

**ALASKA STATE LEGISLATURE**  
**SENATE JUDICIARY STANDING COMMITTEE**

February 17, 2010

1:31 p.m.

**MEMBERS PRESENT**

Senator Hollis French, Chair  
Senator Bill Wielechowski, Vice Chair  
Senator Dennis Egan  
Senator John Coghill

**MEMBERS ABSENT**

Senator Lesil McGuire

**COMMITTEE CALENDAR**

SENATE BILL NO. 194

"An Act relating to civil damages for certain alcohol violations."

- MOVED CSSB 194(JUD) OUT OF COMMITTEE

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 186(FIN) AM

"An Act declaring that certain firearms and accessories are exempt from federal regulation."

- HEARD AND HELD

CONFIRMATION HEARINGS

Legislative Ethics Committee

Gary Turner - Soldotna

H. Conner Thomas - Nome

- CONFIRMATIONS ADVANCED

**PREVIOUS COMMITTEE ACTION**

BILL: SB 194

SHORT TITLE: CIVIL DAMAGES FOR ALCOHOL VIOLATIONS

SPONSOR(s): SENATOR(s) MEYER

|          |     |                                      |
|----------|-----|--------------------------------------|
| 04/17/09 | (S) | READ THE FIRST TIME - REFERRALS      |
| 04/17/09 | (S) | STA, JUD                             |
| 01/28/10 | (S) | STA AT 9:00 AM BELTZ 105 (TSBldg)    |
| 01/28/10 | (S) | Moved CSSB 194(STA) Out of Committee |
| 01/28/10 | (S) | MINUTE(STA)                          |
| 01/29/10 | (S) | STA RPT CS 5DP NEW TITLE             |

01/29/10 (S) DP: MENARD, FRENCH, MEYER, PASKVAN,  
KOOKESH  
02/10/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
02/10/10 (S) Heard & Held  
02/10/10 (S) MINUTE(JUD)  
02/15/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
02/15/10 (S) Heard & Held  
02/15/10 (S) MINUTE(JUD)

BILL: HB 186

SHORT TITLE: AK FIREARMS EXEMPT FROM FED. REGULATION

SPONSOR(S): REPRESENTATIVE(S) KELLY

03/12/09 (H) READ THE FIRST TIME - REFERRALS  
03/12/09 (H) JUD, FIN  
04/06/09 (H) JUD AT 8:00 AM CAPITOL 120  
04/06/09 (H) Moved CSHB 186(JUD) Out of Committee  
04/06/09 (H) MINUTE(JUD)  
04/07/09 (H) JUD RPT CS(JUD) 4DP 2NR  
04/07/09 (H) DP: LYNN, COGHILL, GATTO, RAMRAS  
04/07/09 (H) NR: GRUENBERG, HOLMES  
04/11/09 (H) FIN AT 9:00 AM HOUSE FINANCE 519  
04/11/09 (H) Moved CSHB 186(FIN) Out of Committee  
04/11/09 (H) MINUTE(FIN)  
04/13/09 (H) FIN RPT CS(FIN) 5DP 5NR  
04/13/09 (H) DP: KELLY, AUSTERMAN, FAIRCLOUGH,  
HAWKER, STOLTZE  
04/13/09 (H) NR: THOMAS, GARA, CRAWFORD, SALMON,  
JOULE  
04/16/09 (H) TRANSMITTED TO (S)  
04/16/09 (H) VERSION: CSHB 186(FIN) AM  
04/17/09 (S) READ THE FIRST TIME - REFERRALS  
04/17/09 (S) JUD, FIN  
02/01/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)  
02/01/10 (S) Heard & Held  
02/01/10 (S) MINUTE(JUD)

**WITNESS REGISTER**

JERRY LUCKHAUPT, Legislative Counsel  
Legislative Legal and Research Services  
Legislative Affairs Agency  
Juneau, AK

**POSITION STATEMENT:** Provided a legal overview of HB 186.

GARY MARBUT, President  
Montana Shooting Sports Association (MSSA)

**POSITION STATEMENT:** Testified in support of HB 186.

JAMES FLOYD, representing himself  
Tok, AK

**POSITION STATEMENT:** Testified in support of HB 186.

SCOTT HAMMOND, representing himself  
Kenai, AK

**POSITION STATEMENT:** Testified in strong support of HB 186.

DEREK MILLER, Staff  
to Representative Mike Kelly  
Alaska State Legislature  
Juneau, AK

**POSITION STATEMENT:** Provided information related to HB 186 on behalf of the sponsor.

H. CONNER THOMAS, Nominee  
Select Committee on Legislative Ethics  
Nome, AK

**POSITION STATEMENT:** Nominee to the Select Committee on Legislative Ethics.

GARY TURNER, Nominee  
Select Committee on Legislative Ethics

**POSITION STATEMENT:** Nominee to the Select Committee on Legislative Ethics.

#### **ACTION NARRATIVE**

[1:31:27 PM](#)

**CHAIR HOLLIS FRENCH** called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Senators Wielechowski, Egan, and French were present at the call to order. Senator Coghill arrived soon thereafter.

