Congressional Research Service

Memorandum May 10, 2007

TO: Senate Finance Committee

FROM:

American Law Division

SUBJECT: Identification of sex offenders on U.S. passports

This memorandum is in response to your request concerning whether the U.S. Secretary of State has the discretion to require registered sex offenders to identify themselves on their passport applications and to identify registered sex offenders as such on any passports issued to them or whether new legislation would be required to provide the Secretary of State with such authority. The memorandum will summarize applicable international passport guidelines, statutory and regulatory authority for passport restrictions, and possible constitutional issues concerning sex offender identification on passports.

International guidelines

Pursuant to the mandate of various articles of the Convention on International Civil Aviation (Chicago Convention),[1] the International Civil Aviation Organization (ICAO) has developed international standards for machine readable travel documents, including passports, adopted and published as Document 9303. The current edition of Document 9303 becomes an international standard due to its reference in the Annex 9 standard. International standards concerning travel documents are generally developed pursuant to Annex 9, concerning facilitation, to the Chicago Convention. Facilitation refers to the international standards and recommended procedures (SARPs) which facilitate and expedite air transport

[1] The Ninth Edition of the Convention as amended as of January 1, 2006, was published by the International Civil Aviation Organization as Doc. 7300/9 in 2006. The articles providing the basis for Document 9303 include Articles 13 (compliance of air transport passengers with passport and immigration regulations), 22 (agreement by contracting States to facilitate air transport through laws concerning immigration), 23 (undertaking by contracting States to establish immigration procedures affecting air transport in accordance with practices established or recommended pursuant to the Convention), 37(j) (requirement to adopt international standards and recommended procedures re customs and immigration procedures, among other things), 54(l) (requirement that the Council adopt international standards and recommended practices as annexes to the Convention) and 90 (procedure for the adoption of annexes).

between the territories of Contracting States and prevent unnecessary delays to aircraft, crews, passengers and cargo. Differences between national regulations and practices of a State and those established by an international standard must be notified to the ICAO Council pursuant to Article 38 of the Chicago Convention. Members of the ICAO, including the United States,[2] have agreed to adopt and implement the standards of Document 9303, part 1, concerning passport visual and machine-readable formats and biometric standards.[3] These standards provide for a field for including optional personal information concerning the passport holder.[4] There are no particular guidelines or restrictions concerning the type of information that may be included in this field. Therefore, it appears that information concerning a sex offense conviction could be inserted in this field consistent with international passport standards. According to a presentation on the history and evolution of Document 9303 at the Global Interoperability Test Summit on Electronic Passports, possible travel document enhancements include data sharing, such as law enforcement interfaces.[5] In addition to including information enabling data sharing, such enhancements could include information on the document itself of sex offender status in visual or machine readable format or both.

Federal passport and sex offender registry/notification laws

Currently, there are no statutory or regulatory requirements or authority for recording information on U.S. passports other than basic identifying factors. The Secretary of State is authorized to issue passports and to promulgate regulations establishing standards and guidelines for passports and their issuance.[6]

Although the Secretary of State is not currently authorized to identify criminal convictions on a passport, federal statutes and regulations authorize the Secretary to deny or revoke issuance of a passport in certain circumstances, including where the passport applicant or holder has been convicted of drug trafficking[7] or is in arrears in child support

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[2] See 7 F.A.M. § 1311.1(b) (U.S. passport conforms to the international standard recommended by ICAO).

[3] See Luis Alfonso Fonseca, *Control and Monitoring Measures States Should Apply in a Privatized Airports Environment* (1999) (presented at an Airport Privatization Seminar/Forum in ICAO). "ICAO member States are committed to adopt, as a part of their national legislation, the international Standards and Recommended Practices included in all the Annexes to the Chicago Convention, specifically, Annexes 9, 14, 16 and 17 which deal with international airport specifications, services and procedures."

[4] Field 13 in zone no. II, optional personal data elements in the mandatory zone, *e.g.*, personal identification number or fingerprint, at the discretion of the issuing State or organization. ICAO Doc. 9303, Machine Readable Travel Documents, part 1, machine readable passports, at IV-8, IV-1-1 (Fifth ed. 2003). There is a Sixth Edition, published in 2006, but a copy was not readily available to us. Most of the changes in the Sixth Edition apparently involved the inclusion of detailed biometric standards.

