

HB

186

<target><bill>HB 186</bill><subject>HB
186</subject><comm>HFIN26</comm></target>

HOUSE COMMITTEE REPORT

(11)

Date Referred to Committee: April 7, 2009

FURTHER REFERRALS:

Date of Committee Action: 4/11/09

The FINANCE Committee considered:

HOUSE BILL NO. 186

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

HB 186 AK FIREARMS EXEMPT FROM FED. REGULATION

Recommends it be replaced with HCS or CS for HB 186 (FIN)
 For Senate Bills with new title: Technical Title New Title: HCR _____ Same Title New Title

- attach amendments
- add new referral to _____ Committee
- Letter of Intent _____ Committee

List of Abbrev for Depts.:
 ADM
 CED
 COR
 CRT
 EED
 DEC
 DFG
 GOV
 DHS
 LWF
 LAW
 LEG
 MVA
 DNR
 DPS
 REV
 DOT
 UA

<u>NEW FISCAL NOTES</u>				
*Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW			✓	

<u>PREVIOUS FISCAL NOTES</u>				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

<u>Signing with recommendations</u>	Printed Last Name	DP	DNP	NR	AM
	Thomas			✓	
	Garc CRAWFORD			✓	
	KELLY	X			
	Austerman	X			
	FAIRCLOUGH	✓			
	Salmon			X	
	Youle			X	
Chair:	Howker	*			
Chair:	Steele	*			

FISCAL NOTE

STATE OF ALASKA
2009 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: CSHB186(JUD)
 () Publish Date: _____

Identifier (file name): HB186CS(JUD)-LAW-CRIM-4-8-09
 Title: An Act exempting certain firearms from federal regulation
 Dept. Affected: Law
 RDU: CRIMINAL
 Component: CRIMINAL JUSTICE LITIGATION
 Sponsor: REPRESENTATIVE(s) KELLY, Wilson
 Requester: JUDICIARY Component Number: 2202

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING		***	***	***	***	***	***	***

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES ()								
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FUND SOURCE (Thousands of Dollars)

	FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	***	***	***	***	***	***	***

Estimate of any current year (FY2009) cost: _____

POSITIONS

	FY 2010	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Full-time							
Part-time							
Temporary							

ANALYSIS: (Attach a separate page if necessary)
 This bill attempts to declare that firearms that are made in Alaska are exempt from any federal law or regulation. The bill has significant constitutional issues. These issues would most likely arise in the context of a state citizen being charged with a crime in federal court and could result in significant litigation in both state and federal court. While such litigation is likely, it is difficult to estimate with any certainty the costs that might be incurred and they are therefore indeterminate at this point.

Prepared by: Robert Meiners, Deputy Director
 Division: Administrative Services
 Approved by: Wayne Anthony Ross, Attorney General
Department of Law

Phone 465-3673
 Date/Time 4/8/09 11:15 AM
 Date 4/8/2009

Adopted 4/11/09

AMENDMENT 1

OFFERED IN THE HOUSE

BY REP. KELLY

TO: HB 186

- 1 Page 1 line 10:
- 2 Delete: "understood"
- 3 Insert: "intended"
- 4
- 5 Page 2 line 2:
- 6 Delete: "understood"
- 7 Insert: "intended"
- 8
- 9 Page 2 line 12:
- 10 Delete: "understood"
- 11 Insert: "intended"
- 12

Amendment 2
remove sentence p. 3 M Hawker
622-26

Adopted 4/11/09

AMENDMENT 1

OFFERED IN THE HOUSE

BY REP. KELLY

TO: HB 186

adopted

- 1 Page 1 line 10:
- 2 Delete: "understood"
- 3 Insert: "intended"
- 4
- 5 Page 2 line 2:
- 6 Delete: "understood"
- 7 Insert: "intended"
- 8
- 9 Page 2 line 12:
- 10 Delete: "understood"
- 11 Insert: "intended"
- 12

Adopted 4/11/09

*Amend 2 (p. 3)
Adopted 4/11/09*

26-LS0627R

HOUSE BILL NO. 186

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES KELLY, Wilson, Lynn, Gatto

Introduced: 3/12/09
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

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

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
5 to read:

6 FINDINGS. The legislature finds that the authority for this Act is the following:

7 (1) the Tenth Amendment to the Constitution of the United States guarantees
8 to the states and their people all powers not granted to the federal government elsewhere in
9 the constitution and reserves to the state and people of Alaska certain powers as they were
10 understood at the time that Alaska was admitted to statehood in 1959; the guaranty of those
11 powers is a matter of contract between the state and people of Alaska and the United States as
12 of the time that the compact with the United States was agreed upon and adopted by Alaska
13 and the United States in 1959;

14 (2) the Ninth Amendment to the Constitution of the United States guarantees

1 to the people rights not granted in the constitution and reserves to the people of Alaska certain
 2 rights as they were understood at the time that Alaska was admitted to statehood in 1959; the
 3 guaranty of those rights is a matter of contract between the state and people of Alaska and the
 4 United States as of the time that the compact with the United States was agreed upon and
 5 adopted by Alaska and the United States in 1959;

6 (3) the regulation of intrastate commerce is vested in the states under the
 7 Ninth and Tenth Amendments to the Constitution of the United States, particularly if not
 8 expressly preempted by federal law; the United States Congress has not expressly preempted
 9 state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of
 10 firearms, firearm accessories, and ammunition;

11 (4) the Second Amendment to the Constitution of the United States reserves to
 12 the people the right to keep and bear arms as that right was understood at the time that Alaska
 13 was admitted to statehood in 1959, and the guaranty of the right is a matter of contract
 14 between the state and people of Alaska and the United States as of the time that the compact
 15 with the United States was agreed upon and adopted by Alaska and the United States in 1959;

16 (5) art. I, sec. 19, Constitution of the State of Alaska clearly secures to Alaska
 17 citizens and prohibits government interference with the right of individual Alaska citizens to
 18 keep and bear arms.

19 * **Sec. 2.** AS 44.99 is amended by adding a new section to read:

20 **Article 5. Alaska Firearms Freedom Act.**

21 **Sec. 44.99.500. State policy, declarations, and requirements concerning**
 22 **certain firearms not in interstate commerce and not subject to federal regulation.**

23 (a) A personal firearm, a firearm accessory, or ammunition that is manufactured
 24 commercially or privately in this state and that remains in the state is not subject to
 25 federal law or federal regulation, including registration, under the authority of the
 26 United States Congress to regulate interstate commerce as those items have not
 27 traveled in interstate commerce.

28 (b) This section applies to a firearm, a firearm accessory, or ammunition that
 29 is manufactured in this state from basic materials and that can be manufactured
 30 without the inclusion of any significant parts imported from another state. Generic and
 31 insignificant parts that have other manufacturing or consumer product applications are

1 not firearms, firearm accessories, or ammunition, and their importation into this state
 2 and incorporation into a firearm, a firearm accessory, or ammunition manufactured in
 3 this state does not subject the firearm, firearm accessory, or ammunition to federal
 4 regulation. Basic materials, such as unmachined steel and unshaped wood, are not
 5 firearms, firearm accessories, or ammunition and are not subject to congressional
 6 authority to regulate firearms, firearm accessories, and ammunition under interstate
 7 commerce as if they were actually firearms, firearm accessories, or ammunition. The
 8 authority of the United States Congress to regulate interstate commerce in basic
 9 materials does not include authority to regulate firearms, firearm accessories, and
 10 ammunition made in this state from those materials. Firearm accessories that are
 11 imported into this state from another state and that are subject to federal regulation as
 12 being in interstate commerce do not subject a firearm to federal regulation under
 13 interstate commerce because they are attached to or used in conjunction with a firearm
 14 in this state.

15 (c) A firearm manufactured or sold in this state and not subject to federal
 16 regulation under this section must have the words "Made in Alaska" clearly stamped
 17 on a central metallic part, such as the receiver or frame.

18 (d) The attorney general shall defend a citizen of this state who is prosecuted
 19 by the government of the United States under the congressional power to regulate
 20 interstate commerce for violation of a federal law concerning the manufacture, sale,
 21 transfer, or possession of a firearm, a firearm accessory, or ammunition manufactured
 22 and retained within this state. On receipt of written notification by a citizen of this
 23 state of intent to manufacture a firearm, a firearm accessory, or ammunition to which
 24 this section applies, the attorney general shall seek a declaratory judgment from the
 25 United States District Court for the District of Alaska that this section is consistent
 26 with the Constitution of the United States.