#### **SB 194-CIVIL DAMAGES FOR ALCOHOL VIOLATIONS**

[1:31:42 PM](#)

**CHAIR FRENCH** announced the consideration of SB 194. He noted the proposed amendment to incorporate the penalties for those people who buy alcohol in violation of a court order.

[1:32:09 PM](#)

**SENATOR WIELECHOWSKI** moved Amendment 1.

26-LS0895\S.1

**AMENDMENT 1**

OFFERED IN THE SENATE BY SENATOR WIELECHOWSKI  
TO: CSSB 194( ), Draft Version "S"

Page 1, following line 2:  
Insert a new bill section to read:

"\* **Section 1.** AS 04.16.047(b) is amended to read:  
(b) A licensee may bring a civil action against a person who violates this section if the violation occurs on the premises of that licensee. If judgment is entered in favor of the licensee, the court shall award civil damages in the amount of \$1,500 [\$1,000] and award reasonable costs and reasonable attorney fees allowed under the Alaska Rules of Civil Procedure.

Page 1, line 3:  
Delete "**Section 1**"  
Insert "**Sec. 2**"

Renumber the following bill sections accordingly.

SENATOR COGHILL joined the committee.

SENATOR WIELECHOWSKI reported that his staff met with Senator Meyer and his staff. His understanding is that there is objection to the amendment. He clarified that it does nothing similar to what the House bill does.

CHAIR FRENCH found no objection and announced that Amendment 1 is adopted. Finding no committee discussion, he asked for a motion.

[1:33:21 PM](#)

SENATOR WIELECHOWSKI moved to report CS for Senate Bill 194 from committee with individual recommendations and attached fiscal note(s). There being no objection, CSSB 194(JUD) moved from the Senate Judiciary Standing Committee.

At ease from 1:33 p.m. to 1:34 p.m.

**HB 186-AK FIREARMS EXEMPT FROM FED. REGULATION**

[1:34:55 PM](#)

CHAIR FRENCH announced the consideration of HB 186. [CSHB 186(FIN)am was before the committee.] The committee heard an overview and took public testimony at a previous hearing. He asked Mr. Luckhaupt to give an overview of the research he's done and the legal issues that the bill raises.

[1:35:59 PM](#)

JERRY LUCKHAUPT, Legislative Counsel, Legislative Legal and Research Services, Legislative Affairs Agency, stated that HB 186 raises interstate Commerce Clause issues. At one time it appeared that the U.S. Supreme Court was going to exempt from the Commerce Clause some wholly intrastate activities, but the Gonzales v. Raich decision in 2005 put that notion to rest. He explained that California passed a law exempting medical marijuana activities. It purported to protect people who engage in medical marijuana activities wholly within California from any affect on interstate commerce. The theory was that the federal government could not prosecute these people, but the U.S. Supreme Court rejected that view in an opinion by Justice Scalia. The Court said that even granting that the activities were wholly intrastate, interstate commerce would be affected.

MR. LUCKHAUPT said it was significant that during the time that the case was on appeal, the Ninth Circuit Court of Appeals ("Ninth Circuit") reversed a decision [United States v. Stewart] in a case involving a man who manufactured and sold machineguns wholly within California. The federal government sought certiorari and the U.S. Supreme Court sent the case back to the Ninth Circuit to reevaluate the decision based on the Raich decision. At that point the Ninth Circuit ruled that the man's activities affect interstate commerce even if they are wholly intrastate as claimed. Therefore, the federal government had a right to regulate his activities. "That's, I think, as close as we can get on point in a case like this," Mr. Luckhaupt said.

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That being said, the Legislature has at times passed laws that appear to be unconstitutional, Mr. Luckhaupt pointed out. Medical marijuana is one example; people in this state are exempt from prosecution in state courts for medical marijuana activities, but they still face potential prosecution in federal courts. Another example is found in the Tundra Rebellion statutes - AS 38.05.500 through AS 38.05.505. That was the result of a people's initiative in the early '80s basically disclaiming the Statehood Act. It said that all federal lands in Alaska belong to the State of Alaska.

CHAIR FRENCH asked if California had passed anything similar to HB 186 before the Stewart case was decided.

MR. LUCKHAUPT said no.

CHAIR FRENCH asked if it's legally significant that there is no constitutional amendment giving a person the right to use marijuana, but citizens have been firm about the right to bear arms since this country was founded.

