



Constitutionality of Proposed Firearms Legislation

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Tragic mass shootings in Newtown, Connecticut, and elsewhere have prompted renewed national interest in the federal regulation of firearms. In January 2013 President Barack Obama publicly announced support for three new legislative measures to regulate firearm ownership and sales:

- Banning certain semiautomatic weapons with military-style features—commonly referred to as “assault weapons”—in addition to high-capacity ammunition magazines holding more than 10 rounds
- Requiring background checks on all firearms sales, not just those purchased from federally licensed firearms dealers
- Enhancing penalties for trafficking in firearms¹

Proposed legislation with similar elements has been introduced in Congress. These measures as written would not violate the Second Amendment right to bear arms as recently defined in two landmark Supreme Court decisions—*District of Columbia v. Heller* in 2008,² and *McDonald v. City of Chicago* in 2010.³ Under *Heller* and *McDonald* the Second Amendment protects the right of law-abiding citizens to keep and bear arms for self-defense in the home. The proposed measures would not violate that right, but rather fall squarely within the scope of “presumptively lawful regulatory measures” that *Heller* identified as constitutionally sound.⁴ Furthermore, these proposals would effectively advance the important government objectives of preventing gun violence and protecting law enforcement officers and would not unduly burden law-abiding Americans or impose upon the core right identified in *Heller*.

Below we discuss these three proposals in greater detail.

Summary of current proposals

Banning assault weapons and high-capacity magazines. President Obama’s proposal would reinstate a ban on assault weapons, which were the subject of a federal law that was in place from 1994 to 2004, and would limit the sale of ammunition magazines holding more than 10 rounds. A bill tracking the president’s general approach has already been introduced in the Senate by Sen. Dianne Feinstein (D-CA).⁵ Both Sen. Feinstein’s bill and the expired law that President Obama proposes to reinstate define an “assault weapon” as a semiautomatic weapon with specified military-like features, such as a folding stock or a grenade launcher, as well as firearms on a list of specifically named weapons.⁶

Requiring universal background checks. President Obama proposes to strengthen the currently existing National Instant Criminal Background Check System, or NICS, by requiring every gun buyer to submit to a background check—not just those who purchase firearms from a federally licensed firearms dealer. Approximately 40 percent of all gun sales are made by private sellers often at gun shows or through online transactions. Under current federal law these sales are exempt from the background check requirement. A bill aimed at achieving the president’s goal of universal background checks was introduced in the last Congress by Sen. Charles Schumer (D-NY).⁷

Enhancing penalties for gun trafficking. President Obama has also announced support for increased efforts to stem the flow of firearms to criminals, taking aim especially at so-called straw purchasing. Under current law, convicted felons cannot purchase firearms from a federally licensed firearms dealer. Straw purchasing is a technique used to evade this prohibition by using a third party without a criminal record—the “straw buyer”—to purchase weapons from a licensed firearms dealer under false pretenses. The president’s proposal is similar to legislation introduced by Sens. Patrick Leahy (D-VT) and Richard Durbin (D-IL),⁸ as well as a separate bill introduced by Sens. Kirsten Gillibrand (D-NY) and Mark Kirk (R-IL).⁹ Both proposals would impose criminal penalties on the straw buyer. The Gillibrand and Kirk proposal would also impose penalties on the ultimate firearm recipient.

The Second Amendment under *Heller*

The Second Amendment of the U.S. Constitution provides 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.” In *District of Columbia v. Heller*, the Supreme Court issued its most significant opinion regarding the Second Amendment since 1939, striking down a total ban on handgun possession in the home as inconsistent with the right to keep and bear arms conferred by the Second Amendment. The Supreme Court held that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home,” even apart from collective service in a militia.¹⁰

In striking down the District of Columbia’s ban on handgun possession, the Court took note that the handgun is “the quintessential self-defense weapon” and that it is “the most popular weapon chosen by Americans for self-defense in the home.”¹¹

Two years later in *McDonald v. City of Chicago*, the Supreme Court affirmed that the Second Amendment is fully applicable to the states through the 14th Amendment because it protects the “fundamental” right to self-defense.¹² The Court emphasized that at the core of the Second Amendment is the “basic right” of self-defense, and that this right is “deeply rooted in this Nation’s history and tradition.”¹³

Even as the Court affirmed and reaffirmed that the Second Amendment protects an individual right to possess weapons, it also stressed that the right to bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁴ In particular, the Court identified a nonexhaustive list of firearms regulations that are “presumptively lawful,” including:

- Longstanding “prohibitions on the possession of firearms by felons and the mentally ill”¹⁵
- Laws “forbidding the carrying of firearms in sensitive places such as schools and government buildings”¹⁶
- Laws “imposing conditions and qualifications on the commercial sale of arms”¹⁷
- Laws prohibiting “dangerous and unusual weapons”¹⁸

