

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HM 545 Right to Keep and Bear Arms

SPONSOR(S): Combee and others

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local & Federal Affairs Committee	10 Y, 3 N	Baker	Rojas
2) Judiciary Committee			

SUMMARY ANALYSIS

The memorial expresses the sense of the Florida Legislature that the President's Proposal to constrain the people's access to arms violates the U.S. Constitution. The memorial also expresses the Legislature's intent to lawfully overturn federal firearm control measures that violate the U.S. Constitution.

The Second Amendment protects the individual right to possess for lawful purposes a firearm in common use. That right applies to state regulation as well. The U.S. Supreme Court has found exceptions to that constitutional right, such as longstanding prohibitions on the possession of firearms by the mentally ill. That same court has not specified the level of heightened scrutiny applicable to government measures that constrain that guaranteed right.

The Proposal was issued in January 2013 and urges Congress to not only reinstate the prohibition on military-style weapons and on certain-sized magazines, but also to increase the scope of those prior constrictions. In February 2013, the President asked Congress to pass these general proposals in the State of the Union Address.

The Tenth Amendment may provide a ground upon which to challenge federal regulation of firearms depending on the degree and manner of federal implementation.

The memorial has no fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

A. *The Second Amendment*

The Second Amendment to the U.S. Constitution states 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.”

General Protections

The U.S. Supreme Court (Court) has declared the Second Amendment provides the constitutional right of an individual to keep and bear arms.¹ The Second Amendment applies to the states by operation of the Fourteenth Amendment.² The introductory clause of the Second Amendment does not limit the right to keep and bear arms.³

The Court has looked at the provisions of a challenged regulation working together as a whole in order to determine whether that regulation indeed constrains individual rights protected by the Second Amendment. For instance, a law that outlawed the registration of handguns while also outlawing the possession of unregistered firearms was a de facto prohibition on handguns; therefore, that law violated the Second Amendment.⁴ Requiring a handgun to be disassembled or trigger-locked also violated the Second Amendment by requiring that weapon to be kept inoperable.⁵

The Court emphasized that these bans on handguns would fail any level of heightened constitutional scrutiny; therefore, it did not choose which type of scrutiny (strict or intermediate) was necessary to apply.⁶

Qualifications

In *District of Columbia v. Heller*, the Court decided, among other things, there is no Second Amendment protection for “those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”⁷ In other words, the weapons protected by the Second Amendment are those in common use for lawful purposes, such as self-defense.⁸

For example, because in the United States handguns were a common weapon for home defense, a prohibition on the possession of handguns violated the Second Amendment.⁹

Exceptions

¹ *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008).

² *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

³ *See Heller*, 128 S. Ct. at 2789-90 (the introductory clause is used to resolve any ambiguities, if they exist, after reading the operative clause, and was in use in many state constitutions at the founding era).

⁴ *Id.* at 2789-90.

⁵ *Id.* at 2817-19.

⁶ *Id.* at 2817-18.

⁷ *Id.* at 2816 (choosing to narrow the limitation on the Second Amendment expressed by a prior U.S. Supreme Court decision).

⁸ *Id.* at 2815 (finding that militia-type weapons at the revolutionary period were the same type as used in self-defense).

⁹ *Id.* at 2817-19.

Heller noted there are presumptively lawful regulations the Second Amendment does not protect. The Court then proceeded to give an *open-ended* list of examples of such regulations to which the presumption of lawfulness attaches:

- 1) “longstanding prohibitions on the possession of firearms *by felons and the mentally ill*, or
- 2) laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or
- 3) laws imposing conditions and qualifications on the *commercial* sale of arms.”¹⁰

The Court did not specifically mention the degree of difficulty by which these presumptions could be overcome, or whether these were rebuttable or conclusive presumptions.

