

ARTICLE: Passports, Social-Security Numbers and 26 U.S.C. § 6039E

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Text

[*1] I. INTRODUCTION

One of the "reforms" enacted by the Tax Reform Act of 1986 was [26 U.S.C. § 6039E](#).¹ Thereunder, each person who applies for a United States passport on or after January 1, 1988, is required to disclose his social-security number, and any foreign country in which he resides, to the Internal Revenue Service via the Department of State.

Prior to the enactment of § 6039E, disclosure of one's SSN was not [*2] required of a passport applicant. Though State Department forms² call for passport applicants to furnish their mailing addresses and permanent addresses, the Privacy Act of 1974³ prevented the State Department from revealing those data to the IRS.⁴

¹ Tax Reform Act of 1986, Pub. L. No. 99-514, [100 Stat. 2085 \(1986\)](#) [hereinafter TRA]. Its § 1234 has two parts. Subsection (a) enacted [26 U.S.C. § 6039E](#) (1986), and subsec. (b) amended [26 U.S.C. § 3405](#) (1982).

Subsection (a) of § 1234 has three provisions. Subdivision (1) added [§ 6039E to the Internal Revenue Code of 1986](#). The statutory table of sections was conformed by subd. (2). In subd. (3), the effective date of § 6039E was set forth.

² The forms currently in use are Application For Passport [or] Registration, DSP-11 (12-87) [hereinafter DSP-11] (application for original passport, or for registration when abroad), and Application For Passport By Mail, DSP-82 (12-87) [hereinafter DSP-82] (application for passport subsequent to original passport).

Slightly different versions of the two forms will be issued shortly by the State Department. The changes are: (1) The Occupation question will be marked "Not Mandatory." Present forms do not have that indication, though the information is sought for statistical purposes; and (2) the Privacy Act Statement on both forms will be revised somewhat. Letter from Sharon E. Palmer-Royston, Attorney Advisor, Office of Citizenship Appeals and Legal Assistance, Dep't of State, to Stephen Kruger (Sept. 23, 1992) (on file with author) [hereinafter Palmer-Royston Letter].

³ [5 U.S.C. § 552a](#) (1988).

Section 6039E mandates in addition that a person who applies for permanent residence in the United States disclose his SSN, and state whether tax returns for his three most-recent taxable years were required to be filed. The Immigration and Naturalization Service is responsible for collecting § 6039E information from would-be immigrants and transmitting it to the IRS. This article is limited to discussion of the provisions of § 6039E which relate to passport applicants.

II. UNITED STATES PASSPORTS

There are three types of United States passports: regular passports, official passports and diplomatic passports.⁵ Except as authorized by the State Department, no person may hold more than one valid United States passport.⁶ There is no law against holding and bearing both a valid United States passport and a valid foreign passport, and there may [*3] not be, because the right to passports of different countries arises from the right to have more than one nationality.⁷ The State Department, undeterred by legal authority, adamantly opposes both the right of dual nationality for Americans and their corollary right to foreign passports.⁸ Under "a government of laws and not of

⁴ *Problem of Tax Return Nonfiling by Americans Living Abroad: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Gov't Operations*, 99th Cong., 1st Sess. 18 (1985) (Statement of Johnny C. Finch, Senior Associate Director, General Government Division, General Accounting Office). Doug Barnard, Jr. (D.-Ga.), was the chairman of the subcommittee. Hereinafter, the Finch statement will be referred to as "Finch," the hearing will be referred to as "Hearing," and the published form of the Hearing will be referred to as "Problem."

⁵ [22 C.F.R. § 51.3 \(1992\)](#). United States passport histories include PASSPORT OFFICE, PUB. NO. 8851, THE UNITED STATES PASSPORT[:] PAST, PRESENT, FUTURE (1976) (Department and Foreign Service Ser. 153); *Passports and the Right to Travel*, 89th Cong., 2d Sess. (1966); and DEPARTMENT OF STATE, THE AMERICAN PASSPORT (1898).

⁶ [22 C.F.R. § 51.2\(b\) \(1992\)](#). The rule speaks of "more than one valid or potentially valid U.S. passport." A passport is potentially valid after it is issued and before it is signed by the holder. [22 C.F.R. § 51.4\(a\) \(1992\)](#) (passport valid only if signed).

Pub. L. No. 102-38, § 139, **105 Stat. 66 (1991)** and Pub. L. No. 102-140, § 503, **105 Stat. 820 (1991)** provide that the State Department may not issue a diplomatic passport or an official passport or a regular passport which is valid only for travel to Israel. The State Department was directed to cancel all outstanding passports with that travel limitation. The purpose of the laws is to prevent the State Department from cooperating, even indirectly, with the Arab League boycott.

It is not clear why the Congress thought the anti-boycott laws of little importance, and therefore did not codify them. Perhaps taking a cue, the State Department gets around the statutes by issuing secondary two-year regular passports, without a country restriction, to persons who need them for travel to the Middle East. A two-year passport may be held in addition to a full-term (*i.e.*, a ten-year or a five-year) passport. 3 DEPARTMENT OF STATE DISPATCH 330 (1992).

In addition, the statutes prohibit secondary official passports and secondary diplomatic passports only if the purpose of those passports is compliance with the boycott. Secondary passports as such are not proscribed.

⁷ [Kawakita v. United States, 343 U.S. 717, 723 \(1952\)](#) (dual nationality is "a status long recognized in [United States] law"). Authorities on dual or multiple nationality are collected in 8 DEPARTMENT OF STATE, PUB. NO. 8290, DIGEST OF INTERNATIONAL LAW 64-84 (Marjorie M. Whiteman ed., 1967). Among the ways a person can acquire a nationality in addition to his American one are birth abroad to American parents; birth in the United States to a parent who is a citizen of a foreign country as well of the United States; naturalization; and investment in a country which grants citizenship in exchange for the investment.

⁸ DEPARTMENT OF STATE, PUB. NO. 9162, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1978 248 (Marian Lloyd Nash ed., 1980) [hereinafter Nash]; DEPARTMENT OF STATE, PUB. NO. 8960, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1977 115 (John D. Boyd ed., 1979) [hereinafter Boyd]. The position of the State Department on dual nationality is skewered in H. Ansgar Kelly, *Dual Nationality, the Myth of Election, and a Kinder, Gentler State Department*, 23 U. MIAMI INTER-AM. L. REV. 421 (1991-92).

men,"⁹ a governmental agency such as the State Department may not disapprove of or criticize a lawful act of a citizen.

No reason was given by the State Department for its stand against dual nationality. The State Department rationalized its opposition to foreign passports on the ground that "carrying [sic] passports of different countries can create protection problems and other difficulties[,] especially when the dual national is questioned, detained, or arrested abroad."¹⁰ It was not asserted, let alone shown, that either "protection problems" or unspecified "other difficulties" are frequent, or of a magnitude which warrants curtailment of passport rights.

Comity and case law compelled the State Department to retreat, albeit grudgingly, from its baseless policies. The law of another country may require its citizens to bear its passport when entering or leaving that country. The foreign statute creates a circumstance which, to the State Department, makes holding and bearing a foreign passport "unavoidable"¹¹ or a "necessity".¹² The State Department added, "The obtention and use of a [foreign] passport under these precise circumstances would [*4] not jeopardize an individual's U.S. citizenship."¹³ Whether the circumstances are precisely those of which the State Department deigns to approve or are quite different, holding or bearing a foreign passport without intention to relinquish United States nationality does not affect, let alone jeopardize, that nationality.¹⁴

For the moment, "The Department has a uniform administrative standard of evidence based on the premise that U.S. citizens intend to retain United States citizenship when they obtain naturalization in a foreign state, subscribe to routine declarations of allegiance to a foreign state, or accept non-policy level employment with a foreign government."¹⁵ The administrative standard fails because the distinctions made by the State Department are not sustainable. The question is neither the type of legal act nor the level of employment, but the intention of the United States national with respect to his United States nationality. Consider the acceptance by Milan Panic, a naturalized American citizen, of the post of Prime Minister of Yugoslavia.¹⁶ Though the prime ministership is doubtless a

⁹ MASS. CONST. part 1, art. XXX. The phrase was suggested to the Massachusetts Constitutional Convention by John Adams. He credited the phrase to JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656). The idea can be traced back to Aristotle. 8 *THE PAPERS OF JOHN ADAMS* 228, 242, 264 n.37 (Adams Papers, Ser. III) (Gregg L. Lint *et al.* eds., 1989).

¹⁰ Nash, *supra* note 8, at 248.

The appropriate verbs for passports are "to hold" and "to bear." A person who has a passport holds it. When the person uses it for travel, he bears it. The State Department used "carrying" instead of "bearing."

¹¹ Nash, *supra* note 8, at 249.

¹² Boyd, *supra* note 8, at 115.

¹³ *Id.*

¹⁴ [Vance v. Tarrezas, 444 U.S. 252 \(1980\)](#) (State Department must prove both voluntary act of expatriation and intent to relinquish United States nationality); [Afroyim v. Rusk, 387 U.S. 253 \(1967\)](#) (the Congress lacks constitutional authority to deprive a citizen involuntarily of his nationality); [Parness v. Shultz, 669 F. Supp. 7 \(D.D.C. 1987\)](#) (absence of intent to relinquish nationality is determinative, even in face of casual attitude toward American nationality and gross negligence as to possible expatriating effect of oath of allegiance to foreign country).

¹⁵ Department of State, *Advice About Possible Loss of U.S. Citizenship and Dual Nationality* 2 (nd) (entire passage underscored in original). There is no dated version of the flyer, but it expresses current policy. Letter from Catherine W. Brown, Assistant Legal Advisor for Consular Affairs, Dep't of State, to Stephen Kruger (Aug. 13, 1992) (on file with author).

¹⁶ L.A. TIMES, Jul. 15, 1992, at A12.

policy-making office of a foreign government, the State Department did not challenge Mr. Panic's entitlement to an American passport. It was a wise forbearance. ¹⁷

A regular passport is issued to any United States national "proceeding abroad for personal or business reasons." ¹⁸ An official passport is issued to "an official or employee of the U.S. Government proceeding abroad in the discharge of official duties," and to his dependents. ¹⁹ A diplomatic passport is issued to "a Foreign Service Officer, a person in the diplomatic service or to a person having diplomatic status either because of the nature of his or her foreign mission or by reason of the office he or she holds," and to that person's dependents. ²⁰

[*5] As to official passports and diplomatic passports, the Congress enacted:

It is the sense of the Congress that a diplomatic or official United States passport should be issued only to, and used only by, a person who holds a diplomatic or other official position in the United States Government or who is otherwise eligible for such a passport under conditions specifically authorized by law. ²¹

In the Senate, the draft of its sense-of-the-Congress resolution was supplemented by a directive to the State Department to propose legislation, whereunder the categories of persons eligible for official passports or diplomatic passports would be specified. The State Department would have had also to certify that passport procedures insure that an official passport or a diplomatic passport is not used by someone whose eligibility for it had terminated. The House bill did not contain similar provisions. The conference committee accepted the sense-of-the-Congress resolution, but deleted the directive and the certification requirement. ²²

The resolution gives leeway to the powers that be. If an ineligible person (*e.g.*, a CIA spook or an individual traveling on a hush-hush mission) is deemed worthy, an official passport or a diplomatic passport may be bestowed upon him if the appearance of official status or of diplomatic status is calculated to be useful. Under the non-binding resolution, pragmatic passport issuances are not violations of law.

As a practical matter, disclosure of § 6039E information affects only applicants for regular passports. The people who hold official passports or diplomatic passports are employed by the United States or are dependents of United States employees. These people made their SSNs, addresses (both foreign and domestic) and other personal data known to the State Department in that context. It would be silly of them to object to § 6039E disclosures on passport-application forms.

An American passport is an extraordinarily valuable document. It is issued by the State Department ²³ only to a national of the United States. ²⁴ A passport is a travel document, proof of identity, and proof of **[*6]** permanent allegiance. ²⁵

¹⁷ [Action S.A. v. Marc Rich & Co., Inc., 951 F.2d 504, 507 \(2d Cir. 1991\)](#) (expatriating act must be accompanied by "distinct manifestation of intent" to relinquish United States nationality); [Kahane v. Shultz, 653 F. Supp. 1486 \(E.D.N.Y. 1987\)](#) (election to and membership in national legislature of foreign country, without intent to relinquish nationality, is not an expatriating act).

¹⁸ [22 C.F.R. § 51.3\(a\) \(1992\)](#). The regulation is improperly restrictive. No statute requires anyone to have either a reason or travel plans to apply for or hold a passport.

¹⁹ [22 C.F.R. § 51.3\(b\) \(1992\)](#).

²⁰ [22 C.F.R. § 51.3\(c\) \(1992\)](#).

²¹ Pub. L. No. 95-426, § 125, [92 Stat. 971 \(1978\)](#), reprinted in [22 U.S.C. § 211a](#) note (1988). The failure of the Congress to codify § 125 is a measure of its pointlessness. "Or who is otherwise eligible for such a passport under conditions specifically authorized by law" is a congressional catchall phrase devoid of meaning.

²² H.R. CONF. REP. NO. 1535, 95th Cong., 2d Sess. 3 (1978), reprinted in 1978 U.S.C.C.A.N. 2478, 2485-86.

It was held long ago that a passport is not evidence of citizenship.²⁶ At the time, there was no passport law, and a passport was not a requirement for foreign travel. Indeed, for most of the history of the United States, bearing a passport was not a condition of leaving and entering the country.²⁷ A passport was issued upon a declaration of citizenship, not necessarily on verification of the applicant's citizenship by the State Department.²⁸ Issuance of a passport was entirely discretionary,²⁹ provided no distinction was made between natural-born and naturalized citizens.³⁰ When a passport was not required, the discretion of the State Department caused no one any harm.

Contemporary law is quite different. A passport application must be in writing,³¹ and a false statement on a passport-application form is a felony.³² The applicant must show that he is a national of the United States; he has the burden of proof.³³ Without a passport, an American generally may not leave or enter the United States.³⁴ Therefore, it is imperative that issuance, administrative control and revocation of United States passports be subject to the rule of law.³⁵

²³ [22 U.S.C. § 211a](#) (1988). See Exec. Order No. 11,295, 3 C.F.R. 750 (1966), *reprinted in* [22 U.S.C. § 211a](#) (1988) (transfer of passport rule-making authority from President to State Department).

²⁴ [22 U.S.C. § 212](#) (1988) (passport may be issued only to a person, citizen or not, who owes allegiance to the United States); [26 Op. Att'y Gen. 376, 377 \(1907\)](#) ("allegiance" in the statute means "permanent allegiance"); [22 C.F.R. § 51.2\(a\) \(1992\)](#) (passport may be issued only to United States national); "'National of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." [8 U.S.C. § 1101\(21\)](#) (1988); "'National' means a citizen of the United States or a noncitizen owing permanent allegiance to the United States." [22 C.F.R. § 51.1\(d\) \(1992\)](#).

²⁵ [Haig v. Agee, 453 U.S. 280, 293 \(1981\)](#). A passport is also conclusive evidence of citizenship. [22 U.S.C. § 2705\(1\)](#) (1988). See text *infra*, pp. 8-10.

²⁶ [Urtetiqui v. D'Arcy, 34 U.S. \(9 Pet.\) 692, 699 \(1835\)](#).

²⁷ [Kent v. Dulles, 357 U.S. 116, 121-24 \(1958\)](#) (with minor exceptions, passports were first required in 1952).

²⁸ [Urtetiqui, 34 U.S. \(9 Pet.\) at 699](#).

²⁹ [13 Op. Att'y Gen. 90, 92 \(1869\)](#).

³⁰ [23 Op. Att'y Gen. 509, 511 \(1901\)](#). Accord, [Schneider v. Rusk, 377 U.S. 163 \(1963\)](#) (discrimination between natural-born citizens and naturalized citizens with regard to citizenship is unconstitutional).

³¹ [22 U.S.C. § 213](#) (1988).

³² [18 U.S.C. §§ 1001](#) (general prohibition against false statements) & 1542 (false statement on passport) (1988). The two sections cover separate conduct. [United States v. Ramos, 725 F.2d 1322 \(11th Cir. 1984\)](#) (rejecting defense of multiplicity for convictions under both § 1001 and § 1542).

