

**ALASKA STATE LEGISLATURE**  
**HOUSE JUDICIARY STANDING COMMITTEE**

February 16, 2011

1:06 p.m.

**MEMBERS PRESENT**

Representative Carl Gatto, Chair  
Representative Steve Thompson, Vice Chair  
Representative Wes Keller  
Representative Bob Lynn  
Representative Lance Pruitt

**MEMBERS ABSENT**

Representative Max Gruenberg  
Representative Lindsey Holmes  
Representative Mike Chenault (alternate)

**COMMITTEE CALENDAR**

HOUSE BILL NO. 116

"An Act making a corrective amendment to the Alaska Statutes as recommended by the revisor of statutes by correcting the spelling of 'lorazepam' and providing an applicability section; and providing for an effective date."

- MOVED HB 116 OUT OF COMMITTEE

HOUSE BILL NO. 8

"An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

- MOVED CSHB 8(JUD) OUT OF COMMITTEE

**PREVIOUS COMMITTEE ACTION**

BILL: HB 116

SHORT TITLE: CORRECT SPELLING OF LORAZEPAM

SPONSOR(S): RULES BY REQUEST OF LEGISLATIVE COUNCIL

01/21/11	(H)	READ THE FIRST TIME - REFERRALS
01/21/11	(H)	JUD
02/16/11	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 8

SHORT TITLE: FEDERAL REGULATIONS & EXECUTIVE ORDERS  
SPONSOR(S): KELLER

01/18/11 (H) PREFILE RELEASED 1/7/11  
01/18/11 (H) READ THE FIRST TIME - REFERRALS  
01/18/11 (H) JUD, FIN  
02/16/11 (H) JUD AT 1:00 PM CAPITOL 120

**WITNESS REGISTER**

GERALD LUCKHAUPT, Assistant Revisor  
Legal Services  
Legislative Legal and Research Services  
Legislative Affairs Agency (LAA)  
Juneau, Alaska

**POSITION STATEMENT:** Presented HB 116.

MICHAEL FORD, Assistant Attorney General & Legislative Liaison  
Legislation & Regulations Section  
Civil Division (Juneau)  
Department of Law (DOL)  
Juneau, Alaska

**POSITION STATEMENT:** During hearing on HB 8, answered questions.

JOANNE GRACE, Chief Assistant Attorney General  
Opinions, Appeals, & Ethics  
Civil Division (Anchorage)  
Department of Law  
Anchorage, Alaska

**POSITION STATEMENT:** During hearing of HB 8, answered questions.

STUART THOMPSON  
Wasilla, Alaska

**POSITION STATEMENT:** Suggested changes to HB 8.

JIM POUND, Staff  
Representative Wes Keller  
Alaska State Legislature  
Juneau, Alaska

**POSITION STATEMENT:** Spoke on behalf of the sponsor of HB 8,  
Representative Keller.

**ACTION NARRATIVE**

[1:06:55 PM](#)

**CHAIR CARL GATTO** called the House Judiciary Standing Committee meeting to order at 1:06 p.m. Representatives Gatto, Keller, Pruitt, and Thompson were present at the call to order. Representative Lynn arrived as the meeting was in progress. Representative Gruenberg was excused.

**HB 116 - CORRECT SPELLING OF LORAZEPAM**

1:07:14 PM

CHAIR GATTO announced that the first order of business would be HOUSE BILL NO. 116, "An Act making a corrective amendment to the Alaska Statutes as recommended by the revisor of statutes by correcting the spelling of 'lorazepam' and providing an applicability section; and providing for an effective date."

1:07:59 PM

GERALD LUCKHAUPT, Assistant Revisor, Legal Services, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), explained that HB 116 is a special revisor's legislation. There is another revisor's legislation, which includes all the other changes that have become outmoded in statute. Traditionally, the revisor hasn't placed criminal matters in the revisor's legislation because it can have an effect on past convictions. Therefore, HB 116 was introduced to correct the misspelling of lorazepam that occurred in 1982 and remained unnoticed until last year. Another reason for HB 116 is to have an applicability section that specifies this is merely a technical change that doesn't change the law. Therefore, HB 116 makes it clear that past [charges and convictions] involving "lorazepan" were meant to refer to "lorazepam". In response to Chair Gatto, Mr. Luckhaupt acknowledged that one could argue he/she is innocent [because the individual's charges involved "lorazepan," which doesn't exist]. However, that's why the applicability section of HB 116 is necessary; to specify that the misspelling was a clerical mistake. He offered his belief that there won't be any problem with past convictions or current prosecutions as the notion of strict code pleading went away some 50 years ago. Still, if there is a problem, the applicability clause attempts to fix it as best it can. Department of Law staff members agree that HB 116 is the best way to fix the problem. In response to Chair Gatto, Mr. Luckhaupt relayed that the misspelling was brought up last year with a prosecution in Fairbanks. He reviewed the case in which the misspelling of lorazepam, a form of valium, was discovered. He noted that this fix was added to

legislation at the end of last year, but the legislation didn't get through the process.

