

The Real ID Rebellion

On May 11, 2008, the statutory deadline for compliance with the REAL ID Act passed without a single state meeting its requirements. Indeed, more than 17 states have passed legislation objecting to or outright refusing to implement REAL ID. Earlier this year, the Department of Homeland Security (DHS) handed out compliance deadline extensions for the asking, but state leaders from across the ideological spectrum refused even this small gesture of acquiescence. A REAL ID rebellion is under way, and at a May 7 Cato Policy Forum two of its leaders, Sen. Jon Tester (D-MT) and Gov. Mark Sanford (R-SC), offered insight into why REAL ID—and the de facto national ID card system it represents—is wrong.

SEN. JON TESTER: I want to make it very clear. Taking the needed steps to make this country safe from terrorism is very, very important. But it has to be done without trampling on our rights.

Because when our rights get trampled upon, the terrorists win. That's why I'm proud of the fact that Montana has been a leader in the REAL ID rebellion.

Montana's politics features a mix of prairie populism, tax-hating conservatism, and leave-me-alone libertarianism. Some folks even manage to be all of those things at one time. So getting a unanimous vote in the state legislature is a pretty rare thing. But that is what happened last year when 150 members—100 in the House and 50 in the Senate—joined the governor in opposing REAL ID. There were no votes in favor of REAL ID.

REAL ID is invasive, expensive, and an affront to all of those who cherish privacy rights. This law was written with no public input. No hearings, no debate, no amendments. The system of checks and balances that our Founding Fathers set up was missing in action. The first Senate hearing held on REAL ID finally occurred last year—more than two years after REAL ID became law.

In the three years since REAL ID was enacted, it has had all kinds of unintended consequences, and no benefit whatsoever

when it comes to making this country more secure. It is incredibly expensive and complicated. It is burdensome to states and individuals alike. And it is being implemented in a way that makes ordinary folks cringe.

The most recent charade only proves the point. States were forced to get around an arbitrary May 11 deadline to comply with REAL ID. Many states were deemed to be in compliance with REAL ID, even though they said they had no plans to comply. But some of the states resisted. Interestingly enough, many of those states have already taken steps to make their driver's licenses more secure—Montana and South Carolina among them. Still, they were threatened with retaliation for resisting DHS coercion.

The federal government set up a system that was designed with one thing in mind: using federal resources to bully states into going along with the program. For example, it took more than a month of legal wrangling with the federal government for the state of Montana to finally be able to send a letter to DHS. The state simply said it was not asking for an extension. DHS responded by say-

ing that it had no choice but to treat the letter like it was a request for an extension. This legal bobbing and weaving did nothing to improve our homeland security, and it will not.

By the time REAL ID is fully implemented it will be the year 2017. Sixteen years will have passed since that awful day when our nation was attacked on September 11.

That is a long time to wait for action on something that will not deliver a real security benefit.

In the meantime, the law already is causing massive headaches for the states. These troubles are a sign of things to come if we continue down the REAL ID road.

The states have no idea whether to go forward with building databases, redesigning driver's licenses, and training new DMV workers, which REAL ID requires. If they do in fact undertake these costly efforts, they do so with no guarantee that the federal government will compensate them.

Worse still, more expensive driver's licenses and more time waiting at the DMV line may be the least of our worries. Creating a national ID—and make no mistake, that is precisely what REAL ID will do—will open up countless opportunities for our personal information to be stolen or used in a way that we have not agreed to.

Most of the opposition to the cost of REAL ID has centered on the massive new unfunded mandate that it has placed on the states. But far more is at stake than dollars and cents. The REAL ID Act was yet

Sen. Jon TESTER

(D-MT) was elected to the Senate in 2006. Before that he served eight years in the Montana Senate where he rose to the rank of Senate president. Senator Tester realized the defects in the REAL ID law from the beginning. He was an original cosponsor of S. 717, the Akaka-Sununu legislation that would repeal REAL ID. Tester considers REAL ID a repugnant, costly, and unworkable system and another power grab by the "imperial presidency." Markos "Kos" Moulitsas, founder and proprietor of *Daily Kos*, a popular liberal weblog, calls Sen. Tester an example of a "libertarian Democrat," citing his support for reducing government regulation and the importance he places on local control of government.

another in a series of sweeping laws and programs that represent an invasion of privacy by the government that far exceeds anything that we've seen in a generation.

