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Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress

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Firearms have a unique significance in American society. Millions own or use firearms for numerous lawful purposes, such as hunting and protecting themselves in the home.[1] Still, firearms annually cause tens of thousands of injuries and deaths, including in high-profile mass shootings.[2] The widespread lawful and unlawful uses of firearms have prompted vigorous debate over whether further firearm regulation would be effective or appropriate. And framing the policy debate are legal issues stemming from the existing federal framework of firearms laws and the constitutional constraints that may cabin Congress's ability to legislate in this area.

Firearms regulation at the federal level has grown more expansive over time, setting rules for the lawful manufacture, sale, and possession of firearms at the national level.[3] These federal firearms laws mostly serve as a baseline that states can (and sometimes do) supplement, and Congress regularly considers legislation to address perceived gaps in these laws.[4] Proposals to modify the current federal framework for regulating firearms may be informed by numerous constitutional considerations, including the scope of the Second Amendment right to keep and bear arms and the need to ground legislation in one of Congress's enumerated powers.[5]

This report provides an overview of the development of federal firearms laws and the major components of the current statutory regimes governing firearms. It then describes the constitutional considerations that may impact Congress's ability to enact firearms laws. Finally, this report describes selected topical areas where the 115th and 116th Congresses have considered legislation to amend the existing federal framework regulating firearms, highlighting some of the constitutional issues that may arise in those areas.

Historical Overview of Major Federal Firearms Laws

Federal laws regulating firearms date back roughly a century, and over time lawmakers have established more stringent requirements for the transfer, possession, and transportation of firearms. Though not a regulation of firearms per se, an excise tax was levied on imported firearms and ammunition beginning in 1919.[6] In 1927, a federal law was enacted prohibiting the use of the U.S. Postal Service to ship concealable firearms.[7] Then, "[s]purred by the bloody 'Tommy gun' era" of the 1920s and early 1930s,[8] Congress passed the National Firearms Act of

[1] According to a Gallup poll, 43% of U.S. households owned at least one gun in 2018. STATISTA, *Percentage of households in the United States owning one or more firearms from 1972 to 2018*, https://www.statista.com/statistics/249740/percentage-of-households-in-the-united-states-owning-a-firearm/ (last visited Mar. 20, 2019).

[2] *See* John Gramlich, *7 facts about guns in the U.S.*, PEW RES. CTR., FACTTANK (Dec. 27, 2018), https://www.pewresearch.org/fact-tank/2018/12/27/facts-about-guns-in-united-states/ (stating that nearly 40,000 people died of gun-related violence, including through suicide, in the United States in 2017).

[3] *See infra* "Historical Overview of Major Federal Firearms Laws."

[4] *See infra* "Select Legal Issues for the 116th Congress."

[5] *See infra* "Constitutional Considerations."

[6] 26 U.S.C. § 4181; *see* ATF, *Firearms and Ammunition Excise Tax (FAET)*, https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-and-implements-war-firearms (last visited Mar. 4, 2019).

[7] The provision, which is still in force and contains exceptions, can be found at 18 U.S.C. § 1715.

[8] *History of gun-control legislation*, WASH. POST (Dec. 22, 2012), https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.e566a63e1095; 78 CONG. REC. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals. The rapidity with which they can go across state lines has become a real menace to the law-abiding people of this country.").

1934 (NFA), which established a stringent taxation and registration scheme for specified weapons associated with the Prohibition-fueled gang violence of the time.[9]

A few years later, Congress enacted the Federal Firearms Act of 1938 (FFA), which created a licensing scheme for the manufacture, importation, and sale of firearms and established limited categories of persons who could not possess firearms.[10] The FFA eventually was superseded, however, by the more comprehensive Gun Control Act of 1968 (GCA).[11] In addition to expanding the FFA's licensing scheme and categories of prohibited persons—which largely had been restricted to certain criminals—the GCA augmented the criminal penalties available for violations and established procedures for obtaining relief from firearm disabilities.[12]

Since the GCA's passage, intervening legislation has amended the regulatory regime significantly. For instance, the Firearm Owners' Protection Act of 1986 (FOPA) carved out exceptions to the felony firearm prohibition for certain crimes, repealed certain regulations pertaining to ammunition, expressly prohibited the creation of a national gun registry, added additional categories of persons who are barred from possessing firearms, prohibited the private possession of machineguns manufactured on or after the date of FOPA's enactment, and further expanded the available criminal penalties for violations, among other things.[13] Additionally, the Brady Handgun Violence Protection Act of 1993 (Brady Act) mandated that the Attorney General create a background check system—the National Instant Criminal Background Check System (NICS)—which queries various government records that could indicate that a prospective transferee is ineligible to receive a firearm.[14] The Brady Act further required that a background check be run for many, but not all, proposed firearms transfers before they can be completed.[15] And the Gun-Free School Zones Act added a provision to the GCA that, subject to certain exceptions, bans firearms in statutorily defined school zones.[16]

In 1994, Congress also imposed a 10-year moratorium on the manufacture, transfer, or possession of "semiautomatic assault weapons," as defined in the act, and large capacity ammunition feeding devices, but the ban was permitted to expire in 2004.[17] Finally, some piecemeal legislation in recent years has sought to protect lawful firearm owners, manufacturers, or dealers in certain ways. For example, the Protection of Lawful Commerce in Arms Act, enacted in 2005, grants civil immunity to firearm manufacturers, dealers, and importers when weapons made or sold by them are misused by others.[18]

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[9] Pub. L. No. 73-474, 48 Stat. 1236 (1934).

[10] Pub. L. No. 75-785, 52 Stat. 1250 (1938).

[11] Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[12] *Compare* Pub. L. 75-785, 52 Stat. 1250 (1938), *with* Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[13] Pub. L. No. 99-308, 100 Stat. 449 (1986).

[14] Pub. L. No. 103-159, 110 Stat. 3009 (1993).

[15] *Id.* § 102 (codified at 18 U.S.C. § 922(t)).

[16] Pub. L. No. 104-208, 104 Stat. 4789 (1996) (codified at 18 U.S.C. § 922(q)). This law replaced an earlier version of the Gun Free School Zones Act, which the Supreme Court struck down as exceeding Congress's authority under the Commerce Clause. *See* United States v. Lopez, 514 U.S. 549 (1995).

[17] Pub. L. No. 103-322, 108 Stat. 1796, Title XI (1994).

[18] *See* Pub. L. No. 109-92, 119 Stat. 2095 (2005). The provision is subject to exceptions, which have formed the basis for litigation in the wake of at least one mass shooting. *See* Soto v. Bushmaster Firearms Intl., LLC, No. SC 19832, 2019 WL 1187339 (Conn. Mar. 19, 2019) (concluding that parents of Sandy Hook shooting victims may proceed with claims against firearm manufacturer under state consumer protection statute).

Federal Statutory Framework

Firearms regulation in the United States is an area of shared authority among federal, state, and local governments.[19] Individual states have enacted a variety of laws relating to the possession, registration, and carrying of firearms, among other things.[20] However, federal law establishes a baseline regulatory framework that state and local laws may not contradict.[21] Thus, the current collection of federal firearms laws may be thought of as a regulatory floor that sets out, at the federal level, the minimum requirements for lawful manufacture, sale, and possession of firearms. The two principal federal firearms laws currently in force are the NFA[22] and the GCA, as amended.[23] The Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is the principal agency charged with administering these laws.[24]

National Firearms Act of 1934

The NFA was the first major piece of federal legislation regulating the sale and possession of firearms.[25] Through a taxation and registration scheme, the law sought to curb the rise of violence connected to organized crime by targeting the types of weapons that (at the time of passage) were commonly used by gang members.[26]

Weapons Covered

In its current form, the NFA regulates the manufacture, transfer, and possession of certain enumerated weapons deemed to be "particularly dangerous"[27]: (1) short-barreled shotguns, defined as having a barrel length under 18 inches; (2) short-barreled rifles, defined as having a barrel length under 16 inches; (3) modified shotguns or rifles with an overall length under 26 inches; (4) machineguns,[28] defined as weapons—including frames or receivers—that shoot

[19] *See* Leslie Shapiro, Sahil Chinoy, & Aaron Williams, *How strictly are guns regulated where you live?*, WASH. POST (Feb. 20, 2018) ("Many of the laws regulating access to firearms have been passed at the state level.").

[20] *See id.* (surveying seven types of firearms regulations across states).

[21] 18 U.S.C. § 927 ("No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together."). Federal law also ensures that certain active or retired law enforcement officers may carry concealed firearms and that, subject to certain requirements, authorized persons may transport firearms "for any lawful purpose" from one place where they "may lawfully possess and carry" the firearms to any other such place, irrespective of more restrictive state or local laws. 18 U.S.C. §§ 926A-926C.

[22] Pub. L. No. 73-474, 48 Stat. 1236 (1934).

[23] Pub. L. No. 90-618, 82 Stat. 1213 (1968). The import and export of many firearms are governed as well by the Arms Export Control Act (AECA) and implementing International Traffic in Arms Regulations (ITAR). *See* 22 U.S.C. § 2778; 22 C.F.R. pts. 120-130. AECA, ITAR, and the import and export of firearms are beyond the scope of this report.

[24] *See* 27 C.F.R. pts. 478, 479.

[25] Nicholas J. Johnson, *A Second Amendment Moment,* 71 BROOK. L. REV. 715, 769 (2005).

[26] *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934); 73 CONG. REC. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals. The rapidity with which they can go across state lines has become a real menace to the law-abiding people of this country.").

[27] United States v. Posnjak, 457 F.2d 1110, 1113 (2d Cir. 1972).

[28] The Firearm Owners' Protection Act of 1986 subsequently prohibited the possession and transfer of machineguns unless they are possessed by or transferred to or from federal or state authorities or were lawfully possessed before the effective date of the act (May 19, 1986). *See* 18 U.S.C. § 922(o). Thus, only machineguns manufactured and lawfully

"automatically more than one shot, without manual reloading, by a single function of the trigger," as well as parts intended to convert other weapons into machineguns; (5) silencers;[29] (6) "destructive devices," including bombs, grenades, rockets, and mines; and finally (7) a catchall category of "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," among other things.[30] The NFA explicitly exempts from regulation antique firearms and other devices that are primarily "collector's item[s]" not likely to be used as weapons.[31]

Registration and Identification

All NFA firearms that are produced or imported—as well as their manufacturers, dealers, or importers—must be authorized by and registered with the Attorney General (previously, the Secretary of the Treasury).[32] Any transfer of an NFA firearm must likewise be accompanied by a registration in the name of the transferee.[33] The registrations of all NFA firearms not in the possession or under the control of the United States are maintained in a central registry,[34] and all persons possessing NFA firearms must retain proof that such firearms have been registered.[35]

Any NFA firearm that is produced or imported must be identifiable, with firearms that are not destructive devices bearing, among other things, a serial number that "may not be readily removed, obliterated, or altered."[36]

held prior to May 19, 1986, may be possessed and transferred today. *Id.* On December 26, 2018, the regulatory definition of *machinegun* was amended, for purposes of the NFA and GCA, to include bump-stock-type devices, i.e., devices that "allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger." Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, & 479). The rule becomes effective March 26, 2019. *Id.*

[29] Over the years, several bills have been introduced concerning the NFA's regulation of firearm silencers, including in the 116th Congress. *E.g.*, Hearing Protection Act, H.R. 155, 116th Cong. (2019). If enacted, these bills principally would remove silencers from NFA regulation and preempt states from imposing laws related to taxing, marking, recordkeeping, and registration requirements for firearm silencers. *Id.*; *see also* Silencers Help Us Save Hearing (SHUSH) Act, H.R. 775, 116th Cong. (2019); Silencers Help Us Save Hearing (SHUSH) Act, S. 202, 116th Cong. (2019).

[30] 26 U.S.C. § 5845(a)-(b), (e)-(f). The catchall "any other weapon" category also includes "a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell" and "weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading" but specifically excludes pistols and revolvers with "rifled bores" or "weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition." *Id.* § 5845(e).

[31] *Id.* § 5845(a), (g).

[32] *Id.* §§ 5802, 5822, 5841(b)-(c).

[33] *Id.* §§ 5812, 5841(b)-(c).

[34] *Id.* § 5841(a). The registry is administered by the director of ATF. *See* 28 C.F.R. § 0.131(d).

[35] 26 U.S.C. § 5841(e).

[36] *Id.* § 5842(a). Destructive devices must also be identified in a manner prescribed by regulation. *Id.* § 5842(c); *see* 27 C.F.R. § 479.102(d) (permitting ATF director to authorize alternative means of identifying destructive devices upon receipt of written letter showing that "engraving, casting, or stamping (impressing) such a weapon would be dangerous or impracticable").

Taxation

Every importer, manufacturer, and dealer in NFA firearms must pay an annual "special (occupational) tax for each place of business,"[37] and a separate tax must also be paid for each firearm made.[38] Upon transfer of an NFA firearm, the transferor is subject to a tax of a varying amount depending on whether the firearm to be transferred falls under the catchall category of "any other weapon."[39] A number of tax exemptions exist. Most notably, firearms made by or transferred to the United States, any state, any political subdivision of a state, or any official police organization engaged in criminal investigations are exempted,[40] as are firearms made by or transferred between qualified manufacturers or dealers.[41]

Penalties

A person who violates or fails to comply with the requirements of the NFA is subject to a fine of up to $10,000, imprisonment for up to 10 years, or both.[42] Firearms involved in violations are also subject to forfeiture.[43]

To be criminally culpable for a violation of the NFA, one generally must have knowledge of the features of the firearm that make it a "firearm" under the statute, but one need not know that such a firearm is unregistered.[44]

As originally enacted, a person compelled by the NFA to disclose possession through registration could then be prosecuted if the registration reflected that the person was barred by other legal provisions from possessing firearms.[45] However, the Supreme Court ruled in *Haynes v. United States*[46] that this forced disclosure of potentially incriminating information violated the Fifth Amendment to the U.S. Constitution, which provides in part that no person "shall be compelled in any criminal case to be a witness against himself[.]"[47] *Haynes* prompted Congress to amend the statute to make clear, among other things, that no information from registration records that are required to be submitted or retained by a natural person may be used as evidence against that person in a criminal proceeding for a violation of law occurring prior to or concurrently with the filing of the records, unless the prosecution relates to the furnishing of false information.[48] As amended, the Court has rejected a subsequent challenge to the NFA on Fifth Amendment grounds.[49]

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[37] *Id.* § 5801.

[38] *Id.* §§ 5821-22.

[39] *Id.* §§ 5811-12.

[40] *Id.* §§ 5852-5853.

[41] *Id.* § 5852(c)-(d).

[42] *Id.* § 5871.

[43] *Id.* § 5872.

[44] Staples v. United States, 511 U.S. 600, 619 (1994); United States v. Cox, 906 F.3d 1170, 1189-90 (10th Cir. 2018); United States v. White, 863 F.3d 784, 789-90 (8th Cir. 2017).

[45] United States v. Freed, 401 U.S. 601, 602-04 (1971).

[46] 390 U.S. 85 (1968).

[47] U.S. CONST. amend. V.

[48] 18 U.S.C. § 5848.

[49] *See Freed*, 401 U.S. at 605.

Gun Control Act of 1968

Congress passed the GCA in the wake of the assassinations of Dr. Martin Luther King Jr. and Senator Robert Kennedy 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."[50] Among other things, the statute represented "a Congressional attempt to stem the traffic in dangerous weapons being used in an increasing number of crimes involving personal injury."[51] As enacted, the GCA expanded the existing licensing scheme[52] for the manufacture, importation, and sale of firearms and augmented a previously enacted prohibition on the possession of firearms by certain categories of persons (including felons and "mental defective[s]").[53] It also supplemented available criminal penalties and established procedures for obtaining relief from firearms disabilities.[54]

The GCA today is not a single statute but rather a complex statutory regime that has been supplemented regularly in the decades since its inception. Broadly speaking, the GCA, as amended, regulates the manufacture, transfer, and possession of firearms, extending to categories of weapons that fall outside the scope of the NFA.[55] In general terms, the GCA sets forth who can—and cannot—sell, purchase, and possess firearms; how those sales and purchases may lawfully take place; what firearms may lawfully be possessed; and where firearm possession may be restricted.[56] Major components of the GCA and related supplementing statutes are discussed below, focusing on (1) licensing requirements for firearm manufacturers and dealers, (2) prohibitions on firearm possession, (3) background checks for firearm purchases, (4) interstate firearm sales and transfers, and (5) penalties.

Licensing of Firearm Manufacturers and Dealers

The GCA regulates the manufacture and sale of firearms by requiring persons and organizations "engaged in the [firearms] business"—that is, importers, manufacturers, and dealers—to obtain a license from the federal government and pay an annual fee.[57] These persons and entities are commonly known as Federal Firearm Licensees, or FFLs.[58] Applicants must meet various

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[50] S. Rept. No. 90-1097 (1968).

[51] United States v. Posnjak, 457 F.2d 1110, 1113 (2d Cir. 1972).

[52] Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (1938).

[53] *See* Pub. L. No. 90-618, 82 Stat. 1213 (1968).

[54] *Id.*

[55] The GCA defines a "firearm" as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). "Antique" firearms—i.e., firearms manufactured in or before 1898 or certain muzzle-loading weapons designed to use black powder, among other things—are not included. *Id.* § 921(a)(3), (16).

[56] *Id.* § 922.

[57] *Id.* §§ 921(a)(9)-(11), 922(a), 923. Manufacturers and importers must likewise obtain a license to engage in the business of importing or manufacturing ammunition. *Id.* § 923(a). The GCA separately provides for the licensing of collectors of "curios or relics," which are firearms "of special interest to collectors" by reason of age or other unique characteristics. *See* 18 U.S.C. § 921(a)(13); 27 C.F.R. § 478.11. Licensed collectors may engage in interstate transactions involving curios and relics, but they must still become licensed dealers if they wish to be "engaged in the business" of acquiring or selling *any* firearms (including curios and relics). 27 C.F.R. § 478.41(d).

[58] *See, e.g.*, ATF, *Listing of Federal Firearms Licensees (FFLs) – 2016*, https://www.atf.gov/firearms/listing-federal-firearms-licensees-ffls-2016 (last visited Feb. 14, 2019).

requirements to become FFLs, including being at least 21 years of age, maintaining a premises from which to conduct business that meets safety standards, and certifying compliance with applicable state and local laws.[59] Upon licensing, FFLs are subject to recordkeeping[60] and reporting[61] obligations with respect to the disposition of firearms to non-FFLs and must identify imported or manufactured firearms by means of a serial number,[62] among other things. FFLs also must comply with background-check requirements and certain other transfer restrictions discussed in more detail below.[63] An FFL who willfully violates any provision of the GCA or implementing regulations may, after notice and opportunity for hearing, have his or her license revoked.[64] In this context, a "willful" violation means that the FFL purposefully disregarded or was plainly indifferent to his or her known legal obligation.[65]

A key question with respect to the GCA's licensing regime is what it means to be "engaged in the [firearms] business." Manufacturers are considered to be "engaged in the business" if they "devote time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of firearms manufactured."[66] And dealers are considered to be "engaged in the business" if they "devote[] 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."[67] A person is not "engaged in the business" of dealing in firearms, however, if that person "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."[68] Accordingly, if a person falls within this definitional exclusion, he or she is not subject to the licensing regime and other FFL requirements, such as conducting background checks.

