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National Identification Cards: Legal Issues

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Summary

In the wake of the tragic events of September 11, 2001, renewed debate has arisen regarding the efficacy and legal implications of a national identification card, a form of identification that would be something more comprehensive than a driver's license, a Social Security card or a passport. Such debate has centered around finding the appropriate balance between maintaining personal freedom and protecting national security. Proponents contend that a card using "biometric" surveillance technologies such as electronic retinal scans or fingerprints could help reduce and/or track illegal immigrants or potential terrorists. Conversely, opponents assert that such a card could infringe upon civil liberties with minimal impact on reducing terrorism. This report will briefly summarize the policy arguments related to and legal implications of a national identification card. The report will be updated as developments warrant.

The idea of a national identification system with centralized repositories and tracking capabilities has long stirred controversy. The merits of a comprehensive national identification system have been debated in relation to health care,¹ gun control,² and immigration proposals.³ Arguments over a national identification card seek to balance

¹ See generally, William H. Minor, "Identity Cards and Databases in Health Care: The Need for Federal Privacy Protections," 28 COLUM. J.L. & SOC. PROBS. 253,273 (1995) (quoting public statement of Rep. Armev that "[w]e didn't beat back the administration's plan to issue us all 'health security cards' only to have Congress adopt an I.D. card to track down immigrants.")

² In 1989, a Justice Department task force included a national identity card among options for controlling the proliferation of guns. The proposed card would have been issued to all citizens and would have allowed access to criminal records. Richard Thornburg, then-Attorney General, rejected the identity card proposal. A Justice Department spokesman said at the time that Thornburg viewed such a card as "an infringement on rights of Americans." Ann Debroy, "Thornburgh Rules Out Two Gun-Control Options: Attorney General Objects to Registration Card for Gun Owners, National Identification Card," Wash. Post, June 29, 1989 at A41.

³ In 1976, Congress added the following language to the Immigration Reform and Control Act of 1976: "Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card." A number of bills have been introduced in the 107th Congress to aid in the tracking of

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personal freedom and national security. Some civil liberties groups and privacy advocates oppose a national identity scheme, citing the loss of privacy and fear of misuse.⁴ In addition, some argue that a national identification card is unnecessary as citizens already have de facto identification cards in the form of social security cards and driver's licenses or state identification cards, which could be used as national identification cards with modification.⁵

Conversely, advocates of a national identification system assert that such a system would serve as an invaluable tool to track the movement of known or potential terrorists, thus thwarting a terrorist attack. Moreover, such a system would facilitate tracking of immigrants migrating in and out of the United States. A national identification system might facilitate more accurate accountability of the number of immigrants in this country.

Constitutional and Legal Issues

Apparently, Congress could permissibly legislate a national identification card under a number of its powers enumerated in Article I, Section 8, of the Constitution. For example, Congress has plenary power over naturalization and citizenship.⁶ Assuming that a national identification system were instituted to track aliens, the enactment of such a system would appear to fall within Congress' authority.

Also, under the commerce clause, Congress may regulate persons or things in, as well as those activities having a substantial relationship to interstate commerce.⁷ Assuming that the purpose of a national identification system would be to facilitate better security on instrumentalities of interstate and international travel, such a system would appear to be sufficiently related to an activity in interstate commerce to fall within Congress' commerce clause authority.

³ (...continued)
immigrants.

⁴ Adam Thierer, "National ID Cards: New Technologies, Same Bad Idea," TechKnowledge 21 (September 28, 2001). This article can be obtained at [<http://www.cato.org/tech/tk/010928-tk.html>]

⁵ See, *Does America Need A National Identifier: Hearings Before the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, Committee on House Government Reform, U.S. House of Representatives*, 107th Cong. 1st Sess. (2001) (testimony of Jonathan Turley); see also Stephanie Simon, "Response to Terror," Los Angeles Times (September 28, 2001) (discussing the driver's license as a national identification card lacking national standards). The American Association of Motor Vehicle Administrators (AAMVA) has advocated a national standard for state drivers' licenses. The proposed standards include both uniform identification requirements for the card holder, including name, address and personal characteristics, and uniform technology standards for additional data storage on the card, such as bar codes and optical memory. See, Alan Gathright, "Biometric Technology Raises Hopes, Fears, and Skepticism," San Francisco Chronicle, October 30, 2001; see also Robert O' Harow Jr, "States Devising Plan for High-Tech National Identification Cards," Wash. Post (November 3, 2001) pg. A10.

⁶ U.S. Const. art. I, § 8, cl. 4.

⁷ U.S. Const. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 558-559 (1995) (citations omitted).

In addition, Article 1, Section 8, Clause 1 of the Constitution authorizes Congress to use federal monies to provide for the common defense and the general welfare. As such, Congress could apparently legislate a national identification card by providing funds to states and attaching conditions to these funds without violating the Constitution due to the voluntary nature of states' participation.⁸ States and localities would remain free to reject the federal monies; but if accepted, they would be taken subject to the conditions imposed by Congress.⁹

While Congress would apparently have the authority to enact a national identification system, constitutional and legal concerns could presumably arise in the implementation and enforcement of such a system.¹⁰ For instance, implementation, and enforcement of such a system could conceivably implicate privacy rights as well as the right to travel.

