The Real ID Act: Is it Really Worth it?

Sheena Eastman
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“And if all others accepted the lie which the Party imposed—if all records told the same tale—then the lie passed into history and became truth.”

I. INTRODUCTION

Stephanie just moved to Michigan from New York. Stephanie obtained her first driver’s license from New York in 1974 and has maintained her driver’s license there until she moved to Michigan in February of 2008. When she moved, Stephanie went to the Michigan Secretary of State to obtain a Michigan driver’s license as a Michigan resident. Stephanie was unaware that the Michigan Secretary of State recently implemented a program for anyone applying for a Michigan driver’s license or identification card for the first time to comply with the Real ID Act and the Department of Homeland Security’s final rule. Although the purpose of the Real ID final rule is to deter terrorists and illegal immigrants, it costs the States too much and hinders United States citizens’ privacy rights.

Stephanie brought her valid New York driver’s license, her social security card, her rental agreement, and her pay stub to her local Secretary of State in Cadillac, Michigan. When she approached the counter at the Secretary of State, the employee informed Stephanie that she needed an official copy of her birth certificate. Stephanie

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5 6 C.F.R. § 37.1-.71 (2008).
then traveled ten miles back to her residence to find her official copy of her birth certificate. Once she located it, Stephanie then traveled the ten miles back to the Secretary of State. Once there, Stephanie presented her driver’s license, social security card, official birth certificate and the other documentation. The Secretary of State employee then informed Stephanie that her social security card was invalid because it was laminated. Stephanie had laminated the card in 1968 and had been using the card for forty years without any issues. Stephanie then went to the Social Security Administration to obtain a new social security card. Once back at the Secretary of State, with her New York driver’s license, her official birth certificate, a receipt for her new social security card, her rental agreement, and her pay stub, Stephanie began the process of applying for a new Michigan driver’s license. However, the system to verify Stephanie’s New York driver’s license was not working. So, the Secretary of State employee had to call the New York Department of Motor Vehicle to verify the New York driver’s license. This process took upwards of twenty minutes. All together, Stephanie’s ordeal with the Michigan Secretary of State took approximately six hours to complete.6

Stephanie’s story is just one of the millions of stories that will happen when people are applying for driver’s licenses or identification cards under the Department of Homeland Security’s final rule. This paper will discuss the evolution of privacy rights and the implementation of the Real ID act.7 It will also detail the Department of

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6 Telephone Interview with Stephanie Buono (Mar. 31, 2008).
7 See infra Part II.A.
8 See infra Part II.B.
Homeland Security’s final regulation. Finally, it will show that other legislation can accomplish the goals of the Real ID Act without the same consequences of the Act.

II. BACKGROUND

A. Privacy Rights Evolve

The rights of United States citizens stem from the United States Constitution and its Amendments. “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The Supreme Court has held that this language creates “a penumbra where privacy is protected from governmental intrusion.”

The Court in Griswold v. Connecticut also stated that the Bill of Rights gave United States citizens many areas of privacy.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers ‘[sic] in any house’ [sic] in time of peace without consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘[sic] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ [sic] The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘[sic] The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.’ [sic]

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9 See infra Part II.B.
10 See infra Part III.
11 U.S. CONST. amend. I.
12 Griswold v. Connecticut, 281 U.S. 470, 483 (1965) (holding a Connecticut statute that criminalized a person from using birth control or speaking to a doctor about birth control unconstitutional).
13 Id. at 484.
14 Id.
The Supreme Court has also held that the Fourth Amendment “is construed liberally to safeguard the right of privacy.”\textsuperscript{15} In \textit{Mapp v. Ohio}\textsuperscript{16}, the Court stated that “[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as ‘basic to a free society.’”\textsuperscript{17}

In \textit{Lawrence v. Texas},\textsuperscript{18} Lawrence was convicted under a “deviate sexual intercourse” statute.\textsuperscript{19} The Court stated that

\begin{quote}
\textbf{[L]iberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.}\textsuperscript{20}
\end{quote}

Privacy is a central value of United States citizens. And Congress has responded to United States citizens. Privacy protection laws have three objectives: “minimize intrusiveness in the lives of individuals; maximize fairness in institutional decisions made about individuals; and provide individuals with legitimate, enforceable expectations of confidentiality.”\textsuperscript{21}

Congress has passed several privacy protection statutes. For example, Congress passed the Communications Assistance for Law Enforcement\textsuperscript{22} in 1994. This statute

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\textsuperscript{15} United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (holding that exploratory search and seizure incident to arrest was unreasonable).