There have been a number of court decisions shedding further light on what it means to be "engaged in the business" of dealing in firearms under the GCA, which is a fact-specific question that is dependent on the particular circumstances of the case.[69] Even though the statute mandates

[59] 18 U.S.C. § 923(d).

[60] *See id.* § 923(g)(1)(A) (requiring maintenance of "such records of importation, production, shipment, receipt, sale, or other disposition of firearms ... as the Attorney General may by regulations prescribe"); 27 C.F.R. § 478.124 (establishing record requirements, which include information on transferee and firearm being transferred).

[61] *See* 18 U.S.C. § 923(g)(3)(A) (requiring reporting of multiple sales or dispositions of pistols or revolvers to unlicensed persons); *id.* § 923(g)(5)(A) (requiring submission of record information to Attorney General upon request); *id.* § 923(g)(6) (requiring reporting of theft or loss of firearm from inventory within 48 hours of discovery). Litigants have, at times, objected to government requests for record information on the ground that such requests amount to an end-run around a separate provision of the GCA that prohibits any "rule or regulation" establishing a gun registry, 18 U.S.C. § 926, but such arguments have not had much success. *See, e.g.*, Ron Peterson Firearms, LLC v. Jones, 760 F.3d 1147, 1160 (10th Cir. 2014); RSM, Inc. v. Buckles, 254 F.3d 61, 67 (4th Cir. 2001) (acknowledging that ATF may not "issue limitless demand letters ... in a backdoor effort to avoid" the registry prohibition but concluding that "narrowly-tailored" request in context of criminal investigation was permissible).

[62] 18 U.S.C. § 923(i).

[63] *See infra* "Background Checks for Firearms Purchases," "Interstate Firearms Sales and Transfers."

[64] 18 U.S.C. § 923(e). Licenses may be revoked based on even a single willful violation. Fairmont Cash Mgmt., LLC v. James, 858 F.3d 356, 362 (5th Cir. 2017).

[65] *James*, 858 F.3d at 362.

[66] 18 U.S.C. § 921(a)(21)(A).

[67] *Id.* § 921(a)(21)(C).

[68] *Id.*

[69] *See, e.g.*, United States v. Bailey, 123 F.3d 1381, 1392 (11th Cir. 1997) ("In determining whether one is engaged in the business of dealing in firearms, the finder of fact must examine the intent of the actor and all circumstances surrounding the acts alleged to constitute engaging in business.") (internal quotation marks and citation omitted).

that, to require a license, the dealer's principal objective in selling firearms must be livelihood and profit, courts have recognized that firearms sales need not be the person's sole source of income or main occupation.[70] Instead, relevant factors include (1) the quantity and frequency of firearms sales; (2) sale location; (3) how the sales occurred; (4) the defendant's behavior before, during, and after the sales; (5) the type of firearms sold and prices charged; and (6) the defendant's intent at the time of the sales.[71] At least one federal appellate court appears to apply a broad standard, requiring the government to prove only that the defendant holds himself out as a source of firearms.[72] Furthermore, because the number of firearms sold is typically only one of many factors courts consider, convictions under the GCA for unlawfully dealing in firearms without a license have been sustained for as few as two[73] or four[74] firearms sales.

Prohibitions on Firearm Possession

The GCA regulates firearm possession in several ways. Principally, the statute establishes categories of persons who, because of risk-related[75] characteristics, may not possess firearms.[76] Possession of certain *types* of firearms,[77] as well as possession of firearms in certain *locations*,[78] also are restricted.

Prohibited Persons

Under the GCA, it is unlawful for a person who falls into at least one of nine categories to ship, transport, possess, or receive any firearms or ammunition.[79] Specifically, a person is prohibited if he or she

- is a felon (i.e., someone who has been convicted in any court of a crime punishable by a term of imprisonment exceeding one year);[80]
- is a fugitive from justice;[81]

[70] *See* United States v. Focia, 869 F.3d 1269, 1280-82 (11th Cir. 2017).

[71] *Id.*; United States v. Tyson, 653 F.3d 192, 201 (3d Cir. 2011).

[72] United States v. Nadirashvili, 655 F.3d 114, 119 (2d Cir. 2011) (quoting United States v. Carter, 801 F.2d 78, 81-82 (2d Cir. 1986)).

[73] *See* United States v. Shan, 361 F. App'x 182, 183 (2d Cir. 2010).

[74] *See* United States v. Pineda, 411 F. App'x 612, 614 (4th Cir. 2011).

[75] *See* United States v. Yancey, 621 F. App'x 681, 683 (7th Cir. 2010) (recognizing that GCA prohibitions aim to "keep guns out of the hands of presumptively risky people").

[76] 18 U.S.C. § 922(g).

[77] *E.g.*, *id.* § 922(o).

[78] *E.g.*, *id.* § 922(q).

[79] 18 U.S.C. 922(g). As an exercise of Congress's Commerce Clause powers, discussed in more detail *infra*, the provision requires receipt, shipping, or transportation to be "in interstate or foreign commerce" and possession to be "in or affecting commerce." *Id.*

[80] The GCA's definition of *crime punishable by imprisonment for a term exceeding one year* excludes criminal offenses relating to antitrust violations, unfair trade practices, restraints of trade, or "other similar offenses related to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). Additionally, if a state classifies a particular offense as a misdemeanor and that crime is punishable by a term of imprisonment of two years or less, the offense does not count as a "crime punishable by a imprisonment for a term exceeding one year" for purposes of 18 U.S.C. § 922(g)(1). *Id.* § 921(a)(20)(B). Finally, a person is not considered "convicted" for purposes of the prohibition if his or her conviction has been expunged or set aside or if the person has been pardoned or had his or her rights restored, unless the relevant order expressly provides otherwise. *Id.*

[81] The GCA defines *fugitive from justice* as "any person who has fled from any State to avoid prosecution for a crime or

- is an unlawful user of, or is addicted to, any controlled substance;[82]
- has been adjudicated as a "mental defective" or committed to a mental institution;
- has been admitted to the United States pursuant to a nonimmigrant visa[83] or is an unlawfully present alien;
- has been dishonorably discharged from the Armed Forces;
- has renounced his or her U.S. citizenship;
- is subject to a court order preventing that person from harassing, stalking, or threatening an intimate partner (or that partner's child) or engaging in other conduct that would cause the partner to reasonably fear bodily injury to himself or herself or the child; or
- has been convicted in any court of a misdemeanor crime of domestic violence.[84]

A separate GCA provision prohibits anyone—not just FFLs—from selling or otherwise disposing of a firearm if that person knows or has "reasonable cause" to believe that the prospective recipient fits into any of the above categories.[85]

Additionally, a person under indictment for a crime punishable by a term of imprisonment exceeding one year is not barred by the GCA from *possessing* a firearm but may not receive, ship, or transport a firearm.[86] In other words, a person who has been charged with a felony need not forfeit already-owned firearms, but he or she may not acquire new ones while the charges are pending. The GCA also places significant restrictions on the transfer to, and possession of, firearms by persons under the age of 18.[87]

Because a number of the terms in the individual prohibitions of Section 922(g) are not defined by statute, the contours of some of the prohibitions have had to be fleshed out by regulations and

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to avoid giving testimony in any criminal proceeding." *Id.* § 921(a)(15). There is a split in authority as to whether a person must have the intent to avoid prosecution when he leaves the jurisdiction or whether he must simply leave the jurisdiction knowing charges are pending and subsequently refuse to answer those charges. *See* United States v. Soza, 874 F.3d 884, 891 (5th Cir. 2017) (describing circuit split).

[82] The term *controlled substance* is defined in Section 102 of the Controlled Substances Act, 21 U.S.C. § 802.

[83] There are exceptions to this prohibition for (1) aliens admitted "for lawful hunting or sporting purposes" or in possession of lawfully issued hunting licenses or permits; (2) official, accredited representatives of foreign governments; (3) "distinguished foreign visitor[s]" designated by the Department of State; and (4) law enforcement officers of friendly foreign governments in the United States on official law enforcement business. 18 U.S.C. § 922(y)(2). Any alien admitted to the United States under a nonimmigrant visa may also petition to have the prohibition waived. *Id.* § 922(y)(3).

[84] 18 U.S.C. § 922(g). A misdemeanor crime of domestic violence is defined as an offense that is a misdemeanor under federal, state, or tribal law and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." *Id.* § 921(a)(33)(A).

[85] *Id.* § 922(d).

[86] *Id.* § 922(n).

[87] *See id.* §§ 922(b)(1) (prohibiting FFL transfer of firearms to persons under age 18), 922(x) (prohibiting transfer and possession of handguns by persons under age 18, subject to exceptions). FFLs may sell shotguns and rifles, but not handguns, to persons under the age of 21. *Id.* § 922(b)(1).

judicial construction. Some of the interpretative issues raised with respect to these prohibitions are discussed briefly below.

"Possession" by a prohibited person. For possession of a firearm by a prohibited person to be unlawful, that possession may be "actual" or "constructive."[88] Actual possession occurs when a person exercises physical control over a firearm.[89] Constructive possession exists when a person has the power to exercise dominion and control over a firearm directly or through others.[90] For example, actual possession may be found when, during a traffic stop, a police officer pats down the driver and discovers a firearm in the driver's waistband.[91] Constructive possession, on the other hand, may be found when, during a traffic stop, an officer observes a firearm not on the driver's person but elsewhere inside the vehicle.[92]

Although proximity to a firearm, alone, is insufficient to establish constructive possession, the totality of the circumstances—including other evidence of a connection to the firearm, movements implying control, or the defendant's activities before and after the discovery—is used to establish constructive possession.[93]

Persons prohibited due to a conviction for a felony or misdemeanor crime of domestic violence "in any court." The prohibitions on possession of a firearm by a person convicted of a felony or a misdemeanor crime of domestic violence "in any court," which are among the most frequently enforced prohibitions in the statute,[94] raise the question of what constitutes "any court." Initially, federal courts took an expansive view of the term. For instance, in holding that a military court-martial is a court within the meaning of the GCA, a 1997 opinion from the Seventh Circuit Court of Appeals used the dictionary definition of the word *any*:

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[88] *See, e.g.*, United States v. Perez, 661 F.3d 568, 576 (11th Cir. 2011); United States v. McCane, 573 F.3d 1037, 1046 (10th Cir. 2009); United States v. Grubbs, 506 F.3d 434, 439 (6th Cir. 2007); United States v. Carrasco, 257 F.3d 1045, 1049 (9th Cir. 2001); Aybar-Alejo v. I.N.S., 230 F.3d 487, 488-89 (1st Cir. 2000); United States v. Rahman, 83 F.3d 89, 93 (4th Cir. 1996); United States v. Anderson, 78 F.3d 420, 422 (8th Cir. 1996).

[89] *See, e.g.*, United States v. Morales, 758 F.3d 1232, 1235 (10th Cir. 2014); United States v. Stoltz, 683 F.3d 934, 940 (8th Cir. 2012); United States v. Hampton, 585 F.3d 1033, 1040 (7th Cir. 2009); United States v. Campbell, 549 F.3d 364, 374 (6th Cir. 2008); United States v. Scott, 424 F.3d 431, 435 (4th Cir. 2005); United States v. Gaines, 295 F.3d 293, 400 (2d Cir. 2002).

[90] *See, e.g.*, United States v. Naranjo-Rosario, 871 F.3d 86, 94 (1st Cir. 2017); United States v. Jones, 872 F.3d 483, 489 (7th Cir. 2017); United States v. Hill, 799 F.3d 1318, 1321 (11th Cir. 2015); United States v. Campbell, 549 F.3d 364, 374 (6th Cir. 2008); United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006); United States v. Scott, 424 F.3d 431, 435 (4th Cir. 2005); United States v. Urick, 431 F.3d 300, 303 (8th Cir. 2005); United States v. De Leon, 170 F.3d 494, 498 (5th Cir. 1999); United States v. Payton, 159 F.3d 49, 56 (2d Cir. 1998).

[91] *See, e.g.*, United States v. Tiru-Plaza, 766 F.3d 111, 114 (1st Cir. 2014) (involving a suspect who pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) after an officer found a firearm in his waistband during an investigative stop).

[92] *See, e.g.*, United States v. Vichitvongsa, 819 F.3d 260, 274-77 (6th Cir. 2016) (concluding that there was sufficient evidence for a jury to find that the defendant constructively possessed a handgun that was sticking out from underneath the driver's seat in the car he was driving based on its location and eyewitness testimony linking a firearm the defendant actually possessed and the one discovered in the car).

[93] *See, e.g.*, United States v. Schmitt, 770 F.3d 524, 534 (7th Cir. 2014); United States v. Byas, 581 F.3d 723, 726 (8th Cir. 2009); United States v. Mayberry, 540 F.3d 506, 514 (6th Cir. 2008); United States v. Alexander, 331 F.3d 116, 127 (D.C. Cir. 2003).

[94] *See* Daniel Riess & Melissa A. Anderson, *Post-*Heller *Second Amendment Litigation: An Overview*, U.S. ATT'YS BULL. (Exec. Office for U.S. Attorneys, Columbia, S.C.), Nov. 2015, at 8, https://www.justice.gov/usao/file/794586/download (noting that in FY 2014, out of 6,405 total cases involving violations of Section 922(g), 5,736 involved the felony and domestic-violence misdemeanor conviction provisions).

> Looking to section 922(g)(1), we find nothing that defines or limits the term "court," only a requirement that a conviction have been "in any court" in the course of prohibiting possession of firearms by a felon. Certainly "any court" includes a military court, the adjective "any" expanding the term "court" to include "one or some indiscriminately of whatever kind"; "one that is selected without restriction or limitation of choice"; or "all."[95]

Additionally, some federal courts had concluded that a conviction in "any court," for the purposes of determining a firearm disability, included convictions in foreign courts.[96] But in resolving a circuit split over this issue,[97] the Supreme Court interpreted the phrase to cover only domestic convictions in its 2005 ruling *Small v. United States*.[98] In a 5-4 decision, the Court adopted a more limited interpretation of the GCA's reference to "any" court than employed by the Seventh Circuit and other lower courts.[99] In reaching its conclusion, the Court applied the legal presumption that "Congress ordinarily intends its statutes to have domestic, not extraterritorial application."[100] The Court ruled that this presumption against extraterritorial application was particularly relevant to the GCA, given the many potential differences between foreign and domestic convictions and "the potential unfairness of preventing those with inapt foreign convictions from possessing guns."[101] The Court additionally reasoned that nothing in the GCA's text or legislative history suggests that the act was intended to allow foreign convictions to give rise to a firearms disability.[102]

Although the Supreme Court's opinion in *Small* abrogated lower court rulings holding that foreign convictions serve as a predicate offense for the GCA's firearm ban for felons, the opinion did not directly disturb earlier rulings holding that U.S. military convictions count for the ban. And a conviction by a court-martial does not appear to raise any of the concerns mentioned by the Supreme Court in *Small* about foreign convictions. Federal courts have not found tension with *Small* when analyzing the related issue of whether a court-martial conviction is encompassed by the term *any court* in statutes that provide heightened penalties for certain repeat offenders. For instance, the Eighth Circuit opined that courts-martial proceedings maintain a connection to the U.S. government, given that they were created by Congress and are governed by federal statute.[103] And the Fourth Circuit reasoned that, although there are some differences between courts-martial and civilian courts, they do not "rise to the level of contrasts between domestic and foreign courts that *Small* highlighted."[104] Accordingly, a conviction by a court-martial for a crime punishable by a term exceeding one year or a misdemeanor crime of domestic violence likely would qualify as a conviction in "any court" for the purposes of the GCA's firearm disqualifiers.[105]

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[95] United States v. Martinez, 122 F.3d 421, 424 (7th Cir. 1997) (citing WEBSTER'S THIRD NEW DICTIONARY 1991).

[96] *See* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989); United States v. Winson, 793 F.2d 754, 757-59 (6th Cir. 1986).

[97] *Compare Atkins,* 873 F.3d at 96 (concluding that "any court" includes foreign courts), and *Winson,* 793 F.2d at 757059 (same), *with* United States v. Gayle, 342 F.3d 89, 95 (2d Cir. 2003) (deciding that "any court" excludes foreign courts).

[98] Small v. United States, 544 U.S. 385 (2005).

[99] *Id.* at 388.

[100] *Id.* at 388-91.

[101] *Id.* at 388-91, 94.

[102] *Id.* at 391-94.

[103] United States v. Shaffer, 807 F.3d 943, 946 (8th Cir. 2015).

[104] United States v. Grant, 753 F.3d 480, 485 (4th Cir. 2014).

[105] For further discussion of this issue, see CRS Legal Sidebar LSB10029, *In Any Way, Shape, or Form? What*

Prohibition applicable to nonimmigrant visa holders. With respect to the prohibition for aliens admitted to the United States pursuant to nonimmigrant visas, the terms of the provision do not explicitly prohibit firearm possession for aliens otherwise admitted (e.g., those admitted on an immigrant visa,[106] through the Visa Waiver Program,[107] as refugees,[108] or without a visa for brief visits for business or tourism by Canadian citizens[109] and certain residents of the Caribbean islands).[110] Initially, ATF interpreted the GCA provision barring firearm possession for aliens admitted on nonimmigrant visas as encompassing all foreign nationals in nonimmigrant status[111] in the United States, including those categories of nonimmigrant aliens who do not need a visa to enter the United States.[112] ATF reasoned that Congress intended for the prohibition to cover all nonimmigrant aliens, given that a nonimmigrant visa is needed for fewer than 50% of nonimmigrants entering the United States and merely "facilitates travel" rather than conferring nonimmigrant status.[113] However, the DOJ's Office of Legal Counsel (OLC) overruled ATF's interpretation in 2011.[114] "The text is clear," OLC said, "the provision applies *only to nonimmigrant aliens who must have visas to be admitted*, not to all aliens with nonimmigrant status."[115] Additionally, OLC rejected ATF's contention that "applying the [firearm] prohibit[ion] to only a particular subset of nonimmigrants would produce 'irrational' results."[116] Rather, OLC opined that Congress could have rationally concluded that nonimmigrants eligible for admission without a visa are less of a public safety risk or that nonimmigrants on brief visits to the United States may be less likely to purchase a firearm.[117] In response, ATF issued a final rule imposing the firearm prohibition on only those nonimmigrants admitted to the United States with a nonimmigrant visa.[118] ATF further announced that "[n]onimmigrant aliens lawfully admitted to the United States without a visa, pursuant either to the Visa Waiver Program or other exemptions from visa requirements, will not be prohibited from … possessing firearms."[119]

Qualifies As "Any Court" under the Gun Control Act?, by Sarah Herman Peck.

[106] For more information on immigration visas and policy, see CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by William A. Kandel.