³³ [22 C.F.R. § 51.40 \(1992\)](#). The regulation refers to the applicant's burden of proof not only as to himself, but also as to "any persons to be included in the passport" (intending any person whose *name* is to be included). The quoted language is excess, left over from the days of listing a minor's name in his parent's passport.

³⁴ [8 U.S.C. § 1185\(b\)](#) (1988); [22 C.F.R. § 53.1 \(1992\)](#); [Haig v. Agee, 453 U.S. 280, 293 \(1981\)](#). The exceptions are listed in [22 C.F.R. § 53.2 \(1992\)](#). Exempted persons are generally subject to other documentation rules. No punishment for violation of § 1185(b) is prescribed. [United States v. Laub, 385 U.S. 475 \(1967\)](#). The heading of 22 C.F.R. Part 53 (1992) reflects former law, under which use of a passport was mandatory only during wars and national emergencies.

³⁵ The importance of the rule of law to secure the right to hold a passport and the right of international travel is recognized in other jurisdictions. See, e.g., A. J. Arkelian, *Freedom of Movement Between States and Entitlement to Passports*, 49 SASKATCHEWAN L. REV. 15 (1984); Robert S. Lancy, *The Evolution of Australian Passport Law*, 13 MELBOURNE UNIV. L.

There are three variations on the mandatory-passport theme. The [*7] first is the constitutional right of every citizen to return to the United States, with or without a passport.³⁶ The second variation permits Americans to travel, without passports, to any country in the Western Hemisphere other than Cuba.³⁷ This exception does not apply

when proceeding to or arriving from a place outside the United States for which a valid passport is required under this part[,] if such travel is accomplished *within* 60 days of departure from the United States via any country or territory in North, South or Central America or any island adjacent thereto.³⁸

It follows that an American who stays in North, Central or South America for *more than* 60 days *does* have the benefit of the no-passport exception.³⁹ Neither the exception nor its exclusion, nor the loophole in the exclusion, is comprehensible.

The effectiveness of permitted no-passport travel to other countries is limited by obligations, imposed under foreign laws, that persons enter and leave only with valid passports. Another limitation is practicality. An American who exercises his theoretical right is just looking for trouble.⁴⁰

The third variation is the absence of a requirement that a United States national use a *United States* passport to leave or enter the United States, or for international travel in general.⁴¹ The latitude offered [*8] thereby is limited. Most Americans do not have access to passports other than those issued by the State Department.

REV. 428 (1982); Note, *Review of the Prerogative to Withdraw Passports in South Africa*, 47 CAMBRIDGE L.J. 189 (1988); Note, *The Right to a Passport in Canadian Law*, 1983 CAN. Y.B. INT'L L. 284 (1983).

³⁶ [Worthy v. United States, 328 F.2d 386, 393-94 \(5th Cir. 1964\)](#). The State Department issues passports and other travel documents to facilitate the return of nationals to the United States. [22 C.F.R. § 50.9 \(1992\)](#).

³⁷ [22 C.F.R. § 53.2\(b\) \(1992\)](#). The isolation of Cuba is a remnant of the Cold War. See [United States v. Laub, 385 U.S. 475 \(1967\)](#) (stating origin of provision).

³⁸ *Id.* (emphasis added). The geographic arrangement ("North, South or Central America") is puzzling.

³⁹ [Lynd v. Rusk, 389 F.2d 940, 945 n.13 \(D.C. Cir. 1967\)](#).

⁴⁰ [8 U.S.C. § 1321](#) (1988) (common carrier is liable for its transportation to the United States of a person who is ineligible to be admitted); see, e.g., AMERICAN AIRLINES, INC., PASSENGER SERVICE MANUAL (SABRE) (includes airline procedures for compliance with [8 U.S.C. § 1321](#)); see also TIMATIC (database of documents required by international travelers); [8 C.F.R. § 235.1\(b\) \(1992\)](#) (unless exempted under 22 C.F.R. Part 53, traveler entering United States, claiming United States citizenship, must produce a United States passport; one who does not have a United States passport may be treated as an alien). Section 235.1(b) does not require an American to bear a United States passport; it expresses a non-criminal consequence of not doing so. There is a procedure for entry of Americans without required passports. [22 C.F.R. § 53.3](#) (report to State Department of any American who enters the United States without required passport); § 53.2(h) (waiver of passport requirement by State Department); § 22.1 (p. 134, item 12) (fee of \$ 100 for waiver of passport requirement) (1992). Accord GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 35 (1978) (practicalities override the legal right of a subject of the Crown to leave and enter the United Kingdom without a passport). See Regina v. Secretary of State for the Home Office, THE TIMES (London), Apr. 14, 1992 (C.A.) (denial of right of entry to person who claimed to be British citizen, but lacked passport).

⁴¹ [8 U.S.C. § 1185\(b\)](#) (1988) provides that, except as permitted by the President, "it shall be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The term "passport" is defined as "*any* travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country." [8 U.S.C. § 1101\(30\)](#) (1988) (emphasis added).

The State Department opines, nonetheless, that § 1185(b) requires a United States national to use a United States passport to leave or enter the country. [22 C.F.R. § 53.1 \(1992\)](#); Department of State, *Dual Nationality 2* (nd) (03870). The opinion is baseless. The statutory language does not support the reading, and an unexpressed limitation may not be imposed on those

An expression of the significance of a United States passport is the law which declares that a passport is conclusive evidence of citizenship.⁴² In the same legislation, another document which the State Department issues was likewise made conclusive on the question of citizenship:

The following documents shall the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:

- (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States.
- (2) A report, designated as a "Report of Birth Abroad of a Citizen of the United States," issued by a consular officer to document a citizen born abroad.⁴³

The conclusiveness of a passport as proof of citizenship is illustrated by *Magnuson v. Baker*.⁴⁴ In that case, a passport was issued to Myers, whose personal representative was Magnuson.⁴⁵ The issuance was based on documentary evidence, submitted by Myers with his passport application, to prove that he was a citizen. After the passport was issued, an INS official wrote to the State Department, expressing disapproval of the passport issuance and asserting that the INS was attempting to deport Myers. The State Department then wrote to the Office of Citizenship Appeals, stating that the passport had been issued in error, and threatened Myers with prosecution if he did not return the passport.⁴⁶ [*9] Myers sought a hearing, which was refused. He sued, and was granted summary judgment.

who would be affected by the law. [Demarest v. Manspeaker, 111 S. Ct. 599, 603-04 \(1991\)](#) (unambiguous language of legislation controls, except in rare and exceptional circumstances); [United States v. Laub, 385 U.S. 475, 480 \(1967\)](#) (§ 1185[b] is penal in nature and must be read restrictively).

⁴² [22 U.S.C. § 2705](#) (1988).

⁴³ *Id.*

⁴⁴ [911 F.2d 330 \(9th Cir. 1990\)](#).

⁴⁵ Myers died while the appeal was pending, and Magnuson was substituted as a party. The State Department sought to have the appeal dismissed as moot, but the Ninth Circuit declined to do so. Various legal rights, such as the citizenship of Myers' children and the tax liability of Myers' estate, depended on whether Myers was a citizen. [Magnuson, 911 F.2d at 332 n.4](#).

⁴⁶ A United States passport is unilaterally declared by the State Department to be the property of the United States, which must be returned on demand. [22 C.F.R. § 51.9 \(1992\)](#). According to the State Department, a revoked passport must be surrendered upon demand. If the passport is not surrendered, the State Department may invalidate the passport by written notification to its holder. [22 C.F.R. § 51.76 \(1992\)](#). The legitimacy of § 51.9 or of § 51.76 has not been judicially determined.

If § 51.9 is upheld, travel abroad would be an individual right no longer. The right to travel abroad is inextricably bound to a passport. [Bauer v. Acheson, 106 F. Supp. 445, 451 \(D.D.C. 1952\)](#) ("it is unrealistic to contend that denial of an American passport does not restrict the [citizen's] right to travel abroad"). Therefore, the right is that of the owner of the passport. Ownership by the United States of the passports which it issues would transform travel outside the United States into a government-owned privilege.

Neither § 51.9 nor § 51.76 specifies that a hearing is prerequisite to adverse State Department action. If no hearing is required, a passport holder has no more than a bare license to travel abroad.

Whatever the circumstances, how do passport holders receive State Department notifications? Passports (other than secondary passports) are valid for ten years or five years. [22 C.F.R. § 51.4\(b\) \(1992\)](#). Americans change residences frequently. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, SER. P-20, NO. 456, GEOGRAPHICAL MOBILITY: MARCH 1987 TO MARCH 1990 2, Table A (1991) (about 18% of Americans move every year). A passport holder has no obligation to keep the State Department informed of his current address, so there is no certainty that a letter from the State Department would reach the addressee.

The court of appeals affirmed. It held that § 2705 vested in the State Department the power to determine who is a citizen; that a passport holder may assert that his passport is conclusive proof of citizenship; and that an agency such as the INS has no right to collaterally attack the determination of citizenship by the State Department. ⁴⁷

Magnuson rejected both the new claim of the State Department that it has the right to revoke a passport "on the basis of 'second thoughts'," and the graybeard claim that a passport may be revoked "without giving the passport holder an opportunity to be heard." ⁴⁸ The claims are consistent with the pretence of the State Department to absolutism, but are inconsistent with the law. ⁴⁹ The court concluded:

We affirm the decision of the district court. Through [22 U.S.C. \[*10\] § 2705](#), the Congress has granted the Secretary the power to determine citizenship and to issue a document, a passport, as conclusive evidence of citizenship. Consistent with the interest at stake, the Congress has decided the Secretary can revoke a passport evidencing citizenship only (1) after affording the holder an opportunity to be heard and (2) on exceptional grounds such as fraud or misrepresentation. ⁵⁰

The evidentiary conclusiveness of a passport is exceeded by that of a Report of Birth Abroad of a Citizen of the United States (FS-240) which is referred to as a Consular Report of Birth. ⁵¹ It proves United States citizenship or

⁴⁷ [Magnuson, 911 F.2d 330, 333 \(9th Cir. 1990\)](#).

⁴⁸ [Id. at 333-34](#).

⁴⁹ [Haig v. Agee, 453 U.S. 280, 306 \(1981\)](#) (passport may be revoked for conduct which causes or threatens to cause serious harm to national security or foreign policy of United States); [Kent v. Dulles, 357 U.S. 116, 124 n.10, 128 \(1958\)](#) (passport revocation requires cause which must be substantive, not based on broad discretion of State Department); [Magnuson, 911 F.2d at 336](#) (passport may be revoked only after hearing, and only "on exceptional grounds such as fraud or misrepresentation"); [Boudin v. Dulles, 136 F. Supp. 218, 220 \(D.D.C. 1955\)](#), remanded for hearing, [235 F.2d 532 \(D.C. Cir. 1956\)](#) (passport is a liberty which may not be denied or impaired without due process); 22 C.F.R. §§ 51.80-51.89, [7.1-7.12 \(1992\)](#) (administrative hearing and administrative appellate review by State Department).

The pre-hearing revocation permitted in *Haig* did not obviate notice and a hearing. The State Department preserved Agee's due-process rights by sending him specific, written notice of the reason for the revocation and offering him a hearing within five days of the revocation, to be held in West Germany (as it then was), where Agee was living.

For no apparent reason, § 51.80 prohibits an administrative hearing when the State Department takes adverse passport action (*i.e.*, denial, invalidation, restriction, revocation) for lack of citizenship (not nationality!); does not grant a passport to a specified felon; or does not permit travel to a restricted area. The prohibition is unlawful, however, when applied to revocation of a passport on ground of lack of citizenship. [Magnuson, 911 F.2d 330, 336 \(9th Cir. 1990\)](#). By extension, all § 51.80 exceptions to the general rule of administrative hearings on passport matters is unlawful.

In England, passport issuance is one of the Crown prerogatives. *Regina v. Secretary of State for Foreign and Commonwealth Affairs*, [1989] Q.B. 811 (C.A.). A prerogative power is one which arises out of sovereignty; it is discretionary. *Council of Civil Service Unions v. Minister For the Civil Service*, [1985] A.C. 374, 397-98 (H.L.). The grounds for refusal or withdrawal of a United Kingdom passport are referenced in Goodwin-Gill, *supra* note 40, at 35 n.4. Discretion notwithstanding, administrative denial of a passport is subject to examination by the courts. *Secretary of State*, [1989] Q.B. 811 (C.A.).

⁵⁰ [Magnuson, 911 F.2d at 336](#). The court added: "The Secretary also argues that the district court erred in granting summary judgment because whether Myers was a citizen is a factual dispute. We disagree. Because we have concluded that the Secretary's power to revoke a passport cannot be based on second thoughts about the citizenship determination, the existence of a factual dispute with respect to Myers' citizenship is irrelevant." [Id. at 336 n.14](#).

⁵¹ [22 U.S.C. § 2705\(2\)](#) (1988); [22 C.F.R. § 50.5-50.8 \(1992\)](#). The latest version of the Consular Report of Birth has been in use since November, 1990. FS-240 is not marked with a date, because it is the first of its kind to have a serial number. Subsequent versions will bear the date of the revision. The current Report of Birth Abroad is inexplicably styled "Consular Report of Birth

nationality, by birth, of a child born outside the United States, one or both of whose parents are American citizens or nationals.⁵² There is no statutory restriction on the evidentiary validity of a Consular Report of Birth.⁵³ In contrast, a passport is conclusive only if it is a maximum-period passport, and only during the period of its validity.⁵⁴

[*11] III. [26 U.S.C. § 6039E](#)

The significance of a United States passport for both nationality and travel is the context of examination of § 6039E and its ramifications. The statutory text below omits the provisions of § 6039E which relate solely to immigrants.⁵⁵ The pertinent provisions of the "reform" act are:

SEC. 6039E. INFORMATION CONCERNING RESIDENT STATUS.

(a) GENERAL RULE.--Notwithstanding any other provision of law, any individual who--

(1) applies for a United States passport (or renewal thereof), . . .

(2) . . . , shall include with any such application a statement which includes the information described in subsection (b).

(b) INFORMATION TO BE PROVIDED.--Information required under subsection (a) shall include--

(1) the taxpayer's TIN (if any),

(2) in the case of a passport applicant, any foreign country in which such individual is residing,

Abroad of a Citizen of the United States of America," thereby confusing the official name and the common name of the document.

A Certification of Report of Birth, DS-1350, likewise has a serial number and no date of issue. The certification is based on the Consular Report of Birth. Only one Consular Report of Birth is issued, but multiple certifications may be obtained. DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, PASSPORT SERVICES, PUB. NO. M-300, DOCUMENTATION OF UNITED STATES CITIZENS BORN ABROAD WHO ACQUIRED CITIZENSHIP AT BIRTH 2 (4/91) ("At Birth" underscored in original).

⁵² [8 U.S.C. §§ 1401](#)(c), (d), (e), (g); 1401a; 1408(2), (4) (1988) enable parents or a parent to transmit United States citizenship-by-birth or nationality-by-birth to a child who is not born in the United States. The Department of Defense assists parents to report births in overseas military hospitals. 32 C.F.R. Part 138 (1992); Department of Defense Directive No. 6040.34 (Feb. 12, 1985). Births within the United States are subject, of course, to the [Fourteenth Amendment, U.S. CONST.](#) amend. XIV, § 1. See [United States v. Wong Kim Ark, 169 U.S. 649 \(1893\)](#) (citizenship by birth is gained merely by meeting the conditions of section 1 of the Fourteenth Amendment). The constitutional provision is implemented by [8 U.S.C. § 1401](#) (a), (b), (f) (1988).

⁵³ [22 U.S.C. § 2705](#)(2) (1988).

⁵⁴ [22 U.S.C. § 2705](#)(1) (1988).

The maximum period of validity of a United States passport is ten years, except if limited by the State Department pursuant to regulation. [22 U.S.C. § 217a](#) (1988). A regular passport issued to a person at least 18 years old is valid for ten years from its issue date. [22 C.F.R. § 51.4\(b\) \(1992\)](#). A five-year period of validity, also measured from date of issue, applies to a regular passport issued to someone younger than 18. *Id.* State Department passport regulations are law in the wider sense of the word, so a minor's five-year passport is issued for "the maximum period authorized by law" under § 2705(1). A two-year passport (see *supra* note 6) is not issued for either maximum period, and is not, in any event, issued pursuant to a regulation, so § 2705(1) is inapplicable to it.