\textsuperscript{17} \textit{Id.} at 656 (citing Wolf v. Colorado, 338 U.S. 25, 27 (1949)) (discussing the right to privacy of the 4\textsuperscript{th} and 5\textsuperscript{th} Amendments).

\textsuperscript{18} 539 U.S. 558 (2003).

\textsuperscript{19} \textit{Id.} at 562.

\textsuperscript{20} \textit{Id.}


\textsuperscript{22} 47 U.S.C. §§ 1001-10 (2000).
protects United States citizens from the government intruding into their electronic communications.\(^{23}\) This statute makes it mandatory for the government to obtain a court order before accessing United State citizens’ mobile technology records.\(^{24}\)

In 1994, Congress also passed the Driver’s Privacy Protection Act.\(^{25}\) Congress passed this Act after actress Rebecca Shaeffer was murdered when her attacker acquired her address from the California Department of Motor Vehicles.\(^{26}\) The Act prohibits a state’s department of motor vehicle from disclosing an individual’s personal information or highly restricted personal information to any person or entity.\(^{27}\) The Act defines personal information as “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the [five]-digit zip code), telephone number, and medical or disability information . . . .”\(^{28}\) The Act defines highly restricted personal information as “an individual’s photograph or image, social security number, [and] medical or disability information . . . .”\(^{29}\) However, the Act does allow state departments of motor vehicles to disclose this information to a governmental agency, or its agent, when performing a governmental function.

**B. The Real ID Act\(^ {30}\)**

The Driver’s Privacy Protection Act opened the door for the government to invade United States citizens’ privacy. And invade Congress did. In 2004, in response to

\(^{23}\) See sources cited supra note 21.

\(^{24}\) See sources cited supra note 21


\(^{28}\) 18 U.S.C. § 2725(3).


the terrorist attacks on America, the 9/11 Commission Report made several recommendations about how to enhance the security of the United States. The Commission stated that “[s]ecure identification should begin in the United States [and that]...[t]he federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers [sic] licenses.” The Commission found that multiple terrorist attackers had fraudulent driver’s licenses.

Congress listened to the 9/11 Commission’s call and, in 2005, passed the Real ID Act. Congress added the Real ID act to a bill that dealt with the tsunami relief for South Asia as well as military appropriations. The Act passed Congress without any hearings and very little debate. The Real ID Act instituted many changes, but the change that effects United States citizens the most is Title II—Improved Security for Drivers’ Licenses and Personal Identification Cards.

Title II of the Real ID Act prohibits federal agencies from accepting a state issued driver’s license or identification card for an “official purpose” three years after the Act was enacted. Congress enacted the Real ID Act on May 11, 2005. The Act also states

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32 Id. at 390.
33 Id. at 220, 231.
36 Id.
38 Id. (“The term ‘official purpose’ includes [sic] accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and other purposes that the Secretary shall determine.”).
39 Id.
40 Id.
that the “Secretary”\cite{footnote1} will be the person to make the determination whether a state is in compliance with the Act.\cite{footnote2}

On March 9, 2007, the Department of Homeland Security (DHS) issued a Notice of Proposed Rule Making.\cite{footnote3} DHS stated that it received over 21,000 comments.\cite{footnote4} One comment DHS received was from the Electronic Privacy Information Center (EPIC).\cite{footnote5} In its comment, EPIC stated that the Real ID Act creates a national id system, which United States citizens have consistently rejected.\cite{footnote6} EPIC recommended that the Real ID Act be repealed.\cite{footnote7}

