Federal Firearms Law

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Federal law regulates firearms and ammunition in many different ways. I write to provide history and constitutional context, as well as some practical suggestions.

History

Congress passed the National Firearms Act (NFA) of 1934, which applied to "a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition." *United States v. Miller*, 307 U.S. 174, 175 n.1 (1939). "As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms. Congress found these firearms to pose a significant crime problem because of their frequent use in crime, particularly the gangland crimes of that era." https://www.atf.gov/rules-and-regulations/national-firearms-act ("NFA Page").

The NFA imposed a tax of $200.00 per covered firearm, restricted transfer of such firearms, and imposed a registration requirement. *Miller* at 175 n.1. "Within sixty days after the (thirtieth day after June 26, 1934) effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such

firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment." *Id.* "It shall be unlawful for any person who is required to register . . . and who shall not have so registered . . . to ship, carry, or deliver any firearm in interstate commerce." *Id.*

Jack Miller and Frank Layton were charged in federal court with violating the NFA by transporting unregistered firearms in interstate commerce, "from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas." *Id.* at 175. They contended they could not be prosecuted because the NFA "offend[ed] the inhibition of the Second Amendment to the Constitution." *Id.* at 176. The District Court agreed. *Id.* The Supreme Court did not.

Reviewing the history of firearm regulations in the States, the Court said "[m]ost if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below." *Id.* at 182.

The NFA survived but as it went forward, a serious flaw became apparent. "If the possessor of an unregistered firearm applied to register the firearm as required by the NFA, the Treasury Department could supply information to State authorities about the registrant's possession of the firearm. State authorities could then use the information to prosecute the person whose possession violated State laws." NFA Page. The Supreme Court revisited the NFA in 1968. "We hold that a proper clam of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm . . . or for possession of an unregistered firearm." *Haynes v. United States*, 390 U.S. 85, 101 (1968).

Congress responded by passing the Gun Control Act (GCA) of 1968, P.L. 90-618. The GCA amended the NFA to correct the problems noted in *Haynes*. "First, the requirement for possessors of unregistered firearms to register was removed. Indeed, under the amended law, there is no mechanism for a possessor to register an unregistered NFA firearm already possessed by the person. Second, a provision was added to the law prohibiting the use of any information from an NFA application or registration as evidence against the person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration." https://www.atf.gov/rules-and-regulations/national-firearms-act The NFA continues in effect today, applying to restricted weapons as defined by 26 U.S.C. § 5845, such as machine guns and shotguns with barrels less than 18 inches long.

The GCA also enacted federal firearm statutes "to provide support for Federal, State, and local law enforcement officials in their fight against crime and violence." GCA, Sec. 101. The statutes apply to all firearms and ammunition, with "firearm" being defined 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(3).

The GCA's "unlawful acts" regarding firearms in § 922(g) reach all firearms "in interstate or foreign commerce," defined as "commerce between any place in a State and any place outside of that State." 18 U.S.C. § 921(2). In criminal cases, "the Government may establish the requisite interstate commerce nexus by showing that a firearm was manufactured outside the state where the defendant possessed it." *United States v. Lockamy,* 613 Fed. Appx. 227 (4th Cir. 2015) (internal citation omitted).

Congress has since tweaked the federal firearm statutes on at least two occasions. In 1986, based in part on concerns law enforcement was overreaching under the GCA, Congress passed the Firearm Owners Protection Act (FOPA). According to the National Rifle Association, FOPA "overruled no fewer than six anti-gun Supreme Court decisions and about one-third of the hundreds of lower court rulings interpreting the Gun Control Act." https://www.nraila.org/articles/20110125/no-surrender

The changes included an amendment to the definition of a felony ("crime punishable by imprisonment for a term exceeding one year") for felon-in-possession prosecutions. "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20). FOPA also recognized pardons, expungements, and restorations of rights. "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.*

In 1993 Congress passed the Brady Handgun Violence Prevention Act (often referred to as the Brady bill). James Brady was President Reagan's press secretary who was shot and permanently injured in 1981 while near the president during the assassination attempt. The stated purpose of the bill was "[t]o provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm." H.R. 1025, P.L. 103-159. The bill required all federal firearms licensees (FFL's) to conduct a criminal background check before transferring a firearm. It also established the National Instant Criminal Background Check Systems (NICS).

It further provided a declaratory-judgment-type of action for anyone "who is denied a handgun . . . due to the provision of erroneous information relating to the person . . . by the national instant criminal background check system." 18 U.S.C. § 925A.

