

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVEGAR, INC., et al.,)
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 Plaintiffs,)
)
 v.)
)
UNITED STATES OF AMERICA,) Civil No. 95-550 (RCL)
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 Defendant.)
_____)

MEMORANDUM OPINION

This matter comes before the court on defendant's and plaintiffs' cross-motions for summary judgment on the issue of the constitutionality of certain provisions of the Violent Crime Control and Law Enforcement Act of 1994. Rule 56(c) of the Federal Rules of Civil Procedure provides that "summary judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon consideration of the submissions of the parties and the relevant law, plaintiffs' motion for summary judgment is denied and defendant's motion for summary judgment is granted.

I. Factual and Procedural History

On March 3, 1995, federally licensed firearm manufacturers

Navegar, Inc. ("Intratec") and Penn Arms, Inc. ("Penn Arms") filed a complaint in this court seeking a declaratory judgment that certain provisions of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-327, 108 Stat. 1796 ("the Act"), were outside of Congress's enumerated powers, unconstitutional bills of attainder, and vague in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. The facts leading up to plaintiffs' challenges to the Act are fully set forth in Navegar, Inc. v. United States, 914 F. Supp. 632, 633-35 (D.D.C. 1996).

The government filed a motion for summary judgment asserting that plaintiffs' pre-enforcement constitutional challenge to certain provisions of the Act did not constitute a justiciable controversy under Article III as plaintiffs failed to demonstrate a genuine threat of prosecution. Upon consideration of the arguments presented, this court granted the government's motion and dismissed plaintiffs' case. Id. at 637.

Plaintiffs appealed the decision of this court to the Court of Appeals for the District of Columbia Circuit. Navegar, Inc. v. United States, 103 F.3d 994 (D.C. Cir. 1997). The Court of Appeals first considered the justiciability of the plaintiffs' challenges to the sections of the Act specifically mentioning firearms produced by Intratec and Penn Arms by name. By its terms, the Act makes it unlawful for a person to "manufacture, transfer, or possess a semiautomatic assault weapon." 18 U.S.C.

§ 922(v)(1). "Semiautomatic assault weapon" is defined to include "any of the firearms, or copies or duplicates of the firearms in any caliber, known as . . . INTRATECTEC-9, TEC-DC9 and TEC-22, and . . . revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." Id. § 921(a)(30)(A). In effect, these portions of the Act make it unlawful to manufacture or transfer Intratec's "TEC-9," "TEC-DC9," and "TEC-22" models, and Penn Arms' "Striker 12" model. Id. §§ 922(v)(1), 921(a)(30)(A)(viii) & (A)(ix). Because of the weapon-specific nature of these sections, the Court of Appeals considered plaintiffs' challenges to these provisions separately from the challenges based on the generally worded provisions of the Act.

The Court of Appeals reversed this court's conclusion dismissing plaintiffs' pre-enforcement challenge to these provisions of the Act for lack of a justiciable controversy. Navegar, 103 F.3d at 999-1001. The Court of Appeals noted that the Act effectively singles out both Intratec and Penn Arms as intended targets by prohibiting the production of weapons that only these companies manufacture. The Court of Appeals commented that "the applicability of the statute to appellants' business [is] indisputable: if these provisions of the statute are enforced at all, they will be enforced against these appellants for continuing to manufacture and sell the specified weapons." Id. at 1000. For this reason, the Court of Appeals determined

that the imminent threat of prosecution could be deemed speculative only if it was likely that the government would simply decline to enforce these provisions of the Act—a conclusion that the Court of Appeals was unwilling to reach. As such, plaintiffs demonstrated an imminent threat of prosecution under this portion of the Act and the controversy was ripe for adjudication. Thus, the Court of Appeals was satisfied that the controversy was justiciable.

A contrary conclusion was reached by the Court of Appeals with respect to plaintiffs' pre-enforcement challenges to those portions of the Act identifying prohibited materials by general characteristics only. Plaintiffs sought to challenge the constitutionality of other portions of the Act referring to weapons and accessories sharing certain features, rather than to particular brands and models of weapons. Specifically, plaintiffs alleged that the Act exceeded the powers of Congress enumerated in the Constitution and that the Act was too vague to comply with the Due Process Clause of the Fifth Amendment to the Constitution. The enumerated powers claim presented by plaintiffs challenged the portion of the Act outlawing "large capacity ammunition feeding devices," defined as ammunition magazines "that ha[ve] a capacity of . . . more than 10 rounds of ammunition." 18 U.S.C. §§ 922(w)(1) and 921(a)(31). Plaintiffs' vagueness claims were centered on the portions of the Act that prohibited firearms "known as . . . revolving cylinder shotguns,"

18 U.S.C. § 921(a)(30)(A)(ix), and semiautomatic pistols that have two out of five listed characteristics. 18 U.S.C. § 921(a)(30)(C).

The Court of Appeals agreed with this court's conclusion that plaintiffs were unable to show an imminent threat of prosecution under the portions of the Act describing the outlawed items in general categorical terms and thus, the challenges to these portions of the Act were determined to be non-justiciable at that time. Navegar, 103 F.3d at 1001-02.

Upon remand to this court, plaintiffs sought leave to amend their complaint in an effort to demonstrate their challenges to the generic portions of the Act were justiciable in light of the Court of Appeals' prior decision in this case. After considering plaintiffs' motion to amend their complaint, this court concluded that the information contained in plaintiffs' Proposed Second Amended Complaint failed to establish that plaintiffs would have standing to assert a pre-enforcement challenge to the constitutionality of the generic portions of the Act. This court further held that plaintiffs failed to make any showing that they faced a greater or more imminent threat of prosecution than did other manufacturers of the products covered by the terms of the Act.

Because this court denied plaintiffs' motion to amend their complaint, plaintiffs' pre-enforcement constitutional challenge to the generic provisions of the Act identifying prohibited

materials by characteristics only remained dismissed. Plaintiffs and the government have since filed cross-motions for summary judgment on the remaining constitutional challenges to the weapon-specific portions of the Act.