Then, on January 11, 2008, DHS issued a press release that stated it had announced a final rule establishing minimum security standards for driver’s licenses and identification cards that States issue.\cite{footnote8} In the press release, DHS Secretary Michael Chertoff stated that

[t]he American public’s desire for greater identity protection is undeniable. Americans understand today that the 9/11 hijackers obtained 30 drivers licenses and ID’s, and used 364 aliases. For an extra $8 per license, REAL ID will give law enforcement and security officials a powerful advantage against falsified documents, and it will bring some peace of mind to citizens wanting to protect their identity from theft by a criminal or illegal alien.\cite{footnote9}

The final rule sets forth minimums that States must comply with so that their citizen’s driver’s licenses and identification cards are accepted at federal facilities around

\begin{footnotes}
\footnotetext[1]{Id. (“The term ‘secretary’ means the Secretary of Homeland Security.”).}
\footnotetext[2]{Id.}
\footnotetext[4]{Id.}
\footnotetext[5]{See source cited supra note 32}
\footnotetext[6]{Id. at 3.}
\footnotetext[7]{Id.}
\footnotetext[9]{Id.}
\end{footnotes}
the country.\textsuperscript{50} The DHS must certify that a state is in compliance with the final rule.\textsuperscript{51}

According to the DHS press release, the first date for compliance is December 31, 2009.\textsuperscript{52}

By then, states must upgrade the security of their license systems, to include a check for lawful status of all applicants, to ensure that illegal aliens cannot obtain REAL ID licenses . . . . Federal agencies will continue to accept licenses for official purposes from residents of states that comply with the law.\textsuperscript{53}

But the tasks required of DHS’s final regulation are daunting.

First, the final rule provides several steps that a United States citizen or legal alien must go through before obtaining a driver’s license under Real ID.\textsuperscript{54} When a person first walks into a state department of motor vehicle to obtain a driver’s license or an identification card, the state department of motor vehicle must obtain a “mandatory facial image capture.”\textsuperscript{55} This means that people who wear burqas or other religious clothing that covers the face must remove the garment for the picture.\textsuperscript{56} The department of motor vehicle must take this picture even if a person does not obtain a driver’s license or identification card.\textsuperscript{57} If a person does not receive a card, the state department of motor vehicle must keep a record of that person’s picture for at least five years.\textsuperscript{58} If a person does receive a card, the state department of motor vehicle must keep a record of that person’s picture for at least two years after the card is set to expire.\textsuperscript{59}

\textsuperscript{50} See Homeland Security Real ID Driver’s Licenses and Identification Cards Rule, 6 C.F.R. §§ 37.3-.5, -.11, -.17, -.25, -.31, -.33, -.41, -.51, -.55, -.65, -.71 (2008).
\textsuperscript{51} 6 C.F.R. § 37.55
\textsuperscript{52} See source cited supra note 46.
\textsuperscript{53} 6 C.F.R. § 37
\textsuperscript{54} Id. § 37.11.
\textsuperscript{55} Id. at (a).
\textsuperscript{56} Id. § 37.71(e)(1)(i)-(v).
\textsuperscript{57} Id. § 37.11(a).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
In addition to the mandatory picture, each person applying for a driver’s license or identification card under the Real ID Act must sign a declaration. The declaration provides that “under penalty of perjury that the information presented on the application is true and correct, and the State must retain this declaration.”

Every time a person visits a state department of motor vehicle and produces new “source documents,” they must sign a new declaration.

Next, people applying for a driver’s license or identification card under the Real ID act must prove their identity. For people to prove their identity, they must present at least one of the documents enumerated in the final rule. Those documents are (1) a valid passport; (2) a certified copy of a birth certificated on file with the state of the person’s birth; (3) a Consular Report of Birth Abroad issued by the Department of State; (4) a valid Permanent Resident Card; (5) an unexpired employment authorization document issued by DHS; (6) a valid foreign passport with a valid United States visa attached, along with the approved I-94 form that documents the person’s most recent admittance into the United States; (7) Certificate of Naturalization; (8) Certificate of Citizenship; (9) a Real ID driver’s license or identification card; and (10) any other documents that DHS determines are reliable and publishes in the Federal Register.

