CONSTITUTIONALITY OF THE PUBLIC SAFETY EMPLOYER-EMPLOYEE COOPERATION ACT

SUMMARY

This paper examines the constitutionality of the Public Safety Employer-Employee Cooperation Act of 2007. Although previous decisions of the Supreme Court would likely cause state and local governments to immediately challenge the constitutionality of the Public Safety Employer-Employee Cooperation Act, the IAFF has done everything to place the proposed bill on a foundation that provides the best possible arguments that the law should be viewed as constitutional.

BACKGROUND AND STRUCTURE OF THE ACT

The Act is a Federal bill intended to help ensure the normal flow of commerce and effective delivery of emergency services by establishing minimal standards for collective bargaining between public safety employees and their employers. The Act applies to law enforcement officers, fire fighters, and emergency medical personnel employed by a State, a political subdivision of a State, the District of Columbia, or any possession of the United States that employs public safety officers.

The Act establishes the right for public safety employees to bargain collectively over hours, wages, terms, and conditions of employment and to commit any agreement to writing in an enforceable contract or memorandum of understanding. States may comply with the Act by *either* enacting State legislation that meets or exceeds the minimal standards of the Act, *or through* application of regulations to be promulgated and administered by the Federal Labor Relations Authority (hereinafter "FLRA").

CONSTITUTIONAL AUTHORITY FOR THE ACT

The stated authority for the Public Safety Employer-Employee Cooperation Act is Congress' authority to regulate commerce pursuant to Article 1, Section 8 of the U.S. Constitution. It is well-established that such authority extends to Federal regulation of the relationship between public employees and their employers, where commerce may be affected. This was established by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), where the Supreme Court held that Congress' authority to regulate commerce includes the authority to apply the wage and hour standards of the Fair Labor Standards Act (hereinafter "FLSA") to State and local governments.

Although detractors have questioned the continuing viability of the Garcia decision, the simple truth is that Garcia remains the law of the land. The Supreme Court has had ample opportunity since Garcia to revisit that decision, but has refused to do so. The Court has not wavered from the fundamental holding in that case that Congress, acting pursuant to the Commerce Clause, may regulate the relationship between public employees — including public safety employees — and their public employers. Indeed, it can be reasonably argued that the Act

is ***less*** intrusive on principles of federalism than the FLSA because the Act does not dictate wage and hour requirements for public safety employees, but merely establishes the right of such employees to bargain collectively over such terms and conditions of employment.

Moreover, the constitutionality of the Public Safety Employer-Employee Cooperation Act is unaffected by the Supreme Court's decisions in New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997). In the New York case, the Supreme Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act that required States to regulate the disposal of internally generated waste or to take possession of the waste, and assume liability, therefore. In Printz, the Supreme Court invalidated an interim provision of the Brady Act that required local law enforcement officers to conduct background checks of proposed handgun transferees. In both of these cases, the Court applied its now well-established principle that "the Federal Government may not compel States to enact or administer a federal regulatory program."

Significantly, in reaching its conclusions, the Supreme Court contrasted the legislation in New York and Printz with that present in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), In Hodel, the Supreme Court ***upheld*** the constitutionality of Surface Mining Control and Reclamation Act because that Act did not "commandeer" the States into regulating surface mining. Instead, if a State chose not to enact a program that complied with the Federal requirements, "the full regulatory burden will be borne by the Federal Government." Of course, that is precisely the situation with the Public Safety Employer-Employee Cooperation Act.

The Public Safety Employer-Employee Cooperation Act does not "commandeer" State government or State officials to enact or administer a federal program. Rather, the Act provides States with the ***option*** to enact a State law meeting the minimal requirements of the Federal Act. If a State declines to exercise that option, the responsibility for administering the Act rests with the ***Federal Government***, acting through the Federal Labor Relations Authority (hereinafter "FLRA"), to implement and administer the program. Thus, as was the case in Hodel, "the full regulatory burden will be borne by the Federal Government." In light of the fact that the Supreme Court reaffirmed its adherence to Hodel in the more recent decisions of New York and Printz, it is clear that the enforcement mechanism provided in the Public Safety Employer-Employee Cooperation Act is fully consistent with controlling law.

SEMINOLE TRIBE AND ALDEN

Lastly, consideration should be given to the impact, if any, of the Supreme Court's decisions in Seminole Tribe v. Florida, 517 U.S. 44 (1996), Alden v. Maine, 527 U.S. 706 (1999), and Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002). These decisions concern a State's sovereign immunity from suit. In Seminole Tribe, the Supreme Court held that individuals cannot sue States in ***Federal*** court based upon Federal or State law claims, ***unless*** the State has waived its sovereign immunity. Three years later, in Alden, the Court held that, in most circumstances, individuals — *as opposed to the* ***Federal Government*** — cannot sue a ***State*** in ***State*** court based on a Federal cause of action unless the State has waived its sovereign immunity from suit. In 2002, in Federal Maritime Commission,

the Court held that individuals and private companies may not adjudicate complaints against States in front of federal agencies, as doing so would infringe upon the States' sovereign immunity. Thus, the Court extended its holding in Seminole Tribe and Alden to cases brought by private parties against states in federal administrative agencies.

With respect to Seminole and Alden, it is important to understand the distinction drawn between State and local governments. Both of these decisions are based on State sovereign immunity. Fortunately, in Seminole and Alden the Supreme Court reaffirmed its previous holdings that such immunity does ***not*** extend to local governments or local governmental entities such as cities, towns and counties. More recently, these holdings were affirmed by the Court in Jinks v. Richland County, South Carolina, 538 U.S. 456 (2003) and Northern Insurance Company of New York v. Chatham County, Georgia, 126 S. Ct. 1689 (2006). Thus, these decisions have no impact on the enforcement of the Act against local governments or local governmental entities.

Nor does it appear that Federal Maritime Commission will greatly impact enforcement of the Act. In that case, the Court held that a Federal administrative agency was precluded from adjudicating a **private party's** complaint against a state. Cases brought before the FLRA against states, however, will ultimately involve the Federal Government filing the complaint, specifically the FLRA, and not a private party. Thus, Federal Maritime Commission will have a very limited impact, if any, on the Act.

Under Seminole, Alden, and Federal Maritime Commission, private individuals or labor organizations would not be able to sue a State in State or Federal court to enforce the Public Safety Employer-Employee Cooperation Act, unless the State has waived its immunity to suit. This does not mean, however, that the Act cannot be enforced at all against a State. First, States that choose to enact State legislation in compliance with the Public Safety Employer-Employee Cooperation Act would, by doing so, waive their immunity to suit, thereby rendering the complying State legislation fully enforceable against the state.

Second, the Supreme Court in Alden stressed that State immunity does not limit the right of the Federal Government to sue States to ensure compliance with federal law. As explained by the Court in Alden, "suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." As explained above, under the Act, the Federal Government has been granted the authority to enforce the Act against States that have declined to enact complying state law provisions. Thus, the Public Safety Employer-Employee Cooperation Act can be enforced against a State.