II. The Violent Crime Control and Law Enforcement Act of 1994

The Gun Control Act of 1968, as amended, 18 U.S.C. §§ 921-30 ("GCA"), imposes a comprehensive regulatory scheme on the manufacture and distribution of firearms. On September 13, 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which amends § 922 of Title 18, United States Code, and makes it unlawful to "manufacture, transfer, and possess a semiautomatic assault weapon." 18 U.S.C. § 922(v)(1). The Act is to be in effect for a period of ten years from the date of its enactment in 1994 and effectively maintains the number of legal assault weapons in private hands at the 1994 level.

The term "semiautomatic assault weapon" is defined as any of the firearms known by nine categories of specified brand names or model numbers,¹ including "any of the firearms, or copies or

1. 18 U.S.C. § 921(a)(30)(A) provides:

(30) The term "semiautomatic assault weapon" means—
(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as—
(i) Norinco, Mitchell, and Poly Technologies

duplicates of the firearms in any caliber, known as . . . INTRATEC TEC-9, TEC-DC9 and TEC-22; and revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." Id. § 922(a)(30)(A). Another section of the Act defines prohibited firearms by generic features, including semiautomatic rifles that have "an ability to accept a detachable magazine" and have at least two of five other specified characteristics. Id. § 921(a)(30)(C).

In § 922(w)(1) of the Act, the transfer or possession of any "large capacity ammunition feeding device" is outlawed for a period of ten years. Section 921(a)(31)(A) defines such devices to include ammunition magazines manufactured after the date of the enactment of the Act, which can hold more than ten rounds of ammunition.² Id. §§ 922(w)(1), 921 (a)(31).

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- Avtomat Kalashnikovs (all models);
 - (ii) Action Arms Israeli Military Industries UZI and Galil;
 - (iii) Beretta Ar70 (SC-70);
 - (iv) Colt AR-15;
 - (v) Fabrique National FN/FAL, FNLAR, and FNC;
 - (vi) SWD M-10, M-11, M-11/9, and M-12;
 - (vii) Steyr AuG;
 - (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and
 - (ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

2. 18 U.S.C. § 921(a)(31) provides:

The term "large capacity ammunition feeding device"—

- (A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the

The Act contains various exceptions to the general prohibitions. The Act provides exemptions for the transfer of the proscribed assault weapons to government agencies and law enforcement officers, Id. § 922(v)(4) & (w)(3), and for export of the weapons under certain conditions. The Act also contains a "grandfather" provision that permits the possession or transfer of semiautomatic weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of enactment of the Act. Id. § 922(v)(2) & 922(w)(2). Persons convicted of knowingly violating these provisions are subject to fines and prison sentences of up to five years. Id. § 924(a)(1).

Because plaintiffs contend that neither the Act's language nor its legislative history offers a clear explanation of its nexus between the banning of assault weapons and interstate commerce, plaintiffs submit that the Act exceeds Congress's enumerated powers as set forth in Article I of the Constitution. Plaintiffs also assert that the weapon-specific nature of the Act demonstrates that the Act is an unconstitutional Bill of Attainder.

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- Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition; but
- (B) does not include an attached tubular device designed to accept, and capable of opening only with, .22 caliber rimfire ammunition.

III. Whether § 922(v)(1) Constitutes a Valid Exercise of Congress's Legislative Authority Pursuant to the Commerce Clause

The Constitution vests in Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const., Art. I, § 8, cl. 3. The Commerce Clause is a grant of plenary authority to Congress. See Hodel v. Virginia Mining and Reclamation Ass’n, Inc., 452 U.S. 264, 276 (1981); Cleveland v. United States, 329 U.S. 14, 19 (1946). For over sixty years, Congress has relied on this constitutionally enumerated power to impose controls on the flow of firearms and ammunition in interstate and foreign commerce in an effort to assist the States in reducing and preventing violent crime. While Congress’s authority to regulate such commerce pursuant to the Commerce Clause has been determined to be far-reaching, it is not without limit.³ As stated, plaintiffs assert that § 922(v)(1) exceeds Congress’s power to legislate under the Commerce Clause standard established by the Supreme Court in United States v. Lopez, 514 U.S. 549 (1995). However, as will be discussed below, the historically pervasive regulation of firearms by Congress considered in conjunction with the scope of

3. See Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (reaffirming that “the power to regulate commerce, though broad indeed, has limits” that “[t]he Court has ample power” to enforce), overruled on other grounds, National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 833 (1985).

the Commerce Clause power set forth by the Supreme Court in Lopez leaves little room for doubt that the congressional prohibition of the "manufactur[ing], transfer[ing], or possess[ing] a semiautomatic assault weapon," within the limits of § 922(v)(1) of the Act ,constitutes a constitutionally valid exercise of Congress's legislative authority.

A. The Scope of Congress's Power to Regulate Interstate Commerce

The breadth of Congress's authority to legislate pursuant to the Commerce Clause was first recognized by Chief Justice Marshall in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The commerce power, in Chief Justice Marshall's opinion, was not to be restricted by the judiciary. Indeed, Congress's power in this area reaches "that commerce which concerns more States than one." Id. at 194. The power itself was defined as "the power to regulate; that is, to proscribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Id. at 196.

In determining the scope of congressional power to regulate interstate commerce, the commerce power "must be considered in the light of our dual system of government and may not be

extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). This limitation is admittedly slight, taken even to its most outer limits—the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legislative end, the effective exertion of the granted power to regulate interstate commerce." United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

In essence, whether a particular exercise of congressional power is valid under the Commerce Clause is a relatively narrow and deferential inquiry. In Hodel, the Supreme Court succinctly explained that, in most instances, the inquiry is twofold. 452 U.S. 264 (1981). "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." Hodel, 452 U.S. at 276 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964)).⁴ "This established, the only remaining question for

4. In Katzenbach, the Supreme Court explained that "the mere fact that Congress has said when particular activity shall

judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" Id. (quoting Heart of Atlanta Motel, 379 U.S. at 262). Once the court determines that Congress acted rationally in adopting a particular regulatory scheme, the inquiry is at an end. Id.