In *Heller* and again in *McDonald*, the Court emphasized that legislators retain “a variety of tools” for combatting the problem of gun violence¹⁹—repeating assurance that *Heller* “did not cast doubt” on measures such as these and that “experimentation with reasonable firearms regulations will continue under the Second Amendment.”²⁰

Thus *Heller* and *McDonald* make clear that the individual right to keep and bear arms for self-defense may be subject to reasonable regulation. This is entirely consistent with other cherished liberties in the Bill of Rights, such as the freedom of speech protected by the First Amendment. (See, for example, *Ward v. Rock Against Racism*,²¹ which ruled that restrictions on the time, place, and manner of speech, such as noise limitations, are permissible, and *United States v. O’Brien*,²² which ruled that content-neutral regulations of expressive conduct, such as burning draft cards, are permissible). And as the Supreme Court has emphasized in the First Amendment context, state and federal legislators “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”²³

There is no question that gun violence in the United States is a serious national problem. As the Court noted in *Heller*, “We are aware of the problem of handgun violence in this country.”²⁴ In addition to devastating mass shootings such as those in Newtown, Connecticut, and Aurora, Colorado, approximately 1 million Americans have been

wounded or killed by gunfire in the last decade.²⁵ In 2010 alone firearms were used in an estimated 11,000 murders, 128,000 robberies, and 138,000 aggravated assaults.²⁶ Social scientists have calculated that the lifetime medical costs for gunshot injuries in the United States in one year alone is \$2.3 billion, of which \$1.1 billion was paid by taxpayers.²⁷ When lost earnings, pain, disability, and the costs of lost life are included, the aggregate economic cost of gun violence to American society approaches \$100 billion annually.²⁸

The proposed measures do not infringe the Second Amendment

Banning assault weapons and high-capacity magazines

The proposed ban on “assault weapons” with military-style features and high-capacity magazines is consistent with the Second Amendment. *Heller* made clear that the Second Amendment does not protect the right to own “any weapon whatsoever” and “dangerous and unusual weapons” may be prohibited.²⁹ Courts that have examined bans on assault weapons and high-capacity magazines post-*Heller* have agreed that such bans do not infringe the Second Amendment because “[t]he prohibition of semi-automatic rifles and large capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.”³⁰ (See also *People v. James*—“*Heller* does not extend Second Amendment protection to assault weapons.”)³¹

A ban on assault weapons is consistent with the Second Amendment right recognized in *Heller* because these weapons are both “dangerous and unusual” and are not well-suited to self-defense in the home, which is the “central component” of the Second Amendment right.³² Assault weapons do not constitute a significant percentage of firearms in circulation in the United States—an estimated 1 percent or less prior to the 1994 federal assault weapons ban.³³ Assault weapons are also dangerous to an extraordinary degree. The prior federal assault weapons ban covered weapons with features such as protruding pistol grips, which help the shooter stabilize the weapon during rapid fire or spray fire from the hip position, and barrel shrouds, which protect the shooter’s hands from the heat generated by many rounds fired in rapid succession.

Other characteristics of assault weapons, such as telescoping stocks, principally facilitate concealment and thus have little value to those who use firearms lawfully—but obvious appeal to criminals. Firearms incorporating these characteristics enable the shooter to inflict a high degree of lethal damage rapidly and often indiscriminately. These features are thus better suited to offensive and mass assaults than responsible self-defense, particularly in urban areas where rapid and indiscriminate firing would pierce walls and injure innocent bystanders.

The Supreme Court has not yet addressed the applicability of the Second Amendment to ammunition magazines. But if ammunition magazines are within the protections of the Second Amendment, then it stands to reason that high-capacity magazines would also fall within the scope of Congress’s authority to regulate “dangerous and unusual” weaponry.³⁴ High-capacity magazines enable the firing of more than 10 rounds without requiring the shooter to pause and reload. High-capacity magazines are therefore well suited to enabling offensive, indiscriminate, and rapid firing, and ill-suited to self-defense situations where rapid and indiscriminate firing is more likely to injure innocent bystanders.