People must also bring in proof of a name change if applying for a diver’s license or

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60 Id. at (b).
61 Id.
62 Id. § 37.3 (“Source document(s) means original or certified copies (where applicable) of documents presented by an applicant as required under these regulations to the Department of Motor Vehicles to apply for a driver’s license or identification card.”).
63 Id. § 37.11(c).
64 Id. at (1).
65 Id. at (i)-(x).
identification card under the Real ID Act and their new name differs from the one on the source document.\textsuperscript{66}

People must also prove their date of birth, but if the date of birth is on one of the source documents the person brought in, it should fulfill that requirement.\textsuperscript{67} People applying for the Real ID driver’s license or identification card must also prove their social security number to the state department of motor vehicle.\textsuperscript{68} Everyone who produces a source document must show their social security card.\textsuperscript{69} If people do not have a social security card readily available, they must show other documents that has their social security Number on it.\textsuperscript{70} Those documents include (1) a W-2; (2) a SSA-1099; (4) a non-SSA-1099; or (5) a pay stub with the person’s name and social security number on it.\textsuperscript{71} People who bring in a valid foreign passport with a valid United States visa attached, along with the approved I-94 form that documents their most recent admittance into the United States must produce either a Social Security Number or show their non-work authorized status.\textsuperscript{72}

The state department of motor vehicle then has to verify the person’s birth certificate and social security number.\textsuperscript{73} The department of motor vehicles must verify birth certificates using the Electronic Verification of Vital Events (EVVE) system.\textsuperscript{74} If the birth certificate “does not appear authentic upon inspection,” or the state cannot verify the birth certificate using the EVVE system, and the exception process does not apply,
the state department of motor vehicle cannot issue a driver’s license or identification card to the person.\textsuperscript{75}

States must verify SSNs with the Social Security Administration (SSA) or through another method approved by DHS. In the event of a non-match with SSA, a State may use existing procedures to resolve non-matches. If the State is unable to resolve the non-match, and the use of an exceptions process is not warranted in the situation, the DMV must not issue a REAL ID driver’s license or identification card to an applicant until the information verifies with SSA.\textsuperscript{76}

Every time a person renews the driver’s license or identification, the state must re-verify the person’s social security number and lawful status in the United States.\textsuperscript{77}

A state may develop an “exceptions process” for people who cannot produce all of the required documents.\textsuperscript{78} The exception process must define the exceptions process in a written document as to what other documents the state will accept to prove identity.\textsuperscript{79}

The final rule also provides that there are certain times when a state does not have to comply its requirements.\textsuperscript{80} Those circumstances include the issuance of “driver’s licenses and identification cards in support of federal, state, or local criminal justice agencies or other programs that require special licensing or identification to safeguard persons or in support of their other official duties.”\textsuperscript{81} The final rule mandates states to take whatever steps necessary to safeguard the identity of these people.\textsuperscript{82} At the same time, these people’s driver’s licenses and identification cards must look like the driver’s licenses and identification cards issued to all other people in the state.\textsuperscript{83}

\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} § 37.13(2).
\textsuperscript{77} \textit{Id.} § 37.25(2).
\textsuperscript{78} \textit{Id.} § 37.11(h).
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at (i).
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
States must also employ a security plan.\textsuperscript{84} The states must submit the security plan to DHS as part of the certification process.\textsuperscript{85} The security plan must contain physical protections for places that make the driver’s licenses and identification cards, as well as physical protections where the materials that are used to make the driver’s licenses and identification cards are stored.\textsuperscript{86}

In the security plans, states must also include security provisions that cover the “personally identifiable information maintained at DMV locations involved in the enrollment, issuance, manufacture and/or production of cards issued under the REAL ID Act . . . .”\textsuperscript{87} At minimum, states must employ “[r]easonable administrative, technical, and physical safeguards . . .” that protect the privacy of people’s information.\textsuperscript{88} The provisions are supposed to “include procedures to prevent unauthorized access, use, or dissemination of application information and images of source documents retained pursuant to the Act and standards and procedures for document retention and destruction.”\textsuperscript{89}

