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STATE OF MAINE
OFFICE
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SECRETARY OF STATE

**TESTIMONY OF MATTHEW DUNLAP
IN OPPOSITION
March 7, 2017
LD 306 "AN ACT TO COMPLY WITH FEDERAL REAL ID GUIDELINES"
SPONSORED BY SENATOR WILLIAM DIAMOND**

Senator Collins, Representative McLean, and distinguished members of the Joint Standing Committee on Transportation; my name is Matt Dunlap of Old Town, and I am here to present testimony in opposition to this legislation.

I have had extended conversations with Senator Diamond on the matter; I agree with practically all of his arguments in favor of passage. It is not in spite of those arguments, but rather because of them, and the unintended consequences of compliance, however, that I stand in opposition to this proposal.

The history of REAL ID is murky and complex. We've talked about that history a lot in this committee over the years, so repeating it now would be superfluous. However, I do understand that those new to this policy discussion might desire a high-level review of the topic, so attached to my testimony is a five-page summary of the history of REAL ID, the current posture of the Federal government, our options, and what the ramifications might entail.

It's for the last reason that I cannot abide what is before us as free citizens of a democratic republic. What sets us apart as a nation is that we are, ostensibly, free of government surveillance; that we can travel unimpeded, engage in our business, and speak our minds without fear of that midnight knock on our doors. Our history of abrogations of that freedom is checkered enough; the FBI investigations of clergy opposed to the Vietnam War, the constant surveillance of Martin Luther King, Jr. and the other leaders of the civil rights movement, and even tracking the movements of Hollywood actors who were thought to be engaged in discussions with suspected Communists are enough to remind us to be vigilant in the protection of our rights as American citizens.

Senator Diamond is right about the concerns of our neighbors. Already, our fellow citizens are being denied entry to many Federal facilities because of our statute prohibiting compliance with the Act. What will they say come next January when they won't be able to board aircraft? How will our citizens conduct their business? How will they attend to family emergencies? Not to mention vacations ruined and money lost on deposits because they can't board the planes with the tickets they paid for with their hard-earned money. He may very well be prescient when he says they will look to us, and not Congress, when those moments come, and they won't be pleased.

It is the responsibility of the Legislature, however, to look beyond the inconveniences of the day and consider the long-term impacts and unintended consequences of implementing these provisions.

When the Legislature embraced the policy of including photos on the driver's license for the purpose of preventing the purchase of alcohol by underage persons, no one could have envisioned what the simple driver's license would become. We use them now to rent cars, close mortgages, cash checks, and, of course, board aircraft.

The Department of Homeland Security's rules for implementation of REAL ID include a provision to amend those rules—at any time, and without notice. For now, we will have to begin imaging your original documents into the database and employ facial recognition technology in order to comply. Later, Homeland Security may well decide they also need a thumbprint; maybe an iris scan. Maybe a component that includes a DNA sequence. Maybe a complete breakdown of your status and history as a voter, or whether or not you have a Class III Federal firearms license—or any firearms at all.

Once the tool is created, how it will be employed by the government is only a simple choice of policies. As Napoleon III said, the problem with a bayonet is that one can do anything with it—“except sit on it.”

And as has been said here many times before, REAL ID was accepted at the Federal level not as stand-alone policy, but as a conference committee amendment, and has never been funded. Ironically, while the stated purposes include terrorism prevention and border security, REAL ID does nothing to prevent terrorists from obtaining credentials, nor does it help secure the border. REAL ID is expensive. We estimate it will cost the state of Maine between \$2 million to \$3 million dollars to comply—for now. One would hope we could at least get some bang for our buck if we're going to lay out upwards of \$3 million.

What's the answer? I don't have an easy one. You are presented with a Hobson's choice; do nothing and invoke the wrath of your neighbors as they endure the chaos of impeded travel, or comply, and undermine the blood and sacrifice spilled over 240 years in the name of freedom. I hate everything about REAL ID; but I don't have a vote on this committee. Should you choose to pass LD 306, you have my word that the Department of the Secretary of State will implement the law as swiftly and efficiently as possible, and will lay the groundwork needed for compliance now and into the future.

