

Center for Democracy & Technology Transition Memo

Theme: Balancing Security and Liberty

Issue: Revisiting the REAL ID Act and Other Government ID Programs

★ **Issue/Problem.** In recent years, the federal government has launched a variety of ID card programs, including most notably REAL ID, which imposes standards on state-issued driver's licenses. Some of these programs incorporate biometric and Radio Frequency Identification (RFID) technology.

As implemented by the Bush Administration, REAL ID and related programs fail to safeguard the privacy and security of information on the ID cards or in associated back-end databases, and lack measures limiting how the cards can be used by government or commercial entities to track the movements and activities of ordinary Americans. Poorly designed ID card programs could actually weaken national security and contribute to ID theft. Confirming the fears of critics, the REAL ID card has shown signs of "mission creep," as Administration officials have talked about requiring the card for purposes other than boarding airplanes or entering federal buildings.

★ **Policy History.** Following the 2001 terrorist attacks, the 9/11 Commission recommended the setting of federal standards for the issuance of birth certificates and drivers' licenses (p. 390). Section 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004 [Public Law 108-458] created a negotiated rulemaking committee to gather input from diverse stakeholders, including states and individual rights advocates, and to develop minimum federal standards for state-issued driver's licenses and ID cards. However, before the committee could gain momentum, the REAL ID Act of 2005 was passed as a rider to a military spending and hurricane relief bill [Public Law 109-13], repealing §7212 without hearings in either house or debate in the Senate.

The Department of Homeland Security issued implementing regulations for REAL ID in January 2008. The Act and the regulations (1) pave the way for the creation of a national ID system, (2) fail to prevent the Machine-Readable Zone (MRZ) on the licenses from being used to facilitate governmental and private sector tracking, and (3) fail to provide privacy and security standards for personal information in the REAL ID system. Meanwhile, several states are piloting "enhanced driver's licenses" with insecure RFID chips, which the federal government is promoting for use in land border crossings.

The status of REAL ID Act is confused and uncertain. About 20 states have passed measures of varying kinds (some binding, most not) opposing the Act, but at the same time most states are taking measures to improve the security of their driver's licenses and the issuance process. The American Association of Motor Vehicle Administrators is in the early stages of using a grant from DHS to develop a computer system to link together the state DMV offices; the system developed by AAMVA may promote virtual centralization of ID data. Meanwhile, mainly in response to state concerns about cost, the Bush Administration substantially delayed implementation of the REAL ID Act: All states have been granted extensions until December 31, 2009 to begin issuing REAL ID-compliant licenses to new applicants. In addition, states that are in material compliance by January 10, 2010 with

standards for the security of their credentials and the licensing process will be able to obtain a second extension until May 10, 2011 to achieve full compliance. If a state is not found to be in material compliance by January 10, 2010, then immediately all of its driver's licenses will be invalid for boarding an airplane or entering a federal building. If a state is in compliance, already-issued (non-compliant) licenses will still be valid. The current requirements call for all persons born on or after December 1, 1964 to obtain a REAL ID by December 1, 2014, while those born before December 1, 1964 will have until December 1, 2017.

In the 110th Congress, Senator Akaka and others introduced S. 717, which would have repealed Title II of the REAL ID Act and reinstated the negotiated rulemaking process. The bill also included language that would have specifically required the protection of privacy and civil liberties. The Senate Judiciary Committee held a hearing on REAL ID on May 8, 2007,¹ and a subcommittee of the Senate Homeland Security Committee held a hearing on REAL ID and the use of RFID in passport cards on April 29, 2008.² No further action has been taken.

★What the Obama Administration Should Do. President Obama should ensure that all government identification programs are necessary and effective and protect privacy and civil liberties. The Obama Administration can work with the states to improve both the issuance of driver's licenses and ID cards and the cards themselves while also ensuring that meaningful privacy and security protections are built into the program.

1) President Obama should support repeal or significant revision of Title II of the REAL ID Act. Whether called "repeal" or "amendment," new legislation should address key problematic aspects of the REAL ID Act itself as well as state-led initiatives that threaten privacy even in the absence of REAL ID. New legislation should:

- Prohibit federal agencies, in the absence of express Congressional authorization, from requiring new uses of the driver's license.
- Prohibit card numbers from being unique across the nation.
- Delete the "electronic access" provision of the REAL ID Act, §202(d)(12), and prohibit the creation of a centralized (physically or logically) national ID system, whether it is managed by the government or by a private entity (such as the American Association of Motor Vehicle Administrators [AAMVA]).
- Repeal the mandate for a standardized Machine Readable Zone. To the extent that states wish to include an MRZ on driver's licenses and ID cards, mandate encryption and/or other security features so that the data cannot be read by commercial entities or for other unauthorized purposes.
- Prohibit state and federal agencies, and businesses and other private organizations, from scanning the card to collect personal information or track individuals' activities.

