Opinion 08-07

OPINION OF: GARY K. KING Attorney General

December 1, 2008

BY: Andrea R. Buzzard, Assistant Attorney General

TO: The Honorable Miguel P. García, New Mexico State Representative, 1118 La Font Road SW, Albuquerque, NM 87105

QUESTIONS:

1. Are States legally required to adopt and comply with the licensing standards prescribed by the REAL ID Act?

2. May the constitutionality of the REAL ID Act plausibly be challenged on the basis of federalism principles?

3. Are there legal or constitutional limits with respect to the Homeland Security Secretary's statutory authority to designate "other purposes" for which driver's licenses or identification cards, which do not conform to REAL ID requirements, will not be accepted as valid identification?

4. Does the Secretary of Homeland Security have the authority to forbid the acceptance of such non-conforming driver's licenses or identification cards for purposes of Social Security or Medicare benefits or eligibility to open bank accounts in federally insured banks?

5. Would the REAL ID Act be susceptible to challenge if it were construed to allow the Secretary of Homeland Security to deny entitlement to those privileges and benefits?

6. Does the Secretary of Homeland Security or other federal officer have the authority to deny the use of a passport, as an alternative to non-conforming driver's licenses or identification cards, to gain access to commercial airline travel and access to federally protected facilities that are mentioned in the REAL ID Act.

7. Would the REAL ID Act be susceptible to challenge if a rule or regulation were adopted having the consequences described above.

CONCLUSIONS:

1. In answer to your first, second and third questions, the REAL ID Act does not, on its face, dictate that States must adopt the REAL ID Act's licensing standards. However, the REAL ID Act might be challenged on the basis of federalism principles or on Congress' failure to establish standards to guide the Secretary's exercise of discretion

in determining “official purposes.” The likelihood of success of such a challenge on either of these grounds is unclear at this time.

2. In answer to your fourth and fifth questions, the Secretary has not, in Department regulations, prohibited the acceptance of non-conforming driver’s licenses for the purposes you mention. Those questions are too speculative to permit analysis at this time.

3. In answer to your sixth and final questions, the REAL ID Act does not address federal agencies’ acceptance of U.S. passports as an alternative to REAL ID driver’s licenses. The Department’s regulations allow use of U.S. passports to satisfy identity requirements attendant the issuance of REAL ID licenses but do not address the use of a U.S. passport in lieu of a REAL ID license. Therefore, those questions are not susceptible to analysis based on the Act and the Department’s regulations at this time.

BACKGROUND:

The REAL ID Act is Pub. L. 109-13, Div. B, Title II, §§ 201 to 201, May 11, 2005. Section 202(a)(1) of the REAL ID Act of 2005 (the Act) prohibits federal agencies from accepting a state-issued driver’s license or identification card for any “official purpose” unless the issuing State is meeting the requirements of the Act. “The term ‘official purpose’ includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary shall determine.” Section 201(3). “Secretary” means “the Secretary of Homeland Security.” Section 201(4). For federal recognition purposes the Act imposes minimum information requirements for state-issued driver’s licenses and establishes issuance standards, such as proof of identity, date of birth and proof of U.S. citizenship or other lawful entry status. Section 202.

The Office of the Secretary of the Department of Homeland Security has issued regulations to implement the REAL ID Act. See 73 F.R. 5272-5340; 6 CFR §§ 37.1 to 37.71. Under those regulations, “official purpose” is defined as “accessing Federal facilities, boarding Federally-regulated commercial aircraft, and entering nuclear power plants.” 6 CFR § 37.3. This regulatory definition is aligned to the Act’s definition at Section 201(3).

The Secretary’s regulations “apply to States and U.S. territories that choose to issue driver’s licenses and identification cards that can be accepted by Federal agencies for official purposes.” 6 CFR § 37.1(a). The commentary to these regulations explains: “[T]he REAL ID Act is binding on Federal agencies, rather than on States. The rule would not formally compel any State to issue driver’s licenses or identification cards that will be acceptable for federal purposes.” 73 F.R. at 5330. “[T]he citizens of a given State--not Congress--ultimately will decide whether the State complies with this regulation and the underlying statute.” Id. Although not compulsory, “DHS assumes that States will willingly comply with the regulation to maintain the conveniences enjoyed by their residents when using their state-issued driver’s licenses and non-driver identity

cards for official purposes, particularly as it pertains to domestic air travel." 73 F.R. at 5329.