But I wonder; at what cost? An ancestor of mine was a delegate to both the Continental Congress and the Constitutional Convention. He was a leader of what became known as the Anti-Federalist movement. They needed plenty of convincing that this new, large and powerful central government was going to be a good thing. He and others laid out their concerns to Madison, Hamilton and Jay: “You tell us that this government will not take away the freedom this nation paid for in blood. Put it in writing.” That came to mean the manifestation of the Bill of Rights. I wonder how Sam Adams would feel about a policy that, in order for a veteran to obtain services at a VA hospital, they would first have to surrender many of the freedoms they had fought for?

Once our freedom is gone, we won't get it back. I implore you to consider our future carefully before proceeding in favor of this legislation.

UNDERSTANDING THE IMPACT OF THE REAL ID ACT OF 2005

Prepared by the Office of the Secretary of State

You are getting many inquiries from your constituents about why they can't access certain federal facilities using their valid Maine driver's licenses and ID cards. In January of 2018, if nothing changes, Maine residents will not be able to use those documents to board commercial aircraft. We thought some history would be helpful for you in understanding how Maine reached this point with REAL ID.

ORIGIN

The REAL ID Act of 2005 was attached to a conference report on must-pass legislation regarding Iraq war funding and relief for the 2004 tsunami. The Act had been introduced a number of times prior to 2005, but had little to no support in Congress.

REAL ID replaced prior legislation that was part of the Intelligence Reform and Terrorism Prevention Act of 2004, which was sponsored by U.S. Sen. Susan Collins of Maine. The Intelligence Reform Bill was written in response to the report of the National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission. Part of the bill called for a rulemaking committee to establish national, minimum standards by which states would issue driver's licenses and identification cards.

This stemmed from the 9/11 Commission's observation that the 9/11 attackers had been able to obtain state credentials with ease, which helped them blend in as they traveled about the United States, reconnoitering security systems and planning the execution of the devastating attack that killed thousands of innocent people. The Commission observed that the broad variety of standards for obtaining these credentials constituted a weakness in our security systems.¹

As a result, Collins' successful legislation created the Negotiated Rulemaking Committee for the Establishment of Minimum Standards for the Issuance of State-issued Driver Licenses and Identification Cards. The committee was charged with drafting rules by the end of the summer of 2005, which were to be put in place by the United States Department of Transportation by the beginning of 2006. The committee was nearly

¹ Maine began registering vehicles in 1905, but didn't start licensing drivers until the 1920s. Testing and other requirements were adopted at different times in the ensuing years, and it was in the 1980's that Maine, along with many other states, began to include the photograph of the driver as part of the license, with the policy purpose in mind of preventing underage citizens from unlawfully using someone else's license to obtain alcohol. Unintentionally, the credential for driving became a handy state-issued identity document, which we now use to close mortgages, cash checks, rent cars—and apocryphally, as the 9/11 attackers did, to board airliners.

halfway done with its work when the REAL ID Act was signed into law in May of 2005². REAL ID had a three-year implementation window.

IMPACT

REAL ID bypassed state and stakeholder input, and established robust measures for issuing licenses and ID cards. It called for new materials and screening processes for applicants and the civil servants who interacted with each other, and new technologies to capture the nature of documents and to authenticate them. The rules were so complicated that it took nearly the entire three-year implementation schedule for the draft to be completed by the US Department of Homeland Security (which, under REAL ID, assumed oversight of this process from Transportation).

An important fact about REAL ID is that it has never been funded to any significant degree by the Federal government. Because of that, and the broad scope of federal intrusion into a process historically managed by the states, the act was made voluntary for the states. The price of non-compliance, however, is that citizens in non-compliant states would not be able to use their non-compliant credentials to access many federal or federally controlled facilities and services, including boarding commercial airliners.

Given the timeline, DHS began to issue waivers from compliance. The nature and scope of the waivers varied widely, and as the deadline for compliance loomed, states began examining the requirements of the Act, and began balking. Maine was the first of 16 states to pass statutes prohibiting compliance (many of those have since revisited their stands, but several have not, including Maine, Oklahoma, Pennsylvania, South Carolina, and Montana). Maine's law, now enshrined as Title 29-A MRSA § 1411, was adopted *unanimously* in 2007 as LD 1138, *An Act to Prohibit Maine from Participating in a National Identification Card System*, sponsored by Rep. Scott Lansley, R-Sabattus.

