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DO MISSISSIPPIANS NEED A REAL ID?

BY
LYDIA QUARLES, J.D.

Introduction.

All states, including ours, are beset with numerous mandates from the federal government, but no mandate in recent memory has challenged state autonomy, administration or budgeting as greatly as has the concept of the REAL ID. The REAL ID is actually a federally mandated way of requiring states to issue drivers' licenses and identification cards. Opponents of the idea call it a "national ID card" and tell us that "Big Brother is watching"; proponents tout its anti-terrorist and anti-crime features. Whether you agree or disagree with the concept, it will make an enormous difference in the administration of motor vehicle drivers' licensing in our State.

History of National Identification Cards.

National ID cards have long been advocated at certain levels of US governments, as well as foreign governments. In fact, most European countries, as well as Hong Kong and the Asian countries of Malaysia, Singapore and Thailand require national ID cards. The functions of the cards vary, as do the abilities of governments to protect the privacy of information associated therewith. The United States and the United Kingdom have long deferred, but debating the efficacy of a national ID card has continued in both countries. Last December the UK pulled funding on a proposed National Identify Registry with iris-scanning biometrics, the identifying feature advocated by the Brits.

Social Security Numbers.

In 1936, America's love-hate relationship with social security numbers began. Legislation creating the social security number designated it only as an identifier that operated in the administration of the Social Security system. In 1971, the Social Security Administration rejected any extension of a social security number to the status of a national ID. Numerous other governmental departments, advisory commissions and blue ribbon panels followed suit. For example, an advisory committee of the cabinet level department of Health, Education and Welfare (forerunner of the Department of Health and Human Services) rejected a national identifier in 1973; in 1976-1977 various studies in the Carter Administration rejected the use of the social security number as an identifier. The Reagan Administration, in 1981, went to the press to "explicitly oppose" the creation of a national ID card. The Clinton administration advocated a "health security card" in 1993, but this idea went the way of Clinton's national health plan. While Congress passed the Illegal Immigration Reform and Immigration Responsibility Act of 1996, the provision of the act which required that social security numbers be included on all drivers licenses was repealed by Congress in 1999.

Department of Homeland Security.

After September 11, 2001, there was renewed interest in the idea of a national ID card. The president of Oracle Corporation, Larry Ellison, even offered to donate to the country the technology that would make possible an ID card with embedded digitized thumbprints and photos. These ideas were scratched, however; Americans shy away from these types of controls.

In fact, in the enabling legislation for the Department of Homeland Security, Congress clearly stated that the agency could not create a national ID system. Cabinet Secretary Tom Ridge, speaking on this issue in September of 2004, stated: "the legislation created by the Department of Homeland Security was very specific on the question of a national ID card. They said there will be no national ID card." Those may have been famous last words on the issue.

What is the REAL ID?

The REAL ID is a federally mandated form for the driver's license that Mississippi (and all states) should issue to its citizens on or before May 11, 2008. While opponents call it the "national identity card", it is not unlike the card that many of us carry to gain entrance to and be identified in our places of

employment. The REAL ID will have encoded data capacity – although it remains unclear just what data will be encrypted, if any. The “minimum data elements” to be contained in the “machine readable technology” are not defined in the Real ID Act, but are left to the determination of the Secretary of Homeland Security, in consultation with the Secretary of Transportation and “the states”. Current commentary suggests that individuals will be required to bring to the motor vehicle division (1) a photo ID, (2) documentary proof of date of birth, (3) social security number, (4) address and (5) citizenship in order to get “real ID drivers license”. States will then be required to authenticate the data provided as proof, make digital copies of the data, archive the copies in a database, secure the database, and then make it available to all other states.

The Real ID Act began as US House Bill 418 in 2005, but died a natural death. Representative Sensenbrenner of Wisconsin added the text of House Bill 418 to his military spending bill (House Bill 1268) and it was signed into law (Public Law 109-13, 119 Stat. 231) on May 11 of 2005. The Real ID Act of 2005 is Division B of an act of the U. S. Congress entitled “Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief.” There were no debates or hearings on this act prior to passage; it would have been politically inexpedient in May of 2005 for legislators to vote against funding for the war on terror or tsunami relief.

At a minimum, data imbedded into the card would include:

- Full legal name
- Birth date
- Sex
- ID number
- Digital photograph
- Permanent address (no post office boxes allowed)
- Signature.

Before this data could be imbedded, however, the authentication by the state would have to occur.

Homeland Security will be permitted to add additional requirements, such as a fingerprint or retinal scan or other biometric identifiers in addition to the minimum data elements listed in the act. What those requirements are have yet to be released to the states. Homeland Security sent its proposed regulations (over 100 pages) for implementing the Real ID Act to the Office of Management and Budget for approval in mid-January – a full year later than anticipated. Speculation about the regulations abound, including that

Homeland Security head Michael Chertoff prefers a plan which out-sources regulatory and compliance features of the act to a private corporation which would have access to all data from each state.