[107] For more information on the Visa Waiver Program, see CRS Report RL32221, *Visa Waiver Program*, by Jill H. Wilson.

[108] For more information on refugee admissions and policy, see CRS Report RL31269, *Refugee Admissions and Resettlement Policy*, by Andorra Bruno.

[109] 22 C.F.R. § 41.2(a).

[110] *Id.* § 41.2(b)-(e).

[111] A "nonimmigrant alien" is defined as "[a]n alien in the United States in a nonimmigrant classification as defined by section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15))." 27 C.F.R. § 478.11.

[112] Implementation of Public Law Relating to Firearms Disabilities for Nonimmigrant Aliens, 67 Fed. Reg. 5,422 (Feb. 5, 2002).

[113] *Id.*

[114] VIRGINIA A. SEITZ, MEMORANDUM OPINION FOR THE CHIEF COUNSEL, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES: NONIMMIGRANT ALIENS AND FIREARMS DISABILITIES UNDER THE GUN CONTROL ACT (2011), http://www.justice.gov/sites/default/files/olc/opinions/2011/10/31/nonimmigrant-firearms-opinion_0.pdf.

[115] *Id.* at 1 (emphasis added).

[116] *Id.* at 4-5.

[117] *Id.*

[118] Firearms Disabilities for Certain Nonimmigrant Aliens, 77 Fed. Reg. 33,625, 33,627 (June 7, 2012).

[119] *Id.* That said, other provisions of the GCA—such as the provisions restricting firearm sales to persons who do not reside in the same state as an FFL, discussed in more detail *infra*—may prevent nonimmigrants who were admitted into the United States without a visa from acquiring a firearm.

Prohibition applicable to those who unlawfully use or are addicted to a controlled substance. The prohibition on firearm possession by those who unlawfully use or are addicted to controlled substances also raises the question of what it means to be an "unlawful user" or "addicted."[120] Regulations define the terms as including those who have "lost the power of self-control with reference to the use of [a] controlled substance," as well as "current user[s]" of a controlled substance "in a manner other than as prescribed by a licensed physician."[121] The regulations make clear that one need not be using a controlled substance "at the precise time" a firearm is sought so long as use has occurred "recently enough to indicate that the individual is actively engaged in such conduct."[122] Prosecutions and court decisions appear to focus on the term *unlawful user*, which establishes a lower disability threshold than "addict[]."[123] Cases interpreting the term "typically discuss two concepts: contemporaneousness and regularity,"[124] requiring that there be some "pattern" and "recency" of controlled-substance use.[125] For this reason, the prohibition appears to be temporary—that is, one may "regain his right to possess a firearm simply by ending his drug abuse."[126]

Prohibition applicable to a person "adjudicated as a mental defective" or "committed to a mental institution." The GCA is likewise silent as to the meaning of the terms *adjudicated as a mental defective* and *committed to a mental institution* for purposes of that prohibition. The term *adjudicated as a mental defective* has been interpreted in federal regulations, however, as:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the capacity to manage his own affairs.
>
> (b) The term shall include—(1) a finding of insanity by a court in a criminal case, and (2) those persons found incompetent to stand trial or found not guilty by lack of mental responsibility [under the Uniform Code of Military Justice].[127]

Prior to the issuance of the regulatory definition, at least one court had construed the term *mental defective* narrowly, encompassing only those who have "never possessed a normal degree of

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[120] 18 U.S.C. § 922(g).

[121] 27 C.F.R. § 478.11. Because marijuana is a Schedule I controlled substance, deemed to have "no currently accepted medical use in treatment," a user of marijuana in a state where it is lawful may nevertheless be subject to the prohibition; indeed, possession of a registry card for medicinal marijuana may establish "reasonable cause" for an FFL to conclude that an individual is an "unlawful user" under federal law. *See* Wilson v. Lynch, 835 F.3d 1083, 1088-89, 1099-1100 (9th Cir. 2016).

[122] *Id.*

[123] United States v. Patterson, 431 F.3d 832, 839 (5th Cir. 2005) (concluding that error in jury instruction was harmless because jury convicted defendant "of a higher standard, a standard approaching 'addict'").

[124] *Id.*

[125] United States v. Jackson, 280 F.3d 403, 406 (4th Cir. 2002); *see also* United States v. Augustin, 376 F.3d 135, 139 (3d Cir. 2004) (requiring "regular use over a period of time proximate to or contemporaneous with the possession of the firearm").

[126] United States v. Yancey, 621 F.3d 681, 686 (7th Cir. 2010).

[127] 27 C.F.R. § 478.11. The Department of Justice has proposed to amend this definition to bring it into conformity with the NICS Improvement Amendments Act of 2007 (discussed below) and to clarify that the latter findings apply to all courts—rather than merely the military judicial system—among other things. Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution" (2010R-21P), 79 Fed. Reg. 774 (proposed Jan. 7, 2014) (to be codified at 27 C.F.R. pt. 478).

intellectual capacity" and excluding persons with "faculties which were originally normal [but which] have been impaired by mental disease."[128]

The term *committed to a mental institution* has also been interpreted in regulations as including a "formal commitment" for "mental defectiveness," mental illness, or "other reasons, such as drug use" by a "court, board, commission, or other lawful authority" that is "involuntary."[129] Whether a person has been formally and involuntarily committed appears to be fact-specific and dependent on state law.[130]

Prohibited Firearms

Federal law generally does not bar the possession or sale of particular types of firearms, with two major caveats currently in effect.[131] First, the Firearm Protection Owners' Act of 1986 amended the GCA to prohibit the transfer and possession of machineguns.[132] This prohibition does not apply, however, to (1) the transfer to or from, or possession by (or under the authority of) federal or state authorities; and (2) the transfer or possession of a machinegun lawfully possessed before the effective date of the act (May 19, 1986).[133] In response to the 2017 mass shooting in Las Vegas, ATF recently amended the regulatory definition of *machinegun* for purposes of the NFA and GCA to include bump-stock-type devices, i.e., devices that "allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger."[134] The amended definition is effective as of March 26, 2019, rendering possession of bump-stock-type devices illegal (subject to exceptions) as of that date pursuant to the machinegun prohibition.[135]

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[128] United States v. Hansel, 474 F.2d 1120, 1124 (8th Cir. 1973). *See* United States v. Vertz, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (declining to adopt *Hansel* definition in light of regulatory interpretation). Given that *Hansel* was decided prior to adoption of the regulatory definition, it is questionable whether the Eighth Circuit would adhere to it today. *But see* United States v. B.H., 466 F. Supp. 2d 1139, 1146-47 (N.D. Iowa 2006) (declining to depart from *Hansel* despite intervening regulatory definition and Supreme Court precedent).

[129] 27 C.F.R. § 478.11. A proposed amendment to this definition would clarify that commitment includes involuntary outpatient treatment. Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution" (2010R-21P), 79 Fed. Reg. 774 (proposed Jan. 7, 2014) (to be codified at 27 C.F.R. pt. 478). For additional discussion of the prohibitions in 18 U.S.C. § 922(g)(4), see CRS Report R43040, *Submission of Mental Health Records to NICS and the HIPAA Privacy Rule*, coordinated by Edward C. Liu.

[130] *See* United States v. McIlwain, 772 F.3d 688, 694-96 (11th Cir. 2014) (surveying interpretations of other circuits).

[131] As noted previously, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress enacted the Public Safety and Recreational Firearms Act, which implemented a 10-year prohibition on the manufacture, transfer, or possession of "semiautomatic assault weapons," as defined in the act, and large capacity ammunition feeding devices. Pub. L. No. 103-322, 108 Stat. 1796, Title XI (1994). The ban, which had several exceptions, expired on September 13, 2004. Congress has considered a number of proposals over the years to reinstate the ban, with modifications. *E.g.*, Assault Weapons Ban of 2019, S. 66, 116th Cong. (2019).

[132] 18 U.S.C. § 922(o). Separate provisions of the GCA also prohibit FFLs from selling machineguns, destructive devices, short-barreled shotguns, and short-barreled rifles to non-FFLs "except as specifically authorized by the Attorney General consistent with public safety and necessity. *Id.* § 922(b)(4).

[133] *See id.* § 922(o)(2). Lawful transfers and possessors must still comply with the taxation and registration requirements of the NFA. 26 U.S.C. § 5845(a).

[134] Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, & 479); *see* Devlin Barrett, *Justice Department will ban bump-stock devices that turn rifles into fully automatic weapons*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/world/national-security/justice-department-will-ban-bump-stock-devices-that-turn-rifles-into-fully-automatic-weapons/2018/12/18/6ee08434-02e2-11e9-b5df-5d3874f1ac36_story.html?utm_term=.1ac81fdfb701.

[135] *Id.* Several firearm advocacy groups have filed suit and sought a preliminary injunction preventing implementation of the rule; the district court's denial of the motion for preliminary injunction was recently appealed to the D.C. Circuit. *See* Guedes v. ATF, No. 18-CV-2988 (D.D.C. Dec. 18, 2018).

Second, the Undetectable Firearms Act of 1988 (UFA) banned the manufacture, importation, possession, transfer, or receipt of firearms that are undetectable by x-ray machines or metal detectors at security checkpoints.[136] The UFA has recently come under renewed scrutiny amid litigation over the dissemination of 3D-printed firearm designs that potentially could undermine the statute's requirements.[137]

Though most other types of firearms are lawful, possession of particular firearms may be prohibited based on external factors or the status of the possessor. For instance, it is unlawful to knowingly receive, possess, conceal, store, barter, sell, dispose of, or transport in interstate or foreign commerce any stolen firearm or stolen ammunition.[138] Receipt, possession, and transportation of firearms that have had the importer's or manufacturer's serial number removed or altered are likewise prohibited.[139]

Additionally, juveniles—that is, persons under 18 years of age—are barred from knowingly possessing handguns and handgun ammunition, and others may not knowingly transfer such items to them.[140] However, exception is made for, among other things, temporary transfers in the course of employment, ranching or farming activities or for target practice, hunting, or a safety course; possession in the line of duty by juvenile members of the Armed Forces or national guard; transfers of title by inheritance; and possession in defense of the juvenile or another against an intruder into certain residences.[141]

Beyond firearms themselves, the GCA prohibits any person from manufacturing or importing armor-piercing ammunition and any manufacturer or importer from selling or delivering such ammunition unless (1) the ammunition is for the use of the U.S. government, a state, or a political subdivision of a state; (2) the ammunition is to be exported; or (3) the ammunition is to be tested or used for experimentation as authorized by the Attorney General.[142] A person who possesses armor-piercing ammunition with a firearm "during and in relation to the commission of a crime of violence or drug trafficking crime" is also subject to separate criminal sentencing provisions.[143] Finally, a person who has been convicted of a felony crime of violence is barred from purchasing, owning, or possessing body armor unless the person has obtained prior written certification from

[136] Pub. L. No. 100-649, 102 Stat. 3816 (1988) (codified at 18 U.S.C. § 922(p)). There are exceptions to this prohibition, including for manufacture and sale of firearms to U.S. military or intelligence agencies and for firearms manufactured, imported, or possessed prior to the UFA's enactment. 18 U.S.C. § 922(p)(3)-(6).

[137] *See* Danton Bryans, *Unlocked and Loaded: Government Censorship of 3D-Printed Firearms and a Proposal for More Reasonable Regulation of 3D-Printed Goods*, 90 IND. L.J. 901, 915-16 (2015) (describing 3D-printed gun designs that incorporate nonfunctional and removable metal components "for the express purpose of complying with the UFA"); Washington v. Dep't of State, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. Aug. 27, 2018) (entering preliminary injunction effectively prohibiting company from disseminating 3D-printed gun designs for duration of lawsuit). Legislation introduced in the 116th Congress would amend and update the UFA to make clear that major components must be detectable, among other things. *See* Undetectable Firearms Modernization Act, H.R. 869, 116th Cong. (2019).

[138] 18 U.S.C. § 922(j).

[139] *Id.* § 922(k).

[140] *Id.* § 922(x)(1)-(2). Separate provisions also bar FFLs specifically from knowingly selling or delivering any firearms or ammunition to minors and from knowingly selling or delivering firearms other than shotguns or rifles (or ammunition for the same) to persons under the age of 21. *Id.* § 922(b)(1).

[141] *Id.* § 922(x)(3).

[142] *Id.* § 922(a)(7)-(8).

[143] *See id.* §§ 924(c)(5), 929. The term *crime of violence* is defined elsewhere in Title 18, *see* 18 U.S.C. § 16, and that definition has been partially struck down by the Supreme Court as unconstitutionally vague. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018) (addressing definition's "residual clause," which extends definition to felony offenses that, by their "nature," involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense").

his or her employer that the body armor is needed "for the safe performance of lawful business activity" and the armor's use is limited to the course of such performance.[144]

Prohibited Places

The GCA prohibits the possession of firearms in certain locations.[145] For instance, subject to exceptions, firearms may not be possessed in a "Federal facility," defined as a building (or part of a building) owned or leased by the federal government where federal employees are regularly present for performing their official employment.[146] Additionally, loaded firearms are largely banned on federal land managed by the Army Corps of Engineers with exceptions for law enforcement, certain hunting and fishing activities, use at authorized shooting ranges, and with permission from the district commander.[147] Firearms may generally be carried on most other kinds of federal lands, however, so long as the carrier is not otherwise prohibited by federal law from possessing a firearm and is complying with relevant local firearm laws.[148]

The Gun-Free School Zones Act[149] (GFSZA) also amended the GCA to prohibit the knowing possession or discharge of a firearm in a school zone subject to exceptions for law enforcement and possession or discharge on private property not part of school grounds, among other things.[150] As originally enacted, the GFSZA prohibited possession or discharge of *any* firearm in a school zone.[151] The Supreme Court ruled in *United States v. Lopez*,[152] however, that such a prohibition exceeded Congress's constitutional authority under the Commerce Clause. In response, Congress amended the statute in 1996 to make clear that it applies only to firearms that have "moved in or that otherwise affect[] interstate or foreign commerce."[153] Though the Supreme Court has not reconsidered the amended GFSZA, lower courts have generally upheld it on the basis of the added textual link to commerce.[154]

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[144] 18 U.S.C. § 931.

[145] *Transportation* of firearms, though permitted, may also be subject to strict limitations based on the mode of transport—for example, by plane. *See* 18 U.S.C. § 922(e) (requiring persons seeking to transport firearms by common carrier to provide notice or deliver the firearms to "the custody of the pilot, captain, conductor or operator," as the case may be); 49 C.F.R. § 1540.111 (subject to exceptions, requiring firearms to be transported by plane in checked baggage with notice and in compliance with various safety requirements).

[146] Pub. L. No. 100-690, 102 Stat. 4361, § 6215 (1988); 18 U.S.C. § 930. Exceptions exist for (1) federal or state officials performing official law enforcement activities, (2) other federal officials or members of the Armed Forces "if such possession is authorized by law," and (3) possession incident to hunting or "other lawful purposes." 18 U.S.C. § 930.

[147] 36 C.F.R. § 327.13; see also CRS Report R42602, Firearms at Army Corps Water Resource Projects: Proposed Legislation and Issues in the 113th Congress, by Nicole T. Carter. The House of Representatives passed legislation during the 115th Congress that would have allowed the concealed carrying of a firearm on Corps land, among other federal properties. See Concealed Carry Reciprocity Act of 2017, H.R. 38 (2017). The legislation has been re-introduced in the 116th Congress. See Concealed Carry Reciprocity Act of 2019, H.R. 38 (2019).

[148] *See, e.g.*, 54 U.S.C. § 104906 (National Park System); 43 C.F.R. § 423.30 (Reclamation lands and waterbodies); 36 C.F.R. § 261.8 (National Forest System).

[149] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[150] 18 U.S.C. § 922(q).

[151] Pub. L. No. 101-647, 104 Stat. 4789 (1990).

[152] 514 U.S. 549 (1995).

[153] Pub. L. No. 104-208.

[154] *See* United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005), *abrogated on other grounds by* Arizona v. Gant, 556 U.S. 332 (2009); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999). The Commerce Clause limitations on Congress's ability to regulate firearms are discussed in more detail *infra*.

Exceptions and Relief from Disability

Several exceptions are set out in 18 U.S.C. § 925 to the firearm possession and transfer restrictions found elsewhere in the GCA. These exceptions primarily relate to firearms intended for the use of federal, state, or local governments or active duty military personnel.[155] But Section 925 also authorizes a person who is barred by the GCA from possessing, transporting, or receiving firearms or ammunition to "make application to the Attorney General for relief" from the disability.[156] The Attorney General has discretion to grant relief if the applicant establishes "to his satisfaction" that relief would not be contrary to the public interest and that the "circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety."[157] Review of the Attorney General's decision is available in federal district court.[158] This relief-from-disability process has been essentially defunct since 1992, however, as Congress has annually included a provision in ATF appropriations measures prohibiting the expenditure of funds to act on petitions by individuals.[159]

Nevertheless, the NICS Improvement Amendments Act of 2007 (NIAA) established, as relevant here, alternative mechanisms for obtaining relief from one of the GCA's firearm disabilities: the disability based on adjudication as a "mental defective" or commitment to a mental institution.[160] Under NIAA, federal departments or agencies making determinations pertinent to that disability—for example, the Department of Veterans Affairs (VA)[161]—must establish programs permitting affected persons to apply for relief.[162] Applications must be acted on within one year, and judicial review is available.[163] Further, the statute encourages states to create similar programs through conditional grants.[164] If an application for relief is granted under one of these programs, the adjudication or commitment "is deemed not to have occurred" for purposes of the GCA, meaning that the firearm prohibition no longer applies.[165] As of December 2017, some three dozen states had enacted qualifying relief programs.[166]

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[155] *See* 18 U.S.C. § 925(a)(1)-(4).

[156] *Id.* § 925(c).

[157] *Id.*

[158] *Id.*

[159] *See* Pub. L. No. 102-393, 106 Stat. 1732 (1992); Pub. L. No. 116-6, 133 Stat. 13 (2019); Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 682 (6th Cir. 2016) (noting that Section 925(c) "is currently a nullity"); *see also* United States v. Bean, 537 U.S. 71, 78 (2002) (concluding that ATF failure to approve or deny petition precludes judicial review).

[160] Pub. L. No. 110-180, 122 Stat. 2559 (2008).

[161] *See* 38 C.F.R. § 3.353.

[162] 122 Stat. at 2563. NIAA also establishes notice requirements for adjudication processes and disability relief and makes clear that federal departments and agencies may not furnish mental health adjudication records for background check purposes if the relevant adjudication has been set aside or the person has been found to be "rehabilitated," among other things. *Id.* at 2562-64.

[163] *Id.*

[164] *Id.* at 2568-70.

[165] *Id.* at 2570. The relevant records should also be removed from NICS. *Id.*

[166] U.S. Dep't of Justice, Bureau of Justice Statistics, *The NICS Improvement Amendments Act of 2007*, https://www.bjs.gov/index.cfm?ty=tp&tid=49#terms (last visited Feb. 26, 2019).