Included in the security plans, states must develop a privacy policy regarding the information that persons applying for a driver’s license or identification card.\textsuperscript{90} The final rule then goes on to say that the dissemination of a person’s information must comply with the \textit{Driver’s Privacy Protection Act}.\textsuperscript{91} In the security plans, states have to tell the

\begin{itemize}
\item \textsuperscript{84} \textit{Id.} § 37.41(a).
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at (b)(1).
\item \textsuperscript{87} \textit{Id.} at (b)(2).
\item \textsuperscript{88} \textit{Id.} at (b)(2)(i).
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at (b)(2)(ii).
\item \textsuperscript{91} \textit{Id.} at (b)(2)(iii).
\end{itemize}
DHS what type of security features they are using in the card, i.e. biometrics or technical methods.\textsuperscript{92} The states also have to have employee access control plans.\textsuperscript{93}

In addition, state department of motor vehicles need to establish “DMV databases.”\textsuperscript{94} The database must include information for every person that is issued a driver’s license or identification card. The databases must include, at least, all of the information that is printed on the license or card itself, the identification number on the card, the person’s social security number, both the full legal name and the recorded name of the individual, all information from the machine readable zone (MRZ), and a person’s driving history.\textsuperscript{95}

The information on the front of the card includes (1) full legal name; (2) date of birth; (3) gender; (4) the identification number on the card (which cannot be the card driver’s license or identification card holder’s social security number); (5) a digital photograph of the person; (6) the person’s address; (7) the person’s signature; (8) physical security features; (9) the MRZ; (10) the date the license or the card was issued; (11) the state or territory that issued the card; and (12) DHS’s approved security marking.\textsuperscript{96} The MRZ must include, at minimum, the expiration date of the driver’s license or identification card; the person’s full legal name; the date the license or the card was issued; the person’s date of birth, gender, address, and card number; the card design revision date detailing the latest changes to the physical appearance of the card; the

\textsuperscript{92} Id. at (b)(3).
\textsuperscript{93} Id. at (b)(4)(i)-(iii) (identifying the minimum standards of employee access control).
\textsuperscript{94} Id. § 37.33.
\textsuperscript{95} Id.
\textsuperscript{96} Id. § 37.17.
“inventory control number of the physical document”; and the state or territory that issued the driver’s license or identification card.\footnote{Id. § 37.19.}

A state then has to go through certification by the DHS. The state must turn in a statement by the highest person overseeing the department of motor vehicle that says the state has started the Real ID driver’s license and identification card program and that the state intends to remain in compliance with the final rule.\footnote{Id. § 37.55(a)(1).} The state must also submit a statement from the state’s attorney general validating can legally impose the final rule.\footnote{Id. at (2).} The state must also submit its exception process, waiver process, and security plan.\footnote{Id. at (3)-(4).} If the DHS determines that a state is in compliance, the state becomes certified and must apply for recertification every three years.\footnote{Id. at (b).}

This plan goes into effect on May 11, 2008.\footnote{DHS, REAL ID, (March 12, 2008), http://www.dhs.gov/xprevprot/programs/gc_1200062053842.shtm (last visited Mar. 15, 2008).} If a state does not comply with the final rule, its citizens will not be able to use their driver’s licenses and identification cards as identification for official purposes at federal agencies.\footnote{6 C.F.R. § 37.65.} To help with this problem, DHS is granting “Real ID extensions” until March 31, 2008, for states that cannot fully comply with the rule by May 11, 2008.\footnote{See supra note 102.} If a state requests an extension and the DHS grants it, that state’s citizens can use their current driver’s licenses for official purposes. However, if a state does not seek an extension by March 31, 2008, that states citizens will not be able to use their driver’s licenses for an official purpose.\footnote{Id.}
As of March 12, 2008, Montana, South Carolina, Vermont, and Maine have not asked the DHS for an extension.\textsuperscript{106} DHS recommends that when a state does not seek an extension or is found to be noncompliant, its citizens use their passports, military ID, or government identification badge.\textsuperscript{107} A passport for anyone over the age of sixteen costs $100.\textsuperscript{108} It costs the citizen $60 to expedite the passport.\textsuperscript{109} The citizens who do not already have a passport will have to go and apply for a passport in person, and it will take four weeks to process the application if the citizen does not expedite the application.\textsuperscript{110} In addition to these costs to United States citizens, implementing the final rule for the Real ID will cost states $11 million.\textsuperscript{111}