[1:11:48 PM](#)

REPRESENTATIVE PRUITT asked whether the misspelling affected the prosecution of the Fairbanks case in which it was discovered.

MR. LUCKHAUPT replied no; rather there was recognition that it was merely a misspelling in statute. In further response to Representative Pruitt, Mr. Luckhaupt surmised that the court recognized what the legislature intended to do, which wasn't to criminalize the possession of something that didn't exist.

[1:13:18 PM](#)

REPRESENTATIVE THOMPSON related his understanding that there are other misspellings in the same section. For instance, in AS 11.71.140(b)(1)(O) "oxymorphine" should be "oxymorphone" and in AS 11.71.170(f)(3)"propoxphene" should be "propoxyphene". He asked whether those misspellings could be addressed with HB 116.

MR. LUCKHAUPT expressed the need to have time to research whether those are actual misspellings. He informed the committee that he went through a process with lorazepam to ensure that the misspelling wasn't merely a clerical error in the statute books, but rather something the legislature did. The misspelling of "propoxyphene" is simply a misspelling by Lexis Nexus in the statute books because the legislature actually passed the correct spelling, and therefore it wouldn't require a legislative change. However, "oxymorphine" is listed by the U.S. Drug Enforcement Administration (DEA) as "oxymorphine" and "oxymorphone." Therefore, he said he was hesitant to recommend a change until he has had time to research it further.

[1:15:31 PM](#)

CHAIR GATTO, after ascertaining that no one else wished to testify, closed public testimony.

[1:16:15 PM](#)

REPRESENTATIVE THOMPSON moved to report HB 116 out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, HB 116 was reported from the House Judiciary Standing Committee.

**HB 8 - FEDERAL REGULATIONS & EXECUTIVE ORDERS**

1:17:09 PM

CHAIR GATTO announced that the final order of business would be HOUSE BILL NO. 8, "An Act relating to certain federal regulations and presidential executive orders; relating to the duties of the attorney general; and providing for an effective date."

1:17:46 PM

REPRESENTATIVE KELLER, speaking as the sponsor of HB 8, explained that HB 8 addresses the threat to the sovereignty of the state. He identified the volume of federal regulations as one source to the threat of the sovereignty to the state. This legislation merely instructs the attorney general to keep abreast of federal regulations and executive orders and report to the House and Senate Judiciary Standing Committees if a problem is identified. He relayed that the Department of Law (DOL) has informed him that the department can't keep abreast of all the regulations, which he said he believes. In fact, he recalled being told when the health care legislation was going through, every page of law generates 100 pages of regulations. Therefore, he estimated that the 2,000-page health care law generated about 200,000 pages of regulations. The DOL can't be expected to go through every word of the law and thus DOL has proposed an amendment, as follows [original punctuation provided]:

Delete page 2, line 8 through line 20:

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"

REPRESENTATIVE KELLER explained that the above amendment provides for DOL to let the House and Senate Judiciary Standing Committees know if the department sees a problem with a federal

regulation or presidential executive order. Representative Keller characterized that portion of the proposed amendment as acceptable. However, he emphasized that it's important to him that the portion of the proposed amendment that proposes to delete the language on page 2, lines 8-20, not be deleted and rather remain in the legislation.

[1:22:51 PM](#)

REPRESENTATIVE LYNN asked whether something is unconstitutional only after the U.S. Supreme Court says it is or can something be unconstitutional prior to the U.S. Supreme Court [ruling] it as such.

REPRESENTATIVE KELLER offered his understanding that the U.S. Constitution clarifies that states maintain sovereignty over any federal agency branch, including the federal government. There have been numerous cases in which states have stood up [for their sovereignty] with various results. Representative Keller, stressed that the state's sovereignty is present and it has the right to challenge whether [something is unconstitutional regardless of] whether there's a U.S. Supreme Court decision.

[1:24:43 PM](#)

REPRESENTATIVE LYNN noted his agreement, but questioned at what point something actually moves from being allegedly unconstitutional to unconstitutional. He opined that the answer to the aforementioned would impact how one views HB 8.

