



# Federal Assault Weapons Ban: Legal Issues

**Vivian S. Chu**  
Legislative Attorney

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## Summary

In the 113<sup>th</sup> Congress, there has been renewed congressional interest in gun control legislation. On January 16, 2013, President Obama announced his support for legislation on gun control, including a ban on certain semiautomatic assault firearms and large capacity ammunition feeding devices. Senator Dianne Feinstein introduced S. 150, the Assault Weapons Ban of 2013, which would prohibit, subject to certain exceptions, the sale, transfer, possession, manufacturing, and importation of specifically named firearms and other firearms that have certain features, as well as the transfer and possession of large capacity ammunition feeding devices. Representative Carolyn McCarthy introduced a companion measure, H.R. 437, in the House of Representatives. S. 150 is similar to the Assault Weapons Ban of 1994 (P.L. 103-322) that was in effect through September 13, 2004.

The Assault Weapons Ban of 1994 was challenged in the courts for violating, among other things, the Equal Protection Clause and the Commerce Clause. This report reviews the disposition of these challenges. It also discusses Second Amendment jurisprudence in light of the Supreme Court's decision in *District of Columbia v. Heller* and how lower courts have evaluated state and local assault weapons bans post-*Heller*.

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## Introduction

At the outset of the 113<sup>th</sup> Congress, there has been renewed congressional interest in gun control legislation. Senator Dianne Feinstein introduced S. 150, the Assault Weapons Ban of 2013, which would prohibit, subject to certain exceptions, the sale, transfer, possession, manufacturing, and importation of specifically named firearms and other firearms that have certain features, as well as the transfer and possession of large capacity ammunition feeding devices. Representative Carolyn McCarthy introduced a companion measure, H.R. 437, in the House of Representatives. S. 150 is similar to the Assault Weapons Ban of 1994 that was in effect through September 13, 2004.<sup>1</sup> As Congress considers S. 150 and other gun control measures, it may be useful to review the 1994 law and its relation to federal firearms law, as well as the disposition of the legal challenges to the ban.

## Gun Control Act of 1968

Congress enacted the Gun Control Act of 1968<sup>2</sup> (GCA or Act) to “keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the states and their subdivisions in combating the increasing prevalence of crime in the United States.”<sup>3</sup> The GCA establishes a comprehensive statutory scheme that regulates the manufacture, sale, transfer, and possession of firearms and ammunition.<sup>4</sup>

In particular, the GCA establishes nine classes of individuals who are prohibited from shipping, transporting, possessing, or receiving firearms and ammunition.<sup>5</sup> The individuals targeted by this provision include (1) persons convicted of a crime punishable by a term of imprisonment exceeding one year; (2) fugitives from justice; (3) individuals who are unlawful users or addicts of any controlled substance; (4) persons legally determined to be mentally defective, or who have been committed to a mental institution; (5) aliens illegally or unlawfully in the United States, as well as those who have been admitted pursuant to a nonimmigrant visa; (6) individuals who have been discharged dishonorably from the Armed Forces; (7) persons who have renounced United States citizenship; (8) individuals subject to a pertinent court order; and, finally, (9) persons who have been convicted of a misdemeanor domestic violence offense.<sup>6</sup>

When the GCA was enacted, the transfer and sale of ammunition appear to have been regulated in the same manner as firearms. In 1986, Congress passed the Firearm Owners’ Protection Act<sup>7</sup>

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<sup>1</sup> P.L. 103-322 (1994).

<sup>2</sup> P.L. 90-618 (1968).

<sup>3</sup> S. Rept. No. 90-1097 (1968).

<sup>4</sup> 18 U.S.C. §§922 *et seq.*

<sup>5</sup> 18 U.S.C. §922(g).

<sup>6</sup> The GCA also prohibits the receipt, transport, or shipment of firearms or ammunition by individuals under felony indictment. 18 U.S.C. §922(n). Furthermore, the GCA places significant restrictions on the transfer to, and possession of, firearms by persons under the age of 18. *See* 18 U.S.C. §922(x).

<sup>7</sup> P.L. 99-308 (1986).

(FOPA), which repealed many of the regulations regarding ammunition. Consequently, the transfer and sale of ammunition is not as strictly regulated as the transfer and sale of firearms.<sup>8</sup>

## **Restrictions on Sales**

In order to effectuate the general prohibitions outlined above, the GCA imposes significant requirements on the transfer of firearms. Pursuant to the Act, any person who is “engaged in the business”<sup>9</sup> of importing, manufacturing, or dealing in firearms must apply and be approved as a Federal Firearms Licensee (FFL).<sup>10</sup> FFLs are subject to several requirements designed to ensure that a firearm is not transferred to an individual disqualified from possession under the Act. For example, FFLs must verify the identity of a transferee by examining a government-issued identification document bearing a photograph of the transferee, such as a driver’s license;<sup>11</sup> conduct a background check on the transferee using the National Instant Criminal Background Check System (NICS);<sup>12</sup> maintain records of the acquisition and disposition of firearms;<sup>13</sup> report multiple sales of handguns to the Attorney General;<sup>14</sup> respond to an official request for information contained in the licensee’s records within 24 hours of receipt;<sup>15</sup> and comply with all other relevant state and local regulations.<sup>16</sup>

Not all sellers of firearms are required to be approved FFLs, however. The GCA contains a specific exemption for any person who makes “occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.”<sup>17</sup> Although private sellers are not required to conduct a background check or maintain official records of transactions under federal law, they are prohibited from transferring a firearm if they know or have reasonable cause to believe that the transferee is a disqualified person.<sup>18</sup>

## **Restrictions on Interstate Transfers**

In addition to the requirements imposed upon the sale of firearms by FFLs and non-FFLs (or private individuals) generally, federal law also places significant limitations on the actual interstate transfer of weapons. Although FFLs have the ability to sell and ship firearms in interstate or foreign commerce, the GCA places several restrictions on the manner in which a transfer may occur. Specifically, while FFLs may make an in-person, over-the-counter sale of a

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<sup>8</sup> See CRS Report R42687, *Internet Firearm and Ammunition Sales*, by Vivian S. Chu.