The Supreme Court recently offered a detailed examination of its decisions defining the extent of congressional authority to legislate pursuant to the Commerce Clause. In Lopez v. United States, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, which made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). 514 U.S. at 561. The Act defined a "school zone" as "in or on the ground of, a public, parochial, or private school; or within a distance of 1,000 feet from the grounds of [such] a . . . school." Id. § 921(a)(25). Because this Act "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce," Lopez, 524 U.S. at 551, the Court concluded that Congress exceeded the "outer limits" of its authority to legislate pursuant to the Commerce Clause.

be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. at 303-04.

The Court in Lopez identified the three broad categories of activity that Congress may regulate pursuant to its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) activities "that substantially affect interstate commerce." 514 U.S. at 558-59. These categories were first laid out by the Court in Perez v. United States, 402 U.S. 146, 150 (1971).

In considering the authority of Congress to enact § 922(q), the Court quickly rejected the first two categories set forth above. The refusal to consider the Act under the first two categories was based on the Court's determination that section 922(q) was not "a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce." Lopez, 514 U.S. at 559. Accordingly, the Court considered, in depth, only whether the Gun Free School Zones Act could be considered a regulation of an activity that substantially affected interstate commerce. The Court held that it could not.

The conclusion in Lopez was based, in part, on the Court's determination that the possession of guns within school zones was

neither commercial in nature nor an essential part of a larger regulation of commercial activity, that the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the gun in question was connected with interstate commerce, and that Congress made no findings about the effect gun possession in school zones has on interstate commerce. Id. at 559-63. The Court also rejected the government's theories linking the possession of a firearm in a school zone to interstate commerce. Id. at 563-64. Therefore, in the absence of evidence to support the conclusion that Congress had a rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, the Court declared the statute unconstitutional. Id. at 559.

B. Analysis of § 922(v)(1)

Like the statute at issue in Lopez, § 922(v)(1) of the Violent Crime Control and Law Enforcement Act contains no jurisdictional nexus element specifically linking the manufacture, transfer, or possession of assault weapons with interstate commerce and does not include express congressional findings regarding the effect of the prohibited activity on interstate commerce. However, nothing in the Lopez opinion or in any other aspect of the Supreme Court's Commerce Clause jurisprudence makes the inclusion or absence of either of these

dispositive.

The Court of Appeals for the District of Columbia Circuit has expressly rejected the argument that a federal criminal statute must contain a jurisdictional element. In Terry v. Reno, the Court of Appeals rejected a constitutional challenge to the Freedom of Access to Clinic Entrances Act ("Access Act") which prohibited the use of threat of force or physical obstruction against a person seeking to obtain or provide reproductive health services. 101 F.3d 1412 (D.C. Cir. 1996). Plaintiffs in that case contended that the Access Act exceeded Congress's authority under the Commerce Clause because the statute lacked a jurisdictional element. Id. at 1418. The Court of Appeals clearly stated that the holding in Lopez did not mandate that federal criminal statutes must contain a jurisdictional element, id., and further reasoned that "[i]f a jurisdictional element were critical to a statute's constitutionality, the Court in Lopez would not have gone on to examine the Government's proffered rationales for the constitutionality of the gun possession statute." Id. See also United States v. Wilson, 73 F.3d 675, 685 (7th Cir. 1995) ("In discussing the lack of a jurisdictional element in Lopez, the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is per se unconstitutional.").

The lack of express congressional findings regarding the effect of the prohibited activity on interstate commerce is also not determinative of the issue before the court. Congress's power to legislate does not flow from the legislative findings it may make on a given issue; rather, it flows from the Constitution. The constitutionality of a statute simply cannot turn on the existence (or lack thereof) of legislative findings on a particular issue upon which Congress has chosen to legislate. As the Supreme Court stated in Lopez, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." 514 U.S. at 562. See Perez, 402 U.S. at 156; McClung, 379 U.S. at 304.⁵ See also Heart of Atlanta Motel, 379 U.S. at 252 (upholding Title II of the Civil Rights Act of 1964 despite absence of congressional findings).

Perhaps the clearest expression of this principle is Justice Powell's concurrence in Fullilove v. Klutznick, 448 U.S. 448 (1980). In that case, contracting associations brought suit challenging an affirmative action provision in § 103(f)(2) of the Public Works Employment Act of 1977. These associations asserted, in part, "that a reviewing court may not look beyond

5. The Court simply commented that legislative findings may have significant relevance where they would aid judicial consideration of "the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." Lopez, 514 U.S. at 563.

the legislative history of the PWEA itself for evidence that Congress believed that it was combating invidious discrimination." 448 U.S. at 502 (Powell, J., concurring). In his concurrence, Justice Powell reasoned that this position would essentially require Congress to make specific factual findings with respect to all legislative actions undertaken and would ignore the institutional expertise Congress may have gained in a particular area. He further elaborated that:

Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in an area.

Id. at 502-03.

Although not required to specifically elaborate on the substantial affect a regulated activity has on interstate commerce in order to legislate, it is appropriate to defer to a congressional finding that a certain activity substantially impacts interstate commerce. However, courts may not resort to "pil[ing] inference upon inference" to establish the existence of such an impact in the absence of an express finding. As stated,

the Court in Lopez, rejected the government's attenuated explanation linking possession of a firearm in a school zone to interstate commerce. 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). The Court noted that to accept the argument proffered by the government would in effect make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." Id. at 564. Accordingly, section 922(v)(1) "must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred." United States v. Kenney, 91 F.3d 884, 888 (7th Cir. 1996).

