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BILL



ANALYSIS

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Senate Bill 63 (as reported without amendment)
Sponsor: Senator Phil Pavlov
Committee: Judiciary

Date Completed: 8-28-13

RATIONALE

In response to a number of shootings, particularly the most recent in Newtown, Connecticut, in December 2012, President Obama and other Federal officials have proposed new gun legislation initiatives. Some believe that these proposals, which generally include restrictions on the manufacture and sale of certain firearms, would constitute an overreach of the Federal government's power and an infringement on the rights of states and citizens. As a result, many states have adopted or proposed legislation known as the Firearms Freedom Act, to exempt locally manufactured and sold guns from Congressional authority to regulate interstate commerce. Some people suggest that Michigan also should enact this law.

CONTENT

The bill would create the "Michigan Firearms Freedom Act" to do the following:

- Specify that a personal firearm, a firearm accessory, or ammunition manufactured in Michigan, and remaining within the borders of the State, would not be subject to Federal law or regulation under Congress's authority to regulate interstate commerce.**
- Specify that generic and insignificant parts and firearms accessories imported from another state would not subject a firearm to Federal interstate commerce regulation.**

- Describe firearms and ammunition to which the proposed Act would not apply.**
- State several legislative findings.**

Exemption from Federal Regulation

Under Section 3 of the proposed Act, a personal firearm, a firearm accessory, or ammunition that was manufactured commercially or privately in Michigan, and that remained within the borders of Michigan, would not be subject to Federal law or Federal regulation, including registration, under the authority of Congress to regulate interstate commerce. The bill states, "It is declared by the legislature that those items have not traveled in interstate commerce."

Section 3 would apply to a firearm, a firearm accessory, or ammunition that was manufactured in Michigan from basic materials and that could be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that had other manufacturing or consumer product applications would not be firearms, firearms accessories, or ammunition, and their importation into Michigan and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Michigan would not subject it to Federal regulation. ("Generic and insignificant parts" would include springs, screws, nuts, and pins.) The bill states, "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 Michigan from those materials."

Firearms accessories that were imported into Michigan from another state and that were subject to Federal regulation as being in interstate commerce would not subject a firearm to Federal regulation under interstate commerce because they were attached to or used in conjunction with a firearm in Michigan.

Section 3 would not apply to any of the following:

- A firearm that could not be carried and used by one person.
- A firearm that had a bore diameter greater than 1.5 inches and that used smokeless powder, not black powder, as a propellant.
- Ammunition with a projectile that exploded using an explosion of chemical energy after the projectile left the firearm.
- A firearm that discharged two or more projectiles with one activation of the trigger or other firing device.

A firearm manufactured or sold in Michigan under the proposed Act would have to have the words "Made in Michigan" clearly stamped on a central metallic part, such as the receiver or frame.

The Act would apply to firearms, firearms accessories, and ammunition that were manufactured and retained in Michigan on or after October 1, 2013.

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

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

Legislative Findings

The bill states the following legislative findings.

"Amendment X of the constitution of the United States 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 Michigan certain powers as they were understood at the time that Michigan was admitted to statehood on January 26, 1837. The guaranty of those powers is a matter of contract between the state and people of Michigan and the United States as of the time that the compact with the United States was agreed upon and adopted by Michigan and the United States."

"Amendment IX of the constitution of the United States guarantees to the people rights not granted in the constitution and reserves to the people of Michigan certain rights, as they were understood at the time that Michigan was admitted to statehood. The guaranty of those rights is a matter of contract between the state and people of Michigan and the United States as of the time that the compact with the United States was agreed upon and adopted by Michigan and the United States."

"The regulation of intrastate commerce is vested in the states under amendments IX and X of the constitution of the United States, particularly if not expressly preempted by federal law. Congress has not expressly preempted state regulation of intrastate commerce pertaining to the manufacture on an intrastate basis of firearms, firearms accessories, and ammunition."