Constitutional Context

The Second Amendment 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." *D.C. v. Heller,* 554 U.S. 570, 576 (2008). Does that cover "only the right to possess and carry a firearm in connection with militia service?" *Id.* Or does it protect "an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home?" *Id.*

The question was answered by the Supreme Court 5-4 in 2008 in *Heller*, which found the Second Amendment protects an individual right. *Id.* at 635. But the Court left the door open for some gun control laws. "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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 arms." *Id.* at 626-27.

Heller also said the Second Amendment did not provide a right to possess every available type of firearm. "We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting

the carrying of dangerous and unusual weapons." *Id.* at 627 (internal citations and quotations omitted).

Heller was a federal ruling addressing federal law. A later decision extended it to the States, holding that "the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010).

Litigation continues regarding issues such as the level of scrutiny provided to a Second Amendment violation and the constitutionality of bans on detachable large-capacity magazines and assault rifles like the AR-15. *See Kolbe v. Hogan,* 849 F.3d 114, 120 (4th Cir.), *cert. denied*, 138 S.Ct. 469 (2017) (applying intermediate scrutiny and upholding Maryland assault rifle ban).

In addition to the Second Amendment, the First and Fourth Amendments are connected to firearm issues. The First Amendment protects "the right of the people peaceably to assemble," a provision sometimes relied upon to support gun shows." In 1999, Alameda County, California, passed an ordinance barring firearms or ammunition on county property. The ordinance had the effect of ending a gun show that had been held in previous years at the fairgrounds. Russell and Sally Nordyke, gun show vendors, filed suit in federal court in 1999, the beginning of thirteen years of litigation. *See, e.g., Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011).

The suit included a First Amendment claim: "that gun possession is expressive conduct protected by the First Amendment and that the ban on the possession of firearms unconstitutionally interferes with commercial speech." *Nordyke v. United States,* 319 F.3d 1185, 1188 (9th Cir. 2003). The court acknowledged that "[g]un possession can be speech where there is 'an intent to convey a particularized message, and the likelihood [is] great that the message would be understood by those who viewed it." *Id.* at 1190. The County did "not contest that gun possession

in the context of a gun show may involve certain elements of protected speech." *Nordyke v. Alameda County,* 644 F.3d 776, 791 (9th Cir. 2011).

Alameda County ultimately loosened its interpretation of the ordinance to allow gun shows, and the Ninth Circuit later ruled against the Nordykes on the free speech claim, *Nordyke* slip decision, 07-15763 (9th Cir. 2012), but the issue remains of interest.

In the Fourth Amendment context, the question arises whether the open carrying of a firearm justifies a stop by law enforcement. "Where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states." *United States v. Black,* 707 F.3d 531, 540 (4th Cir. 2013). "That the officer had not seen anyone in this particular division openly carry a weapon also fails to justify a reasonable suspicion." *Id.*

Practical Application

Here are some suggestions and also some answers to frequently asked questions:

1. Does a state law expungement or restoration of rights allow a person to possess a firearm under federal law? Yes, based on the statutory language and also based on my experience. The statutory language is in 18 U.S.C. § 921(a)(20). Whether a person has a "conviction" triggering the federal gun ban is determined by "the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or had civil rights restored shall not be considered a conviction."

North Carolina restores almost all civil rights automatically, upon completion of probation or parole. N.C. Gen. Stat. § 13-1. Later restoring the right to possess firearms under N.C. Gen.

Stat. § 14-415.4 (or expunging the conviction under 15A-145.5) puts the final piece of the puzzle in place, with complete restoration of rights.

My experience is after doing a felony expungement or a rights restoration, I advise the client to apply for a gun permit before taking possession of any firearms or ammunition. The application will lead to a NICS background check. Passing the background check assures us the expungement or restoration has been entered in the record. My experience has generally been that the process has gone smoothly.

