

LEGAL SERVICES

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MEMORANDUM

January 22, 2013

SUBJECT: Federal Firearms Regulation (CSHB 69())
(Work Order No. 28-LS0290\U)

TO: Representative Mike Chenault
Attn: Tom Wright

FROM: Kathleen Strasbaugh
Legislative Counsel

Please find enclosed the draft committee substitute that you requested.

Findings

You requested that I add a paragraph to the findings in sec. 1, ch. 23, SLA 2010 that supported AS 44.99.500, when it was first adopted. The new paragraph was to be added to support AS 44.99.500 in this bill. Uncodified sections from prior years are somewhat difficult for a reader to find, and the finding you requested can stand alone. Thus, I have made the finding a new uncodified section for this bill.

I have also made a change in the language of the finding you requested from Texas House Bill 553, sec. 1(b)(6), so that its list of actions that may be declared unenforceable conforms to the list of actions in the bill. The listed items, "federal statute, regulation, rule, or order," cover all items that might have the force of law, which I understand is what the bill is intended to cover.

Please let me know if you would like these items drafted differently.

I did want to alert you to a problem with the new findings section of the bill, added in this draft. Legislative findings can be a useful way to explain the purpose of legislation, not only to a reader, but to a reviewing court. *See State v. Lewis*, 559 P.2d 630, 643 - 44 (Alaska 1977). However, the findings here are not statements of the factual basis or the legal authority for the legislation, but a legal conclusion that certain laws (not yet enacted) are unconstitutional under the United States Constitution. If a federal or state law is challenged, it will ultimately be a court that determines whether the laws at issue are unconstitutional. *Marbury v. Madison*, 5 U.S. 137, 177 - 78 (1803). Thus it is likely that a court, whether ruling on the constitutionality of the anticipated federal firearms legislation or this legislation, will make its own determination of the legal question rather than rely on the legislative findings. *Cf. State v. Enserch*, 787 P.2d 624 (Alaska 1989), in

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which the Alaska Supreme Court noted legislative findings, but went on to find a law unconstitutional.

Retroactivity

Section 6 of the bill makes retroactive to January 1, 2013, the legislature's declaration in proposed AS 44.99.500(f) (sec. 5 of the bill) that certain actions are unconstitutional. Retroactivity is generally disfavored. *Watts v. Seward School Board*, 421 P.2d 586, 603 (Alaska 1966), *vacated on other grounds*, 391 U.S. 592, 88 S. Ct. 1753, 20 L.Ed.2d 842 (1968), *judgment reinstated*, 454 P.2d 732 (Alaska 1969). AS 01.10.090 requires that a statute that is intended to be retroactive must say so expressly, as proposed AS 44.99.500(f) does. However, retroactive laws that have the effect of imposing criminal penalties on conduct that precedes the enactment of the law are ex post facto laws that are forbidden by both the federal and state constitutions. U.S. Const. Art. I, sec. 9, cl. 3; Alaska Const. art. I, sec. 15. Thus proposed AS 44.99.500(g), also found in sec. 5 of the the committee substitute, if applied to conduct that occurred before the effective date of the act, would be unconstitutional. Accordingly, the provision of the bill imposing criminal penalties for the enforcement of federal law has been drafted so that it covers only post-enactment conduct.

Further, the recent formal actions of the President of the United States that are apparently of concern in this legislation, do not seem to create new law. *See attached* January 16, 2013, presidential memoranda published in the January 22, 2013, Federal Register. These memoranda provide direction to federal agencies, including direction to enforce existing law.¹ Thus it seems particularly important to limit any criminal penalties to post-enactment conduct, to avoid imposing penalties for ongoing enforcement of existing law that is not otherwise the subject of this legislation.

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

KJS:Ind
13-026.Ind

Enclosures

¹ The President's plan includes the topics in the memoranda, and suggestions for legislation that must be passed by Congress. The plan can be found here: http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf. For a summary of the proposals by category, here is a chart from an article in the *Washington Post*: <http://www.washingtonpost.com/wp-srv/special/politics/obama-gun-proposals/index.html>.

Presidential Documents

Memorandum of January 16, 2013

Engaging in Public Health Research on the Causes and Prevention of Gun Violence

Memorandum for the Secretary of Health and Human Services

In addition to being a law enforcement challenge, gun violence is also a serious public health issue that affects thousands of individuals, families, and communities across the Nation. Each year in the United States there are approximately 30,000 firearm-related deaths, and approximately 11,000 of those deaths result from homicides. Addressing this critical issue requires a comprehensive, multifaceted approach.

Recent research suggests that, in developing such an approach, a broader public health perspective is imperative. Significant strides can be made by assessing the causes of gun violence and the successful efforts in place for preventing the misuse of firearms. Taking these steps will improve our understanding of the gun violence epidemic and will aid in the continued development of gun violence prevention strategies.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Research.* The Secretary of Health and Human Services (Secretary), through the Director of the Centers for Disease Control and Prevention and other scientific agencies within the Department of Health and Human Services, shall conduct or sponsor research into the causes of gun violence and the ways to prevent it. The Secretary shall begin by identifying the most pressing research questions with the greatest potential public health impact, and by assessing existing public health interventions being implemented across the Nation to prevent gun violence.

