

COALITION FOR A SECURE DRIVER'S LICENSE TESTIMONY BEFORE THE COMMUNICATIONS AND TECHNOLOGY COMMITTEE OF THE PENNSYLVANIA SENATE

May 11, 2011

Good morning. My name is Philip Max Bluestein. I am speaking on behalf of the Coalition for a Secure Driver's License (CSDL), a not-for-profit, crime prevention, public safety educational charity, located in Washington, DC. CSDL is primarily a research organization, which monitors laws and policies by state and federal governments to combat identity theft and fraud, focusing primarily on driver's license rules. It is financially supported by the contributions from more than 7,000 members in 50 states. Thank you very much for the opportunity to testify today.

First, I will speak in support of SB 355, cited as the Identification Card Electronic Swiping Act. In our view, this bill provides an excellent balance between the legitimate needs of commercial enterprise to confirm the identities of customers, and the state's responsibility to protect the privacy of residents. It is a clearly written bill that establishes under law appropriate business purposes for capturing data on state issued identity cards, including driver's licenses. We think it is extremely important that businesses which enforce age restricted laws regarding tobacco products or alcoholic beverages have clear authority to swipe cards so they can detect counterfeit and altered IDs. By this means they can prevent underage people from violating state laws, and also limit their own liability from law violations. At the same time, we support SB 355's constraint on commercial establishments from using information captured through the age validation procedure to subsequently sell to others or to use for commercial solicitations. Today's citizens are keen to protect their privacy and we believe it is a state legislature's responsibility to define appropriate use of personal information captured electronically in commercial transactions.

Next, I will speak in opposition to SB 354. My organization is a research organization, not an advocacy group. Our opposition is to the predictable effect of the bill, which if enacted will be to remove the flexibility of the Governor and the state executive branch to keep Pennsylvania current with the security improvements now underway in a majority of driver's license agencies across the country. If SB 354 becomes law, Pennsylvania will join a half dozen states which are doing nothing to improve the identity security elements of driver's license issuance, and will inevitably reduce public safety as a result.

The focus of my testimony today is threefold; 1) to discuss sovereignty concerns about REAL ID rules; 2) to describe how rules for confirming the identities of applicants for driver's licenses and state issued IDs help to protect the safety of Pennsylvania's citizens; and 3) to describe which other states are complying with federal regulations issued pursuant to what is now Public Law 109-13, derived from Title II of the REAL ID Act.

The REAL ID Act contains a total of 5 separate titles, each of which contain multiple provisions.

Title I: entitled "Amendments to Federal Laws to Protect Against Terrorist Entry," has a total of six sections which, among other things, establishes prohibitions against the federal government allowing known terrorists or members of terrorist groups to enter the United States. Section 102 of Title I was the focus of an unsuccessful effort by two environmental groups to have the REAL ID Act declared unconstitutional.

The Supreme Court has already refused to consider whether the REAL ID Act is constitutional. In 2008, the Department of Homeland Security used the Real ID Act to waive 36 laws in order to construct fences and barriers for 650 miles across the U.S.-Mexico border. That same year, two environmental groups attempted a Supreme Court challenge of those actions, charging that the REAL ID Act was unconstitutional. Consequently, it's unlikely the Supreme Court would now consider another challenge, like that authorized by SB 354, and such an endeavor by the Pennsylvania Attorney General would be a waste of time and the taxpayer's money.

Title II, entitled Improved Security for Driver's Licenses and Personal Identification Cards, contains the driver's license provisions, and was a direct response to a recommendation of the 9/11 Commission.

Driver's licenses were important to the 9/11 terrorists

The 9/11 terrorists moved freely throughout the Eastern United States before September 11, 2001. They took flying lessons, purchased their September 11 airline tickets on a computer at a Kinko's copy store, and rented cars, apartments and condos.¹ Thirteen of the terrorists had Florida driver's licenses or ID cards, 7 had Virginia driver's licenses, at least 2 had California licenses and 2 had New Jersey licenses.² The director of Carnegie Mellon's Internet Security laboratory, Robert Thibadaux stated that "the 19 terrorists on September 11 were holding 63

¹ St. Petersburg Times, by Thomas C. Tobin, September 1, 2002

² Federation for American Immigration Reform, "Identity and Immigration Status of 9/11 Terrorists, updated September 2010

state licenses for identification.”³ That’s roughly 3 licenses per terrorist. Several of these IDs were found near Shanksville, PA in the wreckage of United Airlines Flight 93. One of the hijacker terrorist pilots, Ziad Jarrah, a 26 year old Lebanese man, carried a Florida driver’s license reissued to him in July 2001, and he also carried a Virginia state issued ID issued to him in August 2001. It is believed he used the Virginia ID to board the plane on the morning of September 11, 2001.⁴

This attack on the United States forced our public officials to probe deeper into the weaknesses in driver’s licenses and identification document issuance processes. What they found was that most states did not have adequate procedures to *verify the true identity of the person* before issuing the most universally accepted form of identification in America!