[5] Barry J. Kefauver, *History of ICAO Document 9303 and the evolution of the framework, especially the role and development of NTWG* (2006), accessible at http://interoptest-berlin.de/pdf/Kefauver_-_History_of_ICAO_Document_9303.pdf.

[6] 22 U.S.C. §§ 211a et seq. and 22 C.F.R. part 51.

[7] 22 U.S.C. § 2714, 22 C.F.R. § 51.71.

payments,[8] or federal repatriation loans,[9] in addition to denial or revocation of a passport where there is an outstanding arrest warrant or extradition request for the passport holder. The Secretary may also deny or revoke a passport where the "Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States."[10]

Although the Secretary of State is not authorized to identify a passport holder as a sex offender on their passport, Title I of the Adam Walsh Child Safety and Protection Act of 2006 (42 U.S.C. §§ 16901 *et seq.*),[11] the Sex Offender Registration and Notification Act (SORNA), established uniform standards and guidelines for state, territorial, and tribal sex offender registries and mandated the Attorney General to establish a national sex offender registry, public website, and community notification program and to establish guidelines and regulations to implement these activities. The statute provides for three tiers of sex offenders depending on the seriousness of the offense of which the person was convicted and includes certain juvenile offenders and also *foreign* convictions which were obtained in accordance with sufficient safeguards for fundamental fairness and due process for the accused. The period during which a sex offender is required to keep registration information current varies according to the sex offender tier and may be reduced for maintaining a clean record. Community notification must be made by the appropriate official in each state, territorial or tribal jurisdiction to law enforcement, school, and housing agencies; any agency responsible for conducting employment related background checks under § 3 of the National Child Protection Act of 1993 (42 U.S.C. § 5119a); social service entities responsible for protecting minors in the child welfare system; volunteer organizations in which contact with minors or other vulnerable individuals might occur; and any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction. The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, is required to establish and maintain a system for informing relevant jurisdictions about persons entering the United States who are required to register under SORNA.

SORNA supersedes the former federal sex offender registry and notification law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and related statutes,[12] which had similar provisions. SORNA is more comprehensive and detailed than its predecessor, particularly with regard to establishing federal registration/notification requirements and penalties to be administered by the Attorney General, in addition to any state requirements. The predecessor statute mainly required compliance with federal requirements only where there was no adequate state program.

Constitutional issues

A range of constitutional issues could arise with regard to the identification of a person as a sex offender on his/her passport, similar to those which have arisen in the context of sex

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[8] 42 U.S.C. § 652(k), 22 C.F.R. § 51.70(a)(8).

[9] 22 U.S.C. § 2671(d)(3); 22 C.F.R. § 51.70(a)(7) & (b)(1).

[10] 22 C.F.R. § 51.70(b)(4).

[11] Pub. L. 109-248, 120 Stat. 587.

[12] Pub. L. 103-322, § 170101, 108 Stat. 1796, 2038 (codified as amended at 42 U.S.C. § 14071-14073).

offender registries and community notification requirements. During congressional consideration of the Adam Walsh Child Safety and Protection Act, potential constitutional concerns were noted as was the state compliance exemption for provisions held by State Supreme Courts to be inconsistent with State constitutions.[13] The federal sex offender registration and community notification law has recently been upheld by a few federal district courts against various challenges on ex post facto, procedural due process, substantive due process, federalism, and delegation grounds.[14] These cases concerned criminal charges under 18 U.S.C. § 2250, added by § 141(a)(1) of SORNA, brought against sex offenders who failed to register after moving interstate after the date of enactment of SORNA. The cases dealing with ex post facto challenges generally follow *Smith v. Doe*, a U.S. Supreme Court decision upholding a State sex offender registry, discussed below.

