

March 24, 2008

The Honorable Mark Sanford  
Governor of the State of South Carolina  
P. O. Box 12267  
Columbia, South Carolina 29211

Dear Governor Sanford:

This past Friday, you sought advice concerning the ramifications to the State of South Carolina of the federal Real ID Act of 2005. The Act (19 Stat. 201), enacted to combat global terrorism, has as its purpose improvement of the security of state drivers' licenses and other personal identification cards. Pursuant thereto, "a Federal agency may not accept" after May, 2008, a driver's license or other identification for any federal purpose unless the State is meeting the Act's requirements, aimed at making drivers' licenses less susceptible to security breaches. Section 202 prescribes the federal standards necessary for a state's driver's license and the documentation required for presentation to the issuing authority before a license is issued. 119 Stat. 231 §§ 202 (b) and (c)(1).

Notably, the Act does not expressly require states to enact the prescribed standards for issuance of a driver's license. Instead, the federal law mandates that a non-complying state's driver's license may not be used for identification to gain access to federal facilities, to board commercial aircraft or to enter nuclear power plants. *Tenn. Op. Atty. Gen.*, No. 07-61 (May 7, 2007). Alternative forms of identification, such as a passport, will thus be necessary to enter these areas or to board aircraft in a non-complying state.

Although we have found no case which has addressed the constitutionality of the Real ID Act, we note that it is the opinion of the Tennessee Attorney General, in *Tenn. Op. Atty. Gen.* Op. No. 07-61, *Id.*, that the Real ID Act's provisions do not violate the Tenth Amendment of the federal Constitution. The Tennessee Attorney General, in his formal opinion, referenced a number of decisions of the United States Supreme Court, including *Reno v. Condon*, 528 U.S. 141 (2000), in concluding that Congress may reasonably regulate access to federal property and commercial airliners as part of the delegated powers to the federal government. In light of these Supreme Court

decisions, particularly *Reno v. Condon*, any successful legal action would be difficult, although not impossible.<sup>1</sup>

Of course, the constitutionality of an Act of Congress and the issue of whether such an Act wisely serves the public interest are two different questions. In that regard, the Real ID Act has been the subject of much criticism throughout the country. One commentator recently wrote that “[i]n addition to carrying a hefty price tag, Real ID would turn our state driver’s licenses into national ID cards, which everyone would need to get on an airplane, [or] enter a federal building ...” *The State*, March 22, 2008. As a result of the tremendous outcry against Real ID, many states have enacted laws opting out of the law or prohibiting the state from complying with Real ID’s requirements. Our General Assembly likewise has enacted S.C. Code Ann. Section 56-1-85, which will be discussed more fully below, and which states that “[t]he State shall not participate in the implementation of the federal REAL ID Act.”

In order to implement the Real ID Act, Congress has delegated to the Department of Homeland Security (DHS) authority to administer the Act. Accordingly, DHS has promulgated regulations providing for extensions of the deadline for compliance with the Act, provided such request is submitted “no later than March 31, 2008.” *73 Fed. Reg. No. 19, § 37.63* (January 29, 2008). In order to qualify for the DHS extension, the agency has stated that a state need not affirmatively pledge compliance with the Act, but must be “on track” to meeting such requirements. *Letter of Stewart A. Baker, Assistant Secretary, to the Attorney General of Montana, March 31, 2008*. In receiving its extension, Montana Attorney General McGrath had in fact advised DHS that “Montana’s legislature voted unanimously in 2007 to forbid implementation of REAL ID in Montana” and thus Montana could not implement the Act.

However, the Montana Attorney General, in his letter to DHS, also catalogued the many steps that State had taken which would “coincidentally” meet “most of the standards established in the federal REAL ID law well ahead of the projected implementation deadlines.” Thus, Attorney General McGrath urged DHS “not to take any steps that would penalize Montanans’ ability to use

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<sup>1</sup> *Reno v. Condon*, distinguished two earlier cases, *New York v. U.S.*, 505 U.S. 144 (1992) and *Prinz v. U.S.*, 821 U.S. 898 (1997), both of which held that the federal government may not “commandeer” state governments under the Tenth Amendment. In *New York*, *supra*, the Court found that it is clear that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” The Attorney General of Tennessee concluded that these cases are inapplicable with respect to Real ID because “[t]he Real ID Act does unlawfully compel the states to enact specific legislation and does not commandeer or conscript any state officer to enforce federal law.” A court may well ultimately agree with this conclusion, although so long as *New York* and *Prinz* remain good law, there exists at least a credible possibility that a Tenth Amendment “commandeering” argument can be mounted.

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their valid Montana drivers' licenses for federal identification purposes and commercial air travel." *Letter from Mike McGrath, Attorney General to Secretary Chertoff, DHS, March 21, 2008.* In response to the Montana Attorney General's letter, DHS wrote that "under the statute, the State of Montana has met the requirements for an extension of the compliance date ...." Thus, DHS granted Montana an extension.

It is our understanding that, like Montana and other states, the State of South Carolina has, of its own volition, taken steps to strengthen dramatically the security of South Carolina driver's licenses. You advise that this State is about 90% of the way to achieving full federal compliance. Moreover, both the House and Senate have adopted resolutions urging the Governor to seek an extension. See H. 4822. Thus, South Carolina could attempt to utilize the same approach as these other states have done, even though § 56-1-85 prohibits South Carolina's implementation of the Real ID Act.

### Conclusion

It is our opinion that South Carolina law mandates that this State may not participate in the implementation of the federal Real ID Act. Regardless of whether the federal Act is within Congress' constitutional power to enact, state law currently forbids compliance with the Real ID program. The General Assembly and the Governor have concluded, in enacting § 56-1-85, that compliance with the Act is not in the interest of the citizens of South Carolina. Any change in that prohibition must come from the General Assembly and Governor.

Nevertheless, we advise that § 56-1-85 does not prohibit you as Governor from presenting to DHS the numerous measures which South Carolina has taken, of its own volition, to strengthen the security of the South Carolina's driver's license. While South Carolina law currently prohibits implementation of Real ID, it does not preclude a cataloguing to DHS of this State's many security measures already in place. This has been the approach of other states and we believe it is a legally sound option and one consistent with South Carolina law. Although we cannot speak for DHS, from its actions, it does not appear that the federal agency deems a prohibitive state law as preclusive of or an affirmative expression of the intent to comply necessary for receiving an initial extension. Apparently, a showing to DHS that the State is "on track" toward meeting the requirements of the Act is what is necessary for an extension or, at least, indefinite forbearance. That being the case, although other options are available, such action by you as Governor, in using an approach similar to that used by other states, as described herein, would not, in our opinion, be tantamount to an admission or concession that the State intends ultimately to comply with the Real ID Act, in contravention of § 56-1-85. Nor would it constitute a refusal to comply.

With respect to any legal action challenging the constitutionality of the Real ID Act, on Tenth Amendment grounds, such a course would be at this point, premature. Our initial analysis is that the

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success of such lawsuit would be difficult, although not impossible. Time and circumstances could have an impact upon the United States Supreme Court's approach to this question. In any event, however, the approach outlined above would be a legally sound way to attempt to protect the State's interest and insure compliance with current state law.

Yours very truly,

Henry McMaster

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