[1:25:18 PM](#)

MICHAEL FORD, Assistant Attorney General & Legislative Liaison, Legislation & Regulations Section, Civil Division (Juneau), Department of Law (DOL), said that one of the issues raised by HB 8 is regarding the point at which it's known that there is a preemption issue. To know there is a preemption issue, there must be a ruling by a court. He noted, however, that there can be views on matters. For example, with the health care dilemma there are courts with differing views. Until the U.S. Supreme Court rules, it's unknown, with finality, whether there is a preemption issue or not.

CHAIR GATTO said that's the point. At the point at which the state views the federal decision as unconstitutional and the federal government does not, he asked if the state would have to act on the law that was passed or can the state ignore the law

without consequence. He ventured that the latter is what HB 8 is intending to accomplish. Chair Gatto said:

So many other issues that are going to require us to enact an exchange program, \$1 million from the feds to do it; it's almost like a bribe. Say, 'Hey, I'll give you \$1 million if you will do something that indicates that the law is constitutional.' ... If, indeed, the constitution says what it says, everything is unconstitutional that we say is unconstitutional until a law decides that we were wrong. Or, is everything constitutional as long as the feds say it, until we decide that a law was wrong? There's no guidance.

MR. FORD said that the principles are easy to describe, but the application of the principles is very difficult. Although one can say there is a line beyond which the federal government can't pass because those rights are reserved for the states, specifying the line is what the litigation is about.

[1:28:14 PM](#)

REPRESENTATIVE KELLER ventured that the issue isn't regarding what action the U.S. Supreme Court takes against the state. In fact, HB 8 doesn't address the issue directly, but instead leaves it such that [both the House and Senate Judiciary Standing Committees] receive notification from the attorney general that there is a problem. Representative Keller opined that the aforementioned problem can't be solved ahead of time because every circumstance is different.

[1:29:26 PM](#)

JOANNE GRACE, Chief Assistant Attorney General, Opinions, Appeals, & Ethics, Civil Division (Anchorage), Department of Law, explained that when a [federal] court finds a law to be unconstitutional, it will have always been unconstitutional. However, until such a decision is received from a federal court, the choice of not following the law would be done at one's own peril. Ms. Grace related her understanding that HB 8 would rely on an opinion of the attorney general. She opined that the Attorney General's Office is typically fairly prudent about giving this type of advice.

CHAIR GATTO, referring to the Commerce Clause and the Affordable Health Care Act, opined that it's not conceivable to him that the Commerce Clause could be applied so broadly. Therefore, he

questioned whether the state should spend funds to institute all the programs required under [the Affordable Health Care Act] assuming that the state would win [the court case] later and be able to undo those programs. Or, should the state spend the funds to institute all the programs required under [the Affordable Health Care Act] based on the assumption that the Act will be shown constitutional. Chair Gatto pointed out that the state has to take an action that costs millions of dollars based on what [the legislature] believes the U.S. Supreme Court will rule. He acknowledged that one can't predict the U.S. Supreme Court's decision.

The committee took an at-ease from 1:32 p.m. to 1:34 p.m.

[1:34:38 PM](#)

MS. GRACE, regarding the question of how does the state know how to proceed on the Affordable Health Care Act if the state doesn't know how a court is going to rule, answered that it is a difficult situation. However, in general, when one seeks a legal opinion, an attorney will relay what he/she thinks a court will do. In the context of the Affordable Health Care Act for which two federal courts have ruled in one way and two federal courts in another way, she doubted that any attorney would provide a firm legal opinion on this question.

CHAIR GATTO asked whether the order of the court decisions matter.

MS. GRACE replied no. However, it may be of some significance that Alaska is a party to the Florida District Court case. Ms. Grace said that she hesitated to speak at length about this case because she's not very knowledgeable about it. She reiterated that the order of the court decisions doesn't matter, but what is of significance is the level of the court and whether Alaska is bound by that court.

CHAIR GATTO posed a scenario in which the U.S. Supreme Court ruled that the Commerce Clause did allow for the Affordable Health Care Act, but the state hasn't done anything up to the decision. In such a scenario, he asked whether the state would be liable for past claims.

[1:37:39 PM](#)

MS. GRACE declined to venture an answer and indicated she would defer to DOL staff members that are very knowledgeable about the Affordable Health Care Act.

CHAIR GATTO asked if the state would be liable for someone who is sick and the state didn't institute the Act, which is the law of the land at the moment.

MS. GRACE said that may depend upon how the law is written. However, she opined that it's possible that the state not being up-to-speed and ready to proceed with the law may place some Alaskans in a difficult situation. Again, she reiterated that she hesitated to comment on this Act because she's not knowledgeable on the Act.