Background Checks for Firearm Purchases

Overview

The Brady Act[167] requires FFLs—but not private parties who make occasional firearm sales from personal collections or as a hobby—to conduct background checks[168] on prospective firearm purchasers who are not licensed dealers themselves in order to ensure that the purchasers are not prohibited from acquiring firearms under federal or state law.[169] To implement the Brady Act, the FBI created the National Instant Criminal Background Check System (NICS), which launched in 1998.[170] Between the enactment of the Brady Act and the launch of NICS, a set of interim provisions required background checks to be conducted through "the chief law enforcement officer of the place of residence of the transferee,"[171] but the Supreme Court struck down those provisions as an unconstitutional usurpation of state executive prerogatives.[172] Today, the NICS background check is completed either by a state "point of contact" (in states that have *voluntarily* agreed to provide that service) or, otherwise, by the FBI.[173]

Through NICS, FFLs can determine whether a prospective firearm purchaser is disqualified from receiving a firearm.[174] NICS is comprised of three FBI-maintained databases

- **The National Crime Information Center Database (NCIC)** contains crime data related to persons and property, including persons subject to protective orders, fugitive records, and aliens who have been deported or are deportable because of committing certain crimes.[175]

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[167] Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[168] As with other areas of firearm regulation, state law can be more restrictive. Indeed, it appears that at least 20 states and the District of Columbia require background checks for gun sales between private parties. *See* Jacob Fischler, *Stymied in Congress, Gun Control Groups Find Success in States,* CQ (Mar. 1, 2019), https://plus.cq.com/shareExternal/doc/news-5471770/DmNBKUEImlSw1B5a0vlxns_8yvc?0.

[169] 18 U.S.C. § 922(t). Exceptions exist to the background check requirement. For example, background checks are not required for prospective purchasers who hold valid permits in certain states that already provide for their own background checks. *See id.* § 922(t)(3)(A). That said, an FFL that knowingly fails to conduct a background check when one is required, and when the check would bar a sale, may have its license suspended or revoked and be subject to a civil or criminal fine and/or up to one year in prison. *Id.* § 922(t)(5). Fines of up to $10,000 may also be levied on FFLs, state or local agencies, or individuals for misusing the NICS system. *See* 28 C.F.R. § 25.11.

[170] FBI, *National Instant Criminal Background Check System (NICS),* https://www.fbi.gov/services/cjis/nics (last visited Feb. 26, 2019).

[171] 18 U.S.C. § 922(s).

[172] Printz v. United States, 521 U.S. 898, 935 (1997). The federalism limits on Congress's ability to regulate firearms are discussed in more detail *infra.*

[173] FBI, *About NICS,* https://www.fbi.gov/services/cjis/nics/about-nics (last visited Feb. 26, 2019). Some states opt to conduct the background check for only some (e.g., handguns) FFL firearms transfers. *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, NICS FEDERAL FIREARMS LICENSEE MANUAL 4 (2011), https://www.fbi.gov/file-repository/nics-firearms-licensee-manual-111811.pdf/view. Background checks in point-of-contact states may be more accurate, as such states access the three NICS databases and can also access state databases that may contain more prohibiting records. *See* 28 C.F.R. § 25.6(e) (recognizing that points of contact may "also conduct a search of available files in state and local law enforcement and other relevant record systems").

[174] *See* FBI, *About NICS,* https://www.fbi.gov/services/cjis/nics/about-nics (last visited Feb. 26, 2019).

[175] Since 2004, the NCIC has also incorporated data from the Terrorist Screening Database (TSD), a "master watchlist of individuals known or suspected of having terrorist ties." Robinson v. Sessions, 721 F. App'x 20, 21-22 (2d Cir. 2018). Currently, prospective firearm purchasers are screened against a subset of the TSD during a NICS check as an investigative tool, but persons are not barred from purchasing firearms by virtue of appearing on the TSD. *See id.* (describing practice).

- **The Interstate Identification Index System (III)** contains criminal history information for persons who have been arrested or indicted for any federal or state felony or serious misdemeanor.
- **The NICS Index** was created solely for NICS checks and is a catchall index housing records that do not fit under NCIC or III, including mental health and immigration records.[176]

Because the three NICS databases rely on record submissions from multiple federal entities and voluntary submissions from individual states, they are not comprehensive catalogues of the records that could identify a person as being prohibited from possessing or purchasing a firearm.[177] As discussed below, Congress has sought on multiple occasions to improve the processes by which records are collected and to make the databases more comprehensive.[178]

Generally, the NICS check will quickly tell the dealer whether the sale may or may not proceed, or if it must be delayed for further investigation.[179] If a dealer receives a response that the sale must be delayed, and the NICS check does not further alert the dealer as to whether the prospective purchaser is disqualified within three business days, the sale may proceed at the dealer's discretion.[180] However, the FFL must still verify the transferee's identity by examining a valid identification document.[181] The extent to which NICS examiners continue to investigate delayed requests after the three-day period is unclear,[182] but if an FFL receives a "denied" response after the third day and after the firearm has already been transferred, the FFL "should notify" the NICS Section of ATF that the transfer was completed.[183]

An FFL who receives a NICS response denying a transfer will not see the reason for the denial, but the prospective transferee may request the reason from the denying agency (either the FBI or the state or local agency in a point-of-contact state).[184] The denying agency must provide the reason or reasons, in writing, within five business days of receiving the request.[185]

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[176] *See* 28 C.F.R. § 25.2 (identifying and defining databases).

[177] *See* Pub. L. No. 110-180, 122 Stat. 2559 (2008) (finding that millions of criminal records "are not accessible by NICS and millions of criminal records are missing critical data").

[178] *E.g.*, *id.*

[179] 28 C.F.R. § 25.6 (indicating that point of contact will generally notify FFL that transfer may proceed, is delayed pending further record analysis, or is denied).

[180] 18 U.S.C. § 922(t)(1)(B)(ii). Some state laws may provide for more time to complete background checks than the three days given under federal law, and FFLs must comply with the longer limits. ATF, *Does a licensee who conducts a NICS check have to comply with State waiting periods before transferring a firearm?*, https://www.atf.gov/firearms/qa/does-licensee-who-conducts-nics-check-have-comply-state-waiting-periods-transferring (last visited Feb. 27, 2019). As described in more detail *infra*, legislation has passed the House of Representatives that would extend the time frame for completing NICS background check requests. *See* Enhanced Background Checks Act of 2019, H.R. 1112 (2019).

[181] 18 U.S.C. § 922(t)(1)(C).

[182] *See* Sanders v. United States, 324 F. Supp. 3d 636, 646 (D.S.C. 2018) (noting public FBI statements that missing record information is actively sought after the three-day period but finding NICS operating procedures to be "directly contradict[ory]" to such statements).

[183] ATF, *What should a licensee do if he or she gets a "denied" response from NICS or a State point of contact after 3 business days have elapsed, but prior to the transfer of the firearm?*, https://www.atf.gov/firearms/qa/what-should-licensee-do-if-he-or-she-gets-%E2%80%9Cdenied%E2%80%9D-response-nics-or-state-point-contact (last visited Feb. 27, 2019).

[184] 28 C.F.R. § 25.10(a).

[185] Pub. L. No. 103-159, 107 Stat. 1536, § 103(g) (1993); 28 C.F.R. § 25.10(b).

Prospective transferees who are denied firearms on the basis of a NICS background check have multiple avenues to challenge the denial. First, the prospective transferee may challenge the accuracy of a record on which the denial was based or assert that his or her right to possess a firearm has been restored by appealing to the denying agency.[186] Second, if that agency cannot resolve the appeal, the prospective transferee may apply for correction of the record directly to the agency that originated the record.[187] If a record is corrected as the result of an appeal, the prospective transferee and relevant agencies are to be notified, and the record is to be corrected in NICS.[188] At this point, the contested firearm transfer may go forward if there are no other disqualifying records, though the FFL will be required to query NICS again if too much time has elapsed since the initial background check.[189] Finally, as an alternative to the agency appeals process, a prospective firearm transferee may contest the accuracy or validity of a disqualifying record in court by bringing an action against the United States or the relevant state or political subdivision, as applicable.[190]

Although NICS records of approved firearms transfers containing transferees' identifying information are destroyed within 24 hours,[191] transferees who may be subject to repeated, erroneous denials because of similarities in name or identifying information to prohibited persons may consent to the FBI's retention of their personal information in a "Voluntary Appeal File" for use in preventing "the future erroneous denial or extended delay by the NICS of a firearm transfer."[192]

NICS Improvement Amendments Act of 2007 (NIAA)

In an attempt to improve access to records concerning persons prohibited from possessing or receiving firearms because of mental illness, restraining orders, and misdemeanor domestic violence convictions, Congress passed the NIAA in early 2008.[193] With respect to federal records, the statute (among other things) imposes a requirement that federal departments and agencies provide information in records pertaining to prohibited persons on a quarterly basis.[194]

With respect to state records, NIAA authorizes monetary incentives and penalties tied to submitting records to NICS. First, a state that provides at least 90% of its relevant records is eligible under NIAA for a waiver of a 10% matching requirement connected to an existing state grant program for upgrading criminal history and criminal justice record systems (among other things).[195] To remain eligible for the waiver, a state must biannually certify that at least 90% of

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[186] 28 C.F.R. § 25.10(c).

[187] *Id.*

[188] *Id.* § 25.10(c)-(e).

[189] NICS background checks are valid for 30 calendar days, 27 C.F.R. § 478.102, meaning that if more than 30 days have passed and the firearm transaction has not been completed, a new NICS background check must be conducted. *Id.* § 478.102(e).

[190] 18 U.S.C. § 925A; 28 C.F.R. § 25.10(f).

[191] 28 C.F.R. § 25.9(b)(1)(iii).

[192] *Id.* § 25.10(g).

[193] Pub. L. No. 110-180, 122 Stat. 2559 (2008).

[194] *Id.* § 101(a)(4). As noted *supra*, the statute also provides certain protections for persons subject to federal mental health adjudications and requires federal departments and agencies to establish relief-from-disability programs for such persons. *Id.* § 101(c).

[195] *Id.* § 102(a). NIAA also stipulates that state records should provide the name and relevant identifying information of persons adjudicated as mental defectives or committed to mental institutions and that specific information should be provided about disqualifying misdemeanor domestic violence offenses. *Id.* § 102(c)(2)-(3).

records have been made electronically available to the Attorney General.[196] As another incentive, the statute directs the Attorney General to withhold, subject to waiver, up to 5% of funds available from the Edward Byrne Memorial Justice Assistance Grant Program (which provides federal funds for local law enforcement initiatives) if a state provides less than 90% of its available prohibiting records.[197] NIAA also establishes additional grant programs that provide states with money to establish or update information and identification technologies for firearms eligibility determinations, automate record systems, and transmit to NICS the targeted prohibiting records.[198]

Fix NICS Act of 2018

The recently enacted Fix NICS Act[199] (Fix NICS) aims to further increase federal and state submission of prohibiting records to NICS through additional incentive and accountability measures. At the federal level, departments and agencies must semiannually certify whether they are submitting all prohibiting records on at least a quarterly basis.[200] Federal departments and agencies also must each create an "implementation plan" within one year that is designed to "ensure maximum coordination and automated reporting or making available of records to the Attorney General," and "the verification of the accuracy of those records," with annual benchmarks.[201] The Attorney General is to publish and semiannually submit to Congress the names of departments and agencies that fail to submit the required certification, fail to certify compliance with the reporting obligation, fail to create an implementation plan, or fail to obtain substantial compliance with the implementation plan.[202] Political appointees within a federal department or agency that fail to either certify compliance or substantially comply with an implementation plan will be ineligible for bonus pay.[203]

At the state level, Fix NICS reauthorizes some of the grant programs established or utilized by NIAA and ties monetary incentives and preferences under those programs to state creation and substantial compliance with implementation plans like those required of federal departments and agencies.[204] Names of states that do not achieve substantial compliance with their implementation plans are to be published by the Attorney General, while those states determined to be in substantial compliance will receive affirmative preference in Bureau of Justice Assistance discretionary grant applications.[205]

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[196] *Id.* § 102(c)(1)(C).

[197] *Id.* § 104(b).

[198] *Id.* §§ 103, 301. Eligibility for these grant programs is conditioned on the establishment of state relief-from-disability programs for persons adjudicated as mental defectives or committed to mental institutions. *See supra* "Exceptions and Relief from Disability."

[199] Pub. L. No. 115-141, tit. VI, 132 Stat. 348 (2018).

[200] *Id.* § 602.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* §§ 603-04, 607. Funding preference under one of the programs, the NICS Act Record Improvement Program (NARIP), is given to states that have established an implementation plan *and* will use amounts made available "to improve efforts to identify and upload all felony conviction records and domestic violence records" within two-and-a-half years. *Id.* § 603(b)(2)(B).

[205] *Id.* § 605(a).

Interstate Firearm Sales and Transfers

The GCA strictly limits the interstate transfer of firearms to non-FFLs. This limitation takes several forms. First, a non-FFL is barred from directly selling or transferring any firearm to any person (other than an FFL) whom the transferor knows or has reason to believe is not a resident of the state in which the transferor resides.[206] Second, FFLs are prohibited from selling or shipping firearms directly to non-FFLs in other states,[207] but FFLs may make in-person, over-the-counter sales of long guns (i.e., shotguns or rifles) to qualified individuals who are out-of-state residents so long as the sales fully comply with the legal conditions of both states.[208] Handguns may be sold only to persons who are residents of the state in which the FFL's premises are located.[209] Non-FFLs who lawfully purchase long guns from out-of-state dealers may transport those firearms back into their states of residence, but such persons are otherwise prohibited from directly transporting into or receiving in their states of residence any firearms purchased or obtained outside the state.[210]

Despite the substantial restrictions on interstate firearm sales, federal law ensures that lawful firearm owners may transport their weapons between jurisdictions where it is legal to "possess and carry" them without incurring criminal liability under inconsistent state or local laws so long as the firearms are transported in a specified manner.[211] Current or retired law enforcement officers who meet certain requirements are also entitled to carry concealed firearms throughout the United States regardless of restrictions under state or local law.[212]

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[206] 18 U.S.C. § 922(a)(5). Exception is made for transfers to carry out a bequest or intestate disposition, as well as temporary loans or rentals for lawful sporting purposes. *Id.* The prohibition on out-of-state transfers may apply to transfers to citizens of other states or even to citizens of foreign countries. *See* United States v. Sprenger, 625 F.3d 1305, 1308 (10th Cir. 2010); *but see* United States v. James, 172 F.3d 588, 593 (8th Cir. 1999 (in dicta, characterizing statute as prohibiting transfer of firearms "to other unlicensed persons who reside in a different state").

[207] 18 U.S.C. § 922(a)(2). FFLs may, however, ship firearms in interstate commerce to other FFLs or to certain military and law enforcement officers for use in connection with their official duties. *Id.* Concealable firearms may not be sent via the U.S. Postal Service except for these purposes, *id.* § 1715, and shipment by common carrier is subject to disclosure requirements. *Id.* § 922(e).

[208] *Id.* § 922(b)(3).

[209] *Id.* An exception exists for firearm loans or rentals "for temporary use for lawful sporting purposes." *Id.* FFLs may not circumvent the prohibitions on interstate sales to non-FFLs by nominally transferring firearms to in-state residents while knowing that the real purchasers reside in a different state—such "straw" purchases may be prosecuted to the same extent as impermissible direct sales. *See* DiMartino v. Buckles, 129 F. Supp. 2d 824, 828 (D. Md. 2001).

[210] 18 U.S.C. § 922(a)(3). The only other exceptions to this prohibition are for bequest, intestate succession, or transportation of firearms acquired prior to the statute's effective date. *Id.* A separate provision prohibits any non-FFL who does not reside in *any* state from receiving any firearms other than for lawful sporting purposes. *Id.* § 922(a)(9).

[211] *Id.* § 926A; *see* Torraco v. Port Authority, 615 F.3d 129, 132 (2d Cir. 2010) (explaining that Section 926A "allows individuals to transport firearms from one state in which they are legal, through another state in which they are illegal, to a third state in which they are legal, provided that several conditions are met"). One court has construed the protection to apply to vehicular, but not ambulatory, transport. *See* Assoc. N.J. Rifle & Pistol Clubs Inc. v. Port Authority, 730 F.3d 252, 257 (3d Cir. 2013). In recent years, legislation has been introduced that would appear to expand the scope of the protection contained in Section 926A. *E.g.*, H.R. 175, 116th Cong. (2019) (proposing to extend entitlement to transport from and to places where persons "may lawfully possess, carry, or transport" firearms, among other things).

[212] 18 U.S.C. §§ 926B-926C. These provisions do not limit private persons or entities from restricting the possession of concealed firearms on their property or prohibit laws that restrict the possession of such firearms on government property. *Id.*

Penalties

Violations of many of the prohibitions contained in the GCA and supplementing statutes are punishable as felonies, subjecting violators to criminal fines and statutory imprisonment ranges of varying lengths.[213] Increased penalties are also tied to transporting or receiving firearms in interstate or foreign commerce with intent to use the firearms (or with knowledge they will be used) to commit separate felony crimes,[214] as well as using, carrying, or possessing firearms in connection with "any crime of violence or drug trafficking crime."[215]

A person thrice convicted of a "violent felony or a serious drug offense," committed on different occasions, who subsequently possesses or receives a firearm unlawfully is likewise subject to a heightened mandatory minimum sentence of imprisonment.[216] However, the Supreme Court has partially struck down as unconstitutionally vague the definition of the term *violent felony*, which includes (among other things) any offense involving "conduct that presents a serious potential risk of physical injury to another."[217] In response, past Congresses have considered legislation that would link the heightened penalty instead to prior "serious felony" convictions, with the term *serious felony* being tied to the authorized or imposed sentence of imprisonment.[218]

In a 1986 amendment, FOPA added an explicit *mens rea*, or intent, requirement to the GCA's penalty provisions.[219] Accordingly, the GCA now imposes its criminal penalties for either knowing or willful violations, depending on the provision.[220] A violation is made knowingly when the person knows the facts that establish the offense.[221] Under this standard, the government need not prove that the defendant knew his behavior was illegal.[222] This is so, according to the Supreme Court, because of the "background presumption that every citizen knows the law," thus making it "unnecessary to adduce specific evidence to prove that 'an evil-meaning mind' directed

[213] *See generally* 18 U.S.C. § 924 (establishing penalties for violations of the various provisions of Chapter 44).

[214] *Id.* § 924(b).

[215] *Id.* § 924(c). Depending on the type of firearm involved and the existence of prior convictions, a defendant can be sentenced to up to life in prison for a simple violation of this subsection. *Id.* § 924(c)(1)(C)(ii); *see also* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, § 403 (2018) (clarifying that prior conviction must have "become final"). And if a violation of the subsection involves murder, the death penalty may be imposed. *Id.* § 924(j)(1). Persons who take other actions involving firearms in relation to drug crimes or "crime[s] of violence"—for example, transferring firearms knowing they will be used in such crimes—are subject to fines and imprisonment pursuant to separate provisions of Section 924. *See id.* §§ 924(g), (h), (j), (k), (o). *Crime of violence* is defined as a felony that has as an element "the use, attempted use, or threatened use of physical force," or a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3). As noted *supra*, the Supreme Court recently concluded that the language used in this latter "residual clause" is unconstitutionally vague, limiting the statute's application to certain felonies. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).