United States v. Madera[15] also followed *Smith v. Doe* with regard to the procedural due process claim. The court in *Madera* also followed decisions by several U.S. Courts of Appeal, including *Doe v. Tandeske*, discussed below, that sex offender registration statutes do not violate substantive due process.[16] The court in *Madera* also held that SORNA does not violate the Commerce Clause because the ability to track and identify sex offenders as they move from state to state in order to promote public safety came within the reach of the Commerce Clause. The court also upheld the Attorney General's authority to determine the retroactive application of SORNA as a proper congressional delegation. One should note that the SORNA penalty for violating the requirement to register or update registry information after traveling in interstate commerce, *i.e.*, after moving to another state to live, work, or attend school, also applies to traveling in foreign commerce, although the U.S. laws cannot mandate registration in a foreign country.[17] However, as noted above, SORNA requires the Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, to establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register.

In contrast to the cases described above, in *United States v. Smith*,[18] the federal district court held that when a person is charged under 18 U.S.C. § 2250 with an offense of failing to register after moving from one state to another before the enactment of SORNA, then the retroactive application of the criminal offense is a violation of the Ex Post Facto Clause of the Federal Constitution. It appears to be the only court to date to have found that an application of SORNA is unconstitutional. The court agreed with the defendant that the retroactive application of 18 U.S.C. § 2250 violated the clear intent of Congress, finding that

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[13] 152 Cong. Rec. S8022-8024 (July 20, 2006) (remarks of Sen. Kennedy).

[14] See, e.g., United States v. Markel, No. 06-20004, 2007 U.S. Dist. LEXIS 27102 (W.D. Ark. April, 11, 2007); United States v. Manning, No. 06-20055, 2007U.S. Dist. LEXIS 12932 (W.D. Ark. Feb. 23, 2007); United States v. Madera, 474 F. Supp. 2d 1257 (M.D. Fla. 2007).

[15] 474 F. Supp. 2d at 1257.

[16] 474 F. Supp. 2d at 1264, citing Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005); Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004) ("[P]ersons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute."); and Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003) (holding that the sex offender registration statute in question did not infringe the fundamental right to a presumption of innocence).

[17] 18 U.S.C. § 2250(a)(2)(B).

[18] No. 06-20674, 2007 U.S. Dist. LEXIS 16350 (E.D. Mich. March 8, 2007).

the use of the term "travels in interstate or foreign commerce" in that provision without including the past tense, "traveled," indicates that Congress did not intend that the provision would apply retroactively. The court further found that such an application would violate the Ex Post Facto Clause, because SORNA replaced the existing misdemeanor penalty at 42 U.S.C. § 14072(i) for a first offense of failure to register with a greater felony penalty for a first offense under 18 U.S.C. § 2250.[19]

A number of sex offender registration/notification state laws have been challenged in federal and state courts on federal and state constitutional grounds. Two U.S. Supreme Court decisions upheld state sex offender registries and Internet access to the registry information against *ex post facto* and procedural due process challenges, respectively, under the Federal Constitution. In a 6-3 decision in *Smith v. Doe*,[20] the U.S. Supreme Court held that the retroactive application of the Alaska statute, requiring sex offender registration and providing for public access to much of the information provided by the registrant through the Internet, did not violate the ex post facto prohibition of the Federal Constitution, because the statute was nonpunitive. The Court examined whether the state legislature intended the registration scheme to be civil remedy or a criminal punishment, and if it is a civil remedy, whether it was so punitive in purpose or effect as to negate the legislature's intent and transform the civil remedy into a criminal penalty. Several factors were analyzed, including whether the registration scheme had traditionally been regarded as a punishment, imposed an affirmative restraint, promoted the traditional aims of punishment, had a rational connection to a nonpunitive purpose, or was execessive with respect to that purpose. The Court rejected the argument that the registration and Internet notification was intended to be a shaming punishment akin to those in use during colonial times, finding that any stigma attaching to the sex offender was incidental to the public dissemination of accurate information about a criminal record. The purpose of both was to inform the public for its own safety, the Web site did not permit the public to post comments to shame the offender, and although the Web site provided ease of access to the criminal record, it was akin to a physical visit to a repository of publicly available criminal records. The Court also noted that it was a passive means of public notification, requiring a member of the public to visit the Web site and seek the information. Consequences of the scheme, such as public shame and unemployability, resulted from the fact of conviction, a matter of public record.

