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U.S. Gun Policy: Framework and Major Issues

Federal firearms regulation has been a subject of continuous interest for legislators. In recent Congresses, a range of proposals has been introduced, with some seeking to ease various federal firearms restrictions or facilitate reciprocity in state treatment of persons authorized to carry a firearm by another state. Other proposals have sought greater restrictions on the federal rules concerning the possession, transfer or sale of firearms, or the expansion of background checks for firearm purchases. These various approaches, in turn, prompt debate about not only their pros and cons but also their legalities, as Congress's ability to legislate on such matters must comport with the Second Amendment and other constitutional constraints.

Federal Statutory Framework

Federal laws regulating firearms date back roughly a century, though they became more comprehensive over time. These laws generally serve as a floor for permissible firearm use and transactions, leaving states free to supplement with additional restrictions, so long as they do not conflict with federal law.

Two primary federal statutory regimes govern the transfer, sale, and possession of firearms: the National Firearms Act of 1934 (26 U.S.C. Chapter 53) and the Gun Control Act of 1968 (18 U.S.C. Chapter 44), as amended. The Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the principal agency charged with administering these laws.

National Firearms Act

Through a taxation and registration system, the National Firearms Act (NFA) generally limits the availability of covered weapons, including short-barreled shotguns and rifles, fully automatic "machineguns," silencers, "destructive devices," and a catchall category covering "any other weapon" that is "capable of being concealed on the person from which a shot can be discharged through the energy of an explosive." NFA-covered firearms and their owners must be registered with the Attorney General at any point a firearm changes ownership in the chain of commerce.

Gun Control Act

The Gun Control Act (GCA) supplemented the NFA and significantly expanded the scope of federal firearms regulation. The GCA principally sets forth various requirements concerning the sale, purchase, and possession of firearms. For instance, persons "engaged in the business" of manufacturing, importing, or selling GCA- or NFA-covered firearms must receive a federal license from the Attorney General. But a license is not required for those who make only "occasional" firearm sales or purchases for the enhancement of personal collections or as a hobby or who sell all or part of a personal collection. Federal

firearms licensees (FFLs) must conduct background checks of non-FFL prospective buyers and maintain records on all commercial firearms sales. The GCA also generally limits non-FFLs to purchasing a firearm within their state of residence, except for long guns sold face-to-face by an FFL when the sale is considered lawful by the purchaser's state of residence and the FFL's state of business.

The GCA also sets forth several categories of persons who are barred or restricted from shipping, transporting, receiving, or possessing firearms or ammunition. These categories include, for example, persons convicted of certain felony offenses; persons "adjudicated as a mental defective" or who have been committed to a mental institution; unlawfully present aliens or aliens holding non-immigrant visas; and persons subject to certain court orders relating to domestic violence or who have committed domestic violence misdemeanors. With limited exception, the GCA also bars juveniles from possessing a handgun.

Background Checks Under the Brady Act

Pursuant to the Brady Handgun Violence Prevention Act of 1993 (P.L. 103-159), the Federal Bureau of Investigation (FBI) activated the National Instant Criminal Background Checks System (NICS) in 1998. NICS is a computer "system of systems" that queries federal, state, local, tribal, and territorial records that could indicate that a prospective customer is ineligible to receive a firearm. FFLs must use NICS to conduct required background checks on non-FFL prospective firearm purchasers. The NICS Improvement Amendments Act of 2007 (P.L. 110-198) and the Fix NICS Act of 2018 (P.L. 115-141) sought to strengthen federal reporting requirements and encourage states to make certain records—particularly related to domestic violence and mental incompetency—accessible to NICS. The FBI facilitated roughly 300 million background check transactions using NICS from December 1998 through October 2018.

Selected Firearm Policy Issues

Numerous proposals to modify federal gun laws have been introduced and in some cases received consideration in recent Congresses. Proposals range from measures purporting to narrow or expand requirements on the sale, possession, or transfer of firearms and accessories.

Background Checks

Some have viewed non-FFLs' ability to engage in firearms transfers, without being required to adhere to the GCA's recordkeeping and background check requirements, as a "loophole" in the law. Opponents contend that expanding background checks would be costly, cumbersome, and ineffective. Proposals to expand background checks vary in comprehensiveness, from covering sales by non-FFLs

arranged at gun shows to “universal” requirements applicable to virtually all private-party firearms transfers.