<sup>9</sup> “Engaged in the business” means one who “devotes time, attention, and labor” to manufacturing, importing, or dealing firearms “as a regular course of trade or business with the principal objective of livelihood and profit.” 18 U.S.C. §§921(a)(21)-(22).

<sup>10</sup> 18 U.S.C. §922(a); §923.

<sup>11</sup> 18 U.S.C. §922(t)(1)(c).

<sup>12</sup> 18 U.S.C. §922(t).

<sup>13</sup> 18 U.S.C. §923(g)(1)(A).

<sup>14</sup> 18 U.S.C. §923(g)(3)(A).

<sup>15</sup> 18 U.S.C. §923(g)(7).

<sup>16</sup> 18 U.S.C. §§922(b)(2), 923(d).

<sup>17</sup> 18 U.S.C. §921(a)(21)(C).

<sup>18</sup> 18 U.S.C. §§922(d), (t).

long gun (i.e., shotgun or rifle) to any qualified individual regardless of her state of residence,<sup>19</sup> they may only sell a handgun to a person who is a resident of the state in which the dealer's premises are located.<sup>20</sup> Relatedly, FFLs are prohibited from shipping firearms, both handguns and long guns, directly to consumers in other states.<sup>21</sup> Instead, FFLs making a firearm sale to a non-resident must transfer the weapon to another FFL that is licensed in the transferee's state of residence and from whom the transferee may obtain the firearm after passing the required NICS background check.<sup>22</sup>

Firearm transfers between non-FFL sellers are also strictly regulated. Specifically, whereas FFLs may transfer a long gun to any individual regardless of her state of residence in an over-the-counter sale, the GCA specifically bars a non-FFL from directly selling or transferring any firearm to any person who is not a resident of the state in which the non-FFL resides.<sup>23</sup> Instead, interstate transactions between non-FFLs result in the transferring party shipping the firearm to an FFL located in the transferee's state of residence.

## **The 1994 Assault Weapons Ban**

Congress enacted, as part of the Violent Crime Control and Law Enforcement Act of 1994, the Public Safety and Recreational Firearms Act (referred to as the "Assault Weapons Ban"), which established a 10-year prohibition on the manufacture, transfer, or possession of "semiautomatic assault weapons," as defined by the act, as well as large capacity ammunition feeding devices.<sup>24</sup> The act contained several exceptions, including a "grandfather clause" allowing for the possession of such items that were otherwise lawfully possessed on the date of enactment. The Assault Weapons Ban expired on September 13, 2004.<sup>25</sup>

Generally speaking, an "assault weapon" is considered to be a military style weapon capable of providing by a selector switch either semiautomatic—that is, the firearm discharges one round, then loads a new round, each time the trigger is pulled until the magazine is exhausted—or a fully automatic firearm—that is, continuous discharge of rounds while the trigger is depressed until all rounds are discharged. Under federal law, a fully automatic firearm falls under the definition

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<sup>19</sup> 18 U.S.C. §922(b)(3)(A).

<sup>20</sup> 18 U.S.C. §922(b)(3).

<sup>21</sup> 18 U.S.C. §922(a)(2). Regarding the mailing of firearms, federal law prohibits the shipment of any firearm other than a shotgun or rifle via the United States Postal Service, except for firearms shipped for official law enforcement purposes. 18 U.S.C. §1715. Firearms, including handguns, may be shipped by common carrier (e.g., FedEx or UPS) upon disclosure and subject to the restrictions discussed above. *See* 18 U.S.C. §922(a)(2)(A); §922(3); 27 C.F.R. §178.31.

<sup>22</sup> 18 U.S.C. §922(b)(3); §922(t).

<sup>23</sup> 18 U.S.C. §922(a)(3); §922(a)(5); §922(b)(3).

<sup>24</sup> P.L. 103-322, Title XI (1994). The 1994 ban marked only the second time that Congress has prohibited the manufacture of specific firearms. The Undetectable Firearms Act of 1988 (P.L. 100-649 (1988)) bans the manufacture, importation, possession, transfer, or receipt of firearms that are undetectable by metal detectors at security checkpoints at certain locations. 18 U.S.C. §922(p).

<sup>25</sup> Prior to its expiration in 2004, several bills were introduced that would strike the expiration date and impose a ban in the importation on large capacity ammunition feeding devices, subject to the same exceptions, or make other amendments to the 1994 law that was in effect. *See* S. 1034, Assault Weapons Reauthorization Act of 2003 (108<sup>th</sup> Cong. 1<sup>st</sup> sess.); H.R. 2038, Assault Weapons Ban and Law Enforcement Protection Act of 2003 (108<sup>th</sup> Cong., 1<sup>st</sup> sess.), and S. 1431, the Assault Weapons Ban and Law Enforcement Protection Act, (108<sup>th</sup> Cong., 1<sup>st</sup> sess.).

