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The Assault Weapons Ban: Review of Federal Laws Controlling Possession of Certain Firearms

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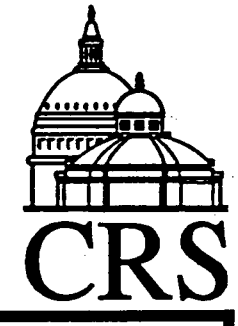

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THE ASSAULT WEAPONS BAN: REVIEW OF FEDERAL LAWS CONTROLLING POSSESSION OF CERTAIN FIREARMS

SUMMARY

The assault weapons ban of the Violent Crime Control and Law Enforcement Act of 1994 builds upon a 60 year history of federal regulation of firearms. Its supporters within and outside Congress hope this legislation will have a positive law enforcement effect in the war against violent crime. The ban, however, also generates the most intense kind of opposition to governmental policy. Enforcement of the ban has been challenged in the courts. Several pending bills seek to overturn or modify the ban.

This report reviews the 1994 assault weapons ban law, the history of federal attempts to ban or substantially regulate the possession of certain classes of firearms, and the cases ruling on alleged defects in the statutory schemes, or on the constitutionality of the laws, in effect before passage of the 1994 legislation.

The ten-year ban of 19 types of semiautomatic assault weapons marks the second time federal law bans the manufacture of specific firearms. The law exempts 1) an estimated 650 types or models of longguns, 2) assault weapons lawfully possessed on the date of enactment, 3) weapons manufactured for, and possessed by, law enforcement and military personnel, and 4) weapons manufactured for authorized testing or experimentation.

Before 1994, federal gun control laws tended to follow one of two patterns. One pattern is a "registration-transfer tax" system, regulating the transfer, receipt, or possession of narrow classes of firearms. Machineguns, sawed-off shotguns, sawed-off rifles, silencers, and destructive devices like grenades are controlled by registration. Moreover, since 1986, machineguns have been banned for private civilian transfer or possession, except for those lawfully possessed and registered before the ban took effect.

The second regulatory pattern is a "federal licensing-disqualified purchaser" system. Semiautomatic longguns fell under this pattern before 1994. This system relies on federal licensing of those who manufacture or distribute guns and upon disqualification of certain categories of persons (e.g., felons, fugitives from justice, or minors) as eligible to purchase guns.

The circuit courts of appeal are divided over the constitutionality of the first system now that the federal government no longer registers or collects the transfer tax for machineguns. The background check and ascertainment provisions of the Brady Act have been held constitutional by the Ninth Circuit. Appeals are pending of three district court opinions holding the Brady Act unconstitutional as a violation of the Tenth Amendment. The Supreme Court has invalidated the Gun-Free School Zones Act as beyond the authority of the federal government to regulate intrastate gun activities under the Commerce Power.

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One of the most controversial provisions of the Omnibus Crime Act[1] of the 103d Congress "bans" for ten years the manufacture, transfer or possession of 19 types or models of "semiautomatic assault weapons" (if not lawfully possessed under Federal law on the date of enactment, September 13, 1994). The law also bans the transfer or possession of large capacity (more than ten rounds) ammunition feeding devices (again, those not lawfully owned on the date of enactment).

The assault weapons ban builds on a 60-year history of federal regulation of firearms and on recent laws passed by the states of California and New Jersey and the District of Columbia.[2] The ban, however, generates the most intense kind of opposition to a governmental policy. Enforcement of the ban has been challenged in the courts. Pending bills seek to overturn or modify the ban.

This report reviews the 1994 assault weapons ban law, the history of federal attempts to ban or substantially regulate the possession of certain classes of firearms, and the cases ruling on alleged defects in the statutory schemes or on the constitutionality of the laws in effect before and after passage of the 1994 legislation.

I. 1994 ASSAULT WEAPONS BAN

The Public Safety and Recreational Firearms Use Protection Act, Title XI, Subtitle A, of the Violent Crime Control and Law Enforcement Act of 1994 (Pub.L. No. 103-322), known as the "assault weapons ban," actually bans for 10 years approximately 19 types of weapons and exempts from the ban approximately 650 longguns.

Although the federal government has attempted for 60 years various methods for controlling the traffic in, and possession of, certain firearms, this

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[1]Violent Crime Control and Law Enforcement Act of 1994, Public Law No. 103-322 (September 13, 1994).

[2]A review of state laws is beyond the scope of this report. For a discussion of the California and New Jersey assault rifle bans, *see* Fafarman, *State Assault Rifle Bans and the Militia Clauses of the United States Constitution,*67 INDIANA L. REV. 187 (1991). For a discussion of the D.C. law, *see Corrective Justice and the D.C. Assault Weapon Liability Act,* 19 JOUR. OF LEGISLATION 287 (1993).

assault weapons ban marks only the second time federal law absolutely bans the manufacture of specific firearms.[3]

The restriction on semiautomatic assault weapons is an amendment of title 18 U.S.C. 922, as follows:

> (v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

Banned Weapons

In lay terms, an assault weapon (a rifle, pistol, or shotgun) is a military-style weapon capable of providing either semiautomatic (trigger is pulled for each shot fired) or fully automatic fire by means of a selector switch (continuous firing while trigger is depressed until all rounds discharged). Since the 1934 National Firearms Act ("NFA")[4] has successfully regulated traffic in, and possession, of machineguns[5] and other automatic weapons, the 1994 assault weapons ban deals with semiautomatic weapons.

The banned weapons are identified in two ways: (1) by make or model (or copies of them); or (2) by specific characteristics, depending upon whether the weapon is a rifle, pistol, or shotgun. The specific characteristics of banned semiautomatic rifles are an ability to accept a detachable magazine in addition to possessing at least two of five features. Banned semiautomatic pistols also have an ability to accept a detachable magazine in addition to possessing at least two of five other features (which differ from the criteria for rifles). Banned semiautomatic shotguns possess at least two of four features (one of which is an ability to accept a detachable magazine).

The 19 models banned by name include all Poly Technologies AKs, the Israeli Military Industries UZI and Galil, the Beretta Ar70, the Colt AR-15, and the Fabrique National FN/FAL, FN/LAR, and FNC. Revolving cylinder shotguns are also banned.

