

Background

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Federal Standards for State-Issued Identity Cards: A Reasonable Proposal

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In the waning days of the 108th Congress, the House and Senate were deadlocked over legislation designed to reform the national intelligence community. In the end, the intelligence reform bill passed without anti-terrorism measures championed by House Judiciary Committee Chairman James Sensenbrenner (R-WI) but with the promise that his proposals would be considered early in the 109th Congress.

The most significant of these proposals involved enhanced identification security requirements for the issuance of state identification cards or driver's licenses. By and large, the proposals reflect a careful balance, enhancing security without threatening civil liberty. Congress should move promptly to act upon the Congressman's proposal.

The Identity Security Imperative

The September 11, 2001, terrorist attacks offer many lessons. One of them is that to the terrorist, an identity document is a weapon to gain access to sensitive areas. A secure system of identification will have significant effects on terrorist activities. It will make it more difficult for a terrorist to obtain an identity document by fraud. Thus, a terrorist will not be able to conceal his true identity to board commercial aircraft, enter federal facilities, transfer funds to a U.S. bank account, or engage in other activities that may require identification. Instead, terrorists will be forced to use their real identities. As a result, law enforcement and intelligence officials are far more likely to be able to detect their activity before an attack.

Talking Points

- Proposals to encourage states to issue identification documents that comport with federal standards reflect a careful balance, enhancing security without any significant threat to civil liberty.
- Minimum federal standards for documents used in federal identification and screening will not transform a driver's license into a national ID card.
- Requiring identity documents to expire at the same time as the expiration of lawful entry status will prevent individuals who have illegally entered or are unlawfully present in the United States from having identification documents.
- States ought to remain free to issue state driving permits that are not compliant with federal standards (including to those not lawfully present in the United States) as long as they are clearly distinguishable from the driver's licenses that meet national identification standards.

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The focus of identity security efforts must be on driver's licenses and identity cards. Most Americans use their state-issued driver's license as their primary form of identification. Other more secure forms of identification, like passports, are used far less frequently.

The 9/11 Commission's report urged the federal government to set standards for the issuance of birth certificates and other forms of identification, such as driver's licenses. The commissioners had good reason to make this recommendation. "All but one of the 9/11 hijackers," their investigations determined, "acquired some form of U.S. identification document."¹ They used those documents to rent cars and apartments, buy airline tickets, pass through security checkpoints, and board planes.

The findings and recommendations of the 9/11 Commission built on an earlier study by a Markle Foundation task force that evaluated post-9/11 requirements for security and the protection of civil liberties. "Minimum standards for federal recognition of identification documents are by no means a silver bullet," their report read, but "they are an important aspect of a comprehensive security policy."² The task force concluded that it was essential to have better identification security, including minimum data requirements and standards to ensure that a person who presents a form of identification is the person identified on that document.

Moreover, the proposal is nothing new. It is consistent with actions already taken by individual states. In 2003, Nevada took the same action Congress is being urged to take: Nevada does not accept licenses from 23 states and the District of Columbia as primary proof of an individual's identity because

their license and issuance standards are less stringent. Arizona took similar action, refusing to accept, as primary proof of identity, a driver's license or identification card issued by 19 states.³

The recently passed intelligence reform bill⁴ did include provisions intended to strengthen identification security, but the bill's provisions were flawed in two respects. First, the law required that regulations relating to new identity security requirements should be written through an elongated procedure with "interested parties" at the table, a needless exercise given existing comprehensive studies of the issue and one likely to be frustrated by the forced inclusion of advocates who oppose more stringent identity security despite its evident necessity. Second, the act also included language that lets states opt out of the new standards, creating a gaping loophole.

New Proposals

It is likely that new legislation will be introduced in the House to establish a more secure system for issuing driver's licenses and other forms of state identification documents for use in connection with federal benefits and activities. It is also likely that this legislation will include the following provisions to determine whether a state-issued driver's license may be used as a form of federal identification:

- State-issued driver's licenses or identification cards would be required to display the full name, date of birth, gender, license number, address, photograph, and signature.
- The identification card would also be required to have a physical security feature to prevent tampering or illegal duplication and a

1. National Commission on Terrorist Attacks Upon the United States, *Final Report of the National Commission on Terrorist Attacks Upon the United States* (Washington, D.C.: U.S. Government Printing Office, 2004), p. 390.
2. Markle Foundation Task Force, *Creating a Trusted Information Network for Homeland Security*, App. A (2003), at www.markle.org/downloadable_assets/nstf_report2_full_report.pdf (Oct. 19, 2004). One of the authors of this paper served on the Markle task force.
3. See Nev. Rev. Stat. §§ 483.083, -.290 (2003) (requiring proof of identity and lawful presence); Az. Rev. Stat. § 28-3158 (requiring proof of identity, lawful presence, and verification of valid social security number).
4. Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845) § 7212 (Jan. 28, 2005), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s2845enr.txt.pdf.

machine-readable component containing the basic data about the individual to whom the card was issued.