“machinegun,” which is defined as “any weapon that shoots ... automatically more than one shot, without manual reloading, by a single function of the trigger.”<sup>26</sup> Semiautomatic firearms, including semiautomatic assault weapons, are “produced with semiautomatic fire capability only.”<sup>27</sup>

## Banned Weapons and Exemptions

The 1994 act made it “unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.”<sup>28</sup> Weapons banned were identified either by specific make or model (including copies or duplicates thereof, in any caliber), or by specific characteristics that slightly varied according to whether the weapon was a pistol, rifle, or shotgun.<sup>29</sup>

For example, a semiautomatic rifle fell under the term “semiautomatic assault weapon” if it had the ability to accept a detachable magazine and possessed two of the following five features: (1) a folding or telescopic stock; (2) a pistol grip that protrudes conspicuously beneath the action of the weapon; (3) a bayonet mount; (4) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; or (5) a grenade launcher. See Former 18 U.S.C. §921(a)(30)(B).

For the feature-based definition semiautomatic pistols and semiautomatic shotguns that would be included under the term “semiautomatic assault weapon.” See Former 18 U.S.C. §§921(a)(30)(C), (D).

The act also made it unlawful to transfer and possess large capacity ammunition feeding devices (LCAFD).<sup>30</sup> An LCAFD was defined as “any magazine, belt, drum, feed strip, or similar device manufactured after the date [of the act] that has the capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.”<sup>31</sup> LCAFDs manufactured after the date of enactment were required to have a serial number that “clearly shows” that they were manufactured after such date, as well as other markings prescribed by regulation.<sup>32</sup>

The 1994 act included a grandfather clause and therefore allowed for the transfer of any “semiautomatic assault weapon” or LCAFD that was otherwise lawfully possessed on the date of

<sup>26</sup> See 26 U.S.C. §5845. Since 1934, the National Firearms Act has regulated the traffic in, and possession of, machineguns, other weapons and destructive devices. 26 U.S.C. §§5801 *et seq.*

<sup>27</sup> Public Safety and Recreational Firearms Use Protection Act, Hearing Before the H. Comm. on the Judiciary, 103d Cong. at 18 (H. Rept. 103-489).

<sup>28</sup> Former 18 U.S.C. §922(v).

<sup>29</sup> Former 18 U.S.C. §921(a)(30). Specific models included: the Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models); Action Arms Israel Military Industries UZI and Galil; Beretta Ar70 (SC-70); Colt AR-15; Fabrique National FN/FAL, FN/LAR, and FNC; Steyr AUG; INTRATEC TEC-9 TEC-DC9 and TEC-22; and revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12. Former 18 U.S.C. §921(a)(30)(A).

<sup>30</sup> Former 18 U.S.C. §922(w).

<sup>31</sup> Former 18 U.S.C. §921(31). The term did not include an attached tubular device designed to accept and capable of operating only with .22 caliber rimfire ammunition.

<sup>32</sup> 18 U.S.C. §923(i) (as amended by P.L. 103-322). The Bureau of Alcohol, Tobacco, Firearms and Explosives issued regulations requiring that LCAFDs manufactured or imported under the act be identified with a serial number, and domestically manufactured devices bear the name, city, and state of the manufacturer. Imported devices were required to bear the manufacturer and country of origin as well as the name of the importer. Finally, LCAFDs manufactured after September 13, 1994 to be exempted by the ban were required to be marked “RESTRICTED LAW ENFORCEMENT/GOVERNMENT USE ONLY,” or, in the case of devices manufactured for export (since July 5, 1995) “FOR EXPORT ONLY.” 27 C.F.R. §478.92(c).

enactment.<sup>33</sup> Additionally, Congress exempted roughly 650 types or models of firearms, such as various models of Browning, Remington, and Berettas, deemed mainly suitable for target practice, match competition, hunting, and similar sporting purposes.<sup>34</sup> This list was not exhaustive and the act provided that the absence of a firearm from the exempted list did not mean it was banned unless it met the definition of “semiautomatic assault weapon.” The act also exempted any firearm that (1) is manually operated by bolt, pump, lever, or slide action; (2) has been rendered permanently inoperable; or (3) is an antique firearm. The act also did not apply to any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition nor any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.<sup>35</sup>

Furthermore, there were exemptions that permitted semiautomatic assault weapons and LCAFDs to be manufactured for, transferred to, and possessed by law enforcement and for authorized testing or experimentation purposes. The other exemptions included a transfer for purposes of federal security pursuant to the Atomic Energy Act, as well as possession by retired law enforcement officers who are not otherwise a prohibited possessor under law.<sup>36</sup>

### **Importation of Assault Weapons Under 18 U.S.C. Section 925(d)(3)**

The 1994 Assault Weapons Ban did not address the importation of semiautomatic assault weapons, rather Section 925(d)(3) of the GCA provides that the Attorney General<sup>37</sup> shall authorize a firearm or ammunition to be imported or brought into the United States if it does not meet the definition of a firearm under the National Firearms Act,<sup>38</sup> and is “generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military rifles.” Notably, the statute does not specifically describe or list any criteria that the Attorney General is required to take into consideration when determining what constitutes “suitable for or readily adaptable to sporting purposes.” This provision permitting the importation of firearms is generally known as “the sporting purposes test,” and its implementation appears to be left to the Attorney General’s discretion.

Prior to the implementation of the 1994 Assault Weapons Ban, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) identified several semiautomatic assault rifles that it determined did not meet the sporting suitability standard of Section 925(d)(3). On July 6, 1989, ATF prohibited importation of these rifles.<sup>39</sup> This decision was, in part, based on ATF’s finding that “these rifles have certain characteristics that are common to modern military assault rifles and that distinguish them from traditional sporting rifles.”<sup>40</sup> Subsequent to this decision, domestic

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<sup>33</sup> Former 18 U.S.C. §§922(v)(2); (w)(2).