27 (e) In this section,

28 (1) "firearm accessory" means an item that is used in conjunction with
 29 or mounted on a firearm but is not essential to the basic function of a firearm,
 30 including a telescopic or laser sight, magazine, flash or sound suppressor, folding or
 31 aftermarket stock and grip, speedloader, ammunition carrier, and light for target

*Amd 2
remove*

1 illumination;

2 (2) "generic and insignificant parts" includes springs, screws, nuts, and
3 pins;

4 (3) "manufactured" means a firearm, a firearm accessory, or
5 ammunition that has been created from basic materials for functional usefulness,
6 including forging, casting, machining, or other processes for working materials.

7 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
8 read:

9 APPLICABILITY. AS 44.99.500, added by sec. 2 of this Act, applies to firearms,
10 firearm accessories, and ammunition that are manufactured and retained in this state after
11 October 1, 2009.

A111109

Alaska State Legislature

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Member

House Finance Committee

Representative Mike Kelly

House District 7

Sponsor Statement – CSHB 186(JUD)

"ALASKA FIREARMS FREEDOM ACT"

The United States Constitution gives Congress the authority to regulate Interstate Commerce between the states and 18 USC 922 makes it unlawful for any person not licensed as a manufacturer or dealer in firearms to engage in the business of manufacturing or dealing in firearms. Collectively, the Interstate Commerce Clause and 18 USC 922 are used by the federal government as a means to regulate firearms.

The Alaska Firearms Freedom Act addresses this by exempting firearms, firearm accessories, and ammunition manufactured and retained in the state from all federal firearm control laws including registration, as firearms that meet these criteria shouldn't be regulated by the federal government because they have not traveled in interstate commerce. Firearms exempt from this Act must have the words "Made in Alaska" clearly stamped on a central metallic part such as the receiver or frame.

This bill frees certain firearms from federal regulation as long as certain conditions are met. It frees the state of Alaska from restrictive federal firearm regulation and allows the state to take responsible firearm regulation into her own hands. The federal government has historically used the Interstate Commerce Clause to regulate firearms and has consistently pursued legislation that imposes its will on states. Outdoorsmen, hunters, and Alaskans defending their families and property will benefit from the passage of CSHB 186(JUD).

4/11/09

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Member

House Finance Committee

Representative Mike Kelly

House District 7

MEMORANDUM

DATE: April 7, 2009
TO: Representative Mike Kelly
FROM: Derek Miller
RE: Sectional Analysis for CSHB 186(JUD)
(26-LS0627\S)

A sectional summary of a bill should not be considered an authoritative interpretation of the bill. The bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1.

Findings Section. The authority of this Act is the Second, Ninth, and Tenth Amendments to the Constitution of the United States. The Second Amendment reserves to the people the right to keep and bear arms, the Ninth Amendment guarantees to the people rights not granted in the constitution, and the Tenth Amendment guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution. The United States Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearm accessories, and ammunition. Article I, Section 19 of the Constitution of the State of Alaska secures to the citizens and prohibits government interference with the right of individual Alaska citizens to keep and bear arms.

Section 2.

(a) A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in this state and that remains in the state is not subject to federal law or federal regulation including registration under the authority of the United States Congress to regulate intrastate commerce.

(b) This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in this state from basic materials without the inclusion of significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer applications are not firearms, firearm accessories, or ammunition and their incorporation into a firearm, firearm accessory, or ammunition manufactured in this state does not subject them to federal regulation. Basic materials, such as unmachined steel and unshaped wood are not firearms, firearm accessories, and ammunition and are not subject to federal regulation under intrastate commerce. Firearm accessories imported into this state from another state and are attached to or used in conjunction with a firearm in this state does not subject the firearm to federal regulation under intrastate commerce.

(c) A firearm manufactured or sold in this state and not subject to federal regulation must have the words "Made in Alaska" clearly stamped on a central metallic part, such as the receiver or frame.

(d) Definitions section.

"Firearm accessory" – an item that is used in conjunction with or mounted on a firearm but is not essential to the basic function of a firearm. This includes: a telescope or laser sight, magazine, flash or sound suppressor, folding or aftermarket stock and grip, speedloader, ammunition carrier, and light for target illumination.

"Generic and insignificant parts" – includes springs, screws, nuts, and pins.

