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DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM April 8, 2009

SUBJECT: Interstate Commerce Clause and CSHB 186(JUD)
(Work Order No. 26-LS0627\S)

TO: Representative Lindsey Holmes

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked if the declarations in CSHB 186(JUD) regarding interstate and intrastate commerce would successfully prevent someone from being prosecuted for a firearms violation under federal law. In my opinion, CSHB 186(JUD) would not prevent the federal government from prosecuting someone for a firearms violation under federal law.[1]

The commerce clause is found at Article I, § 8, of the Constitution of the United States:

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

The extent of the commerce clause was first interpreted to not apply to commerce "which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."[2] Over the years, "certain categories of activity such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause."[3] As the interpretation of the commerce clause continued, the United States Supreme Court allowed incidental effects on purely interstate commerce if that

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[1] 18 U.S.C. §§ 921 - 931 regulate certain firearms and activities. For example, 18 U.S.C. § 922(g) prohibits a felon from possessing in or affecting commerce firearms or ammunition.

[2] *Gibbons v. Ogden*, 9 Wheat. 1, 189 - 190 (1824)

[3] *United States v. Lopez*, 514 U.S. 549 (1995).

regulation was necessary to regulate interstate commerce.[4] The development of the commerce clause continued as explained in this excerpt from *United States v. Lopez*:[5]

> In *A. L. A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935), the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *Id.*, at 548. Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. *Id.*, at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.*, at 548.
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> Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *Id.*, at 36-38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *Id.*, at 37.
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> In *United States* v. *Darby*, 312 U.S. 100 (1941), the Court upheld the Fair Labor Standards Act, stating:
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> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at 118.
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> See also *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which

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[4] *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342 (1914)

[5] *United States v. Lopez*, 514 U.S. 549 (1995) (syllabus and majority opinion enclosed).

in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of home grown wheat. 317 U. S., at 128-129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

"[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " *Id.*, at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127-128.

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U. S., at 37; see also *Darby*, *supra*, at 119-120 (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard*, *supra*, at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate

commerce. See, *e.g., Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez* v. *United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-253 (1964).

Similarly, in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. *Id.*, at 196, overruled on other grounds, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "[a]ll activities affecting commerce, even in the minutest degree, *[Wickard]*, may be regulated and controlled by Congress," 392 U.S., at 204 (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "[n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *id.*, at 197, n. 27. Rather, "[t]he Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez* v. *United States*, *supra*, at 150; see also *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, *supra*, at 276-277. First, Congress may regulate the use of the channels of interstate commerce. See, *e.g., Darby*, 312 U. S., at 114; *Heart of Atlanta Motel*, *supra*, at 256 (" '[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' " (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e.g., Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern R. Co.* v. *United States*, 222 U.S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32), or . . . thefts from interstate shipments (18 U.S.C. § 659)"). Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, *i.e.*,

> those activities that substantially affect interstate commerce. *Wirtz*, *supra*, at 196, n. 27.
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> Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990), with *Wirtz*, *supra*, at 196, n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Lopez, at 554 - 559. The *Wickard* case is particularly relevant as it involved an individual farmer who grew his own wheat for his own consumption. As noted, Wickard was still subject to federal regulation even though as an individual his potential effect on interstate commerce was small but when combined with others the court noted that the potential effect on interstate commerce could be great.

In *Lopez*, the Court struck down 18 U.S.C. § 922(q), the "Gun Free School Zones Act of 1990," which made it a federal crime to possess a gun within a school zone. The Court found that

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.
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> Second, §922(q) contains no jurisdictional element which would ensure, through case by case inquiry, that the firearm possession in question affects interstate commerce.
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> The 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.

Id., at 561. See also *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the "Violence Against Women Act" that created civil liability for the commission of any gender based violent crime and noting that again there was no "express jurisdictional element which might limit its reach" to those acts connected with or affecting interstate commerce).[6]

The limits of the *Lopez* and *Morrison* decisions were found in the context of medical marijuana. In *Gonzales v. Raich*, 545 U.S. 1 (2005),[7] the Court held 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.

> Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA [Controlled Substances Act] are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.
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> Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be. *Wirtz*, 392 U.S., at 196 (quoting *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925)). See also 392 U.S., at 195-196; *Wickard*, 317 U.S., at 124 (" '[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress' "). Just as state acquiescence to federal regulation

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[6] Syllabus and majority opinion enclosed.

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> cannot expand the bounds of the Commerce Clause, see, *e.g.*, *Morrison*, 529 U.S., at 661-662 (Breyer, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power. See *United States* v. *Darby*, 312 U.S. 100, 114 (1941) ("That power can neither be enlarged nor diminished by the exercise or non-exercise of state power").

Raich, *id.* at 25 - 26.

The *Wickard* and *Raich* cases seem especially relevant to CSHB 168(JUD). They clearly stand for the proposition that the Commerce Clause allows federal regulation of purely intrastate activities and products if Congress could rationally conclude that those activities could enter or affect interstate commerce. The production of wheat in *Wickard* and the production of marijuana in *Raich* could enter and could affect interstate commerce. Similarly, the production of a firearm, even if performed wholly intrastate and with materials found only in that state, could seemingly affect interstate commerce in firearms generally.

Indeed, this was the decision of the Ninth Circuit Court of Appeals in *United States v. Stewart*, 451 F.3d 1071 (9th Cir. 2006).[8] 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 *Morrison*, 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(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*.[9] 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 "[h]omemade guns, even those with a unique design, can enter the interstate market and affect supply and demand."[10]

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Enclosures

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[8] Opinion enclosed.

[9] *United States v. Stewart*, 545 U.S. 1112 (2005).

[10] *Stewart*, 451 F.3d at 1077.