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March 20, 2013

Opinion No. 13-24

Use of State Personnel or Resources to Enforce Federal Firearms Laws

QUESTION

Is House Bill 10/Senate Bill 40 of the 108th Tennessee General Assembly, 1st Sess. (2013) (hereinafter "HB10") constitutionally defensible?

OPINION

Yes, HB10 is defensible from a facial constitutional challenge.

ANALYSIS

HB10[1] would preclude the allocation of state or local funds "to the implementation, regulation or enforcement of any federal law, executive order, rule or regulation that becomes effective on or after January 1, 2013, that adversely affects a United States citizen's ability to lawfully possess or carry firearms in this state." HB10 § (a), 108th Tenn. Gen. Assembly, 1st Sess. (2013). HB10 also would restrict the allocation of state or local personnel or property for the same purposes "unless federal funding for such implementation, regulation or enforcement is provided to the state or political subdivision." *Id.* § (b). HB10 maintains the current statutory definition for "firearm" found at Tenn. Code Ann. § 39-11-106. *Id.* § (c).

This nation's federal system of government leaves the allocation of State funds and resources within the exclusive control of the government of the State of Tennessee. *See* Tenn. Const. art. II, § 24 (stating that "[n]o public money shall be expended [by the State] except pursuant to appropriations made by law"). *See also State v. Thompson*, 221 S.W. 491, 494 (Tenn. 1920) ("recognizing that "[t]he exclusive control of the expenditure of the public moneys is vested in the legislative branch of the government"); *Governor v. McEwen* 24 Tenn. (5 Hum.) 241, 284 (1844) (observing that "the Legislature of the State, in the absence of constitutional prohibition, is the proper guardian and protector of its funds, no matter for what purpose appropriated, and that, as such, it is its duty to watch over them, to see that they are properly secured, vested, and applied, as the law may direct . . . This power, on the part of the Legislature, is supreme, and, when exercised, can not be revised or called in question by any other power whatever."). Accordingly, it is within the province of the General Assembly to determine the level of state resources allocated to the enforcement of firearms regulations in Tennessee.

[1] This Office is unaware of any amendments to HB10 as of this date.

This Office is unaware of any current federal law seeking to directly utilize State personnel or resources to implement or enforce the provisions of any federal firearms laws, executive orders, rules, or regulations. As the United States Supreme Court recently reiterated, principles of federalism prohibit "federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) (citing *Printz v. United States*, 511 U.S. 898, 933 (1997) and *New York v. United States*, 505 U.S. 144, 174-75 (1992)). As the Court explained:

> "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York [v. United States]*, 505 U.S., at 178, 112 S.Ct. 2408. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

National Federation of Independent Business, 132 S.Ct. at 2602.

The United States Supreme Court's decision in *Printz v. United States* is particularly relevant to the question posed. In *Printz*, the Supreme Court considered the constitutionality of certain interim provisions of the Brady Handgun Violence Prevention Act's (hereinafter "Brady Act") amendments to the federal Gun Control Act of 1968, requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks to determine whether an individual's possession of a handgun was contrary to federal law. *Printz*, 511 U.S. at 902. The precise issue before the Court was the constitutionality of "the forced participation of the State's executive in the actual administration of a federal program." *Id.* at 918.

The Supreme Court found the Brady Act's requirement of State participation in implementing the Act unconstitutional, stating:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 935.

The Supreme Court has recognized, however, that Congress has the "ability to encourage a State to regulate in a particular way" and may "hold out incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. For example, "under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.'" *Id.* at 167 (quoting *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)). Additionally, "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* (citations omitted). As the Court has stated:

> By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

Id. at 168. *See also Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (determining that "the States are not compelled . . . to expend any state funds" in the enforcement of a federal regulatory program). *Cf. National Federation of Independent Business*, 132 S.Ct. at 2608 (holding that "while Congress may offer the States grants and require the States to comply with accompanying conditions, . . . the States must have a genuine choice whether to accept the offer").

HB10 also does not implicate Supremacy Clause concerns under the United States Constitution because HB10 would not impede individuals with federal authority from enforcing federal laws; rather, HB10 addresses the manner in which the State will allocate funds, personnel, and property in connection with enforcement of such laws. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating "where [the federal government] acts, and the state also acts on the same subject, 'the act of congress, . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.'") (footnote omitted); *Tennessee v. Davis*, 100 U.S. 257, 263 (1880) ("No State government can exclude [the Federal Government] from the exercise of any authority conferred upon it by the Constitution [or] obstruct its authorized officers against its will").

In the absence of specific factual situations or federal firearms laws to review, this Office cannot effectively anticipate situations in which "as applied" challenges may arise concerning HB10. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (detailing distinctions between "facial" and "as applied" constitutional challenges). Accordingly, any "as applied" challenges are outside the scope of this opinion.

In sum, HB10, which restricts State personnel and resources from being used to directly implement certain federal programs, is defensible from a facial constitutional challenge.

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