"Amendment II of the constitution of the United States reserves to the people the right to keep and bear arms as that right was understood at the time that Michigan was admitted to statehood, and the guaranty of the right is a matter of contract between the state and people of Michigan and the United States as of the time that the

compact with the United States was agreed upon and adopted by Michigan and the United States."

"Section 6 of article I of the state constitution of 1963 clearly secures to Michigan citizens, and prohibits government interference with, the right of individual Michigan citizens to keep and bear arms. This constitutional protection is unchanged from the original Michigan constitution, which was approved by congress and the people of Michigan, and the right exists, as it was understood at the time that the compact with the United States was agreed upon and adopted by Michigan and the United States."

BACKGROUND

The Tenth Amendment to the U.S. Constitution states, "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." This is generally interpreted to mean that Congress must point to a source of power within the Constitution if it regulates something, such as a particular activity; if there is no legitimate source of power, the states reserve the right to regulate that activity, unless the Constitution forbids it. The powers left to the states include what is typically referred to as the "police power", or the power to regulate for the health, safety, welfare, and morals of their citizens.

One source of Congressional power is the Interstate Commerce Clause found in Article 1, Section 8 of the U.S. Constitution. This clause vests Congress with the power to regulate commerce among the states. Under current case law, the power is interpreted to include only regulation of the following: 1) channels of interstate commerce, e.g., highways, railways, electronic transmissions, or other routes that people or goods move through; 2) instrumentalities of interstate commerce, e.g., people or things that operate completely *intrastate* but facilitate *interstate* commerce; and 3) local intrastate activities that have a substantial effect on interstate commerce, e.g., farming of crops by individual farmers that, in the aggregate, substantially affect the national market for that crop.

To determine whether a regulation qualifies under the third category, commonly known as the "substantial effects doctrine", courts consider the following factors, although no one factor is determinative: 1) whether the regulated activity is economic or commercial in nature; 2) whether there is a jurisdictional nexus in the law that ties the regulated activity to interstate commerce; 3) whether Congressional findings support the contention that the regulated local activities substantially affect interstate commerce; and 4) whether there is a direct relationship between the regulated activity and the substantial effects on interstate commerce.

Two landmark U.S. Supreme Court cases effectively summarize contemporary substantial effects doctrine. In 1995, the U.S. Supreme Court held that the Gun Free School Zones Act of 1990 was an unconstitutional exercise of Congress's power under the Interstate Commerce Clause (*United States v Lopez*, 514 U.S. 549). The law made it a Federal crime to knowingly possess a firearm in a school zone. The Court concluded that the Act did not regulate channels or instrumentalities, so it examined the law under the substantial effects doctrine.

First, the Court found that the law was a purely criminal statute and therefore had nothing to do with regulating commerce. Second, the Act had no express jurisdictional nexus to link it to interstate commerce. In contrast, a civil version of the Act was limited to guns that have moved in interstate commerce. Third, the legislative history did not indicate that gun possession in a school zone substantially affected interstate commerce. Finally, the link between gun possession and any substantial effect on interstate commerce was too weak. The Court reasoned that if Congress were allowed to regulate violent crime through its interstate commerce powers, it could lead to Congressional regulation of all activities that relate to crime. The Court concluded, "Under these theories, [it] is difficult to perceive any limitation on federal power, even in areas...where States historically have been sovereign." After the Court issued its ruling, Congress amended the Act to include a jurisdictional nexus similar to its civil counterpart, limiting the Act to cover guns that have travelled in interstate commerce, and included findings that guns near schools affect interstate commerce.

In 2005, the Court upheld Congress's power to prohibit the local cultivation and use of marijuana under the Controlled Substances Act, despite a California law that legalized medicinal marijuana cultivation and use (*Gonzales v Raich*, 545 U.S. 1). Although the regulated activity was purely intrastate, the Court found that it fell within Congress's power under the Interstate Commerce Clause. First, the Court reasoned that marijuana cultivation and sale were a commercial activity. Also, the aggregate effects of purely intrastate personal marijuana consumption would affect price and market conditions of marijuana sales nationwide, since it was a banned substance with a very high demand. As it would be impossible to distinguish between the locally cultivated marijuana and other marijuana, any exemption for a large segment of the market, such as the State of California, would undermine the entire Controlled Substances Act. Therefore, the Court found that Congress acted reasonably and did not exceed its power under the Interstate Commerce Clause.