The Court also rejected the idea that a restraint was imposed, finding that the requirement to update registration information did not constitute a disability or restraint. It rejected the reasoning that the scheme promoted punitive aims because it deterred crime and the length of the registration update requirement seemed to correlate to the degree of seriousness of the offense. The Court noted that even civil regulations could have a deterrent effect and that the length of the registration requirement was reasonably related to the danger of recidivism, consistent with the civil objective of informing the public of safety issues, which is a legitimate nonpunitive purpose. Considering the mobility of the population, the availability and accessibility of the registry through the Internet was not so excessive a requirement as to constitute a punishment. The regulatory means chosen are reasonable in light of the nonpunitive objective.

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[19] 42 U.S.C. §§ 14071-14073 are to be repealed upon the later of 3 years after the date of enactment of SORNA or 1 year after the availability of certain registry and notification software.

[20] 538 U.S. 84 (2003).

In a unanimous decision in *Connecticut Department of Public Safety v. Doe*,[21] the U.S. Supreme Court held that a Connecticut statute requiring sex offender registration and availability of the registry to the public through the Internet did not violate procedural due process under the Fourteenth Amendment by failing to afford convicted sex offenders the opportunity for a hearing on current dangerousness before public disclosure of the registry information. The Court apparently disagreed with one basis for the lower appellate court's finding that the respondent sex offender had been deprived of a liberty interest because of the stigma caused by the registry's implication that he was currently dangerous and the onerous registration requirements. It noted that it had previously held that mere injury to reputation does not constitute deprivation of a liberty interest. However, the Court found it unnecessary to even reach this issue, holding that, even if public disclosure of the registry information would deprive the convicted offenders of a liberty interest, procedural due process did not require opportunity for a hearing concerning current dangerousness where the requirement to register was not based on current dangerousness but on the fact of previous conviction. The sex offender had already had an opportunity to contest the fact of the previous conviction in accordance with due process. The Court noted that although the respondent might well have a substantive due process claim under the Fourteenth Amendment, the issue of whether the Connecticut statute violated substantive due process was not before the Court because the respondent sex offender had expressly disavowed reliance on a substantive due process ground for the constitutional challenge and the Court expressed no opinion with regard to such a potential claim. Justice Souter noted in his concurrence that an equal protection claim might also lie against the Connecticut statute, which permits the possibility of judicial exemption of certain sex offenders from the registry and reporting requirements. The line drawn by the state legislature between offenders who are eligible for such discretionary relief and those who are not is open to an equal protection challenge.

On remand of the *Smith v. Doe* case to the U.S. Court of Appeals for the Ninth Circuit as *Doe v. Tandeske*,[22] the appellate court noted that it had initially held that the Alaska statute violated the Ex Post Facto Clause of the Federal Constitution with regard to the plaintiffs who had been convicted of sex offenses before the enactment of the statute and therefore had not found it necessary to address the procedural and substantive due process claims. Reversal and remand by the U.S. Supreme Court necessitated such consideration. In accordance with the U.S. Supreme Court decision in *Connecticut Department of Public Safety v. Doe*, the appellate court found that the Alaska statute did not violate procedural due process. With regard to the substantive due process claim, the appellate court noted that the U.S. Supreme Court had described fundamental rights implicated in substantive due process rights as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."[23] The appellate court found that in accordance with U.S. Supreme Court precedent, it had to conclude that persons who have been convicted of serious sex offenses do not have a *fundamental* right to be free from the registration and notification requirements of the Alaska statute, although they have an important liberty interest. Accordingly, the a rational basis for the state statute was the appropriate standard of review, that the government demonstrate "a reasonable relation to a

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[21] 538 U.S. 1 (2003).

[22] 361 F.3d 594 (9th Cir. 2004).

[23] 361 F.3d at 596, citing Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

legitimate state interest to justify the action."[24] The appellate court noted that the U.S. Supreme Court had already found in *Smith v. Doe* that the statutory registry served a legitimate nonpunitive purpose of public safety and that the length of the registry update/reporting requirement, varied according to the seriousness of the offense, was reasonably related to the danger of recidivism and thus to the goal of public safety. Therefore, the appellate court concluded that the Alaska statute does not violate substantive due process rights.

