The Identity Project

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1736 Franklin Street, 9th Floor
Oakland, CA 94612
510-208-7744 (office)
415-824-0214 (cell/mobile)

March 23, 2011

Standing Committee on Transportation and Housing
California State Senate
State Capitol, Room 2209
Sacramento, CA 94248

Re: SB251 (Vehicles, driver's licenses, and selective service)

Honorable Chair and Members of the Committee,

We hope the Committee will recommend that the Senate reject SB 251. We write to raise several issues which we believe should be considered in your evaluation of what SB 251 would mean, whether it is justified, and what it would cost to implement.

SB 251 would require, as a condition of applying for a California driver's license, that applicants consent to having the information they provide to the DMV forwarded to the federal Selective Service System and used to register them for military conscription.

We believe that requiring applicants for driver's licenses to consent to being registered for a military draft would deter many young men from getting driver's licenses, but would be unlikely to stop them from driving. This would make it harder to reach this highly accident-prone population or educate them about safe driving, make it more difficult to enforce safe driving requirements, and ultimately lead to more road accidents.

In addition, SB 251 would perpetuate and expand the inappropriate practice of tying unrelated enforcement activities to the issuance of driver credentials.

This practice starts by redefining a Constitutionally-protected activity, freedom of movement, as a "privilege". In the days of horses, no government license was required to move about the state. In today's California, this right is exercised by more than 83% of the population by getting a driver's license and driving a vehicle. [1]

1. U.S. Department of Transportation, Highway Statistics 2000, "Licensed Drivers by Sex and Ratio to Population – 2000", http://www.fhwa.dot.gov/ohim/hs00/dl1c.htm

Once this former "right" is claimed to be a "privilege", then a Pandora's Box of restrictions can in theory be attached to it. Enforcement regimes from "deadbeat dads" to "smoke a joint, lose your license" have been tied to driver's licenses, not because they are related to driver safety, but because they are "convenient" and attractive to legislators. But the attraction of using linkages to driver licensing as means to enforce other laws stems precisely from the importance of a driver's license – and the right to free movement for which it has been made a prerequisite. In today's California, "consent" given under threat of denial of a license to exercise the "privilege" of driving is no real consent at all. The exercise of one right cannot lawfully be conditioned on the waiver of another right.

Every time the legislature drives another part of the California population "underground", unable to obtain a driver's license without some kind of draconian sanction being applied to them (such as being subjected to the risk of being forced into military service) we are reducing driver safety, which is the whole point of the licensing regime. [2] The DMV itself has said that, "Many unlicensed and suspended and revoked drivers continue to drive and represent significant public safety risks. Better methods are needed for identifying and controlling unlicensed driving in California."

Creating powerful disincentives for young drivers to get a driver's license – and we can think of few more powerful ones than the threat of military conscription – isn't just irrelevant to any legitimate purpose of the DMV. It would be directly counterproductive to the fundamental purpose of the DMV to promoting safe driving, which is the ostensible reason for requiring drivers to be licensed in the first place.

Besides the practical effects of SB 251 on fatal accidents and respect for the law, driver's licenses are the thin end of the wedge of restrictions on the right to travel, which is protected both internationally (in the UN Declaration of Human Rights and the International Conventiona on Civil and Political Rights), nationally (in the Constitution's Assembly Clause), and in our state Constitution's Article I, Section 3 (a).

Travel, both within the state of California and to and from other states and countries, is a fundamental right guaranteed as part of the "right of the people … peacably to assemble" under the First Amendment, as well as by Article 12 (freedom of movement) of the International Covenant on Civil and Political Rights (ICCPR), a treaty to which the U.S. is a party and which is thus part of the supreme law of the land.

Government-issued photo ID credentials are required to exercise these rights, including not just driving but also travel within California by Amtrak. Government-

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2. See "Unlicensed Driving: A Major California Safety Problem", by Raymond C. Peck, California DMV Licensing Operations Division Research and Development (1997), http://www.dmv.ca.gov/about/profile/rd/resnotes/unlicensed.htm. According to this DMV research report, 8.8% of the drivers on the road had suspended or revoked licenses, and another 3.3% had no record of any driver's license. These drivers were disproportionately likely to have a subsequent accident involving a fatality.

issued ID credentials are also required for entrance to many government buildings, including some courthouses and buildings housing Congressional offices. This makes these ID credentials, issued by the DMV, a prerequisite to the exercise of the right to petition for redress of grievance, as also guaranteed by the First Amendment.

Travel is a right, not a privilege. Conditions placed on the exercise of this right, as would be done by this bill, must be evaluated according to the strict standards applicable to measures which burden or place conditions on the exercise of these rights.

Any conditioning of driver's licenses on consent to the use of DMV data for other purposes – whether for purposes of Selective Service registration, compilation and maintenance of "REAL-ID" databases, or otherwise – would transform the right to travel into a privilege that can be granted or withheld by the state at whim. Once such conditions on the exercise of rights begin to be imposed, where will they end?

Measures which burden First Amendment rights are subject to strict scrutiny, while measures that burden the rights protected by Article 12 of the ICCPR must meet a strict standard of necessity: they must be shown to be actually effective for a legitimate government purpose that could not be achieved by any less burdensome alternative.