In 2009, Montana passed the "Montana Firearms Freedom Act" (which contains provisions, and legislative findings, that are virtually identical to those in the proposed Michigan Firearms Freedom Act). After the Montana law was enacted, the Federal government attempted to enforce its own regulations on locally manufactured guns, and a court challenge followed. The U.S. district court dismissed the action, in part because the complaint failed to state a claim. Relying on the U.S. Supreme Court's decision in *Gonzales v Raich* (the marijuana case described above), the district court concluded that Congress had the power to regulate the manufacture and sale of a locally manufactured rifle. The case then was appealed to the 9th Circuit Court of Appeals, which issued its decision on August 23, 2013. The Court of Appeals agreed with the district court, finding that the Montana Firearms Freedom Act was preempted by Federal law and invalid. The Court stated, "Congress could have rationally concluded that the manufacture of unlicensed firearms, even if initially sold only within the State of Montana, would in the aggregate substantially affect the interstate market for firearms."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would protect state rights in the face of a proposed increase in gun regulation at the Federal level. Recent gun control policy initiatives being pursued in Washington, D.C., threaten to erode state and individual rights, specifically those in the Second, Ninth, and Tenth Amendments to the U.S. Constitution (the right to keep and bear arms, the rights retained by the people, and the rights retained by the states and the people, respectively), and Article I, Section 6 of the State Constitution (the right to keep and bear arms for personal and State defense). The bill would send a strong message to the Federal government that it continues to excessively and inappropriately regulate matters of state concern.

Supporting Argument

The bill could encourage gun manufacturers to move production to Michigan, which would be economically beneficial to the State. For example, according to news sources, new gun regulations were recently passed in New York; easing Michigan's restrictions on local manufacturers would give manufacturers in New York an incentive to relocate to this State.

Opposing Argument

The bill is a premature reaction to legislation that has been only proposed, and not enacted, at the Federal level. The bill would run counter to public sentiment, in the wake of recent shootings, that stiffer gun control laws are needed. It would make it more difficult for local police to enforce existing gun laws, and could put law enforcement in the precarious position of breaking Federal laws in order to uphold State law.

Federal gun regulations exist to protect citizens through limiting gun accessibility and regulating ownership of handguns and semi-automatic weapons. By preventing the operation of these regulations through an exemption of firearms produced and sold in the State, the bill would burden the government's protection of Michigan's residents.

Furthermore, the bill could stifle discussion about gun violence and regulation at a time when Americans are asking Federal and state officials to develop smarter and more comprehensive gun laws.

Opposing Argument

The bill might not reflect a legal exercise of State power under the U.S. Constitution and could face a court challenge, especially in light of the 9th Circuit's decision invalidating the Montana law. The interstate commerce power is very broad, and challenges to Congress's power under it are often unsuccessful. A court challenge would result in costs that ultimately would be the responsibility of the State's taxpayers.

Response: The mere potential for a constitutional challenge should not discourage legislative action on this matter, and the 9th Circuit's decision is not binding on the 6th Circuit, which includes Michigan. Also, a court challenge could ultimately find its way to the U.S. Supreme Court and change the status quo regarding Congress's interstate commerce power and state sovereignty. That could result in a favorable decision with regard to state rights, such as clarification on the limits of the substantial effects doctrine or state sovereignty principles, and would be worth the cost.

Legislative Analyst: Glenn Steffens

FISCAL IMPACT

The bill would have no fiscal impact on local or State law enforcement agencies under State and Federal firearms laws as they currently stand. In the future, should the Federal government establish new or additional firearms regulations that differed from established State regulations, the bill's exemption from Federal regulations for firearms manufactured and remaining in Michigan could result in less required policing of firearms laws by State and local law enforcement agencies than otherwise would have been required.

Fiscal Analyst: Bruce Baker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.