A related point is the process of setting aside the firearm prohibition under that results from an involuntary commitment. The GCA bans firearm possession by anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. § 922(g)(4), language that remained unchanged after FOPA. As interpreted by ATF, the statute meant anyone who had ever been involuntarily committed (IVC) was prohibited from possessing a gun. https://www.atf.gov/file/58791/download It "was effectively a lifetime prohibition on possessing firearms." *Bureau of Justice Statistics*, https://www.bjs.gov/index.cfm?ty=tp&tid=49 (*BJS Website).*

Congress addressed the issue as part of the NICS Improvement Amendments Act (NIAA) of 2007. P.L. 110-180, 121 Stat. 2559. "The NIAA was enacted in the wake of the April 2007 shooting tragedy at Virginia Tech," designed to improve the NICS system by "address[ing] the gap" in information concerning involuntary commitments. *BJS Website.*

As part of the NIAA, Congress allowed States to enact statutes ending the gun ban for someone with a past IVC. The NIAA directs such statutes must require a showing that "the person will not be likely to act in a manner dangerous to public safety and that the granting of [ ] relief would not be contrary to the public interest." NIAA § 105(a)(2). When a state-level program

"implemented in accordance" with NIAA makes such findings, the NIAA says the IVC "is deemed not to have occurred for purposes of" 18 U.S.C. § 922(g)(4). NIAA § 105(b).

North Carolina's IVC restoration statute is N.C. Gen. Stat. § 14-409.42 (formerly § 122C-54.1). It is accepted by ATF as a program meeting the requirements of the NIAA and therefore effective to end the IVC gun ban. https://bit.ly/2P08E35

2. Be ready to use the declaratory judgment big stick under 18 USC § 925A. If you have someone who is permitted to own a firearm and who is wrongly denied because of a NICS background check, you can appeal the denial to the FBI using the Voluntary Appeal process. A faster and more forceful approach is to file a lawsuit in federal court asking the judge to declare your client is eligible to possess firearms.

Any person who is denied "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 18 U.S.C. § 925A.

I can attest that the statute is an effective and powerful way of getting the Government's attention and correcting the record in a timely fashion.

3. Does a DWI conviction trigger the federal gun ban? If the maximum punishment is two years or less, it should not. Under 18 U.S.C. § 921(a)(20)(B), a "crime punishable by imprisonment for a term exceeding one year" does not include "any State offense classified by the laws of the State

as a misdemeanor and punishable by a term of imprisonment of two years or less."

The issue depends on the maximum punishment for the particular crime at issue. *See United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (maximum punishment of North Carolina conviction for federal purposes determined by defendant's specific punishment block under Structured Sentencing Act). North Carolina DWI convictions at level one, two, three, four, or five are punishable by no more than two years in prison and should not trigger the federal firearm ban. N.C. Gen. Stat. § 20-179.

But aggravated level one DWI convictions are punishable by three years. N.C. Gen. Stat. § 20-179.1(f3). Do they trigger the federal ban? I am not aware of any cases deciding the issue, but I would suggest they do.

4. What about domestic violence convictions? "It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to possess in or affecting commerce any firearm or ammunition." 18 U.S.C. § 922(g)(9).

Under 18 U.S.C. § 921(a)(33), a "misdemeanor crime of domestic violence" is any misdemeanor that "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 cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."

The required element is not the existence of the domestic relationship but the use of a deadly weapon or the use of physical force. *United States v. Hayes*, 555 U.S. 415, 426 (2009).

The wrinkle for North Carolina is that our assault law is broad enough to convict for assault

based on conduct that does not involve the use of force. The "use" of force means "the intentional availment of force. Negligent or merely accidental conduct does not constitute a *use* of physical force." *United States v. Vinson*, 805 F.3d 120, 125 (4th Cir. 2015) (internal quotation and citation omitted). North Carolina allows an assault conviction based on negligent conduct, that is, based on culpable negligence.

"[B]ecause North Carolina [assault law] permits conviction for conduct that does not amount to a use of 'force' under [federal law]," a North Carolina assault conviction does not qualify as a misdemeanor crime of domestic violence in the Fourth Circuit. *Id.* at 126. Note this is a Fourth Circuit ruling dealing with North Carolina law. It may or may not be adopted by other circuits. And it may or may not represent the Fourth Circuit's analysis of assault convictions from states other than North Carolina.

A separate but related point for domestic cases: domestic violence protective orders (DVPO's) clearly fall within the federal firearms ban for the length of time that the DVPO is in effect in state court. Anyone who "is subject" to a DVPO is barred from possessing a firearm, per 18 U.S.C. § 922(g)(8). Once the DVPO expires in state court (usually after one year, but it can be extended), the federal firearms ban goes away, because the person no longer "is subject" to the DVPO.

5. <u>The federal gun ban includes some people who are only under indictment.</u> Anyone who is "under indictment for a crime punishable by imprisonment for a term exceeding one year" is not allowed "to ship or transport . . . any firearm or ammunition or receive any such firearm or ammunition." 18 U.S.C. § 922(n).