In examining whether §922(v)(1) of the Violent Crime Control Act exceeds Congress's authority under the Commerce Clause, this court notes that the reasoning employed by the Court of Appeals for the Seventh Circuit in United States v. Kenney is persuasive. In that case, the Court of Appeals considered a challenge nearly identical to the one presently presented by plaintiffs in the instant case to § 109(9) of the Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452-53, codified at 18 U.S.C. § 922(o). This statute also amended the Gun Control Act of 1968 and made it unlawful to transfer or possess a machine gun. As in the instant case, the statute itself contained no congressional

findings and no jurisdictional nexus element linking the prohibited conduct to interstate commerce. Notwithstanding these factors, the Court of Appeals joined every other Circuit to have considered the issue in concluding that Congress did not exceed its authority under the Commerce Clause in banning the transfer and possession of machine guns. See, e.g., United States v. Bailey, 123 F.3d 1381 (11th Cir. 1997); United States v. Wright, 117 F.3d 1265 (11th Cir. 1997), cert. denied, 118 S. Ct. 584 (1998); United States v. Rybar, 103 F.3d 273 (3d Cir. 1996), cert. denied, 118 S. Ct. 46 (1997); United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1986); United States v. Kirk, 70 F.3d 791 (5th Cir. 1997), aff'd by equally divided en banc panel, 105 F.3d 997 (5th Cir.) (per curiam), cert. denied, 118 S. Ct. 47 (1997); United States v. Rambo, 74 F.3d 948 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995).

The Court of Appeals in Kenney determined that the statute would be best analyzed under the third Lopez/Perez category—whether the transfer and possession of a machine gun was an activity having a substantial affect on interstate commerce. The Court of Appeals reasoned that § 922(o) could not be properly categorized as a regulation of a “channel of interstate commerce” based on the conclusion that in Lopez and Perez, each statute cited by the Supreme Court and identified as being upheld as a regulation of a channel of interstate commerce was a direct

regulation of interstate commerce as evidenced by an explicit jurisdictional nexus element. According to the Court of Appeals, this category could only justify section 922(o) to the extent that the statute regulated interstate transfers and possessions of machine guns. Moreover, the Court of Appeals noted that "although it may be true that Congress must regulate intrastate transfers and even mere possessions of machine guns in aid of its prerogative of preventing the misuse of the channels of interstate commerce, the regulation still regulates much more than the channels of interstate commerce." Id. at 889. In the view of the Court of Appeals, the statute at issue clearly covered more than would legislation designed to regulate the channels of interstate commerce. Compare Rambo, 74 F.3d at 952 ("[T]he ban on such possession is an attempt to control the interstate market for machineguns."); Kirk, 70 F.3d at 795-96 (concluding that the § 922(o) falls into either the first or second Lopez/Perez category and stating that "there could no unlawful possession . . . without an unlawful transfer").

The Court of Appeals also declined to rely on the second category identified in Lopez and Perez—the regulation of things or persons in or instrumentalities of interstate commerce, for similar reasons. The Court of Appeals again cited examples of cases identified by the Supreme Court as falling within this category and again concluded that this category could provide only partial support for § 922(o). The nexus between the

prohibited activity and interstate commerce in those cases was identified as "explicit and obvious in each case." Kenney, 91 F.3d at 889. The Court of Appeals in Kenney rejected the Tenth Circuit's observation that "[t]he interstate flow of machineguns 'not only has a substantial effect on interstate commerce; it is interstate commerce,'" Wilks, 58 F.3d at 1521, as this observation failed to contemplate the different question of the propriety of § 922(o)'s regulation of purely intrastate possession and transfer. Kenney, 91 F.3d at 889.

The Court of Appeals conceded that § 922(o) was a congressional effort to regulate the whole of an economic activity—the trade in machine guns. With this in mind, the Court of Appeals appropriately recognized that Congress's authority to legislate pursuant to the Commerce Clause extended to purely intrastate activities when such activities threaten Congress's ability to regulate interstate commerce. However, the Court of Appeals concluded that "[p]ermitting unregulated intrastate possessions and transfers of machine guns . . . indirectly undermines . . . the effectiveness of the federal attempt to regulate interstate commerce," and therefore, "the intrastate activity 'affects' the interstate commerce[] in an attenuated way that raises the Lopez concern of whether such effect is 'substantial.'" Id. at 890 (emphasis supplied).

Upon determining that section 922(o) could not be considered legislation falling within either the first or second Lopez/Perez

categories, the Court of Appeals concluded that the statute was within the limits of the third category because the transfer or possession of machine guns had a substantial impact on interstate commerce. In reaching this conclusion, the Court of Appeals recognized that unlike the banning of firearms within one thousand feet of a school, the banning of the transfer or possession of machine guns was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Kenney, 91 F.3d at 890 (quoting Lopez, 514 U.S. at 561). The Court of Appeals likened the possession of a machine gun to the Supreme Court's consideration of the harvesting and consumption of wheat by a single farmer in Wickard v. Fillburn. Kenney, 93 F.3d at 890. In Wickard, Congress's power to legislate pursuant to the Commerce Clause was considered to extend to this purely intrastate commercial activity because of the prohibited activity exerted a substantial effect on interstate commerce. Wickard v. Fillburn, 317 U.S. 111, 125 (1942).

The Court of Appeals also distinguished the ban considered in Lopez on the grounds that the ban on transfer and possession of machine guns did not "plow[] thoroughly new ground and represent[] a sharp break with the long-standing pattern of federal firearms legislation." Lopez, 514 U.S. at 563. For this reason, the Court of Appeals concluded it was proper to examine the legislative history and findings of other congressional

statutes regulating firearms. "In light of [those] findings and enactments, the 1986 addition of § 922(o) was not novel but incremental, merely preventing further growth in the number of machine guns in private hands as an exercise of the historic federal interest in the regulation of machine guns." Kenney, 91 F.3d at 890-91. In sum, the nature of the statute and the history of the federal firearms legislation led the Court of Appeals to conclude that § 922(o) was a constitutional exercise of Congress's authority to legislate pursuant to the Commerce Clause. See Wright, 117 F.3d at 1270 (reaching the same conclusion); Rybar, 103 F.3d at 283-84 (same).

