USC 1425 and false statement generally under 18 USC 1001. In each case, the alleged false statement was at best an omission, and clearly neither material nor intentional. *United States v. Mousavi*, 378 F. App'x. 667 (9th Cir. 2010). While the appellate court reversed the conviction on both counts, the example demonstrates the troubling legal quagmire that tens of thousands of innocent Americans could enter because of this overbroad and burdensome form.

In light of the extensive problems with Form DS-5513, the ACLU makes the following recommendations:

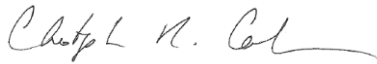
- Form DS-5513 should be withdrawn and redrafted:
 - to eliminate the most burdensome disclosure requirements including employment, address and educational history;
 - to make explicit that information collection is not mandatory and only need be completed to the extent practicable; and
 - to make accommodation in the submission requirements for those who don't have access to information about biological parents, including adoptees, foster children, and those who were conceived through artificial insemination, surrogacy, or other practices that limit an applicant's access to information. Such accommodations should be extended to those raised by one or both biological parents when circumstances prevent the access to information such as the death or absence of one or both biological parents.
- The SORN governing passport information should be redrafted to explicitly exempt the sharing of supplemental information like that provided in Form DS-5513 from being shared outside of the Department of State or for purposes other than determining citizenship.

Absent such changes, Form DS-5513 remains extremely problematic. In many ways it represents the worst of government excess: burdensome, overbroad, and susceptible to widespread misuse. For all of these reasons the ACLU opposes DS-5513 in its current form and urges that it be withdrawn and redrafted.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive, flowing style.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Christopher R. Calabrese". The signature is written in a cursive, flowing style.

Christopher R. Calabrese
Legislative Counsel