In 2009, facing intense pressure from Homeland Security, the Baldacci administration introduced successful legislation that rolled back much of the intent of § 1411. Maine had already made significant security improvements to its credentials apart from the debate over REAL ID—for instance, Maine stopped accepting expired foreign-originated documents for identification purposes, required submission of a Social Security number if the applicant was eligible for one, and established that only Maine residents could obtain Maine credentials. But Homeland Security stipulated that for Maine to obtain a waiver, it had to do much more. So Maine, under Baldacci, acceded to subscription to the Systematic Alien Verification for Entitlements (SAVE) system, established that applicants must provide documentation of either citizenship or legal immigration status, and that for non-citizens, credentials must expire the same time as their visa documents (this is “co-terminus expiration”). With those changes, Maine obtained the desired waiver from full compliance.

² Secretary of State Matthew Dunlap was nominated by Senator Collins and Governor Baldacci to serve on the committee, and was subsequently appointed by U.S. Department of Transportation Norman Mineta to the negotiated rulemaking committee.

Since 2009, Homeland Security has continued to issue waivers to the states, and has redefined numerous times what it means to be in compliance. Under Homeland Security rules, no one born before 1935 need provide the full complement of documentation to obtain a REAL ID, for example, as prior to that time, such documentation would have been nonexistent for immigrant children. Under immigration laws of the day, minor children immigrating to the United States with their parents would have been *automatically* considered citizens --with no additional paperwork. DHS rules also allowed for citizens born prior to 1964 and who had held valid credentials during their entire period of residency to be exempt from the legal presence requirement, which Maine adopted into law in 2013 (Public Law chapter 163; Title 29-A MRSA § 1301 §§ 2-A and § 1410 §§ 8).

During this period, Maine has enjoyed immunity from the enforcement of REAL ID under the auspices of the continuance of the 2009 waiver. Theoretically, the state is supposed to re-apply for the waiver each federal year in October; however, in 2015, the state received notice that the waiver had been granted, even though extension of it had not yet been sought. In the late summer of 2016, we received notice that the waiver would *not* be extended for 2017, and that the schedule of enforcement for non-compliance would begin. Since that notice, we have been vigorously in communication with Maine citizens, the Executive, and the Legislature about the State of Maine's REAL ID status and the associated implications.

WHAT WE WOULD NEED FOR COMPLIANCE

Maine would need to embrace an imaging process of original documents into the driver license database, employ up-front photo capture of new applicants (currently, we take the photo of an applicant as the *last* step in issuing a credential) and use facial-recognition technology, and conduct fingerprint-based background checks on employees involved in licensing.

These additional requirements stand at the heart of the resistance from the states. We currently require submission of documents that demonstrate either citizenship or a status that is current with Immigration and Customs Enforcement; under the rules of REAL ID, we would have to scan images of those documents into our driver database and the images would become part of the data set. While up-front photo capture would be only a procedural change, facial-recognition technology would constitute another expensive addition of high-density information to the individual data set. The background checks, too, would also have an ongoing cost to them, and would have to be addressed in our collective bargaining agreements. The policy theory behind up-front photo capture and facial recognition technology is that it would prevent someone ineligible for a credential from "shopping" for one, going from office to office in order to refine their fraudulent attempts at acquisition. What's ludicrous about that is that all of our offices *use the same systems*, so if an individual were found to be ineligible in Topsham, they wouldn't suddenly be able to acquire a credential in Kennebunk. The idea of background checks for employees would be to prevent the so-called "inside job," in which a disgruntled or