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[3]The Undetectable Firearms Act of 1988, Pub. L. No. 100-649, 102 Stat. 3816 (Act of November 10, 1988), banned the manufacture (as well as importation, possession, transfer, or receipt) of "plastic" guns which are undetectable by metal detectors at security checkpoints in airports, government buildings, prisons, courthouses and similar public places. 18 U.S.C. 922(p).

[4]Codified, as amended, as chapter 53 of the Internal Revenue Code of 1986, Title 26 U.S.C., Sections 5801-5872. Although originally passed in 1934, the National Firearms Act was reenacted with a few changes as Title II of the Gun Control Act of 1968, 82 Stat. 1213.

[5]Also, as discussed later, the transfer or possession of machineguns for civilian use was banned in 1986, subject to a grandfather clause for guns lawfully possessed and registered before the date of enactment.

The transfer or possession (but not the manufacture) of large capacity ammunition feeding devices is also banned for 10 years. Manufacture could not be banned because the law also exempts approximately 650 longguns, many, if not all, of which utilize such feeding devices. Also, semiautomatic weapons lawfully possessed on the date of enactment remain legal and may need such feeding devices. Restricted ammunition devices manufactured after enactment, however, must bear an identifying serial number.

The Act contains no registration requirements. Those pre-1994 assault weapons exempted from the ban if lawfully possessed on the date of enactment will generally not be registered federally. Registration would not have been required by the former law unless the weapons were modified to fire automatically or converted to short-barrel form. Also, the approximately 650 exempt types or models of firearms remain outside the federal registration requirement unless, again, the weapon is modified to fire automatically or to short-barrel form. As discussed below, pre-1994 unmodified semiautomatic assault weapons are federally regulated by prohibitions on the persons who are eligible to receive or possess a firearm.

Any semiautomatic assault weapon manufactured after the date of enactment (for example, for military or law enforcement use) must clearly show the date of manufacture.

Exempt Weapons

In an Appendix A to Subtitle A, Congress exempted an estimated 650 types or models of firearms, including many Brownings, Remingtons, and Berettas, deemed mainly suitable for target practice, match competition, hunting, and similar sporting purposes. The Appendix A list is not exhaustive: subsection (v)(3) of amended Section 922 provides that absence from the list shall not be construed to mean the weapon is banned (unless it is specifically covered by paragraph (1)). Notably, no weapon can be removed from the exempt list so long as the assault weapons ban is in effect.

In addition to those weapons lawfully possessed on the effective date and those models exempted by Appendix A, the law also exempts firearms operated by bolt, pump, lever or slide action, antique and inoperable firearms. The law also allows the manufacture, transfer, and possession of assault weapons for law enforcement purposes, and for testing or experimentation authorized by the Secretary of the Treasury. Other exemptions include transfer for purposes of federal security pursuant to the Atomic Energy Act, and possession by a retired law enforcement officer, who is not otherwise prohibited from receiving the firearm.

The same exemptions apply to large capacity ammunition feedings devices.

II. FEDERAL LAW PRE-1994

Summary

Before 1994, federal laws restricting transfer, receipt, or possession of firearms tended to follow one of two patterns, which stem from legislation enacted in the 1930s. One pattern is a "registration-transfer tax" system, regulating narrow classes of firearms; the other is a manufacturer-dealer licensing system regulating firearms comprehensively, coupled with a prohibition on transfer to certain classes of persons declared ineligible to receive or possess a firearm.

Faced with intense political opposition and constitutional concerns under the Second Amendment,[6] federal gun control regulation has not fully invoked the registration-permit method followed by some states and many foreign countries. By its terms, the Second Amendment is a limitation on congressional action. The federal Constitution, therefore, does not inhibit state gun control legislation, but many state constitutions do limit state action.

Under a registration-permit system, not only is the firearm registered. The very right to keep and bear the gun is accorded to a limited group of citizens who hold a permit. Generally, the permit is issued under strict criteria, such as proof of a compelling need to possess the gun.

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[6]A review of Second Amendment constitutional arguments is beyond the scope of this report, but a few comments are in order. Opponents of gun control legislation generally assert the Second Amendment grants a constitutional right to keep and bear arms. The courts have not been hospitable to this argument. In the only Second Amendment case decided by the Supreme Court following enactment of federal gun control legislation [*United States v. Miller,* 307 U.S. 174 (1939)], the Court ruled that the Second Amendment confers no right on a citizen to bear a sawed-off shotgun, a weapon regulated by the National Firearms Act. The lower federal courts have been even more explicit in rejecting an individual right to keep and bear arms. *Stevens v. United States,* 440 F.2d 144 (6th Cir. 1971) (Second Amendment applies only to the right of the State to maintain a militia and not to any individual right to bear arms). Substantial support for an individual right to keep and bear arms for lawful purposes can be found, however, in recent academic writing. *See, e.g.,* Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 DUKE L. JOUR. 1236 (1994); Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias and the Second Amendment,* 26 VALPARAISO UNIV. L. REV. 131 (1991); and Dowlut, *Federal and State Constitutional Guarantees to Arms,* 15 UNIV. OF DAYTON L. REV. 59 (1989). For a review of Second Amendment issues, *see* Schrader, *Federal Gun Control Laws: The Second Amendment and Other Constitutional Issues,* CRS Report 95-220 S.

By contrast, the federal law only requires registration of narrow classes of firearms (machineguns and sawed-off shotguns or rifles). Recent amendments have strengthened the authority of the Secretary of the Treasury to review and approve the transfer of National Firearms Act weapons, but registration remains an exception in federal regulation of firearms. In passing the 1993 Brady Handgun Act,[7] Congress emphasized that neither the background check provision nor any other provision could be utilized to create a federal handgun registration system.[8]

In 1986, Congress banned the transfer or possession of machineguns for use by civilians, except those guns lawfully possessed and registered before the effective date of the ban -- May 19, 1986.[9] Unlike the 1994 semiautomatic assault weapons ban, the ban on machineguns does not extend to their manufacture.