⁵⁵ Section 6039E covers applicants for permanent residence by authority of subd. (a)(2). The tax-return requirement is set forth in subd. (b)(3). The Technical and Miscellaneous Revenue Act of 1986, Pub. L. No. 100-647, § 1012(o), **102 Stat. 3342 (1988)**, added to subd. (d) of § 6039E, after its sub-para. (2), an undesignated provision that § 6039E does not mandate disclosure of information subject to "section 245A of the Immigration and Nationality Act (as in effect on the date of the enactment of this sentence)." Section 245A, which was codified as [8 U.S.C. § 1255a](#) (1988), provided for legalization of residency of qualified aliens under certain conditions. Subdivision (c)(5) of § 1255a attaches confidentiality to information submitted to the INS by an applying alien.

(3) . . ., and

(4) such other information as the Secretary may prescribe.

(c) PENALTY.--Any individual failing to provide a statement required under subsection (a) shall be subject to a penalty equal to \$ 500 for each such failure, unless it is shown that such failure is due to reasonable cause and not to willful neglect.

(d) INFORMATION TO BE PROVIDED TO SECRETARY.--Notwithstanding any other provision of law, any agency of the United States which collects (or is required to collect) the statement under subsection (a) shall--

(1) provide any such statement to the Secretary, and

(2) provide to the Secretary the name (and any other identifying information) of any individual refusing to comply with the provisions of subsection (a).

* * *

(e) EXEMPTION.--The Secretary may by regulations exempt any class of individuals from the requirements of this section if he determines that applying this section to such individual is not necessary to carry out the purposes of this section.

The effective date of § 6039E was set, more or less, in an uncodified provision:

[*12] EFFECTIVE DATE.--The amendments made by this subsection shall apply to applications submitted after December 31, 1987 (or, if earlier, the effective date which shall not be earlier than January 1, 1987) of the initial regulations issued under [section 6039E of the Internal Revenue Code of 1986](#) as added by this subsection. ⁵⁶

As with any statute, there is more to the text than meets the eye:

1. The title of the section, "Information Concerning Resident Status," is disingenuous. The law does provide, in subd. (b)(2), that a passport applicant is to disclose "any foreign country in which such individual is residing." It is a misdirection to suggest by the section title that the aim of § 6039(e) is disclosure of the passport applicant's foreign residence, to the utter disregard of the requirement that the applicant disclose his SSN.

From the mid-1960s to 1979, there was a voluntary program where-under an individual could inform the IRS of his SSN and his occupation, and where and when he last filed a United States income-tax return. ⁵⁷ An innocuously-titled form, "Internal Revenue Service Identification of U.S. Citizen Residing Abroad" (IRS Form 3966), was given by the State Department to citizens who applied for passports from, or sought to be registered by, consular officials. The form contained information about tax responsibilities of Americans abroad and about tax assistance available overseas. ⁵⁸ The exchange of tax information for personal data was, however, a scam. The IRS does not need to know anything about individuals in order to provide printed material to them. ⁵⁹ Form 3966 was found objectionable on privacy grounds by many to whom the form was given. An undetermined number of Americans

⁵⁶ TRA, *supra* note 1, § 1234(a)(3), [100 Stat. at 2566](#).

⁵⁷ *Finch*, *supra* note 4, at 22.

⁵⁸ *Id.*

⁵⁹ Free tax publications are distributed by the IRS every year. Of particular interest to Americans living outside the United States are INTERNAL REVENUE SERVICE, PUB. NO. 54, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD (1991); INTERNAL REVENUE SERVICE, PUB. NO. 514, FOREIGN TAX CREDIT FOR INDIVIDUALS (1991); INTERNAL REVENUE SERVICE, PUB. NO. 593, TAX HIGHLIGHTS FOR U.S. CITIZENS AND RESIDENTS GOING ABROAD (Rev. Nov. 1991); and *Instructions for Form 2555[:]* *Foreign Earned Income* (1991).

filled out the form, and an undetermined number did not. The IRS never measured the effectiveness of the program.
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Were an IRS information return issued under authority of § 6039E, it would be the mandatory equivalent of the voluntary Form 3966. The IRS did not issue an information return, because its vehicles for collection of § 6039E information are State Department passport-application forms.

Form 3966 sought, and § 6039E seeks, disclosure by Americans of [*13] their SSNs. Secondary information (occupation; where and when last income-tax return was filed) was also sought by way of Form 3966. The IRS receives secondary information from passport-application forms, albeit different information from that which it wanted in Form 3966.

2. Pursuant to subd. (b)(1), a passport applicant must reveal his "taxpayer's TIN (if any)." A "TIN" is "the identifying number assigned to a person under [26 U.S.C.] section 6109."⁶¹ For the individual taxpayer, his SSN is his TIN.
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3. Under subd. (b)(4), a passport applicant is to provide "such other information as the Secretary may prescribe."⁶³ The extent of this open-ended provision, another congressional catch-all phrase, is not determinable. No regulation under authority of this subdivision was promulgated.

4. The penalty of \$ 500 under subd. (c) was originally \$ 50. The Senate Committee Report stated, "A new penalty of \$ 50 will generally apply with respect to a failure to file the required return, in addition to any other applicable penalties (such as criminal penalties provided in section 7203 for willful failures to comply with the reporting and other requirements of the Code)."⁶⁴

The Conference Committee Report did not repeat the threat of criminal sanctions. Instead, the civil penalty was increased ten-fold: "First, to deter noncompliance effectively, the penalty for each failure to file the required information returns is increased from \$ 50 to \$ 500."⁶⁵

5. Reference is made in the opening paragraph of subd. (d) to "any agency of the United States which collects (or is required to collect) the statement under subsection (a)." The word "any" implies that a slew of agencies collects § 6039E information, but only two do: the State Department (in relation to passport applications) and the INS (in relation to applications for permanent residence).

The phrase "which collects" is in addition to the phrase "(or is required to collect)." The first phrase suggests that agencies which are not authorized to demand § 6039E data from the public might nonetheless do so. The phrase also suggests that an authorized agency (the State Department or the INS) might collect § 6039E data in an unauthorized [*14] context. Under a government of laws, only lawful collections of personal data would be undertaken by governmental units. The loose statutory language condones passing along illegally collected § 6039E data to the IRS.

⁶⁰ Finch, *supra* note 4, at 22-23.

⁶¹ [26 U.S.C. § 7701\(a\)\(41\)](#) (1988). "TIN" is obviously an acronym for taxpayer identifying number, but the acronym is not explicated in the Internal Revenue Code. The term "taxpayer identification number" is used in [26 C.F.R. § 301.6109-1 \(1992\)](#), without reference to the statutory acronym.

⁶² [26 U.S.C. § 6109\(a\)](#) undesignated para., 6109(c) (1988).

⁶³ The term "Secretary" in the Internal Revenue Code of 1986 means "the Secretary of the Treasury or his delegate." [26 U.S.C. § 7701\(11\)\(B\)](#) (1988).

⁶⁴ 10 STAND. FED. TAX REP. (CCH) P36,880.09 (p. 63,116) (1991) [hereinafter SFTR].

⁶⁵ *Id.*

6. The two sub-parts of subd. (d) have two distinct requirements. As to a passport applicant who complies with § 6039E, subd. (d)(1) directs the State Department to "provide any such statement to the Secretary." If no § 6039E statement is collected, subd. (d)(2) directs the State Department to "provide to the Secretary the name (and any other identifying information) of any individual refusing to comply with the provisions of subsection (a)."

7. No exemption under subd. (e) was granted.

8. Absent § 6039E regulations, the provision in the uncodified section which ostensibly allowed the effective date of January 1, 1988, to be advanced was not utilized.⁶⁶

IV. IMPLEMENTATION OF § 6039E

The statute distinguishes between the two sets of personal information which the State Department may send to the IRS. When a passport applicant complies with § 6039E, disclosure to the IRS by the State Department is limited to sending § 6039E(b) data, which are the applicant's SSN and foreign country of residence. Only if the passport applicant does not reveal these data may the State Department send to the IRS his name and other identifying information.

Separation of IRS information from State Department information would have been easy, had the statutory prescription been followed. It was contemplated by the Congress that the information required by § 6039E(b) would be revealed on an IRS information return. The Senate Committee Report states: "The bill provides that an IRS information return must be filed in conjunction with a citizen's passport application, and with a resident alien's green card application."⁶⁷ The Conference Committee Report likewise refers to information returns.⁶⁸ As a result, § 6039E specifies that the passport applicant "shall include with any such application a *statement*"⁶⁹ of his SSN and country of foreign residence. **[*15]** The penalty of \$ 500 is imposed on anyone "failing to provide a *statement*."⁷⁰ The agency "which collects (or is required to collect) the *statement* under subsection (a) shall . . . provide any such *statement* to the Secretary."⁷¹ If a *statement* is not furnished, the State Department is to provide "the name (and any other identifying *information*) of" the passport applicant.⁷² Absent a § 6039E(b) *statement* (*i.e.*, an information return), the State Department has nothing but *information* to send to the IRS. Failure to use information returns undermines the statutory scheme. The State Department retains passport-application forms, so it has to furnish *information* to the IRS, even when a passport applicant complies with § 6039E.

The congressional intent is also shown in § 1234(a) of the TRA, which is titled "Information Returns." Similarly, the Congress codified § 6039E among the laws which require taxpayer filing of various information returns with the IRS. Section 6039E is part of Subpart A ("Information Concerning Persons Subject to Special Provisions"), Part III

⁶⁶ The constitutionality of a change of a statutory effective date by way of a regulation has not been determined. An effective date movable by bureaucrats cannot be upheld. The power to legislate is vested in the Congress ([U.S. CONST. art. I, § 1](#)), not in the bureaucracy. Designation of the effective date of a law is inherently a legislative function. In no way is the effective date of a law an interpretation of that law.

⁶⁷ SFTR, *supra* note 64.

⁶⁸ *Id.*

⁶⁹ [26 U.S.C. § 6039E\(a\)](#) (1988) (emphasis added).

⁷⁰ [26 U.S.C. § 6039E\(c\)](#) (1988) (emphasis added).

⁷¹ [26 U.S.C. § 6039E\(d\)](#) (1988) (emphasis added).

⁷² [26 U.S.C. § 6039E\(d\)\(2\)](#) (1988) (emphasis added). The statute should read, "the name of (and other identifying information about)." The preposition "of" is necessary after "name" to show possession, and the preposition "about" is required after "information" to show attribution. The statute falls short by using "of" as the preposition for both "name" and "information."

("Information Returns"), Subchapter A ("Returns and Records"), Chapter 61 ("Information and Returns") of the Internal Revenue Code of 1986. There can be no doubt that § 6039E intended an IRS information return separate from a passport-application form.

A related violation of law is the transmittal by the State Department to the IRS of the name, mailing address, date of birth and SSN of every applicant for a regular passport. Passport-application forms contain the following notice:

FEDERAL TAX LAW:

[Section 6039E of the Internal Revenue Code of 1986](#) requires a passport applicant to provide his/her name ([box] # 1), mailing address ([box] # 2), date of birth ([box] # 5), and social-security number ([box] # 6). If you have not been issued a social-security number, enter zeroes in box # 6. Passport Services will provide this information to the Internal Revenue Service routinely. Any applicant who fails to provide the required information is subject to a \$ 500 penalty enforced by the IRS. All questions on this matter should be referred to the nearest IRS office. ⁷³

The first sentence of the notice is inaccurate. Section 6039E(b) does **[*16]** not require a passport applicant to reveal his name or mailing address or date of birth to the IRS. It is practicality, not legality, which motivates the IRS to receive those secondary data from the State Department. With a date of birth, the IRS knows whether the passport applicant is an adult. If he is, the IRS searches its records to see whether income-tax returns were filed under the related name and SSN.

The IRS wants the passport applicant's address from the passport-application form in order to obtain his current address. Though a taxpayer's address is required on income-tax returns, ⁷⁴ irrespective of § 6039E, the passport applicant may be a stopfiler (*i.e.*, a person who inexplicably stopped sending returns to the IRS). The address which the IRS would have for a stopfiler is not necessarily current. If the passport applicant is a nonfiler (*i.e.*, a person who never filed a tax return), the IRS has, of course, no record of him. In either case, the IRS uses the address from the passport-application form to remind the passport applicant of his civic duty.

⁷³ Each governmental agency which asks for SSNs is required to state whether disclosure is mandatory or voluntary; the statutory "or other authority" under which SSNs are sought; "and what uses will be made of it." Pub. L. No. 93-579, § 7, [88 Stat. 1909 \(1974\)](#) [hereinafter § 7], *reprinted in* [5 U.S.C. § 552a](#) note (1988). A measure of the insignificance of the SSN privacy issue to the Congress is that § 7 was left uncodified.

The request by the State Department for SSNs subjects it to § 7. The State Department not only collects SSNs, but also retains them. Passport applications are kept on file for 100 years, on paper or microfilm. Letter from Sharon E. Palmer-Royston, Attorney Advisor, Office of Citizenship Appeals and Legal Assistance, Dep't of State, to Stephen Kruger (Jan. 5, 1993) (on file with author).

The federal-tax-law notice on passport-application forms is in addition to the Privacy Act Statement, which is required under [5 U.S.C. § 552a\(e\)\(3\)](#) (1988). The notice does not specify the uses to which the passport applicant's SSN will be put, and therefore does not implement § 7. It is meaningless to "inform" the passport applicant that the State Department "will provide this information to the Internal Revenue Service routinely." The substantive uses to which the IRS puts SSNs and other data of passport applicants include identification and location of nonfilers, and enforcement of the tax laws against them. A lawful § 7 disclosure would notify passport applicants of those uses.

The phrase, "or other authority," in § 7 is a source of concern. One wonders about the legal health of the Republic, when authority for governmental action by the United States is thought by the Congress to be independent of statutes.

"To the nearest IRS office," which appears in the notice, is a poor expression. The distance from a passport office to an IRS office, or the distance from the residence of the passport applicant to an IRS office, is irrelevant, and the most proximate IRS office might not be one which deals with the public. A better expression is "to the IRS."

⁷⁴ No law or rule requires a taxpayer to provide his address to the IRS. The obligation is implied from address boxes on tax returns. Nothing prevents a taxpayer from using a post-office box as his address for tax purposes.

Even if the passport applicant is a minor, and there is no reason to suspect that he should be filing a tax return, the IRS makes use of the personal information which it receives from the State Department. When the minor reaches the age of 21, the tax collectors know that another cash cow is expected in the herd of the United States Treasury.

In general, personal data about taxpayers and potential taxpayers from sources other than tax returns are always of interest to the IRS. Information about people serves to build IRS data bases. Personal details also enable the IRS to rummage through governmental and private [*17] data banks.⁷⁵

The second sentence of the notice instructs the passport applicant how to indicate that he does not have an SSN. Woe betide any American who is not numerically branded for the benefit of bureaucrats!

In the third sentence, the passport applicant is advised that the State Department provides the specified information to the IRS "routinely." Section 6039E(b) and (d) are to the contrary.

The fourth sentence follows the Conference Committee Report, in that there is no mention of criminal sanctions. The notice does not disclose to the passport applicant that, under § 6039E(c), the \$ 500 penalty is waivable if "it is shown that such failure is due to reasonable cause and not to willful neglect."

The fifth and last sentence of the notice is a sloughing by the State Department of its responsibility for its wholesale violations of § 6039E. Not *all* questions about § 6039E should be referred to the IRS. Questions about unauthorized transmittal by the State Department of personal data should be directed to the State Department. Questions about receipt by the IRS of unauthorized personal data should be addressed to the IRS.

The State Department also collects § 6039E information from persons who are not required to provide that information. DSP-11 serves not only first-time passport applicants, but also those who wish to register at an American embassy or consulate. The purposes of registration are to claim United States nationality and to advise consular officials of one's residence in the consular district.⁷⁶ An application for registration is one of three ways United States nationality is determined by the State Department. The other two are an application for a passport and an application for a Consular Report of Birth.⁷⁷

On both DSP-11 and DSP-82, the space for one's SSN appears on the obverse of the form. There is no indication in the space that SSNs are required only from those who use the forms as passport-application forms. The federal-tax-law notice (reference to which is made on the [*18] obverse of each form) appears on the reverse of each form. The notice does not specify that disclosure of an SSN is not required of an applicant for registration or for a card of identity. It takes sophisticated reading of a passport-application form to fathom from it that § 6039E applies only to passport applicants. This trap substantiates that the bureaucratic goal is universal collection of SSNs, not "information concerning resident status." One suspects that data from *every* DSP-11 and DSP-82 submitted to the State Department, other than those submitted by applicants for official passports or diplomatic passports,⁷⁸ are

⁷⁵ DAVID BURNHAM, A LAW UNTO ITSELF 329-47 (1989); Note, *IRS Computer Data Bank Searches: An Infringement of the Fourth Amendment Search and Seizure Clause*, 25 SANTA CLARA L. REV. 153 (1985).

