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## **The Assault Weapons Ban: Legal Challenges and Legislative Issues**

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# The Assault Weapons Ban: Legal Challenges and Legislative Issues

## Summary

The semiautomatic assault weapons ban of 1994 establishes a comprehensive regulatory scheme prohibiting the manufacture, transfer, or possession of semiautomatic assault weapons, as well as the possession or transfer of large capacity ammunition feeding devices. The Act identifies prohibited weapons either by specific make or model, or by the presence of specific characteristics, varying according to whether the weapon is a rifle, pistol, or shotgun. The Act contains several exemptions to the general prohibition on semiautomatic assault weapons and large capacity ammunition feeding devices, such as specifically identifying roughly 650 types or models of firearms that are not covered under the ban, and further providing that the provisions of the ban do not apply to the possession or transfer of any weapon or feeding device that was otherwise lawfully possessed on the date of enactment. Additionally, the ban was authorized for a period of ten years, and is slated to expire on September 13, 2004.

Several constitutional challenges have been lodged against the provisions of the assault weapons ban, all of which have been rejected by reviewing courts. In particular, it has been determined that the Act does not violate the Ninth Amendment, does not constitute a Bill of Attainder, and is not unconstitutionally vague. More substantively, courts have held that semiautomatic assault weapons can substantially affect interstate commerce, obviating any concerns raised by the Supreme Court's decision in *United States v. Lopez* that the ban operates in violation of the Commerce Clause. Additionally, courts have considered arguments maintaining that the ban violates the Equal Protection Clause since it prohibits weapons that are the functional equivalents of weapons exempted from the Act and because the prohibition of other weapons based upon an amalgam of independent characteristics serves no legitimate governmental purpose. Such challenges have been rejected upon a determination that Congress may rationally distinguish between firearms commonly used in the commission of violent crimes and those suited for sporting purposes, irrespective of their functional similarity, and that Congress could logically conclude that a confluence of dangerous characteristics on a firearm could increase the likelihood that such a firearm would be used for dangerous purposes.

Despite judicial validation of the ban, a lack of accord remains between those who view the ban as an essential part of federal efforts to reduce firearm violence and those who maintain that the difference between banned and exempted weapons largely hinges on cosmetic distinctions with little bearing on functionality. As such, initial proposals to reauthorize the ban prior to its expiration have not progressed legislatively, raising questions regarding the future scope of federal firearm laws.

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# The Assault Weapons Ban: Legal Challenges and Legislative Issues

## Introduction

This report provides an overview of the provisions of the Assault Weapons Ban of 1994, which establishes a scheme prohibiting, subject to certain exceptions, the manufacture, transfer, or possession of semiautomatic assault weapons, and the transfer or possession of large capacity ammunition feeding devices. In addition to providing an overview of the ban and its relation to federal firearm laws, this report also discusses the disposition of legal challenges to the ban, as well as legislative proposals to extend and modify the ban beyond September 13, 2004, when the ban is currently slated to expire.

## The Gun Control Act of 1968

Congress enacted the Gun Control Act of 1968 (GCA) 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>1</sup> establishing a comprehensive scheme regulating the manufacture, sale, transfer, and possession of firearms and ammunition.<sup>2</sup> Section 922(g) of the GCA delineates nine classes of individuals who are prohibited from shipping, transporting, possessing, or receiving firearms or ammunition in interstate commerce. 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>3</sup>

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<sup>1</sup>S.Rept. 90-1097 (1968).

<sup>2</sup>See 18 U.S.C. §922.

<sup>3</sup>18 U.S.C. §922(g)(1)-(9). The GCA, as enacted and amended, contains a public interest exception for all but one of the aforementioned disqualification categories. Specifically, except for 18 U.S.C. §922(g)(9) (relating to persons convicted of a misdemeanor domestic violence offense), 18 U.S.C. §925(a)(1) exempts from prohibition “any firearm or  
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## A. Restrictions on Sales.