Real ID was an effort to address this deficiency and vulnerability. This law was deemed by Congress as a compliment to other federal laws, increasing security measures to protect against foreign terrorism and to improve border security.

Representative James Sensenbrenner, sponsor of the legislation, explained what the driver’s license provisions were intended to correct:

“The goal of the REAL ID Act is straightforward. It seeks to prevent another 9/11-type terrorist attack by disrupting terrorist travel. The 9/11 Commission’s terrorist travel report stated that ‘abuse of the immigration system and a lack of interior enforcement were unwittingly working together to support terrorist activities.’ The report further states that, ‘members of Al Qaida clearly valued freedom of movement as critical to their ability to plan and carry out the attacks prior to September 11th. Finally, the report observes ‘if terrorist travel options are reduced, they may be forced to rely on means of interaction which can be more easily monitored and to resort to travel documents that are more easily detectable.’”

The legislation does not try to set states’ policy for those who may or may not drive a car, but it does address the use of a driver’s license as a form of identification to a federal official. American citizens have the right to know who is in their country, that people are who they say they are, and that the name on the driver’s license is the real holder’s name, not some alias....”

³ Pittsburgh Post Gazette, March 28, 2002

⁴ <http://www.scribd.com/doc/13120683/FBI-Summary-about-Alleged-Flight-93-Hijacker-Ziad-Jarrah>

President Bush added his endorsement, from which I quote:

“The Administration supports the provisions in H.R. 418 to strengthen the standards for issuance of drivers' licenses.”⁵

Some claim that the REAL ID Act infringes upon constitutional rights. The REAL ID Act has been challenged by suit from two environmental groups, and the Supreme Court refused the petition from the Sierra Club and the Friends of Wildlife without comment. Nonetheless, I will address some of the claims.

- (1) Separation of Powers Clause -- Opponents of REAL ID, Public Law 109-13, *wrongly* argue that it is unconstitutional claiming that it usurps state authority for the issuance of driver's licenses.

Because the law and regulations only govern the actions of the federal government in accepting driver's licenses and state issued identity documents for official purposes, and those official purposes are narrowly defined, these claims have no standing.

- (2) Congress required the Secretary of Homeland Security to include states in formulating the regulations, and gave the Secretary almost unlimited authority to grant the states extensions to meet regulatory deadlines. If, as claimed by some, the REAL ID Act actually mandated compliance by the states and set unreasonable dates, there might be some basis for such a suit, but that is simply not what has happened. REAL ID calls for VOLUNTARY compliance by the individual states. It does not challenge state sovereignty because, in addition to having the right to opt out of the regulations, each state that elects to comply has considerable latitude in defining how it will comply. Again, the REAL ID Act itself required the Secretary of Homeland Security to allow participation by the states in drafting of the regulations. I quote from the law, Section 205:

“(a) Participation of Secretary of Transportation and States- All authority to issue regulations, set standards, and issue grants under this title shall be carried out by the Secretary, in consultation with the Secretary of Transportation and the States.

(b) Extensions of Deadlines- The Secretary may grant to a State an extension of time to meet the requirements of section 202(a)(1) if the State provides adequate justification for noncompliance.”⁶

⁵ **Statement of Administration Policy: H.R. 418 - REAL ID Act of 2005** February 9, 2005; **Citation:** John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Web: <http://www.presidency.ucsb.edu/ws/?pid=24840>.

(3) The Federal government has passed driver’s license laws that are true federal mandates, some of which have been challenged in court under a variety of claims.⁷ The most sweeping driver’s license law was enacted by Congress nearly fifty years ago: the National Traffic and Motor Vehicle Safety Act of 1966. The Driver’s Privacy Protection Act of 1994 (known as DPPA) was challenged by the State of South Carolina, which claimed that it violated the Tenth Amendment. Chief Justice William Rehnquist, famous for authoring a series of cases addressing the powers reserved to the states, specifically refuted South Carolina’s argument, citing Article One, Section 8, generally known as the Commerce clause of the Constitution.⁸ Chief Justice Rehnquist delivered the opinion of the Court:

The Driver’s Privacy Protection Act of 1994 (DPPA or Act), 18 U.S.C. § 2721—2725 (1994 ed. and Supp. III), regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs). We hold that in enacting this statute Congress did not run afoul of the federalism principles enunciated in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997).⁹

If the Supreme Court were in the future to consider the constitutional basis of the REAL ID Act, I believe the Supreme Court would uphold the law, citing Article III, Section 4 of the Constitution: “the United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.” It is this provision that obligates the Congress and the President to protect the states from terrorists

⁶ Section 205, Division B, the REAL ID Act of H.R.1268; Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Enrolled Bill [Final as Passed Both House and Senate]

⁷ There are many federal laws governing driver’s licenses and ID cards including: the Automobile Information Disclosure Act, the Motor Vehicle and Cost Saving Act, the National Traffic and Motor Vehicle Safety Act of 1966, the Anti-Car Theft Act of 1992, the Clean Air Act, and the Driver’s Privacy Protection Act of 1994.

⁸ In a unanimous decision in the (2000) *Reno v. Condon* case, the United States Supreme Court upheld the Drivers Privacy Protection Act (DPPA), by reversing lower federal and appeals court decisions. This Act remains the keystone of driving records privacy. The Supreme Court specifically refuted the argument that the DPPA violates the Tenth Amendment, which confers all powers to the states that Constitution does not specifically associate with the federal government. Instead, the Supreme Court ruled that the federal government has the authority to regulate state driver’s license information under the federal government’s authority over interstate commerce. – *RENO V> CONDON* (98-1464) 528 U.S. 1441 (2000) 155 F. 3d 453, reversed.

⁹ SUPREME COURT OF THE UNITED STATES, No. 98—1464; JANET RENO, ATTORNEY GENERAL, et al., PETITIONERS v. CHARLIE CONDON, ATTORNEY GENERAL OF SOUTH CAROLINA, et al.; ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT [January 12, 2000]

who might visit “domestic violence” upon this country. Most state constitutions likewise assign authority to their respective governors and agencies to protect citizens from domestic violence.

Several facts are important as they apply to the REAL ID Act regulations and SB 354: There is nothing in the REAL ID Act about biometrics or about RFID chips.

It is NOT a requirement of the REAL ID Act that facial recognition software be employed by states to screen applicants for driver’s licenses.

It is an earlier federal law passed in 1966 that provides federal and state law enforcement access to individual driver’s license records, provided certain rules are followed, which in some instances require judge issued warrants.¹⁰

The federal government has maintained driver record systems for nearly twenty years – but only on commercial truck drivers and “problem drivers.”

Furthermore, PL 109-13 (REAL ID) establishes requirements for state issued driver’s licenses and identity documents only with regard to federal purposes. The law requires that only REAL ID compliant IDs be acceptable for official purposes – entering secure federal facilities, boarding federally-regulated aircraft and entering nuclear power plants.

All states remain free to issue and to accept non-compliant IDs for state purposes - and that is precisely what some states are doing. Among the fifteen states that have submitted certification documents to the Secretary of Homeland Security that they are in compliance, five states issue both REAL ID compliant licenses and a lower tier of non-compliant licenses. The states taking that approach are Indiana, Maryland, Delaware, Utah, and most recently, Connecticut.

Benefits of implementing PL 109-13 (REAL ID)

An examination of the REAL ID regulations will show that many are aimed at preventing imposter fraud. States like Pennsylvania should comply with these regulations to reduce the risk to their residents of financial loss from identity fraud, if for no other reason.

¹⁰ Much of the National Traffic and Motor Vehicle Safety Act of 1966 is incorporated in 49 USC CHAPTER 301 - MOTOR VEHICLE SAFETY, As updated 02/01/2010

Identity Theft is the fastest growing type of fraud in the United States; in 2008 about 9.9 million Americans were reportedly victims of identity theft. The cost to consumers is about 90 billion dollars each year. Imposters have always been a problem for society, but it is a growing problem as criminals are using new sources of information about other people, and then assuming another person's identity.

Because adherence to REAL ID rules and benchmarks reduces the ease with which imposters can obtain valid driver's licenses, it increases public safety in Pennsylvania by:

- Preventing reckless and drunk drivers from getting licenses through fraud.
- Preventing dead beat dads from hiding under assumed names.
- Preventing welfare and Medicare theft by denying crooks multiple licenses under various identities in multiple states.
- Stopping sexual predators and other criminals from attempting to acquire false identities by using fraud to obtain Pennsylvania driver's licenses or ID cards under assumed names. This is particularly important because Pennsylvania has more than 10,000 registered sex offenders but is likely home to others who have fled from other states.
- Helping to prevent voter fraud, a priority in Pennsylvania for many citizens.
- Helping to stop underage drinking and smoking.
- Training of DMV employees on how to recognize counterfeit identity documents and prevent identity fraud, which is among the REAL ID regulatory requirements.
- Creating a tool that assists police and especially narcotics investigators to accurately identify suspected criminals.