⁷⁶ [22 C.F.R. § 50.3 \(1992\)](#).

⁷⁷ The State Department "shall determine claims to United States nationality when made by persons abroad on the basis of an application for registration, for a passport, or for registration at birth." [22 C.F.R. § 50.2 \(1992\)](#). Actually, the State Department determines nationality within the United States when it acts upon a passport application made at a passport office.

Both DSP-11 and DSP-82 are used for issuance of a card of identity ([22 C.F.R. § 50.9 \(1992\)](#)), which facilitates the return of a United States national to the United States. Palmer-Royston Letter, *supra* note 2. Section 50.2 does not mention that an application for a card of identity is a circumstance under which the State Department determines a claim to United States nationality.

sent by the State Department to the IRS. No rule indicates that differentiation is made by the State Department among submitted forms, based on the respective purposes for which they are used by the public.

V. EVIDENTIARY SUPPORT FOR § 6039E WAS NON-EXISTENT

Naive readers of the House Conference Report would believe that § 6039E was necessary because of massive underpayment of income taxes by Americans resident overseas:

Present Law U.S. persons resident abroad are required to file U.S. tax returns, but a substantial percentage of foreign residents fail to do so. ⁷⁹

The statement refers only to alleged failures to file. Its implication is that those who supposedly do not file deprive the Treasury of substantial tax revenue. In fact, there is no problem. The GAO and the IRS used, and the Congress accepted, cooked statistics to create the appearance of tax evasion by Americans who exercise their right to live outside the United States. At the Hearing, the GAO informed Congress:

We used the best information available to GAO to arrive at an overseas nonfiling rate--information that is not generally available to IRS. Because of the sensitivity of the information used, the Subcommittee and GAO agreed not to disclose the source of the information. Based on this information, we estimate that about 61 percent of our sample may be nonfilers. In other words, we found no record of tax [*19] returns being filed for tax years 1981 through 1983 by 2,376, or 60.9 percent, of the 3,905 individuals in our sample. ⁸⁰

The secrecy agreed to so readily by the subcommittee and the GAO makes it impossible for anyone to check that "best information." The GAO withheld not only the source of its information, but also the means by which the information was obtained; the total number of Americans thought to live in the seven cities which were the focus of the GAO inquiry; the rationale for limiting the inquiry to only 3,905 SSNs; and the reasons for selecting those persons whose SSNs were compared to SSNs in IRS records.

Moreover, the GAO acknowledged that its inquiry had other serious flaws:

1. The sample was limited to Americans who resided "in and around" seven cities (Hamburg, Vienna, Florence, Genoa, Rome, Nuevo Laredo and Tijuana) in four countries. Those cities were not selected because the populations of United States citizens therein were representative of Americans living abroad. Rather, the cities were

⁷⁸ Bryan L. Musselman, *Filing Characteristics of U.S. Passport Applicants Resident Abroad*, in INTERNAL REVENUE SERVICE, DOC. NO. 6011, 1989 UPDATE[:] TREND ANALYSES AND RELATED STATISTICS 179, 185 n.3 (Rev. 6-89). The information is culled, apparently, prior to the sending by the State Department of recorded data to the IRS. *Id.* at 179 (quarterly receipt by the IRS of tapes from the State Department).

Section 6039E(e) permits the IRS to exempt classes of individuals from the requirements of § 6039E, "if he [the Secretary] determines that applying this section to such individuals is not necessary to carry out the purposes of this section." The rule-making authority begs the question. What is the purpose of § 6039E?

The IRS made no determination and promulgated no rule under authority of subd. (e). Information about applicants for official passports and information about applicants for diplomatic passports are withheld nonetheless by the State Department.

⁷⁹ H.R. CONF. REP. NO. 99-841, *reprinted in* 1986 U.S.C.C.A.N. 4075, 4726.

⁸⁰ Finch, *supra* note 4, at 15. The GAO and the IRS used the term "nonfiling," without distinguishing between stopfiling and nonfiling. Perforce, this article follows suit. The imprecise language of the governmental agencies is indicative of the inaccuracies of their data and conclusions.

At the Hearing, and in the publications of the GAO and of the IRS, the two agencies were referred to by their minions as "GAO" and "IRS," without definite articles. The mode of expression is equivalent to a nurse speaking of a physician as "Doctor" with neither name nor definite article. Such is the mentality of lifers in bureaucracies.

selected because the SSNs of many Americans resident there were assertedly available, in some unspecified manner, to the GAO. ⁸¹

2. The comparison was of the foreign residents' SSNs with the primary SSNs on income-tax returns filed by people whose tax return addresses were of that city. In doing so, the GAO assumed that each person who lives overseas files a separate tax return. The GAO knew that joint returns, which have secondary SSNs, are filed by couples. No match of the foreign residents' SSNs with secondary SSNs in IRS files was made, because the GAO could not get sufficient computer time from the IRS. Thus, the GAO failed to match many of the SSNs, supposedly known to it, to tax returns. ⁸²

3. The "study" did not determine whether the foreign residents who apparently had not filed income-tax returns had tax liabilities. ⁸³ A technical obligation to file a tax return does not imply that a taxpayer **[*20]** owes taxes. ⁸⁴

A serious flaw unacknowledged by the GAO was its assumption that every taxpayer who lives abroad uses a foreign mailing address. The GAO should have considered, but did not, that a taxpayer resident overseas could use a United States postal address. ⁸⁵ IRS Form 2555, Foreign Earned Income (wherein an American abroad reports his foreign income and demonstrates his entitlement to applicable exclusions and deductions), has a space for the taxpayer's foreign address. That entry is separate from, and need not be the same as, the address entered on IRS Form 1040.

Foreign conditions might make it prudent to avoid reliance on local mail service for matters as important as tax returns and tax refunds. Conditions regardless, many Americans abroad have their tax returns prepared by United States tax practitioners. Those filers could use their lawyers' or accountants' office addresses for income-tax purposes. With or without professional tax assistance, any overseas taxpayer may use a United States postal address. Americans in Mexico, for example, are overseas in the tax-filing sense but are not distant geographically.

⁸¹ *Id.*

⁸² *Id.* at 16.

Tax returns can also have tertiary SSNs, *i.e.*, those of dependents. The GAO did not inquire whether the foreign residents had children, or were supporting elderly parents. Dependents' SSNs were certainly not compared by the GAO to SSNs in IRS records.

⁸³ *Id.*

⁸⁴ United States citizens are taxed on their world-wide incomes. Those who reside abroad may exclude up to \$ 70,000.00 of foreign-earned income; exclude or deduct certain foreign housing amounts; and exclude the values of meals and lodgings provided by employers. [26 U.S.C. § 911](#) (1988); 26 C.F.R. § 1.911 (1992). Employees of the United States, who may not take § 911 exclusions and deductions, may exclude governmental overseas allowances. [26 U.S.C. § 912](#) (1988); 26 C.F.R. § 1.912 (1992).

⁸⁵ United States postal addresses include addresses in the United States, its territories and possessions, which are under the jurisdiction of the United States Postal Service [hereinafter USPS]; and overseas military addresses, which are under the jurisdiction of the Military Postal Service [hereinafter MPS]. The MPS, an extension of the USPS, is operated by the Defense Department. [39 U.S.C. §§ 403](#), 406, 407, 3401 (1988); U.S. POSTAL SERVICE, PUB. NO. 38, POSTAL AGREEMENT WITH THE DEPARTMENT OF DEFENSE (Feb. 1980); U.S. POSTAL SERVICE, PUB. NO. 38A, GUIDELINES FOR PROVIDING POSTAL SERVICES ON MILITARY INSTALLATIONS (June 1983). The Defense Department establishes APOs (army post offices) and FPOs (fleet post offices) as needed, and the USPS supports those post offices by transporting mail to them. Letter from Connee L. Rainey, Acting Senior Consumer Affairs Associate, Consumer Affairs Department, USPS, to Stephen Kruger (Apr. 28, 1992) (on file with author).

The USPS has authority to enter into separate agreements with the State Department for postal service at embassies and consulates at which no MPS service is available. [39 U.S.C. § 413](#) (1988). No § 413 agreement was made. Mail of officials and others to and from State Department facilities which lack MPS service may be sent via diplomatic pouches.

Taxpayers who live in Nuevo Laredo and Tijuana, two of the foreign cities in the GAO "analysis" of the nonfiling "problem," could easily use mailing addresses in the respective adjacent border cities of Laredo, Texas, and San Ysidro, California, on their tax returns. The convenience of a United States mailing address might also appeal to American contingents in other countries.

According to the GAO, the nonfiling rate in the seven cities ranged **[*21]** from 37.0% to 77.7%.⁸⁶ The GAO purported to know the sexes of the Americans whose SSNs it secretly (and presumably illegally) obtained, so it came up with figures broken down by sex. For men, the range was represented to be 22.7% to 72.6%; for women, it was given as 46.8% to 81.2%.⁸⁷

The ranges of the figures are too wide to be accurate. Further, the unverifiable and flawed "facts" utilized by the GAO are nonsense. Therefore, the figures do not support meaningful statements about the people to whom they supposedly refer.

The GAO represented nonetheless, at the Hearing, that "our results are still indicative of a potential nonfiling problem."⁸⁸ To the IRS as well, the "problem" was real:

Despite the U.S. filing requirements, IRS believes that many U.S. citizens living overseas are not filing federal income-tax returns. IRS' belief is based on statistics regarding the number of U.S. citizens residing abroad and the number of federal tax returns filed by such persons. For example, the State Department estimated that about 1.8 million U.S. citizens lived abroad in 1983. IRS statistics, however, indicate that about 246,000 individual income-tax returns were filed in 1983 by U.S. citizens living overseas. Neither of these figures include U.S. military personnel and their families stationed abroad--about 950,000 in 1983.⁸⁹

The conclusion of the IRS was based on its acceptance of the State Department "estimate." That the IRS should not have done so is evident from its later acknowledgment that the figure of 1.8 million was unsubstantiated. The IRS conceded:

Currently, there is no accurate measurement of the total number of Americans resident abroad by country. . . . Although the Department of Defense and the Department of State have accurate records of the number of Americans employed by the U.S. government who live overseas by country, no accurate data exists [sic] for the number of Americans who live abroad and who are not employed by the U.S. government.⁹⁰

The grammar and syntax of the concession are uneven, and the concession is a paradigm of dangling modifiers, but the meaning is clear. The IRS put no faith in the State Department guess of how many Americans live abroad for private reasons.

[*22] The guess of 1.8 million touted by the State Department was the sum of the numbers of Americans thought to be resident in each of the foreign countries wherein there is American diplomatic representation.⁹¹ The State

⁸⁶ Finch, *supra* note 4, Exhibit A at 34.

⁸⁷ *Id.*

⁸⁸ *Id.* at 21. The GAO mentioned in passing that asserted nonfilers should be considered "*possible* nonfilers" (*id.* at 20) (underscoring in original), and that joint returns account for an indefinite number of alleged nonfilers (*id.* at 20-21). The thrust of the GAO presentation was, regardless, that purported overseas nonfiling was a "serious problem." *Id.* at 40.

⁸⁹ *Id.* at 17.

⁹⁰ Musselman, *supra* note 78, at 180, n.3.

⁹¹ Appendix 3, Country-by-Country Listing of Numbers of U.S. Citizens Living Abroad, *in* Problem, *supra* note 4, at 208-20 [hereinafter Appendix 3]. The notation under the title of Appendix 3 reads, "United States Citizens Residing Abroad (1983) Based on Reports from U.S. Foreign Service Posts." The total of United States citizens apparently living abroad for "official" purposes was put by the State Department at 55,165. Its total of Americans supposedly resident overseas for "non-official" purposes was given as 1,756,808. The terms "official" and "non-official" were not defined.

Department does not know and cannot know the number of expatriate Americans, because it has neither authority nor means to count Americans who choose to live outside the United States. The only step which the State Department can take is to tally the number of citizens who inform an embassy or consulate that they reside in the consular district.

There is no way to glean from State Department registration statistics how long the voluntary registrant intends to stay in that place. A person could register for reasons unrelated to a long-term stay, such as keeping in touch with the embassy or consulate due to local unrest. Each registration is separate, so the number of times an individual registers with the State Department cannot be determined by it. A registrant could have registered more than once at a particular diplomatic facility or could have registered once in each of several places. No connection can be established between registration with the State Department and filing an income-tax return with a foreign address.

Registration figures are inaccurate also because registration lists are kept for many years:

A number of years ago the AmCham in Venezuela was advised by the U.S. Consulate [sic] in Caracas that their list of U.S. residents in Venezuela was compiled on the basis of those U.S. citizens who had registered with the U.S. Embassy, either upon arrival or when applying for passport renewals. The names are maintained on the list for ten years after last contact, regardless of [sic] the fact that the person may have returned home, gone to another country, died, renounced U.S. citizenship, married with consequent name change (unless the Embassy is so advised), or simply ceased to be employed (as is the case of many married women, when they reside abroad). Such lists might therefore be compared, in some respects, to the notorious Cook County voting lists of yore. They may have little relation to reality. ⁹²

Thus, both numerator and denominator put to the subcommittee by **[*23]** the IRS are fantasy figures. With the IRS figures, one calculates a horrendous overseas nonfiling rate of 86% (246,000 tax returns/1.8 million purported expatriate Americans = 14% filing rate), assuming that all 1.8 million people are required to file tax returns, and that all file single-person tax returns. One could as easily attribute an average of 3.5 persons to each of the 246,000 tax returns, ⁹³ so that the numerator is not 246,000, but is 861,000. If State Department registration lists are 50% inaccurate, the denominator is not 1.8 million, but is 900,000. With a numerator of 861,000 and a denominator of 900,000, the filing rate is 96%.

The GAO and IRS representations were accepted by the subcommittee because it wanted to find a major source of income-tax revenue (Americans abroad). Section 6039E is the product of a government desperately broke and unable to curb its spending. Just as an alcoholic denies his problem and turns empty wine bottles to eke the last drops from them, the Congress turned to squeezing hypothetical tax receipts from already-tapped sources.

The calculations in this article are based on 1.8 million, rather than 1,756,808. The difference between the two numbers is 2.4%, which is negligible. For easier reading, the results of the calculations are expressed in whole numbers.

⁹² *Problem of Tax Return Nonfiling by Americans Living Abroad: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Gov't. Operations* 99th Cong., 1st Sess. 99 (1985) (Statement of David A. Wicker, President of the Association of American Chambers of Commerce in Latin America) [hereinafter Wicker].

Keeping registration lists for ten years is consistent with State Department policy. "The diplomatic or consular officer shall determine the period of time for which the registration shall be valid." [22 C.F.R. § 50.3\(b\) \(1992\)](#). "Of time" is a redundant phrase. In this context, "period" means "unit of time."

⁹³ Both a joint return and a head-of-household return cover two or more people. A married-filing-separately return, as well as a surviving-spouse return, could include two or more people. Thus, for example, a joint tax return on behalf of a man, his wife and their two children accounts for four people. The number of persons accounted for is increased by those who have more than two dependents, and reduced by those who have fewer dependents. Non-dependents who need not file tax returns also decrease the number of filed tax returns.

The Congress should not expect a rush of revenue as a result of § 6039E. In 1985, the GAO evaluated IRS collection policies and procedures for taxpayers with APO and FPO mailing addresses.⁹⁴ The IRS asserted that, in 1983, 450,000 tax returns showed APO or FPO addresses.⁹⁵ Those addresses are not correlative with overseas tax filings. Eligibility to use the MPS is based on employment by or association with a governmental agency or support function, not on long-term residence abroad.⁹⁶ No one who is eligible to use the MPS is obligated to do so.