- Before being issued an identification card, the applicant would be obliged to present a picture identity document, proof of date of birth and Social Security number, and documentation showing the address of principal residence.
- The state would be required to verify those documents' validity. That verification would include, for example, assuring that the Social Security number presented was valid and that an applicant seeking an identification card in a new state of residence also relinquished his card for his former state of residence.
- Applicants would also be required to prove U.S. citizenship or lawful presence within the United States.
- For those applicants temporarily within the United States, the date of expiration of the identification card would have to coincide with the date that lawful presence within the United States ended and would have to be prominently displayed on the face of the card.
- The federal government, beginning three years from the date of passage of the statute, would no longer accept any non-compliant state identification card for purposes of federal identification.

Why Not?

The commonsense provisions of the Sensenbrenner proposal seem so reasonable that it is hard to understand why some oppose them with such vehemence. But they do, and they offer a host of reasons—none of which withstand sustained analysis.

Concerns About De Facto “National Identity Cards”

One argument against the identity security proposals is that establishing national standards for licenses will make the licenses a surrogate for a national identity card. But minimum federal standards for documents used in federal screening do not transform a driver's license into a national ID card.

A national card might require a separate federal agency, while the various congressional proposals would use the existing state issuance infrastructure, laws, and regulations. A national identity card would come into existence only if it were the sole form of identification required for certain essential purposes rather than a voluntary and optional form of identification. Nations have recognized for centuries that a secure passport is necessary for some very limited purposes relating to international travel. But a single national identity card is unnecessary for homeland security purposes and should be opposed for a variety of reasons. Indeed, one improvement to pending legislative proposals would be a provision that forbids federal agencies from making any single form of identification the only acceptable identifier.

More important, the concern expressed mistakes a symptom for a cause. The problem is not with requiring an enhanced, more reliable form of identification. The problem, to the extent it exists, is that identification is being increasingly called for when it is unnecessary. Every petty bureaucrat should not require a picture ID merely for the privilege of entering a building—but where the security concerns are legitimate (as, for example, with entry into secure facilities or boarding aircraft), the need for a reliable identification form is paramount.

As a purely voluntary and optional form of identification, state driver's licenses are the preferred form of identification for most Americans, in part because most Americans already carry them for ease of proving driving eligibility. They already are a generally accepted identity card and are used as an optional form of identity confirmation in many federal laws such as the Help America Vote Act. The pending proposals would simply add to their utility in fighting terrorism, an even more significant objective. More important, by continuing to use the distributed state-based network of identity protection, we guard against encroachments on civil liberties that arise from more centralized systems.

Thus, the identity security legislation would not substantially change either the types of uses or the frequency of use of driver's licenses as optional

forms of identification. The only significant change is that the legislation would enhance the reliability of the form of identification most Americans prefer. It simply is not sound public policy to prefer unreliable and potentially forged documents over the same documents that are more secure and reliable.

Federalism Not Threatened

The point is also made that it is not the state's job to issue identity cards to meet the needs of federally supervised activities, such as boarding an airplane. To be sure, this is true. The federal government issues identity documents now that are more reliable substitutes and that serve as "national identity cards." These include passports, military identity cards, and identity cards for access to secure federal facilities, which are issued by the federal government and have strict controls on the methods for confirming the identity of the holders. But they are unwieldy, and not everyone has them. For example, although more than 40 million U.S. citizens possess passports, they are not issued in a "wallet sized" format. So it is generally inconvenient to carry a passport for identification, although many people now do so for domestic airline travel for the convenience of a quick identity confirmation.

The essential point is that those people who prefer to use a federal ID can do so, and no state is required to change its licensing laws under the proposed legislation. Yet states will know that this is the form of identification most of their citizens desire. The federal government would simply notify the states that if they wanted to serve their citizens' interests to continue to use their state-issued driver's license for certain federal purposes in the future, they would have to make them more reliable. The respective states could decline to follow the federal standards, but the consequence would be that their citizens would have to use one of the other forms of federal identification. That would narrow their citizens' choices and might arguably enhance the role of the national government, but a state's voluntary compliance with the proposed law would hardly violate federalism principles.