Registration-Transfer Tax System

Under the National Firearms Act of 1934 ("NFA"),[10] the law requires registration of a narrow class of weapons, subjects transfers to a high tax, and makes trafficking in, or possession of, an unregistered weapon a felony. The NFA applies to machineguns, sawed-off shotguns, short-barreled rifles, silencers, and certain destructive devices. The NFA pattern targets specific weapons and controls access by a tax and a registration requirement. Since 1986, however, the transfer or possession of machineguns for private civilian use has been banned,[11] subject to a grandfather provision for machineguns lawfully possessed and registered by May 19, 1986.

Regulatory power is based upon the Taxation Clause. Since the tax ($200) is imposed on traffic in covered weapons, federal jurisdiction is justified for

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[7]The Brady Handgun Violence Prevention Act, Public Law No. 103-159, 107 Stat. 1536, Act of November 30, 1993, amending 18 U.S.C. 922(s).

[8]For a review of the basic provisions of the Brady Act and court decisions since its enactment, *see* Schrader, *The Brady Handgun Control Act: Constitutional Issues,* CRS Report No. 94-885 S.

[9]As part of the Firearms Owners' Protection Act, Public Law. No. 99-308, 100 Stat. 449, Congress amended 18 U.S.C. 922 by adding a new section (o) to ban the transfer or possession of machineguns for civilian use.

[10]48 Stat. 1236-1240, originally codified as 26 U.S.C. 1132; now codified, as amended, as chapter 53 of the Internal Revenue Code of 1986, 26 U.S.C. 5801-5872.

[11]18 U.S.C. 922(o), which was added to the Gun Control Act of 1968, 82 Stat. 1213, codified at 18 U.S.C. 921-928, by the Firearms Owners' Protection Act of 1986, Public Law No. 99-308, 100 Stat. 449 (Act of May 19, 1986).

intrastate as well as interstate transactions. Because the NFA was based on the taxing power, the Internal Revenue Service was initially assigned law enforcement responsibility. This authority continued until 1972, when enforcement was assigned to a separate division, the Bureau of Alcohol, Tobacco, and Firearms ("BATF"), also in the Treasury Department.[12]

The NFA also began the federal licensing of firearms manufacturers and dealers, but dealer licensing was not a primary method of controlling access to firearms. This law has been relatively effective in minimizing access to machine guns by criminals,[13] but the Act covers a limited number of firearms.

Federal Licensing-Disqualified Owners System

The Federal Firearms Act of 1938 ("FFA")[14] established a different regulatory pattern. Under the FFA, virtually all firearms are covered, but there is no federal registration and no tax on the transfer. Instead, manufacturers, distributors, and dealers in firearms are federally licensed, and the licensees are prohibited from transferring firearms to certain ineligible classes (e.g., felons and fugitives). Receipt or possession of any firearm by a disqualified person is a felony. A slight or modest tax is imposed in the form of the licensing fee. The FFA pattern encompasses virtually all firearms without requiring registration, but entails high enforcement costs in the absence of a centralized database of firearms transfers.

Fully automatic assault weapons are covered by the NFA pattern. Semiautomatic assault weapons were governed by the FFA pattern until 1994.

Automatic Weapons

For a civilian to possess lawfully a weapon capable of automatic fire, the Secretary of the Treasury must have approved the transfer to the individual, the transfer must be registered, and the seller must have paid a $200 transfer tax. The same requirements apply to sawed-off shotguns and short-barreled rifles even if they are not capable of automatic fire.

Since 1986, automatic weapons known as machineguns have been banned for private civilian transfer or possession, except for those machineguns lawfully possessed and registered before the ban took effect. The Bureau of

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[12]Zimring, *Firearms and Federal Law: The Gun Control Act of 1968,* 4 J. LEGAL STUDIES, 133, 157 (1975).

[13]*Id.* at 139.

[14]52 Stat. 1250, originally codified as former 15 U.S.C. 901-910, repealed by Public Law No. 90-351, Section 906, 82 Stat. 234 (1968), but which, as amended, has been carried forward to chapter 44 of title 18, Sections 921-928.

Alcohol, Tobacco, and Firearms refuses to register or accept the transfer tax for any machinegun made after the ban took effect.[15]

Semiautomatic Assault Weapons: Pre-1994

For a civilian to possess lawfully a semiautomatic longgun before 1994, the purchaser had to certify to a federally-licensed dealer that he or she is not an ineligible purchaser (e.g., a felon or fugitive; or a minor). Semiautomatic handguns were regulated in the same way as longguns until the 1993 Brady Act,[16] which set a five day waiting period before the handgun purchase can be made.

Since the NFA requires registration and imposes a transfer tax on sawed-off shotguns and rifles, only those semiautomatic rifles that had a barrel length of at least 16 inches and an overall length of at least 26 inches fell under the less strict requirements of the FFA before 1994.

Importation of assault weapons and firearms generally has been broadly prohibited for private civilian use since 1968,[17] subject to four exceptions. The exceptions allow importation for research, competition, or training; importation of curios and antiques; reimportation of a lawfully possessed firearm; and importation of guns suitable for or readily adaptable to sporting purposes.

President Bush attempted to prohibit importation of military assault-style weapons by an administrative action of the Treasury Department in 1989, acting under 18 U.S.C. §925(d)(3). Domestic manufacture of semiautomatic weapons increased greatly. Foreign manufacturers "circumvented the strictures of the Bush ban by reconfiguring their weapons and shipping them out under different model numbers."[18] They attempted to give the weapons a "sporting" appearance.

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[15]*United States v. Ardoin,* 19 F.3d 177, 179 (5th Cir. 1994).

[16]Public Law No. 103-159, 107 Stat. 1536, Act of November 30, 1993, amending 18 U.S.C. 922(s).

[17]18 U.S.C. 922 and 925. The law authorizes importation of firearms by federal, state or local agencies for law enforcement or military purposes. The authority of the Bureau of Alcohol, Tobacco, and Firearms to regulate the first domestic sale of such firearms was upheld in *United States v. F. J. Vollmer & Co., Inc. et al,* 1 F. 3d 1511 (7th Cir. 1993).