In order to effectuate the general prohibitions outlined above, the GCA also imposes significant requirements on the transfer of firearms. Pursuant to the Act, any person who is engaged in the business of importing, manufacturing, or dealing in firearms must possess a Federal Firearms License (FFL) issued by the Attorney General.<sup>4</sup> The possession of a FFL grants an individual the ability to ship, transport, and receive firearms in interstate and foreign commerce, while also imposing several requirements on the licensee designed to ensure that a firearm is not transferred to an individual disqualified from possession under the Act. For example, a licensee 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>5</sup> conduct a background check on the transferee using the National Instant Criminal Background Check System (NICS);<sup>6</sup> maintain records of the acquisition and disposition of firearms;<sup>7</sup> report multiple sales to the Secretary;<sup>8</sup> respond to an official request for information contained in the licensee's records within 24 hours of receipt;<sup>9</sup> and comply with all other relevant state and local regulations.<sup>10</sup>

Federal law does not impose licensing requirements on all sellers of firearms, 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>11</sup> Such private sellers are prohibited from knowingly transferring a

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<sup>3</sup>(...continued)

ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof." The practical effect of this exception is to allow for the possession of firearms in an official capacity, irrespective of criminal record.

<sup>4</sup>18 U.S.C. §922(a); §923. An individual is "engaged in the business" of dealing in firearms if he or she "devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." 18 U.S.C. §922(a)(21)(C). It should be noted that the Homeland Security Act of 2002 transferred the Bureau of Alcohol, Tobacco, and Firearms to the Department of Justice from the Department of the Treasury. P.L. 107-296, Title XI, Subtitle B, §1111, 116 Stat. 2274, 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (Nov. 25, 2002).

<sup>5</sup>18 U.S.C. §922(t)(1)(c).

<sup>6</sup>18 U.S.C. §922(t).

<sup>7</sup>§923(g)(D)(2).

<sup>8</sup>§923(g)(D)(3)(A).

<sup>9</sup>§923(g)(D)(7).

<sup>10</sup>§923(d).

<sup>11</sup>18 U.S.C. §921(a)(21)(C).

firearm to a disqualified individual, but are not required to conduct Brady background checks or maintain official records of transactions.<sup>12</sup>

## **B. Restrictions on Interstate Transfers.**

In addition to the aforementioned requirements imposed upon the sale of firearms by licensed and unlicensed individuals generally, federal law also places significant limitations on the actual interstate transfer of weapons.<sup>13</sup> These provisions are of particular interest in analyzing internet-based firearm sales, given the inherently interstate quality of such activity and the perceived potential for abuse in the internet sale context.

While the possession of a FFL grants a dealer 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 a licensee may make an over-the-counter sale of a shotgun or rifle to any qualified individual, the licensee may not make such a sale of a handgun to a resident of a state other than that in which the dealer's licensed premises is located.<sup>14</sup> Relatedly, a licensee is prohibited from shipping firearms directly to consumers in other states. Instead, a licensee making a firearm sale to a non-resident must transfer the weapon to a licensee in the destination state, from whom the transferee may obtain the firearm after passing the required NICS check.<sup>15</sup>

Substantial restrictions are also placed on firearm transfers between non-licensees. Specifically, whereas a licensee may transfer a rifle or shotgun to a non-resident non-licensee in an over-the-counter sale, the GCA specifically bars a non-licensee from directly selling a firearm to any person who does not reside in the transferring non-licensee's state.<sup>16</sup> Instead, a non-licensee wishing to transfer a firearm to a non-licensee in another state must ship the firearm to a licensed dealer in the transferee's state.

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<sup>12</sup>18 U.S.C. §922(d); §922(t).

<sup>13</sup>Regarding the mailing of firearms, 18 U.S.C. §1715 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. Firearms, including handguns, may be shipped by common carrier 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>14</sup>18 U.S.C. §922(b)(3).

<sup>15</sup>18 U.S.C. §922(b)(3); §922(t).

<sup>16</sup>18 U.S.C. §922(a)(3); §922(a)(5); §922(b)(3).

## The 1994 Assault Weapons Ban

Responding to what it perceived as the “growing menace to our society”<sup>17</sup> posed by certain classes of firearms, Congress enacted, as part of the Violent Crime Control and Law Enforcement Act of 1994, the Public Safety and Recreational Firearms Use Protection Act (referred to as the “assault weapons ban”), establishing a ten year prohibition on the manufacture, transfer, or possession of semiautomatic assault weapons, as well as the possession or transfer of large capacity ammunition feeding devices.<sup>18</sup> As is discussed in greater detail below, the Act contains several exemptions, including a “grandfather clause” allowing for the possession and transfer of semiautomatic assault weapons and large capacity ammunition feeding devices that were otherwise lawfully possessed on the date of enactment. The provisions of the assault weapons ban are slated to expire on September 13, 2004.