Since September 11 there has been a steady erosion of the privacy of ordinary citizens. First came the Patriot Act, which gave the FBI extraordinary powers to snoop on the private lives of all Americans. Then came REAL ID, followed by revelations of the president's secret domestic wiretapping program.

At their core, these efforts share a common origin—the arrogant and wrongheaded belief that the federal government knows best.

Ultimately, the failure of Congress and the administration to address the concerns that many states have or to respond to the commonsense objections of civil libertarians results in far more than just philosophical disagreement. In my view, these executive powers do long-term harm to our national security.

Just as the warrantless wiretapping issue has prevented Congress from enacting permanent legislation that allows the federal government to listen in on communications of interest outside the United States, so too has the REAL ID debate distracted us. It has distracted us from the obvious need for states to continue to improve the security of driver's licenses. It has distracted us from the real mission of preventing terrorism on American soil.

The threat of an attack is real, and we cannot ignore it. But make no mistake—the longer that REAL ID hangs around, the more of our homeland security resources it will consume.

I live 80 miles from the Canadian border, and I can tell you that we have major holes in our border security efforts. I'd rather have the federal government spend dollars on closing those gaps than on looking over the shoulder of the Montana DMV or creating a national database of American citizens.

I know this paints a pretty bleak picture of what's going on. But there is a little bit of

good news here. A growing number of folks—liberals, conservatives, and everyone in between—are finding their voice against these massive privacy violations. Although this administration may turn a deaf ear to the growing chorus of concerns, I think that Congress is increasingly receptive to our message—just in time, too.

In essence, the executive branch has swept a ton of power. Our Founding Fathers set up three branches of government; we



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need to respect those three branches of government. Our Constitution is important, and we need to live by it. As we move forward with the REAL ID program, they're going to hear a lot from me, and they're going to hear a lot from folks like Gov. Sanford. The big issue here is that we've got peoples' attention. People are starting to realize that this isn't healthy. And I think there are better solutions—better solutions that make this country more secure.

GOV. MARK SANFORD: I've got a *Chicago Sun-Times* editorial here that I think you'll find interesting. It's called "Repugnant National ID Card Looms Again." It reads, in part, "like a bad TV show gone into re-runs, the specter of a national ID card for every American is back again. Against a backdrop of anti-immigration rhetoric on the campaign trail, the Senate Judiciary Committee is considering sweeping legislation to develop a national electronic database." This editorial is from March 11, 1996.

The debate over whether or not to have a national ID card is not a new one. It took place in the 1980s, in the 1990s, and we're having it again in the 2000s.

But the debate over liberty versus security goes back further than that. You can look as far back as the Great Wall of China, which stands as a silent reminder of the fact that in asymmetrical warfare things constantly change.

REAL ID represents the Maginot Line of security measures in the 21st century, given the way the world is changing and the way that terrorists will always be asymmetrical in their attacks. Since I don't think it will do much in the way of security for reasons I'll outline later, when I look at REAL ID I focus especially on how it infringes on the liberty Americans hold so dear.

First, whether one is from the left or the right, the thing we can all agree on in the American system is that our ideas are debated, and through that Socratic process, we come up with ideas that ultimately work better than if they were just dictated. But this was a bill that fundamentally received no debate in the halls of Congress. It wasn't marked up in the Senate or House side. There have been more hearings—and there has been more debate in Congress—about steroid abuse

What is REAL ID?

REAL ID is a law that would make states issue driver's licenses according to federal standards and place driver information into national databases. REAL ID would make driver's licenses and ID cards have a machine readable component that would allow scanning of Americans' basic information whenever asked. REAL ID was passed in 2005 in unusual circumstances. It was attached to a military spending bill, and consequently passed without a hearing in the House of Representatives or the Senate. Want to learn more about REAL ID and other threats to privacy? Check out *Identity Crisis: How Identification Is Overused and Misunderstood*, by Jim Harper, director of information policy studies at the Cato Institute. It's available at www.catostore.org.

among baseball players than there has been on REAL ID and the de facto national ID card system that comes with it. And so, I think that this is a “process” question. Is it OK to append something as significant as REAL ID to a bill to help military personnel in the Middle East and tsunami victims in the Southeast? This question is especially important given the defeat of national ID card legislation in the 1980s and 1990s.