(The standards applicable to measures which burden the rights protected by Article 12 of the ICCPR – which are of particular import to this Committee because of the relationship between transportation and freedom of movement – are specified in General Comment No. 27 of the U.N. Human Rights Committee, as attached.)

None of these criteria are satisfied by SB 251. Selective Service registration is not a legitimate purpose for California or the DMV. There is no evidence that merely requiring applicants for California driver's licenses to consent to being registered will salvage this failed federal program, particularly in light of the fact that even the threat of severe criminal penalties has not "generate[d] sufficient registrations to maintain the credibility of the system", as federal authorities had hoped. And there is no evidence that measures that are less burdensome to First Amendment rights have even been considered.

By making the California DMV an agent or instrumentality of the federal Selective Service System (SSS) in carrying out draft registration, SB251 would subject the actions of the DMV in that capacity to the requirement of the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb. Those actions of the DMV, on behalf of the SSS, would substantially burden the First Amendment rights of those whose religious beliefs do not permit them to consent to being registered for military service.

Pursuant to the RFRA, such a burden is permitted only if it both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." SB 251 is neither in furtherance of a *compelling* interest (nothing *compels* California to assist the federal government with Selective Service registration) nor is it the least restrictive means of doing so.

Enactment of SB 251 without the inclusion of sufficient administrative mechanisms to ensure the accommodation of those with sincere religious objections would violate the federal RFRA and lead to costly litigation.

Determining which applicants for drivers licenses have religious beliefs that would be substantially burdened by consenting to Selective Service registration would place the DMV in the position of having to conduct *de facto* evaluation and classification of the sincerity and substantive religious beliefs of claimants to conscientious objection – something for which the DMV in unprepared, unqualified, and has no funding.

The RFRA creates an absolute defense against any civil or criminal penalties for noncompliance with any measure that imposes such a burden on religious beliefs. Enacting SB 251 without provision for accommodating such sincere and substantial religious objections would create an absolute defense, for religious conscientious objectors to Selective Selective registration, to any charge of operating a motor vehicle without a license. Is this really what the legislature should be doing?

We urge the Committee to carefully evaluate the preparedness of the DMV to make the accommodations required by the RFRA, and the costs of those measures. In considering this bill, and in the future, we urge you to respect First Amendment rights, and not to impose any conditions on the exercise of the right to travel that are not the least restrictive alternative, actually effective and justified by strict standards of necessity.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

Attachment:
U.N. Human Rights Committee, General Comment No. 27: Freedom of Movement

(The Identity Project, <http://www.PapersPlease.org>, provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights. IDP is a program of the First Amendment Project, a California nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.)

UNITED NATIONS

CCPR

International Covenant on Civil and Political Rights

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General Comment No. 27: Freedom of movement (Art.12) : . 11/02/1999. CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments)

Convention Abbreviation: CCPR
HUMAN RIGHTS COMMITTEE

GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Addendum

GENERAL COMMENT No. 27 (67)*

Freedom of movement

(Article 12)

1. Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant, as is often shown in the Committee's practice in considering reports from States parties and communications from individuals. Moreover, the Committee in its general comment No. 15 (“The position of aliens under the Covenant”, 1986) referred to the special link between articles 12 and 13. [1]

2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

3. States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by article 12, taking into account the issues discussed in the present general comment. They must also include information on remedies available if these rights are restricted.

Liberty of movement and freedom to choose residence (para. 1)

4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. [2] Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3. [3] It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

5. The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

6. The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of

women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.

7. Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together. [4]

Freedom to leave any country, including one's own (para. 2)

8. Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State. [5]

9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. [6] Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. [7] It is no justification for the State to claim that its national would be able to return to its territory without a passport.

10. The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

Restrictions (para. 3)

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (see para. 18 below).

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of “State secrets”, or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities. [8]

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, inter alia, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

The right to enter one's own country (para. 4)

19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. [9] The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

Notes

1/ HRI/GEN/1/Rev.3, 15 August 1997, p. 20 (para. 8).

2/ Communication No. 456/1991, Celepli v. Sweden, para. 9.2.

3/ General comment No. 15, para. 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

4/ See, for example, communication No. 138/1983, Mpandajila v. Zaire, para. 10; communication No. 157/1983, Mpaka-Nsusu v. Zaire, para. 10; communication Nos. 241/1987 and 242/1987, Birhashwirwa/Tshisekedi v. Zaire, para. 13.

5/ See general comment No. 15, para. 9, in HRI/GEN/1/Rev.3, 15 August 1997, p. 21.

6/ See communication No. 106/1981, Montero v. Uruguay, para. 9.4; communication No. 57/1979, Vidal Martins v. Uruguay, para. 7; communication No. 77/1980, Lichtensztejn v. Uruguay, para. 6.1.

7/ See communication No. 57/1979, Vidal Martins v. Uruguay, para. 9.

8/ See general comment No. 23, para. 7, in HRI/GEN/1/Rev.3, 15 August 1997, p. 41.

9/ See communication No. 538/1993, Stewart v. Canada.

* Adopted at the 1783rd meeting (sixty-seventh session), held on 18 October 1999.

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