Generally speaking, an “assault weapon” is a military style weapon capable of providing either semiautomatic (firearm discharges one round, then loads a new round, each time the trigger is pulled until the magazine is exhausted) or fully automatic fire by means of a selector switch (continuous discharge of rounds while trigger is depressed until all rounds are discharged).<sup>19</sup> As noted in the House Report accompanying the Act, semiautomatic firearms, including semiautomatic assault weapons, are “produced with semiautomatic fire capability only.”<sup>20</sup>

### A. Banned Weapons and Devices.

Codified at 18 U.S.C. §922(v), the Act states that “[i]t shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.”

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<sup>17</sup>H.Rept. 103-489, at 13, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (May 2, 1994). The House Report further stated that “evidence continues to mount that these semiautomatic assault weapons are the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder.” *Id.* at 13. The House Report also noted testimony from the Director of the Bureau of Alcohol, Tobacco and Firearms “that the percentage of semiautomatic assault weapons among guns traced because of their use in crimes” increased from 5.9 percent in 1990 to 8.1 percent in 1993. *Id.* at 13. A 2001 Bureau of Justice Statistics report surveying 203,000 state and federal prisoners in 1997 found that roughly 2% of offenders who were armed during the commission of the offenses for which they were incarcerated used, carried, or possessed a semiautomatic or fully automatic assault weapon. See Caroline Wolf Harlow, Ph.D., “Firearm Use by Offenders,” Bureau of Justice Statistics Special Report, November, 2001 [<http://www.ojp.usdoj.gov/bjs/pub/pdf/fuo.pdf>].

<sup>18</sup>P.L. 103-322, Title XI, Subtitle A, 108 Stat. 1996, 103<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. (September 13, 1994). It is interesting to note that the assault weapons ban marks only the second time that Congress has prohibited the manufacture of specific firearms. The Undetectable Firearms Act of 1998, P.L. 100-649, 102 Stat. 3816 (November 10, 1988), banned the manufacture, importation, possession, transfer, or receipt of firearms 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).

<sup>19</sup>Since 1934, the National Firearms Act has regulated traffic in, and possession of, machine guns and other automatic weapons. 26 U.S.C. §§5801-5872.

<sup>20</sup>H.Rept. 103-489, at 18.

Weapons banned under the Act are identified either by specific make or model (including copies or duplicates thereof, in any caliber), or by specific characteristics, varying according to whether the weapon is a rifle, pistol, or shotgun. Regarding particular makes and models banned under the Act, the definition of “semiautomatic assault weapon,” codified at 18 U.S.C. §921(a)(30), identifies 19 models, including all models of Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (“AK’s”), Action Arms Israeli Military Industries UZI and Galil, the Beretta Ar70, the Colt AR-15, the Fabrique National FN/FAL, FN/LAR, and FNC, as well as revolving cylinder shotguns.

Regarding weapons with specific characteristics that fall under the Act, semiautomatic rifles that have the ability to accept a detachable magazine in addition to possessing at least two of the following five features are banned: (1) a folding or telescoping 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 capable of accepting such a suppressor; or (5) a grenade launcher.<sup>21</sup> Semiautomatic pistols are banned if they have the ability to accept a detachable magazine and at least two of the following five features: (1) an ammunition magazine that attaches to the pistol outside of the pistol grip; (2) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; (3) a shroud that partially or completely covers the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; (4) a manufactured weight of 50 ounces or more when unloaded; or (5) qualify as a semiautomatic version of an automatic firearm.<sup>22</sup> Finally, semiautomatic shotguns are banned if they possess any two of the following four characteristics: (1) a folding telescope or stock; (2) a pistol grip; (3) a fixed magazine capacity in excess of five rounds; or (4) the ability to accept a detachable magazine.<sup>23</sup>

The Act also imposes restrictions on large capacity ammunition feeding devices. Codified at 18 U.S.C. §922(w)(1), the Act prohibits the transfer and possession of such devices, which are defined as any magazine, belt, drum feed strip or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has the capacity (or that can be readily restored or converted to accept) more than 10 rounds of ammunition.<sup>24</sup> Restricted large capacity ammunition feeding devices manufactured after the date of enactment of the Act must bear a serial number that “clearly shows” that they were manufactured after such date,<sup>25</sup> as well as other markings prescribed by regulation.<sup>26</sup>

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<sup>21</sup>18 U.S.C. §921(a)(30)(B).