[18]Dailard, *The Role of Ammunition in a Balanced Program of Gun Control: A Critique of the Moynihan Bullet Bills,* 20 JOUR. OF LEGIS. 19, 33 (1994).

Regulations under the 1968 Gun Control Act

The Gun Control Act of 1968[19] reenacted the FFA as amended, cured a constitutional problem with the registration requirement of the NFA,[20] banned the importation of military surplus firearms (except curios or relics), and purported to "ban" the importation of any firearm unless it was certified by the Secretary of the Treasury as "particularly suitable for. . . sporting purposes." The latter "ban" has not been very effective in restricting the flow of firearms into the United States because a long list of firearms are considered suitable for sporting purposes under the implementing regulations.[21]

The regulations implementing the 1968 Act imposed new requirements on federally licensed dealers. The dealers had to sign a form indicating the buyer had identification showing he or she was not a resident of another state and showing the buyer's age. The duty to obtain identification from the buyer meant that the dealer had to verify the name, address, and age. Dealers could be prosecuted for willful failure to obtain identification or for knowingly making a sale to someone whose ID disqualified him or her (e.g., a minor or a nonresident).

Even with its broader coverage, tougher penalties, and stricter enforcement, the 1968 Act could be evaded by use of false ID's or purchases on the unregulated, secondary market. Strict enforcement would have required a huge commitment of law enforcement resources since the dealer records were decentralized, the guns were not registered at the federal level (except for those covered by the NFA as amended), and there was no waiting period during which the buyer's eligibility could be checked.

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[19]82 Stat. 1213, codified at 18 U.S.C. 921-928.

[20]In *Haynes v. United States*, 390 U.S. 85 (1968), the Supreme Court held the original registration provision of the NFA violated the constitutional privilege against self-incrimination. The defect was cured by providing in the Gun Control Act of 1968 that the registration information could not be used in a criminal prosecution.

[21]Zimring, note 12 *supra*, at 163-164. The import ban was further weakened by a 1986 amendment that substituted the word "shall" for "may" in 18 U.S.C. 925(d). The original discretionary authority of the Secretary of the Treasury to allow importation was replaced with a duty to allow importation if the weapon falls within one of the exceptions to the import ban. Since the original authority was not fully utilized, the import ban has not been significantly changed by the 1986 amendment, although the government's burden to justify exclusion of a firearm has increased. The authority to order a temporary suspension with respect to importation of certain weapons, pending review of their eligibility under the sporting purposes criterion, was sustained in *Gun South, Inc. v. Brady*, 877 F. 2d 858 (11th Cir. 1989) even in a case where the import permit had already been issued but importation had not yet occurred.

1986 FOPA Amendments

In 1986, several adjustments were made to the 1968 law by passage of the Firearms Owners' Protection Act ("FOPA").[22] In addition to the ban on transfer or possession of machineguns for civilian use, the 1986 Act allowed sale of an ordinary rifle or shotgun to nonresidents if the transaction was made in person and the sale complied with the law in both states. The Act also slightly weakened the authority of the Secretary of the Treasury to enforce the "ban" on importation of firearms, especially in the case of guns whose sporting purpose may be suspect.[23]

One other major change was the amendment of the firearm penalties provision, 18 U.S.C. § 924(a), to punish certain offenses only if committed "willfully" or in other cases "knowingly." The latter term was applied to the most serious offenses. In *United States v. Sherbondy,* 865 F.2d 996 (9th Cir. 1988), the Ninth Circuit held that "knowingly" means knowledge of the conduct or acts that constitute the offense of possession of a firearm by a felon. It does not mean knowledge of the law. 865 F.2d at 1002-03.

1988 Undetectable Firearms Ban

Congress banned the manufacture, importation, possession, transfer, or receipt of "plastic" guns by passing the Undetectable Firearms Act of 1988.[24] The ban applies to firearms that are undetectable by the metal detector machines commonly used at security checkpoints in airports and public buildings.

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[22]Public Law No. 99-308, 100 Stat. 449, Act of May 19, 1986, codified as amendments to 18 U.S.C. 921 et. seq.

[23]However, in *Gun South, Inc. v. Brady,* 877 F.2d 858 (11th Cir. 1989), the Secretary of the Treasury's authority to suspend importation of a previously eligible gun was upheld for the purpose of re-evaluating its eligibility for importation as a sporting weapon. The court noted that, since the law speaks of weapons "generally recognized" as particularly suitable for sporting use, eligibility for importation depends not only on the physical characteristics of the gun but also on possibly changing patterns of use.

[24]Public Law No. 100-649, 102 Stat. 3816, Act of November 10, 1988, codified as 18 U.S.C. 922(p).

1993 Brady Act

In the 1993 Brady Act,[25] the Congress sought to restrict access to handguns by remedying a significant problem with the 1968 Gun Control Act -- the high cost of enforcement caused by the lack of centralized records of gun transactions (except of course for the machineguns and sawed-off guns covered by the NFA).

As a long range solution, Congress mandated creation by the Attorney General of a national instant criminal background check system by November 1998. Both federal and state criminal records are to be accessible to federally licensed dealers and law enforcement officials by telephone. The handgun sale may be made immediately if the system generates a unique identification number; if not, the sale may be made after three business days, unless the national system notifies the licensee that the receipt of the firearm violates the law.

In the interim, Congress established a five-day waiting period before a handgun sale can be finalized in order to allow time for an ascertainment and background check by local law enforcement of the legality of the sale.

Within the first year of the Brady Act, five[26] of six district courts to consider challenges to the law held the mandatory background check provision unconstitutional as a violation of the Tenth Amendment. The first appellate court to consider the issue, however, upheld the constitutionality of the Brady Act,[27] reversing the district courts in *Mack v. United States,* 856 F. Supp. 1372 (D. Ariz. 1994) and *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994). Also, local law enforcement officials are not prohibited from conducting background checks, even where the Act has been held unconstitutional. Those three district courts have said the local officials have an option not to enforce the Brady Act. The five-day waiting requirement remains in effect. One district court, before the favorable decision by the Ninth Circuit, upheld the Act's constitutionality.[28]

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[25]Brady Handgun Violence Prevention Act, Public Law 103-159, 107 Stat. 1536, Act of November 30, 1993, amending 18 U.S.C. §922(s)(the "Gun Control Act of 1968").