III. ANALYSIS

The costs to United States citizens and states are too high. The Real ID final rule threatens privacy interests as well as economic interests. There are several ways to deal with fighting terrorism and illegal immigrants without jeopardizing citizens’ and states’ interests.

First, Congress should repeal the Real ID Act. This will terminate the driver’s license and identification card program. As of January 11, 2008, twenty-one states passed legislation that opposes the Real ID Act, several asking Congress to repeal the

\begin{footnotes}
106 Id.
107 Id.
109 Id.
\end{footnotes}
One such state is Utah. In 2007, the Utah House of Representatives passed a resolution in opposition to the Real ID Act and asked Congress to repeal the Act. The resolution stated that “the REAL ID Act intrudes upon the states’ sovereign power to determine their own policies for identification, licensure, and credentialing of individual residing [in the states] . . . .” The resolution also states that the Real ID Act “ignore[es] states’ sovereignty and their right to self-governance . . . .”

Because of the way that Congress passed the Real ID Act, Utah’s legislature wants Congress to repeal the Act. First, the resolution points out that the Real ID Act was passed without an “up or down vote” and without any hearings in both the Senate and the House of Representatives. Next, the resolution states that the “REAL ID Act . . . imposes a national identification system through the states, premised upon the threat to nation security, but without the benefit of public debate and discourse . . . .” Lastly, the resolution states that Congress violated “the Jeffersonian principles of individual liberty, free markets, and limited government . . . .” by passing the Real ID Act.

The resolution also enumerates violations of citizens’ rights. The resolution states that “the REAL ID Act wrongly coerces states into doing the federal government’s bidding by threatening to refuse noncomplying [sic] states’ citizens the privileges and immunities enjoyed by [complying] states’ citizens . . . .” The Utah resolution states that “the use of identification-based security cannot be justified as part of a ‘layered’

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114 Id.
115 Id.
116 Id.
117 Id.
118 Id.
119 Id.
security system if the costs of the identification ‘layer’—in dollars, lost privacy, and lost liberty—are greater than the security identification provides . . . “120 Certain minority and social groups have special concerns with the Real ID Act driver’s licenses and identification cards.121 These special concerns involve the government and other entities using the Real ID driver’s licenses and identification cards as tracking devices by using the MRZ on the back of the cards.122 The resolution asserts that the privacy of United States citizens will be compromised by the databases required by the Real ID Act.123 Not only does the Real ID Act allow the government and other entities to track United Citizens’ movements, but the citizens will also be more vulnerable then they already are to identity theft.

Other states have introduced similar resolutions with these and other concerns. For example, California introduced a resolution on March 10, 2008, which stated that the Real ID Act is an unfunded mandate.124 The California resolution also states that the “[i]mplementation of REAL ID could cost the State of California in the neighborhood of $500 million at a time when the state is grappling with an estimated $14 billion budget deficit . . . “125 The California legislature is also concerned with the Real ID Act’s effect on its citizens.126 California’s resolution states that “REAL ID will . . . likely place enormous burdens on consumers seeking a new or, [sic] a renewal of their, driver’s

120 Id.
121 Id. (WHEREAS, the REAL ID Act threatens the privacy and liberty of those individuals belonging to unpopular or minority groups, including racial and cultural organizations, firearm owners and collectors, faith-based and religious affiliates, political parties and social movements . . . ”).
122 Id. (“WHEREAS, the ‘common machine-readable technology’ required by the REAL ID Act would convert state-issued driver licenses and identification cards into tracking devices, allowing computers to note and record people’s whereabouts each time they are identified . . . ”).
123 Id. (“WHEREAS, the requirement that states maintain databases of information about their citizens and residents and then share this personal information with all other states will expose every state to the information security weaknesses of every other state and threaten the privacy of every American.”).
125 Id.
126 See id.
license, including longer lines, higher costs, and increased document requests and waiting periods . . . ”

The California Legislature is also concerned about the threat of identity theft that the Real ID Act driver’s licenses and identification cards foster. California, too, in its resolution urges Congress to repeal the Real ID Act.