The meaning of this statute is a bit unclear. At the very least, it bars anyone under

indictment from "receiving," or acquiring, a gun they did not own before being indicted. But what about guns someone owned before indictment? Are they required to get rid of them after indictment?

The express terms of the statute mention only shipping, transporting, and receiving a gun, not possessing one. In comparison, the federal ban for convicted felons expressly bans possession, as well as shipping, transporting, and receiving. 18 U.S.C. § 922(g)(1). You can make a strong argument based on the wording of the statute that someone under indictment is allowed to possess a gun he owned before being indicted, even if he is not allowed to ship, transport, or receive it.

But how far can the person move the gun before possession become transporting or shipping? In my opinion, the issues are too murky, and the stakes are too high. The safer and better practice is probably to advise all clients under indictment not to possess firearms or ammunition while the indictment is pending.

6. No guns for drug users. Federal law also says that any person "who is an unlawful user of or addicted to any controlled substance" is barred from possessing guns. 18 U.S.C. § 922(g)(3). The statute has "a limited temporal reach." *United States v. Carter,* 750 F.3d 462, 466 (4th Cir.), *cert. denied,* 135 S.Ct. 273 (2014). The "prohibition lasts only as long as the individual remains an unlawful drug user or addict."

The term "controlled substance" is defined by 21 U.S.C. § 802 to include "a drug . . . or immediate precursor" and to exclude "distilled spirits, wine, malt beverages, or tobacco."

7. Is there an exception for guns that someone keeps in their own home or business? Never under federal law and not any more under state law. There used to be a state law that allowed a

convicted felon to keep a gun "within his own home or on his lawful place of business." N.C. Gen. Stat. § 14-415.1(a). But that provision was abolished effective December 1, 2004.

And even prior to the change in the law, the state exception had no effect on the federal gun ban. If someone was barred by federal law from possessing a gun (because they were a convicted felon, a drug addict, etc.), they were not allowed to possess a gun even in their own home or business as a matter of federal law. The old North Carolina law was no defense to a federal gun prosecution.

As the Fourth Circuit put it, "the fact that state law permitted [the defendant] to possess a firearm in his home despite his status as a convicted felon whose civil rights had not been restored [was] not sufficient to insulate him from federal prosecution." *United States v. King*, 119 F.3d 290, 293 (4th Cir. 1997).

8. What about long guns? Prior to December 1, 2004, North Carolina's felon-in-possession statute prohibited only the possession of a "handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches." N.C. Gen. Stat. § 14-415.1(a). Effective December 1, 2004, however, the statute changed. It now says that it shall be unlawful for any convicted felon to "to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction."

The statute goes on to define the term "firearm" by borrowing heavily from the federal definition found in 18 U.S.C. § 921(a)(3): "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." The term "firearm" also includes the frame of a weapon and silencers. The length of the gun is now irrelevant; whether long or short, it cannot be possessed by a felon.

And even though a felon's possession of a long gun may have been permitted by state law prior to December 1, 2004, it has always been prohibited by federal law. So even before December 1, 2004, a felon in possession of a long gun was violating the federal ban on gun possession.

9. It's not just a ban on guns – it also includes ammunition. The federal statute prohibits possession of "any firearm or ammunition." 18 U.S.C. § 922(g). "Ammunition" is defined as "cartridge cases, primers, bullets, or propellant powder designed for use in any firearm." 18 U.S.C. § 921(a)(17)(A). I have heard anecdotally of a state prosecutor giving a case to the United States Attorney's Office to prosecute based on the fact that the defendant possessed a single bullet. That is ammunition and enough to trigger prosecution in federal court.

10. Ignorance of the law is no excuse. It does not matter if someone is unaware of the federal firearms ban. In *United States v. Mitchell*, 209 F.3d 319, 322-23 (4th Cir.), *cert. denied*, 531 U.S. 849 (2000) the Fourth Circuit said that the Government is not required to show that a defendant knew that federal law prohibited him from possessing a gun. If the defendant knew that he possessed the gun and knew that he was a convicted felon (or knew that he was a person with a conviction for a misdemeanor crime of domestic violence, a drug addict, etc.), that is enough for him to be prosecuted in federal court.

It does not matter whether he was aware that federal law prohibited him from possessing a gun. "The only knowledge the government was required to prove . . . was knowledge of the possession." *Id.* (citations omitted).

I hope this material is helpful. I am glad to talk anyone who has questions or who has suggestions for making this better. I am at 252-931-9362 and keith@williamslawonline.com.