Chapter 2
The Mode of Information – Due Process of Law and Student Loans: Bills of Attainder Enter the Digital Age

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ABSTRACT
This chapter examines the laws, policies and practices of the Federally Guaranteed Student Loan Program and the use of digital records and databases in creating changes in the laws governing the collections of student loan debt that have led to Bills of Attainder upon consumers in default on their Federal student loans. The research found a relationship between how information is created and utilized within the student loan program and due process issues related to the offset of income tax refunds. It examines how the databases are used as a means of surveillance how the administrative practice of due diligence was compromised by student loan guarantors, lending institutions and the Department of Education. The practice of reasonable due diligence is the accepted standard for valid administrative record keeping. It is the assertion of this research that the end result has been the creation of a digital Bill of Attainder upon the property (income tax refunds) of consumers in default on their student loans.

INTRODUCTION
Databases in both public and private enterprises seem inoffensive and necessary in the conduct of modern administrative operations. In the case of public programs they are the means for the re-distribution of resources in some form of equitable merit or need based evaluation of the applicants. The Federal Student Loan Program in the United States is one such program. The loan program is placed on a continuum of student financial aid, some of which do not require repayment by the applicant to the government or the government sponsored lenders.

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As a once marginal factor in the financial lives of students and graduates the student loan program started as a supplement in the relatively low cost tuition and housing environments of colleges and college communities. Over time things have changed. The cost of living, especially student housing, has risen as have tuition and fees for colleges and universities. The education supplier situation has also changed with the upsurge in for-profit organizations offering traditional education but additionally offering career certificates and certifications.

For the individual consumer student loans have grown to the point of surpassing credit card, auto and, some instances, mortgage or rent obligations. Along with the rise in the proportion of student debt within a consumer’s portfolio of debt, relief from that debt has been closed off by law and policy changes disproportional to the repayment behavior of consumers, the risks they faced in education choices relative to the job market, and the profits received by the lenders and educational institutional participants including the U.S. government.

The databases of the student loan program have been used to benefit the lenders and educational institutions and not the borrowers. The reports from the databases have been used to frame and support policy changes. The use of even the most innocent databases in the manner used in the student loan program should be viewed with caution.

This chapter examines the relationship between information and due process of law. The research examines information from the postmodern perspective of information systems as processes that monitor and control individuals and groups. This is described by Mark Poster (1990) as the “Mode of Information.” The power to control and monitor, as Poster theorized, is accomplished through control of databases and data gathering mechanisms. As a case study, it examines the process of the administrative taking of the federal income tax refunds of people who have defaulted on loans made under the Guaranteed Student Loan Program (GSLP).

Income tax refunds are monies held by the federal government that are owed to taxpayers as a result of excess payment on their annual income tax. Judge Murray Schwartz, in the “Constitutional” section of his decision in Games v Cavasos 737 F Supp. 1368 (D. Del 1990), recognized the Fifth and Fourteenth Amendments property interest of the consumer plaintiff toward the consumer’s income tax refund. Because these administrative takings involve records about private individuals, there may be Fourth Amendment privacy implications toward the basis of the taking. This may also extend to privacy provisions of the Administrative Procedure Act (PL75-404, 5 U.S.C. 1001(a)) and to similar provisions within the Consumer Credit Protection Act of 1968 (PL90-321, 15 U.S.C.A. 1001).

These properties may be taken by the federal government through administrative offset upon a finding against the individual toward moneys owed to the government (S. Hrg. 101-1116, 1990). This can be owed through a variety of government programs such as the GSLP, taxes owed for prior years or overpayments of government benefits. In the first four years (1986-1990) following enactment of the income tax refund-offset program, nearly $1.2 million in income tax refunds were taken toward payment of student loans (S. Hrg. 101-1116, 1990). From 1966 to 1992 the various loan programs authorized under the Higher Education Act of 1965 have amounted to $142 billion lent to 22 million consumers (GAO/AFMD-93-20).

The Fifth and Fourteenth Amendments of the Constitution permit the government to take property only through due process of law. This would have normally required an administrative or civil court hearing prior to the actual taking. Today, under the structure of the GSLP and related legislation, the taking of income tax refunds is largely exempt from these hearing requirements as a result of passage of the Deficit Reduction Act of 1984 (PL98-369, 31 U.S.C. 3720A, July 18, 1984). A consumer may