<sup>34</sup> Former 18 U.S.C. §922(v)(3).

<sup>35</sup> Former 18 U.S.C. §922(v)(3)(B)-(D).

<sup>36</sup> Former 18 U.S.C. §922(4).

<sup>37</sup> It should be noted that the Homeland Security Act of 2002 transferred the Bureau of Alcohol, Tobacco, Firearms and Explosives to the Department of Justice from the Department of Treasury. P.L. 107-296, Title XI, Subtitle B, §1111 (2002).

<sup>38</sup> 26 U.S.C. §5845(a).

<sup>39</sup> See 1989 Study on ATF’s website; see also Bureau of Alcohol, Tobacco, Firearms and Explosives, “Federal Firearms Reference Guide,” General Information Question 20 at 167-68 (2005).

<sup>40</sup> See Federal Firearms Reference Guide, *supra* note 39.



manufacturing of semiautomatic assault weapons reportedly increased, and foreign manufacturers reportedly “circumvented the strictures of the [1989] ban [under President Bush] by reconfiguring their weapons and shipping them out under different models,” as well as attempting to give the weapons a sporting appearance.<sup>41</sup>

The enactment of the 1994 Assault Weapons Ban addressed these developments to a certain degree; however, ATF subsequently determined in 1997 that certain semiautomatic assault rifles could no longer be imported even though they were permitted to be imported under the 1989 “sporting purposes test” because they had been modified to remove all of their military features other than the ability to accept a detachable magazine. Accordingly, on April 6, 1998, ATF prohibited the importation of 56 such rifles, determining that they did not meet the “sporting purposes test.”

### **S. 150 and H.R. 437 Assault Weapons Ban of 2013**

S. 150, the Assault Weapons Ban of 2013, was introduced by Senator Dianne Feinstein in the 113<sup>th</sup> Congress. A companion measure, H.R. 437, was introduced by Representative Carolyn McCarthy in the House of Representatives. S. 150 would establish a regulatory scheme for “semiautomatic assault weapons” similar to the 1994 law with a few differences. First, it would ban approximately 157 specifically named firearms and any copies, duplicates, or variants thereof. It differs from the 1994 law because a semiautomatic firearm would be considered a “semiautomatic assault weapon” if it accepts a detachable magazine and has any one of five features (compared to two of five features in the 1994 law). The features listed in S. 150 are slightly different than those listed in the 1994 law. The bill also further provides definitions for each of the features listed.

For example, under S. 150, a semiautomatic rifle would fall under the term “semiautomatic assault weapon” if it has the capacity to accept a detachable magazine and any one of the following: (1) a pistol grip; (2) a forward grip; (3) a folding, telescoping, or detachable scope; (4) a grenade launcher or rocket launcher; (5) a barrel shroud; or (6) a threaded barrel.

The bill further defines “semiautomatic assault weapon” as any semiautomatic rifle that has a fixed magazine with the capacity to accept more than 10 rounds, except for an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

With respect to rifles, it also includes under the definition of “semiautomatic assault weapon” any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun.

The bill also provides altered definitions for the semiautomatic pistols and shotguns that would fall under the term “semiautomatic assault weapon.”

Second, the bill would prohibit the importation of—in addition to the sale, manufacture, transfer, and possession of—such weapons and LCAFDs. The bill’s exemptions are similar to the 1994 law; however, it would exempt more hunting and sporting rifles and shotguns by make and model (approximately 2,258), and prohibit the transfer of grandfathered semiautomatic assault weapons to other private individuals unless a background check is conducted through an FFL.

<sup>41</sup> See Scott Dailard, “The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills,” 20 J. Legis. 19, 33 (1994).

Other differences from the 1994 law include an absence of a sunset provision; requirements for safe storage of semiautomatic assault weapons by any private persons; and a requirement for the Attorney General to establish, maintain, and annually report to Congress the make, model, and if available, the date of manufacture of any semiautomatic assault weapon which the Attorney General is made aware has been used in relation to a crime under federal or state law.

## Legal Challenges to the 1994 Assault Weapons Ban

The Assault Weapons Ban of 1994 was unsuccessfully challenged as violating several constitutional provisions. While arguments that the act constituted an impermissible Bill of Attainder,<sup>42</sup> is unconstitutionally vague,<sup>43</sup> and is contrary to the Ninth Amendment<sup>44</sup> were readily dismissed by the courts, challenges to the ban based on the Commerce Clause and the Equal Protection Clause received more measured consideration.

### Commerce Clause

The 1994 Assault Weapons Ban was challenged on the basis that it violated the Commerce Clause.<sup>45</sup> The ban was evaluated under the factors delineated by the Supreme Court in *United States v. Lopez*,<sup>46</sup> which held that Congress had exceeded its constitutional authority under the Commerce Clause by passing the Gun Free School Zone Act of 1990<sup>47</sup> (School Zone Act). The Court in *Lopez* clarified the judiciary's traditional approach to Commerce Clause analysis and identified three broad categories of activity that Congress may regulate under its commerce power. These are (1) the channels of commerce; (2) the instrumentalities of commerce in interstate commerce, or persons or things in interstate commerce; and (3) activities which "substantially affect" interstate commerce.<sup>48</sup>

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<sup>42</sup> See *Navegar, Inc. v. United States*, 192 F.3d 1050, 1066-68 (D.C. Cir. 1999), rehearing *en banc* denied, 200 F.3d, 868 (D.C. Cir. 2000), *cert. denied* 531 U.S. 816 (2000) (the assault weapons ban does not constitute a Bill of Attainder as it does not impose a legislative punishment, does not exhibit a purely punitive purpose, and does not manifest a congressional intent to punish specific individuals, but rather specifies conduct from which individuals must refrain in order to avoid punishment).