[216] 18 U.S.C. § 924(e)(1).

[217] *Id.* § 924(e)(2)(B); *see* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). That clause of the definition had been applied to unlawful possession of at least some kinds of firearms. *See* Chambers v. United States, 555 U.S. 122, 133 n.2 (2009) (Alito, J., dissenting) (noting splits over carrying of concealed weapon and possession of sawed-off shotgun as felon).

[218] *See* Restoring the Armed Career Criminal Act, H.R. 6697, 115th Cong. (2018).

[219] *See* Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); Bryan v. United States, 524 U.S. 184, 193 (1998); United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995).

[220] 18 U.S.C. § 924.

[221] *See* Dixon v. United States, 548 U.S. 1, 5 (2006); *Bryan*, 524 U.S. at 187-88.

[222] *Bryan*, 524 U.S. at 193.

the 'evil-doing hand.'"[223] Further, to prosecute unlawful possession of a firearm under 18 U.S.C. § 922(g), the federal courts of appeals have consistently concluded that the government must prove only that the defendant knowingly possessed a firearm but not that he had knowledge of the circumstances disqualifying him from possessing a firearm.[224] For example, a prosecutor may prove a knowing violation of 18 U.S.C. § 922(g)(1)—the GCA provision that bars felons from possessing firearms—by establishing only that the defendant knew that he possessed a firearm *but not* that he knew of his status as a felon at the time he possessed the firearm.[225] However, in January 2019, the Supreme Court granted *certiorari* in *Rehaif v. United States* in order to determine whether this interpretation of the GCA is correct or whether the "knowing" requirement must apply to both possession *and* disqualifying status.[226] Argument in the case is set for April 23, 2019.[227]

For willful violations, there is a heightened intent requirement: A violation is willful when the actor knows that the conduct is unlawful.[228] However, for the act to be willful, the actor need not have specific knowledge of provisions of the law he is breaking. Instead, the person must act only "with knowledge that his conduct [is] unlawful."[229]

Depending on proof of the requisite *mens rea*, firearms or ammunition involved in certain violations of the GCA or other federal criminal laws are subject to seizure and forfeiture.[230]

Constitutional Considerations

Numerous constitutional considerations may inform congressional proposals to modify the current framework for regulating firearms sales and possession. Although Congress has broad constitutional authority to regulate firearms, any firearm measure must be rooted in one of

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[223] *Id.*

[224] *See* United States v. Rehaif, 888 F.3d 1138, 1144-45 & n.3 (11th Cir. 2018), *cert. granted*, __S. Ct.__ (Jan. 11, 2019) (collecting cases). In *Rehaif*, the Eleventh Circuit explained that "there is a longstanding uniform body of precedent holding that the government does not have to satisfy a mens rea requirement with respect to the status element of § 922.... [N]o court of appeals has required proof of the defendant's knowledge of his prohibited status under any subsection of § 922(g)." *Id.* at 1145. Moreover, the court further commented that each subdivision of 18 U.S.C. § 922(g) should garner the same intent requirements because, "[n]ot only would it be bizarre for two § 922(g) subdivisions to have different mens rea requirements, but also, there is nothing in the text or history of § 922 to support such deviation." *Id.* at 1144 n.2.

[225] *See* United States v. Langley, 62 F.3d 602, 604-06 (4th Cir. 1995).

[226] Rehaif v. United States, No. 17-9560, __S. Ct.__ (Jan. 11, 2019).

[227] *See* Docket, Rehaif v. United States, No. 17-9560 (Feb. 11, 2019), https://www.supremecourt.gov/docket/docketfiles/html/public/17-9560.html. Notably, the view that the knowledge requirement applies to both possession and status, which no federal court of appeals has adopted, appears to have at least one adherent on the Supreme Court. While sitting on the Tenth Circuit Court of Appeals, then-Judge Gorsuch argued in a concurring opinion that the position that the government does not have to prove that a defendant knew of his felonious status in a prosecution under Section 922(g)(1) "simply can't be squared with the text of the relevant statutes." United States v. Games-Perez, 667 F.3d 1136, 1143(10th Cir. 2012) (Gorsuch, J., concurring). He recounted that Section 922(g)(1) has three elements: (1) a previous conviction for a firearm; (2) subsequent possessions of a firearm; and (3) the possession was in or affecting interstate commerce. *Id.* And because the GCA punishes knowing violations of Section 922(g), then-Judge Gorsuch contended that the circuit's current interpretation "leapfrog[s] over the very first § 922(g) element and touch[es] down only at the second," which, in his view, "defies linguistic sense—and not a little grammatical gravity." *Id.*

[228] *See* Dixon v. United States, 548 U.S. 1, 5 (2006); Bryan v. United States, 524 U.S. 184, 192-93 (1998).

[229] *Bryan*, 524 U.S. at 193-96.

[230] 18 U.S.C. § 924(d)(1).

Congress's enumerated powers.[231] In enacting firearms laws, Congress has typically invoked its tax, commerce, and spending powers. Still, when exercising those enumerated powers, Congress must be mindful of other constitutional restraints, such as those flowing from the Second Amendment, the Fifth Amendment's Due Process Clause, and principles of federalism. This section provides an overview of the primary powers Congress has invoked to enact firearms measures and then addresses the constitutional constraints that independently could limit Congress's ability to regulate firearms.

Constitutional Source of Authority to Enact Firearms Measures

Tax Power

Article I of the Constitution, which enumerates powers of Congress, declares that "[t]he Congress shall have Power To lay and collect Taxes."[232] This broad power enables Congress to tax many activities that it could not directly regulate.[233] Still, "[e]very tax is in some measure regulatory" by creating "an economic impediment to the activity taxed as compared with others not taxed."[234] Because a tax can shape behavior, when imposing a tax Congress may be motivated by an objective other than raising revenue,[235] like limiting the supply of certain firearms.[236] And provisions of a tax measure that go beyond the actual collection of the tax, such as penalty provisions,[237] are considered lawful so long as they are reasonably related to the exercise of

[231] *See, e.g.*, Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018) ("The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers."); United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

[232] U.S. CONST. art. I, § 8, cl. 1. Several other Article I provisions limit Congress's taxing power: (1) Taxes levied must be for the "general Welfare of the United States"; (2) "all Duties, Imposts and Excises shall be uniform throughout the United States"; (3) "[n]o Tax or Duty shall be laid on Articles exported from any State"; and (4) "[n]o Capitation, or other direct, Tax, shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." *Id.* § 8, cl. 1, § 9, cl. 4.

[233] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius [NFIB], 567 U.S. 519, 537 (2012) ("Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control.").

[234] Sonzinsky v. United States, 300 U.S. 506, 555 (1937).

[235] *See NFIB*, 567 U.S. at 567 (noting examples of taxes used to shape behavior, like taxes on cigarettes and certain firearms, and opining that the individual mandate in the Affordable Care Act, which "seeks to shape decisions about whether to buy health insurance[,] does not mean that it cannot be a valid exercise of the taxing power"); United States v. Doremus, 249 U.S. 86, 94 (1919) (opining that a tax measure "may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue").

[236] *See* United States v. Aiken, 974 F.2d 446, 448-49 (4th Cir. 1992) (holding that the NFA's penalty provisions were constitutionally enacted under Congress's taxing power because they are "rationally designed to aid in the collection of taxes").

[237] *See* United States v. Lim, 444 F.4d 910, 913 (7th Cir. 2006) ("Congress legitimately may target for punishment the recipient of an unregistered firearm as a means of discouraging the circumvention of the transfer tax" in the NFA); United States v. Thompson, 361 F.3d 918, 921 (6th Cir. 2004) ("Having required payment of a transfer tax and having required registration as an aid in collection of that tax, Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons ... to discourage the transferor ... from transferring the firearm without paying the tax." (internal quotation marks, citations, and alternations omitted)); *see also* United States v. Dodge, 61 F.3d 142, 145 (2d Cir. 1995) ("Of course, tax regulation may have a regulatory effect on the activity or commodity being taxed, but such effect will not invalidate the law as long as the statutory scheme is 'in aid of revenue purpose.'" (quoting *Sonzinsky*, 300 U.S. at 513)).

Congress's tax power[238] and not "extraneous to any tax need."[239] Congress's tax power is not without limitation, however. While the Supreme Court often will "decline[] to closely examine the regulatory motive or effect of revenue-raising measures," the Court has indicated that it will step in when a tax measure is "so punitive" that it "loses its character as [a tax] and becomes a mere penalty with the characteristics of regulation and punishment."[240]

Congress invoked its tax power when enacting the NFA. Within a few years of its enactment, in 1937, the Supreme Court upheld the NFA as a lawful exercise of Congress's tax power in *Sonzinsky v. United States*.[241] Notwithstanding the NFA's deterrent purpose, the Court opined that "a tax is not any the less a tax because it has a regulatory affect."[242] The Court further concluded that the NFA's registration requirements were "obviously supportable as in aid of a revenue purpose," and, the Court added, the tax produced "some revenue."[243] More recently, in 2018 the Tenth Circuit, relying on *Sonzinsky*, upheld the NFA's taxing and registration scheme as a valid exercise of Congress's tax power in a challenge to the NFA's regulation of firearm silencers.[244] The Tenth Circuit rejected the defendants' argument that the NFA, in modern times, is "far more of a gun-*control* measure than a gun-*tax* measure."[245] The defendants had principally argued that, because the NFA taxes collect no net revenue, "the NFA's taxing purpose disappear[ed], leaving only its regulatory effect," thus rendering the tax unconstitutional.[246] But the Tenth Circuit declined to create a heightened constitutional requirement for Congress's tax power that would require a tax to produce net revenue, pointing to the Supreme Court's continued emphasis, since *Sonzinsky*, on whether a tax measure collects "some" gross revenue, no matter how small.[247]

Commerce Clause Power

The Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[248] The Commerce Clause, as interpreted by the Supreme Court, authorizes Congress to regulate three categories of activities related to

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[238] *Doremus*, 249 U.S. at 93 ("If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."); *Aiken*, 974 F.2d at 448 ("The NFA's regulatory provision need only bear a 'reasonable relation' to the statute's taxing power." (quoting *Doremus*, 249 U.S. at 93)).

[239] *See* United States v. Kahriger, 345 U.S. 22, 31 (1953), *overruled on other grounds in* Marchetti v. United States, 390 U.S. 39, 50-54 (1968).

[240] *NFIB*, 567 U.S. at 573.

[241] 300 U.S. 506 (1937); *see also* United States v. Gresham, 118 F.3d 258, 262 (5th Cir. 1997) ("[I]t is well-settled" that the NFA's registration requirement "is constitutional because it is part of the web of regulation aiding enforcement of the transfer tax provision.... Having required payment of a transfer tax and registration as an aid in collection of that tax, Congress under the taxing power may reasonably impose a penalty on possession of unregistered weapons." (internal quotation marks and citation omitted)).

[242] *Sonzinsky*, 300 U.S. at 513; *see also* United States v. Lim, 444 F.3d 910, 912-13 (7th Cir. 2006) (citing to *Sonzinsky* and opining that "[i]nherent in the power to tax is the prerogative to decide what to tax and how large of a tax to impose. Those choices will have regulatory effects in the sense that the more heavily a particular activity is taxed, the more people will be deterred from engaging in that activity. Yet, the Supreme Court has rejected the notion that the regulatory character of tax legislation renders the legislation an invalid exercise of the taxing power").

[243] *Sonzinsky*, 300 U.S. at 513-14.

[244] United States v. Cox, 906 F.3d 1170, 1179-83 (10th Cir. 2018).

[245] *Id.* at 1180 (quoting the defendants' appellate brief).

[246] *Id.* at 1181-83.

[247] *Id.* at 1183.

[248] U.S. CONST. art. I, § 8, cl. 3.

interstate commerce: (1) "channels" of interstate commerce, like highways and hotels;[249] (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce," such as motor vehicles and goods that are shipped;[250] and (3) "activities that substantially affect interstate commerce," which include intrastate activities (such as robbery) "that might, through repetition elsewhere," substantially affect interstate commerce.[251]

Congress has relied on the Commerce Clause as a constitutional basis for GCA provisions restricting the manufacture, import, sale, transfer, and possession of firearms,[252] and the Supreme Court has reviewed a number of these regulations. Early cases mainly involved statutory interpretation, centering on what conduct the statutory prohibitions reached.[253] Only the most recent case—*United States v. Lopez*—directly addressed the scope of Congress's Commerce Clause power to regulate firearms. For example, in the 1971 ruling *United States v. Bass*,[254] the Supreme Court analyzed the scope of a law enacted as part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which made it a federal crime for a felon to "receive[], possess[], or transport[] *in commerce or affecting commerce* ... any firearm."[255] (A similar provision is found in the current version of the GCA.[256]) In *Bass*, the Court held that the language "in commerce or affecting commerce" applied to all three listed activities—receiving, possessing, and transporting—and not just the last one.[257] In resolving the textual ambiguity this way, the Court in part relied on federalism principles (discussed in more detail *infra*), reasoning that if the statute had reached "mere possession," wholly untethered to interstate commerce, the provision

[249] *See* Pierce Cty., Wash. v. Guillen, 537 U.S. 129, 147 (2003) (holding that a federal law designed to improve safety on the nation's highways is a lawful exercise of Congress's power to regulate channels of commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253, 261-62 (1964) ("[T]he action of the Congress in the adoption of [Title II of the Civil Rights Act of 1964] as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution."); United States v. Ballinger, 395 F.3d 1218, 1225-26 (11th Cir. 2005) (listing highways, railroads, navigable waters, airspace, and telecommunications networks as examples of channels of interstate commerce).

[250] *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (citing to cases upholding as a valid exercise of Congress's Commerce Clause power laws regulating vehicles like aircrafts and locomotives as examples of instrumentalities of interstate commerce); *Ballinger*, 395 F.3d at 1226 (listing automobiles, airplanes, boats, goods, and telephones as examples of instrumentalities of interstate commerce).

[251] *See Lopez*, 514 U.S. at 567; United States v. Parker, 108 F.3d 28, 30 (3d Cir. 1997) (upholding the Child Support Recovery Act of 1992 as a valid exercise of Congress's power to regulate interstate commerce because, among other things, the failure to make child support payments is a local activity that substantially impacts interstate commerce); United States v. Bolton, 68 F.3d 396, 398-99 (10th Cir. 1995) (concluding that the Hobbs Act, which criminalizes robbery and extortion, is a lawful exercise of Congress's Commerce Clause power because those activities, through repetition, may have a substantial effect on interstate commerce).

[252] *See* 18 U.S.C. § 922; *see also* J. Richard Broughton, *The Ineludible (Constitutional) Politics of Guns*, 46 CONN. L. REV. 1345, 1356 (2014) (noting Congress's reliance on the Commerce Clause to impose firearm regulations).

[253] *See* Scarborough v. United States, 431 U.S. 563, 564 (1977) ("The issue in this case is whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce."); Barrett v. United States, 423 U.S. 212, 213 (1976) ("The issue before us is whether [a GCA provision] has application to a purchaser's intrastate acquisition of a firearm that previously, but independently of the purchaser's receipt, had been transported in interstate commerce from the manufacturer to a distributor and then from the distributor to the dealer."); United States v. Bass, 404 U.S. 336, 338 (1971) ("We granted certiorari to resolve a conflict among lower courts over the proper reach of the statute." (internal citation omitted)).

[254] 404 U.S. 336 (1971).

[255] Pub. L. No. 90-351, § 1202(a), 82 Stat. 197 (1968) (emphasis added).

[256] 18 U.S.C. § 922(g)(1).

[257] *Bass*, 404 U.S. at 347.

would have "dramatically intrud[ed] upon traditional state criminal jurisdiction."[258] In light of the Court's interpretation of the statute, it declined to opine on whether the Commerce Clause could provide a basis for Congress to regulate the "mere possession" of a firearm.[259]

A few years later, in *Scarborough v. United States*, the Supreme Court reviewed the same provision to determine *when* the firearm must travel in interstate commerce for the possession ban to apply to felons.[260] The Court ultimately concluded that the criminal provision applied to any felon who possessed a firearm that had "at some time" traveled in interstate commerce.[261] In rejecting the defendant's contention that the possession itself must be contemporaneous with interstate commerce, the Court pointed to contrary legislative intent. In particular, the Court concluded that the legislative history "supports the view that Congress sought to rule broadly to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society,'" without "any concern with either the movement of the gun or the possessor or with the time of acquisition."[262]

Similarly, in *Barrett v. United States*,[263] the Supreme Court analyzed the scope of the interstate commerce nexus in a GCA provision that made it unlawful for certain categories of persons, such as felons, "to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[264] The Court concluded that the term *to receive* applies to the *intrastate* acquisition of a firearm if that firearm previously had been transported in interstate commerce (e.g., from the manufacturer to the distributor to the dealer).[265] The Court reasoned that the language "has been" shipped or transported in interstate commerce "denot[es] an act that has been completed" and thus applies "to a firearm that already has completed its interstate journey and has come to rest in the dealer's showcase at the time of its purchase and receipt by the felon."[266] Finally, the Court commented that interpreting the provision to apply only to interstate receipts "would remove from the statute the most usual transaction, namely, the felon's purchase or receipt from his local dealer," and that interpretation, in the Court's view, would contravene Congress's "concern with keeping firearms out of the hands of categories of potentially irresponsible persons."[267]

Most recently, in its 1995 opinion *United States v. Lopez*, the Supreme Court reviewed—and invalidated—the GFSZA, which criminalized the possession of a firearm in a school zone but contained no explicit nexus to interstate commerce.[268] The government had argued that firearm possession in a school zone may cause violent crime, which could affect the national economy by (1) handicapping the educational process, which would generate a "less productive citizenry," and

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[258] *Id.* at 349-50.

[259] *Id.* at 339 n.4 ("In light of our disposition of the case, we do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the 'mere possession' of firearms" and whether the law withstands scrutiny under the Court's application earlier that year of the Commerce Clause to a different federal crime).

[260] Scarborough v. United States, 431 U.S. 563, 564-67 (1977).

[261] *Id.* at 575.

[262] *Id.* at 571-73 (quoting 114 CONG. REC. 14,773 (1968) (statement of Sen. Long), *available for download* at https://www.govinfo.gov/app/details/GPO-CRECB-1968-pt11).

[263] 423 U.S. 212 (1976).

[264] Gun Control Act of 1968, Pub. L. No. 90-617, 82 Stat. 1213 (1968).

[265] Barrett v. United States, 423 U.S. 212, 213, 216 (1976).

[266] *Id.* at 216-17.

[267] *Id.* at 220-21.

[268] United States v. Lopez, 514 U.S. 549, 551-52 (1995).