CHAIR GATTO asked whether it's possible that the U.S. Supreme Court wouldn't take up this case.

MS. GRACE responded that although it's possible for the U.S. Supreme Court to decline to take up a case, it's very unlikely. Because the courts are already split with regard to this Act, it's very likely the U.S. Supreme Court would accept a petition for a writ of certiorari if there were two different circuit courts with conflicting opinions. Furthermore, this Act is an issue of national interest.

[1:40:13 PM](#)

REPRESENTATIVE LYNN asked whether something is unconstitutional prior to it being declared unconstitutional by the U.S. Supreme Court of the Alaska Supreme Court.

CHAIR GATTO reminded the committee that Ms. Grace testified that once something is declared unconstitutional it has always been unconstitutional. He opined that the state would be "off the hook" if the Act is declared unconstitutional. He then reminded the committee that the last judge considering the Act, declared the entire Act unconstitutional based on the Severability Clause. Therefore, Chair Gatto said that he felt comfortable proceeding as if the Act will be declared unconstitutional.

REPRESENTATIVE PRUITT asked if the four district court rulings on the Affordable Health Care Act apply only to the [jurisdiction] of the particular court, the states involved, or the entire U.S. He clarified that his question is regarding where the ruling of the district courts apply.

CHAIR GATTO noted that Alaska joined the Florida lawsuit, and thus he surmised that Alaska would be part of the decision of that district court.

[1:42:10 PM](#)

MS. GRACE answered that generally the decision of [a district court] would bind the parties and be effective in the district covered by the ruling court. However, she pointed out that it's an awkward situation when it's a national law and the U.S. is one of the parties. In such a situation it would mean that the U.S. is bound to enforce the law in [the states involved in the particular district court ruling] but not in the states that aren't involved. The aforementioned, she emphasized, isn't how the federal government operates, which is one of the reasons why the Act will likely proceed to the U.S. Supreme Court; there has to be uniformity in terms of how the law impacts the country.

CHAIR GATTO offered his belief that in the future HB 1 will come before the committee and that legislation states that no one can be compelled to purchase a product they don't want to purchase. He opined that if HB 1 becomes law it would add to Alaska's ability to justify refusing to follow the Affordable Health Care Act.

[1:43:32 PM](#)

REPRESENTATIVE PRUITT asked then whether the Affordable Health Care Act is unconstitutional as it applies to Alaska. Therefore, by not implementing aspects of that Act, the state isn't in violation of the federal law.

MS. GRACE said it's not clear that the state needs to be doing anything, other than possibly getting ready to implement the Act when it goes into effect. Although she didn't know that the state would be violating a federal law by doing nothing, there may be a point at which if a higher court were to deem the Act constitutional, the state may not be ready to implement the law when required.

CHAIR GATTO recalled that part of the Act requires the collection of taxes to support the program. Therefore, he opined, "We will probably be stuck paying certain taxes to support the bill."

[1:45:33 PM](#)

REPRESENTATIVE KELLER explained that HB 8 was not introduced to address the Affordable Health Care Act rather it's intended [to require the attorney general to notify the House and Senate Judiciary Standing Committees of federal regulations and presidential executive orders that may be in conflict with and preempt state law].

[1:46:14 PM](#)

MR. FORD, returning to his comments on HB 8, referred the committee to the proposed new language for Section 4 [text provided previously], which he believes will narrow the scope of the legislation and alleviate DOL's concerns.

REPRESENTATIVE KELLER said that he has no problem with the portion of the amendment inserting new language on page 2, lines 22-29, save the use of the word "If".

[1:48:02 PM](#)

STUART THOMPSON, representing his sovereign citizenship, provided the following testimony [original punctuation provided]:

I testify in support of House Bill No. 8 and commend the sponsors for acting in acute compliance to their oath of office. The most deadly means of overthrowing our form of multi-level republic—forget foreign enemies and terrorism—is to permit Federal government officials to have uncheckable authority to interpret the US Constitution in defining their powers. Quote: "If the federal government has the exclusive right to judge the extent of its own powers", warned the Kentucky and Virginia resolutions' authors Thomas Jefferson and James Madison, "it will continue to grow - regardless of elections, the separation of powers, and other much-touted limits on government power." Unquote.

This is especially true since, currently, the Constitution's 10th Amendment (that strictly limits the possible extent of Federal government powers), and the Constitution's strict process of amendment are openly ignored under the doctrine of "The Living Constitution". For Alaska not to take action concerning the constitutionally moral principle of nullification is to make the US Pledge of Allegiance a cheap chant for lemmings.