Sec. 2. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
 - (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.
- (b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 3. *Publication.* You are hereby authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,
Washington, January 16, 2013

[FR Doc. 2013-01272
Filed 1-18-13; 8:45 am]
Billing code 4150-42

Presidential Documents

Memorandum of January 16, 2013

Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System

Memorandum for the Heads of Executive Departments and Agencies

Since it became operational in 1998, the National Instant Criminal Background Check System (NICS) has been an essential tool in the effort to ensure that individuals who are prohibited under Federal or State law from possessing firearms do not acquire them from Federal Firearms Licensees (FFLs). The ability of the NICS to determine quickly and effectively whether an individual is prohibited from possessing or receiving a firearm depends on the completeness and accuracy of the information made available to it by Federal, State, and tribal authorities.

The NICS Improvement Amendments Act of 2007 (NIAA) (Public Law 1107–180) was a bipartisan effort to strengthen the NICS by increasing the quantity and quality of relevant records from Federal, State, and tribal authorities accessible by the system. Among its requirements, the NIAA mandated that executive departments and agencies (agencies) provide relevant information, including criminal history records, certain adjudications related to the mental health of a person, and other information, to databases accessible by the NICS. Much progress has been made to identify information generated by agencies that is relevant to determining whether a person is prohibited from receiving or possessing firearms, but more must be done. Greater participation by agencies in identifying records they possess that are relevant to determining whether an individual is prohibited from possessing a firearm and a regularized process for submitting those records to the NICS will strengthen the accuracy and efficiency of the NICS, increasing public safety by keeping guns out of the hands of persons who cannot lawfully possess them.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Improving the Availability of Records to the NICS.* (a) Within 45 days of the date of this memorandum, and consistent with the process described in section 3 of this memorandum, the Department of Justice (DOJ) shall issue guidance to agencies regarding the identification and sharing of relevant Federal records and their submission to the NICS.

(b) Within 60 days of issuance of guidance pursuant to subsection (a) of this section, agencies shall submit a report to DOJ advising whether they possess relevant records, as set forth in the guidance, and setting forth an implementation plan for making information in those records available to the NICS, consistent with applicable law.

(c) In accordance with the authority and responsibility provided to the Attorney General by the Brady Handgun Violence Prevention Act (Public Law 103–159), as amended, the Attorney General, consistent with the process described in section 3 of this memorandum, shall resolve any disputes concerning whether agency records are relevant and should be made available to the NICS.

(d) To the extent they possess relevant records, as set forth in the guidance issued pursuant to subsection (a) of this section, agencies shall prioritize making those records available to the NICS on a regular and ongoing basis.

Sec. 2. *Measuring Progress.* (a) By October 1, 2013, and annually thereafter, agencies that possess relevant records shall submit a report to the President through the Attorney General describing:

- (i) the relevant records possessed by the agency that can be shared with the NICS consistent with applicable law;
- (ii) the number of those records submitted to databases accessible by the NICS during each reporting period;
- (iii) the efforts made to increase the percentage of relevant records possessed by the agency that are submitted to databases accessible by the NICS;
- (iv) any obstacles to increasing the percentage of records that are submitted to databases accessible by the NICS;
- (v) for agencies that make qualifying adjudications related to the mental health of a person, the measures put in place to provide notice and programs for relief from disabilities as required under the NIAA;
- (vi) the measures put in place to correct, modify, or remove records accessible by the NICS when the basis under which the record was made available no longer applies; and
- (vii) additional steps that will be taken within 1 year of the report to improve the processes by which records are identified, made accessible, and corrected, modified, or removed.

(b) If an agency certifies in its annual report that it has made available to the NICS its relevant records that can be shared consistent with applicable law, and describes its plan to make new records available to the NICS and to update, modify, or remove existing records electronically no less often than quarterly as required by the NIAA, such agency will not be required to submit further annual reports. Instead, the agency will be required to submit an annual certification to DOJ, attesting that the agency continues to submit relevant records and has corrected, modified, or removed appropriate records.

Sec. 3. *NICS Consultation and Coordination Working Group.* To ensure adequate agency input in the guidance required by section 1(a) of this memorandum, subsequent decisions about whether an agency possesses relevant records, and determinations concerning whether relevant records should be provided to the NICS, there is established a NICS Consultation and Coordination Working Group (Working Group), to be chaired by the Attorney General or his designee.

(a) *Membership.* In addition to the Chair, the Working Group shall consist of representatives of the following agencies:

- (i) the Department of Defense;
- (ii) the Department of Health and Human Services;
- (iii) the Department of Transportation;
- (iv) the Department of Veterans Affairs;
- (v) the Department of Homeland Security;
- (vi) the Social Security Administration;
- (vii) the Office of Personnel Management;
- (viii) the Office of Management and Budget; and
- (ix) such other agencies or offices as the Chair may designate.