(2) spawning substantial financial losses "spread throughout the population" through insurance costs and the "reduce[d] willingness of individuals to travel to areas within the country that are perceived to be unsafe."[269] The Court rejected these arguments, opining that if the Commerce Clause could reach such activity, it essentially would authorize a federal police power, a constitutional power the Framers declined to give to the federal government.[270] Without finding a substantial effect on interstate commerce, the Court further concluded that the law exceeded Congress's power under the Commerce Clause because "[t]he Act neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce."[271] Congress subsequently amended the provision to provide expressly that, for the possession of a firearm in a school zone to be a federal crime, the government must show that the firearm "moved in or ... otherwise affects interstate or foreign commerce."[272] This amended version of the statute has been upheld by lower courts against constitutional challenges.[273]

Spending Power

Article I grants Congress broad authority to enact legislation for the "general welfare" through its spending power.[274] When invoking this power, Congress can place conditions on funds distributed to the states that require those accepting the funds to take certain actions that Congress otherwise could not directly compel the states to perform.[275] Still, the Supreme Court has articulated several limitations on Congress's power to attach conditions to the receipt of federal funds—namely, any condition

- must be written unambiguously, so that state lawmakers understand the full consequences of accepting or declining funds;
- must be germane to the federal interest in the particular program to which the money is directed;

[269] *Id.* at 563-64.

[270] *Id.* at 564 ("Under the theories the Government presents in support of [the GFSZA], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education, where States historically have been sovereign.").

[271] *Id.*

[272] 18 U.S.C. § 922(q)(2).

[273] *See, e.g.,* United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999).

[274] *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare of the United States."); Agency for Int'l Dev. v. All. for Open Society Int'l, Inc., 570 U.S. 205, 213 (2013) (noting that the Spending Clause "provides Congress broad discretion to tax and spend for the 'general Welfare,' including by funding particular state or private programs or activities"); NFIB, 567 U.S. 519, 579 (2012) ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds."); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) ("Congress has broad power to set the terms on which it disburses federal money to the States."); Sabri v. United States, 541 U.S. 600, 605 (1941) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare.").

[275] *See NFIB,* 657 U.S. at 536 ("[I]n exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions," which "may well induce the state to adopt policies that the federal Government itself could not impose"); *see also* South Dakota v. Dole, 483 U.S. 203, 212 (1987) ("Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in [23 U.S.C.] § 158 is a valid use of the spending power.").

- cannot induce the recipient states to engage in an activity that would independently violate the Constitution; and
- cannot be "so coercive as to pass the point at which pressure turns into compulsion."[276]

Arguably, the most difficult limitation to glean is whether a spending condition is unduly coercive. Two Supreme Court opinions exploring the bounds within which Congress must stay offer some guidance. First, in *South Dakota v. Dole*, the Supreme Court upheld a 1984 congressional measure designed to encourage states to raise the minimum drinking age to 21.[277] To achieve this result, Congress directed the Secretary of Transportation to withhold 5% of certain federal highway grant funds from states with a lower minimum drinking age.[278] In upholding the spending condition, the Court concluded that a state stood to lose only "a relatively small percentage of certain federal highway funds," which the Court further described as "relatively mild encouragement."[279] Second, and more recently, in *National Federation of Independent Business v. Sebelius* (*NFIB*), the Supreme Court struck down a provision of the Patient Protection and Affordable Care Act of 2010 (ACA) that purported to withhold Medicaid funding from states that did not expand their Medicaid programs.[280] Unlike in *Dole*, in *NFIB* the Court concluded that the financial condition placed on the states in the ACA (withholding all federal Medicaid funding, which, according to the Court, typically totals about 20% of a state's entire budget) was akin to "a gun to the head" and thus unlawfully coercive.[281]

Constitutional Constraints on Congress's Ability to Regulate Firearms

The Second Amendment

The Second Amendment states that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."[282] In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to possess firearms for historically lawful purposes.[283] Since *Heller*, the Supreme Court has substantively opined on the Second Amendment one other time, holding in *McDonald v. City of Chicago* that the Second Amendment right is incorporated through the Fourteenth Amendment to apply to the states.[284] During the upcoming October 2019 term, the Supreme Court is scheduled to review a Second Amendment challenge to a New York City firearm licensing provision in *New*

[276] *Dole*, 483 U.S. at 207-211.

[277] *Id.* at 206-12.

[278] *Id.* at 205; 23 U.S.C. § 158.

[279] *Dole*, 492 U.S. at 211.

[280] *NFIB*, 567 U.S. at 588.

[281] *Id.* at 581.

[282] U.S. CONST. amend. II.

[283] District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742, 780 (2010) ("[O]ur central holding in *Heller*[is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

[284] McDonald v. City of Chicago, 561 U.S. 742 (2010).

York Rifle & Pistol Association v. City of New York.[285] That ruling may provide further guidance for Congress in crafting legislation that comports with the Second Amendment.

In *Heller* the Supreme Court did not elaborate on the full extent of the Second Amendment right. But a number of takeaways may be distilled from the Court's opinion. First, the Court concluded that the Second Amendment codified a pre-existing individual right to keep and bear arms for lawful purposes, such as self-defense and hunting, unrelated to militia activities.[286] Second, the Court singled out the handgun as the weapon that "the American people have considered ... to be the quintessential self-defense weapon."[287] But the Court clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and further announced that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms," among other "presumptively lawful" regulations.[288] Additionally, as for the kind of weapons that may obtain Second Amendment protection, the Court opined that the Second Amendment's coverage is limited to weapons "in common use at the time" that the reviewing court is examining a particular firearm; the conclusion, the Court added, "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[289]

Since *Heller*, the circuit courts have largely been applying a two-step inquiry, drawn from the discussion in *Heller*, to determine whether a particular law is constitutional.[290] First, courts ask whether the challenged law burdens conduct protected by the Second Amendment.[291] If so, courts next ask whether, under some type of means-end scrutiny, the law is constitutional under that standard of review.[292] To date, no federal appellate court has invalidated on Second Amendment grounds any provision of the GCA or NFA.[293] Nonetheless, when considering proposals to expand

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[285] *See* New York State Rifle & Pistol Ass'n v. City of New York, 883 F. 3d 45 (2d Cir. 2018), *cert. granted*, —S. Ct.—, No. 18-280, 2019 WL 271961 (Jan. 22, 2019). For more on this litigation, see CRS Legal Sidebar LSB10261, *Supreme Court Cert Grant Creates Uncertainty in Post-Heller World: Part I*, by Sarah Herman Peck.

[286] *Heller*, 554 U.S. at 559 ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.").

[287] *Id.* at 629.

[288] *Id.* at 626-27 & n.26.

[289] *Id.* at 627 (internal quotation marks and citations omitted) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communication … the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."); *see also* Caetano v. Massachusetts, 136 S. Ct. 1027, 1027-28 (2016) (ruling that the Massachusetts Supreme Court's conclusion "that stuns guns are not protected [by the Second Amendment] because they 'were not in common use at the time of the Second Amendment's enactment' ... is inconsistent with *Heller*'s clear statement").

[290] *See, e.g.*, Powell v. Tompkins, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (collecting cases); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 & n.49 (2d Cir. 2015) (collecting cases); *see also* Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011) ("The [Supreme] Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal 'test' for resolving future claims.").

[291] *See, e.g.*, United States v. Jimenez, 895 F.3d 228, 232 (2d Cir. 2018); Silvester v. Harris, 843 F.3d 816, 820-21 (9th Cir. 2016).

[292] *See Jimenez*, 895 F.3d at 232.

[293] See generally CRS Report R44618, *Post-Heller Second Amendment Jurisprudence*, by Sarah Herman Peck.

federal firearm restrictions, Congress may want to consider whether the expansion would fit within the parameters established in *Heller* and subsequent jurisprudence as permissible under the Second Amendment.

Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." "The touchstone of due process is protection of the individual against arbitrary action of government."[294] The Due Process Clause has a substantive and procedural component, described below,[295] and may become relevant in the context on firearms regulation if the government deprives a person of constitutionally protected liberty interest (e.g., a right to keep and bear arms under the Second Amendment)[296] or property interest (e.g., a firearm license).[297]

The substantive component of the Due Process Clause prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[298] As relevant here, a substantive due process violation may occur when a legislative measure infringes on a fundamental right.[299] But "[w]here a particular [constitutional] Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior," like the Second Amendment,[300] "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such claims.[301] Accordingly, it appears that in the event the government deprives a person of the right to keep and bear arms—the potential result of an overly stringent federal firearms measure—the touchtone of a reviewing court's constitutional

[294] Wolf v. McDonnell, 418 U.S. 539 (1974).

[295] Cty. of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998); United States v. Salerno, 481 U.S. 739, 746 (1987).

[296] *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997) ("[T]he development of this Court's substantive-due-process jurisprudence ... has been a process whereby the outlines of the 'liberty' specifically protected by the Fourteenth Amendment—never fully clarified, to be sure, and perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."); Doe v. Miami Univ., 882 F.3d 579, 597 (6th Cir. 2018) (explaining that substantive due process claims may be brought for "deprivations of a particular constitutional guarantee").

[297] *See* Spinelli v. City of New York, 579 F.3d 160 (2d Cir. 2009) (engaging in due process analysis of state revocation of gun dealer license); *see also* Nicholas v. Penn. State Univ., 227 F.3d 133, 139 (3d Cir. 2000) ("[A] property interest that falls within the ambit of substantive due process may not be taken away by the state for reasons that are arbitrary, irrational, or tainted by improper motive." (internal quotation marks and citations omitted)); Doe v. District of Columbia, 206 F. Supp. 3d 583, 604 ("As an initial step for both substantive and procedural due process claims, however, plaintiffs must allege that the defendant deprived them of a constitutionally cognizable liberty or property interest.").

[298] *Lewis*, 523 U.S. at 847.

[299] *See* Lindsey v. Hyler, —F.3d—, No. 17-7074, 2019 WL 1246822, at *4 (10th Cir. Mar. 19, 2019); *see also* McDonald v. City of Chicago, Ill., 561 U.S. 742, 778 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

[300] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend II.

[301] Albright v. Oliver, 510 U.S. 266, 273 (1994) (internal quotation marks and citation omitted); *see also* Gardner v. Vespia, 252 F.3d 500, 501 (1st Cir. 2001) ("Where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of 'substantive due process.' The thrust of Gardner's challenge is the infringement upon his right to bear arms, and Second Amendment jurisprudence provides an adequate answer to this challenge." (internal quotations marks, citations, and alteration omitted)).

analysis would be the Second Amendment rather than the substantive component of the Due Process Clause.[302]

Still, the Due Process Clause also requires that the government afford persons with adequate procedures when depriving them of a constitutionally protected interest. This "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth ... Amendment."[303] Examining procedural due process involves a two-step inquiry. First, a court asks whether the government has interfered with a protected liberty or property interest.[304] In the context of federal firearms regulations, at least two constitutionally protected interests could be affected: (1) the fundamental liberty interest in a person's right to keep and bear arms, granted by the Second Amendment (i.e., the right to purchase and possess firearms for lawful purposes), and (2) the property interest in a government-issued firearms license (e.g., if the person is an FFL whose license is revoked by the government).

If the government has deprived a person of one of these constitutionally protected interests, courts ask, second, whether the government, in deciding whether to make the deprivation, used constitutionally sufficient procedures.[305] Adequate due process generally requires notice of the deprivation and an opportunity to be heard before a neutral party.[306] This constitutional requirement, the Supreme Court says, is meant to be "flexible and calls for such procedural protections as the particular situation demands."[307] Accordingly, the appropriate process due—i.e., the type of notice, the manner and time of a hearing regarding the deprivation, and the identity of the decisionmaker—will vary based on the specific circumstances at hand.[308] To determine what procedures should be applied to a deprivation of a constitutionally protected interest, courts apply the balancing test outlined in *Mathews v. Eldridge*.[309] This test requires courts to weigh three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest through the procedures used; and (3) the government's interest.[310]

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[302] *See* Turaani v. Sessions, 316 F. Supp. 3d 998, 1011 (E.D. Mich. 2018) ("Plaintiff asserts a substantive due process claim, which is best understood as a Second Amendment challenge" to the 3-day delay for a firearms purchase required under 28 C.F.R. § 25.6(c)(1)(iv)(B) for when the FBI does not immediately determine that a sale should proceed or be denied); Second Amendment Arms v. City of Chicago, 135 F. Supp. 3d 743, 763 (N.D. Ill. 2015) ("[T]he right to sell firearms is a Second Amendment concern.... As such, this portion of Plaintiff's substantive due process challenge is dismissed, as Plaintiff must pursue th[at theory] under his ... Second Amendment claim[].");; Montalbano v. Port Authority of N.Y & N.J., 843 F. Supp. 2d 473, 483 (S.D.N.Y. 2012) ("Because Montalbano cannot establish ... that his Second Amendment rights have been infringed, he cannot establish that he has been denied substantive due process son the basis of any alleged arbitrary action by the defendants.").

[303] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[304] *See* Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999); Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989); General Elec. Co. v. Jackson, 610 F.3d 110, 117 (D.C. Cir. 2010).

[305] *See Sullivan*, 526 U.S. at 59; *Thompson*, 490 U.S. at 460; Colon v. Schneider, 899 F.2d 660, 666 (7th Cir. 1990).

[306] Kerry v. Din, 135 S. Ct. 2128, 2144 (2015) ("Due Process Clause procedures ... normally include notice of an adverse action, an opportunity to present relevant proofs and arguments, before a neutral decisionmaker, and reasoned decisionmaking."); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation marks and citation omitted)).

[307] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[308] *See* Bell v. Burson, 402 U.S. 535, 540 (1971) ("A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case.").

[309] 424 U.S. 319, 334 (1976).

[310] Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017); *Mathews*, 424 U.S. at 335.

Accordingly, although substantive due process concerns surrounding firearms measures may fuse with the Second Amendment concerns identified above, the procedural component of the Due Process Clause raises independent considerations for Congress. For instance, procedural due process may be relevant to congressional consideration of firearm measures that may result in the revocation or inability to obtain a license to own, purchase, or sell a firearm.[311] Accordingly, when considering a firearms licensing measure, Congress may want to keep in mind the standards and procedures for obtaining and revoking such a license to ensure that due process is supplied.

Federalism

The Constitution establishes a system of dual sovereignty in which "both the National and State Government have elements of sovereignty the other is bound to respect."[312] For instance, the Constitution explicitly grants certain legislative powers to Congress in Article I and then reserves all other legislative powers for the states to exercise.[313] Both the federal government and the states regulate firearms,[314] and two federalism principles particularly inform this shared policymaking role: the preemption and anti-commandeering doctrines.

The preemption doctrine derives from the Constitution's Supremacy Clause, which declares that "the Laws of the United States ... shall be the supreme Law of the Land."[315] Congress, through legislation lawfully enacted pursuant to an independent source of constitutional authority, may "preempt" (i.e., invalidate) state law.[316] The Supreme Court has articulated that the doctrine operates as follows: "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[317] In other words, whenever states and the federal government regulate in the same area, like firearms, and the state and federal measures conflict, the conflict is to be resolved in favor of the federal government.[318]

Notwithstanding the supremacy of federal law, the anti-commandeering doctrine bars the federal government from directly regulating the states.[319] The doctrine is "the expression of a

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[311] *See, e.g.,* Letter from Karin Johnson, Director, American Civil Liberties Union & Christopher Anders, Deputy Director, American Civil Liberties Union, to U.S. Senators (June 20, 2016), https://www.aclu.org/letter/aclu-letter-urging-senators-vote-no-cornyn-amendment-4749-and-feinstein-amendment-4720-hr (urging Senate to vote against proposed amendments to appropriations bill that would prohibit certain firearms transactions for persons who had been placed on the "No Fly List," arguing that "[t]he overly broad criteria" used for placing a person on the list "result in a high risk of error" without adequate procedural safeguards to satisfy due process).

[312] Arizona v. United States, 567 U.S. 387, 398 (2012); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) ("The Constitution limited but did not abolish the sovereign powers of the States, which retained 'a residuary and inviolable sovereignty.' ... Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'" (quoting THE FEDERALIST NO. 39, James Madison)).

[313] *Murphy*, 138 S. Ct. at 1475-76.

[314] *See* 18 U.S.C. § 927 ("No provision of [chapter 44 of Title 18] shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so the two cannot be reconciled or consistently stand together.").

[315] U.S. CONST. art. VI, cl. 2; *see Murphy,* 138 S. Ct. at 1479.

[316] *Murphy*, 138 S. Ct. at 1479; Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015).

[317] *Murphy*, 138 S. Ct. at 1480.

[318] *Arizona*, 567 U.S. at 398-99.

[319] *Murphy*, 138 S. Ct. at 1475 ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the

fundamental structural decision incorporated into the Constitution" to limit Congress's authority, including "to withhold from Congress the power to issue orders directly to the States."[320] Accordingly, Congress cannot direct the states to enact a particular measure, nor can it conscript state employees, or those of its political subdivisions, to enforce a federal regulatory program.[321] Similarly, the federal government cannot prohibit a state from enacting new laws.[322] As a result, the federal government cannot require the states to enforce a particular federal firearm regulatory regime. In *Printz v. United States*, for example, the Supreme Court struck down under the anti-commandeering doctrine certain interim provisions of the Brady Act.[323] The relevant provisions required state and local law enforcement officers to conduct background checks on prospective handgun purchasers.[324] The Court held that a federal mandate requiring state and local law enforcement to perform background checks on prospective handgun purchasers violated constitutional principles of federalism "by conscripting the State's officers directly" to enforce a federal regulatory scheme.[325]

Select Legal Issues for the 116th Congress

Federal firearms regulation has been a subject of continuous interest for Congress. A range of proposals have been in this and past Congresses. Some seek to ease federal firearms restrictions or facilitate state reciprocity in the treatment of persons authorized to carry firearms by another state; others seek greater restrictions on the federal laws concerning the possession, transfer, or sale of firearms or the expansion of background checks for firearm purchases. These various approaches, in turn, prompt various constitutional questions, including Congress's constitutional authority to legislate on such matters and whether the proposed measures comport with the Second Amendment and other constitutional constraints. This section discusses several congressional proposals related to 3D-printed firearms, background checks, mental illness, particular firearms and accessories (e.g., semiautomatic assault weapons, bump stocks, silencers), and "red flag" laws and identifies related constitutional questions.

3D-Printed Firearms

Under the Undetectable Firearms Act of 1988 (UFA), it is unlawful[326] for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive a firearm (1) that, after removal of grips, stocks, and magazines, is not detectable by walk-through metal detectors; or (2) any major component of which does not generate an accurate image when scanned by the types of x-ray machines commonly used at airports.[327] These prohibitions grew out of a concern that the increasing use of lightweight, noncorrosive plastics as a substitute for metal in firearm-

power to issue orders directly to the States.").

[320] *Id.*

[321] *Id.* at 1476-77.

[322] *Id.* at 1478.

[323] Printz v. United States, 521 U.S. 898 (1997).

[324] *Id.* at 902-04.

[325] *Id.* at 933-35.

[326] Though the UFA is subject to a sunset provision, it has been repeatedly extended, most recently through 2023. Pub. L. No. 113-57, 127 Stat. 656 (2013).