MR. LUCKHAUPT said that in the Raich case Justice Scalia didn't talk about whether or not a person had a right to possess marijuana. The issue was commerce. The Court said that even intrastate activities have an effect on interstate commerce so the federal government and Congress have the right to intervene. He said his opinion doesn't change considering the Second Amendment. His memo referenced two cases in the last 20 years that seemed to say there was a limit on how far the Commerce Clause went with regard to interstate activities. But the Raich case kind of said that everyone was confused and that they were reading too much into these cases.

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SENATOR WIELECHOWSKI warned that if this becomes law, people need to realize that there is potential for federal prosecution. That being said, there is a provision that the state must provide defense, he added.

MR. LUCKHAUPT agreed that people could get the wrong impression that if this were to become law that they would be completely immunized. In fact, they would likely have criminal liability if they engaged in the activity and the federal government decided to prosecute, he said.

CHAIR FRENCH called a point of order to clarify that the language on page 3, line 18, says the attorney general may defend a citizen. Some earlier versions said "shall" but in this version there is no command for the attorney general to defend someone in federal court for breaking the federal firearms law.

MR. LUCKHAUPT said it would be unfortunate if someone engaged in an activity that is purported to be protected only to find that they were subject to criminal liability. When the medical marijuana law passed in Alaska there was considerable effort to make people understand that there was potential federal liability. That's what the Raich case was about.

[1:46:08 PM](#)

SENATOR WIELECHOWSKI asked if he sees the potential for a chain of prosecutions or if it would only be the person who possesses the gun who would be prosecuted.

MR. LUCKHAUPT opined it would primarily be the person manufacturing firearms without obtaining a federal license or permit. In the Stewart case the person who received the machinegun was not prosecuted; it was the person who manufactured and sold the machinegun who was prosecuted. The opinion didn't talk about other clients.

[1:47:39 PM](#)

SENATOR COGHILL emphasized that if this were to become law it's important to let the citizens know that this is a challenge to the federal government regarding the right to bear arms under the Second Amendment and states' rights authority. The question will be whether the Commerce Clause trumps those.

CHAIR FRENCH asked for an update on the Montana litigation.

MR. LUCKHAUPT summarized that a wildlife group sought declaratory judgment in U.S. District Court in Montana and the federal government has responded. He surmised that the case is either waiting resolution or the scheduling of arguments. Theoretically there could be discovery going on, he added. He hasn't found anything on the Tennessee case, but has heard it exists.

CHAIR FRENCH noted that the bill packet contains letters to Montana and Tennessee federal firearms licensees regarding their need to continue to obey federal law in this regard despite passage of bills similar to HB 186.

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GARY MARBUT, President, Montana Shooting Sports Association (MSSA), said he wrote the original Firearms Freedom Act that was passed in Montana in 2009. The subject is states' rights and a challenge to federal Commerce Clause authority. Since MSSA is a gun group, the vehicle for the challenge is firearms. Acknowledging there is precedent that does not bode well for success, he emphasized that the purpose of the Firearms Freedom Act is to challenge the status quo, not to conform. He reported that the goal is to take this all the way to the U.S. Supreme Court and persuade the Court to overturn a lot of precedent surrounding the Commerce Clause. He noted that similar legislation has been introduced in 22 other states.

MR. MARBUT reported that the Montana lawsuit was filed on October 1, 2009, the same day that the Montana Firearms Freedom Act became effective. The goal was to get the issue into court; it was not to have people start manufacturing these items. "We have advised all Montanans in every news release we've put out ... that people should not try and make these Montana-made items until we can validate the principles of the Montana Firearms Freedom Act in court," he said.

In a Second Amendment case, District of Columbia v Heller, Justice Scalia said, "... what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." Mr. Marbut asserted that it is also not its role to pronounce the Tenth Amendment extinct. Noting that the U.S. Supreme Court overturns a lot of president, he highlighted that Justice Roberts, in Citizens United v. Federal Election Commission, talked about when the Court should overturn precedent.

[1:55:18 PM](#)

He read the following from Justice Roberts' opinion:

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.

MR. MARBUT cited Gonzales v. Raich as an example of how far the interpretation of the Commerce Clause authority has gone. It goes back to Justice Roberts' statement about jury-rigging justifications to shore up an original mistake. In that case the Court said that the marijuana distributed under the California Medical Marijuana Act theoretically affected a marketplace in an illegal substance.

He said that a Tenth Amendment wave is sweeping the country and many states are asserting their sovereignty. This is proper and the Firearms Freedom Act is part of that. It's a healthy exercise in democracy to try to persuade the U.S. Supreme Court

that it needs to do something about a bad law that came about during the New Deal era.

