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State Department puts "X" passport applicants in limbo

The US State Department is withholding passports from some US citizens, effectively denying them the ability to leave or return to the US, without any basis in law or regulations.

Multiple [news](#) outlets have [reported](#) that the State Department has ordered its staff in the US and abroad to "[suspend](#)" processing of all pending applications for new or renewal US passports or passport cards with an "X" gender marker.

A [new page of the State Department's website](#) suggests that each of these passport applicants will (eventually) be notified that their application has been "suspended" and will remain "suspended" (i.e. that they won't be issued a passport) unless and until they provide "certain documents and records to help us establish your biological sex".

Many states have been and still are [issuing non-gendered "X" replacement birth certificates on request](#). There's no requirement for the recipient of an "X" birth certificate to keep a copy of the "M" or "F" birth certificate it replaced — if indeed they ever had a copy of that original.

Part of the point of switching to "X" birth certificates, passports, and other documents — or at least offering them as an option for anyone who wanted them — was that neither sex nor gender, regardless of what those terms mean, is relevant to any of the purposes of these documents. Once someone was issued a non-gendered "X" birth certificate, passport, and driver's license, there was no need to retain official records of gender or sex assignment at birth.

Many trans and non-binary people have sought and been granted asylum in the US because their gender identity puts them at risk of persecution in other countries. They may not be able to obtain new official birth records without returning to a country where they would be at risk, especially if they go to offices of the governments from whose persecution they fled and try to obtain birth records that don't match their current gender presentation. Other immigrants may find it impossible to obtain birth records if they were born in conflict zones or failed states where records weren't retained.

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IDP explores and defends the fundamental American right to move freely around our country and to live without constantly having to prove who we are or why we are here. ([More](#))

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For all of these reasons, many applicants for “X” passports will find it impossible to obtain official documentation of their sex as assigned at birth. In the best case, their applications will be delayed, regardless of how soon they had planned or might need to travel.

The “suspended” applications in progress at the time of the change in State Department practice include applications for urgent travel from the US and applications for replacement passports by US citizens whose passports have been lost or stolen abroad, and who urgently need new passports to return to the US and/or to satisfy laws requiring foreigners in many countries to carry their passports on their persons at all times. Even brief delay in passport issuance can have costly or catastrophic consequences.

“Suspended” is a euphemism for “denied”. “Suspending” applications rather than explicitly denying them is a pretext that the State Department has often used in the past to try to frustrate judicial review of *de facto* denials, when there is no legal basis for denial. If challenged in court, the State Department will either say that the application hasn’t been denied, but is still “under consideration”, and thus that [there is no final administrative decision to review](#), or will [issue a passport to moot the case](#) only after a lawsuit is filed.

This withholding or delay of passport issuance on the basis of gender or sex, or the lack or insufficiency of evidence with respect to gender or sex, is patently *ultra vires*.

There is no requirement in USA law or in current or proposed State Department regulations for an applicant for a passport to provide any evidence of gender identification or sex. Nor are gender or sex relevant to establishing citizenship or identity.

Neither gender nor sex, by any definition, has any relevance to US citizenship or eligibility for a US passport. The [Constitutional criteria](#) of birthright citizenship, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”, are explicitly and unambiguously non-gendered: “persons”.

Because neither current gender identity nor sex as assigned at birth can necessarily or with certainty be ascertained by inspection, even by a strip search, they are of little or no more use in establishing identity than in establishing citizenship.

The best analogy is the assignment of racial identifiers, which used to be required and included on birth certificates and passports, but rightfully no longer are in the US, although they still are in some other more overtly racist countries.

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Not all people who have, or have requested, "X" passports are non-binary. Some people have requested "X" ID documents in solidarity with trans and non-binary people. The more people have "X" documents, the more ordinary they will seem, and the less they will provide a basis for discrimination against presumptively non-binary people. Other people just don't see a reason to have any gender marker on their ID. One answer to the question, "Why does your ID have an 'X' in the 'sex' field?" is, "Because sex or gender has nothing to do with my citizenship, license to drive a motor vehicle, or right to travel." Because ICAO international passport format standards include a "sex" field, the easiest way to move toward eliminating gender markers from IDs is to put a gender-neutral "X" in that field.

Since 2021, the passport application form has boxes to indicate a self-selected gender marker of "F", "M", or "X". Adding these to passports didn't require any change in laws or regulations, since neither law nor regulations required passports to include a gender marker at all, or required applicants to specify, much less provide evidence of, sex or gender. Now the Department of State has [requested approval](#) from the Office of Management and Budget (OMB), pursuant to the Paperwork Reduction Act (PRA), for a new passport application form on which "gender" would be replaced by "sex" (as assigned at birth) with only "M" and "F" options. In addition, the State Department has announced, without any basis in law or regulations, that it will now require evidence of sex assigned at birth as a new precondition for issuance of a passport. You can [leave comments here](#) through Monday, March 17, 2025, on the proposed new form, but you shouldn't get your hopes up that public comments will persuade OMB to disapprove the new form.

The [online passport application form](#) has already been changed to substitute "sex" for "gender" and remove the "X" option, even before the new form has been approved. The form now posted without OMB approval on the State Department website is in flagrant violation of the PRA. But that's the least of its legal defects.