[*24] Of the APO/FPO addresses, the GAO sought cases which had been open for at least one year, involved unsuccessful attempts to locate the taxpayer, "and/or"⁹⁷ were being considered for closure because of lack of contact with the taxpayers.⁹⁸ The number of tax returns meeting GAO criteria was not reported. Of the unknown number of criteria-consistent cases, the IRS selected and sent 37 to its Washington FOD (Foreign Operations District) Office. The 37 cases were .008% (8 out of every 100,000) of the 450,000 total tax filings. The GAO left case selection to the IRS. The IRS did not reveal the grounds for its selections or the number of files reviewed prior to selection.

At the outset, tax delinquencies were estimated to range from about \$ 580 to about \$ 211,000.⁹⁹ The basis of the estimate was not stated. The total amounts of estimated unpaid taxes at the beginning of the study and at its end were not specified. The paucity of information in the GAO report was an operational necessity, because its inquiry was admittedly limited to "a small, unscientific sample of ongoing APO/FPO collection cases."¹⁰⁰ It is no comfort to learn that the GAO inquiry "was performed in accordance with generally accepted *government* auditing standards."¹⁰¹

The tax-collection results were dismal. Of the 37 cases, 11 had been closed by June 25, 1986. Three of the cases were closed by filings of late tax returns without tax liabilities; two cases resulted in payments of back taxes of about \$ 6,400 and \$ 1,700, respectively; and six cases were transferred to IRS district offices because the taxpayers were found to have been living in the United States.¹⁰²

The GAO report does not support the conclusion that large amounts of unpaid taxes are to be found among those who live overseas. The clearing of 11 out of 37 cases (30%) resulted in a grand total of about \$ 8,100 in back taxes collected by the IRS. The figures also put the lie to massive overseas nonfiling. Of 11 cases cleared, 6 (55%) supposedly-disappeared taxpayers were accounted for by IRS mismanagement of files.

⁹⁴ GENERAL ACCOUNTING OFFICE, TAX ADMINISTRATION[:] IRS CAN IMPROVE ITS COLLECTION PROCEDURES FOR TAXPAYERS LIVING OVERSEAS 2 (Dec. 12, 1986) (GAO/GGD-87-14) [hereinafter Tax Administration].

⁹⁵ *Id.*

⁹⁶ Numerous categories of Americans abroad have a full or partial right to use MPS facilities. These include military personnel and their dependents; retired military; employees of the Defense Department, and their dependents; employees of military-related activities (*e.g.*, banks, schools, USO, contractors); employees of other governmental agencies, and their dependents; and merchant-marine officers and crewmen who serve on ships under contract to the Defense Department. 1 DEPARTMENT OF DEFENSE, DoD POSTAL MANUAL Appendix A, pp. A-1 to A-7 (Dec. 1989) (DoD 4525.6-M).

⁹⁷ The combination of conjunctive and disjunctive is simultaneously ungrammatical, illogical, uneuphonious and bureaucratic.

⁹⁸ Tax Administration, *supra* note 94, at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 2.

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* at 4.

The IRS referred to passport-application data to prove its hypothesis of extensive nonfiling, though a correlation between overseas passport-applications and earning money overseas is problematic. Among [*25] those who would renew their passports at embassies and consulates, yet not have foreign income, would be dependents of Americans abroad, students and scholars with American-source grants and fellowships, and long-term travelers. The variety of motivations for overseas passport-applications belies the assumption which underlay the IRS reference to those data.

According to the IRS, about 73,000 applications for regular passports were filed in American embassies and consulates in 1988.¹⁰³ The IRS reference is to the calendar year; passport statistics are kept in terms of fiscal years (October - September). The actual numbers are:¹⁰⁴

Fiscal Year	Foreign Issuances n105
1987	260,541
1988	193,215
1989	163,944
1990	172,201

105

¹⁰³ Musselman, *supra* note 78, at 179.

¹⁰⁴ Letter from Department of State, Bureau of Consular Affairs, Office of Public Affairs, to Stephen Kruger (Dec. 4, 1991) (Freedom of Information Act response) (on file with author). The State Department does not keep separate records for original and renewal passport issuances. Letter from Department of State, Bureau of Consular Affairs, Office of Public Affairs, to Stephen Kruger (Sept. 16, 1991) (Freedom of Information Act response) (on file with author) [hereinafter September 16 Letter].

¹⁰⁵ Domestic issuances of regular passports for the same period were:

Fiscal Year

Domestic Issuances

1987

4,777,650

1988

4,245,134

1989

3,726,395

1990

3,688,689

September 16 Letter, *supra* note 104. A letter from Department of State, Office of Freedom of Information, Privacy and Classification Review, to Stephen Kruger (Nov. 20, 1991) (Freedom of Information Act response) (on file with author) [hereinafter November 20 Letter], gives identical numbers, except that, for 1990, the number of issuances is stated as 3,746,602. The discrepancy of 57,913 is unexplained.

The numbers of overseas passport-issuances for fiscal year 1988 (193,215) and for fiscal year 1989 (163,944) do not match the IRS number (73,000). The IRS pretended that only 73,000 regular passports were issued abroad in calendar year 1988. Assuming in all instances a uniform rate of passport issuances, 185,897 regular passports were issued in calendar year 1988 ($[3/4 \cdot 193,215] + [1/4 \cdot 163,944] = 185,897$). The IRS figure 73,000 is inaccurate by 61% ($[(185,897 - 73,000)/185,897 = 0.61]$).

The decision of the State Department not to send to the IRS data about applicants for official passports or for diplomatic passports ¹⁰⁶ likewise allowed the IRS to skew the data with which it worked. In relation **[*26]** to the number of regular passports for which applications were made abroad, relatively large numbers of official passports and of diplomatic passports were issued. State Department statistics ¹⁰⁷ for issuances of official passports and diplomatic passports are:

Fiscal Year	Official Passports	Diplomatic Passports	Total
1987	82,499	22,399	104,898
1988	82,800	20,701	103,501
1989	82,753	18,220	100,973
1990	76,579	18,922	95,501

There were 103,501 official passports and diplomatic passports issued in fiscal year 1988, and 100,973 in fiscal year 1989. Thus, 102,869 official passports and diplomatic passports were issued in calendar year 1988 ($[3/4 \cdot 103,501] + [1/4 \cdot 100,973] = 102,869$). In this context, the IRS figure of 73,000 is inaccurate by 29% ($[(102,869 - 73,000)/102,869 = 0.29]$).

As to all passports--regular, official and diplomatic--issued in calendar year 1988, the combined inaccuracy for the IRS figure of 73,000 is 75% ($[(185,897 + 102,869 - 73,000)/(185,897 + 102,869) = 0.75]$). The distortions induced by the arbitrary figure of 73,000 are gross.

The IRS should have been alerted by the 73,000 figure to the baselessness of the State Department guess that 1.8 million Americans live abroad for private reasons. If the supposed 73,000 passport applications are projected over ten years, there were 730,000 overseas applications for regular passports. As shown below, the IRS assumed that about one-half of overseas passport-applicants were minors. Thus, the number of Americans living abroad is 486,667 (243,334 passport applications by adults + $[2 \cdot 243,333]$ passport applications by or on behalf of minors = 730,000 passport applications, because a minor's passport is issued for five years, which is half the period of validity of an adult's passport).

If one uses the latest data on overseas applications for regular passports, the State Department guess is still not supported. From fiscal year 1987 through fiscal year 1990, the average annual overseas passport-application rate was 197,475 ($[260,541 + 193,215 + 163,944 + 172,201]/4 = 197,475$). On a ten-year projection, the number of overseas passport-applications would be 1,974,750. This figure is for *all* Americans, both adults and minors, whether civilian or military, and whether abroad for private or public reasons. The IRS estimated that there were 950,000 military personnel and family members abroad, and the State Department placed at 55,165 the number of people living overseas for governmental **[*27]** purposes. Therefore, the number of passport applications by Americans abroad for private reasons was 969,586 ($950,000 + 55,165 = 1,005,164$; $1,974,750 - 1,005,164 = 969,586$). If, as assumed by the IRS, about one-half of overseas passport-applications were by or on behalf of minors, the number of Americans living abroad is 484,793 ($323,195$ adults' applications + $[2 \cdot 323,195$ minors' applications] = 484,793 passport applications). This number, which is quite close to the 486,667 reached above,

¹⁰⁶ Musselman, *supra* note 78, at 185 n.3. The IRS did not ask for complete data. No reason was given by the IRS for its lack of diligence.

¹⁰⁷ November 20 Letter, *supra* note 105.

likewise challenges the State Department guess that, exclusive of military and civilian employees of the United States, 1.8 million Americans live abroad.

On an unspecified basis, said to be random, the IRS selected 615 data sets among the 73,000 for examination. ¹⁰⁸ The IRS limited its examination to 0.21% (21/100 of 1%) of all passports issued in calendar year 1988 ($615/[185,897 + 102,869] = 0.0021$).

From the dates of birth sent along by the State Department, the IRS found that 333 (54%) of the 615 overseas passport-applicants were under the age of 22, 256 (41%) of them were 22 to 65 years old, and 26 (4%) were older than 65. ¹⁰⁹ The IRS dropped data of those under 22 and those over 65. It was decreed, for the purpose of the examination, that persons in the two age groups were not likely to be subject to the requirement of filing an income-tax return. ¹¹⁰

The exclusion of those passport applicants was arbitrary. Though many overseas passport-applicants do not earn money while abroad, they have no income by reason of status (e.g., dependent, academic, traveler), not age. In any event, the exclusion by age set aside the data of 359 passport applicants (58%) in the sample of 615. The number of the statistical group was reduced to 256 (41% of 615). That number is 0.09% (9/100 of 1%) of all passports issued in calendar year 1988 ($256/[185,897 + 102,869] = 0.0009$).

Of the 256, 156 (61%) provided SSNs, 47 (18%) stated that they were not required to have SSNs, 41 (16%) did not provide SSNs, and 12 [*28] (5%) provided SSNs of other persons. ¹¹¹ The IRS sample was reduced thereby from 256 to 156. The latter number is 0.05% (5/100 of 1%) of all passports issued in calendar year 1988 ($156/[185,897 + 102,869] = 0.0005$).

On this extremely limited and unsoundly selected group of passport applicants between the ages of 22 and 65, the IRS came up with a 38.7% to 73.3% range of nonfilers among Americans who live abroad. ¹¹² The figure of 38.7% was based on the assumption that passport applicants within the age group, who stated that they were not required to have SSNs or who provided no SSNs, were in compliance with the tax laws. The IRS reached the 73.3% figure by assuming that none of those passport applicants complied with the tax laws. An intermediate figure of 53.1% was reached on the assumption that every passport applicant among the 256, whatever his response to the SSN question on the passport-application form, was required to file a tax return. ¹¹³

¹⁰⁸ Musselman, *supra* note 78, at 179.

¹⁰⁹ *Id.* at 180.

¹¹⁰ *Id.* at 180.

The obligation to pay income tax is a function of income, not age. People of *all* ages have taxable incomes. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, CONSUMER INCOME, SER. P-60, NO. 174, MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES: 1990 26-27, Table 8 (1991) (showing income by age brackets from age fifteen upward). The amounts earned by children younger than fifteen cannot be determined. The Census Bureau does not inquire about it, and the IRS does not correlate income-tax returns with age.

In 1990, children under the age of fourteen who were subject to the kiddie tax ([26 U.S.C. § 1\(g\)](#) (1988)) had § 1(g) taxable incomes of \$ 1,697,521,000. Letters from Robert A. Wilson, Technical Advisor, Statistics of Income Division, IRS, to Stephen Kruger (May 21 and Jun. 12, 1992) (on file with author) (unpublished preliminary, partial tabulation of kiddie-tax figures).

¹¹¹ *Musselman*, *supra* note 78, at 182.

¹¹² *Id.*

¹¹³ *Id.*

The conclusion is unpersuasive, unless one is willing to suspend disbelief in a review of a sample, selected on no known basis from a fraction of available data and arbitrarily minimized. The statistics of the IRS, like those of the GAO, are nonsense. The IRS did not make meaningful statements about Americans abroad, any more than the GAO did.

If credence is given somehow to the IRS presentation, the results do not support its contention that American taxpayers who live abroad evade payments of income taxes. The IRS decreed that over half of overseas passport-applicants did not have taxable incomes. Even assuming that 1.8 million Americans live overseas, the 58% ratio of incomeless people (333 [passport applicants younger than 22] + 26 [over 65] = 359; that number is 58% of 613) means that the maximum number of presumptive non-governmental *taxpayers* abroad is 749,160 (42% of 1.8 million). Closer to reality, passport-application statistics show that, at most, either 243,333 or 323,195 adults (including people over 65!) who are presumptive non-governmental *taxpayers* live in other countries. The number of *tax returns* has to be less than the number of presumptive *taxpayers*.¹¹⁴ The belief of the IRS (*mutatis mutandis* the GAO) in massive [*29] nonfiling falls flat on its face.

VI. SECTION 6039E IS UNCONSTITUTIONAL

In *Selective Service System v. Minnesota Public Interest Research Group*,¹¹⁵ the plaintiffs challenged a statute¹¹⁶ whereunder male students who refused to certify that they were in compliance with the registration provisions of the Military Selective Service Act¹¹⁷ were denied governmental higher-education financial assistance. The arguments were that the certification statute was a bill of attainder, and that the law forced the plaintiffs to incriminate themselves.¹¹⁸ Both arguments were rejected,¹¹⁹ but they have merit here.

The first contention against § 6039E is bill-of-attainder.¹²⁰ Under criteria established by the Supreme Court, a bill of attainder is legislation which designates an individual or a group of individuals, intends punishment or sets up a

¹¹⁴ In 1988, the IRS received 109,708,280 individual tax returns. Of these, 48,149,734 were joint returns and 1,750,047 were returns of married persons filing separately. An additional 11,303,325 people filed head-of-household returns. Surviving-spouse returns were filed by 94,408 people. the number of single-person tax returns was 48,410,766. INTERNAL REVENUE SERVICE, PUB. NO. 1304, INDIVIDUAL TAX RETURNS 1988 25, Table 1.3 (Rev. 9-91).

A joint return must be filed by a husband and wife, and a head-of-household return must be filed by an adult with at least one dependent. From this, it can be determined that the majority of returns represents two or more persons. (48,149,734 joint returns + 11,303,325 head-of-household returns = 59,453,059. That number is 54% of 109,708,280.) Married-filing-separately and surviving-spouse returns could represent more than one person. Thus, the percentage of tax returns which represent more than one person is slightly higher than 54%.

Joint returns, of themselves, show the error inherent in assuming that each tax return represents only one person. Of 49,024,758 couples (48,149,734 + [1/2 · 1,750,047]) eligible to file jointly, 98% (48,149,734/49,024,758) did so.

¹¹⁵ [468 U.S. 841 \(1984\)](#).

¹¹⁶ 50 U.S.C. § 462(f) (1988).

¹¹⁷ [50 U.S.C. § 453](#) (1988); Proclamation No. 4,771, 3 C.F.R. 82 (1981). The registration requirement was upheld in [Rostker v. Goldberg](#), [453 U.S. 57 \(1981\)](#).

¹¹⁸ [Selective Serv. Sys.](#), [468 U.S. at 845-46](#).

¹¹⁹ [Id. at 859](#).

¹²⁰ The restraint on the Congress is, "No Bill of Attainder . . . shall be passed." [U.S. CONST., art. I, § 9, cl. 3](#). The equivalent provision against states is, "No State shall . . . pass any Bill of Attainder . . ." [U.S. CONST. art. I, § 10, cl. 1](#).

At common law and under the Constitution, a bill of attainder is "a legislative condemnation to death without trial for either treason or felony, accompanied by corruption of blood." Raoul Berger, *Bills of Attainder: A Study of Amendment By the Court*, 63

qualification unrelated to fitness for an office or benefit, and is based on irremediable past conduct. ¹²¹ Statutory punishment is that which falls within historical legislative punishment, or is unrelated to a nonpunitive legislative purpose, or evinces a legislative intent to punish. ¹²²

Section 6039E is a bill of attainder. The law designates the group of **[*30]** passport applicants. ¹²³ Members of the group are intended for punishment under the tax laws. The disclosure requirement is based on a qualification (payment of income taxes) which is unrelated to holding a passport. The past conduct is irremediable, because nonfiling is tax fraud.