<sup>43</sup> See *United States v. Starr*, 945 F.Supp. 257, 259 (M.D. Ga. 1996), *aff'd* 144 F.3d 56 (11<sup>th</sup> Cir. 1998) (assault weapons ban was not unconstitutionally vague because it defines "a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" and court had "no difficulty finding that an ordinary person" would conclude that the provisions of the federal law applied to the firearms possessed by the defendant). The district court also cited *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952), which stated: "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

<sup>44</sup> See *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9<sup>th</sup> Cir. 1996) (The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Joining other circuit court decisions, the Ninth Circuit concluded that the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation" and thus does not encompass an unenumerated, fundamental individual right to bear firearms.).

<sup>45</sup> U.S. Const., art. I, §8, cl. 3.

<sup>46</sup> 514 U.S. 549 (1995).

<sup>47</sup> P.L. 101-647 (1990). The act had made it a federal offense for "any individual to knowingly possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q) (1988 ed. Supp. V).

<sup>48</sup> *Lopez*, 514 U.S. at 558-59.

In examining the School Zone Act, the Court concluded that possession of a gun in a school zone was neither a regulation of the channels nor the instrumentalities of interstate commerce.<sup>49</sup> Because the conduct regulated was considered to be a wholly intrastate activity, the Court concluded that Congress could only regulate if it fell within the third category and “substantially affect[ed]” interstate commerce. The Court indicated that intrastate activities have been, and could be, regulated by Congress where the activities “arise out of or are connected with a commercial transaction” and are “part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>50</sup> With respect to the School Zone Act, the Court declared that the intrastate activity was not a part of the larger firearms regulatory scheme.<sup>51</sup> Moreover, the Court found it significant that the act did not require that interstate commerce be affected, such as by requiring the gun to be transported in interstate commerce.<sup>52</sup>

Commerce Clause challenges to the 1994 Assault Weapons Ban were evaluated under the framework provided by the *Lopez* decision, and lower courts readily determined that the act met minimum constitutional requirements under the Commerce Clause. For example, in *Navegar, Inc. v. United States*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) addressed the question of whether the act fell within one of the three categories of activity identified in *Lopez*.<sup>53</sup> Like the Court in *Lopez*, the D.C. Circuit determined that it was not required to analyze the act under the first or second categories because the “[it] readily falls within category 3 as a regulation of activities having a substantial [e]ffect on interstate commerce.”<sup>54</sup> The court analyzed individually the act’s prohibitions on manufacture, transfer, and possession.

Regarding the manufacturing prohibition, the D.C. Circuit declared that “[t]he Supreme Court has repeatedly held that the manufacture of goods which may ultimately never leave the state can still be activity which substantially affects interstate commerce.”<sup>55</sup> Regarding the prohibition on transfers, the court similarly remarked that “the Supreme Court precedent makes clear that the transfer of goods, even as part of an intrastate transaction, can be an activity which substantially affects interstate commerce.”<sup>56</sup> Based on these maxims, the court held that “it is not even arguable

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<sup>49</sup> *Id.* at 559-60.

<sup>50</sup> *Id.* at 561 (referencing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 561-62. The Court found it significant that the act “contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.” A jurisdictional element would also “limit [the statute’s] reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.” *Id.* at 562. In 1996, Congress passed a new version of the Gun Free School Zone Act (P.L. 104-208) that added a jurisdictional hook. The provision reads: “It shall be unlawful for any individual to knowingly possess a firearm that has moved in or otherwise affects interstate or foreign commerce at ... a school zone.”

<sup>53</sup> 192 F.3d 1050, 1066-68 (D.C. Cir. 1999), rehearing *en banc* denied, 200 F.3d, 868 (D.C. Cir. 2000), *cert. denied* 531 U.S. 816 (2000).

<sup>54</sup> *Id.* at 1055.

<sup>55</sup> *Id.* at 1057 (citing *United States v. Darby*, 312 U.S. 100, 118-19 (1941); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

<sup>56</sup> *Id.* at 1058 (citing *Lopez*, 514 U.S. at 560-61 (citing *Wickard v. Filburn*, 317 U.S. 11, 127-28 (1942) (noting that farmer’s home consumption of wheat substantially affected interstate commerce and that farmer’s selling of homegrown wheat and local marketing substantially affects interstate commerce)).

that the manufacture and transfer of ‘semiautomatic assault weapons’ for a national market cannot be regulated as activity substantially affecting interstate commerce.”<sup>57</sup>

However, with respect to the possession of a semiautomatic assault weapon, the court in *Navegar* noted that the *Lopez* decision raised a question of whether “mere possession” can substantially affect interstate commerce. The court proceeded to analyze the purposes behind the act to determine whether “it was aimed at regulating activities which substantially affect interstate commerce.”<sup>58</sup> Analyzing the congressional hearings, the court determined that the ban on possession was “conceived to control and restrict the interstate commerce in ‘semiautomatic assault weapons,’” and that the “ban on possession is a measure intended to reduce the demand for such weapons.”<sup>59</sup> The D.C. Circuit stated that the ban on possession was “necessary to allow law enforcement to effectively regulate the manufacture and transfers where the product comes to rest, in the possession of the receiver.”<sup>60</sup> Based on these factors, the court held that the “purpose of the ban on possession has an ‘evident commercial nexus.’”<sup>61</sup>

Although the Supreme Court further clarified its Commerce Clause jurisprudence in later decisions, such as *Gonzales v. Raich*,<sup>62</sup> it appears that the Commerce Clause analysis applicable to the ability of Congress to regulate or ban certain semiautomatic assault weapons would not be fundamentally altered by these later developments.