[26]*Mack v. United States,* 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States,* 854 F. Supp. 1503 (D. Mont. 1994); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994); and *Romero v. United States,* 883 F. Supp. 1076 (W.D. La. 1994).

[27]*Mack v. United States,* 66 F.3d 1025 (9th Cir. 1995).

[28]*Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994).

III. CASE LAW ON FEDERAL REGULATION OF ASSAULT WEAPONS

Standing to Challenge Assault Weapons Ban

The constitutionality of the assault weapons ban was challenged by several plaintiffs including the National Rifle Association and two firearms manufacturers before the district court for the Eastern District of Michigan. In *National Rifle Association v. Magaw*, 898 F. Supp. 477 (E.D. Mich. 1995), the court dismissed the case for lack of subject matter jurisdiction since no justiciable case or controversy existed within the meaning of Article III of the Constitution.

Under *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130 (1992), the Supreme Court had identified three criteria for standing to raise a constitutional challenge to a statute. The first factor proved a stumbling block to consideration of the constitutional claims in *NRA v. Magaw*: the plaintiff must suffer injury in fact.
The court held that, since none of the plaintiffs had been threatened with prosecution under the semiautomatic assault weapons statute, the plaintiffs lacked standing to litigate a pre-enforcement challenge to the ban.

In reaching this decision, the court observed that it must weigh two competing concerns: 1) the firmly established policies that underlie the case or controversy requirement; and 2) the potential chilling effect on the plaintiff's activities if a pre-enforcement challenge to a criminal statute is not permitted. Except in First Amendment cases, however, pre-enforcement challenges to a criminal law have generally not been permitted. Every criminal law by its very existence may have a chilling effect on personal behavior; that is the reason for its enactment. Since the assault weapons ban has not yet been applied to the plaintiffs, the court ruled that a determination of its constitutionality on vagueness grounds would be premature.

What Is a Machinegun?

The National Firearms Act makes it unlawful for any person to possess a machinegun that is not properly registered with the Federal Government. In *Staples v. United States,* 114 S. Ct. 1793 (1994), the Supreme Court addressed the nature of a machinegun and the scienter burden on the prosecution to prove commission of a crime under Section 5861(d) of the NFA. At issue was a semi-automatic rifle, whose metal stop for preventing automatic fire had been filed away. On testing, the weapon fired more than one shot with a single pull of the trigger. The defendant testified that the rifle had never fired automatically when it was in his possession. 114 S.Ct. at 1796. If the weapon was classified as a semiautomatic, the registration requirements of the NFA did not apply.

At common law, "mens rea" (or guilty knowledge) was a necessary element in every crime. Under conventional "mens rea," the government must prove the defendant knew the facts that make his conduct illegal. 114 S.Ct. at 1797. "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Ibid.* For so-called "public welfare" or "regulatory" offenses, however, the Court recognizes congressional intent to impose strict criminal liability where the statute is silent on the standard of scienter. For example, under the Narcotics Act of 1914, the government had to prove the defendant knew he was selling drugs -- not that he knew the specific items were illegal narcotics under the statute. Typically, the "public welfare" statutes regulate potentially harmful or injurious items.

In *Staples,* the government argued that all guns are dangerous devices, whose possession should put their owners at risk to determine whether their gun falls within the scope of a criminal statute. Since the relevant section did not contain an express scienter requirement, the government proposed as the standard of criminal intent that the defendant knew the gun was highly dangerous and of a type likely to be subject to regulation. The majority of the justices rejected this standard of proof and read a *mens rea* requirement into Section 5861(d): to obtain a conviction for possession of an unregistered machinegun, the government must prove the defendant knew that his firearm fell within the statutory definition of a firearm under the NFA. In the opinion of the Court, while possession of hand grenades is not an innocent act, possession of a semiautomatic rifle modified to fire automatically may be innocent. 114 S. Ct. at 1799. "Guns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Id.* at 1800.

The Court was unwilling to interpret congressional silence on the *mens rea* standard as criminalizing activity engaged in by a broad range of the people. The Court observed that there is a "long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 1799. It noted that roughly one-half of American homes contain at least one gun. Although the majority acknowledged that certain categories of guns may be more suspect than others, it reasoned that the distinctions were not sufficiently clear to justify strict criminal liability for mere possession of an unregistered, covered firearm. The ten year penalty for the crime confirmed for the majority that Congress did not intend to dispense with *mens rea.*

The concurring opinion of Justices Ginsburg and O'Connor agreed that Section 5861(d) should be interpreted to include a *mens rea* requirement since firearms are not comprehensively regulated. Since only limited classes of firearms are regulated, the "dangerous" nature of any gun does not suffice to put a citizen on notice that he or she should inquire about the need for registration.[26]

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[26]These justices, however, also noted with approval a compromise interpretation followed by some appellate courts. The government must prove the defendant knew the gun was a machinegun as defined by statute, but the requisite knowledge may be inferred where a visual inspection reveals the

Making and Unassembled Parts

Two years before the *Staples* decision, a plurality of the Court ruled that the NFA was ambiguous as applied to a pistol-plus conversion kit that could be assembled either as an NFA unregulated long-barreled rifle or as an NFA regulated short-barreled rifle. *United States v. Thompson/Center Arms Company,* 112 S. Ct. 2102 (1992). At issue was the question of what constitutes the "making" of a firearm marketed with a conversion kit to fashion different weapons. Even though the ruling came in a civil, tax-refund context, the Court applied the criminal law's rule of lenity because the same NFA provisions could trigger criminal liability, which the Court in 1992 said could be imposed without proof of willfulness or knowledge. 112 S. Ct. at 2104. That, of course, is no longer the law, following the *Staples* decision; now the government must prove the defendant knew the weapon was an NFA firearm.

The plurality said the term firearm could apply to unassembled rifle parts, but held the statute ambiguously unenforceable where the parts could usefully be assembled either into an NFA-regulated or a nonregulated weapon.