By letter dated May 7, 2007, New Mexico, through its Motor Vehicle Division, in commenting on the Department's proposed regulations, estimates that it will cost at least $13 million to comply with the REAL ID Act, stating further that the federal government has not allocated sufficient grants in order for New Mexico to comply. The Department of Homeland Security acknowledges the burdens the Act imposes on the States in complying with the Act and the impracticality of not complying. "DHS recognizes that, as a practical matter, States may view noncompliance with the requirements of REAL ID as an unattractive alternative. DHS also recognizes that compliance with the rule carries with it significant costs and logistical burdens, for which Federal funds are generally not available." 73 F.R. at 5330.

ANALYSIS:

The Act, on its face, does not compel a State to comply. Nor is it clearly evident that the Act impinges on the core of state sovereignty. In New York v. United States, 505 U.S. 144 (1992), the United States Supreme Court struck down, in part, a federal law, as unconstitutional under the Tenth Amendment to the United States Constitution, which made States responsible for regulating disposal of radioactive waste generated within the State. The federal law was structured to provide incentives to States to comply with their obligations. The Court found one of the incentives to be unconstitutional because it offered States no constitutional "choice" to comply but rather "compelled" States to comply with the federal law. That incentive or option provided that if a State was unable to provide for the disposal of waste, that State would "take title" to the waste. This impinged upon the core of state sovereignty retained by the States under the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1]

In New York, it was undisputed that Congress could, under the Commerce Clause, Art. I, § 8, cl. 3, regulate the interstate market in waste disposal, and, therefore, the federal government could, if it wished, directly regulate the generators and disposers of waste. However, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 505 U.S. at 160 (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981), which held that the federal reclamation law did not "commandeer" States into regulating mining because a State could choose not to adopt a program that complied with the federal law, in which case, the full regulatory burden would be borne by the federal government).[2] The Commerce Clause, the Court observed, "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U.S. at 166.

The Tennessee Attorney General's office has opined that the plain face of the Act's language does not compel States to adhere to the requirements of the REAL ID Act.

See Tenn. Att'y Gen. Op. No. 07-61, 2007 WL 1451648.[3] However, it may be argued that Congress is attempting to regulate State governments' regulation of the matter of drivers' license issuance, and, moreover, is also distancing itself from political accountability with respect to this regulatory program. As the Court stated in New York, Congress may encourage a State to adopt a legislative program by a variety of methods, "short of outright coercion," and it may offer States the choice of regulating private activity or having state law preempted by federal regulation. 505 U.S. at 166-67, 173-74.[4] "Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." Id. at 168. "But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." Id. at 169. Thus, accountability is diminished when, "due to federal coercion," elected state officials cannot regulate in accordance with the views of the electorate. Id. The ramifications of State non-compliance with the REAL ID Act raise the issue whether Congress is attempting by the REAL ID Act to regulate State governments' regulation of the issuance of state drivers' licenses.

In Printz v. United States, 521 U.S. 898 (1997), the United States Supreme Court reinforced this thread of "political accountability" in assessing a Tenth Amendment issue. In Printz, the Court struck down, as unconstitutional under the Tenth Amendment, the Brady Act's amendments to the federal Gun Control Act, which required the States' chief law enforcement officers to perform background checks of people desiring to acquire guns from gun dealers to determine whether possession by those individuals was contrary to federal law. The precise issue before the Court was "the forced participation of the States' executive in the actual administration of a federal program." Id. at 916. The Court held that the States' executive could not be so forced.

Referring to Hodel and FERC, the Court stated: "[W]e sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law." Id. at 925. Referring to the diminished accountability rationale in New York, the Court in Printz commented:

> By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.

Id. at 930. Adhering to New York's conclusion that the federal government may not compel the States to enact or administer a federal regulatory program, the Court struck the Brady Act's mandatory obligation imposed on chief law enforcement officers to perform background checks on prospective handgun purchasers. Id. at 933. The REAL ID Act, although not mandating State compliance, generates the political accountability

concerns expressed in New York and in Printz because the Act employs State governments as mechanisms to enforce the Act's requirements. The Department of Homeland Security's use of the term "unattractive" to describe the alternative of noncompliance may well understate the conundrum facing state legislative bodies when deciding whether their citizens should suffer the Act's consequences of being denied the ability to board commercial airlines or to enter federal buildings if they present a state driver's license for purposes of such access and are denied access because of inability to present a conforming license.