Nor should the legislation prevent a state from continuing to issue non-compliant driver's licenses

(perhaps in a parallel system) if it wishes. For example, a state that wished to do so could have a secondary form of "state driving permit" that it issued in a manner that does not meet federal standards. If a state were to adopt such a parallel system for its own convenience (perhaps because it values the broader availability of driving permits even for those ineligible for a federally compliant license), it should be free to issue such permits, provided only that they are clearly distinct from its federally compliant ID card.

In other words, the proposed legislation should merely make clear the obvious—that driver's licenses used for federal purposes are insecure, and they should not be. The legislation should be agnostic on the unrelated state interest in authorizing driving within its borders.

Unfunded Mandate Argument Is Backwards

Another objection to the identity security proposals is that they will constitute an unfunded mandate obliging the states to expend funds for compliance. This objection ignores history: Historically, federal regulation of driver's licenses has been tied to transportation funding.

The current proposals are more sensitive to state interests. Rather than penalize for non-compliance, the latest identity security proposals would use an incentive system, fostering compliance through grants to assist those states that do not already meet the standards over a three-year period.

One Size Doesn't Fit All

National standards for driver's licenses, another objection holds, are too proscriptive, requiring uniformity where it is not necessary. But that argument proves too much—for it is an argument for never having federal standards regarding any question. While one may debate the necessity of federal intervention generally, there is little doubt that national security interests are among the most vital federal interests.

The specific requirements advanced are all drawn directly from recommendations prepared by a task force of state officials convened by the American Association of Motor Vehicle Administrators (AAMVA) immediately after 9/11 to study security

weaknesses and correct them. The AAMVA completed its study, led by state officials from nearly all states, in February 2004, and its DL/ID Security Framework document set forth very clear requirements for AAMVA member states. Some of the recommendations mirror requirements dating to a 1982 federal law, which have never been implemented by the states. The Department of Transportation recommended similar security improvements to Congress in July 2001.⁵

No Threat to Privacy

Fears regarding an erosion of privacy are legitimate, but they are overblown with regard to the identity security legislation at issue. Long-standing standards for the appropriate sharing of driver's license information are already in place.⁶ The federal government is not demanding any new information. Additionally, national standards provide new opportunities to put additional safeguards in place, ensuring that information is properly used solely for identify verification and not for any other purposes.

Not an Anti-Immigrant Initiative

Provisions of the proposal would require identity documents to expire at the same time as the

expiration of lawful entry status and would preclude individuals who have illegally entered or are unlawfully present in the United States from having identification documents. Construing such measures as "anti-immigrant" is just wrong. The law in no way would penalize individuals who are lawfully present in the United States either as legitimate visitors or as persons seeking to immigrate to the United States.

Still, critics of this provision of the law have a more nuanced point that is worth considering. Some states believe that the issuance of driver's licenses to illegal immigrants advances legitimate state interests. Lawmakers in California, for example, have promoted the effort to license persons who are in the state unlawfully because doing so would require testing those drivers and increasing the likelihood that they would get insurance. This, they argue, would make roads safer, which in turn would lower insurance rates.⁷

Substantively, this argument is problematic. It rests on a conjecture that may or may not prove valid, and it ignores the point that providing licenses to people unlawfully present in the United States promotes living and working here in violation of the law. While citizens may save a few dol-

5. *Evaluation of Driver Licensing Information Programs and Assessment of Technologies*, July 2001, report to Congress by the U.S. Department of Transportation, National Highway Traffic Safety Administration, in conjunction with the Federal Motor Carrier Safety Administration and American Association of Motor Vehicle Administrators.
6. Those with privacy concerns often ignore the long-standing use of the National Driver Register (NDR), created in 1960 by Public Law 86. The NDR is a national database of driver's license information containing a central file of state reports on individuals whose licenses to operate a motor vehicle have been suspended, revoked, canceled, or denied, for cause, or who have been convicted of the following serious traffic-related offenses: operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; a traffic violation arising in connection with a fatal traffic crash, reckless driving, or racing on the highways; failing to give aid or provide identification when involved in a crash resulting in death or personal injury; and perjury or knowingly making a false affidavit or statement to officials about activities governed by a law or regulation on the operation of a motor vehicle. The NDR's primary purpose is to enable state motor vehicle agencies to share driver record information with each other so that they can make informed decisions about issuing driver's licenses to individuals, particularly those who move into their states from other jurisdictions. Other groups with access to the NDR include employers and potential employers of motor vehicle and locomotive operators; air carriers regarding pilot applicants; federal agencies such as the Federal Aviation Administration, Federal Railroad Administration, and the Coast Guard for transportation safety purposes; the National Transportation Safety Board and the Federal Motor Carrier Safety Administration for crash investigation purposes; federal departments or agencies that issue licenses to individuals; and individuals who request information pertaining to themselves. Without a program such as the NDR, an inquiring agency would have to query each of the 50 states individually in order to ascertain whether a driver's license applicant's license or privilege has been withdrawn or denied in another state.
7. Nathan Root, "To License or Not to License, Part II," *Inside ID*, July 26, 2004, at www.insideid.com/credentialing/article.php/3385831.