<sup>22</sup>18 U.S.C. §921(a)(30)(C).

<sup>23</sup>18 U.S.C. §921(a)(30)(D).

<sup>24</sup>18 U.S.C. §921(a)(31)(A). This definition does not include an attached tubular device designed to accept and capable of operating only with .22 caliber rimfire ammunition.

<sup>25</sup>18 U.S.C. §923(i).

<sup>26</sup>*Id.* ATF has issued regulations requiring that large capacity ammunition feeding devices manufactured or imported under the Act be identified with a serial number, and domestically  
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## B. Exempt Weapons and Devices.

The Act contains several exemptions to the general prohibition on the manufacture, transfer, and possession of semiautomatic assault weapons and the transfer or possession of large capacity ammunition feeding device. As noted above, the Act applies only to covered weapons and devices manufactured after September 13, 1994. Accordingly, the Act does not prohibit the possession or transfer of any semiautomatic assault weapon or large capacity ammunition feeding device that was otherwise lawfully possessed on the date of enactment.<sup>27</sup> Additionally, in an Appendix to Subtitle A of the Act, Congress exempted roughly 650 types or models of firearms, such as various models of Brownings, Remingtons, and Berettas, deemed mainly suitable for target practice, match competition, hunting, and similar sporting purposes.<sup>28</sup> It is important to note that the list of exempted firearms in Appendix A is not exhaustive. Rather, the Act provides that absence from the list shall not be construed to mean that the weapon is banned (unless it is otherwise prohibited, either by specific identification, or by the presence of the qualifying characteristics discussed above).<sup>29</sup> The Act also exempts any firearm that is: (1) manually operated by bolt, pump, lever or slide action; (2) an antique or permanently inoperable; (3) a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (5) a semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.<sup>30</sup> The Act also allows the manufacture, transfer, and possession of assault weapons and large capacity ammunition feeding devices for law enforcement purposes, and for authorized testing or experimentation purposes. Other exemptions include transfer for purposes of federal security pursuant to the Atomic Energy Act, as well as possession by a retired law enforcement officer who is not otherwise prohibited from receiving the weapon or device.<sup>31</sup>

## C. Treatment of Assault Weapons Under 18 U.S.C. §925(d)(3).

18 U.S.C. §925(d)(3) provides that the Attorney General<sup>32</sup> shall authorize a firearm or ammunition to be imported or brought into the United States if it does not

<sup>26</sup>(...continued)

manufactured devices are required to bear the name, city, and state of the manufacturer. Imported devices must bear the name of the manufacturer and the country of origin, and, since July 5, 1995, must bear the name, city, and state of the importer. Finally, devices manufactured after September 13, 1994, must be marked “RESTRICTED LAW ENFORCEMENT/GOVERNMENT USE ONLY,” or, in the case of devices manufactured or imported for export since July 5, 1995, “FOR EXPORT ONLY.” 27 C.F.R. §178.92

<sup>27</sup>18 U.S.C. §922(v)(2); §922(w)(2).

<sup>28</sup>See H.Rept. 103-489 at 20.

<sup>29</sup>18 U.S.C. §922(v)(3). It should also be noted that no weapon can be removed from the list of exempted weapons so long as the assault weapons ban is in effect.

<sup>30</sup>18 U.S.C. §922(v)(3)(B)-(D).

<sup>31</sup>18 U.S.C. §922(v)(4); §922(w)(3).

<sup>32</sup>See n. 4, *supra*.

meet the definition of a firearm under the NFA, and is “generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military rifles.” Prior to the implementation of the assault weapons ban in 1994, the ATF identified several semiautomatic assault rifles that it determined did not meet the sporting suitability standard delineated in §925(d)(3), and, on July 6, 1989, ATF prohibited the importation of those rifles.<sup>33</sup> Subsequent to this decision, domestic manufacture of semiautomatic assault weapons increased, and foreign manufacturers “circumvented the strictures of the Bush ban by reconfiguring their weapons and shipping them out under different model numbers,” as well as by attempting to give the weapons a sporting appearance.<sup>34</sup> While the enactment of the assault weapons ban addressed these developments to a certain degree, the ATF determined in 1997 that certain semiautomatic assault rifles that were barred under the 1989 ruling and/or the assault weapons ban of 1994 had been modified to remove all of their military features other than the ability to accept a detachable, large capacity magazine. Accordingly, on April 6, 1998, the ATF prohibited the importation of 56 such rifles, ruling that they were unsuitable for sporting purposes.

