

LEGAL SERVICES

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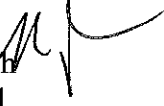
State Capitol
Juneau, Alaska 99801-1182
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MEMORANDUM

January 16, 2013

SUBJECT: Exempting Firearms from Federal Regulation
(Work Order No. 28-LS0290\A)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Kathleen Strasbaugh 
Legislative Counsel

Please find enclosed the bill you requested exempting certain firearms and firearms accessories from federal regulation and providing a criminal penalty for federal officials who attempt to enforce such federal regulation. We note that the bill is largely unconstitutional.

Drafting Matters

The bill is in the form of amendments to AS 44.99.500, enacted in 2010. AS 44.99.500 was enacted in an effort to avoid federal regulation of firearms that are made in Alaska on the theory that the commerce clause could not be used to authorize federal firearms regulation for purely intrastate activity. Wyoming's new bill is also in the form of amendments to a nearly identical act. The amendments (1) add possession to the activities to be exempted from federal regulation, (2) provide criminal penalties at a misdemeanor level for enforcing or attempting to enforce federal regulation, and (3) attempt to prevent the application of not-yet-proposed federal laws regarding semiautomatic weapons and magazines.

You did not specify the level of misdemeanor that you wanted to apply to the newly created offense. The current draft makes the offense a class B misdemeanor, which allows imprisonment for not more than 90 days, and a fine of not more than \$2000. AS 12.55.135(b); AS 12.55.035(b)(6). The other available class of misdemeanor is class A, which carries a penalty of not more than one year's imprisonment, and a fine of not more than \$10,000. AS 12.55.135(a); AS 12.55.035(b)(5). Please let me know if you would prefer that the offense be classified as a class A misdemeanor.

Constitutional Failings

Challenges to federal firearm regulation are generally undertaken for a determination of whether a regulation is an appropriate subject for federal legislation under the Commerce

Clause. This issue was discussed in some detail in hearings conducted at the time the legislature was considering passage of AS 44.99.500. *See Minutes*, H. Jud. Comm. (HB 186, April 6, 2009); *Minutes*, S. Jud. Comm. (HB 186, February 1, 2010); *Minutes*, S. Jud. Comm. (HB 186, February 17, 2010).¹

We summarize the discussion briefly here.

Article I, § 8 of the Constitution of the United States provides:

The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states and with the Indian tribes

In *United States v. Lopez*, 514 U.S. 549 (1995), the United States Supreme Court found that a federal law prohibiting the possession of a firearm near a school was not an economic activity:

[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

514 U.S. at 561. Accordingly, the Court struck down 18 U.S.C. § 922(q), the "Gun Free School Zones Act of 1990," holding that the commerce clause did not provide support for the legislation.

However, *Lopez* is not likely to save the bill, or AS 44.99.500. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court held that the commerce clause authorized Congress to enact federal laws regulating and criminalizing activities involving controlled substances even if those activities were wholly intrastate and were pursuant to a state statutory scheme that authorized the activities. The court found that unlike the activity at issue in *Lopez*, the activities regulated by the federal controlled substances laws are fundamentally economic. The CSA regulates the production, distribution, and consumption of commodities for which there is an established, interstate market. Prohibiting intrastate possession of an article of commerce is a commonly utilized means of regulating commerce in that product. Limiting the activity to marijuana possession and cultivation "in accordance with state law" could not serve to place those activities outside of Congress's reach. 545 U.S. at 25-26.

Once Congress properly adopts legislation under the commerce clause, the supremacy clause resolves any conflict between federal and state law in favor of federal law. *Id.*

¹ *See also*, documents linked at http://www.legis.state.ak.us/basis/get_minutes.asp?chamb=B&date1=010109&date2=011413&session=26&Root=HB186.

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As Article VI, Clause 2 of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Ninth Circuit Court of Appeals upheld federal regulation of firearms produced solely within one state in *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006). Robert Stewart manufactured homemade machine guns and machine gun kits wholly within California and was convicted of possessing a machine gun in violation of federal law. Stewart appealed and the Ninth Circuit Court of Appeals, based upon *Lopez* and another case, and before *Raich* was decided, initially reversed his conviction finding that the simple possession of homemade machines did not have a substantial effect on interstate commerce. See *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003). After the United States Supreme Court decided *Raich*, the Supreme Court vacated the decision of the Ninth Circuit and told the court to reconsider their opinion in light of *Raich*. On remand, the Ninth Circuit found that Congress had the authority to regulate machine guns, including one's wholly a product of intrastate commerce. The court found that guns, can enter the interstate market and affect supply and demand.

The new amendments to the law compound the problems of AS 44.99.500, in that by adding possession and a potential federal ban on certain weapons and accessories to the exemptions in the law, items that may well be obtained in interstate commerce are affected. Further, attempting to prevent federal officers from enforcing federal law presents rather clear supremacy clause issues.

In light of the foregoing, it will be important as the bill proceeds that the public be notified that the law is unlikely to result in the suspension of federal enforcement.

Please let me know if I can be of any further assistance in this matter.

KJS:plm
13-007.plm

Enclosure