The *Thompson* opinion does not finally settle that the NFA applies to unassembled rifle parts because the two concurring Justices who joined to form the majority thought the statute ambiguous on this point. In the case of machineguns and silencers, the statute has been amended to include unassembled parts explicitly. Nevertheless, the issue is almost settled in the case of rifles because the four dissenters agreed with the three-Justice plurality that the Congress clearly intended "making" to include a disassembled aggregation of parts which, when assembled, results in a covered firearm. Thus, seven Justices were prepared to rule that the term "making" includes disassembled short-barreled rifle parts.

Constitutionality of the Current NFA

The circuit courts of appeal are split on the constitutionality of the current National Firearms Act registration-tax system. The original NFA was enacted under the Taxation Clause, although it has always been recognized that the major purpose of the legislation is gun regulation rather than revenue collection. For fifty years, the constitutionality of the NFA was sustained under the power to tax. *Sonzinsky v. United States,* 300 U.S. 506 (1937).

Then, in an amendment to 18 U.S.C. 922 in 1986, which did not directly amend the NFA, Congress banned the transfer or possession of post-1986 machineguns made for the civilian market. Based on this ban, the BATF refuses to register the making or transfer of any post-1986 machinegun and does not collect the $200 tax, except when it charges someone with the illegal making

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firearm has been converted to automatic firing.

of a machinegun.[26] The appellate courts are divided as to whether the refusal to collect the tax (except as part of criminal prosecutions) deprives the NFA of its constitutional foundation.

The Fourth Circuit upheld the NFA's constitutionality in *United States v. Jones,* 976 F. 2d 176 (4th Cir. 1992). First, in rejecting the contention that the machinegun ban repealed the NFA, the court held that absent an affirmative intention to repeal a statute (which was lacking in this case), the only permissible justification for repeal by implication is that the earlier and later statutes are irreconcilable. The statutes can be reconciled because Congress can tax illegal conduct. The *Jones* court then held that the tax power sustained the NFA, even if BATF chooses not to allow registration or collect taxes for post-1986 machineguns, since it has the authority to tax. *Accord, United States v. Ardoin,* 19 F.3d 177 (5th Cir. 1994); *United States v. Ross,* 9 F.3d 1182 (7th Cir. 1993); *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) (in the case of an unregistered pre-1986 machinegun). The *Jones* and *Ardoin* courts also found alternatively that regulation of machineguns could be upheld under the Commerce Power, even though Congress has not specifically invoked the latter as a justification for the NFA. *United States v. Ardoin*, 19 F.3d at 180.

Although in *Staples* one panel of the Tenth Circuit upheld the constitutionality of the NFA as applied to a pre-1986 machinegun, earlier in *United States v. Dalton,* 960 F. 2d 121 (10th Cir. 1992), another panel held the NFA unconstitutional in the case of a weapon converted into a machinegun after 1986. The court was not persuaded by the government's argument that it's authority to tax someone who unlawfully makes a machinegun sustains the NFA as a tax measure. Instead, the *Dalton* panel agreed with the analysis of a district court in *United States v. Rock Island Armory,* 773 F. Supp. 117 (C.D. Ill. 1991). A provision which was passed as an exercise of the taxing power no longer has that constitutional basis when Congress decrees that the subject of that provision can no longer be taxed. The *Dalton* panel also thought that due process bars conviction under the NFA for illegal making of a machinegun when the only act that would avoid violation of the law --registration and payment of a tax -- is itself precluded by law.

The constitutionality of the current NFA therefore remains unsettled. When the Supreme Court decided *Staples v. United States,*114 S. Ct. 1793 (1994), it limited its opinion to statutory interpretation and did not reach any constitutional question. This decision, however, will likely have a major impact on prosecutions under the NFA. Presumably one reason the government

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[26]The statute provides it is unlawful for any person "to transfer or possess a machinegun" for civilian use unless the machinegun was lawfully possessed before May 19, 1986. The BATF regulations interpret the statute to mean it is illegal to make a machinegun unless an application is filed with BATF to obtain approval for the making for governmental purposes. *Farmer v. Higgins,* 907 F.2d 1041, 1043 (11th Cir. 1990) [18 U.S.C.§922(o) prohibits the private possession of machineguns not lawfully possessed prior to May 19, 1986].

continued to seek prosecutions under the NFA instead of the Gun Control Act as amended in 1986 is because many appellate courts had held conviction for the NFA offense did not require proof of *mens rea.* Because the Supreme Court has now interpreted the NFA to require proof the defendant knew his weapon was an NFA-covered firearm, the scienter standard is the same as under 18 U.S.C., section 922(o).

Registration and the Privilege Against Self-Incrimination

Section 5851 of the original National Firearms Act made criminal the possession of any machinegun (or other covered weapon) which has been transferred or made in violation of the Act, or which has not been registered as required by the Act. While stopping short of holding the provision unconstitutional on its face, the Supreme Court held that a proper claim of the constitutional privilege against self-incrimination provided a full defense to prosecutions either for failure to register a firearm under Section 5841 or for possession of an unregistered firearm under Section 5851. *Haynes v. United States,* 390 U.S. 85 (1968).

Section 5851 might have been constitutional in a case where someone obtains possession by finding a lost or abandoned firearm. The Court thought this situation "uncommon." In almost every case, the possessor of an illegal firearm was compelled, on pain of criminal prosecution, to provide information to the federal government likely to facilitate his or her arrest and conviction.

The *Haynes* Court also noted that several lower courts had held the registration requirement of Section 5841 required incriminating disclosures, in violation of the Fifth Amendment privilege against self-incrimination. *Russell v. United States*, 306 F.2d 402 9th Cir. 1962); *Dugan v. United States,* 341 F.2d 85 (7th Cir. 1965); *McCann v. United States,* 217 F. Supp. 751 (D. Colo. 1963); *United States v. Fleish*, 227 F. Supp. 967 (E.D. Mich. 1964).