What is the impact?

The Real ID Act will require changes to the 240,000,000 existing driver's licenses and non-license identification cards in existence and will alter business practices of all 50 state motor vehicle agencies. States have traditionally issued drivers' licenses to drivers and identification cards to non-drivers. Additionally the states have established what documents an applicant must provide to gain the license or card. They have maintained sole authority to establish, manage and maintain databases which reflect the information collected on each of us with the license or card. The Real ID Act changes all that. It requires our state's adherence to certain standards for issuance of the license or card in order for the holder to use his driver's license or card for official federal identification purposes. In other words, a federal agency (the Federal Transportation Agency, for example, which hires airport screeners) will not accept, for identification purposes, a state issued license or card that does not meet the requirements of the Real ID Act after May 11, 2008. States retain the right to issue non-complying drivers licenses and identification cards, but the design of these cards must differ from the REAL ID and they must contain a clearly readable statement that they are "not acceptable for any Federal identification purposes."

There's more. The Real ID Act requires each state to share its database with all other states. States refusing to link their database with other states will lose all federal funding. This raises privacy concerns since some states allow drivers license data to be sold to third parties.

Security experts are concerned about the identity theft issues. A number of groups have registered their discontent with the implementation of the Real ID for security reasons, including the Enterprise Strategy Group, the Electronic Privacy Information Center, Digimarc Corporation and Application Security, Inc. They point to recently compromised databases at ChoicePoint, Lexis Nexis, and motor vehicle databases in the states of Nevada, Florida and Maryland.

Other controversial aspects of the Real ID Act require the Attorney General of the United States to "install additional physical barriers...in the vicinity of the U. S. borders" to detect illegal crossing and with this mandate to the Attorney General comes the Secretary of Homeland Security's ability to waive existing laws in order to ensure expeditious construction of barriers and roads (in other words, expeditious taking of private property upon which to



install the barriers). Additionally, the Real ID Act restricts review of any waiver decision that the Secretary of Homeland Security may make to the United States District Courts and the statute of limitations allowing an aggrieved party to bring an action for review is exceedingly brief – 60 days.

The Real ID Act actually doesn't require Mississippi to make these changes. But residents of states that don't comply with the Real ID Act will be unable to use their drivers' licenses as a valid form of federal ID. In addition to impacting our abilities to board planes, it will prohibit our ability to enter federal buildings such as post offices and court houses; or to receive federal services, such as social security benefits; or to use services of a private entity (such as a bank or hospital) that is required under federal law to verify customer identity. So as a practical matter, at some point, Mississippi will take on the REAL ID.

What are the implications?

Whether you discern that the REAL ID is the beginning of “Big Brother” or merely an innocuous change in form, the implications are astounding. RFID and GPS chips – technology so small that it can be imbedded in a card the size of a driver's license – could identify and locate us as we go about our lives. It could transform our driver's license into our diary – except that this diary could be shared. Proponents argue that it can assist the police and FBI in locating the criminals and terrorists among us; opponents consider it invasive action of the federal government into citizens' private lives.

While some commentators have speculated on the use of bar coding or magnetic strips in the REAL ID, the Department of Homeland Security has indicated its preference for radio frequency identification (RFID) tags, which emit radio frequency signals and will allow tracking of the movement of the REAL ID and, obviously, its bearer. If RFID technology is used, private entities may use remote scanners to seduce the embedded information from the REAL ID without the bearer even knowing it. The Real ID Act includes no safeguards on the use of RFID. (As an example, the State Department has determined to use RFID technology for passports, but has included safeguards – specifically, covers that prevent remote scanning and encryption that requires the activation of a special reader.)

While the REAL ID is ostensibly voluntary, it is clearly an unfunded federal mandate – an expensive mandate. The National Conference of State Legislatures estimates a cost of \$11 billion over five years. The National Governors' Association and the American Association of Motor Vehicle Administrators concur with the \$11 billion figure, although Congress initially

estimated \$80 to \$100 million and allocated \$40 million in 2006 for “start-up” costs. No more funding has been allocated.

Complaints abound.

National Governors’ Association Chairman Mike Huckabee of Arkansas spoke of “skyrocketing costs” which had been discussed in the Association’s 2005 annual meeting, 3 months after the act’s passage. New Mexico Governor Bill Richardson spoke of the act as “a short-sighted, ill-conceived initiative” and promised that the governors would challenge its efficacy in court. Huckabee was more direct: “The federal government doesn’t have the guts to put out a national ID card, so they are trying to make 50 states come up with this program. Congress is now asking the states to make every driver’s license a national ID card, or passport. It’s absurd. The cost to the states will be staggering.”