[327] 18 U.S.C. § 922(p)(1). The statute contains various exceptions, such as for firearms manufactured and sold exclusively for military or intelligence agencies. *See id.* § 922(p)(2)-(6).

component manufacturing would lead to the proliferation of firearms not detectable at security checkpoints.[328]

Despite the prohibitions in the UFA, the advent of 3D-printing technology and its application to firearms has prompted concern about a new wave of undetectable, plastic guns that technically comply with the statute and could fall into the wrong hands.[329] A high-profile example of a design for such a gun is the "Liberator" pistol, plans for which were first disseminated in 2013 by Defense Distributed—a nonprofit "private defense firm" and FFL.[330] According to media reports, the design for the Liberator allows for the 3D-printing of a functioning pistol that is almost entirely plastic, with the only metal components being a small firing pin and a removable piece of steel that is included specifically to make the design compliant with the UFA.[331] In other words, the irrelevance of the steel block to the firearm's functionality potentially could allow bad actors to produce operable and concealable plastic firearms that would not be caught by metal detectors.

With respect to Defense Distributed specifically, years of litigation over the company's online dissemination of computer files for 3D-printed nonmetallic firearms has mostly stymied the company's efforts to share its files on the internet.[332] Most recently, a federal district court in Washington entered an order that effectively bars Defense Distributed from making its disputed files available online for the duration of the ongoing lawsuit in that jurisdiction.[333] Nevertheless, the company's continuing efforts to spread its designs for nonmetallic firearms have raised novel constitutional questions without easy answers, including (1) whether First Amendment free speech protections extend to computer code (which could bring Defense Distributed's activities within the amendment's scope), and (2) whether the Second Amendment protects the right to make arms as a necessary precursor to keeping and bearing them.[334]

Faced with the long-simmering dispute over dissemination of 3D-printed gun files and the possibly incomplete protections of the UFA, the 115th and 116th Congresses have considered legislation addressing the online spread of 3D-printed gun files and the possession of 3D-printed guns themselves. For instance, the 3D-Printed Gun Safety Act of 2018 would have made it unlawful to "intentionally publish" on the internet "digital instructions ... that can automatically

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[328] H.R. REP. NO. 100-612, at 2-3 (1988).

[329] *E.g.*, Chloe Albanesius, *Obama Signs Bill to Extend Ban on Plastic Guns*, PC MAGAZINE (Dec. 10, 2013), https://www.pcmag.com/news/318758/obama-signs-bill-to-extend-ban-on-plastic-guns (pointing out concern of some Members of Congress that UFA contains a "dangerous loophole" for plastic guns with removable metal components).

[330] *See* Andy Greenberg, *This is the World's First Entirely 3D-Printed Gun*, FORBES (May 3, 2013), https://www.forbes.com/sites/andygreenberg/2013/05/03/this-is-the-worlds-first-entirely-3d-printed-gun-photos/#a6812ed4197e.

[331] *Id.*

[332] Litigation in multiple jurisdictions has mostly centered on conflicting administrative decisions concerning application of the regulatory regime that governs the import and export of "defense articles." A bill introduced in the current Congress would address the Trump Administration's efforts to transfer control over such decisions from the Department of State to the Department of Commerce, which could potentially reduce congressional oversight and create other logistical issues. *See* Stopping the Traffic in Overseas Proliferation of Ghost Guns Act, S. 459, 116th Cong. (2019). For more detail on the applicable regulatory regime as it relates to ongoing 3D-printed gun litigation, see CRS Legal Sidebar LSB10195, *3D-Printed Guns: An Overview of Recent Legal Developments*, by Michael A. Foster.

[333] *See* Washington v. Dep't of State, 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018).

[334] One federal district court in Texas assumed in a 2015 order that the First and Second Amendments would apply to the company's efforts to share its 3D-printed gun files on the internet; nonetheless, the court concluded that, based on the government's significant interest in controlling such information, Defense Distributed's challenge to specific regulations was unlikely to succeed. Defense Distributed v. Dep't of State, 121 F. Supp. 3d 680, 696, 700 (W.D. Tex. 2015).

program" a 3D printer or similar device to produce or complete a firearm.[335] Perhaps with First Amendment concerns in mind, the bill's "Findings" section stated that Congress's intention was not "to regulate the rights of computer programmers" but was instead "to curb the pernicious effects of untraceable—and potentially undetectable—firearms."[336] Other legislation would appear to have banned firearm assembly kits or firearm components that might be produced with a 3D printer either by amending the definition of *firearm* in the GCA[337] or by bringing such items within the purview of the Consumer Product Safety Act.[338] The Untraceable Firearms Act of 2018 additionally would have expanded serial number requirements, extended the UFA to firearms lacking detectable major components, and clarified that manufacturing firearms under the GCA includes 3D printing, among other things.[339] Finally, a bill introduced in the 115th Congress would have amended the GCA to prohibit the manufacture of firearms or components by means of a 3D printer and the transfer or possession of any such items.[340]

Background Checks

The 116th Congress began with a push in the House to expand firearm background checks.[341] Two House bills were passed in February 2019: (1) H.R. 8, the Bipartisan Background Checks Act of 2019, and (2) H.R. 1112, the Enhanced Background Checks Act of 2019.

If enacted, H.R. 8 would expand background checks to capture many private transfers between non-FFLs, subject to enumerated exceptions.[342] (A similar bill has been introduced in the Senate.[343]) One question the bill raises is whether it may be lawfully enacted under one of

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[335] S. 3304, 115th Cong. (2018). Substantively identical legislation was introduced in the House of Representatives. H.R. 6649, 115th Cong. (2018).

[336] *Id.*

[337] *See* Ghost Guns Are Guns Act, H.R. 1266, 116th Cong. (2019). The GCA's definition of *firearm* raises a related issue, also addressed in some of the bills that address 3D-printed guns, concerning the spread and commercial sale of firearm component kits and so-called "unfinished" firearm receivers that are not subject to the manufacturing and serial-number requirements of the GCA. Though the GCA's definition of a *firearm* includes "the frame or receiver" of a weapon, ATF has long viewed unfinished receivers that have not reached a certain "stage of manufacture" as falling outside the scope of this definition, meaning that such items need not be marked with identifying information and may be sold by unlicensed individuals. ATF, *Are "80%" or "unfinished" receivers illegal?*, https://www.atf.gov/firearms/qa/are-%E2%80%9C80%E2%80%9D-or-%E2%80%9Cunfinished%E2%80%9D-receivers-illegal (last visited Mar. 14, 2019). Some perceive this as a loophole in the law that may allow persons who could not legally buy a completed gun to produce their own. *E.g.*, Sari Horwitz, *'Unfinished receivers,' a gun part that is sold separately, lets some get around the law*, WASH. POST (May 13, 2014), https://www.washingtonpost.com/world/national-security/unfinished-receivers-that-can-be-used-to-build-guns-pose-problems-for-law-enforcement/2014/05/13/8ec39e9e-da51-11e3-bda1-9b46b2066796_story.html?utm_term=.f07a1273eed5.

[338] 3D Firearms Prohibitions Act, H.R. 7115, 115th Cong. (2018). H.R. 7115 also included an advertising prohibition and serial number requirements. *Id.*

[339] S. 3300 & H.R. 6643, 115th Cong. (2018). A bill introduced in the 116th Congress would similarly address the perceived loophole in the UFA by establishing that a firearm must still be detectable after removal of "all parts other than major components," among other things. Undetectable Firearms Modernization Act, H.R. 869, 116th Cong. (2019).

[340] PLASTIC Act, H.R. 7016, 115th Cong. (2018). H.R. 7016 would also have established a task force to study and address various issues related to the potential proliferation of 3D-printed guns and components. *Id.*

[341] *See* Press Release, Congressman Mike Thompson, Chairman Thompson Joins Democrats and Republicans to Introduce Bipartisan Background Checks Act of 2019 (Jan. 8, 2019), https://mikethompson.house.gov/newsroom/press-releases/chairman-thompson-joins-democrats-and-republicans-to-introduce-bipartisan.

[342] Bipartisan Background Checks Act of 2019, H.R. 8, 116th Cong. § 3 (2019).

[343] Background Check Expansion Act, S. 42, 116th Cong. (2019).

Congress's Article I powers. The bill's accompanying constitutional authority statement does not specify which Article I power Congress is invoking to enact the measure, but the bill may be an attempt to exercise Congress's commerce power.[344] Although the bill does not use the word *commerce*, other GCA provisions lack an explicit textual hook to the Commerce Clause.[345] Courts reviewing other federal firearms law without a textual hook have upheld those measures after distinguishing them from the firearm possession law struck down in *Lopez*.[346] Accordingly, the constitutionality of H.R. 8, as a lawful enactment under the Commerce Clause, may depend on the ability to distinguish it from the flaws the Supreme Court identified in *Lopez*.

H.R. 1112 would amend the so-called "default proceed" process that allows an FFL to transfer a firearm when the NICS check has not been completed within three business days.[347] The bill provides a mechanism for a transfer to occur if the FFL does not receive instructions from the NICS system on whether to proceed with or deny a proposed transaction within 10 business days.[348] If the transferee wishes to proceed with the sale in such cases, he or she must file a petition (electronically or via first-class mail) to the Attorney General certifying that the transferee does not believe he or she is prohibited from acquiring the firearm. If a response is not provided within 10 business days, the FFL would be allowed to proceed with the transfer. The committee report accompanying the bill appears to construe these 10-day periods as occurring in succession rather than concurrently (i.e., the delay period might last up to 20 business days).[349] Because the bill potentially could delay a sale to a law-abiding citizen up to 20 business days, there may be questions about whether those persons have received adequate procedural due process in the short-term deprivation of a constitutionally protected interest. Because the temporary deprivation (i.e., the inability to purchase a firearm for self-defense) would occur *before* a firearm may be transferred to the prospective purchaser, a reviewing court would be tasked with determining whether post-deprivation proceedings—meaning proceedings that take place *after* a person has been deprived of a constitutionally protected interest—are constitutionally permissible. Typically, due process requires that a person be given an opportunity to be heard before the deprivation of a protected interest may occur; in that case there are pre-deprivation hearings.[350] But the Supreme Court has recognized in circumstances in which the

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[344] *Id.* (constitutional authority statement).

[345] *See e.g.*, 18 U.S.C. § 922(o) ("Except for as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun"); *Id.* § 922(x)(1)(A) ("It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile a handgun."); *Id.* § 922(x)(2)(A) ("It shall be unlawful for any person who is a juvenile to knowingly possess a handgun").

[346] *See, e.g.*, United States v. Rybar, 103 F.3d 273, 282 (3d Cir. 1996) (distinguishing the GFSZA, which banned firearms within "a discrete area unlikely to have a meaningful aggregate effect on commerce," from the GCA's machinegun ban, which "regulates possession of a class of firearms ... in a much more dispersed and extensive area," and so "Congress could reasonably have concluded that such a general ban of possession of machine guns will have a meaningful effect on interstate commerce").

[347] Enhanced Background Checks Act of 2019, H.R. 1112, 116th Cong. § 2 (2019).

[348] *Id.*

[349] H. Rept. No. 116-12, at 2 (2019) (Committee Report). The report's "purpose and summary" section states:

> The bill provides that if the NICS system has not returned an answer to the licensed firearms dealer *within ten days*, the prospective firearms purchaser may file a petition with the Attorney General for review. *After another ten-day period* has expired, the licensed firearms dealer may sell or transfer the firearm to the prospective purchaser if it has not received a response through the NICS system and the dealer has no reason to believe that the purchaser is prohibited from obtaining a firearm under federal, state, or local law.

Id. (emphasis added).

[350] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (describing the opportunity for a hearing before

government "must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause."[351]

Concealed Carry Reciprocity

Some Members of Congress have proposed measures that would require states to recognize concealed carry privileges afforded by other states. Both S. 69, the Constitutional Carry Reciprocity Act of 2019, and H.R. 38, the Concealed Carry Reciprocity Act of 2019, if enacted, would allow persons who are eligible to carry a concealed handgun in one state to lawfully carry a handgun in other states that have a concealed-carry regime for their residents without regard to differences in the states' eligibility requirements for concealed carry.[352] Both bills purport to preempt state laws to varying degrees.[353] Whether these preemption provisions are considered to be valid likely will depend on whether the bills, as a whole, are interpreted to "confer[] on private entities ... a federal right to engage in certain conduct," i.e., carrying a concealed handgun, "subject only to certain (federal) constraints."[354]

H.R. 38 also contains a civil-suit provision that would authorize a private right of action against any person, state, or local government entity that interferes with a concealed-carry right that the bill establishes.[355] Because the bill seeks to abrogate the states' Eleventh Amendment immunity[356] from suit in federal court, several questions need to be answered, the first being what exception to Eleventh Amendment immunity the bill is invoking. Given that the bill cites the Second Amendment as the constitutional source of authority,[357] it is possible that the bill seeks to invoke Congress's enforcement power under Section Five of the Fourteenth Amendment. Section Five of the Fourteenth Amendment enables Congress to abrogate a state's Eleventh Amendment

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a deprivation of a significant property interest as a "root requirement" of the Due Process Clause).

[351] Gilbert v. Homar, 520 U.S. 924, 930 (1997). In *Homar*, for example, the Supreme Court tolerated a post-suspension hearing, recognizing the state's interest in quickly suspending a police officer when felony charges had been filed against the officer. *Id.* at 932-36.

[352] Constitutional Concealed Carry Reciprocity Act of 2019, S. 69, 116th Cong. (2019); Concealed Carry Reciprocity Act of 2019, H.R. 38, 116th Cong. (2019).

[353] *Compare* S. 69 (proposing to preempt only state and local eligibility requirements to possess or carry a concealed handgun but otherwise requiring all concealed carriers to comply with other state or local limitations (e.g., *where* a person may carry the handgun)), *with* H.R. 38 (proposing to preempt all state laws related to concealed carry except for those that allow private persons or entities to restrict possession of concealed firearms on their private property or those laws that restrict firearm possession on certain state-owned property).

[354] *See* Murphy v. NAACP, 138 S. Ct. 1461, 1480 (2018).

[355] H.R. 38.

[356] The Eleventh Amendment proclaims that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States." U.S. CONST. amend. XI. It generally shields a state (including an "arm" of the state such as state agencies and state officials acting in their official capacities) from suit in federal court unless that state consents. *See, e.g.,* Sossamon v. Texas, 563 U.S. 277, 284 (2011); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't, 510 F.3d 681, 695 (7th Cir. 2007). *But see* MCI Telecomms. Corp. v. Ill. Bell Tel. Co., 222 F.3d 323, 337 (7th Cir. 2000) (listing the exceptions to Eleventh Amendment immunity). Eleventh Amendment immunity does not extend to political subdivisions of a state, like counties or municipalities. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Pittman v. Or. Emp't Dep't, 509 F.3d 1065, 1071 (9th Cir. 2007); Kitchen v. Upshaw, 286 F.3d 179, 183-84 (4th Cir. 2002).

[357] H.R. 38 (constitutional authority statement). The bill also invokes the Commerce Clause as additional constitutional authority. But Congress cannot use its commerce power as a basis to haul states into federal court. *See* Va. Office for Protection & Advocacy v. Stewart, 563 U.S. 247, 254 n.2 (2011); College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Board, 527 U.S. 666, 672 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996).

immunity through legislation designed to enforce the Fourteenth Amendment's protections.[358] And the Second Amendment is made enforceable on the states via the Fourteenth Amendment.[359] If Congress, indeed, intends to invoke its Section Five power, a second question raised is whether legislation designed to remedy or deter state violations of the Second Amendment would be a permissible exercise of Congress's Section Five enforcement power.[360] And assuming that Congress could lawfully exercise its Section Five power to enforce violations of Second Amendment rights, a third question would be whether the Second Amendment protects the right to carry a concealed handgun—an issue that has divided the federal appellate courts.[361]

Mental Illness

As described previously, a person who has been "adjudicated as a mental defective" or "committed to a mental institution" is barred by federal law from transporting, possessing, or receiving firearms or ammunition.[362] Both regulatory and judicial interpretations of these terms have focused on the need for a formal decision by an authoritative body like a court or board after an adjudicative hearing, as broader interpretations could raise constitutional due process and Second Amendment concerns.[363] Nevertheless, the prohibition—even construed narrowly—has been criticized in some quarters as unconstitutional given its effectively permanent nature[364] or as stigmatizing mental illness and unfairly painting as dangerous individuals who are more likely to be victims than perpetrators of violent crime.[365] At the same time, some observers have, in response to past mass shootings, called for even stricter limits on possession of firearms by the mentally ill.[366] For its part, the 115th Congress considered bills that would have both broadened

[358] *See, e.g.*, Coleman v. Court of Appeals of Md., 566 U.S. 30, 36 (2012); United States v. Georgia, 456 U.S. 151, 158-59 (2006); Mich. Corr. Org. v. Mich. Dep't of Corr., 774 F.3d 895, 900 (6th Cir. 2014).

[359] *See* McDonald v. City of Chicago, 561 U.S. 742 (2010). In *McDonald*, a majority of the Court held that the Second Amendment applies to the states via the Fourteenth Amendment. *Id.* But there was not a controlling opinion as to whether the right was applicable through the Fourteenth Amendment's Due Process Clause or Privileges and Immunities Clause. *Id.* Four Justices held that the Due Process Clause provides the constitutional basis for applying the Second Amendment to the states. *Id.* at 791.Whereas another Justice, concurring in the judgment, concluded that the Privileges and Immunities Clause provides the constitutional support. *Id.* at 778 (Thomas, J., concurring).

[360] "[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provision, and must tailor its legislative scheme to remedying or preventing such conduct." Fla. Prepaid Postsecondary Educ. Expense Bd. V. College Savings Bank, 527 U.S. 627, 639 (1999). And when enacting measures to enforce the provisions of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[361] *Compare* Peruta v. Cty. of San Diego, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (holding that the Second Amendment does not protect carrying a concealed firearm in public), *with* Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (holding that the right to carry a concealed firearm in public is a core component of the Second Amendment).

[362] *Id.* § 922(g)(4).

[363] *See* 27 C.F.R. § 478.11 (requiring formal adjudication or commitment); United States v. McIlwain, 772 F.3d 688, 696 (11th Cir. 2014) (recognizing "primary importance" of "whether some authoritative body" has "rendered a decision about the defendant's mental illness"); United States v. McMichael, 350 F. Supp. 3d 647, 659 (W.D. Mich. 2018) (collecting cases); Franklin v. Sessions, 291 F. Supp. 3d 705, 716 (W.D. Pa. 2017).

[364] *See* Alan R. Felthous & Jeffrey Swanson, *Prohibition of Persons with Mental Illness from Gun Ownership Under Tyler*, 45 J. AM. ACAD. PSYCHIATRY L. 478, 478-79 (2017).

[365] *E.g.*, Liza H. Gold & Donna Vanderpool, *Legal Regulation of Restoration of Firearms Rights After Mental Health Prohibition*, 46 J. AM. ACAD. PSYCHIATRY L. 298, 306 (2018).