“[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”¹¹ A law implicates the right to travel when it actually deters such travel, or when impeding travel is its primary objective.¹² A law that infringes the right to travel is subject to strict scrutiny by the courts,¹³ under which a compelling state interest must be shown and the government's purpose “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁴ Thus, the question whether a national identification system would impermissibly infringe upon the right to travel, would ultimately depend upon the nature and effect of the regulatory scheme adopted. Where the scheme as implemented actually deters the ability to travel, a reviewing court would likely inquire into the objective underlying the system to determine whether it is sufficiently “compelling” to justify the

⁸ *South Dakota v. Dole*, 483 U.S. 203 (1987).

⁹ *Id.*

¹⁰ As there are few details on the contents, implementation or enforcement of a national identification system, it is difficult at present to provide specific assessments of the constitutional roadblocks to such a system.

¹¹ *Saenz v. Roe*, 526 U.S. 489 (1999) (emphasizing that the right to travel is a “virtually unconditional personal right” under our Constitution); see *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (noting that the Constitution does not explicitly mention the right to travel because such “a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”); *United States v. Guest*, 383 U.S. 745, 758 (1966); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (stating that “the right to travel is part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”); *Cramer v. Skinner*, 931 F.2d 1020, 1029 (5th Cir. 1991) (“Although no clause in the Constitution specifically provides a right to interstate travel, the Supreme Court has inferred this right from various constitutional provisions and from the structure of the federal system itself.”).

¹² *Attorney Gen. Of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986).

¹³ *Id.*

¹⁴ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

restriction on travel. In addition, the court will examine the availability of means less restrictive on travel that could be utilized to accomplish the government's objectives.¹⁵

Another potential problem could exist with the collection and dissemination of information in a national identification system. Depending on the type of information contained on a national identification card, privacy concerns can be raised. For example, a national identification card which contained an individual's name, date of birth, sex, height, weight and fingerprint or other biometric identifier may be less likely to raise privacy concerns than a card which also contained blood type, genetic or medical information.

Although the Constitution does not expressly provide for a right to privacy, the Supreme Court has found some right to informational privacy.¹⁶ However, these rights are limited by judicial deference to the government's need to acquire the information and by the fact that a constitutional challenge would be limited to state action. As a practical matter, this would mean that federal or state collections of information may receive some constitutional and or statutory¹⁷ protection but the collection and use of information by private organizations would not be covered.¹⁸

Prior Legislation

No bills were introduced in the 107th Congress which specifically proposed a national identification card.¹⁹ However, several bills were proposed which in some form authorized an identifier to facilitate the tracking of immigrants. For example, S. 1491 would have required the Secretary of State and the Commissioner of Immigration and Naturalization to jointly establish and implement a fingerprint processing system under which an alien's fingerprints would be entered into an electronic database upon issuance

¹⁵ To avoid the constitutional concerns presented by a mandatory system, some have suggested utilizing a voluntary national identification to be used by individuals traveling. See Alan M. Dershowitz, "Why Fear National ID Cards?", The New York Times; New York; October 13, 2001. The Air Transport Association recently announced support in the airline industry for a "trusted traveler" card that would require a background check and national registry. Ricardo Alonso-Zaldivar & Richard Simon, "Screening: Travel Ids Sought for Air Safety", Los Angeles Times, November 9, 2001, at A1.

¹⁶ See e.g. *Whalen v. Roe*, 429 U.S. 589 (1977).

¹⁷ The Privacy Act of 1974, 5 U.S.C. § 552a, prohibits the disclosure of records maintained on individuals by federal government agencies except under certain conditions. The Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., establishes a right of access to records maintained by agencies within the executive branch of the federal government. It contains several exemptions, including one for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Both the Privacy Act and FOIA may, then provide some privacy protections for genetic information but they are limited in their scope and would not encompass information held by a private entity.

¹⁸ For a discussion of this issue see Gostin, "Genetic Privacy," 23 J. of Law, Medicine & Ethics 320 (1995).

¹⁹ Section 1514 of the 2002 Homeland Security Act (P.L. No. 107-296) states: "Nothing in this Act shall be construed to authorize the development of a national identification system or card."

of a visa to such alien.²⁰ Moreover, the Immigration and Naturalization Service would have been required to access the database upon the alien's entry into the United States to certify that the fingerprint of the individual seeking admission matches the fingerprint in the database. The alien would be prohibited entry if the fingerprint did not match. Similarly, H.R. 3052 would have amended the Immigration and Nationality Act to require a nonimmigrant visa applicant to provide machine readable biometric identifiers (fingerprints or handprints), which shall be checked against a database for criminal information prior to visa approval.²¹ H.R. 2276 and S. 1400 would have amended the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and extend the deadlines for aliens to present a border crossing card containing a biometric identifier matching the appropriate alien's biometric characteristics.²² In addition, S. 1489 provided for the sharing of information between Federal departments, agencies and other entities with respect to aliens seeking admission to the United States.²³

²⁰ S. 1491, 107th Cong. (2001).

²¹ H.R. 3052, 107th Cong. (2001).

²² H.R. 2276, 107th Cong. (2001); S. 1400, 107th Cong. (2001).

²³ S. 1489, 107th Cong. (2001).