## Equal Protection Clause

The Assault Weapons Ban of 1994 was also challenged on Equal Protection Clause grounds, with opponents arguing that it prohibited weapons that were the functional equivalents of weapons exempted under the Act, and because the prohibition of other semiautomatic assault weapons based upon their characteristics served no legitimate governmental interest.

A court must employ one of the three levels of judicial scrutiny<sup>63</sup> in an Equal Protection Clause analysis to determine whether a law negatively impacts a suspect class or a fundamental right. If there is such an impact, the law is subjected to strict scrutiny, requiring the government to prove

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<sup>57</sup> *Id.*

<sup>58</sup> To determine whether an activity that does not have an clear connection with interstate commerce, the Court in *Lopez* stated that it would consider legislative findings and even congressional committee findings to determine if there was a rational basis for congressional action. *Lopez*, 514 U.S. at 562.

<sup>59</sup> *Navegar*, 192 F.3d at 1058-59 (citing other cases such as *United States v. Rybar*, 103 F.3d 273 (3d. Cir 1996) (holding that the Firearm Owners Protection Act of 1986 targets the mere intrastate possession of machine guns as a “demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce of machine guns”); *United States v. Rambo*, 74 F.3d 948 (9<sup>th</sup> Cir. 1995) (holding that the ban on possession is in effect “an attempt to control the interstate market ... by creating criminal liability for the demand-side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire mere possession” [citation omitted])).

<sup>60</sup> *Id.* at 1059.

<sup>61</sup> *Id.* (citing *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

<sup>62</sup> 545 U.S. 1 (2005) (holding that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law).

<sup>63</sup> Generally there are three levels of judicial scrutiny. First, strict scrutiny, the most rigorous, requires a statute to be narrowly tailored to serve a compelling state interest. Second, intermediate scrutiny, requires a statute to further a government interest in a way that is substantially related to that interest. Third, the rational basis standard merely requires the statute to be rationally related to a legitimate government function. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* §§ 6.5, 10.1.2 (3d ed. 2006).

that the law is necessary to satisfy a compelling governmental interest.<sup>64</sup> If a law does not affect a suspect class or a fundamental right, the court engages in a “rational basis” review, requiring only that the law be rationally related to a legitimate governmental interest.<sup>65</sup>

Applying these standards, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) held that the provisions of the 1994 law did not violate the Equal Protection Clause. In *Olympic Arms v. Buckles*, the Sixth Circuit first noted that the lower court had held that the plaintiffs’ claim was non-cognizable, given that the “Equal Protection Clause protects against inappropriate classifications of people, rather than things.”<sup>66</sup> However, the court stated that other rulings have held that since persons may have an interest in things, their classification may be challenged on equal protection grounds.<sup>67</sup> Rather than resolve this disparity on the scope of the Equal Protection Clause, the Sixth Circuit went on to declare that “even if we were to assume that equal protection analysis is appropriate here, we would have to conclude that the semi-automatic assault weapons ban meets all equal protection requirements.”<sup>68</sup>

The court first addressed the argument “that variations in the specificity of weapon descriptions and lack of common characteristics in the list of weapons outlawed destroy the constitutional legitimacy of the 1994 Act.”<sup>69</sup> The Sixth Circuit found this argument to be without merit for several reasons. First, the court found it significant that the list of prohibited firearms was developed to target weapons commonly used in the commission of violent crimes. Additionally, the court found that the prohibition on copies or duplicates of listed firearms was incorporated to prevent manufacturers from circumventing the act’s terms “by simply changing the name of the specified weapons.”<sup>70</sup> Finally, the court noted that the list of exempted weapons was based on the determination that they were particularly suited to sporting purposes. Taking these factors together, the Sixth Circuit held that it was “entirely rational for Congress ... to choose to ban those weapons commonly used for criminal purposes and to exempt those weapons commonly used for recreational purposes.”<sup>71</sup> The fact that many of the protected weapons were somewhat similar in function to those that were banned does not destroy the rationality of the congressional choice.<sup>72</sup>

The Sixth Circuit next addressed whether prohibiting weapons based upon having two or more qualifying features was irrational, given that the act allowed a weapon to possess one such feature and that the individual features did not operate in tandem with one another. The court also rejected this argument, explaining that each characteristic served to make the weapon “potentially

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<sup>64</sup> See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985).

<sup>65</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 319 (1993). Intermediate scrutiny has also been applied in equal protection analysis. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny when declaring unconstitutional an Oklahoma law that allowed women to buy low alcohol, 3.2 percent beer, at age 18, but men could not buy such beer until age 21).

<sup>66</sup> *Olympic Arms v. Buckles*, 301 F.3d 384, 388 (6<sup>th</sup> Cir. 2002) (referring to *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061 (E.D. Mich. 2000)).

<sup>67</sup> *Id.* at 388.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 389.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 390.