[366] *See* Arash Javanbakht, *Mental illness and gun laws: What you may not know about the complexities*, THE CONVERSATION (Mar. 1, 2018), http://theconversation.com/mental-illness-and-gun-laws-what-you-may-not-know-about-the-complexities-92337 (reporting President Trump's calls for guns to be taken from the mentally ill).

and narrowed the existing firearm prohibition. Some legislation would have, among other things, adopted the narrow understanding that an adjudication or commitment for purposes of the firearm prohibition must stem from an order or finding of an "adjudicative body" after a hearing and that the order or finding may impose only a temporary disability.[367] Other legislation would have added temporary firearm prohibitions for persons assessed by mental health professionals to pose a risk of danger to others.[368]

Apart from constitutional and interpretive issues, commentators have highlighted the challenges of collecting comprehensive mental health records for use in NICS background checks, contending that the 2007 Virginia Tech shooting could have been avoided if the gunman's prior state mental health adjudication had been reported.[369] One challenge specific to collecting mental health records is that many such records are held by state or local agencies that may believe patient information must remain confidential pursuant to the Health Insurance Portability and Accountability Act (HIPAA).[370] To combat this perception, the Department of Health and Human Services issued a rule in 2016 that expressly allows specified state entities to report limited information otherwise covered by HIPAA to NICS or to another entity that reports to NICS.[371] As noted above, Congress has also sought to improve mental health record reporting at the state level through NIAA, which (among other things) funds state efforts to develop systems for accurate and complete reporting.[372]

NICS reporting of mental health records at the federal level has raised somewhat different issues. Although federal agencies are generally required to report mental health adjudication records for background check purposes, NIAA makes clear that federal departments and agencies may *not* furnish such records if the relevant adjudication has been set aside or the person has been found to be "rehabilitated," among other things.[373] Additionally, the Department of Veterans Affairs (VA), which appears to supply the vast majority of federal mental health records to NICS,[374] has for years provided records of beneficiaries who are appointed fiduciaries to manage their financial affairs based on a VA determination that the beneficiaries are "mentally incompetent";[375] concern that this practice may unfairly deprive veterans of their right to possess firearms,

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[367] Protecting Communities and Preserving the Second Amendment Act of 2018, S. 2502, § 103, 115th Cong. (2018).

[368] End Purchase of Firearms by Dangerous Individuals Act of 2017, H.R. 4344, 115th Cong. (2017). Separate efforts to moderately expand the prohibition have focused on clarifying that it extends to persons who are involuntarily committed for *outpatient*, as opposed to solely inpatient, treatment. *E.g.*, Safer Communities Act of 2017, H.R. 4142, § 401, 115th Cong. (2017); *see also* Urban Progress Act of 2018, H.R. 5164, § 344, 115th Cong. (2018).

[369] GIFFORDS LAW CTR TO PREVENT GUN VIOLENCE, *Mental Health Reporting*, https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/ (last visited Mar. 5, 2019).

[370] Becki Goggins & Anne Gallegos, *State Progress in Record Reporting for Firearm-Related Background Checks: Mental Health Submissions*, SEARCH, NATIONAL CTR. FOR STATE COURTS, & BUREAU OF JUSTICE STATISTICS (Feb. 2016), https://www.ncjrs.gov/pdffiles1/bjs/grants/249793.pdf.

[371] 45 C.F.R. § 164.512(k)(7). The information that may be reported does not include diagnostic or clinical information. *Id.* For more information on the interaction among NICS, HIPAA, and state law, see CRS Report R43040, *Submission of Mental Health Records to NICS and the HIPAA Privacy Rule*, coordinated by Edward C. Liu.

[372] Pub. L. No. 110-180, 122 Stat. 2559, § 103 (2008).

[373] *Id.* § 101(c)(1).

[374] FBI, *Active Records in the NICS Indices by State*, https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view (last visited Mar. 6, 2019) (reflecting that of approximately 250,000 total records from federal agencies, the VA has submitted over 246,000).

[375] 38 C.F.R. § 3.353(a); Definitions for the Categories of Persons Prohibited from Receiving Firearms (95R-051P), 62 Fed. Reg. 34,634, 34,637 (June 27, 1997) (codified at 27 C.F.R. pt. 178). As explained previously, pursuant to NIAA, beneficiaries must be notified of the ramifications of mental incompetency determinations and be provided a means to pursue administrative relief. Pub. L. No. 110-180, 122 Stat. 2559 (2008).

however, led to the introduction of legislation in the 115th Congress that would have ensured that veterans for whom fiduciaries are appointed are not considered "adjudicated as a mental defective" unless a judicial authority has issued an order or finding "that such person is a danger to himself or herself or others."[376] A final rule published by the Social Security Administration (SSA) in December 2016, which specified similar conditions for SSA reporting of disability program beneficiaries who were appointed a representative payee, was also vacated by Congress through a Congressional Review Act resolution early in 2017.[377]

Particular Firearms and Accessories

Numerous proposals have been made over the years to limit or expand the ability to possess certain kinds of firearms and accessories. For example, bills have targeted limiting the possession of semiautomatic "assault weapons," large-capacity ammunition feeding devices, and bump stocks. Conversely, other bills have proposed decreasing regulations on firearm silencers.

There has been continued interest in tightening the regulation of semiautomatic "assault weapons"[378] since the 1994 ban expired in 2004.[379] Some proposals seek to reinstate and expand upon the former assault weapon ban.[380] Congress has also considered bringing certain semiautomatic firearms under the more-stringent NFA's regulatory scheme.[381] Further, some Members of Congress have proposed to make it unlawful for an FFL to sell or transfer to any person under 21 years old certain semiautomatic rifles;[382] currently, anyone age 18 or older may purchase such rifles from an FFL.[383] Banning the possession of these kinds of firearms entirely or by a subset of the population may raise Second Amendment questions, such as the extent to

[376] *See* Protecting Communities and Preserving the Second Amendment Act of 2018, S. 2502, § 104, 115th Cong. (2018); Veterans 2nd Amendment Protection Act, H.R. 1181, 115th Cong. (2017). The 115th Congress also considered legislation that would have codified a detailed process for VA "mental defective" determinations, requiring (among other things) the government to prove "by clear and convincing evidence" that a "person is a danger to self or others." Veterans' Second Amendment Rights Restoration Act of 2018, S. 2386, 115th Cong. (2018); End Purchase of Firearms by Dangerous Individuals Act of 2017, H.R. 4344, 115th Cong. (2017).

[377] Pub. L. No. 115-8, 131 Stat. 15 (2017). Legislation introduced prior to the Congressional Review Act resolution would have established that an SSA determination that benefits should be paid to a representative payee would not be a determination of "mental defective" status for purposes of the GCA. Social Security Beneficiary 2nd Amendment Rights Protection Act, S. 202, 115th Cong. (2017).

[378] The term "assault weapon ban" was generally used to describe the Public Safety and Recreational Firearms Act (part of the Violent Crime Control and Law Enforcement Act of 1994), which established a 10-year prohibition on the manufacture, transfer, and possession of certain "semiautomatic assault weapons" (as defined in the act) and large capacity ammunition feeding devices. *See* P.L. 103-322, 108 Stat. 1796 (1994); Christopher S. Koper, Jerry Lee Ctr. of Criminology, Univ. of Pa., Updated Assessment of the Federal Assault Weapons Ban: Impacts of Gun Markets & Gun Violence, 1994-2003, Report to the National Institute of Justice, United States Department of Justice 4 (2004), http://tinyurl.com/ycmqeqle. The 1994 law listed numerous weapons that qualified as "semiautomatic assault weapons," and also applied to firearms with at least two designated features. P.L. 103-322, 108 Stat. 1796 (1994).

[379] *See supra* notes 11 and accompanying text, 124.

[380] Assault Weapons Ban of 2019, H.R. 1296, 116th Cong. (2019); Assault Weapons Ban of 2019, S. 66, 116th Cong (2019); These bills name 205 banned firearms and outline categories of banned weapons, including those that have a single "military-style" feature and magazines and ammunition-feeding devices capable of holding more than 10 rounds. *See* Press Release, Congressman David Cicilline, Cicilline Introduces Assault Weapons Ban with Record Support (Feb. 15, 2019), https://cicilline.house.gov/press-release/cicilline-introduces-assault-weapons-ban-record-support; Press Release, Senator Dianne Feinstein, Senators Introduce Assault Weapons Ban (Jan. 9, 2019), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=EFC76859-879D-4038-97DD-C577212ED17B.

[381] National Firearms Amendments Act of 2019, H.R. 1263, 116th Cong. (2019).

[382] Raise the Age Act, H.R. 717, 116th Cong. (2019).

[383] *See* 18 U.S.C. § 922(b)(1).

which the Second Amendment protects the right of all persons to bear specific arms other than handguns in the home for self-defense.[384] To date every federal appellate court that has reviewed a state or local semiautomatic assault weapon ban has rejected Second Amendment challenges to those laws.[385] Nor has a federal appellate court sustained a challenge to the current federal law that prohibits the sale of handguns to persons under 21 years old.[386]

There have also been proposals to ban "bump stock" devices,[387] which can be attached to a semiautomatic firearm and allow it to effectively mimic the firing capability of a fully automatic weapon.[388] After it was discovered that the assailant behind the Las Vegas, Nevada, mass shooting in October 2017 used one of these firearm accessories, ATF initiated the process of regulating them.[389] ATF published a final rule the next year, on December 26, 2018, banning the transfer and possession of all bump stock devices, effective March 26, 2019.[390] Litigation seeking to enjoin the rule before its effective date followed. The plaintiffs challenged the rulemaking process and the rule itself.[391] Codifying the ban through legislation would avoid the challenges to the rulemaking process but could potentially be subject to constitutional challenge under the Takings Clause, which forbids "private property [to] be taken for public use, without just compensation."[392] In this vein, takings lawsuits for compensation under the Tucker Act[393] or Little Tucker Act[394] potentially could be brought by persons who owned bump stock devices before the effective date of any statutory ban.[395] Still, these constitutional concerns could be alleviated by creating a grandfather clause for bump stocks that were lawfully owned before the effective date of any bump stock ban.

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[384] *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that a ban on handgun possession in the home violates the Second Amendment).

[385] *See* Kolbe v. Hogan, 849 F.3d 114, 135-37 (4th Cir. 2017) (en banc) (holding that the "assault weapons" and large-capacity magazines banned in Maryland garner no Second Amendment protection); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261-64 (2d Cir. 2015) (upholding under intermediate scrutiny New York and Connecticut's ban on semiautomatic assault weapons and large-capacity magazines); Friedman v. City of Highland Park, Ill., 784 F.3d 406, 410-12 (7th Cir. 2015) (concluding that ordinance banning semiautomatic assault weapons and large capacity magazines does not violate the Second Amendment); Heller v. District of Columbia, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (upholding under intermediate scrutiny the District of Columbia's ban on semiautomatic rifles and large-capacity magazines).

[386] *See* 18 U.S.C. § 922(b)(1); Nat'l Rifle Ass'n of Am., Inc. v. ATF, 700 F.3d 185, 203-11 (5th Cir. 2012) (upholding under intermediate scrutiny the federal law banning FFL handgun sales to persons under age 21).

[387] SAFER Now Act, H.R. 282, 116th Cong. § 11 (2019).

[388] For more information on bump stock devices, see CRS Legal Sidebar LSB10103, *ATF's Ability to Regulate "Bump Stocks,"* by Sarah Herman Peck.

[389] Two months after the shooting, on December 26, 2017, ATF issued an advance notice of proposed rulemaking and request for comments on the ability of the agency to include "bump stock" devices within the definition of *machinegun* in the NFA and GCA. Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60929 (Dec. 26, 2017).

[390] Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

[391] *See* Guedes v. ATF, —F.Supp.3d—, Nos. 18-cv-2988 & 18-cv-3086, 2019 WL 922594, at *1 (D. D.C. Feb. 25, 2019). The district court declined to preliminarily enjoin the final rule on any ground. *Id.*

[392] *See* U.S. CONST. amend. V.

[393] 28 U.S.C. § 1491(a)(1).

[394] *Id.* § 1346(a)(2).

[395] *See Guedes*, 2019 WL at *15 (opining that injunctive relief is unavailable for takings claims when a suit for compensation may be brought).

Additionally, there have been congressional efforts to deregulate firearm silencers, which are currently regulated under the NFA *and* GCA.[396] In the SHUSH Acts, as introduced in the House and Senate, some Members have proposed measures that, if enacted, would eliminate the federal regulation of firearm silencers entirely.[397] These bills also seek to preempt state and local laws that impose a tax on the making, transferring, possessing, or transporting of a firearm silencer as well as those that require marking, recordkeeping, or registering the same.[398] Less expansive proposals purport only to remove silencers from NFA regulation.[399] Thus, if the bills were enacted, silencers would not be subject to the NFA's tax and registration requirements but would still be subject to all GCA firearm regulations.[400] Still, this proposal contains the same preemption provisions as the more comprehensive SHUSH Acts.[401] All three bills may raise questions about whether the preemption provisions are constitutionally valid, as Congress can only preempt state and local measures when those measures conflict with a federal regulation covering the same activity.[402] As relevant here, though, Congress, as part of a deregulation measure, may expressly prohibit states from further regulating the same activity "[t]o ensure that the States would not undo federal deregulation with regulation of their own."[403]

"Red Flag" Laws

Somewhat related to mental health firearm restrictions are proposals for so-called "red flag" laws, which generally permit courts to issue temporary orders barring particular persons from possessing guns based on some showing of imminent danger or a risk of misuse. Following the February 2018 school shooting in Parkland, Florida, a number of states proposed or passed red-flag laws,[404] and legislation has been introduced in the 116th Congress on the subject.[405] Disagreement over various proposals has largely turned on the stringency of the showing that

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[396] *See* 18 U.S.C. § 921(a)(3) (defining *firearm*, for GCA purposes, to include firearm silencers); 26 U.S.C. § 5845(a)(7) (defining *firearm*, for NFA purposes, to include firearm silencers).

[397] SHUSH Act, H.R. 775, 116th Cong. §§ 2, 5 (2019); SHUSH Act, S. 202, 116th Cong. §§ 2, 5 (2019).

[398] H.R. 775, § 4; S. 202, § 4.

[399] Hearing Protection Act, H.R. 155, 116th Cong. § 2 (2019).

[400] *Id.* The bill would also redefine the term *silencer* to mean "any device for silencing, muffling, or diminishing the report of a portable firearm, including the 'keystone part' of such a device," with *keystone part* defined as "an externally visible part of a firearm silencer or firearm muffler, without which a device capable of silencing, muffling, or diminishing the report of a portable firearm cannot be assembled, but the term does not include any interchangeable parts designed to mount a firearm silencer or firearm muffler to a portable firearm." *Id.* § 6. *Silencer* is currently defined as "any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." 18 U.S.C. § 921(a)(24).

[401] H.R. 155, § 4.

[402] *See, infra Section "Federalism."*

[403] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378, 391 (1992) (upholding express preemption provision); *see also* Murphy v. NAACP, 138 S. Ct. 1461, 1480 (2018) (using law at issue in *Morales* as illustrative example of a lawful preemption provision).

[404] Laura Ly, *New York's governor, joined by Nancy Pelosi, signs 'red flag' gun protection law*, CNN (Feb. 25, 2019), https://www.cnn.com/2019/02/25/us/cuomo-pelosi-red-flag-gun-protection-law/index.html.

[405] Though varying in the details, bills that have been introduced generally establish state grant programs to encourage adoption of red-flag laws and amend the GCA's list of persons prohibited from possessing firearms to include individuals who are subject to state-imposed orders that meet certain requirements. *See* Extreme Risk Protection Order Act of 2019, H.R. 1236 & S. 506, 116th Cong. (2019); Protecting Our Communities and Rights Act of 2019, H.R. 744, 116th Cong. (2019); Extreme Risk Protection Order and Violence Prevention Act of 2019, S. 7, 116th Cong. (2019).

must be made to obtain an order, the persons who may seek an order, whether an initial order may be obtained without the presence of the gun owner, and the length of the resultant firearm disability.[406]

Red-flag legislation may raise questions as to whether such measures run afoul of the Second Amendment and deprive gun owners (or prospective gun owners) of constitutionally protected interests without due process of law.[407] However, proponents of such laws assert that they are an effective and needed means of averting gun violence before it happens[408] and that hearing and review procedures are constitutionally adequate.[409] Were a court to consider a constitutional challenge to a red-flag measure under the Second Amendment or Due Process Clause, the outcome potentially could depend on (1) the court's conception of the scope of the right to keep and bear arms in light of *Heller*[410] and (2) the weight ascribed by the court to the three *Mathews v. Eldridge* factors based on the particular procedures of the measure at issue.[411]

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This report was originally co-authored by Sarah Herman Peck, former CRS Legislative Attorney.

[406] *E.g.*, *ACLU of Rhode Island Raises Red Flags Over 'Red Flag' Gun Legislation*, ACLU RHODE ISLAND (Mar. 2, 2018), http://www.riaclu.org/news/post/aclu-of-rhode-island-raises-red-flags-over-red-flag-gun-legislation (noting objection to legislation allowing confiscation "for at least a year" based on a "broad" standard); FED. COMM'N ON SCHOOL SAFETY, FINAL REPORT 94, https://www2.ed.gov/documents/school-safety/school-safety-report.pdf (cautioning against red-flag laws that "invit[e] misuse by individuals who are less likely to possess reliable information relevant to a person's dangerousness"); Michael Hammond, *Kafkaesque 'red flag laws' strip gun owners of their constitutional rights*, USA TODAY (Apr. 19, 2018), https://www.usatoday.com/story/opinion/2018/04/19/red-flag-laws-strip-gun-rights-violate-constitution-column/526221002/ (asserting that initial *ex parte* hearings are unconstitutional).

[407] *E.g.*, Vicente Arenas, *Red Flag Law moves closer to becoming official*, FOX31 DENVER (KDVR) (Mar. 4, 2019), https://kdvr.com/2019/03/04/red-flag-law-moves-closer-to-becoming-official/; Hammond, *supra* note 406.

[408] Mary D. Fan, *Disarming the Dangerous: Preventing Extraordinary and Ordinary Violence*, 90 IND. L.J. 151, 157 (2015) (noting that a person involved in a homicide is "very likely to have committed interpersonal violence in the month before the homicide-yet never entered the legal system, thereby evading current firearms-restrictions screens triggered by adjudications").

[409] *E.g.*, Ovetta Wiggins, *Red-flag law in Maryland led to gun seizures from 148 people in first three months*, WASH. POST (Jan. 15, 2019), https://www.washingtonpost.com/local/md-politics/red-flag-law-in-maryland-led-to-148-gun-seizures-in-first-three-months/2019/01/15/cfb3676c-1904-11e9-9ebf-c5fed1b7a081_story.html?utm_term=.eecfe86ecbdf (quoting Maryland Delegate as averring that state's red-flag law has "proven itself to be constitutionally sufficient").

[410] *See supra* "The Second Amendment."

[411] *See supra* "Due Process."

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