MR. MARBUT said that a new argument they intend to put forth is that the Commerce Clause, the Supremacy Clause, and the Necessary and Proper Clause have all been amended by the Tenth Amendment. It's bedrock of jurisprudence that if there is a conflict between two provisions of a co-equal body of law, the most recent must be given preference. Lacking that principle, law could be neither amended nor repealed. This fresh argument can change the course from the precedence of the Raich decision, he concluded.

[1:58:29 PM](#)

CHAIR FRENCH asked if the personality of the Court in 2010 is different than it was in 2005 when Raich was decided.

MR. MARBUT said the complexion hasn't changed significantly, but we hope that Justice Scalia and Justice Roberts will be on our side this time. They hope that Justice Scalia will be persuaded to talk about the role of the Court with respect to the Tenth Amendment as he did in the Heller case, and they hope that Justice Kennedy will be persuaded because there's an emerging consensus among states on this issue and he is most interested in public opinion.

CHAIR FRENCH asked which side Justice Kennedy came down on in the Raich case.

MR. MARBUT replied Justice Kennedy and Justice Scalia were with the majority, but the new rationale may put Justice Scalia in a different position.

[2:00:45 PM](#)

JAMES FLOYD, representing himself, Tok, said in light of the Bureau of Alcohol, Tobacco and Firearms (BATF) letters that were sent to licensees last year, he wonders if anyone has given thought to having state firearms licensees versus federal firearms licensees.

MR. MARBUT explained that the BATF only sent letters addressed to Montana and Tennessee licensees and the assumption has always been that they wouldn't be players. They require national markets and their business models are to ship across state lines. Presumably it will be the mom and pop machine shops that would make these state-made items if the principles of the Firearms Freedom Act are validated in court.

[2:03:36 PM](#)

SCOTT HAMMOND, representing himself, Kenai, reiterated his strong support for HB 186. "Let the federal government know that we are very serious about this and it's time for us to assert our rights under the Constitution," he said.

CHAIR FRENCH said given that the challenge will be completed through the Montana case, he wonders why Alaska should subject even one citizen to the potential calamity of going to jail.

[2:05:04 PM](#)

DEREK MILLER, Staff to Representative Mike Kelly, said we'd like to join in for the same reasons that Mr. Marbut stated.

CHAIR FRENCH summarized that the bill almost becomes an amicus brief to the U.S. Supreme Court saying that the Legislature agrees with the thrust of the case.

MR. MILLER said yes.

SENATOR COGHILL commented that there are people who would willingly subject themselves to this potential federal liability thinking that it would be a patriotic act.

[2:06:21 PM](#)

CHAIR FRENCH held HB 186 in committee.

#### **CONFIRMATION HEARINGS**

[2:06:50 PM](#)

CHAIR FRENCH announced the next order of business to be legislative confirmations.

H. CONNER THOMAS, Nominee, Select Committee on Legislative Ethics, Nome, said he has served on the committee since 1999 and is asking for confirmation to another three-year term. He enjoys the duty and feels that this is a public service he can do for the citizens of the state. He said he is able to meet the committee responsibilities even though he is a partner in a law firm in Nome. I would like to continue, he concluded.

CHAIR FRENCH reported that he has served on the committee with Mr. Thomas and has no questions. "I'm perfectly comfortable and happy that you're stepping forward to serve again," he said.

SENATOR WIELECHOWSKI thanked Mr. Thomas for his service.

SENATOR COGHILL remarked that he's got institutional history.

[2:08:46 PM](#)

GARY TURNER, Nominee, Select Committee on Legislative Ethics, said he is the director of the Kenai Peninsula College said he just completed his first three-year term on the committee. He enjoys working on the committee and considers it an intriguing public service. I look forward to being reconfirmed if deemed worthy, he concluded.

CHAIR FRENCH reported that he served with Mr. Turner for several years and is pleased that he wants to continue. It takes awhile to get up to speed on the complex set of rules that attend the ethics laws in the state.

SENATOR COGHILL asked if he encountered any major surprises since he comes from an academic rather than legal background.

MR. TURNER replied he certainly relies on the attorneys that serve on the committee, but he thinks it's healthy that he brings a different perspective.

[2:11:23 PM](#)

SENATOR WIELECHOWSKI moved to advance the names Gary Turner and H. Conner Thomas for appointment to the Select Committee on Legislative Ethics. The names will be forwarded to the full membership of the legislature in joint session for consideration and a final vote.

CHAIR FRENCH found no objection and announced that in accordance with AS 24.60.130, the Senate Judiciary Standing Committee reviewed the following and recommends the appointments of Gary J. Turner and H. Conner Thomas. He reminded members that this does not reflect any intent by the members to vote for or against the confirmation of the individuals during any further sessions.

[2:12:14 PM](#)

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 2:12 p.m.