The punishment is within the historical scope of legislative punishment. Bills of attainder were retaliations, in legislative form, for real or imagined offenses against the sovereign, and imposition of taxes is an act of sovereignty. The required disclosure has no nonpunitive purpose. The IRS needed § 6039E information in order to locate alleged nonfilers and to enforce the tax laws against them. Section 6039E has no other function. The State Department has issued passports for decades without a demand for the SSN and foreign country of residence of each passport applicant. ¹²⁴ Further, the clear congressional intent was to seek out and punish Americans who allegedly transform overseas residence into a tax dodge.

Though § 6039E is a bill of attainder, one should not be sanguine that a successful bill-of-attainder argument can be made. It is instructive that, despite the judicially-expanded scopes of the bill-of-attainder clauses, United States courts have managed to invoke them only twelve times. ¹²⁵ One reason is that justices and judges strain to find statutes constitutional. ¹²⁶ The undue reluctance of the judiciary to give life to constitutional prohibitions is abetted by the Supreme Court, which arrogated unto itself the power to decide that which amounts to bill-of-attainder punishment. ¹²⁷ A case-by-case approach vitiates examination of legislation according to principles, and is an

CORNELL L. REV. 355, 356 (1978). Imposition of a lesser penalty is by a bill of pains and penalties. *Id.* at 357. Original intent notwithstanding, the Supreme Court takes the position that both bill-of-attainder clauses prohibit bills of pains and penalties. [Selective Serv. Sys., 468 U.S. at 852.](#)

Bill-of-attainder cases are collected in Annotation, [Supreme Court's Views As to What Constitutes a Bill of Attainder Under the Federal Constitution, 53 L. Ed. 2d 1273 \(1977\)](#). The earlier annotations are [What Constitutes Bill of Attainder Under the Federal Constitution--Federal Cases, 4 L. Ed. 2d 2155 \(1960\)](#), and [What Constitutes Bill of Attainder Under the Federal Constitution, 90 L. Ed. 1267 \(1945\)](#). Though the latter two annotations were superseded by the 1977 annotation, they remain sources of case law.

¹²¹ [Selective Serv. Sys., 468 U.S. at 847-50.](#)

¹²² *Id.*

¹²³ The class is not excessively large. See [In re Yung Sing Hee, 36 F. 437 \(C.C.D. Ore. 1888\)](#) (legislative bar to entry into United States by all Chinese laborers, as applied to United States citizens of Chinese descent, is bill of attainder).

¹²⁴ Though State Department passport-application forms have spaces for passport applicants' permanent addresses and mailing addresses, no law or regulation prohibits the individual, wherever he lives, from using his United States address as his permanent address for passport-application purposes. It is inconceivable that a failure or refusal to designate a mailing address is a ground for refusal to issue a passport.

¹²⁵ Note, *The Bill of Attainder: An Unqualified Guarantee of Process*, [50 BROOK. L. REV. 77, 78 n.3 \(1983\)](#) (listing twelve cases, of which only three are decisions of the United States Supreme Court striking down congressional statutes). A cynic might well wonder how a rarity of judicial courage can be a "guarantee of process," let alone an "unqualified" guarantee.

¹²⁶ [Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 850 \(1983\)](#).

¹²⁷ [Id. at 852.](#)

invitation to willfulness. ¹²⁸ **[*31]** Jesuitical argumentation would be necessary to convince the lawless United States judiciary that § 6039E is a bill of attainder.

The second contention against § 6039E is self-incrimination. Current judicial fashion is that the Fifth Amendment privilege applies to testimony, to testimonial or communicative evidence, and to a production demand which admits to existence, possession or authenticity of the thing produced, but not to incrimination based on the content or nature of that which is produced. ¹²⁹ A disclosure under § 6039E is made under legal compulsion to tell the truth, ¹³⁰ so it is testimonial or communicative evidence. The § 6039E response of the passport applicant is, in addition, an admission by him of the existence of his SSN and his possession of it, and of the authenticity of the number which he is required to disclose. In like manner, the passport applicant's response is an admission by him of the existence of his foreign residence and his possession of it, and of the authenticity of the address which he discloses. ¹³¹

The privilege against self-incrimination applies to § 6039E disclosures, because an SSN and a foreign residence thus revealed are the *sine qua non* of prosecution under the tax laws. The very purpose of the disclosure requirement is to ferret Americans abroad who supposedly have the benefit of citizenship without the detriment of income taxes, and to prosecute them for alleged tax evasion. Section 6039E information is not demanded for its content or nature, but for the computer-enhanced access to the individual which the information provides to the IRS. Disclosure by the individual of § 6039E information is the equivalent of his confession of tax delinquency. The information leads the IRS directly to the intentional nonfiling of one or more tax returns by, and to the whereabouts of, the delinquent taxpayer. When the IRS catches up with the taxpayer, severe criminal and civil penalties will be imposed on him.

The Fifth Amendment is not suspended by the zeal of the United States to collect taxes. The protection against self-incrimination is applicable in tax cases where there is a real possibility that the IRS investigation **[*32]** will lead to civil or criminal action against the taxpayer. ¹³² Not only the Fifth Amendment, but the Fourth Amendment as well, protect the passport applicant against disclosure of his SSN and foreign country of residence. ¹³³

¹²⁸ Cf. [Nixon v. Administrator of General Services, 433 U.S. 425 \(1977\)](#) (statute creating named class of one is not bill of attainder) and [News America Publishing, Inc. v. FCC, 844 F.2d 800 \(D.C. Cir. 1988\)](#) (statute creating an unnamed class of one implicates the congressional Bill of Attainder Clause). The court of appeals decided *News America* on First Amendment and Fifth Amendment grounds, but refused to address the bill-of-attainder contention presented by the plaintiff. [Id. at 804 n.8](#). The contention ought to have been met squarely by the court. The provision "strikes at Murdoch [the owner] with the precision of a laser beam" ([id. at 814](#)), so the contention was ripe for analysis and judgment under art. I, § 9, cl. 3 of the Constitution. One must conclude that the bill-of-attainder clauses are treated as step-children by the judiciary.

¹²⁹ [Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 554-55 \(1990\)](#). The cramped reading of the Fifth Amendment by the Supreme Court, in *Bouknight* and in other decisions, is a vast departure from original intent. As understood by the Framers, the constitutional protection could be invoked if the information intended to be elicited would be a "link in the chain of testimony." [United States v. Burr, 25 F. Cas. 38, 40 \(C.C. Va. 1807\)](#) (No. 14,692e).

¹³⁰ [18 U.S.C. § 1001](#) (1988). In the event § 6039E information is demanded by way of an IRS information return, the passport applicant has a similar obligation to be truthful. [26 U.S.C. § 7207](#) (1988).

¹³¹ See [In re Candiotti, 729 F. Supp. 840 \(S.D. Fla. 1990\)](#) (production of passport is testimonial act).

¹³² [United States v. Sharp, 920 F.2d 1167 \(4th Cir. 1990\)](#) (civil investigation); [United States v. Bohn, 890 F.2d 1079 \(9th Cir. 1989\)](#) (criminal investigation).

¹³³ See [Pennsylvania v. Muniz, 496 U.S. 582, 601 n.14 \(1990\)](#) (booking exception to *Miranda* does not apply if the demanded information would elicit incriminating admissions); [Lawson v. Kolender, 461 U.S. 352, 361 n.10 \(1983\)](#) (leaving open the questions whether, during a *Terry* stop, an individual has a Fourth Amendment expectation of privacy in his identity, and whether the Fifth Amendment privilege against self-incrimination applies to a demand for identification).

Another defense against § 6039E disclosure is the constitutional limitation against statutory conditions precedent for obtaining governmental benefits. In *Selective Service System*, the two rationales for upholding the certification provision were that the target groups (students and potential registrants) largely overlapped, and that scarce financial resources should be allocated to those who obey the law:

Conditioning receipt of Title IV aid on registration is plainly a rational means to improve compliance with the registration requirement. Since the group of young men who must register for the draft overlaps in large part with the group of students who are eligible for Title IV aid, the Congress reasonably concluded that § 12(f) would be a strong tonic to many nonregistrants.

Section 12(f) also furthers a fair allocation of scarce federal resources by limiting Title IV aid to those who are willing to meet their responsibilities to the United States by registering with the Selective Service when required to do so. ¹³⁴

As to the first *Selective Service System* rationale: Neither the IRS nor the GAO showed that the group of Americans resident abroad "overlaps in large part" with the group of nonfilers. The relationship cannot be shown, for place of residence has nothing to do with tax evasion.

The lack of relationship can be explained empirically. Americans who live and work overseas maintain their connections to the United States--houses, families, friends. These connections force adherence to the tax laws of the United States. Another practical consideration is that few Americans are wealthy enough to live without employment. The need to be productive, which is separate from the need to earn money, suffices in any event to keep people within the purview of the IRS. How many Americans would choose lifelong idleness *and* leave the United States permanently *and* give up all American investments *and* forego social-security benefits, solely to avoid IRS scrutiny? It is absurd to postulate [*33] that evading United States income taxes is the *raison d'être* of innumerable people.

Assuming *arguendo* that is so, an American who resides (with or without employment) in a foreign country does not necessarily escape the long arm of the American tax collector. The United States has tax treaties with numerous countries. ¹³⁵ Correlation of the list of tax-treaty countries with the State Department tally of 1.8 million Americans supposedly abroad ¹³⁶ shows that 735,817 (41%) of them reside in the eleven major tax-treaty countries. Add Mexico, and the number of Americans subject to tax-treaty income-tax reports increases to 991,014 (55%) of the 1.8 million. Even if the State Department guess is accepted, tax treaties suffice to keep track of the tax obligations of Americans who reside in foreign countries.

Tax treaties are supplemented by foreign tax laws, which encourage compliance by Americans with United States tax law. Americans who live in foreign countries are resident aliens there, so they pay local income taxes and are required to have income-tax clearances before they leave those countries. They cannot avoid foreign income-tax payments, so they might as well claim the amount paid as a credit against United States taxes. ¹³⁷ Local tax-reporting requirements also generate information which, even without a tax treaty, is reportable to the IRS. ¹³⁸ Foreign countries are not havens for American taxpayers.

¹³⁴ [Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 854-55 \(1984\)](#) (footnote omitted).

¹³⁵ INTERNAL REVENUE SERVICE, PUB. NO. 901, U.S. TAX TREATIES 29 (Rev. Nov. 1991) (listing 40 countries with which the United States has tax treaties). The major tax-treaty countries are Australia, Canada, China, France, Germany, India, Italy, Japan, New Zealand, Switzerland and United Kingdom. Tax treaties with many countries, including Israel, Mexico, and Russia, are awaiting ratification. *Tax Report*, WALL ST. J., June 10, 1992, at 1 (second item).

¹³⁶ Appendix 3, *supra* note 91.

¹³⁷ Wicker, *supra* note 92, at 98.

¹³⁸ The IRS receives information informally from countries which have no tax treaties with the United States. *Problem of Tax Return Nonfiling by Americans Living Abroad Before the Commerce, Consumer, and Monetary Affairs Subcommittee of the*

The extensiveness of official and unofficial tax-reporting systems leads to the realization that tax collection was the stalking horse for enactment of § 6039E. The policy motivation for the law was furtherance of the legislative plan whereunder SSNs have become the numerical designators of the national identity-cards of Americans.¹³⁹ It is of no moment [*34] that the United States has no identity-card law; in the computer age, no card is needed. Computers keep track of individuals through their SSNs, regardless that supposedly-free Americans do not carry identity cards in their wallets.

Concerns about transmutation of SSNs notwithstanding, the Congress rejected a proposal that the Privacy Act of 1974¹⁴⁰ include a prohibition against use by private individuals and entities of SSNs as personal identifiers.¹⁴¹ Restrictions on governmental use of personal data such as SSNs are undermined by a dozen major loopholes.¹⁴²

Enactments subsequent to the failed Privacy Act wove the SSN into a tight information net. Disclosure of SSNs is mandated or authorized under United States law, and authorized disclosures are made mandatory under state law, for many purposes. Among these are birth certificates;¹⁴³ United States taxes;¹⁴⁴ state taxes, welfare payments, driver licenses and motor-vehicle registrations;¹⁴⁵ crop insurance;¹⁴⁶ blood donations¹⁴⁷ welfare payments;¹⁴⁸ AFDC, medicare, unemployment insurance, food stamps and other welfare programs;¹⁴⁹ draft registration;¹⁵⁰ student loans¹⁵¹ and so on.

House Committee on Government Operations, 99th Cong., 1st Sess. 55 (1985) (Statement of James I. Owens, Acting Commissioner of Internal Revenue); IRS Responses to Subcommittee Questions Concerning the Service's Policies, Practices and Procedures for Deleting Overseas Nonfilers, *id.* at 204.

¹³⁹ The Secretary of Health and Human Services "shall take affirmative measures" to assign SSNs to aliens admitted for permanent residence in the United States; welfare recipients and their children; to everyone else, other than aliens not eligible to work in the United States; children below school age; and children upon their first enrollments in school. **42 U.S.C. § 405(c)(2)(B)(i)** (1988). *Cf.*, e.g., Gesetz uber Personalausweise (Law of Identity Cards), BGB1. I S. 548 § 1 (Apr. 21, 1986) (Germany) (every German 16 and older must apply for and obtain an identity card (*Personalausweis*) issued by one of the states of Germany under corresponding state law; an identity card must be displayed to an authorized public official on demand).

¹⁴⁰ [5 U.S.C. § 552a](#) (1988).

¹⁴¹ S. REP. NO. 1183, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6943-46.

¹⁴² [5 U.S.C. § 552a](#)(b), (j) (1988).

Protection of collected data must take into account the existence and ubiquitousness and power of computers. JOSEPH W. EATON, *CARD-CARRYING AMERICANS* (1986) is a thoughtful analysis of privacy problems in the computer age. Paul Schwartz, *Data Processing and Government Administration: The Failure of the American Legal Response to the Computer*, [43 HASTINGS L.J. 1321 \(1992\)](#) illuminates use of SSNs for welfare programs.

¹⁴³ **42 U.S.C. § 405(c)(2)(C)(ii)** (1988).

¹⁴⁴ [26 U.S.C. §§ 6109](#), 7701(a)(41) (1988).

¹⁴⁵ **42 U.S.C. § 405(c)(2)(C)(i)** (1988).

¹⁴⁶ **42 U.S.C. § 405(c)(2)(C)(iii)** (1988).

¹⁴⁷ **42 U.S.C. § 405(c)(2)(D)(i)** (1988).

¹⁴⁸ **42 U.S.C. § 405(c)(2)(E)** (1988).

¹⁴⁹ [42 U.S.C. § 1320b-7](#)(a)(1), (b) (1988).

¹⁵⁰ [50 U.S.C. APP. §§ 453](#)(b), 462(e) (1988).

¹⁵¹ **20 U.S.C. § 1091(a)(4)** (1988); [20 U.S.C. § 1092b\(a\)\(2\)](#) (1988) (National Student Loan Data System to include the borrowers' SSNs).

It would have been poetic to conclude the listing with death certificates, for it was begun with birth certificates. There is no opportunity to do so; the *coup de grace* has not yet been mandated or authorized by United States law. The information is demanded nonetheless.¹⁵²

[*35] (Not all mandatory and authorized uses can be located. The indices (whether published publicly or privately) to the United States Code and to the Code of Federal Regulations do not list SSN mandates and authorizations as such. The same limitation applies to collections of laws and regulations of states, the District of Columbia, and territories and possessions of the United States. Further, a computer search of all this material would not turn up, for example:

(1) Uncodified laws¹⁵³ and court rules;¹⁵⁴

(2) Any United States law which authorizes a state which issues identification cards to ask for applicants' SSNs;¹⁵⁵ or which permits a state to demand the SSNs of applicants and licensees under professional and occupational license laws;¹⁵⁶ or allows a state to utilize SSNs for verification of licensure or examination status in relation to national examinations;¹⁵⁷

(3) Any law which conditions negotiation of a check on disclosure of the maker's SSN;¹⁵⁸

¹⁵² See, e.g., California Certificate of Death (VS-11 [Rev. 3-89]) (Question 13 asks for decedent's SSN); New York State Dep't of Health Certificate of Death (DOH-1961 [VS-60] [9/91]) (Question 12 seeks decedent's SSN); N.Y. PUB. HEALTH L. § 4161(1) (Consol. Supp. 1992) (eff. Apr. 1, 1993) (certificate of fetal death to include, *inter alia*, SSN of mother, unless otherwise requested by her). How many people have the sophistication to refuse disclosure of information demanded on governmental forms?