Concealed Carry

Firearms regulations vary considerably from state to state and activities lawful in one jurisdiction may be barred in another. Recent Congresses have considered proposals addressing state laws governing when someone may carry a firearm in a concealed manner in public. These proposals generally provide that if a state allows residents to carry a concealed weapon in some circumstances, the state must honor the concealed-carry privilege given by other states. Proponents argue that reciprocity is warranted to reconcile the complicated array of state concealed-carry laws that may make it difficult for lawful gun owners to know where they may carry a concealed handgun outside of the state in which they hold a concealed-carry license. Opponents claim that such proposals pose a risk to public safety and raise federalism concerns.

Deterring “Straw Purchases”

Under the GCA, whenever an unlicensed person seeks to acquire a firearm from an FFL, both the FFL and prospective purchaser must truthfully fill out and sign a form verifying the purchaser’s identity. The purchaser also attests under criminal penalty that he or she is not a prohibited person and is the “actual buyer.” Some proposals seek to deter “straw purchases”—firearm purchases made on behalf of a prohibited person—by heightening applicable criminal penalties or expanding their reach. Opponents contend, among other things, that existing laws are adequate and, in some instances, have expressed concern regarding the requisite mental state for criminal liability to attach.

Modifying Ineligibility Rules and Restrictions on Types of Firearms and Accessories

Recurring proposals to modify the laws governing firearms eligibility often turn on questions regarding the scope of current restrictions (i.e., narrowed versus expanded), the temporal nature of ineligibility (i.e., permanent versus temporary), and whether certain grounds for ineligibility should be adjudicated by a court before the restriction may attach.

For example, proposals have been offered to amend the GCA’s restriction on the receipt or possession of firearms by persons “adjudicated as a mental defective” to specify whether it may attach to persons whose mental health has not been adjudicated by a court. Additionally, some “red flag” proposals seek to authorize the temporary removal of firearms from persons believed to be a danger to themselves or others or to promote state enactment of such laws. The extent to which certain mental health information may be made available in background checks has also received attention. The 115th Congress, for instance, invalidated a 2016 Social Security Administration final rule, under which the agency would submit to NICS information about mentally impaired Social Security recipients whose benefits require management by a third party (P.L. 115-8).

Other recurring proposals address persons suspected of terrorist ties who have not been charged with or convicted

of a criminal offense. Federal law currently does not render persons ineligible to receive or purchase firearms based solely on suspected activities (though as an investigative tool, prospective firearms purchasers are screened against a subset of the Terrorist Screening Database during a NICS check). Proposals have been considered, for example, to grant the Attorney General the power to deny a firearm transfer to a suspected terrorist.

Finally, after a 2017 shooting in Las Vegas, Nevada, involving the use of “bump-fire” or “bump-stock” devices that enable semiautomatic firearms effectively to mimic the firing capabilities of fully automatic weapons, ATF proposed regulation that would interpret existing restrictions that bar the possession of automatic weapons to cover those accessories. Some proposals have sought to codify this ATF proposal. Other proposals have sought to restrict other firearms such as 3D-printed guns and firearms characterized as “assault weapons.” Still other proposals have sought to ease federal restrictions on silencers.

Constitutional Considerations

Congress has broad, but not unlimited, constitutional authority to regulate firearms. While some federal firearm laws find constitutional support in Congress’s taxing power, most federal firearm laws derive from the Commerce Clause. Congress’s authority over interstate commerce confers it with wide latitude to regulate the interstate sale of firearms. Moreover, the Supreme Court, most notably in *United States v. Lopez*, 514 U.S. 549 (1994), has recognized that the Commerce Clause permits Congress to regulate firearms activity occurring wholly within a state when that activity has, in the aggregate, “substantial economic effect” on interstate commerce. Still, *Lopez* recognized that the Commerce Clause does not authorize federal regulation of all wholly intrastate firearms activity, opining, for example, that a general federal interest in reducing localized gun violence does not have a sufficient commercial nexus to satisfy Commerce Clause requirements. Alternatively, Congress could use its spending powers to condition or make available federal money to states that pursue firearms measures beyond the reach of the federal statute. There may be federalism limitations, however, upon Congress’s ability to compel or coerce state firearms activity.

Constitutional rights guaranteed to individuals are also relevant. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court ruled that the Second Amendment preserves an individual right to possess a firearm and use it for traditionally lawful purposes, such as self-defense in the home. However, the Court’s opinion did not disturb what it described as longstanding, “presumptively lawful” firearms prohibitions. Still, congressional proposals to expand federal firearms restrictions must consider implications of the Second Amendment. Other constitutional considerations, such as those involving due process principles, may also be relevant to measures affecting individuals’ eligibility to acquire and possess firearms.

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