Second, this is the mother of all unfunded mandates. The National Conference of State Legislatures called REAL ID the “most egregious example” of unfunded federal mandates. You hear \$17 billion, you hear \$23 billion, and you hear the current revised number of \$9 billion in terms of how much REAL ID will cost the states. Whatever the number, we have a situation where the feds pay 2 percent and the states pay the other 98 percent. What if you went out to dinner with your friends and said, “I’m going to pick up 2 percent of the bill, you guys go out and pick up the other 98 percent—and I’m ordering for everyone”? That’s just not how it’s supposed to work, and Washington needs to know that.

Allowing the federal government to mandate state spending perpetuates out-of-control federal spending. Former comptroller general David Walker points out that the accumulated debt is basically \$50 trillion of contingent liability. That’s about \$450,000 per American household. We are getting to that tipping point, and the decline of the dollar says we are getting past that tipping point. Unfunded mandates allow the federal government to spend more than it already is by passing the bill to the states. So if you care about the nuts and bolts of Washington spending and how to reduce it, you should oppose REAL ID.

Third, I would point out that this is an unfunded mandate not just in terms of money, but in terms of time. In South Carolina, we have worked over the last couple of years to get wait times at the Department of Motor Vehicles down to 15 minutes. Marcia Adams, head of our DMV office, estimates that those lines will run one to two hours under REAL ID. Two hours is a lot of time. We all have but

so many hours here on earth. You can spend it with friends, you can spend it at work, you can spend it at play, or you can spend it at a DMV line.

Fourth, I would say REAL ID is another blow against the notion of citizens actively engaging their government. The First Amendment is very clear in guaranteeing to Americans the right to petition the government for a redress of grievances. There was not a caveat at the bottom that read,



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“only if you’ve got a REAL ID card.” But because a REAL ID is required to get into federal buildings, for the first time in recorded history, citizens attempting to speak with their Congressman or Senator could be turned away if they don’t have their ID card.

Fifth, REAL ID is based on the presupposition that to err is not human. It sets up a system where all of our personal information is stored in one central location.

We all know that this idea of one-stop shopping for every computer hacker around the world is not a good idea from the standpoint of security. We believe the idea of having peoples’ information housed separately and independently in

50 different states would enhance security rather than detract from it.

And finally I would say this: because this bill was not debated there are a whole host of loopholes that render it ineffective and indeed the Maginot Line when it comes to security measures. REAL ID does not address foreign passports. It strikes me that the bad guy is not going to go through the REAL ID hoops when he can go to a third world country and pick up a passport there to come to the United States.

Never mind that the 9th Circuit Court recently came down with a ruling that said you don’t need any personal information to board a plane, all you need is a pat down search. So you’re telling me a bad guy is going to go through the hoops involved with REAL ID, when in fact our own court system says he doesn’t have to? REAL ID has lots of very serious faults and as a consequence deserves a serious debate in Congress. For an issue we’ve been confronting for 30 years now, that’s the least we could ask.

Thomas Jefferson had it right when he said “I would rather be exposed to the inconveniences attending too much liberty than to those attending to small a degree of it.” Liberty is the central ingredient to a republican form of government. It’s the central ingredient to making a free market system work. And it’s the key determinant in allowing citizens to achieve personal happiness. REAL ID flies in the face of great thinkers like Thomas Jefferson, as well as Locke, Burke, and Hume, who understood the central importance of liberty.

Gov. Mark SANFORD (R-SC) was elected South Carolina’s 115th governor in 2002 and was reelected in 2006 on his record as a budget cutter and school choice advocate. From 1995 to 2001, he served South Carolina in the U.S. House of Representatives, where he was known as one of the most libertarian members. This March, Gov. Sanford emerged as a leader in the REAL ID rebellion when he wrote Secretary Michael Chertoff a carefully considered, five-page letter declining to ask for an extension to comply with REAL ID, which he said his state had no intention of ultimately doing. Sanford argues that REAL ID will provide little in the way of security while significantly infringing on the liberty of Americans.