After *Heller*, the Court was asked to decide whether a federal prohibition on firearm possession by a person convicted of a domestic violence misdemeanor required proof of a domestic relationship.¹¹ In its opinion, the Court did not invalidate that statute but did not address the issue of the Second Amendment either.¹² However, one U.S. Circuit Court of Appeals has applied intermediate scrutiny (a lower degree of scrutiny than many fundamental rights enjoy) to a prohibition on firearm possession by a person subject to a domestic violence injunction.¹³

Another U.S. Circuit Court of Appeals has found that a prohibition on the possession of military-style firearms and large-capacity magazines passes intermediate scrutiny.¹⁴

B. The U.S. President’s recent proposal for federal regulation of firearms

On January 16, 2013, the President released a statement proposing changes to federal law and the regulation of firearms (Proposal).¹⁵ That Proposal was based on recommendations from the Vice President.¹⁶ Those recommendations leaned toward executive action rather than congressional legislation.¹⁷ On January 26, 2013, the President announced certain executive actions he would take regarding firearms (Announcement).¹⁸

At the State of the Union Address on February 12, 2013, the President called on Congress to vote on firearm control as envisioned by the Proposal. Among other regulatory and spending requests,¹⁹ the Proposal listed two broad prongs of firearm regulation:

- 1) magazine size, ammunition, and military-style firearms, and
- 2) constraints on sales.

¹⁰ *Id.* at 2816-17 (numerals and emphasis added).

¹¹ *United States v. Hayes*, 555 U.S. 415 (2009).

¹² *Id.*

¹³ *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

¹⁴ *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (case is currently at federal District Court after being remanded by the Circuit Court; discovery deadline has been set for May 2013).

¹⁵ “Now is the Time: The President’s plan to protect our children and our communities by reducing gun violence,” The White House, available at <http://www.whitehouse.gov/issues/preventing-gun-violence#what-we-can-do> (click “Download the full text of the President’s Plan”) (last visited Feb. 19, 2013) (hereinafter the “Presidential Proposal”).

¹⁶ Kevin Liptak, “Details of Biden gun package emerge,” CNN, Jan. 15, 2013, available at <http://politicalticker.blogs.cnn.com/2013/01/15/details-of-biden-gun-package-emerge/> (last visited Feb. 20, 2013).

¹⁷ *See id.* (reporting that Vice President’s recommendations found a high-capacity magazine law may pass House, while assault weapon ban would not).

¹⁸ “Now is the Time”, *supra* n. 14 (click “See the Executive Actions President Obama Announced”) (last visited Feb. 19, 2013) (hereinafter “Announcement”).

¹⁹ The portions of the proposal calling for spending include millions of dollars for research; increased police presence on streets; encouragement for firearm manufacturers to create new constraints on weapons; hiring school resource officers, psychologists, and counselors; and implementation of emergency management plans and behavior management plans. The other regulatory categories of the Proposal included schools and mental health services.

1. Magazine size, ammunition, and military-style firearms

The Proposal urges Congress to “reinstate and strengthen the prohibition on assault weapons.”²⁰ According to this language, the President not only seeks to recreate the same ban that existed from 1994 to 2004²¹, but also wants Congress to enact an even more stringent law. In particular, the Proposal implores Congress to prevent cosmetic modifications of semiautomatic rifles that the President alleges were a circumvention of the 1994 assault weapon ban.²² The Proposal does not specify which modifications allegedly circumvented that now-repealed law.

The 1994 assault weapons ban prohibited the manufacture, transfer and possession of a “semiautomatic assault weapon,” including A-K technology weapons, UZI, AR-15, TEC-9, and “copies or duplicates of the [prohibited] firearms.”²³

The Proposal also urges Congress to “reinstate the prohibition on magazines holding more than 10 rounds.”²⁴ The 1994 federal law prohibited ammunition feeding devices of more than 10 rounds.²⁵ The Proposal goes on to urge Congress to ban the possession and transfer of armor-piercing ammunition among persons who are not members of law enforcement or the military.²⁶

2. Constraints on Sales

The Proposal urges Congress to change the National Criminal Background Check System under the Brady Act.²⁷ Accordingly, the President urges Congress to require background searches for *all* firearm purchasers, unless a transaction occurred between family members or was a temporary transfer for sporting purposes.²⁸ The Proposal urges Congress to prevent unlicensed persons from selling weapons to those who may not otherwise be able to make a lawful purchase because of failing a background search, i.e., “straw purchasers.”²⁹