The tragic mass shootings in Tucson, Arizona; Aurora, Colorado; and Newtown, Connecticut, were all carried out by assailants using high-capacity magazines, and there is evidence in some of these cases that the shootings halted or were stopped only when the shooter was forced to pause to reload or switch weapons.³⁵ High-capacity magazines also pose a particular threat to law enforcement, as they are used in 31 percent to 41 percent of fatal police shootings.³⁶ As noted in *Heller II*, “the evidence demonstrates that large-capacity magazines tend to pose a danger ... particularly to police officers.”³⁷

Requiring universal background checks

The proposed expansions to the existing background check system are also consistent with the Second Amendment. *Heller* made clear that the individual right to bear arms does not extend to felons or the mentally ill.³⁸ Such “longstanding prohibitions” have been uniformly upheld in post-*Heller* cases in the federal courts. Both *United States v. Barton*³⁹ and *United States v. Smoot*⁴⁰ upheld the federal ban on possession of a firearm by convicted felons. If Congress may prohibit felons, the mentally ill, and other unfit persons from possessing firearms, it follows that Congress may also take reasonable measures to enforce the prohibition such as background checks at the point of sale. Indeed, *Heller* specifically observed that firearm sales would continue to be subject to reasonable “conditions and qualifications” enacted by legislators.⁴¹ The Court in *Heller* assumed that such regulations would exist when it ruled that the District of Columbia was required to permit the plaintiff to own a handgun, “assuming that [he] is not disqualified from the exercise of Second Amendment rights.”⁴²

Experience with the existing National Instant Criminal Background Check System has demonstrated that background checks can be effective at reducing violent crime without burdening the ability of law-abiding citizens to obtain firearms. The national background check system has proven to be a meaningful check on access to firearms by convicted felons and other “prohibited persons.” Since 1999 the system has blocked prohibited purchasers from buying firearms at federally licensed dealers more than 1.9 million times. The most common reason for denial was a prior felony conviction.⁴³ In 2009 alone approximately 150,000 applications for a permit to transfer or purchase a firearm were denied as a result of background checks. Here again, the most common reason for

denial was a prior felony conviction.⁴⁴ Given the efficacy of the system, a court would be unlikely to conclude that expanded background checks during firearm sales would unduly burden the Second Amendment right of law-abiding citizens to obtain firearms.

Enhancing penalties for arms trafficking

The Second Amendment would also not be infringed by the enhanced penalties for gun trafficking currently under consideration. The proposed measures outlaw “straw purchasing”—the practice of using a third-party intermediary to purchase weapons from a federally licensed firearms dealer for ultimate delivery to a felon or other person prohibited by law from buying the weapons.

Such measures would be constitutional because they do not impede the possession of firearms for self-defense by “law-abiding, responsible citizens,” which the Supreme Court found to be at the core of the Second Amendment.⁴⁵ Straw purchasing is not done for a “lawful purpose,” but occurs only to circumvent legal restrictions on the purchasing of weapons by felons or the mentally disturbed.⁴⁶ The Supreme Court left no doubt about the constitutionality of current, longstanding prohibitions on the possession of firearms by felons, therefore straw purchasers violate that prohibition by purchasing arms under false pretenses and with the intent to transfer the weapons to another person.

Conclusion

The Supreme Court has ruled that the Second Amendment protects an individual right to keep and bear arms for lawful self-defense, and that this right is violated by a total ban on possession of handguns by law-abiding citizens in their homes. But many forms of firearm regulation remain constitutional, including laws to prevent firearm possession by criminals and limitations on the possession of dangerous and unusual weapons. The measures endorsed by President Obama and proposed by Congress are safely within these confines and reflect the sort of reasonable regulation that the Supreme Court endorsed in *Heller* and has accepted in a host of other constitutional contexts.