This isn't the first time that the [State Department](#) or [other Federal agencies](#) have tried to use the improper mechanism of a request for approval of a new form as a shortcut to avoid the need for Congressional action or formal rulemaking to change their rules.

In 2011, for example, the State Department proposed to require some arbitrarily selected subset of applicants for US passports to provide a bizarre collection of irrelevant information — what were the circumstances of your circumcision? who were all the people in the room when you were born? — as a condition of obtaining a passport. This new passport requirement was proposed not to Congress or through agency rulemaking, but by a request to OMB to approve the new “long form” passport application.

OMB only has the authority to approve a form if the information collected on it is necessary for an agency function authorized by law. OMB approved the passport “long form” anyway in 2013, in spite of a flood of objections.

As an office within the White House, OMB rarely disapproves proposed forms or other actions that align with Presidential policy. The purpose of OMB is to ensure that Federal agencies align their actions with Presidential priorities, not to police against agency proposals to advance the President’s agenda in unlawful ways. Last year we learned that more than 100,000 people have been sent the long form when they applied for U.S. passports.

The goal of the passport long form, like that of the new request for evidence of sex as assigned at birth, was and is to provide a pretext for denial (or indefinite “suspension” amounting to denial) of passport applications from certain disfavored individuals. These applicants will be told they haven’t provided all the evidence “required” by the form, regardless of whether the evidence requested on the form is legally required.

The State Department’s request for approval of the new passport form is purportedly based on an executive order issued by President Trump on his inauguration day. The current use of the as-yet-unapproved form is clearly illegal, but OMB undoubtedly will approve it. The problem, though, is that an Executive Order can’t override the law. And there is no conceivable theory of Presidential authority that would empower the President, by *diktat*, to add to the criteria for citizenship specified in the Constitution.

This has implications for all US citizens, of course, not just for non-binary people. If the President can, with the stroke of a pen, add arbitrary criteria for citizenship to those spelled out explicitly and unambiguously in the Constitution, no US citizen is safe from being stripped of their citizenship and trapped in the US (or effectively banished if they are abroad and can’t get back to the US without a passport) at the President’s whim.

The ACLU has filed a [class action lawsuit](#) on behalf of applicants and would-be applicants for "X" passports, seeking an order voiding the practice of requiring passport applicants to provide evidence of sex as assigned at birth. Passport applicants could also file lawsuits for writs of "mandamus" ordering the State Department to issue passports.

What happens in the meantime to those who have, or have applied for, passports with an "X" gender marker or a gender marker that doesn't match their sex as assigned at birth?

The appropriate answer to questions about gender or sex on a US passport application is the same as the appropriate answer to similar questions at a US port of entry: "Is that relevant to my US citizenship, entitlement to a US passport, or right to leave or return to the US?"

The State Department [claims](#) that already-issued "X" US passports will remain valid, at least for now, but that gives little reassurance to holders of these passports. These US citizens have good reason to fear that an "X" gender marker will now be treated by at least some US customs and immigration inspectors as a stigmatizing scarlet letter on their passport, and might be seized and revoked at any time, in response to another Executive Order or perhaps on pretext of forgery, fraud, or invalidating damage.

If you have an "X" US passport, you can send it in for replacement with an "M" or "F" passport, if you have satisfactory evidence of your sex as assigned at birth. But that application might well be "suspended" or put in the slow lane for processing, leaving you with no passport for an indeterminate time. It's unclear whether you can get a new or renewal passport at all, even with an "F" or "M", if your birth certificate has an "X" gender marker.

If your passport application has already been, or is in the future, suspended or delayed, you might need to sue an airline to enforce its obligation as a common carrier to transport you on an international flight regardless of whether you have a passport.

Without a passport, you can walk across the border into Canada or Mexico. But neither Canada nor Mexico nor almost any other country will admit you with no passport, except as an applicant for asylum. US citizens without passports are effectively trapped in the US, unable to flee or leave the country unless and until conditions in the US become such

that they qualify for asylum in some other country on the grounds of a credible fear of persecution in the US.

What if you are abroad, go to a US consulate to renew your passport or for other services, and they seize your passport? (We know [people to whom this has happened](#), for as-yet unexplained reasons.) A US citizen is supposed to be entitled to enter the US without a passport. But if you try to do so, your claim to be a US citizen might not be believed, in which case you'll wind up somewhere in the American gulag of immigration detention. On the other hand, if you are abroad without any passport, you're likely to end up in violation of some other country's immigration laws, which [could land you in a foreign prison](#).

The [new passport application form](#) for which the State Department is seeking approval also includes an affidavit under penalty of perjury that the applicant is not required to register as a sex offender. This is both another ["scarlet letter" to stigmatize some passports](#), and a trap.

The sex-offender registration requirements are complex, confusing, vary by state, and have particularly uncertain implications as applied to people who have moved between states. Not even the best lawyer can say with certainty, until it has been litigated in a particular case, whether a particular person is required to register. The goal of adding this affidavit to the passport application is to scare anyone who even might be required to register into not trying to leave the US, lest they be liable for perjury or passport fraud if they guess wrong about whether they are required to register..

Edward Hasbrouck
Papers, Please, Secret Law

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