PL 109-13 (REAL ID) regulations require that each applicant for a driver's license or ID card must sign a declaration acknowledging that he understands any false statement in his application makes him subject to state and federal identity fraud statutes. This is a requirement in neighboring New York state as the initial step of the application. Officials there note that some applicants turn and walk out of DMV offices without signing the form, when they are confronted with reality of potential criminal prosecution. So this particular REAL ID requirement clearly has a deterrent effect on would be fraudsters.

REAL ID COMPLIANCE – Fifteen States are now materially compliant with the first 18 benchmarks, and more states are moving to material compliance.

Under U.S. Department of Homeland Security (DHS) policy, those states and territories granted waivers in 2008, and again in December of 2009, must reach “material compliance” with minimum requirements for issuing driver’s licenses and ID cards by May 31, 2011. When, on December 18, 2009, DHS announced an extension of the material compliance deadline, 46 of 56 states and territories indicated that they could not reach material compliance until a later date. Three states had met compliance, and three states notified DHS that they would not comply because of “binding state laws.” Those states were Montana, Washington, and Oklahoma.

Fifteen states and the District of Columbia are already fully compliant with all 18 of the REAL ID material compliance benchmarks: Alabama, Arkansas, Connecticut, Nebraska, Delaware, Indiana, Kansas, Kentucky, Maryland, Mississippi, South Dakota, and Utah and Connecticut. Another six states are within one to three benchmarks of full compliance: Georgia, Nevada, New York, North Dakota, West Virginia and Wyoming.

Hawaii was a holdout against REAL ID implementation until 2010, with political objections to REAL ID, especially the “lawful status” checks. Now Hawaii is moving forward to meet REAL ID benchmarks.

Maryland, which had refused REAL ID compliance until April 2008, is now materially compliant. Examples like Maryland demonstrate that REAL ID compliance is achievable. Illinois has only nine benchmarks completed, but is working toward compliance on the remaining nine benchmarks. Virginia only has five benchmarks met, but is working towards compliance on 10 others. Vermont has nine benchmarks in place and five partially completed.

California recently began issuing a new driver’s license that exceeds REAL ID standards for physical card security.

There are only TEN States that are at 50 percent material compliance or less: Alaska, Illinois, Massachusetts, Montana, Oklahoma, Rhode Island, Vermont, Virginia, and Washington

Within three years from today, I believe more than 90% of the population of the United States will be issued REAL ID compliant licenses. If Montana, Oklahoma and Washington state choose to remain outside compliance, perhaps joined by Alaska, New Hampshire and Maine, the vast number of Americans will be covered by secure driver’s license rules.

Homeland security and public safety should be your main concern. But, protection against foreign terrorists is not the only benefit from having Pennsylvania comply with the Department

of Homeland Security (DHS) regulations for Public Law 109-13, REAL ID. In the long term, the most important benefit will be to assure Pennsylvania residents that state officials zealously guard the integrity of the identity document most people carry – the state issued driver’s license. A 2007 poll commissioned by the Information Technology Association of America found that 82 percent of adults favor secure driver’s licenses. The poll also found that 85 percent of Americans believe that secure driver’s licenses improve homeland security and reduce fraud and identity theft. A second important benefit is that the Pennsylvania driver’s license will continue to be accepted by the federal government and in all other states as the proof of the bearer’s identity, as well as eligibility to drive.

Compliance with the federal driver’s license security standards will finally lead to realizing the goal of “one driver, one license”. This logical extension of the highly successful “one driver, one license” for commercial truck drivers has improved safety on our highway system. It will also promote safety by denying people who have lost their driver’s license in one state from simply assuming another identity in another state to get a new driver’s license. These people are shopping for a new identity because of reckless driving or driving while intoxicated, or for vehicular manslaughter, and it’s important to stop them before they kill someone on the highway.

Lives will be saved by authenticating the identity of driver’s license applicants by keeping drunks and reckless drivers from getting new licenses under assumed or changed names. Young lives will be saved because secure licenses and confirmation of the identity of applicants will help to prevent underage drinking.

Thank you very much for holding this hearing and for the invitation to testify. I look forward to responding to your questions.