The well-reasoned and thoughtful analysis relied on by the Court of Appeals in Kenney is instructive on the issue presently before this court. This court's own review of the cases and statutes traditionally considered by the Supreme Court to fall within the first two categories identified in Lopez and Perez demonstrates that § 922(v)(1), like § 922(o), cannot properly be viewed as falling within either of these categories.

1. Regulation of the Channels of Interstate Commerce

Without question, the clearest exercise of Congress's authority to regulate the use and channels of interstate commerce can be identified in statutes which contain an explicit jurisdictional nexus element. Frequently cited examples of such

statutes include the prohibition of interstate transportation or shipment of: stolen goods, 18 U.S.C. § 2312-2315; kidnaped persons, 18 U.S.C. § 1201; prostitutes; 18 U.S.C. § 2421; and drugs, 21 U.S.C. § 841(a). See also United States v. Robertson, 514 U.S. 669, 670-72 (1995) (affirming conviction under federal RICO statute because gold mine was "engaged in commerce"); United States v. Darby, 312 U.S. 100, 105 (1941) (upholding statute making unlawful the interstate shipment of goods produced by workers whose wages violated the Fair Labor Standards Act). In light of the fact that each statute and case cited by the Supreme Court in Lopez and Perez as falling within this category contains a jurisdictional nexus element, it is reasonable to interpret this category as being restricted "to legislation that specifically reaches interstate transfers, possessions, and transactions and businesses 'engaged in commerce.'" Kirk, 105 F.3d 997, 1008 (5th Cir. 1997) (Jones, J., dissenting).

The broadest reading of Congress's authority to regulate the use of the channels of interstate commerce can be found in the Supreme Court's opinion in Heart of Atlanta Motel. In this case, the Court upheld the constitutionality of Title II of the Civil Rights Act of 1964. Section 201(a) of Title II made it unlawful for public accommodations "affecting commerce" to discriminate or segregate on the basis of race, color, religion, or national origin. In elaborating on Congress's power to legislate pursuant to the Commerce Clause, the Court stated:

[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

379 U.S. at 256 (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)).

While it is not a far stretch to conclude that the interstate manufacture, transfer, and possession of assault weapons may very well constitute an immoral and injurious use of interstate commerce, § 922(v)(1), in effect, simply reaches more than the channels of interstate commerce alone. Indeed, given the absence of a jurisdictional nexus element, the statute prohibits purely intrastate possession and transfer of assault weapons. Although it has been clearly established that Congress may regulate purely local activity in furtherance of its power to regulate the channels of interstate commerce, see, e.g., Darby, 312 U.S. at 118, the reach of § 922(v)(1) extends beyond this category by potentially criminalizing assault weapons that have never been a part of interstate commerce. As the Court of Appeals in Kenney reasoned, the breadth of the statute is "therefore an aspect of Congress's broader power to regulate things 'affecting' interstate commerce." 91 F.3d at 889. Furthermore, the government has offered no explanation regarding how intrastate possession or transfer of an assault weapon is necessary as a means to regulate a particular channel of interstate commerce. Compare Heart of Atlanta Motel, 379 U.S. at

258 (concluding it was lawful for Congress to prohibit discrimination in local public accommodations because such discrimination affected interstate travel). As such, it is the conclusion of this court that § 922(v)(1) cannot properly be considered a regulation of the channels of interstate commerce.⁶

2. Regulation of Instrumentalities of Interstate Commerce or Things or Persons in Interstate Commerce

It would require an equally strained interpretation of the second Lopez/Perez category were this court to uphold § 922(v)(1) as a regulation of an instrumentality of interstate commerce, or of persons or things in interstate commerce, despite the fact that Congress's power extends to the regulation of instrumentalities "even though the threat may come only from intrastate activities." Lopez, 514 U.S. at 558. As the cases and statutes cited by the Supreme Court in Lopez reveal, this category includes regulation of instrumentalities or things as they move through interstate commerce and the nexus between the regulated instrumentality or thing and interstate commerce is therefore clearly evident in each case. The Court has cited the regulation of the destruction of aircraft, 18 U.S.C. § 32, thefts

6. Contrary to the Court of Appeals' determination in Kenney that § 922(o) did not fall within the first Lopez/Perez category, some Courts of Appeals have reached an opposite conclusion. See, e.g., Beuckalaere, 91 F.3d at 786-87; Rambo, 74 F.3d at 952.

from interstate shipments, 18 U.S.C. § 659, the Shreveport Rate Cases, 234 U.S. 342 (1914) (upholding authority of Congress to regulate rail rates), and Southern Ry. Co. v. United States, 222 U.S. 20, 32 (1911) (upholding authority of Congress to regulate rail cars), as examples of the exercise of congressional authority coming within this category. The Court has also determined that interstate roads and toll roads and drawbridges connecting interstate roads are instrumentalities of interstate commerce because these things are necessary to the transport of persons and goods moving in interstate commerce. See Alstate Const. Co. v. Durkin, 345 U.S. 13 (1953) (interstate roads); Overstreet v. North Shore Corp., 318 U.S. 125 (1943). See also United States v. Cobb, 144 F.3d 319, 322 (1998) (discussing the second Lopez category).