lars on insurance claims, those savings are likely to pale in comparison to the vast costs inherent in permitting an underground economy—expenses that by some estimates already cost California \$10.5 billion a year.

Moreover, giving federally recognized driver's licenses to people unlawfully residing in the United States is not just an argument that makes bad economic sense; it also makes for bad homeland security strategy. Any strategy that hopes to stem the tide of illegal entry and unlawful residence in the United States must make it more attractive for people to enter and reside in the country under the rule of law. National policies should focus on encouraging legal behavior.

If regulating immigration and incentives affecting illegal immigration is the real purpose of congressional legislation, it ought to be addressed in separate legislation. It is unclear whether the national government could or should simply require states to deny various benefits or protections of state law to illegal immigrants. The states might counter that the national government has failed in its duty to control illegal immigration and its citizens ought not to be subjected to uninsured and unsafe illegal alien drivers. But that debate really is separate from the national interest in more reliable and secure forms of identification.

Moreover, the essential national interest in more secure forms of identification for transportation screening can be met without forbidding states from issuing any driver's licenses to illegal immigrants. If that is so, our constitutional federalism protects such state-based actions where they do not trench upon federal interests, even when they seem profoundly unwise to the citizens of most states.

Thus, the federal government is wholly within its power in insisting that licenses to be used for access to federal programs and facilities must meet certain minimum standards. It should, however, as already outlined, be permissible for a state (at its own discretion) to adopt a parallel identity card program (if it wishes to) that meets its own needs but does not satisfy federal stan-

dards, so long as the two types of cards are readily distinguishable.

In short, we think states ought not to issue driver's licenses to illegal immigrants; but no matter how wrongheaded we think that policy is, states ought to remain free to issue such state driving permits as long as they are clearly distinguishable from the driver's licenses that meet national identification standards. In this way, a state would not be pressured to abandon one policy that it believes to be in its interest (requiring illegal immigrants to secure driver's permits and insurance) in order to secure the utility of the federal recognition for its lawful citizens. Perhaps a state pursuing a dual licensing system would have to use a different color for illegal immigrant driver's licenses and indicate across the top that they do not meet the national identification standards. That would satisfy the national interest without unduly frustrating the state's purported interest.

However, if states attempt to meet their interests by issuing licenses that cannot be used for federal identity purposes, they open themselves to a plethora of unintended consequences, including the prospects of creating a ready means for racial or ethnic profiling. Tennessee, for example, has tried issuing licenses labeled "FOR DRIVING PURPOSES ONLY, NOT VALID FOR IDENTIFICATION." They are not to be used for boarding airplanes or for purchasing guns or alcohol. Recognizing that the document could subject cardholders to a degree of scrutiny beyond a regular license, the League of United Latin American Citizens filed a federal lawsuit charging that the Tennessee law discriminates against Hispanic residents. Still, that is a choice that a state may choose to make.

Conclusion

The proposal to establish federal standards for state-issued identity cards is a reasonable requirement. Most security systems in the United States rely on establishing legitimate identities. While not a panacea that can solve all the problems of homeland security, guaranteeing the surety of identity documents is essential. Indeed, reliable identity documents are essential both for protecting liberties

and for promoting security. They not only help law enforcement in their efforts to protect us, but also can be tools to ensure that lawful citizens are not inconvenienced as they conduct routine and personal affairs. Valid secure documents can also help to protect individual privacy by limiting the requirement for individuals to share personal information.

Federal standards for identity documents can be established in way that promotes security, protects individual liberties, and preserves the principles of

federalism. Congress should not hesitate to establish laws that achieve these ends.

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