## Legal Challenges to the Assault Weapons Ban

The assault weapons ban has been challenged unsuccessfully as being violative of several different constitutional provisions. While arguments that the Act constitutes an impermissible Bill of Attainder,<sup>35</sup> is unconstitutionally vague,<sup>36</sup> and contrary to the Ninth Amendment<sup>37</sup> have been dismissed readily, challenges relating to the Commerce Clause and the Equal Protection Clause have received more measured consideration.

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<sup>33</sup>See Bureau of Alcohol, Tobacco, and Firearms, “Federal Firearms Reference Guide,” ATF P 5300.4(01-00) at 125-25 (2000).

<sup>34</sup>See 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).

<sup>35</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. 200), *cert. denied*, 531 U.S. 816 (2000) (assault weapons ban does not constitute 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>36</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) (statute is not unconstitutionally vague where it defines a criminal offense sufficiently to enable ordinary person to understand what conduct is prohibited, and “court has no difficulty” finding that an ordinary person would conclude that provisions of Act applied to firearms possessed by defendant).

<sup>37</sup>See *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121, 1125 (9<sup>th</sup> Cir. 1996) (Ninth Amendment has not been interpreted to secure independently any constitutional rights for the purpose of establishing a constitutional violation and thus does not encompass “a right to bear arms independent of the Second Amendment.”).

## A. Commerce Clause.

The validity of the assault weapons ban has been challenged on the basis that it violates the tenets of the Commerce Clause, as delineated in the Supreme Court’s decision in *United States v. Lopez*.<sup>38</sup> Specifically at issue in *Lopez* was whether a federal statute prohibiting the mere possession of a firearm on school grounds exceeded congressional authority.<sup>39</sup> In explaining the judicially enforceable limits of the Commerce Clause, the Court delineated three categories of activity that come within its ambit.<sup>40</sup> First, Congress possesses the authority to regulate the use of the channels of interstate commerce.<sup>41</sup> Second, Congress may regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce.<sup>42</sup> Finally, Congress may also regulate activities which have a substantial relation to, and effect on, interstate commerce.<sup>43</sup>

In applying these standards to the case before it, the Supreme Court determined that the statute at issue, 18 U.S.C. §922(q), was neither a regulation of the instrumentalities or channels of interstate commerce, making the determination of the case hinge on the “substantial effects” test.<sup>44</sup> In conducting its analysis under this category, the Court determined that §922(q) was a criminal statute which, by its terms, had no connection with commerce or any sort of economic enterprise, and did not play an essential role in a larger regulatory scheme.<sup>45</sup> The Supreme Court also found it significant that there was no jurisdictional element in the statute which would ensure that firearm possession affected interstate commerce in a particular case.<sup>46</sup>

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<sup>38</sup>514 U.S. 549 (1995).

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 557

<sup>41</sup>*Id.* at 558.

<sup>42</sup>*Id.* at 558.

<sup>43</sup>*Id.* at 558.

<sup>44</sup>*Id.* at 559.

<sup>45</sup>*Id.* at 561.

<sup>46</sup>*Id.* at 561-562. In *Lopez*, the Supreme Court adjusted the judiciary’s traditional approach to Commerce Clause analysis, maintaining that while the history of Commerce Clause jurisprudence represented an expansive interpretation of federal Commerce Clause power, the judiciary maintained the ability to enforce limits on that power. In addition to its consideration of the issues discussed above, the Court also rejected the argument that possession of a gun in the school environment impacted the economy by contributing to the costs associated with violent crime, curtailing the willingness of individuals to travel to areas seen as unsafe, or by posing a threat to the education of the citizenry, thus comprising the quality of the nation’s workforce. *Id.* at 563-564. The Court went on to note that if such remote connections to economic effects were accepted as relevant, it would be almost impossible to identify “any activity by an individual that Congress is without authority to regulate.” *Id.* at 565.

Courts addressing the impact of *Lopez* on the validity of the assault weapons ban have readily determined that the Act meets minimum constitutional requirements under the Commerce Clause. In *Navegar, Inc. v. United States*,<sup>47</sup> for instance, the Court of Appeals for the District of Columbia addressed the question of whether the assault weapons ban fell within one of the three categories of activity identified in *Lopez*. The *Navegar* court determined that it was not required to analyze the first or second *Lopez* categories, “because the Act readily falls within category 3 as a regulation of activities having a substantial effect on interstate commerce.”<sup>48</sup> In addressing this prong of the *Lopez* decision, the court analyzed individually the Act’s prohibitions on manufacture, transfer, and possession.