(b) *Functions.* The Working Group shall convene regularly and as needed to allow for consultation and coordination between DOJ and agencies affected by the Attorney General's implementation of the NIAA, including with respect to the guidance required by section 1(a) of this memorandum, subsequent decisions about whether an agency possesses relevant records, and determinations concerning whether relevant records should be provided to the NICS. The Working Group may also consider, as appropriate:

- (i) developing means and methods for identifying agency records deemed relevant by DOJ's guidance;
- (ii) addressing obstacles faced by agencies in making their relevant records available to the NICS;
- (iii) implementing notice and relief from disabilities programs; and
- (iv) ensuring means to correct, modify, or remove records when the basis under which the record was made available no longer applies.

(c) *Reporting.* The Working Group will review the annual reports required by section 2(a) of this memorandum, and member agencies may append to the reports any material they deem appropriate, including an identification of any agency best practices that may be of assistance to States in supplying records to the NICS.

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

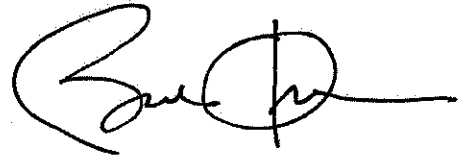
- (i) the authority granted by law to a department or agency, or the head thereof; or
- (ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Independent agencies are strongly encouraged to comply with the requirements of this memorandum.

Sec. 5. Publication. The Attorney General is hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 16, 2013

Presidential Documents

Memorandum of January 16, 2013

Tracing of Firearms in Connection With Criminal Investigations

Memorandum for the Heads of Executive Departments and Agencies

Reducing violent crime, and gun-related crime in particular, is a top priority of my Administration. A key component of this effort is ensuring that law enforcement agencies at all levels—Federal, State, and local—utilize those tools that have proven most effective. One such tool is firearms tracing, which significantly assists law enforcement in reconstructing the transfer and movement of seized or recovered firearms. Responsibility for conducting firearms tracing rests with the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Over the years, firearms tracing has significantly assisted law enforcement in solving violent crimes and generating thousands of leads that may otherwise not have been available.

Firearms tracing provides two principal benefits. First, tracing is an important investigative tool in individual cases, providing law enforcement agents with critical information that may lead to the apprehension of suspects, the recovery of other guns used in the commission of crimes, and the identification of potential witnesses, among other things. Second, analysis of tracing data in the aggregate provides valuable intelligence about local, regional, and national patterns relating to the movement and sources of guns used in the commission of crimes, which is useful for the effective deployment of law enforcement resources and development of enforcement strategies. Firearms tracing is a particularly valuable tool in detecting and investigating firearms trafficking, and has been deployed to help combat the pernicious problem of firearms trafficking across the Southwest border.

The effectiveness of firearms tracing as a law enforcement intelligence tool depends on the quantity and quality of information and trace requests submitted to ATF. In fiscal year 2012, ATF processed approximately 345,000 crime-gun trace requests for thousands of domestic and international law enforcement agencies. The Federal Government can encourage State and local law enforcement agencies to take advantage of the benefits of tracing all recovered firearms, but Federal law enforcement agencies should have an obligation to do so. If Federal law enforcement agencies do not conscientiously trace every firearm taken into custody, they may not only be depriving themselves of critical information in specific cases, but may also be depriving all Federal, State, and local agencies of the value of complete information for aggregate analyses.

Maximizing the effectiveness of firearms tracing, and the corresponding impact on combating violent crimes involving firearms, requires that Federal law enforcement agencies trace all recovered firearms taken into Federal custody in a timely and efficient manner.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. Firearms Tracing. (a) Federal law enforcement agencies shall ensure that all firearms recovered after the date of this memorandum in the course of criminal investigations and taken into Federal custody are traced through ATF at the earliest time practicable. Federal law enforcement agencies, as well as other executive departments and agencies, are encouraged, to the extent practicable, to take steps to ensure that firearms recovered

prior to the date of this memorandum in the course of criminal investigations and taken into Federal custody are traced through ATF.

(b) Within 30 days of the date of this memorandum, ATF will issue guidance to Federal law enforcement agencies on submitting firearms trace requests.

(c) Within 60 days of the date of this memorandum, Federal law enforcement agencies shall ensure that their operational protocols reflect the requirement to trace recovered firearms through ATF.

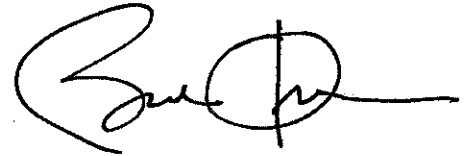
(d) Within 90 days of the date of this memorandum, each Federal law enforcement agency shall submit a report to the Attorney General affirming that its operational protocols reflect the requirements set forth in this memorandum.

(e) For purposes of this memorandum, "Federal law enforcement agencies" means the Departments of State, the Treasury, Defense, Justice, the Interior, Agriculture, Energy, Veterans Affairs, and Homeland Security, and such other agencies and offices that regularly recover firearms in the course of their criminal investigations as the President may designate.

Sec. 2. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect the authority granted by law to a department or agency, or the head thereof.

(b) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 3. Publication. The Attorney General is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 16, 2013