Congress rapidly cured this constitutional infirmity of the NFA registration system later in 1968. While retaining the registration requirement, the 1968 Gun Control Act provided that the registration information may not be used in a criminal prosecution.[27] The Supreme Court in *United States v. Freed,* 401

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[27]The same day the Court decided *Haynes*, it also held unconstitutional on the same grounds the gamblers' registration requirement of the Internal Revenue Code. *Marchetti v. United States,* 390 U.S. 39 (1968) and *Grosso v. United States,* 390 U.S. 62 (1968). Chief Justice Warren dissented, and Justice Stewart concurred. Stewart wrote, however, that, if they were writing on a clean slate, he would agree with Warren. "For I am convinced that the Fifth Amendment's privilege against compulsory self-incrimination was originally meant to do no more than confer a testimonial privilege upon a witness in a judicial proceeding. But the Court long ago lost sight of that original meaning." 390 U.S. at 76-77.

U.S. 601 (1971), ruled that the amended Act does not violate the privilege against self-incrimination.

Commerce Clause Nexus to Gun Control

Unlike the National Firearms Act, which was premised on the Taxation Clause, the Federal Firearms Act (and its successor, the Gun Control Act of 1968) was premised on the Interstate Commerce Power. The FFA and the Gun Control Act comprehensively inhibit access to firearms by disqualified persons through regulation of the manufacturers, importers, and dealers in guns and the traffic in guns.

At least two general questions arise: whether an interstate commerce nexus is a necessary element of certain criminal offenses; and the constitutional justification for federal regulation of intrastate gun transfers or activities.

After initially signalling otherwise in *United States v. Bass,* 404 U.S. 336 (1971), the Supreme Court in *Scarborough v. New York,* 431 U.S. 563 (1977) upheld a conviction for mere possession of a firearm by a felon based on proof that the firearm had at some earlier time moved in interstate commerce.[28] The district court had found for the defendant on the ground the government had to prove the weapons were acquired after the felony conviction to sustain the charge of unlawful receipt of the guns. The Fourth Circuit reversed and the Supreme Court affirmed the appellate court.

The Justices distinguished *Bass* by saying that in that case the government made no attempt to show any interstate commerce nexus. In *Scarborough,* the government proved interstate movement at an earlier time. The legislative history of the Omnibus Crime Control Act of 1968 showed that Congress intended to inhibit gun traffic broadly, in order to keep guns out of the hands of convicted felons and other disqualified classes. Although at the time of the *Bass* decision, the Court was inclined to think the possession offense might require a stricter nexus with commerce, "further consideration has persuaded us that this was not the choice Congress made. ... All indications are that Congress meant to reach possessions broadly." 431 U.S. at 575.

The Supreme Court apparently set outer limits on the authority of Congress to regulate guns under the Commerce Power in *United States v.Lopez,*

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[28]An earlier Supreme Court decision, *Tot v. United States,*319 U.S. 463 (1943) held unconstitutional on due process grounds the presumption of the original Federal Firearms Act that a gun had moved in interstate commerce. Thereafter, the government had to prove at least some movement in interstate commerce to justify federal regulation under the Commerce Power. With the *Scarborough* case, it became settled that minimal proof that the gun had moved in interstate commerce at some time before indictment was sufficient. Usually, this can be proved by tracing serial numbers to a place of manufacture other than the state in which the gun was possessed at the time of indictment.

115 S. Ct. 1624 (1995), when it held unconstitutional 18 U.S.C. 922(q)(known as the Gun-Free School Zones Act of 1990).[29] The Act made it unlawful for anyone to possess a firearm in a school zone (defined as within 1,000 feet of the boundary of any public or private school, regardless of whether the school is in session). This decision was the first time in 50 years that the Court invalidated a statutory provision as beyond Congress' authority under the Commerce Power.

The statute lacked any interstate commerce jurisdictional element. Also, the legislative history of the Gun-Free School Zones Act as originally enacted contained no congressional findings about the impact upon commerce of firearms in schools. Congress later attempted to provide the necessary findings to sustain the Gun-Free School Zones Act by amending 18 U.S.C. §922(q) as part of the Violent Crime Control and Law Enforcement Act of 1994.[30] In the end, the Court noted the congressional findings even though the Government did not rely upon them, but the Court rejected the substance of some of those findings.

A plurality of the Court held the Act exceeded the Commerce Power because possession of a gun in local school zones is in no sense an economic activity. Even if gun possession in school zones were a repeated activity, this activity would not substantially affect interstate commerce. The five-Justice majority relied heavily on the fact that education has traditionally been the responsibility of State and local governments. Without a stronger connection with commercial activity, the Act intruded impermissibly on State sovereignty. The concurring opinion of Justices Kennedy and O'Connor also noted that 40 States have laws prohibiting gun possession in school zones.

The four dissenting Justices would have upheld the statute under the rational basis test. They would have deferred to Congress' implicit and later explicit judgment about the connection between the regulated activity and interstate commerce. They would have found sufficient rational basis for the connection in the evidence of widespread violence in schools, the evidence that violence interferes with the quality of education, and the evidence that a work force composed of functionally or technologically illiterate workers erodes the United States economy.[31]

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[29]Public Law No. 101-647, 104 Stat. 4789, 4844-45, Act of November 29, 1990.

[30]Section 320904 of Public Law No. 103-322, Act of September 13, 1994. This amendment was passed after Lopez was convicted and after the Fifth Circuit had held the Gun-Free School Zones Act unconstitutional. *United States v. Lopez,* 2 F. 3d 1342 (5th Cir. 1993).

[31]Within a month of the decision, President Clinton submitted a bill to the Congress (H.R. 1608) to cure the constitutional defect in the Gun-Free School Zones Act. The bill would establish an interstate commerce jurisdictional element by requiring the Government to prove that the firearm "has moved in or the possession of such firearm otherwise affects interstate or foreign commerce."

Except for invalidation of the Gun-Free School Zones Act, the *Lopez* decision has not had any significant impact on federal firearms statutes.[32] The Tenth Circuit upheld the constitutionality of the machinegun possession or transfer ban of 18 U.S.C. §922(o) in *United States v. Wilks,* 58 F.3d 1518 (10th Cir. 1995), even though that provision does not contain a specific interstate commerce jurisdictional element. The court distinguished machineguns from handguns and ruled that machineguns are bound up with interstate attributes. Machineguns are a commodity transferred across state lines for profit by business entities.