Regarding the manufacturing prohibition, the court 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>49</sup> Regarding the transfer prohibition, the court likewise determined that “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>50</sup> Based upon these maxims, the court declared that “it is not even arguable that the manufacture and transfer of ‘semiautomatic assault weapons’ for a national market cannot be regulated as activity substantially affecting interstate commerce.”<sup>51</sup>

Turning to the possession prohibition, the court stated that the decision in *Lopez* “does raise a question of whether mere possession of a ‘semiautomatic assault weapon’ can substantially affect interstate commerce. For that reason, it is necessary to examine the purposes behind the Act to determine whether it was aimed at regulating activities which substantially affect interstate commerce.”<sup>52</sup> Analyzing congressional hearings on the Act, 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>53</sup> The court went on to declare 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

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<sup>47</sup>192 F.3d 1050 (D.C. Cir. 1999), rehearing *en banc* denied, 200 F.3d 868 (D.C. Cir. 200), *cert. denied*, 531 U.S. 816 (2000). *See also*, *Olympic Arms v. Magaw*, 91 F.Supp.2d 1061 (E.D. Mich. 2000), *affirmed by Olympic Arms v. Buckles*, 301 F.3d 384 (6<sup>th</sup> Cir. 2002).

<sup>48</sup>*Id.* at 1055.

<sup>49</sup>*Id.* at 1057-58 (citing *United States v. Darby*, 312 U.S. 100, 118-19 (1941); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

<sup>50</sup>*Id.* at 1058 (citing *Lopez*, 514 U.S. at 560-61 (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942)).

<sup>51</sup>*Id.* at 1058.

<sup>52</sup>*Id.* at 1058.

<sup>53</sup>*Id.* at 1058.

receiver.”<sup>54</sup> Based upon these factors, the court held that the “purpose of the ban on possession has an ‘evident commercial nexus.’”<sup>55</sup>

## **B. Equal Protection.**

It has also been argued that the assault weapons ban violates the Equal Protection Clause in that it prohibits weapons that are the functional equivalents of weapons protected under the Act, and because the prohibition of other semiautomatic assault weapons based upon their characteristics serves no legitimate governmental purpose.

Determining the level of scrutiny to be applied under the Equal Protection Clause hinges upon an analysis of 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 that the law is necessary to satisfy a compelling governmental interest.<sup>56</sup> In instances where a law does not affect a suspect class or a fundamental right, the court engages in “rational basis” review, requiring only that the law be rationally related to the asserted governmental interest.<sup>57</sup>

Applying these standards, the Court of Appeals for the Sixth Circuit has held that the provisions of the assault weapons ban do not violate the Equal Protection Clause. In *Olympic Arms v. Buckles*,<sup>58</sup> the court began its analysis by noting that the district court had held that the plaintiff’s equal protection claim was non-cognizable, given that the “Equal Protection Clause protects against inappropriate classifications of people, rather than things.”<sup>59</sup> While acknowledging that such a conclusion has been reached in several cases, the court noted that other rulings have held that since persons may have an interest in things, their classification may be challenged on equal protection grounds.<sup>60</sup> Rather than address this disparity, the court declared that it was not required to decide the scope of equal protection in order to resolve the case before it, based upon its determination 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>61</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

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<sup>54</sup>*Id.* at 1059.

<sup>55</sup>*Id.* at 1059 (citing *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)).

<sup>56</sup>*See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 (1985).

<sup>57</sup>*See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993).

<sup>58</sup>301 F.3d 384 (6<sup>th</sup> Cir. 2002).

<sup>59</sup>*Id.* at 388. *See Olympic Arms v. Magaw*, 91 F.Supp.2d 1061 (E.D. Mich. 2000).

<sup>60</sup>*Id.* at 388.

