



Domestic Violence and Federal Firearms Laws

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I. The Second Amendment

The U.S. Supreme Court, in *DC v. Heller* and *MacDonald v. City of Chicago*, has found that the Second Amendment of the U.S. Constitution protects the right of individuals to possess firearms for the purposes of self-defense and hunting. In deciding these cases, the Supreme Court noted that the constitutional right is not absolute, meaning that the government may, under certain circumstances, regulate an individual's right to possess firearms. The Court noted that there were existing federal firearms laws that would survive legal challenges under the Second Amendment, though the Court declined to identify which laws they deemed appropriate. Additionally, the Court noted that when legal challenges to any federal firearm law should arise, the state would have to provide justification for regulating or prohibiting firearm possession; the Court, however, declined to say whether it would review such laws deferentially (requiring the government to provide a minimal justification for the law) or whether it would review such laws under strict scrutiny (requiring the government to provide a compelling reason for the law).

A number of cases addressing these ambiguities are working their way up from the states to the U.S. Supreme Court.

II. Federal firearms laws addressing domestic violence

Federal firearms law identifies persons who may be prohibited from possessing, owning, or transferring a firearm. Two of these "prohibitors" relate specifically to domestic violence:

- 18 U.S.C. 922(g)(8) prohibits persons who are subject to certain kinds of protection orders from possessing a firearm.
- 18 U.S.C. 922(g)(9), also known as the Lautenberg Amendment, prohibits persons who have been convicted of certain misdemeanor crimes of domestic violence from possessing firearms.

Both of these provisions have withstood numerous legal challenges in both the federal Circuit Courts and in the Supreme Court prior to the *Heller* and *MacDonald* cases. Following these cases, some new challenges to the domestic violence federal firearms provisions have been litigated, and it is assumed that the Supreme Court will revisit the constitutionality of these provisions under the *Heller/MacDonald* standard. Experts in

the field assume that these laws will ultimately survive constitutional challenge, whether the Court adopts a deferential level of review, an intermediate level of review, or strict scrutiny standard. It is fairly well accepted in caselaw that the government has a very strong interest in keeping persons who have been found by courts to have a propensity for violence against intimate partners from possessing firearms.

III. Enforcing the federal firearms laws

The real challenge regarding federal firearms laws is enforcement. The statutory system that has evolved is complex and requires the efforts of numerous government agencies to work.

State courts. State courts are the entities that issue the protection orders against domestic violence offenders or convict persons of misdemeanor crimes of domestic violence. Exactly what the state court finds or orders is crucial to whether either a protection order or misdemeanor conviction will qualify to prohibit an individual from possessing firearms. State courts must expressly find that the offender engaged in certain violent or threatening conduct against an intimate partner or order an offender to refrain from engaging in such conduct.

Law Enforcement. Local law enforcement is charged with entering the relevant information regarding the domestic violence protection order or misdemeanor conviction into the National Crime Information Center (NCIC) database. There is no dedicated federal or state funding in most areas of the country to ensure that law enforcement has the staffing to consistently enter the required information into NCIC. Therefore, most cases which might qualify to prohibit an individual from possessing a firearm under the federal domestic violence laws are not entered into NCIC.

FBI. The Federal Bureau of Investigation maintains the Brady database, also known as the National Instant Background Check System (NICS). Under the Brady Act, when an individual seeks to purchase a firearm or ammunition from a federally licensed firearms dealer, that dealer must submit the name of the proposed purchaser to NICS. NICS has three days to determine, by checking NCIC and NICS, whether the proposed purchaser has a qualifying protection order outstanding against him/her or whether the proposed purchaser has been convicted of a qualifying misdemeanor crime of domestic violence.

ATF. The Bureau of Alcohol, Tobacco and Firearms is charged with determining whether a protection order or misdemeanor conviction qualifies to prohibit an individual from possessing or purchasing a firearm or ammunition under the federal firearms domestic violence provisions. If the ATF finds that the protection order or misdemeanor conviction does qualify, that information will go through NICS, so that federally licensed firearms dealers will know not to sell or transfer firearms or ammunition to a proposed purchaser. The ATF is also the entity charged with enforcing federal law as regards seizing prohibited firearms, so state courts and law enforcement who suspect that an

individual possesses a firearm or ammunition in violation of federal law must notify the ATF to initiate enforcement and seizure of the prohibited firearms and ammunition.

U.S. Attorneys. If the ATF reports that an individual has been in possession or has transferred firearms or ammunition in violation of federal law, the U.S. Attorney's office will decide whether to prosecute.

IV. The Problem

This system is incredibly complex. To work as designed in statute, state courts and local law enforcement must be trained to provide the information that federal actors will need to enforce the federal firearms laws. This requires consistent communication between state courts, local law enforcement, the FBI, the ATF, and the U.S. Attorneys. There is no dedicated funding to provide this training, nor is there dedicated funding to pay for the data collection and entry that must take place regularly on the state and local level. The NCIC and NICS are also underfunded, as are the ATF, the FBI, and the U.S. Attorneys, meaning that enforcement of these federal laws is spotty at best.

V. Policy Concerns

We know how volatile the combination of firearms and domestic violence is. A domestic violence case can quickly turn fatal when the offender has access to a firearm. When a court has made an adjudication that an individual has committed domestic violence and is likely to do so in future, the government has a compelling interest in ensuring that such cases do not escalate to homicides. The funding it would take to establish an effective data entry and database system throughout the country is well worth the cost. The costs of investigating and prosecuting domestic violence homicides far outweigh the costs of maintaining an effective enforcement system.

References:

International Association of Chiefs of Police: Report and Recommendations from the Great Lakes Summit on Gun Violence (September 19, 2007) <http://www.bradycampaign.org/studies/view/43/>

National Council of Juvenile and Family Court Judges, Family Violence Department: Full Faith and Credit: A Passport to Safety: A Judges' Guide (2010) <http://www.ncjfcj.org/content/blogcategory/256/302/>

National Center on Full Faith and Credit: Enforcing Domestic Violence Firearms Prohibitions: A Report on Promising Practices (2006) <http://www.bwjp.org/publications.aspx>