Even the United States House of Representatives Committee on Homeland Security is wary about DHS’s final rule on the Real ID Act. One thing that the Chairman points out is that the final rule may not make the United States and her citizens any safer. The letter underlined California’s concern that the final rule is an unfunded mandate upon the states. The Chairman also expressed concern about the economic cost to United States citizens. The letter then states that the document verification systems mandated in the final rule are not in a functioning state. “By failing to address the known inadequacies of these databases, the Department has ensured operational chaos.” Lastly, the letter addresses United State citizens’ privacy concerns. The Chairman states that DHS has not yet issued privacy standards for the states to follow and then points out that DHS has failed in protecting people’s privacy in other programs.

127 Id.
128 Id. (“WHEREAS, The Federal Trade Commission estimates that 10 million Americans are victims of identity theft annually and these thieves are increasingly targeting motor vehicle departments, and REAL ID could facilitate the crime of identity theft by making the personal information of all Americans . . . accessible from tens of thousands of locations . . . ”).
129 Id.
131 Id.
132 Id.
133 Id. (“From the figures currently available, it appears that the states and the American people will be required to directly incur [forty percent] and [fifty-eight percent] of the implementation costs.”).
134 Id. (“A number of the federal databases that the States [sic] must use to authenticate source documents are incomplete, unreliable, and in dire need of significant enhancements.”).
135 Id.
136 See id.
137 Id.
“Not only will such unprotected information be a windfall to identity thieves and other unscrupulous individuals, it may well become the treasure trove of information for those who seek to do [sic] enter this country outside of the legal process.”

On February 28, 2007, Senators Akaka, Sununu, Leahy, and Tester introduced a bill that would repeal the part of the Real ID Act that pertains to driver’s licenses and identification cards. This bill would set minimum standards for what information that states need to look for when issuing a driver’s license or identification card but leaves the decision making up to the states.

The bill introduced by the Senators is a favorable alternative to the Real ID Act. First, the Identification Security Enhancement Act of 2007 allows flexible time periods for states to comply with the Act. The Act states that the government will not accept driver’s licenses for official purposes two years after DHS issues the final rule. The Act makes an exception if states’ driver’s licenses and identification cards already comply with the minimum standards set out in the Act. The Act then provides that the Government will not accept driver’s licenses and identification cards five years after DHS issues the final rule if a state’s driver’s licenses and identification cards do not comply with the final rule. However, the Act also states that if DHS determines that the five years provided in the act is not workable, the Secretary of DHS and the Secretary of Transportation can set a later deadline. The Act imposes a time period of twelve

138 Id.
140 See id.
141 Id. at § 3(b)(1).
142 Id. at (b)(1)(A).
143 Id.
144 Id. at (b)(1)(B)(i).
145 Id. at (b)(1)(B)(ii).
months from the date of the Act’s enactment for DHS to issue its final rule. These flexible time periods allow for states to comply with a final rule without having the rule overwhelm their time and their budgets.

Next, the Identification Security Enhancement Act of 2007 sets out minimum requirements that DHS must follow when promulgating the final rule. First, DHS must determine standards for “documentation required as proof of identity of an applicant for a driver’s license or personal identification card; standards for the verifiability of documents used to obtain a driver’s license or personal identification card . . . .” Then DHS must issue standards that prevent fraud when people apply for driver’s licenses or identification cards. The Act then continues to say that DHS is required to set standards for what information will be on the driver’s licenses and identification cards. This information includes the applicant’s full legal name, date of birth, gender, photograph, address, signature, and driver’s license or identification number. An MRZ is required to be on the driver’s license or identification number as well. The Identification Security Enhancement Act of 2007 also mandates DHS to set standards to make the driver’s licenses and identification cards harder to copy or change. The Act also mandates DHS to make a requirement in its final rule that “a State [sic] confiscate a