To the extent that an assault weapon constitutes a "thing" actually traveling from state to state via an instrumentality of interstate commerce, § 922(v)(1) would constitute a valid exercise of Congress's authority pursuant to the Commerce Clause and this exercise of authority would seem to fit squarely within this second category. It is clear, however, that § 922(v)(1) extends much further than simply regulating assault weapons in this fashion in its prohibition of purely intrastate possession of assault weapons.⁷

7. In reaching the conclusion that § 922(q) did not fall within the second category, the Court in Lopez seemed to suggest

Although the government submits that intrastate possession or transfer of an assault weapon can be properly considered a "thing" in interstate commerce because such possession may threaten the instrumentalities of interstate commerce, it is clear that the second category was not intended to extend to this type of threat. Purely intrastate activities and things that have been traditionally described as falling within the second category, and thus properly regulated by Congress, involve activities or things that constitute a direct threat to the free flow of interstate commerce as evidenced by either the inclusion of a jurisdictional nexus element in the statute at issue or some statutory presumption. See, e.g., Lopez, 514 U.S. at 557-58 (citing federal statutes criminalizing the destruction of aircraft "used, operated, or employed in interstate . . . commerce"). While an intrastate transfer or possession of an assault weapon certainly indirectly impacts interstate commerce, the second category, if it is to have any meaning at all, simply cannot be read to contemplate the regulation of such activities. See Kenney, 91 F.3d at 890 ("Permitting unregulated intrastate possessions and transfers of machine guns instead indirectly undermines, via a market theory, the effectiveness of the federal

that the second category was limited to "things or persons" as they move through commerce. See Lopez, 514 U.S. at 559 ("[Section] 922(q) is not . . . an attempt to prohibit the interstate transportation of a commodity through the channels of commerce.").

attempt to regulate interstate commerce in machine guns.”). To conclude otherwise would, in effect, permit Congress to legislate pursuant to its Commerce Clause power in an unrestricted manner with absolutely no assurance that the resulting federal regulation, in fact, regulates persons or things in interstate commerce.

3. Regulation of Activities that Have a Substantial Affect on Interstate Commerce

Having determined that the assault weapon ban does not fit completely within either of the first two categories identified in Lopez and Perez, the constitutionality of § 922(v)(1) must rest on whether the prohibited activity substantially affects interstate commerce. The analysis employed by the Supreme Court in Lopez in concluding that the possession of a handgun within one thousand feet of a school did not substantially affect interstate commerce is instructive on this issue. The Supreme Court’s conclusion in Lopez rested on three points: (1) § 922(q) regulated neither a commercial activity nor an essential part of a larger regulation of commercial activity; (2) the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the firearm in question was connected with interstate commerce; and (3) the government failed to provide a convincing explanation, supported by either legislative findings or argument

presented to the Court, that the prohibited activity had a substantial affect on interstate commerce without “pil[ing] inference upon inference.” Lopez, 514 U.S. at 559-67. While the Court found that the statute failed to satisfy all of these considerations, it did not assign the relative weights to be afforded each of these factors. The Court left unclear whether a statute must satisfy all three of the Lopez considerations to be constitutional or whether it simply needs to satisfy one of them.

In United States v. Wall, the Court of Appeals for the Sixth Circuit considered a constitutional challenge to 18 U.S.C. § 1955, which criminalizes illegal gambling operations of a certain size. 92 F.3d 1444 (6th Cir. 1996), cert. denied, 117 S. Ct. 690 (1997). In an opinion concurring in part and dissenting in part with the Court of Appeals’ determination that this statute was constitutional, Judge Boggs presented a cogent analysis demonstrating the interaction of the factors shaping the Court’s conclusion in Lopez that possession of a firearm within one thousand feet of a school did not substantially affect interstate commerce. It is the conclusion of this court that Judge Boggs’ analysis permits a court to undertake the serious judicial review of Commerce Clause measures contemplated by Lopez when purely intrastate activities are potentially regulated by federal legislation. Judge Boggs explained that the factors identified by the Court in Lopez should be considered in the following manner:

First, a reviewing court should determine whether the intrastate activity being regulated is commercial in nature or its regulation is an essential part of the regulation of some commercial activity. If the activity is neither commercial nor is its regulation an essential part of the regulation of commercial activity, then that activity cannot be regulated under the Commerce Clause. If the intrastate activity is either commercial or its regulation is necessary to the regulation of a commercial activity, however, then a reviewing court needs to go on to the next question.

Second, that court must ask whether the statute contains a jurisdictional nexus requirement that limits jurisdiction over the intrastate activity generally to those instances of the activity that have some particular connection with interstate commerce. If a facial challenge is mounted to the constitutionality of a statute with a jurisdictional nexus requirement, then this challenge must be rejected . . . If a statute contains a jurisdictional nexus requirement and the challenge is to the application of that requirement in a particular case, or the statute contains no jurisdictional nexus requirement, then the court must go on to the final question.

Third, the court must ask whether the statute's constitutionality or the constitutionality of its application in a particular case is supported by (1) the findings in the statute or the legislative history of the statute; (2) by the litigant's proffered defenses of the constitutionality of the statute; or, (3) by the court's own attribution of congressional purpose to the statute. . . . The rationales offered to support the constitutionality of the statute . . . must have a logical stopping point that would prevent them from being used to regulate any intrastate activity.

Id. at 1462 (Boggs, J. concurring in part and dissenting in part).

Applying Judge Boggs's framework to the instant case clearly demonstrates that the prohibited conduct at issue in § 922(v)(1) has a substantial effect on interstate commerce, and therefore, § 922(v)(1) constitutes a constitutional exercise of Congress's

authority to legislate pursuant to the Commerce Clause. First, the regulation of the intrastate activity covered in § 922(v)(1) constitutes an essential part of the regulation of a commercial activity. Section 922(v)(1) prohibits the manufacture, transfer, or possession of a semiautomatic assault weapon and as stated, the prohibited conduct extends to purely intrastate activity. Regulation of the intrastate manufacture, transfer, and possession of semiautomatic assault weapons is essential to Congress's regulation of this same conduct on an interstate level. In Kenney, the Court of Appeals for the Seventh Circuit analogized the regulation of purely intrastate possession and transfers of machine guns to the intrastate production and consumption of wheat in Wickard. Just as the regulation of local production and consumption of wheat in Wickard was essential to controlling the volume of wheat moving in interstate and foreign commerce, the regulation of the intrastate manufacture, transfer, and possession of semiautomatic assault weapons is essential to the congressional regulation of these activities on an interstate level. Preventing Congress from reaching intrastate activities would essentially render congressional efforts to regulate the market in semiautomatic assault weapons ineffective given the national market for these weapons. Indeed, the prohibition of the transfer, manufacture, or possession on a national level where interstate commerce is directly impacted would prove to be of little good in the absence of local control over these same

activities where interstate commerce is indirectly, though substantially, affected.