The National Conference of State Legislators, at its annual meeting in August 2006 (believing that funding for compliance with the Real ID Act would ultimately fall upon the states) demanded that the federal government fund or repeal the Real ID Act. Executive Director William T. Pound noted: “Federal legislators and rule makers are negating state driver’s license security efforts, imposing difficult-to-comply-with mandates and limiting their flexibility to address new concerns as they arise. In other words, decades of state experience is being substituted for a ‘command and control regime’ from a level of government that has no driver’s license regulatory experience.” In truth, legislators were still waiting for details on implementation while the implementation deadline edged closer. They are waiting still.

The National Conference of State Legislators is not merely concerned with funding aspects. Its criticisms include: increases in number and length of visits to motor vehicle agencies; increases in staffing, facilities, training and equipment and development, expansion and deployment of verification systems required by Congress, and insufficient time to implement the act’s requirements before May of 2008. The Conference projects that to logistically manage the changes required by the Real ID Act, the states should be given at least until May 11, 2016 (8 years) to renew current drivers licenses and non-drivers identification cards and should be allowed to grandfather citizens having pre-existing drivers licenses or identification cards with the state for at least 10 continuous years.

A poll of members of the American Association of Motor Vehicle Administrators taken by the Associated Press reveals widespread concern about various provisions of the Real ID Act and general skepticism that implementation will even be possible by the 2008 federal deadline.

A number of state legislatures have introduced bills rejecting the REAL ID on the grounds that it is too difficult and costly to implement, an over-reaching of federal legislation and authority, and that it creates a *de facto* national ID card and database. These states include Georgia, Massachusetts, Montana, Vermont, Arizona, Utah, Missouri, Virginia, New Hampshire, New Mexico, Alaska and Maine. Alaska's legislature has also requested the repeal of the Real ID Act, noting that it is lacking in sufficient security and privacy protection.

Maine passed a resolution: "The Maine State Legislature refuses to implement the REAL ID Act and thereby protest the treatment by Congress and the President...as agents of the federal government." The resolution requests that the Real ID Act be repealed.

Montana's legislation calls the Real ID Act "inimical to the security and well-being of the people of Montana."

Former Virginia Governor Mark Warner assembled a task force to study of the impact of the Real ID Act on his state. The task force warned of significant financial impacts on the Commonwealth, longer lines at the state's Department of Motor Vehicles, additional personnel for document authentication and cataloging required by the act, significantly more paperwork for the department, and serious dangers to citizens' privacy – urging Congress to repeal or revise the act.

In late January, the state of Washington joined other states in introducing legislation which would cause the state to refuse to comply with the Real ID Act by forbidding state agencies to spend money to implement the requirements of the act. Washington's Department of Licensing estimated the cost of implementation in the state would cost \$96.7 million in the 2007-09 budget period, an additional \$93.5 million in the budget period 2009-11 and \$50 million annually thereafter.

Alabama, a state which attempted a type of early compliance with the Real ID Act, acknowledged that this attempt created "a perfect storm of confusion and disruption" per an official of the Alabama office of Motor Vehicles in an interview in *The Birmingham News*.

As things currently stand, the Department of Homeland Security has not released implementing guidelines to the states, but the implementation deadline remains a mere 15 months away. While the concept of the REAL ID may fundamentally be a rankle to the sensibilities, the act's rigid enforcement could severely disrupt the personal and business lives of Mississippi's citizens come May 2008.

ABOUT THE AUTHOR:

LYDIA QUARLES, J.D.

Lydia Quarles is a Senior Policy Analyst at the John C. Stennis Institute of Government, Mississippi State University. She received her *Juris Doctorate* in 1975 from Cumberland School of Law, Samford University, and her MA and BA from Mississippi University for Women, in 1972 and 1971 respectively, in political science and communication. After over a dozen years in the private practice of law in Alabama and Mississippi, she joined the Mississippi Workers' Compensation Commission as an Administrative Judge in 1993. Eight years later, in 2001, she was appointed Commissioner of the agency. In 2006, she resigned to join the Stennis Institute.

Quarles remains active in bar work, and currently chairs the Women in the Profession Committee, a standing committee of the Mississippi Bar. She also serves as co-chair of the Mississippi Supreme Court's "Gender Fairness Implementation Study Committee" and acts as the Chief Operating Officer of the Workers' Compensation Section of the Mississippi Bar. She is a fellow of the Mississippi Bar Foundation, a recipient of the Mississippi Bar's Distinguished Service Award, a member of the Mississippi School for Math and Science Foundation Board and a member of the MUW Alumni Board. Quarles was recently honored by the American Bar Association's Administrative Law and Regulatory Practice Section, receiving the Mary C. Lawton Award for lasting contributions to the Mississippi Workers' Compensation Commission in the areas of alternative dispute resolution and access for Hispanic workers.

In 2004, Quarles was named one of Mississippi's 50 Leading Business Women by the Mississippi Business Journal; the Journal recognized her service to the State as a Commissioner as well as entrepreneurial skills developed in her property management business in Starkville, Spruill Property Management, LLC

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