¹ <http://judiciary.senate.gov/hearings/hearing.cfm?id=2746>

² <http://hsgac.senate.gov/public/index.cfm?Fuseaction=Hearings.Detail&HearingID=c8bd6312-5714-4a1c-8f25-eef90c611a44>

- Mandate specific privacy and security standards for the protection of personal information stored on the card itself and in associated computer systems, including deleting the requirement that states retain copies of source documents, such as birth certificates and Social Security cards.
- Prohibit the use of long-range RFID technology (or similarly insecure technology) in driver's licenses/ID cards (as in the Enhanced Driver's License program).
- Prohibit federal agencies from accessing and collecting personal information held in state databases, and prohibit states from recording residents' travel histories.

2) President Obama should direct the Department of Homeland Security to amend the REAL ID regulations to adequately protect privacy and ensure security of personal information collected and stored in the issuance of state driver's licenses. Even if REAL ID repeal or reform legislation is not passed, President Obama will have ample authority under current law to direct DHS to amend the current REAL ID regulations and insert meaningful privacy and security protections.

3) President Obama should support amendment of the Driver's Privacy Protection Act. REAL ID reform legislation could also address the DPPA, 18 U.S.C. §§2712 – 2725, a federal law protecting data in state DMV records. The DPPA contains a myriad of exceptions that virtually swallow the rule against disclosure to third parties. The DPPA should be amended to protect against both governmental and commercial abuse of personal information, and should address privacy risks associated with state efforts to outsource management of personal information to private entities such as AAMVA.

★ **Campaign Platform.** As a candidate, President Obama said, "I do not support the Real ID program because it is an unfunded mandate, and not enough work has been done with the states to help them implement the program."³ REAL ID also implicates President Obama's promise to protect the right to privacy on the Internet,⁴ since driver's licenses and ID cards are just one component of the networked world where individuals can be identified, tracked and monitored like never before.

★ **Other Voices.** The American Association of Motor Vehicle Administrators (AAMVA), the association of state DMV heads, could play a key role in achieving reform. AAMVA has not taken a strong position on REAL ID per se; rather it sees its role as protecting the states against unreasonable mandates while helping the states improve standardization, coordination and interstate information sharing whether REAL ID survives or not. A large number of organizations across⁵ the political spectrum have opposed REAL ID, from CDT in the middle, to the Cato Institute on the libertarian right and the ACLU and immigrants rights groups of the left. Groups on both sides of the immigration debate may be important, since a key controversial provision of REAL ID is the requirement that a person must be lawfully present in the U.S. in order to qualify for a drivers' license. Twenty states have

³ Technology Voters Guide: Barack Obama, *CNET News.com* (Jan. 4, 2008): http://news.cnet.com/Technology-Voters-Guide-Barack-Obama---page-2/2100-1028_3-6224109-2.html?tag=mncol

⁴ <http://www.barackobama.com/issues/technology/#open-internet>

⁵ <http://privacycoalition.org/stoprealid/>; <http://www.stoprealidcoalition.com/>

adopted legislation of varying kinds against REAL ID.⁶ Makers of ID cards have also weighed in, arguing for standards that would favor their technologies or products. The position of the National Governors Association regarding REAL ID is “fix and fund,” by which NGA means that “REAL ID should be fixed through regulatory and, if necessary, congressional action to ensure it is workable, cost-effective and actually enhances the security and integrity of state driver’s licenses and identification cards.”⁷ The position of the National Conference of State Legislatures is to “repeal the REAL ID Act if Congress does not provide for full funding or the federal government does not provide for” a series of points recommended by NCSL.”⁸

★ For More Information.

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Resources:

- CDT analysis of final REAL ID regulations, with recommendations for Congress (Feb. 1, 2008): http://www.cdt.org/security/identity/20080201_REAL%20ID_hillbrief.pdf
- CDT resources on identification and privacy: <http://www.cdt.org/security/identity/>

November 13, 2008

⁶ <http://www.realnighmare.org/news/105/>

⁷ Testimony of National Governors Association (April 2008): <http://hsgac.senate.gov/public/files/QuamTestimony0429080.pdf>

⁸ <http://www.ncsl.org/statefed/transportation.htm#REALID>