<sup>72</sup> *Id.* The court in *Olympic Arms* further stated: “A classification does not fail because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’” (citing *Dandridge v. Williams*, 397 U.S. 471, 488 (1970)).

more dangerous,” and were not “commonly used on weapons designed solely for hunting.”<sup>73</sup> The court also explained that “Congress could have easily determined that the greater the number of dangerous add-ons on a semi-automatic weapon, the greater the likelihood that the weapon may be used for dangerous purposes.”<sup>74</sup> Accordingly, the Sixth Circuit concluded that the plaintiffs had “failed to meet the heavy burden required to show that the 1994 Act violates equal protection.”<sup>75</sup>

Notably, the Sixth Circuit reviewed the equal protection claim under the rational basis test finding that “precedent does not recognize a fundamental right to individual weapon ownership or manufacture, and the plaintiffs, gun retailers and owners, are not a suspect class.”<sup>76</sup> While the latter is still accurate, precedent regarding a fundamental right to individual weapon ownership has changed with the Supreme Court’s decision in *District of Columbia v. Heller*.<sup>77</sup> As discussed below, the full nature of the right guaranteed by the Second Amendment has yet to be determined by the courts. Therefore, a court considering an equal protection claim in the context of a semiautomatic assault weapons ban could conceivably determine that it is necessary to first address the fundamental issue of whether assault weapons are protected by the Second Amendment.

## Second Amendment Consideration

If enacted, an assault weapons ban could also be challenged on Second Amendment grounds in light of the Supreme Court’s decision in *District of Columbia v. Heller*. In *Heller*, the Court recognized that the Second Amendment protects an individual right to bear arms for lawful purposes such as self-defense within the home.<sup>78</sup> The decision was not an exhaustive analysis of the full scope of the right guaranteed by the Second Amendment,<sup>79</sup> but the Court stated that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”<sup>80</sup> One limitation upon the Second Amendment the Court addressed is that it “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”<sup>81</sup> The Court found that its prior 1939 decision in *United States v. Miller*<sup>82</sup> supported this conclusion. Relying on *Miller*, the Court acknowledged that this limitation is supported by the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” and that the “sorts of weapons protected were those ‘in common use at the time’” because those capable of service in the militia at the time of ratification would have brought “the sorts of lawful weapons that they possessed at home to militia duty.”<sup>83</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 389.

<sup>77</sup> 554 U.S. 570 (2008).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 626.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *United States v. Miller*, 307 U.S. 174 (1939) (holding that the Second Amendment did not protect an individual’s right to transport an unregistered short-barreled shotgun in interstate commerce).

<sup>83</sup> *Heller*, 540 U.S. at 627. The Court recognized that “it may be true that no amount of small arms could be useful (continued...)”

Since *Heller*, cases that have evaluated the constitutionality of state assault weapons bans have generally found them to be valid under the Second Amendment. In 2009, the California Court of Appeals decided *People v. James*, which held that possession of an assault weapon in California remains unlawful and is not protected by the Second Amendment.<sup>84</sup> California's Roberti-Roos Assault Weapons Control Act of 1989, like the 1994 federal assault weapons ban, defines "assault weapons" by providing a list of proscribed weapons and through characteristics "which render these weapons more dangerous than ordinary weapons typically possessed by law-abiding citizens for lawful purposes."<sup>85</sup> Relying on *Heller*'s brief discussion that the Second Amendment does not protect a military weapon, such as an M16 rifle, the court in *James* declared that the prohibited weapons on the state's list "are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather these are weapons of war."<sup>86</sup> It concluded that the relevant portion of the act did not prohibit conduct protected by the Second Amendment as defined in *Heller* and therefore the state was within its ability to prohibit the types of dangerous and unusual weapons an individual can use.<sup>87</sup>

The District of Columbia amended its firearms regulations after the *Heller* decision and enacted new firearms regulations including an assault weapons ban that is similar to California's. In 2011, the D.C. Circuit issued its decision in *Heller v. District of Columbia (Heller II)* which upheld the District's ban on certain semiautomatic rifles and LCAFDs.<sup>88</sup> Under the "common use" factor delineated in *Heller*, the D.C. Circuit acknowledged that "it was clear enough in the record that certain semi-automatic rifles and magazines holding more than 10 rounds are indeed in 'common use.'"<sup>89</sup> However, the court could not conclude definitely whether the weapons are "commonly used or are useful specifically for self-defense or hunting" such that they "meaningfully affect the right to keep and bear arms."<sup>90</sup> Therefore, the court went on to analyze the bans under a two-stepped approach to determine their validity under the Second Amendment.<sup>91</sup>

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(...continued)

against modern-day bombers and tanks." However, it noted that modern day developments "cannot change our interpretation of the right." *Id.*

<sup>84</sup> *People v. James*, 94 Cal. Rptr. 3d 576 (Cal. Ct. App. 2009), *rev. denied* by *People v. James*, 2009 Cal. LEXIS 9895 (Cal. Sept. 17, 2009), *cert. denied* *James v. Cal.* 2010 U.S. LEXIS 1284 (U.S., Feb. 22, 2010). Notably, a petitioner challenging an assault weapons ban could make an argument that civilian versions of military weapons, like the AR-15, should be differentiated from military weapons, like the M16, which the Supreme Court does not consider protected under the Second Amendment. However, the Supreme Court's denial of certiorari in the *James* case could indicate that the Court does not distinguish between military and civilian versions of military style weapons, considering both beyond the scope of the Second Amendment's guarantee.

<sup>85</sup> *James*, 94 Cal. Rptr. 3d at 579-580 (citing Cal. Penal Code §§ 12276, 12276.1).

<sup>86</sup> *Id.* at 585-86 (quoting Cal. Penal Code § 122275.5(a) (West 2006)).

<sup>87</sup> *James*, 94 Cal. Rptr. 3d at 586 (citing the Cal. Penal Code §§ 12280(b)-(c) which imposes penalties for possession of assault weapon or .50 BMG rifle).