Because § 922(v)(1) does not contain a jurisdictional nexus element, it is necessary to proceed to the third inquiry in Judge Boggs's framework. Upon conducting this third inquiry, the court finds that the statute's constitutionality is supported by congressional findings and legislative history. In making this inquiry, the court notes that it is not confined to simply examining congressional findings and legislative history of the statute at issue in circumstances where congressional legislation in a particular area has been historically pervasive. The subject matter of § 922(v)(1) is sufficiently similar to the subject matter of other federal firearms legislation which is accompanied by explicit congressional findings and legislative history so as to render the findings and history accompanying the other statutes a reliable statement of the rationale for Congress's authority to enact § 922(v)(1). See Rybar, 103 F.3d at 279 (reaching the same conclusion with respect to § 922(o)); Kenney, 91 F.3d at 890 (same).

In Lopez, the Court refused to defer to the institutional expertise accumulated by Congress in the area of regulating firearms regulation because "prior federal enactments or Congressional findings [did not] speak to the subject matter of section 922(q) or its relationship to interstate commerce." Lopez, 514 U.S. at 563 (quoting the Court of Appeals for the

Fifth Circuit's opinion in United States v. Lopez, 2 F.3d 1342, 1366 (5th Cir. 1993)). The Court reasoned that § 922(q) "plow[ed] thoroughly new ground and represent[ed] a sharp break with the long-standing pattern of federal firearms legislation." Id. The Court made no mention of whether it was appropriate to consider prior findings and legislative history when Congress replows old ground, as was done with § 922(v)(1). However, as Justice Powell's concurrence in Fullilove makes clear, deference to Congress is appropriate "[a]fter Congress has legislated repeatedly in an area of national concern." Fullilove, 448 U.S. at 503. In circumstances where deference to Congress is appropriate, it is reasonable and, in fact, essential to consider prior findings and legislative history to demonstrate that Congress recognizes that a particular regulated activity substantially affects interstate commerce. To conclude otherwise would require Congress to include either express findings with every piece of legislation enacted pursuant to its Commerce Clause power or for Congress to include a jurisdictional nexus element with every such piece of legislation—two requirements that have been explicitly rejected by the Supreme Court. See supra, pp. 13-17.

For nearly six decades, Congress has enacted federal legislation regulating firearms pursuant to its authority under the Commerce Clause. In 1938, Congress enacted the Federal Firearms Act of 1938, Pub. L. No. 785, 52 Stat. 1250 (1938),

which was defined as "An Act to regulate commerce in firearms," and applied to all firearms and prohibited various transfers of firearms by licensed as well as unlicensed dealers "in interstate or foreign commerce." This statute prohibited "any manufacturer or dealer" not specifically licensed pursuant to that statute from transporting, shipping, or receiving any firearm or ammunition "in interstate or foreign commerce" and made it unlawful for "any person" to receive firearms or ammunition that was "transported or shipped in interstate or foreign commerce" in violation of the licensing requirement. Id.

The 1938 Act, in conjunction with the National Firearms Act of 1934 which regulated firearms pursuant to Congress's taxing power under Article I, Section 8, Clause 2 of the Constitution, remained in force and otherwise unchanged for the next three decades. In June 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) ("Omnibus Act"). As explained in the Court of Appeals opinion in Lopez, Title IV of Pub. L. 90-351 repealed the Federal Firearms Act and enacted a new chapter 44 of Title 18 (18 U.S.C. §§ 921-28) which incorporated, with some amendments, nearly all of the provisions of the Federal Firearms Act and included additional firearms offenses. Lopez, 2 F.3d at 1350-52.

This legislation required a federal license "for any person . . . to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition" regardless of whether the

transaction operated in interstate commerce. The relevant committee report and express findings included in the Omnibus Act clearly demonstrate that this legislation was based on a congressional finding of an extensive interstate commerce in firearms and the inadequacy of state control at a local level over the difficulties this presented.

The Omnibus Act contains the following express congressional findings:

[T]here is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and . . . the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

[T]he ease with which any person can acquire firearms . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States;

[O]nly through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;

. . . .

[T]he lack of adequate federal control over interstate and foreign commerce in highly destructive weapons . . . has allowed such weapons and devices to fall into the hands of lawless persons, . . . thus creating a problem of national concern.

82 Stat. at 225-26 (1968).

Congress expanded and strengthened federal restrictions on firearms that same year through the passage of the Gun Control Act of 1968, which superseded previous firearms legislation

through the following measures: (1) implementing restrictions similar to those Congress had already applied to handguns to most transactions involving rifles and shotguns; (2) adding broader coverage of transactions in ammunition; (3) tightening restrictions on deliveries and sales of heavy firearms, including machine guns; and (4) prohibiting interstate movement of firearms by or to unlawful drug users or adjudicated mental defectives. Pub. L. No. 90-618, 90th Cong., 2d Sess., 82 Stat. 1213, 1218-21 (1968).

As with the Omnibus Act, the legislative findings accompanying the Gun Control Act clearly demonstrate the connection between the increasing crime rates, the increasing prevalence in the use of firearms, and the trafficking of firearms through interstate commerce. The House Report stated:

The principal purpose of H.R. 17735, as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.

. . . .

The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic.

The subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate.

Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. Statistics indicate

that 50 lives are destroyed by firearms each day. In the 13 months ending in September 1967 guns were involved in more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500 aggravated assaults and 50,000 robberies. No civilized society can ignore the malignancy which this senseless slaughter reflects.

H.R. 17735, as amended, builds substantially on the regulatory framework contained in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

H.R. Rep. No. 1577, 90th Cong., 2d Sess. 6-7 (1968).