"Manufactured" – means a firearm a firearm accessory, or ammunition that has been created from basic materials for functional usefulness, including forging, casting, machining, or other processes for working materials.

Section 3.

Applicability section. This Act applies to firearms, firearm accessories, and ammunition that are manufactured and retained in this state after October 1, 2009.

LEGAL SERVICES

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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 *GLP*
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

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).

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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. Schechter 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.

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.

In *United States v. Darby*, 312 U.S. 100 (1941), the Court upheld the Fair Labor Standards Act, stating:

"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.

See also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which

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.

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.

Second, §922(q) contains no jurisdictional element which would ensure, through case by case inquiry, that the firearm possession in question affects interstate commerce.

....

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.

...

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

⁶ Syllabus and majority opinion enclosed.

⁷ Syllabus and majority opinion enclosed.

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

GPL:ljw
09-222.ljw

Enclosures

⁸ Opinion enclosed.

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

¹⁰ *Stewart*, 451 F.3d at 1077.

4/11/09

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Member
House Finance Committee

Representative Mike Kelly

House District 7

MEMORANDUM

DATE: April 7, 2009
TO: Representative Mike Kelly
FROM: Derek Miller
RE: Changes to HB 186 in CSHB 186(JUD)
(26-LS0627\S)

Section 1. (Minor Changes)

Page 1, line 10	Page 2, line 2	Page 2, line 12
Delete "understood"	Delete "understood"	Delete "understood"
Insert "intended"	Insert "intended"	Insert "intended"

Section 2.

The CSHB 186(JUD) deleted a section requiring the Attorney General to defend a citizen of the state who is prosecuted by the government of the United States under the Congressional power to regulate interstate commerce for violation of a federal law concerning the manufacture, sale, transfer, or possession of a firearm, a firearm accessory, or ammunition manufactured and retained within this state.

Page 3, lines 18 - 26
Delete

Section 3

No changes.



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4/11/09

State Legislation to Exempt Firearms from Federal Regulation

ALASKA

AK H 186 **AUTHOR:** Kelly (R)
TITLE: Firearms Exempt From Federal Regulation
INTRODUCED: 03/12/2009
DISPOSITION: Pending
SUMMARY:
 Declares that certain firearms and accessories are exempt from federal regulation.
STATUS:
 03/12/2009 INTRODUCED.
 03/12/2009 To HOUSE Committee on JUDICIARY. (PASSED)
 03/12/2009 To HOUSE Committee on FINANCE.

AK S 146 **AUTHOR:** Dyson (R)
TITLE: Firearms Exempt From Federal Regulation
INTRODUCED: 03/11/2009
DISPOSITION: Pending
SUMMARY:
 Declares that certain firearms and accessories are exempt from federal regulation.
STATUS:
 03/11/2009 INTRODUCED.
 03/11/2009 To SENATE Committee on JUDICIARY.
 03/11/2009 To SENATE Committee on FINANCE.

MONTANA (Enacted)

MT D 671 **AUTHOR:** Office of Curtiss
TITLE: Firearms and Ammunition
DISPOSITION: Pending
SUMMARY:
 Exempts from Federal regulation under the commerce clause of the Constitution of the United States, which regulates interstate and international commerce, a firearm, firearm accessory, or ammunition manufactured and retained in this State.
STATUS:
 01/09/2009 Draft delivered to Requester.

MT H 246 **AUTHOR:** Boniek (R)
TITLE: Commerce Clause
INTRODUCED: 01/13/2009
DISPOSITION: To Governor
SUMMARY:
 Exempt Montana-made firearms and ammunition from commerce clause.
STATUS:
 04/03/2009 Eligible for GOVERNOR'S desk.

TN H 1783 **SAME AS:** TN S 1644

TENNESSEE

AUTHOR: West (D)
TITLE: Firearms and Ammunition
INTRODUCED: 02/23/2009
DISPOSITION: Pending
SUMMARY:
 Relates to firearms and ammunition; enacts the Tennessee Firearms Freedom Act.
STATUS:
 03/02/2009 In HOUSE Committee on JUDICIARY: Referred to Subcommittee on CRIMINAL PROCEDURE AND PRACTICE.