<sup>88</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011) (affirming in part and vacating in part the lower court's decision, remanding to the lower court the petitioner's challenge to the District's "novel registration requirements").

<sup>89</sup> *Id.* at 1261.

<sup>90</sup> *Id.*

<sup>91</sup> The D.C. Circuit adopted from other circuits a two-step approach to determining the constitutionality of the gun laws at issue. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). This D.C. Circuit indicated that this two-step approach is taken if the challenged regulation is not one that the *Heller* decision identified as a "longstanding" regulation that is "presumptively lawful." *Id.* (citing *Heller*, 554 U.S. at 626-27, n.26).

Under this approach, the court first asks whether a particular provision impinges upon a right protected by the Second Amendment as historically understood. If it does, then it goes on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.<sup>92</sup> Assuming that the ban impinged on the right protected under *Heller* (i.e., to possess certain arms for lawful purposes such as individual self-defense or hunting), the court found that such regulations should be reviewed under intermediate scrutiny because the prohibition “does not effectively disarm individuals or substantially affect their ability to defend themselves.”<sup>93</sup> Under intermediate scrutiny, the government has the burden of showing that there is a substantial relationship or reasonable “fit” between the regulation and the important governmental interest “in protecting police officers and controlling crime.”<sup>94</sup> The D.C. Circuit held that the District carried this burden and that the evidence demonstrated that a ban on both semiautomatic assault rifles and LCAFDs “is likely to promote the Government’s interest in crime control in the densely populated urban area that is the District of Columbia.”<sup>95</sup>

In 2012, the Supreme Court of Illinois decided *Wilson v. Cook County*, a case that evaluated the constitutionality of the Blair Holt Assault Weapons Ban of Cook County, a long-standing ordinance that was amended to similarly reflect provisions of the 1994 Assault Weapons Ban.<sup>96</sup> The plaintiffs argued that the ordinance violates the Due Process and Equal Protection Clauses of the U.S. Constitution as well as the Second Amendment. Regarding the due process claim, the court concluded that the ordinance is not unconstitutionally vague such that it “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.”<sup>97</sup> The court also dismissed the plaintiff’s equal protection claim, finding that the “[o]rdinance does not arbitrarily differentiate between two owners with similar firearms because the banned firearms are either listed, a copy or duplicate, or fall under the characteristics-based test.”<sup>98</sup> With respect to the Second Amendment claim, the court indicated that it would follow the two-step approach similar to the *Heller II* court. While the court acknowledged that the ordinance banned only a subset of weapons with particular characteristics similar to other jurisdictions, it found that it could not “conclusively say ... that assault weapons as defined in the [o]rdinance categorically fall outside the scope of the rights protected by the [S]econd [A]mendment.”<sup>99</sup> The court ultimately remanded the Second Amendment claim to the trial court for further proceedings, because unlike the *James* and *Heller II* decisions, the county did not have an opportunity to present evidence to justify the nexus between the ordinance and the governmental interest it seeks to protect.<sup>100</sup>

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<sup>92</sup> *Heller II*, 670 F.3d at 1252.

<sup>93</sup> *Id.* at 1261-62.

<sup>94</sup> *Id.* at 1262.

<sup>95</sup> *Id.* at 1263.

<sup>96</sup> *Wilson v. Cook County*, 968 N.E.2d 641 (Ill. 2012).

<sup>97</sup> *Id.* at 650-53.

<sup>98</sup> *Id.* at 658.

<sup>99</sup> *Id.* at 655.

<sup>100</sup> *Id.* at 657. (“Without a national uniform definition of assault weapons from which to judge these weapons, it cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this [o]rdinance are all well suited for self-defense or support or would be outweighed completely by the collateral damage resulting from their use, making them ‘dangerous and unusual’ as articulated in *Heller*. This question requires us to engage in an empirical inquiry beyond the scope of the record and beyond the scope of judicial notice about the nature of weapons that are banned under this [o]rdinance and the dangers of these particular weapons.” *Id.* at 656.).



These cases demonstrate that courts evaluating various assault weapons bans, and to a limited extent LCAFD bans, have looked to the *Heller* decision and the general framework that has developed in the lower courts for analyzing claims under the Second Amendment. Based on the *Heller* decision where the Supreme Court indicated that certain weapons fall outside the protection of the Second Amendment, lower courts have examined whether the prohibited weapons are considered in “common use” or “commonly used” for lawful purposes or “dangerous and unusual.” It is uncertain whether, to be protected under the Second Amendment, the weapon must be in “common use” by the people and if so, must it be in “common use” for self-defense or hunting, or what constitutes “dangerous and unusual.” *Heller* could arguably be taken to indicate that if the prohibited weapons do not meet these criteria then they are not protected by the Second Amendment, in which case no heightened judicial scrutiny would be applied.

Courts also could evaluate such measures under the two-step approach laid out by the lower courts. This asks whether a ban on certain weapons and firearm accessories imposes a burden on conduct falling within the scope of the Second Amendment. If so, then a heightened level of judicial scrutiny will be applied to determine the ban’s constitutionality. How the “common use” and “dangerous and unusual” criteria should be read, if at all, in connection with the two-step approach remains unclear. Neither the *James*, *Heller II*, nor *Wilson* courts appear to have fully explained the connection between the two approaches.

Lastly, while it appeared that constitutional claims under the Due Process and Equal Protection Clauses were largely dismissed when the 1994 Assault Weapons Ban was in effect, the *Wilson* case demonstrates that they are claims challengers may still consider raising.

## **Author Contact Information**

Vivian S. Chu  
Legislative Attorney  
vchu@crs.loc.gov, 7-4576

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