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FROM : BOB BARR,
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SUBJECT : COMMENTS IN OPPOSITION TO DHS DOCKET
NO. DHS-2006-0030, REAL ID

DATE : MAY 3, 2007

These comments are submitted in response to the proposal for meeting the minimum standards for the REAL ID Act of 2005, announced by the Department of Homeland Security (hereinafter, "DHS") as a "Notice of Proposed Rulemaking" on or about March 1, 2007, and published in 6 CFR Part 37, Docket No. DHS-2006-0030, RIN 1601-AA37. These comments are timely submitted within 60 days of the aforesaid publication of the proposed rules, in strong opposition to the proposed rules.

GENERAL OBJECTIONS

No Meaningful Security Benefit

The REAL ID Act, and the proposed rulemaking resulting from enactment thereof, are based on the Holy Grail of post-911 federal policy; the theory that if the government is permitted to gather enough information, on enough people, from enough sources, over a sufficient period of time, and to then be

able to retain, access and analyze the data, potential terrorists will somehow be identified. The fact that at least two of the 9-11 hijackers obtained state-issued identification cards fraudulently is a further factor motivating reliance on the institution, for the first time in U.S. history, of a national identification card. Notwithstanding that the two 9-11 hijackers obtained their identification based on corrupt acts by issuing state employees, the mantra that fraudulent identification cards helped empower the 9-11 hijackers to succeed in the hijackings on that fateful day, is oft repeated as a justification for efforts like the REAL ID Act as necessary actions on the part of the federal government to avoid a recurrence.

The fact is, however, the steps mandated by the REAL ID Act would do little, if anything, to tangibly protect against a future terrorist attack. On the other hand, enactment of the Act, as contemplated and furthered by the proposed rulemaking, would serve to dramatically erode privacy of virtually all U.S. citizens and others lawfully in this country, even as it would significantly destroy the principle of federalism on which our country was founded.

Violates Principle of Federalism

Driver's licenses have traditionally, legally and historically come within the purview of state governments – *not* the federal government. This circumstance is based on the fact that the fundamental purpose of a driver's license is to evidence one's having met minimum requirements to operate a motor vehicle safely on the roadways within a state's borders and, through the full faith and credit clause of the Constitution (Art. IV, Sec. 1, U.S. Const.) on the roadways within the borders of all other states and the District of Columbia. Apparently, the principle of federalism was of little interest to the 109th Congress that enacted the REAL ID Act in 2005, or to the current President, insofar as the Act not only pays little heed to any principles of federalism or state's rights, it substantially weakens them.

The REAL ID Act *is* a National ID Card

These general concerns may be viewed as irrelevant to the question posed by DHS in the context of the proposed rulemaking – which might be considered as accepting the underlying legislation (the REAL ID Act) as valid, and questions about its validity already decided. However, the fact remains, such

concerns are inextricably a part of the implementing rules proposed now or in the future by DHS. In fact, DHS itself clearly recognizes that concerns about whether the REAL ID Act and the proposed rulemaking constitute a “National ID card” *are* relevant to the proposal before us. DHS itself addresses this concern officially, for example, in its “Questions & Answers,” by explicitly denying that the REAL ID Act or the proposed rulemaking constitutes a National ID card. It is important also to bear in mind that federal agencies should not be able to divorce themselves from underlying concerns relating to a law with which they are tasked with implementing. Whether or not the REAL ID Act constitutes a National ID card – I believe it clearly and obviously does – is very much part and parcel of the propriety of the rulemaking proposed by DHS.

While many in the Congress and the Executive Branch, in commenting in support of the REAL ID Act, regularly state that the Act is not and will not result in a National ID card, common sense dictates otherwise. The REAL ID Act will in every practical manner, result in a National ID card for the first time in our country’s proud history. Superficial statements such as that found at page 16 of the instant proposal, that “[t]he Act does not require any State to issue REAL ID driver’s licenses” is disingenuous at best. The fact is, when the federal government mandates, as does this Act, that in order for a driver’s license or other state-issued identification card to be valid for *any* federal purpose it must meet specific standards mandated by the federal government, the government is in fact creating a National ID card.

The Congress that passed this legislation, the President who signed the REAL ID Act, and the DHS charged with implementing it, know full well that life in 21st Century America necessarily requires access to federally-controlled areas or matters for a citizen’s survival. Many of us wish this were not the case, but it is. If the federal government were not so involved in virtually every aspect of a citizen’s life – from traveling on a train or a plane, to securing health and insurance coverage, to obtaining an education, to opening a bank account – then perhaps statements such as DHS makes in denying the obvious (that the REAL ID Act will not result in a National ID card) might have a bit of validity; in reality, they do not. The REAL ID Act, if and when *will* result in a National ID card.

Requiring citizens to obtain, and show on demand (“your papers, citizen”) an identification card as to which every jot and tittle has been mandated and approved by the federal government, will change the nature of how citizens operate, behave, and interface with government at all levels. And not for the better.

Even as the proposed rulemaking purports to mandate what a REAL ID Act-compliant driver’s or other state-issued identification card must *look* like, what information it *must* contain, and the *manner* by which it is issued, the proposal additionally proposes to mandate “requirements for issuance of non-REAL ID driver’s licenses” (*Proposed Minimum Standards . . .* at page 19, Para. II.A.). Such language clearly should disabuse the states or any person considering support for the REAL ID Act of the notion the proposed rules are anything other than a comprehensive mandate to place the federal DHS in the position of passing judgment on virtually all state-issued identification cards. DHS should not be allowed to avoid responsibility for this by disingenuously claiming that the REAL ID Act-compliant identification cards and driver’s licenses are being “issued” by the states, so therefore these are State ID cards and not National ID cards.