Since the U.S. Supreme Court upheld the passive notification provided by the registries in the cases concerning the Alaska and Connecticut statutes, it may uphold a passport identification of a sex offender. However, it has not yet considered cases involving active community notification. The Court has also not dealt with other types of constitutional challenges that have arisen in state courts and lower federal courts under the Federal Constitution and state constitutions with regard to registries and/or community notification, including substantive due process, right to privacy, equal protection, cruel and unusual punishment, double jeopardy, and right to travel.[25] These courts have reached different conclusions with regard to the validity of registration and/or community notification schemes depending on the scope, nature, and manner of registry and community notification. For example, community notification procedures can differ with regard to the extent of notification to the community, ranging from direct contact of law enforcement agencies to dissemination by the media to the general public. In considering whether a jurisdiction has failed to substantially implement the requirements of SORNA (for which it may lose 10 percent of federal law enforcement funding), that act permits the Attorney General to take into consideration a State's inability to comply with certain provisions where doing so would cause the State to violate the state constitution, as determined by the State's highest court. Since passports fall solely within the jurisdiction of the Federal Government, the state case law or considerations necessary for state registration/notification laws would be irrelevant to passport guidelines. Although the registry and notification federal case law may be relevant by analogy to the passport context and may indicate possible constitutional issues, it is uncertain how the courts may treat legal issues that may arise for a passport identification.

In addition, there is no fundamental right to a passport; revocation, restriction, or impingement of a passport does not constitute an infringement of the constitutional right to travel. In *Haig v. Agee*,[26] the U.S. Supreme Court upheld the authority of the Secretary of State to deny or revoke a passport for reasons of national security and foreign policy under 22 C.F.R. § 51.70(b)(4). Agee, a former employee of the Central Intelligence Agency (CIA), denounced the CIA and engaged in activities to expose confidential information concerning the operations of the CIA. Consequently, the Secretary of State revoked his passport. Agee

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[24] 361 F.3d at 596, citing Washington v. Glucksberg, 521 U.S. at 722.

[25] See CRS Report for Congress RL33967, *Adam Walsh Child Protection and Safety Act: A Legal Analysis*, at 3, by Charles Doyle; Carol Schultz Vento, *Validity, construction, application of state statutes authorizing community notification of release of convicted sex offender*, 78 A.L.R. 5th 489 (2000 & 2006 supp.); Licia A. Esposito, *State statutes or ordinances requiring persons previously convicted of crime to register with authorities*, 36 A.L.R. 5th 161 (1996 and 2006 supp.); 64 Fed. Reg. 572, 575 (1999) (description of related litigation in the notice of promulgation of final guidelines for state programs under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act).

[26] 453 U.S. 280 (1981).

asserted, among other things, that regulations under which the Secretary of State revoked his passport contravened the Passport Act (22 U.S.C. § 211a). The Court held that although the Passport Act did not expressly authorize the Secretary of State to revoke or deny a passport, it also did not limit the Secretary's authority to do so, and the Secretary clearly had such authority for reasons not specified in the Passport Act, such as national security reasons. The policy in the regulations had been sufficiently consistent and substantial to compel the conclusion that Congress had approved it. A passport is essentially a travel document requesting that a foreign power permit safe passage by the bearer; it serves as a document identifying the bearer as someone owing allegiance to the United States, whose government in effect is vouching for the bearer and his/her conduct. The Court noted:

> Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation. The Court has made it plain that the freedom to travel outside the United States must be distinguished from the right to travel within the United States. . . . 'The constitutional right of interstate travel is virtually unqualified [cites omitted]. By contrast the "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such this "right," the Court has held, can be regulated within the bounds of due process.' (Citations omitted.) . . . [W]hen there is a substantial likelihood of "serious damage" to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States. . . . The Constitution's due process guarantees call for no more than what has been accorded here: a statement of reasons and an opportunity for a prompt postrevocation hearing.

The Court noted that it was not saying that a hearing was constitutionally required, just that the procedures satisfied due process rights. Although the instant case involved breaches of national security by a former government employee, the other existing statutory/regulatory grounds for denying/revoking a passport have not been successfully challenged on constitutional grounds.