financially stressed employee could be enticed into doing something illegal to assist criminals or terrorists. It makes for great reading, but it's never happened, and our current technology security framework makes such activity impossible to go undetected. Thus, the requirement constitutes an expensive redundancy. But the addition of document images to the data set is the element that has worried the public and state governments the most—aside from the initial and ongoing expenses, there would be the inevitable security vulnerabilities, and most concerning to many, the unintended consequences of the utility of the data. The policy purpose of adding the photograph of the operator to the license, as has been mentioned elsewhere, was to prevent underage citizens from using someone else's license to acquire alcohol. Policymakers from that time could not have predicted how the credential would later be used. Adding to those concerns is the ability of Homeland Security to amend the rules governing these requirements *at any time, without notice*. So future requirements for fingerprints and iris scans would not be unthinkable, nor would the possible services that would require the presentation of the REAL ID document. To be fair, that is not contemplated at this time; however, Maine's efforts in 2009 were considered good enough to forestall compliance enforcement, and here we are, looking at additional steps. These additional processes will probably cost between \$1 million and \$3 million if not more.

CURRENT ACTIONS

Legislation has been filed to repeal Title 29-A M.R.S.A. § 1411 by Senator Bill Diamond. There is no indication that repealing that section and beginning the process of compliance will delay the effect of REAL ID on Maine citizens for any appreciable time (Homeland Security is offering extensions of the waiver to states that signal actions toward compliance only through June of 2017). More problematic, DHS has stated that *no non-compliant credentials will be accepted for federal purposes after 2020*. That means that even if states fully comply by the deadline, citizens who have renewed in the interim period will have to obtain new credentials, at their own expense, all over again, and completely from scratch—re-submitting original documents, including certified birth certificates and other identifying documents as well as residency documents.

Also, indications are that Congress may intervene. Congressman Bruce Poliquin is submitting legislation to delay implementation of REAL ID, and Congresswoman Chellie Pingree is co-sponsoring legislation being offered by Congressman Mark Sanford (R-S.C.) that would delay implementation as well as repeal some of the most onerous and expensive aspects of REAL ID.

THE EFFECTS AND THE NATIONAL LANDSCAPE

The arguments that have been used to support the REAL ID Act have been twofold; that it will make it difficult for terrorists to obtain “the keys to the kingdom” in order to facilitate future attacks in America; and that it will prevent undocumented immigrants

who come to America without clearance from enjoying the benefits of citizenship illegally. There is nothing in REAL ID's implementation that will achieve either end.

First of all, the 9/11 attackers did not get into America with state-issued driver's licenses—they were issued visas from the State Department, and used those visas in concurrence with their passports to obtain state ID cards and driver's licenses. That won't change. In fact, no state motor vehicle office even has access to the federal No-Fly or Terrorist Watch Lists, making such a premise laughable. Further, at the outset of the debate on REAL ID, many motor vehicle administrators in the southwestern United States favored issuing driver's licenses to so-called "illegal immigrants" because if they had licenses, they would most likely comply with other laws, including registration and insurance laws, plus state officials would *know where they are*, as opposed to them hiding in the shadows out of official view. Most obviously, non-citizens don't come to America as if they were tourists to drive around the country. They historically come to find work, and if they can't get licenses, they will come regardless, and probably drive anyway, just without licenses.

Maine is not alone in its posture with the REAL ID Act as it relates to services being withheld by the Federal government. At this writing, 25 states are not in compliance, including Maine and the four other states with similar prohibitions mentioned above. Twenty-five states are *considered* in compliance, although that is a definition artfully and broadly applied by DHS. The remaining 25 states represent 62% of all licenses and ID cards issued in America. Assuming nothing changes, then next year the 50 United States Senators and 287 members of the U.S. House of Representatives will be giving their undivided attention to those 132,106,955 constituents whose lives have been turned upside down by the application of an expensive federal law that does nothing to make them safer or to better secure their borders.

While Maine is acting responsibly to consider its statutory posture given the consequences that non-compliance with REAL ID has for Maine residents, the true heavy lift belongs to Congress. When Maine rejected REAL ID in 2007, it was not done in a fit of pique. Maine lawmakers were genuinely aroused by the abrogation of the privacy and civil liberties of American citizens under REAL ID, and even more appalled at its lack of effectiveness in achieving its stated goals. Congress, in the meantime, has been deaf to the consistently reiterated concerns of the states. The path we take forward from this crossroads will have broad and far-reaching consequences for every American in the future.