If it looks like a duck, walks like a duck, and quacks like a duck, it is a duck. What we are considering in these proposed rules, is a National ID card.

SPECIFIC OBJECTIONS

While I would leave to persons and organizations expert on the technical aspects of the proposed implementing rules to comment on problems relating thereto, several points in opposition to the proposed rules need clearly to be made, and are submitted hereby.

Privacy Concerns

- As noted above, the proposed rules would result in a National ID card. This is reason sufficient by itself to oppose the proposed rules.
- The development of a massive database of the most private of information on individual citizens (including, for example, details of every speeding ticket they’ve had) under the effective control of the

federal government – or at a minimum accessible by the federal government – raises serious concerns about the privacy of such records.

- The manner in which the database(s) would be maintained might very well provide room for the federal government to evade or ignore existing laws designed to provide at least some privacy protection for information on citizens (e.g., the federal Privacy Act). In essence, the federal government might have its cake and eat it, too – able to access clearly personal and otherwise private information on citizens, but without having to bother complying with laws designed to protect such information from federal access.
- Such a database would be a boon to potential identity thieves.
- The proposed implementing rules will in fact create a massive database of information of a very personal nature on virtually all Americans. Whether the database is “housed” in one compute or 50 that are then accessible by *at least* 52 entities (each of the 50 states, plus the District of Columbia and the federal government) is a distinction without a difference.
- Regardless of the specific architecture according to which all the data compiled pursuant to the REAL ID Act regulations is maintained, the security of the entire system will be only as strong (or as weak) as the one state agency with the weakest security.
- There is no effective way for citizens to ensure the accuracy of the information contained in the system, to change outdated information (e.g., a driving violation later dismissed), or to correct erroneous information. The problems we have witnessed since 9-11 with law-abiding citizens -- including in several well-publicized incidents, prominent political leaders – being denied the ability to board a passenger plane because of faulty information in a no-fly list, would be magnified many-fold with the REAL ID Act system proposed to be implemented through the DHS proposal.
- State governments would lose effective control over private data on their citizens. State privacy laws would lose their effectiveness.
- Private information on U.S. citizens that would be required to be submitted in order to obtain a REAL ID Act-compliant license might also be accessible at some point to foreign governments, as part of anti-terrorism information exchanges, intelligence-sharing arrangements, or

otherwise. This would lead to serious potential security risks for U.S. citizens.

RFID Chip Concerns

- The fact that the proposed rules fail to include a *prohibition* on inclusion of an RFID (radio frequency identifier or identification) chip, can reasonably be taken to mean that initially or at some later point, an RFID chip *will* be incorporated in the REAL ID Act-compliant licenses. The history of government mandates leads to no other reasonable conclusion.
- RFID chips pose a very significant danger to persons possessing a card containing an RFID chip, insofar as RFID chips by their very nature can be scanned and read remotely -- including, for example, by persons or entities that may very well have evil designs on America citizens -- without the person carrying the card even being aware that someone or something is scanning and "reading" their license.

Second Amendment Concerns

- Second Amendment concerns are not addressed in the proposed rules. The rules might result -- initially or subsequently -- in the inclusion of records or other information relating to a person's exercise of their rights guaranteed by the Second Amendment in the Bill of Rights. This serves clearly to chill exercise of such rights, and could circumvent other federal laws that prohibit the retention of such information.

Cost

- The cost to the states of implementing the proposed rules would be huge -- objective estimates indicate in excess of \$23 *billion*. While DHS may not blink at such a sum, the amount to the states, and to individual license applicants (which could rise to \$195 per application), is significant if not prohibitory.

Inconvenience

- The inconvenience to holders of current licenses would be significant, because *everyone* would have to apply for and be issued a new, REAL ID Act-compliant license, even if they already possess a valid driver's license that might otherwise be valid for many years. Moreover, the time required to gather required documentation, have them verified by the state government and then processed, is far in excess of what is currently necessary for a person to obtain a license. Here again, bureaucrats sitting in Washington, DC mandating all this for millions of citizens, might not bat an eyelid at delays, costs and inconveniences occasioned by implementation of these proposed rules. In the real world, to real people, however, such results are anything but trivial.

Civil Liberties Concerns

- Allowing the government to decide whether to issue a license to someone, which then is used to determine whether a person can exercise fundamental rights guaranteed in the Bill of Rights – including, for example, the rights to free expression, to free exercise of religion, to petition or assemble for political purposes, to keep and bear arms, to travel, etc. – is troubling in the extreme, and ought to give all freedom-loving Americans pause.

Freedom *Not* to Use Social Security Number

- Citizens of states, such as Georgia, that currently allow license applicants to use a number other than their Social Security Number on their driver's license, would be denied that ability if the REAL ID Act rules proposed by DHS are implemented. There is simply no legitimate reason for such arbitrary action in thus limiting freedom to choose by the citizenry. Use of Social Security Numbers in a massive, one-size-fits-all scheme as proposed by the proposed rules further erodes the privacy rights of U.S. citizens, and compounds the risks of massive identity theft.

CONCLUSION

This commentator opposes the proposed rules. It is strongly urged, in order of priority, that DHS:

- Shelve the proposed rules, and recommend the Congress repeal the REAL ID Act.
- Shelve the proposed rules, and urge the Congress to revisit the underlying legislation so as to craft a proposal that is much simpler and more respectful of civil liberties and the right to privacy; one that is consistent with the Bill of Rights, and which ensures a much higher degree of security than the system contemplated by and that would result from the system proposed in the instant rulemaking. Congress should also and as part of such a re-write, include sufficient funding with which the states would implement the program.
- Substantially redraft the proposed rulemaking in accordance with the points outlined in this memorandum.
- Seek and implement a much longer period of time within which to implement any proposed rules.

Respectfully submitted,



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