Ban on importation of relic arms

The Proposal requests Congress to permit the executive branch to restrict the definition of importable relic weapons by excluding semiautomatic military rifles therefrom.³⁰

Executive action

The Proposal implies the implementation of certain executive action. The President has stated that he intends to take executive action so that in spite of the Health Insurance Portability and Accountability Act (HIPAA), states may disclose a person’s mental health information when a background search is conducted.³¹ To this end, the Proposal, without providing specifics, requests to spend \$70 million on states in the next two fiscal years to encourage them to make relevant disclosures.

²⁰ Presidential Proposal at 5, *supra* n. 14.

²¹ Pub. L. 103-322, §§ 110102-110104 (HR 3355) (Violent Crime Control and Law Enforcement Act of 1994); once codified at 18 U.S.C. §§ 921-22 (1994).

²² Presidential Proposal at 5, *supra* n. 14.

²³ Pub. L. 103-322, § 110102 (1994).

²⁴ Presidential Proposal at 5, *supra* n. 14.

²⁵ Pub. L. 103-322, § 110102 (1994).

²⁶ Presidential Proposal at 6, *supra* n. 14.

²⁷ *Id.* at 3; *see* 18 U.S.C. § 921, *et. seq.*

²⁸ Presidential Proposal at 3, *supra* n. 14.

²⁹ *Id.* at 6.

³⁰ *Id.* at 7.

³¹ *Id.* at 4; Announcement at 2, *supra* n. 18.

Further, the President has stated that he intends to direct federal agencies to review federal firearm laws and recommend changes to Congress and the executive branch as to how those laws can be used to “ensure dangerous people aren’t slipping through the cracks.”³²

The President intends to issue a Memorandum requiring all federal law enforcement to trace firearms recovered by a criminal investigation.³³ He also intends to recommend regulations that would create a law enforcement database for the purpose of conducting a broader background search before returning a recovered weapon to its owner.³⁴

C. *The State of Florida’s authority to resist federal measures relating to firearms*

The vagueness by which the Proposal expresses its intent to strengthen the 1994 federal ban on military-style weapons leaves enough room for the federal government to adopt a measure that may violate the Second Amendment.

Moreover, the U.S. Supreme Court (Court) had not yet clarified the meaning of the Second Amendment at the time the 1994 ban existed. It is possible the Court may determine that strict scrutiny is the necessary level of scrutiny to apply to government measures that raise Second Amendment issues, and thereby invalidate laws constricting the possession of certain firearms and magazines, such as those urged in the Proposal.

The proposed federal action may be unconstitutional under the Tenth Amendment to the U.S. Constitution to the extent that a federal measure may impose an obligation on state officers to execute federal law.³⁵ Such was the case with the Brady Handgun Violence Prevention Act that required *state* officials to implement federal law by searching the background of prospective buyers and handling documents submitted by dealers.³⁶

Effect of Proposed Changes

This memorial expresses the Florida Legislature’s position to the United States Congress and President regarding the President’s proposals on firearm constraints. The memorial expresses the Legislature’s sense that those proposals to restrict the availability of arms to law-abiding citizens violate the United States Constitution.

The memorial also notifies Congress and the President that the Florida Legislature intends to lawfully exercise its authority to resist and overturn any federal gun control that violates the U.S. Constitution.

B. SECTION DIRECTORY:

N/A

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

³² *Id.* at 5.

³³ *Id.* at 6.

³⁴ *Id.* at 6-7.

³⁵ See *Printz v. United States*, 521 U.S. 989, 117 S. Ct. 2365 (1997).

³⁶ *Id.*; but see *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007) (holding the Tenth Amendment did not apply when Congress properly exercised its Commerce power and did not commandeer state officials when implementing the federal law).

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

N/A

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS / COMMITTEE SUBSTITUTE CHANGES

N/A