To strengthen this legislation, I recommend several almost self-evident changes.

Bill Page 2, line 1&2 should be modified to read "federal law and regulations or presidential executive orders that are not properly adopted in accordance with constitutional and statutory authority are not laws of the US for the purposes of the Supremacy clause". The rest of the bill's language should be modified to be consistent with these proposed changes.

An additional legislative finding should approximately read "Federal law and regulations or presidential executive orders not complying to or respecting the Constitution's 10th Amendment depend on forcing the Constitution to be inconsistent and in conflict with itself-in order to gain apparent legitimacy in the confusion. Such efforts are not only unconstitutional but anti-constitutional, and must earn wide condemnation."

Lastly, this bill should provide that, in addition to any state legislation formulated, using a Governor-signed Alaska nullification resolution & its documentation, the Attorney General shall obtain the support of a fast-tracked Alaska Supreme Court injunction against the offending law/regulation/presidential executive order in Alaska. The injunction is intended to provide the time for Alaska to sue the Federal Government for relief from, & punishment of, its unconstitutional behavior. Coordinated use of the three branches of Alaska government, combined with using established national legal paths, will avoid the secessionist label that has castrated States Rights for 150 years.

Gentlemen, good luck in your deliberations.

[1:51:17 PM](#)

CHAIR GATTO related his understanding that Mr. Thompson was suggesting that in HB 8 the language should include "federal law" as well as "federal regulations". He further understood Mr. Thompson to suggest including language referring to "presidential executive orders not complying with the 10th Amendment that are unconstitutional".

MR. THOMPSON related an incident in which a [U.S.] Supreme Court justice asked an attorney in court if he/she could provide an example of the U.S. Constitution limiting the use of the Commerce Clause in federal government activity. The attorney couldn't provide such an example, which he opined seems to be a contradiction that needs to be reviewed.

[1:52:24 PM](#)

CHAIR GATTO, upon determining no one else wished to testify, closed public testimony.

[1:52:41 PM](#)

CHAIR GATTO announced that he would accept amendments to HB 8 now, otherwise the committee will vote on the legislation as it stands.

[1:53:33 PM](#)

REPRESENTATIVE KELLER remarked that Mr. Thompson's comments are consistent with his intent, but before committing to such changes he wanted to hear from his staff.

[1:54:10 PM](#)

JIM POUND, Staff, Representative Wes Keller, Alaska State Legislature, speaking on behalf of the sponsor, Representative Keller, acknowledged that [HB 8] is an issue of the Supremacy Clause versus the Tenth Amendment. The Supremacy Clause specifies that what is passed by Congress is the law of the land. The case cited in HB 8 is the United States Supreme Court, in City of New York v. Federal Communications Commission, 486 U.S. 57 (1988). The aforementioned ruling includes statutes, but subsequently included regulations that Congress so intended. He noted that there is standing regarding whether certain departments within the federal government have the authority to enforce certain laws that address criminal activity, which is normally local. The Tenth Amendment, which essentially specifies that the powers given to the federal government are limited, was certainly discussed.

[1:55:12 PM](#)

MR. POUND then read the Supremacy Clause, Article VI of the U.S. Constitution, as follows:

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.

MR. POUND then read the Tenth Amendment, as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

MR. POUND clarified that those are the two argument points that arise in various regulations and laws. Even at the state level, regulations are established that don't follow the intent of the state legislature.

CHAIR GATTO said that the first time he heard the notion that the U.S. Constitution is a living document was surprising. If it's a living document, then there are no standards and everything can be reinterpreted, depending upon the year and the direction of the country. Chair Gatto stated that he is a constitutionalist and believes that the U.S. Constitution should be followed exactly.

[1:57:17 PM](#)

The committee took a brief at-ease.

[1:58:05 PM](#)

REPRESENTATIVE KELLER made a motion to adopt Conceptual Amendment 1, as follows:

Delete page 2, lines 22 through line 29:

Insert

"(h) If the attorney general finds that a federal regulation or presidential executive order has the effect of preempting state law and that the regulation or order is unconstitutional or was not properly adopted, the attorney general shall report the findings to the chairs of the house and senate committees having jurisdiction over judicial matters. The report must include"

There being no objection, Conceptual Amendment 1 was adopted.

1:59:05 PM

REPRESENTATIVE THOMPSON moved to report HB 8, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 8(JUD) was reported from the House Judiciary Standing Committee.

1:59:30 PM

**ADJOURNMENT**

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 1:59 p.m.