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Endnotes

- 1 The White House, "Now Is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence" (2013), available at http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.
- 2 554 U.S. 570 (2008).
- 3 130 S. Ct. 3020 (2010).
- 4 554 U.S. at 627 n. 26.
- 5 See: Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013), co-sponsored by Sens. Blumenthal, Boxer, Cardin, Carper, Durbin, Franken, Gillibrand, Hirono, Klobuchar, Lautenberg, Levin, Menendez, Mikulski, Murphy, Reed, Rockefeller, Schatz, Schumer, Warren, and Whitehouse. It should be noted that this bill only bans the sale, manufacture, transfer, and importation of new weapons and would not take away any weapons or magazines that are currently lawfully owned. See also: H.R. 437, 113th Cong. (2013), sponsored by Rep. McCarthy.
- 6 *Ibid.*, § 2; *Public Safety and Recreational Firearms Use Protection Act*, Public Law 103-322, §§ 110102, 110103, 108 Stat. 1796, 1996-2000 (1994) (expired federal assault weapons ban).
- 7 See: Fix Gun Checks Act of 2011, S. 436, 112th Cong. (2011), co-sponsored by Sens. Akaka, Gillibrand, Kerry, and Menendez. See also: H.R. 137, 113th Cong. (2013), sponsored by Rep. McCarthy.
- 8 See: Stop Illegal Trafficking in Firearms Act of 2013, S. 54, 113th Cong. (2013).
- 9 See: Gun Trafficking Prevention Act of 2013, S. 179, 113th Cong. (2013). See also: H.R. 452, 113th Cong. (2013), co-sponsored by Reps. Cummings, Maloney, Meehan, and Rigell.
- 10 554 U.S. at 635.
- 11 *Ibid.* at 629.
- 12 130 S. Ct. at 3037, 3050.
- 13 *Ibid.* at 3036 (internal quotation marks omitted).
- 14 *Heller*, 554 U.S. at 626.
- 15 *Ibid.*
- 16 *Ibid.*
- 17 *Ibid.* at 626-27.
- 18 *Ibid.* at 627.
- 19 *Ibid.* at 636.
- 20 *McDonald*, 130 S. Ct. at 3046-47.
- 21 491 U.S. 781, 791 (1989).
- 22 391 U.S. 367, 376-77 (1968).
- 23 *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).
- 24 *Heller*, 554 U.S. at 636.
- 25 Centers for Disease Control and Prevention, "Injury Prevention & Control: Data & Statistics (WISQARS)," available at <http://www.cdc.gov/injury/wisqars/index.html> (last accessed February 2013). Estimate based on 2000–2010 data for fatal shootings and 2001–2011 data for nonfatal shootings.
- 26 Centers for Disease Control and Prevention, "FastStats: Assault or Homicide," available at <http://www.cdc.gov/nchs/fastats/homicide.htm> (last accessed February 2013); FBI, "Crime in the United States 2010," tables 21–22, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offenses-known-to-law-enforcement/expanded/expandedoffensemain>
- 27 Philip J. Cook and others, "The Medical Costs of Gunshot Injuries in the United States," *Journal of the American Medical Association* 282 (5) (1999): 447–454.
- 28 Philip J. Cook and Jens Ludwig, *Gun Violence: The Real Costs* (Oxford: Oxford University Press, 2002).
- 29 *Heller*, 554 U.S. at 626-27.
- 30 *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).
- 31 94 Cal. Rptr. 3d 576, 585-586 (Cal. Ct. App. 2009).
- 32 *Heller*, 554 U.S. at 599 (emphasis omitted).
- 33 Marianne W. Zawitz, "Guns Used in Crime" (Washington: Bureau of Justice Statistics, 1995); Christopher S. Koper, "Updated Assessment of the Federal Assault Weapons Ban" (Washington: National Criminal Justice Reference Service, 2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>. Estimates assume that assault weapons constituted 0.5 percent of the civilian gun stock in 1990.
- 34 *Heller*, 554 U.S. at 627.
- 35 "Jared Lee Loughner," *The New York Times*, November 8, 2012, available at http://topics.nytimes.com/top/reference/timestopics/people/l/jared_lee_loughner/index.html; Jack Healy, "Suspect Bought Large Stockpile of Rounds Online," *The New York Times*, July 22, 2012, available at <http://www.nytimes.com/2012/07/23/us/online-ammunition-sales-highlighted-by-aurora-shootings.html>.
- 36 Koper, "Updated Assessment of the Federal Assault Weapons Ban."
- 37 *Heller II*, 670 F.3d at 1264.
- 38 *Heller*, 554 U.S. at 626.
- 39 633 F.3d 168, 172-75 (3d Cir. 2011).
- 40 690 F.3d 215, 219-22 (4th Cir. 2012).
- 41 *Heller*, 554 U.S. at 626-27.
- 42 *Ibid.* at 635.
- 43 Background checks are conducted by the FBI or, in point-of-contact states that run their own background checks, by state and local agencies. Between the inception of the NICS system in 1998 and 2012, the FBI issued 987,578 denials. FBI, *Federal Denials*, available at http://www.fbi.gov/about-us/cjis/nics/reports/20130101_denials.pdf XX DEAD LINK XX. Between 1998 and 2009 state and local agencies issued an additional 865,724 denials, and it is estimated that they have issued 200,000 denials in the three years since data was last released. Bureau of Justice Statistics, *Background Checks for Firearms Transfers, 2009-Statistical Tables* (Department of Justice, 2009), table 2, available at <http://bjs.ojp.usdoj.gov/content/pub/html/bcft/2009/bcft09st.pdf>. Of the 1,613,953 background checks denied between 2000 and 2009, the most recent year for which all data are available, 94,882 people appealed their denial and had it reversed. Therefore only 6 percent of all failed background checks during that period were so-called "false positives." *Ibid.*, table 6.
- 44 *Ibid.*, tables 1 and 4.
- 45 *Heller*, 554 U.S. at 636.
- 46 Existing law already generally prohibits the unlicensed transport into a state of firearms purchased outside the state. 18 U.S.C. § 922(a)(3). That prohibition has been held to be constitutional after *Heller*. See: *United States v. Decastro*, 682 F.3d 160, 168-69 (2d Cir. 2012) (noting "ample alternative means of acquiring firearms for self-defense purposes" other than purchasing out-of-state). Like § 922(a)(3), the proposed gun-trafficking bill would leave ample alternative means for law-abiding, responsible citizens to acquire firearms.