Nevertheless, a challenge to the law on this ground is not a guaranteed success. A court may agree with the Tennessee Attorney General's view that the REAL ID Act does not compel States to adhere to its requirements contrary to the Tenth Amendment. What constitutes "outright coercion," mentioned by the Court in New York, is difficult to quantify. In the context of legislation enacted under Congress' power under the Spending Clause, pursuant to which it makes grants of money with conditions, the Tenth Circuit has evidenced its disinclination to apply a "coercion theory" with respect to challenged conditions of a federal grant, because such theory is "unclear, suspect, and has little precedent to support its application." Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) ("The boundary between incentive and coercion has never been made clear … '[the] courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely with a hard choice….'") (quoting Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981)).

Another potential legal challenge may be to the interpretation of the phrase "any other purposes that the Secretary shall determine," as used in Section 201(3) in defining "official purpose." The term is defined in the Act as "includ[ing] but … not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary shall determine." Such "other purposes" may, as a matter of statutory construction, be qualified by the terms that precede that phrase. Under the familiar rule of statutory construction, known as ejusdem generis, where general words follow specific words in a statutory enumeration, the general words are construed to embrace objects similar in nature to those objects enumerated by the preceding specific words. 2A Sutherland Statutory Construction, § 47:17 (7th ed.). For example, a statutory list of particular causes for dismissal of teachers was found to embody a principle of relevance to ability to perform satisfactorily the functions of a teacher, which principle applied to limit the meaning of the catch-all phrase "other due and sufficient cause" that followed the list. diLeo v. Greenfield, 541 F.2d 949, 954 (2d Cir. 1976). Similarly, the purposes specified in Section 201(3) suggest that Congress is concerned with access to commercial aircraft and facilities that might pose a threat to national security. The general phrase "other purposes" likely would be qualified in a manner consistent with that underlying purpose that is evident from the Act's specific listings.

Absent any such limiting construction and absent any form of guidance whatsoever to the Secretary, the Act could be susceptible to challenge based on the principle that Congress may not delegate its legislative power to another branch of government. See

Touby v. United States, 500 U.S. 160, 165 (1991) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power"). See also Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 109 S.Ct. 1726, 1731 (1989) (reaffirming a long standing principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "ascertain whether the will of Congress has been obeyed," no delegation of powers trenching on the principle of separation of powers has occurred)(quoting Yakus v. United States, 321 U.S. 414, 426 (1944)). The Act, or at least a portion, may be struck down because it improperly opens the door to the federal government's expansion of "other purposes" to include access to medical benefit programs. See Cobb v. State Canvassing Board, 140 N.M. 77, 90, 140 P.3d 498 (2006) (election law struck down because it violated non-delegation doctrine).

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[1] In New York, the Court determined that the "take title" option was not one that Congress could impose as a "freestanding requirement." 505 U.S. at 174. The Constitution would not permit Congress simply to transfer radioactive waste from the generators to state governments. "Such a forced transfer, standing alone, would in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." Id.

[2] See also FERC v. Mississippi, 456 U.S. 742 (1982) (upholding a federal statute that encouraged States to develop programs to combat the nation's energy crisis but did not compel the States to enact a legislative program; observing "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations"). Id. at 761-62.

[3] See also Opinion of South Carolina's Attorney General, issued March 24, 2008, 2008 WL 903975, (concluding that any legal action challenging the constitutionality of the REAL ID Act on Tenth Amendment grounds would be premature at this point, that the success of any such suit would be difficult, and that there exists at least a credible possibility that a Tenth Amendment "commandeering" argument can be mounted).

[4] The Department of Homeland Security states, in its regulations, that its rule does not preempt state law. See 73 F.R. at 5330. However, in an unreported decision in which the issue of preemption was not contested, League of United Latin American Citizens (LULAC) v. Bredesen, 2005 WL 2034935, the court observed that although the REAL ID Act permits a state to issue licenses through an alternative procedure, "those driver's licenses could not be used to access federal facilities [or] board federally regulated

commercial aircraft ….” Consequently, “states are likely to comply … [and] given the broad scope of the phrase ‘official purpose’ … and that the federal interest in national security is one of the goals of the Act, the court concludes that Congress intended to preempt state law in this area of identity verification documentation for drivers’ licenses.”