Post-Hearing Questions of Senator Patrick Leahy
"Will REAL ID Actually Make Us Safer?
An Examination of Privacy and Civil Liberties Concerns"
Senate Judiciary Committee
May 15, 2007

Questions for Jim Harper:

1. One thing that troubles me about the REAL ID Act is the fact that it was attached as rider on a must-pass appropriations bill, with little debate and without the benefit of hearings. The majority of legislators stripped the REAL ID Act from the 2004 Intelligence Reform bill in favor of a negotiated rulemaking process between the States, stakeholders, and the Federal government, but REAL ID was added back a year later.

What can the American people infer about this law when it was essentially forced on the States outside the normal legislative process?

Response:
The actions of REAL ID's proponents to gain passage of the law is inductive evidence of its substance. The passage of the law without a hearing, attached to a military spending bill, and without an up-or-down vote in the Senate suggests that it does not add to our nation's protections.

In our representative democracy, it is normal, expected, and desirable for elected officials to seek credit for their good works. Doing good things in office and getting the word out about such things help to ensure reelection, which is something most Members of Congress and Senators desire.

Fear of terrorists and terrorist attacks is a prominent theme of the nationl debate since September 11, 2001. This makes security a particularly ripe area for political credit-seeking.

Given these factors — legislators' self-interest and public concern with potential terrorist attacks — one would expect congressional leaders to promote knowledge of, and seek credit for, a new and effective security proposal. This would typically be done by holding hearings during its consideration, by issuing press releases and holding press conferences, and by having floor votes on the proposal.

But these things did not happen with REAL ID. REAL ID did not receive hearings to tout its effectiveness as a security measure. REAL ID was attached to a military spending bill rather than going through as a free-standing bill. REAL ID wasn't even mentioned in the President's signing statement when it became law.

Were REAL ID an effective security measure, and consistent with American values, its proponents would have promoted it relentlessly. And they would have easily (and loudly) defeated opponents of it, because securing the country against terrorist attacks is an agreed-upon national priority.

But they did not promote what they were doing. They did not invite public discussion and debate. They did what they could to force it through Congress with mimimum publicity, knowing that it would not survive a full public airing.

Even today, with the Department of Homeland Security "bought into" REAL ID, there has not emerged any advocate that can make a credible case that REAL ID adds to our protections more than it costs in dollars, lost privacy, and lost liberty. As I observed in my written testimony, the DHS' own study of REAL ID helps to show that it would cost the country more than it would gain us.

There is much pandering to terror fears, and advocates of REAL ID continue to use fear, attempting to buffalo the American people, but this should not cause us to implement REAL ID, which would divert taxpayer dollars from security programs that work.

2. Ms. Kephart testified that the REAL ID Act is not a mandate on the States because States can opt out and inconvenience their citizens with respect to access to Federal facilities and air travel.

Do you agree? Is this a meaningful distinction?

Response:
It's an entertaining notion, the idea that one can "opt out" of a uniform, government-imposed system at the center of the economy or society, making that system no longer a mandate.

According to that theory, most law is optional. Income taxes are not mandated – they're just a product of the choice to earn money above a certain threshold. Anyone can "opt out" of that. Environmental laws are the product of the choice to engage in manufacture, transportation, ownership of property, or other productive enterprise. Opt-out is easy. Carrying a driver's license is the product of a "choice" to exercise autonomy by driving a car. Opt out by staying home.

All practical people recognize that these laws are not optional. Good or bad, they are mandates.

When the Supreme Court ruled in the 1992 case of *New York v. United States* that the federal government could not "commandeer" state governments, federal "mandates" on states in the most technical sense of the term were elminated as unconstitutional. Yet, three years later in 1995, the new 104th Congress passed the Unfunded Mandates Reform Act. Congress had persisted, despite *New York*, in forcing the states into doing its bidding, often at very high costs. Congress had continued to impose mandates, even without directly ordering states to do things.

Something is mandated when it is commended directly. It is also mandated when the government conditions a common or essential activity on doing that thing.

But the answer to the question is not all semantics. When the Congressional Budget Office assessed the REAL ID Act in February 2005, its estimate of impacts on state, local, and tribal governments talked about "new mandates with significant additional costs." Under UMRA, CBO treated REAL ID as a mandate. It's a mandate.

3. Many Americans – especially older Americans and those who have suffered in the wake of natural disasters – do not have access to important enrolling documents like their birth certificates.

If the DHS agrees that States may waive the requirement for certain "breeder" documents that may have been lost or destroyed, doesn't this undermine the entire system?

Response:
As I noted in my testimony, the Department of Homeland Security has not articulated how this "system" is intended to secure the country. This makes it very hard to determine what might undermine the system.

The assumption I have made — and on the one I think most people share — is that locking down people's identity and proof of legal residency would enable DHS to compare people's proferred identities to lists of known terrorists using government checkpoints at key bottlenecks like airports.

This approach is already riven with flaws, as I noted in my testimony:

- It transfers risk from ID-controlled infrastructure to non-ID-controlled infrastructure;

- It can be avoided through the recruitment of accomplices without records of crime or terrorism; and

- It can be defeated through the acquisition of false documents by forgery or bribery.

Allowing people without breeder documents to acquire REAL ID compliant licenses and IDs widens the forgery and bribery holes in the REAL ID "system." It would be easier to dupe a DMV employee into issuing a license and it would be easier to pay off a DMV employee to do so with this waiver. Undermining the REAL ID "system" in this way would be somewhat analogous to drilling an additional hole in swiss cheese.

4. I believe there are troubling parallels between the REAL ID and the Western Hemisphere Travel Initiative (WHTI) programs, as both face serious hurdles to implementation. Some have suggested combining the two documents, or allowing States to issue WHTI-compliant REAL ID cards.

What are your thoughts on making REAL ID compliant licenses an acceptable credentialing document to enter the U.S. from Canada, Mexico, or the Caribbean?

Would it be wise to integrate the WHTI Passcard with the REAL ID Card?

Response:
The similarities between REAL ID and WHTI do not end at implementation hurdles. The more fundamental similarity is that both programs carry more costs than they provide increased security to the country.

WHTI is already doing a great deal to increase the costs and, accordingly, reduce the frequency and robustness of cross-border trade and travel. This daily saps the vitality of the U.S. economy and the economies of other countries in the region, rendering our societies weaker and reducing employment, wealth, and health.

Like REAL ID, the security benefits of WHTI are insignificant. There are a variety of ways to avoid WHTI, or to access the country with evil intent despite WHTI. Combining these two failed security systems, or making them interoperable, is no solution. Neither REAL ID nor WHTI should be implemented.