<sup>61</sup>*Id.* at 388.

outlawed destroy the constitutional legitimacy of the 1994 Act.”<sup>62</sup> The court pointed to several factors in declaring that this argument lacked merit. In particular, 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 in order to prevent manufacturers from circumventing the terms of the Act “by simply changing the name of the specified weapons.” Finally, the court noted that the list of exempted weapons was based on the determination that they were particularly suited to sporting purposes. Viewing these distinctions together, the court 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. The fact that many of the protected weapons are somewhat similar in function to those that are banned does not destroy the rationality of the congressional choice.”<sup>63</sup>

The court then turned to the argument that prohibiting certain weapons based upon their possession of two of any qualifying characteristics was irrational, given that the Act allows a weapon to possess one such feature, and the individual features do not operate in tandem with one another. In rejecting this argument, the court explained that each of the characteristics specified in the Act served to make the weapon “potentially more dangerous,” and were not commonly present on weapons designed solely for sporting purposes.<sup>64</sup> Accordingly, the court stated that “Congress could easily have determined that the greater the number of dangerous add-ons on a semi-automatic weapon, the greater likelihood that the weapon may be used for dangerous purposes.”<sup>65</sup> Based upon these factors, the court held that the plaintiffs had “failed to meet the heavy burden required to show that the 1994 Act violates equal protection.”<sup>66</sup>

## Legislative Activity in the 108<sup>th</sup> Congress

The assault weapons ban will expire on September 13, 2004, absent congressional action. Three bills aimed at repealing the expiration date and making substantive changes to the provisions of the Act have been introduced, one in the House, and two in the Senate. Senator Diane Feinstein has forwarded a proposal, S. 1034, that would strike the expiration date and impose a ban on the importation of large capacity ammunition feeding devices, subject to the same exceptions currently provided for in the Act.

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<sup>62</sup>*Id.* at 389.

<sup>63</sup>*Id.* at 389. The court further stated: A classification does not fail because it “is not made with mathematical nicety or because in practice it results in some equality.” *Id.* at 389-90 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas*, 220 U.S. 61 (1911))).

<sup>64</sup>*Id.* at 390.

<sup>65</sup>*Id.* at 390.

<sup>66</sup>*Id.* at 390.

Representative Carolyn McCarthy and Senator Frank Lautenberg have introduced identical bills (H.R. 2038 and S. 1431 respectively) that would likewise eliminate the ban's expiration date and impose restrictions on the importation of large capacity ammunition feeding devices. However, these measures would make additional significant changes to the Act, such as: (1) making numerous additions to the list of specifically prohibited firearms (including the M1 Carbine and the Sturm, Ruger Mini-14); (2) making the characteristic-based prohibitions more restrictive; (3) removing the exemption for any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; (4) requiring that semiautomatic assault weapons not prohibited under the Act may only be transferred through a licensed dealer or a state or local law enforcement agency; (5) prohibiting the transfer of any assault weapon with a large capacity ammunition feeding device; and (6) prohibiting the transfer to, or possession by, any juvenile of any semiautomatic assault weapon or large capacity ammunition feeding device, without exception.<sup>67</sup>

None of these proposals have been the focus of any legislative action, and, furthermore, it is important to note that comments made by some congressional leaders have cast doubt on the vitality of attempts to reauthorize the Act. In particular, it has been reported that House Majority Leader Tom DeLay has stated that it is unlikely that a proposal for renewal will come up for a vote, and House Minority Leader Nancy Pelosi has been quoted as saying “[i]t won’t be something that we would be whipping.”<sup>68</sup>

## Conclusion

As has been shown, the assault weapons ban establishes a complex regulatory scheme designed to prohibit the manufacture, transfer or possession of semiautomatic assault weapons and the transfer or possession of large capacity ammunition feeding devices. At the same time, however, the Act contains several exemptions designed to ensure access to firearms that have been determined to be suitable for sporting purposes, and to enable the possession and transfer of semiautomatic assault weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of the ban's enactment.

While the provisions of the assault weapons ban have been a significant source of controversy, reviewing courts have rejected all challenges to the validity of the Act, determining that it comports with minimum constitutional requirements. Irrespective of judicial affirmance, there remains little political accord on the Act. As such, initial efforts to ensure the reauthorization of the ban prior to its expiration on September 13, 2004, have garnered scant legislative attention, raising questions regarding the future scope of federal firearm laws.

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<sup>67</sup>As in the original Act, these proposals provide a “grandfather clause” for firearms prohibited under their provisions, so long as they are otherwise lawfully possessed on the date of enactment.

<sup>68</sup>James G. Lakely, “Democrats Shunning Gun Control; Pelosi Won’t ‘Whip’ Assault-Weapons Ban Reauthorization,” *The Washington Times*, May 31, 2003.