TN H 1796 **SAME AS:** TN S 1610
AUTHOR: West (D)
TITLE: Firearms and Ammunition
INTRODUCED: 02/23/2009
DISPOSITION: Pending
SUMMARY:
 Relates to firearms and ammunition; enacts the Tennessee Firearms Freedom Act.
STATUS:
 03/02/2009 In HOUSE Committee on JUDICIARY: Referred to Subcommittee on CRIMINAL PROCEDURE AND PRACTICE.

TN S 1610 **SAME AS:** TN H 1796
AUTHOR: Beavers (R)
TITLE: Firearms and Ammunition
INTRODUCED: 02/12/2009
DISPOSITION: Pending
SUMMARY:
 Relates to firearms and ammunition; enacts the Tennessee Firearms Freedom Act. - Amends TCA Title 4.
STATUS:
 02/18/2009 To SENATE Committee on JUDICIARY.

TN S 1644 **SAME AS:** TN H 1783
AUTHOR: Beavers (R)
TITLE: Firearms and Ammunition
INTRODUCED: 02/12/2009
DISPOSITION: Pending
SUMMARY:
 Relates to firearms and ammunition; enacts the Tennessee Firearms Freedom Act.
STATUS:
 02/18/2009 To SENATE Committee on JUDICIARY.

TEXAS

TX H 1863 **AUTHOR:** Berman (R)
TITLE: Firearm Manufacturer Regulation
INTRODUCED: 02/26/2009
DISPOSITION: Pending
SUMMARY:
 Relates to exempting the intrastate manufacture of a firearm, a firearm accessory, or ammunition from federal regulation.
STATUS:
 03/04/2009 To HOUSE Committee on PUBLIC SAFETY.



SENATE BILL 1644

By Beavers

AN ACT to amend Tennessee Code Annotated, Title 4, relative to exempting from regulation under the commerce clause of the Constitution of the United States a firearm, firearm accessory, or ammunition manufactured and retained in Tennessee.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 4, is amended by adding Sections 2 through 6 of this act as a new chapter thereto.

SECTION 2. This chapter shall be known and may be cited as the "Tennessee Firearms Freedom Act".

SECTION 3. The general assembly declares that the authority for this chapter is the following:

(1) The tenth amendment to the United States Constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the Constitution and reserves to the state and people of Tennessee certain powers as they were understood at the time that Tennessee was admitted to statehood. The guarantee of those powers is a matter of contract between the state and people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States;

(2) The ninth amendment to the United States Constitution guarantees to the people rights not granted in the Constitution and reserves to the people of Tennessee certain rights as they were understood at the time that Tennessee was admitted to statehood. The guarantee of those rights is a matter of contract between the state and

people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States.

(3) The regulation of intrastate commerce is vested in the states under the ninth and tenth amendments to the United States Constitution, particularly if not expressly preempted by federal law. Congress cannot preempt state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition;

(4) The second amendment to the United States Constitution reserves to the people the right to keep and bear arms as that right was understood at the time that Tennessee was admitted to statehood, and the guarantee of the right is a matter of contract between the state and people of Tennessee and the United States as of the time that the compact with the United States was agreed upon and adopted by Tennessee and the United States; and

(5) The Tennessee Constitution clearly secures to Tennessee citizens, and prohibits government interference with, the right of individual Tennessee citizens to keep and bear arms.

SECTION 4. As used in this chapter, unless the context otherwise requires:

(1) "Firearms accessories" means items that are used in conjunction with or mounted upon a firearm but are not essential to the basic function of a firearm, including but not limited to telescopic or laser sights, magazines, flash or sound suppressors, folding or aftermarket stocks and grips, speedloaders, ammunition carriers, and lights for target illumination;

(2) "Generic and insignificant parts" includes but is not limited to springs, screws, nuts, and pins; and

(3) "Manufactured" means creating a firearm, a firearm accessory, or ammunition from basic materials for functional usefulness, including but not limited to forging, casting, machining, or other processes for working materials.

SECTION 5. A firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Tennessee is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Tennessee from basic materials and that can be manufactured without the inclusion of any significant parts imported into this state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Tennessee and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Tennessee does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Tennessee from those materials. Firearms accessories that are imported into Tennessee from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Tennessee.

SECTION 6. A firearm manufactured or sold in Tennessee under this chapter must have the words "Made in Tennessee" clearly stamped on a central metallic part, such as the receiver or frame.

SECTION 7. This act shall take effect upon becoming a law, the public welfare requiring it.