Death certificates are hardly the first instances of lawless bureaucratic activity. Within a month of the entry of the United States into World War II, John Kenneth Galbraith and Harold Leventhal issued an order forbidding all sales of new tires, and directing dealers to make inventories of tire stocks. Neither governmental subaltern was authorized to do so. JOHN KENNETH GALBRAITH, *A LIFE IN OUR TIMES* 153-54 (1981).

¹⁵³ E.g., Pub. L. No. 98-164, § 122(d)(1), [97 Stat. 1024 \(1983\)](#) (disclosure of SSN to obtain repatriation loan from State Department).

¹⁵⁴ E.g., [FED. R. BANKR. P. 1005](#) (1992) (individuals who file bankruptcy petitions required to disclose their SSNs). Rule 1005 has no statutory grounding in Title 11; it was promulgated by the Supreme Court under the general rule-making authority of [28 U.S.C. § 2075](#) (1988).

¹⁵⁵ *But see*, e.g., [CAL. VEH. CODE § 1653.5](#) (Deering Supp. 1992) (applicant for California identification card must reveal SSN). The rationale for the California law is bureaucratic convenience. California identification cards are issued by the Department of Motor Vehicles.

¹⁵⁶ *But see*, e.g., [CAL. BUS. & PROF. CODE §§ 29.5, 30](#) (Deering Supp. 1992); [CAL. INS. CODE § 1666.5](#) (Deering Supp. 1992); [CAL. REV. & TAX. CODE § 19276](#) (Deering Supp. 1992); and [CAL. WELF. & INST. CODE § 11350.6\(h\)-\(n\)](#) (Deering Supp. 1992). SSNs are collected under the guise of aiding tax, spousal-support and child-support collections, though merely having a license has nothing to do with fulfillment of those obligations. Also, the statutes exempt professional corporations, which are taxpayers, from providing federal identification numbers as a condition of obtaining and holding licenses. Therefore, the aim of the laws is to obtain SSNs as personal identifiers, not to facilitate collections.

¹⁵⁷ *But see*, e.g., [CAL. BUS. & PROF. CODE § 30\(j\)](#) (Deering Supp. 1992). Here, too, the law was motivated by convenience, not legality.

¹⁵⁸ *But see*, e.g., LOS ANGELES COUNTY FISCAL MANUAL § 1.7.1 (Rev. 4/91); LOS ANGELES COUNTY SHERIFF, MANUAL OF POLICY AND PROCEDURES, vol. 3, ch. 5, § 3-05/060.05 (09-01-90); LOS ANGELES COUNTY MARSHAL, MANUAL OF RULES AND REGULATIONS § 301.10 (Revised 1-1-91). The rules generally require the maker of a check to show his driver's license and to disclose his SSN.

[*36] (4) Any law which supports use by the Defense Department of SSNs as military personnel numbers; ¹⁵⁹

(5) Any law which requires arrestees or other persons to disclose their SSNs when their fingerprints are taken. n160)

As to the seco^d *Selective Service System* rationale: No "scarce federal resources" are impinged. There is no shortage of passports as there is of tax dollars for governmental loans and grants. Moreover, a passport is neither largesse of the Executive nor a condition-laden program enacted by the Congress. Overseas travel is a natural right, ¹⁶¹ a common-law liberty, ¹⁶² and a freedom protected by the Due Process Clause. ¹⁶³ Passport holders pay for their passports, ¹⁶⁴ and have paid for them figuratively in numerous wars.

The constitutional freedom to travel overseas is not absolute, but departure from the United States is nonetheless "more than a mere privilege accorded to American citizens. It is a right, an attribute of personal liberty, which may not be infringed upon or limited in any way unless there be full compliance with the requirements of due process." ¹⁶⁵ Therefore, the freedom may not be restricted for any old reason which the United States dreams up. To hold otherwise is to subject the freedom **[*37]** of travel to governmental policy whims. ¹⁶⁶

The administrative prerequisite of disclosure of an SSN lacks statutory authority. [CAL. GOV'T CODE § 6157\(a\)](#) (Deering Supp. 1992) requires governments to accept checks as payments of obligations, "if the person issuing [!] the check furnishes [!] to the person authorized to receive payment [unspecified] satisfactory proof of residence in this state," and if the check is drawn on a bank located in California. The ostensible authority for the Marshal's rule is [CAL. CIV. CODE § 1725\(c\)\(1\)](#) (Deering Supp. 1992), which permits the payee to require "the production of reasonable forms of positive identification . . . as a condition of acceptance of a negotiable instrument." Letter from Lt. Jay Zuanich, Legal Affairs Officer, Los Angeles County Marshal, to Stephen Kruger (Aug. 24, 1992) (on file with author). If an SSN is now positive identification, it is so only because the United States has gone the way of civil-law jurisdictions, and imposed an identity-card requirement upon its citizens.

¹⁵⁹ *But see, e.g.*, Memorandum, Discontinuance of Military Service Numbers As Personnel Identification (Jan. 30, 1967); Department of the Army, Circ. No. 600-42 (Oct. 27, 1967); and Department of the Army, Circ. No. 600-63 (May 16, 1969). These documents and others authorized substitution of SSNs for military-service numbers. Letter from W. M. McDonald, Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense, Dep't of Defense, to Stephen Kruger (Sept. 17, 1992) (Freedom of Information Act response) (on file with author). None of the documents cites legal authority for use of SSNs for that purpose.

^d *But see, e.g.*, Federal Bureau of Investigation fingerprint cards (FD-249 [Rev. 12-29-82]; FD-258 [12-29-82]) (space for fingerprinted person's SSN not marked "Mandatory" or "Voluntary"; reverse has paraphrase of § 7, but no particulars); California fingerprint card (BID-7 [5-90]) (space for fingerprinted person's SSN marked "Voluntary - For ID Only"; no other § 7 information; no reference to § 7); New York fingerprint cards (DCJS-2 [4/90]; DCJS-3 [4/88]; DCJS-4 [4/88]; DCJS-6 [1/89]) (space for fingerprinted person's SSN not marked "Mandatory" or "Voluntary"; no § 7 information; no reference to § 7).

¹⁶¹ [Schachtman v. Dulles, 235 F.2d 938, 941 \(D.C. Cir. 1955\).](#)

¹⁶² MAGNA CARTA, cls. 41, 42 (1215); 1 WILLIAM BLACKSTONE, COMMENTARIES *265-66; Reginald Parker, *The Right To Go Abroad: To Have and To Hold a Passport*, 40 VA. L. REV. 853, 866-68 (1954).

¹⁶³ [Kent v. Dulles, 357 U.S. 116, 125-26 \(1958\); Agee v. Baker, 753 F. Supp. 373, 386 \(D.D.C. 1990\).](#)

¹⁶⁴ The fee for a passport issued to an adult is \$ 55.00. A passport issued to a minor costs \$ 30.00. The execution fee is \$ 10.00. [22 C.F.R. § 51.61 \(1992\)](#). There are a few exceptions. [22 C.F.R. §§ 51.62-51.66 \(1992\)](#).

The fee for a service such as issuance of a passport has to cover the cost of the service. Office of Management and Budget, Circular A-25 (1959); Transmittal Memorandum No. 2 (1974). Thus, the 1992 fees are higher than the 1991 fees. See [22 C.F.R. § 51.61 \(1991\)](#) (the ten-year-passport fee was \$ 35.00; the five-year-passport fee was \$ 20.00; the execution fee was \$ 7.00).

¹⁶⁵ [Boudin v. Dulles, 136 F. Supp. 218, 220 \(D.D.C. 1955\), remanded for hearing, 235 F.2d 532 \(D.C. Cir. 1956\).](#)

The State Department claims for itself the power, on numerous grounds, to refuse to issue a passport to an individual, based on the circumstances of the individual,¹⁶⁷ except for direct travel to the United States.¹⁶⁸ Only one of the grounds has been judicially tested.¹⁶⁹ By what right does the State Department maintain multi-faceted lists of circumstances under which it denies passports to applicants whose United States nationality is undisputed?

1. Denying a passport is the equivalent of prohibiting an individual from leaving the country. Only a court of equity may issue a writ of *ne exeat*,¹⁷⁰ and the writ may issued only under exceptional [*38] circumstances.¹⁷¹

¹⁶⁶ See, e.g., [Aptheker v. United States, 378 U.S. 500 \(1964\)](#) (unconstitutional to criminalize application for passport by member of subversive organization); [Kent v. Dulles, 357 U.S. 116 \(1958\)](#) (impermissible denial of a passport on grounds of Communist Party affiliation and association with party members); [Perkins v. Elg, 307 U.S. 325 \(1938\)](#) (improper denial of passport for acquisition of foreign nationality); [Woodward v. Rogers, 344 F. Supp. 974 \(D.D.C. 1972\)](#), *aff'd w/o op.*, [486 F.2d 1317 \(D.C. Cir. 1973\)](#) (unauthorized oath of allegiance as prerequisite to obtain passport); [Kraus v. Dulles, 235 F.2d 840 \(D.C. Cir. 1956\)](#) (unlawful means test to obtain passport); [Nathan v. Dulles, 129 F. Supp. 951 \(D.D.C.\)](#), *appeal dismissed as moot*, [225 F.2d 29 \(D.C. Cir. 1955\)](#) (delay of 2 1/2 years in processing passport application; State Department contended, based on asserted confidential information, that issuance of passport to Nathan would be contrary to the best interests of the United States; when ordered by court to hold administrative hearing, State Department issued passport); [Bauer v. Acheson, 106 F. Supp. 445 \(D.D.C. 1952\)](#) (passport revoked, without hearing, while Bauer was abroad; ground was unspecified activities contrary to best interests of the United States; State Department would validate passport only for direct travel by Bauer to the United States; *held*, State Department lacked authority to unilaterally revoke passport). *Cf.* [Bauer to Haig v. Agee, 453 U.S. 280 \(1981\)](#) (State Department revoked Agee's passport, prior to hearing, while Agee was abroad, for causation of serious damage to American security or foreign policy; Agee conceded, for purposes of litigation, the truth of the allegations by the State Department); *cf.* [22 U.S.C.S. § 2721](#) (Law. Co-op. Supp. 1992) (enacted 1991) (passport may not be refused, restricted or revoked for exercise abroad of First Amendment rights).

The law found unconstitutional in *Aptheker*, [50 U.S.C. § 785](#) (1988), has never been repealed. Despite *Kraus*, the State Department has a means test for issuances of certain passports. [22 C.F.R. § 51.70\(b\)\(3\) \(1992\)](#) (parent of minor who applies for passport must approve of its issuance, and must agree to reimburse the United States in the event it advances money for return of minor to the United States).

¹⁶⁷ [22 C.F.R. §§ 51.70, 51.71 \(1992\)](#). Passports of all passport holders as a class may not be restricted, except for travel to a country with which the United States is at war, in which there are armed hostilities, or wherein there is a public-health or physical-safety danger. [22 U.S.C. § 211a](#) (1988); [22 C.F.R. § 51.73 \(1992\)](#). Violation of an area restriction is not a crime. [United States v. Laub, 385 U.S. 475 \(1967\)](#).

¹⁶⁸ [22 C.F.R. § 51.70\(a\) \(1992\)](#); [22 C.F.R. § 50.9 \(1992\)](#).

¹⁶⁹ [Haig v. Agee, 453 U.S. 280 \(1981\)](#), *approving* [22 C.F.R. § 51.70\(b\)\(4\) \(1992\)](#) ("The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States").

¹⁷⁰ The writ prohibits the named individual from leaving the jurisdiction. [Elkay Steel Co. v. Collins, 141 A.2d 212, 215-16 \(Pa. 1958\)](#). Brief histories of the writ are to be found in [Elkay Steel Co. and National Auto. & Cas. Ins. Co. v. Queck, 405 P.2d 905, 909-10 \(Ariz. Ct. App. 1965\)](#). Texts include JOHN BEAMES, A BRIEF VIEW OF THE WRIT OF NE EXEAT REGNO (1821) and 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 685-93 (1836).

The jurisdiction in which the writ is issued is indicated by the ablative added to the name of the writ. Thus, the United Kingdom styles the writ *ne exeat regno* ("lest he leave the kingdom"). Canadian provinces and Australian states use, and the thirteen American colonies and provinces used to use, *ne exeat provincia* or *colonia* ("lest he leave the province or colony"). The term in the United States and its states is *ne exeat republica* ("lest he leave the republic").

Ne exeat may not be translated "do not leave." Classical Latin forms a negative command with *noli* or *nolite* plus infinitive. Letter from William F. Rickenbacker to Stephen Kruger (Dec. 31, 1992).

2. Assuming for a moment the administrative equivalent of a judicial writ, the United States would have the initial burden of proof (clear entitlement to relief) and the initial burden of going forward.¹⁷² The State Department, however, claims the right to deny a passport "in any case in which the Secretary of State determines or is informed by competent authority" that the passport applicant is within [22 C.F.R. § 51.70](#) or [§ 51.71](#).¹⁷³ Neither section prohibits a unilateral determination; defines "competent authority;" imposes the evidentiary burdens on the State Department; or applies high standards to the case which the State Department must make.

3. Enacting the provisions of §§ 51.70 and 51.71 would solve the problem of lack of State Department authority by creating statutory bases for issuance by United States district courts of *ne exeat* writs, but the legislation would not cure the inherent wrong. Judicial action notwithstanding, the constitutional liberty to leave the United States would be undone by numerous legislative exceptions to it.

If the State Department should have discretion to deny a passport to a United States national, that discretion ought to be carefully tailored.¹⁷⁴ It could be argued, for example, that parolees should be denied passports. If so, the restriction of travel is rational because it is narrow--it would apply only to criminals. Everyone who refrains from crime is unaffected by a law which forces a paroled convict to remain within the jurisdiction of the court. Also, the law would apply only to certain criminals. The parole condition of loss of freedom to travel would be imposed only for a [*39] severe crime, such as a felony punishable by many years of imprisonment. Not least, denial of the freedom to travel abroad would be temporary. It would hinge on the parole term, the period of which is set by law. None of these considerations applies to the involuntary and baseless § 6039E requirements, or to the permanent use by governmental agencies of personal data collected thereunder.

That a legal prerequisite must be rational is not limited to governmental giveaways and to parole programs. *Every* governmental condition is constitutionally required to be germane to the intended goal, to prevent arbitrary exercise of power. In *Nollan v. California Coastal Commission*,¹⁷⁵ the issue was whether the commission could condition the building of the Nollans' house on their granting of an easement. Were the easement imposed and granted, the public would have been able to walk parallel to the ocean between a public park north of the Nollans' property and a public beach south of it. The park, the Nollans' property and the beach were all beach-front properties with ocean views.

Some cases refer to the writ in variant terminology, such as *ne exeat regnum*. A phrase of that sort is "a first-year Latin scholar's howler." It might be a judge's attempt "to recall some dimly illumined law-phrase from his youth, an otherwise innocent youth, free of such baggage as the linguistic heritage of our culture." Letter from William F. Rickenbacker to Stephen Kruger (Dec. 15, 1992).

¹⁷¹ [United States v. Shaheen, 445 F.2d 6, 10 \(7th Cir. 1971\)](#) (Stevens, J.); [Elkay Steel Co. v. Collins, 392 Pa. 441, 444-46, 141 A.2d 212, 215-16 \(1958\)](#); [Felton v. Callis, \[1969\] 1 Q.B. 200, 211-12](#). One reason for the strict approach is that issuance of a writ impinges on the constitutional liberty to travel abroad. [D. Ginsburg & Sons, Inc. v. Popkin, 285 U.S. 204, 209 \(1932\)](#); [Shaheen, 445 F.2d at 10](#).

¹⁷² [Shaheen, 445 F.2d at 8-10](#).

¹⁷³ [22 C.F.R. §§ 51.70\(a\), 51.71\(a\) \(1992\)](#).

¹⁷⁴ There is dictum that the State Department has limited authority to deny passports to individuals. [Kent v. Dulles, 357 U.S. 116, 127-28 \(1958\)](#) (narrow ground of illegal activity); [Magnuson v. Baker, 911 F.2d 330, 333-34 \(9th Cir. 1990\)](#) ("exceptional grounds such as fraud or misrepresentation"). These grounds, if validated, would be in addition to the grounds of lack of entitlement and damage to United States national security or foreign policy.

¹⁷⁵ [483 U.S. 825 \(1987\)](#).