The Ninth Circuit had an even easier time upholding the federal carjacking statute, 18 U.S.C. §2119, in *United States v. Oliver,*[33] since this provision contains an interstate commerce jurisdictional element. The Government must prove that the particular vehicle had a connection with interstate commerce. The court found that automobiles are instrumentalities of commerce. Also, the Congress had made a finding that carjacking itself is a form of commercial activity and the court agreed.[34]

In *United States v. Cruz,* 50 F.3d 714 (1995), the Ninth Circuit did reverse a firearms conviction because of a lack of an interstate commerce nexus. The court did not rule, however, that the statute exceeded congressional authority under the Commerce Power. The issue was whether conviction of the receipt of stolen grenades requires proof of knowing receipt and travel in interstate commerce after the grenades were stolen. (The grenades were stolen and received in Guam.) In ruling that the offense required proof of travel in interstate commerce after the grenades were stolen, the Ninth Circuit disagreed with the Sixth Circuit. In *United States v. Honaker,* 5 F.3d 160 (1993), the Sixth Circuit held that 18 U.S.C. §922(j) applies if the firearm moved in interstate commerce either before or after its theft. Quite possibly, the Supreme Court will have to resolve this split in the circuits in due course.

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[32]The *Lopez* decision was applied to reverse a conviction under the federal arson statute, 18 U.S.C. §844(i), for setting one's private residence on fire. The Government attempted to satisfy the interstate commerce jurisdictional element by arguing that the receipt of natural gas from out-of-state established the necessary nexus to commerce. *United States v. Pappadopoulos,* 64 F.3d 522 (1995). The Ninth Circuit rejected this contention and found no other commercial use of the private residence that, following *Lopez,* would justify federal jurisdiction. In one other non-firearms case, a district court upheld the constitutionality of the Drug-Free School Zones Act, 21 U.S.C. §860, on the ground that the offense --trafficking in drugs -- is inherently commercial in nature. *United States v.Garcia-Salazar,*891 F. Supp. 568 (D. Kan. 1995).

[33]68 F.3d 483 (9th Cir. 1995) (Table)(Unpublished), 1995 WL 607619.

[34]*Accord, United States v. Martinez,* 49 F.3d 1398 (9th Cir. 1995).

IV. PENDING LEGISLATION TO OVERTURN THE ASSAULT WEAPONS BAN

Several bills have been introduced in the first session of the 104th Congress to repeal or modify the 10-year ban on semiautomatic assault weapons.

H.R. 125, H.R. 464, H.R. 698, H.R. 920, and H.R. 1488 would repeal the ban.

Another bill, H.R. 793, would substantially revise the definition of "semiautomatic assault weapon" in 18 U.S.C. §921(a)(30). The ban would remain in effect for the 19 named models and any revolving cylinder shotgun. The ban on weapons based upon their characteristics or features would be eliminated, however, along with the administrative authority to determine which weapons have such characteristics or features.

V. CONCLUSION

The assault weapons ban of the Violent Crime Control and Law Enforcement Act of 1994 builds upon a 60 year history of federal regulation of firearms. Its supporters within and outside Congress hope this legislation will have a positive law enforcement effect in combating violent crime. The ban, however, also generates the most intense kind of opposition to governmental policy. Enforcement of the ban has been challenged in the courts, but unsuccessfully to date. Several pending bills seek to overturn or modify the ban.

Although the federal government has attempted for 60 years various methods for controlling the traffic in, and possession of, certain firearms, the ten year ban of 19 types of semiautomatic assault weapons marks only the second time federal law absolutely bans the manufacture of specific firearms. As a counter-balance to the ban, the law exempts approximately 650 types or models of firearms. Of the banned models, weapons lawfully possessed on the effective date of the Act are exempt. The Act contains no registration requirements, even for the "grandfathered" weapons. Weapons lawfully manufactured for military or law enforcement purposes must bear a serial number clearly showing the date of manufacture.

Since 1986, automatic weapons known as machineguns have been banned for private civilian transfer or possession, except for those machineguns lawfully possessed and registered before the ban took effect. This law does not expressly ban manufacture of machineguns, but its practical effect is a total ban on making for civilian use.

Under pre-1994 federal law, for a civilian to possess lawfully a semiautomatic longgun, the purchaser had to certify to a federally-licensed dealer that he or she is not an ineligible purchaser (e.g., a felon or fugitive from

justice, or a minor). Semiautomatic handguns were regulated in the same way as longguns until passage of the 1993 Brady Act, which set a five day waiting period before any handgun purchase can be completed. Sawed-off shotguns and sawed-off rifles, whether or not capable of automatic fire, are subject to registration with the Treasury Department. For lawful civilian possession of sawed-off guns, the Secretary of the Treasury must approve the transfer, the transfer must be registered, and the seller must pay a $200 transfer tax.

The constitutionality of federal gun control laws has been subject to many challenges. A fair number of the challenges have resulted in invalidation of a specific provision. In *United States v. Lopez*, however, the Supreme Court for the first time held unconstitutional a federal firearms statute on the ground that Congress had exceeded its authority under the Commerce Clause. The Court invalidated the Gun-Free School Zones Act because possession of a gun in a local school is in no sense an economic activity which, even if repeated, could have a substantial effect on interstate commerce.

Within the last ten years, the circuit courts of appeal have split on the constitutionality of the National Firearms Act of 1934, which was enacted and originally upheld under the Taxation Power. The constitutional basis of the NFA came into question after the government ceased registration and tax collection for machineguns, following the ban on their possession or transfer for civilian use in 1986.

Finally, the constitutionality of the Brady Handgun Act's background and ascertainment check provisions was upheld by the first appellate court to reach a decision on the issue. Appeals are pending concerning three district court decisions holding the Act unconstitutional.

This review of federal regulation of assault weapons shows that the federal government possesses and exercises substantial regulatory authority over traffic in, and possession of, guns. That authority has limits, of course, and the Supreme Court's decision in *United States v. Lopez* may signal that the outer limits have been reached on regulation of intrastate gun activities under the Commerce Clause. In any case, exercise of federal authority to regulate firearms remains controversial, subject to challenge, and compels a continuing re-examination of the federal-state relationship in the field of law enforcement.

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