\[146\] Id. at (b)(2).
\[147\] Id.
\[148\] Id. at (b)(2)(A)-(B).
\[149\] Id. at (b)(2)(C).
\[150\] Id. at (b)(2)(D).
\[151\] Id. at (b)(2)(D)(i)-(vii).
\[152\] Id. at (b)(2)(E).
\[153\] Id. at (b)(2)(F) ("[S]ecurity standards to ensure that driver’s licenses and personal identification cards are—(i) resistant to tampering, alteration, or counterfeiting; and (ii) capable of accommodating and ensuring the security of a photograph or other unique identifier . . . .").
driver’s license or personal identification card if any component or security feature of the license or identification card is compromised.”

The Identification Security Enhancement Act of 2007 also requires that DHS involve various groups when establishing the minimum standards for the final rule. The Act mandates that any rulemaking committee include equal proportions of people from state DMV’s, state elected officials, the United States Department of Transportation, and interested parties.155

The Act would also make sure that state’s rights and citizen’s rights are looked after. Explicitly, the Act states that the final rule must “include procedures and requirements to protect the federal and state constitutional rights and civil liberties of individuals who apply for and hold driver’s licenses and personal identification cards . . . .”156 The Act states that the final rule issued by DHS “may not infringe on a State’s power to set criteria concerning what categories of individuals are eligible to obtain a driver’s license or personal identification card from that State . . . .”157 The Act also allows states to issue driver’s licenses to the people that the states want to, as long as the applicant has the proper documentation.158 DHS’s final rule must also “include procedures and requirements that protect the privacy rights of individuals who apply for and hold driver’s licenses and personal identification cards.”159

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154 Id. at (b)(2)(G).
155 Id. at (c)(3)(A)-(D) (“[I]ncluding experts in privacy protection, experts in civil liberties and protection of constitutional rights, and experts in immigration law.”).
156 Id. at (c)(4)(F).
157 Id. at (c)(4)(B).
158 See id. at (c)(4)(C).
159 Id. at (c)(4)(E).
The Act goes even further to protect United States citizens. The Act only allows states to transmit any of a person’s information by using encryption.\footnote{Id. at (c)(4)(G).} If there is an error with a person’s information, the Act provides the applicant with “procedural and substantive due process, including promulgating rules and rights of appeal, to challenge errors in the data records . . . .”\footnote{Id. at (c)(4)(H).} The Act also provides that private entities—business and the like—to use the information that is contained in the MRZ portion of the driver’s licenses or identification cards.\footnote{Id. at (c)(4)(I).} The Act also allows state privacy laws to control if they are more protective than the privacy provision issued in the final rule.\footnote{Id. at (c)(4)(J).} As to verification of birth certificates, the Act forbids the requirement of verifying birth certificates “until a nationwide system is designed to facilitate such verification.”\footnote{Id. at (c)(4)(K).}

The Identification Security Enhancement Act of 2007 also makes sure that the driver’s license and identification card program is funded.\footnote{See id. at (d).} In fact, the Act provides for $300,000,000 for seven years to assist states implementing the program.\footnote{Id. at § 4.} Another glaring difference between the Identification Security Enhancement Act of 2007 and the Real ID Act is that the new Act does not require states to set up databases to share the information with other states or the federal government.\footnote{See S. 717.}

States citizens should urge their congressional representatives to revive this bill and to pass it—for the safety and security of the country.

**IV. CONCLUSION**

Privacy interests are central to American values. Congress has impeded on those interests and DHS has implemented the tool to hurt United States citizens. Congress and DHS have also burdened states greatly during a tough economic time.

Congress should repeal Title II of the Real ID Act and enact the Identification Security Enhancement Act of 2007. This Act provides for the economic well being of the states and of United States citizens. The Act also does not impede on state governments’ sovereignty. In addition, the Act protects United States citizens’ privacy interests. The citizens of the United States must contact their congressional representatives and urge them to implement the Identification Security Enhancement Act of 2007.