Had the Nollans been required to simply grant an easement, the taking would have been obvious.¹⁷⁶ The question on appeal was "whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."¹⁷⁷ There is no taking if the regulation substantially advances a legitimate state interest.¹⁷⁸ The Court assumed, for the sake of argument, that public viewing of the ocean was a legitimate state interest, and that a ban on erecting a house on the Nollans' property would have substantially advanced that interest. If so, the commission could allow the Nollans to build a house on the condition that a public viewing-area be set aside on the property. The condition would be lawful because it serves the same purpose as the outright ban. Whether by way of a building ban or by way of a viewing area, the public would be able to look at the ocean from the Nollans' property.¹⁷⁹

Even with the major assumptions concerning the so-called visual access, the Court held that the easement condition was a taking because the condition bore no relationship to the asserted state interest. Neither those on the beach nor those driving by needed the lateral easement to make use of the beach.¹⁸⁰ A condition which abridges property rights must *substantially* advance a legitimate state interest, lest the abridgement be imposed under the guise of the police power to avoid payment of [*40] just compensation.¹⁸¹

The Court gave an example of a non-germane condition:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$ 100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a \$ 100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.¹⁸²

The conclusion of law was, "In short, unless the permit condition serves the *same* governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion'."¹⁸³

Nollan applies to passports because both eminent domain and the freedom to travel abroad are subject to Fifth Amendment evaluation. Section 6039E does not meet the *Nollan* standard, because personal information demanded under the law is intended for enforcement of the tax laws. In no way do § 6039E disclosures advance, let alone substantially advance, the governmental interest in issuing passports only to United States nationals. Having an SSN proves nothing, because an alien, resident or non-resident, may apply for and obtain an SSN,¹⁸⁴

¹⁷⁶ [Id. at 831.](#)

¹⁷⁷ [Id. at 834.](#)

¹⁷⁸ *Id.*

¹⁷⁹ [Id. at 836.](#)

¹⁸⁰ [Id. at 838.](#)

¹⁸¹ [Id. at 841.](#)

¹⁸² [Id. at 837.](#)

¹⁸³ *Id.* (emphasis added).

and there is no nexus between residence and nationality. The condition precedent of disclosure to the IRS of one's SSN and foreign country of residence (or, as the State Department and the IRS would have it, one's name, SSN, date of birth and mailing address) in order to obtain a passport, which is the legal prerequisite to international travel, imposes an unrelated condition on a necessity. Section 6039E is not valid legislation, but is "an out-and-out plan of extortion" of personal information.

It does not matter that a passport is not withheld from an individual who does not comply with § 6039E, because the penalties for not complying are severe. Five hundred dollars is collectible by the IRS from the passport applicant in the same manner, routine or draconian, as is any other money due under the Internal Revenue Code. Enforcement pursuant [***41**] to [26 U.S.C. § 7203](#) and other provisions might be sought. The failure to disclose an SSN could cause a passport-applicant's name and other identifying information to be placed on a State Department security list,¹⁸⁵ transferred to the watch list of the Customs Service, and added to the tax-protesters list of the IRS.¹⁸⁶

The Customs Service watch list was discussed by IRS officials. They were questioned at the Hearing by the subcommittee chairman concerning Americans abroad who tell the IRS to "go fly a kite."¹⁸⁷ The Director of the Foreign Affairs District observed that the individual's tax account remains open and the statute of limitation is tolled.¹⁸⁸ The Acting Commissioner added:

I have one other point I want to make on this, Mr. Chairman. When we are unable to locate the person in a foreign country, we have a system where [*sic*] we do work with, it's called the Treasury Enforcement Communications System. It is basically run by the Customs Service. So, we enter the name in that inventory, in that data base. Then when a U.S. citizen whose name is in there returns to the country, we are notified by Customs where that person came into the country and how long they will be here and where their address will be when they come in, and that sort of thing. So, we get an immediate alert. If it's one that told us to go fly a kite, and in fact they take, instead of a kite, they come back on a plane, we do know when they come back in. We follow up on those.¹⁸⁹

The extortion inherent in the threat of the placement of one's name on a Customs Service list or on a State Department list or on an IRS list would give pause to any person. The prospect of being of particular interest to officials in all three agencies would affect the heartbeat of even the stoutest defender of his legal rights.¹⁹⁰

¹⁸⁴ [Rev. Proc. 63-22, 1962-2 C.B. 755.](#)

¹⁸⁵ [22 C.F.R. § 171.32 \(1992\)](#) (specifying record systems exempt from disclosure).

¹⁸⁶ The rules for IRS dealings with tax protesters are delineated in 6 INTERNAL REVENUE MANUAL - ADMINISTRATION (CCH) § 9383.13 (p. 28,205) (1992); 1 INTERNAL REVENUE MANUAL - AUDIT (CCH) § 4231(11)10 - (11)60-3 (pp. 7249-7 to 7249-64) (1992); and 2 INTERNAL REVENUE MANUAL - AUDIT (CCH) § 4293 (pp. 7311-18 to 7311-35) (1992).

¹⁸⁷ Problem, *supra* note 4, at 89.

¹⁸⁸ *Id.* (Response of Thomas J. Clancy).

¹⁸⁹ *Id.* at 89-90 (Response of James I. Owens).

¹⁹⁰ The State Department, the Customs Service and the INS were directed to "develop a comprehensive machine-readable travel and identity document border security program that will improve border entry and departure control through automated data capture of machine-readable travel and identity documents." Pub. L. No. 100-690, § 4604(a)(1), **102 Stat. 4289 (1988)**, reprinted in [8 U.S.C. § 1103](#) note (1988). The term "machine-readable . . . identity documents" suggests that *any* type of document which identifies a person and is computer-compatible could be entered into the *comprehensive* data-capture system.

Driver's licenses, credit cards, identification cards and library cards are examples of the many kinds of identity documents which tie into one computer or another. All qualify for input into the § 4604 system. A wide view of the scope of the system is fortified by the requirement that the three governmental units "shall ensure that *at least* the following documents shall be integrated into the program and be machine-readable: border crossing cards; alien registration [cards]; pilots licenses; passports; and visas." *Id.*

[*42] The brave (or foolhardy) soul who nonetheless refuses to supply § 6039E personal information cannot find out whether his omission causes official interest in him. All governmental agencies make full use of Freedom of Information Act exemptions.¹⁹¹ The individual under investigation has to await a communication (whether a letter or a summons and complaint or a grand jury *subpoena duces tecum* or an arrest warrant) from the governmental agency to learn that he is *it*.

The § 6039E requirement is constitutionally infirm on a broader ground: The law transcends the delegated powers of the United States. The only purpose of the requirement is to catch Americans resident abroad who don't pay taxes. The congressional intention is shown, among other ways, by its titling of TRA § 1234, under which § 6039E was added, "Foreign Compliance Provisions." Therefore, § 6039E should have been tailored to cover only those who show on their passport applications that they reside overseas. The imposition of § 6039E requirements on millions of passport holders,¹⁹² to catch a handful of people who may not be filing income-tax returns, on the outside chance that a fraction of supposed nonfiling expatriates may owe taxes on incomes in excess of the amounts which are excludable and deductible, is use by the Congress of a cannon to shoot a fly which doesn't exist.

A legislative response to a chimerical problem offends the Constitution because the response is an attribute of unlimited power. The United **[*43]** States is a government of delegated powers.¹⁹³ The American theory is in sharp contrast to the British theory of unlimited legislative power. In the United Kingdom, Parliament is absolute.¹⁹⁴ It has authority to make, modify and repeal laws of any kind.¹⁹⁵ The legislative power is unhindered by

§ 4604(a)(4) (emphasis added). The vague phrase "at least" sets a minimum, and invites bureaucrats to set the sky as the maximum.

"The border security program . . . shall include an integrated cooperative data exchange system." *Id.* § 4604(a)(3). Its purpose is to "incorporate law enforcement data on narcotics traffickers, terrorists, convicted criminals, fugitives, *and others* currently documented in the Lookout Systems of all three agencies and departments." *Id.* (emphasis added). Outside contributors to the State Department/Customs Service/INS system are the Drug Enforcement Administration, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms, the IRS, the Federal Aviation Administration, the United States Marshals Service and the Coast Guard. *Id.* § 4604(b).

The upshot will be free trade in data, because the statute speaks of "an integrated cooperative data *exchange* system." *Id.* § 4604(a)(3) (emphasis added). Though the purpose of the system is border control, nothing in the uncodified law prohibits the State Department or the Customs Service or the INS from sending data *to* outside contributors. Worse, the law does not limit data usage to *United States* departments and agencies.

Do governmental computers give due regard to concerns about ebbs and flows of oceans of personal information? Bureaucrats never do.

¹⁹¹ See, e.g., [31 C.F.R. § 1.36](#) (pp. 90-97) (1992) (exempting the Treasury Enforcement Communications System and other Customs Service records); [22 C.F.R. § 171.32\(i\)](#) (1992) (exempting the State Department systems of records, including Consular Service and Assistance Records, Overseas Records and Passport Records); [31 C.F.R. § 1.36](#) (pp. 85-90) (1992) (exempting IRS records, such as the Treasury Enforcement Communications System and the Overseas Compliance Projects System).

¹⁹² The number of valid regular passports was estimated by the State Department to be both 30 million (September 16 Letter, *supra* note 104) and 34 million (November 20 Letter, *supra* note 105). If the State Department does not know the number of valid regular passports, the issuances of which are under its exclusive control, how would it know the number of Americans abroad, over whom it has no control?

¹⁹³ [U. S. CONST. art. I, § 1](#); [Martin v. Hunter's Lessee, 14 U.S. \(1 Wheat.\) 304, 326 \(1803\)](#); [Youngstown Sheet and Tube Co. v. Sawyer, 103 F. Supp. 569, 573](#) (D.D.C.), *inj. stayed*, [197 F.2d 582](#) (D.C. Cir.), *aff'd*, [343 U.S. 579 \(1952\)](#); [United States v. Tiede, 86 F.R.D. 227, 234](#) (U.S. Ct. for Berlin 1979) ("Everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution.").

¹⁹⁴ 8 HALSBURY'S LAWS OF ENGLAND, *Constitutional Law* P811, at 531 (4th ed. 1974).

delegated power, reserved power, federalism, due process, equal protection, *ex post facto*, bill of attainder, 196 comity or any other legal factor. A barrister may not argue that an Act of Parliament is unconstitutional. 197 The classic formulation of legislative omnipotence is, "It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman." 198

American constitutional theory does not permit the Congress to legislate in every manner on every subject. Though the power of the Congress with respect to United States passports and to United States taxation is plenary, the means (§ 6039E) is inappropriate and not plainly adapted to its purported goal; the end (impingement of international travel) is illegitimate, because its premise is unlimited legislative authority. 199 For example, Parliament could prohibit people from running fifteen miles an hour on public ways, though there is no demonstrable instance of unsafe sidewalk speed. 200 The prohibition would be *ultra vires* to the Congress, because irrational legislation undermines the concept of constitutional restraint.

Absent legislative restraints, mandatory registration of Americans could be validly legislated. The chairman of the subcommittee asked a participant, "You think that registration of some kind--I mean [*44] mandatory registration of people traveling abroad, people living abroad could not be somewhat [sic] instituted?" 201 The question reflects the extent to which the Congress has lost sight of itself as a creature of the Constitution, and as an institution subject to its limitations. Mandatory registration as a prerequisite to traveling or living elsewhere is a pass law. To the Congress, however, no means is excessive or inherently illegal, and liberty is not too great a price to pay for additional tax revenue.

The participant replied:

Possibly, sir. I definitely think that IRS, the subcommittee, and other Federal agencies should really look at how IRS could get better information on individuals traveling or living abroad.

From a pure tax administration standpoint, I would answer your question, definitely, yes, that IRS should have that kind of information. Beyond a pure tax administration standpoint, though, you do get into some privacy implications, this, that, and the other. I think those issues should really be pursued in depth before legislation would [sic] be enacted. 202

No privacy implication, neither this nor that nor the other, was considered by the Congress, and no privacy implication kept the Congress from enacting § 6039E. The IRS stated expressly, "As the data base of Americans

¹⁹⁵ A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-85 (10th ed. 1959).

¹⁹⁶ In England, the last act of attainder was passed in 1746. Its victims were the Earl of Kellie and others. 34 HALSBURY'S LAWS OF ENGLAND, *Parliament* P1312, at 522, n.1 (4th ed. 1980). The last act of pains and penalties was the unsuccessful one, in 1820, against Queen Caroline. *Id.* n.2. Parliament is permitted, with the assent of the King (or Queen), to reverse an attainder and the punishment inflicted. *Id.* at P1313. This was last done in 1916. *Id.* at P1313, n.2.

¹⁹⁷ DICEY, *supra* note 195, at 60-63.

¹⁹⁸ DICEY, *supra* note 195, at 43 (quoting De Lolme's aphorism).

¹⁹⁹ See [McCulloch v. Maryland, 17 U.S. \(4 Wheat.\) 316, 421 \(1819\)](#) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the constitution, are constitutional."); Antonin Scalia, *Originalism: the Lesser Evil*, [57 UNIV. CIN. L. REV. 849, 852-53 \(1989\)](#).

²⁰⁰ The fastest official running speeds are 26.95 m.p.h. for a man (Carl Lewis) and 24.58 m.p.h. for a woman (Florence Griffith Joyner). The runs were over short distances. GUINNESS BOOK OF WORLD RECORDS 766 (1992). A marathon run in 2 1/2 hours is accomplished at an average speed of 10.5 m.p.h. An ordinary person walks about 4 m.p.h., and runs not much faster.

²⁰¹ Problem, *supra* note 4, at 40. The question was asked of Johnny Finch of the GAO.

²⁰² *Id.*

applying for passports from [sic] abroad is built, IRS should be able to better determine the number and location [sic] of Americans resident abroad." ²⁰³ Thus, § 6039E, as implemented, is the odious mandatory-registration provision which the chairman of the subcommittee advocated. The purpose of § 6039E is tax collection, not "information concerning resident status" ²⁰⁴ and not issuance of passports. Were there truth in legislation, the title of the section would have reflected its purpose, and a preamble would have revealed the pernicious potential of § 6039E as a springboard to more frequent reporting and to additional reportable information.

VII. CONCLUSION

Section 6039E is a draconian solution to a non-existent problem. Paranoia, induced by the uncontrolled addiction of the United States for revenue, explains the unfounded governmental belief that untold tens of thousands of Americans who live abroad do not file income-tax returns, and that the amount of revenue lost thereby is significant. The law is a [*45] desperate effort by the Congress, an institution in massive denial of its financial irresponsibility, to increase the tax take by any means, however uncertain or marginal the result.

The requirements of § 6039E curtail the natural rights and common-law liberties and constitutional freedoms to travel abroad, to live outside the United States and to choose one's domicile. The law is also another long step on the road away from American civic and political values. The United States has trodden that road for sixty years, and too much distance along it has been covered. It was the departure of the Republic from its heritages which made § 6039E possible.

Formerly, the United States was a beacon of liberty for all mankind. America, which once aspired to be "as a city upon a hill," ²⁰⁵ has caused itself to decay into a Sodom of socialism and a Gomorrah of governmental regulations. Sodom and Gomorrah (along with Admah and Zeboyim) were destroyed for the sins of their inhabitants. ²⁰⁶ Nineveh, in contrast, was spared because its people perceived the errors of their ways and returned to the path of righteousness. ²⁰⁷

However much current law exceeds the constitutional limits set by the Framers, it is not yet too late to redeclare, return to and reimplement the values which legitimize the United States. The infirmities of § 6039E are manifest, and sufficient for a judicial determination that the "reform" enacted by the TRA is unconstitutional.

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²⁰³ Musselman, *supra* note 78, at 180. United States passports are not applied for *from* abroad. The application is made at, and the passport is issued by, the embassy or consulate.

²⁰⁴ [26 U.S.C. § 6039E](#), title of section (1988).

²⁰⁵ John Winthrop, *A Modell of Christian Charity* (1630), in VII COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 31, 47 (3d Ser. 1838). The text is a wondrous homily delivered by Winthrop aboard the *Arbella*, en route from England to Massachusetts-Bay.

²⁰⁶ *Genesis* 13:13, 18:16-19:28; *Deuteronomy* 29:23.

²⁰⁷ *Jonah*, ch. 3.