The House Report also attaches a letter from the Attorney General stating that:

By recognizing the Federal responsibility to control the indiscriminate flow of firearms and ammunition across State borders, this bill will give States and local communities the capacity and the incentive to enforce effectively their own gun control laws. Once enacted into law, it will insure that strong local or State laws are not subverted by a deadly interstate traffic in firearms and ammunition.

Id. at 19.

The enactment of the § 922(v)(1) represented the next logical step by Congress in its efforts to eradicate the dangers associated with the national market for certain firearms. H.R. 4296, the House Report accompanying the 1994 assault weapons legislation, summarized a series of hearings conducted over a five year period detailing the problems presented to the nation by semiautomatic assault weapons. H.R. Rep. No. 489, 103d Cong., 2d Sess. 13-20 (1994). During the hearings summarized in the House Report, witnesses offered extensive testimony on the increasing use of semiautomatic assault weapons and the inability of States to appropriately address this problem. *Id.* at 14-15.

See, e.g., Hearing on H.R. 4296 and H.R. 3527, Public Safety and Recreational Firearms Use Protection Act, House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, April 25, 1994 (statements of various witnesses). It is evident from the House Report's substantial reference to these hearings that in enacting the ban on the transfer, manufacture, and possession of semiautomatic assault weapons that Congress recognized that regulation on a national level would be ineffective in the absence of Congress's ability to reach this activity on a local, intrastate level because of the substantial affect of this activity on interstate commerce. See, e.g., Hearing on H.R. 4296 and H.R. 3527, Public Safety and Recreational Firearms Use Protection Act, House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, April 25, 1994 (statement of Representative Charles Schumer) ("A number of states and cities have already banned [semiautomatic assault weapons]. . . . And these state laws will never be effective without a national ban."); id. (statement of John Magaw, Director of the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms) ("[The] statistics and cases . . . demonstrate the proliferation of semiautomatic assault weapons that are used by criminals against law-abiding citizens and law enforcement officers."). See also Hearing on the Need for a national Assault Weapons Ban, Senate Judiciary Committee, August 3, 1998 (statement of Jim Florio,

Governor of New Jersey) (“[N]o individual state’s law, no matter how strong, can stop the deadly flow of assault weapons across state lines.”).

The Supreme Court has recognized that Congress enacted federal firearms legislation because “it was concerned with the widespread traffic in firearms.” Huddleston v. United States, 415 U.S. 814, 824 (1974). Because local manufacture, transfer, and possession of semiautomatic assault weapons is so closely related to the interstate market for these weapons, such transfer, manufacture, and possession has a substantial affect on interstate commerce when viewed in the aggregate and cannot truly be considered purely local. See Kenney, 91 F.3d at 891. See also Wickard, 317 U.S. at 125. As the Court of Appeals for the Third Circuit explained in Rybar, the regulation contemplated by § 922(v)(1), like the ban on the possession and transfer of machine guns, targets the transfer, manufacture, and possession of assault weapons “as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce” in semiautomatic assault weapons. Rybar, 103 F.3d at 283. The prohibition of the manufacture, transfer, and possession of semiautomatic assault weapons constitutes a rational means to eradicate the substantial and detrimental impact these weapons have on our nation. Accordingly, it is the conclusion of this court that Congress did not exceed its authority to legislate pursuant to the Commerce Clause in enacting § 922(v)(1).

IV. Whether § 921(a)(30)(A)(viii) and (ix) Constitutes an Unconstitutional Bill of Attainder

Plaintiffs assert that § 922(a)(30)(A)(viii) and (ix), when read in conjunction with § 922(v)(1), constitutes a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution ("No Bill of Attainder . . . Law shall be passed."). As stated, § 922(v)(1) makes it unlawful to "manufacture, transfer, and possess a semiautomatic assault weapon." Section 921(a)(30)(A)(viii) and (ix) define the term "semiautomatic assault weapon" as including the "INTRATEC TEC 9, TEC-DC and TEC-22" and "revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." Plaintiffs submit that the reference to "INTRATEC TEC 9, TEC-DC and TEC-22" is to products manufactured by plaintiff Intratec and the reference to the "Striker 12" is to a product manufactured by plaintiff Penn Arms. Plaintiffs contend that the weapon-specific nature of § 921(a)(30)(A)(viii) and (ix) and the alleged punitive effects of the statute demonstrate that this statute is an unconstitutional bill of attainder.

In essence, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Administrator of General Services, 433 U.S.

425, 468 (1977). See also United States v. Lovett, 328 U.S. 303, 315 (1946). When the prior activity of an identifiable person or group serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment, the statute at issue may be an attainder. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961). The Bill of Attainder Clause prohibits the legislature from assuming judicial functions and conducting trials and reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon specific persons." United States v. Brown, 381 U.S. 437, 445 (1965). Indeed, as the Supreme Court explained in Brown, the prohibition against bills of attainder is bound up in the principle of separation of powers. Id. at 445-46.

"[O]nly the clearest proof [can] suffice to establish the unconstitutionality of a statute" on the ground that it is a bill of attainder. Communist Party, 367 U.S. at 83 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)). The examination of whether a particular legislative action constitutes a bill of attainder necessarily requires consideration of two separate criteria: specificity in classification and punishment. See Nixon, 433 U.S. at 470 (describing these criteria as "the anchor that ties the bill of attainder guarantee to realistic conceptions"). See

also BellSouth Corp. v. FCC, 144 F.3d 58, 62 (D.C. Cir. 1998) (noting that a Bill of Attainder "is a prohibition triggered when a legislative act meets two tests—first, that it apply with specificity, and second, that it imposes punishment"). While it cannot be disputed that § 921(a)(30)(A)(viii) and (ix) specifically prohibits the manufacture of the semiautomatic assault weapons produced by plaintiffs, "[a]n otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals." Fresno Rifle & Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 727 (9th Cir. 1992). "Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one." Communist Party, 367 U.S. at 88.

1. The Specificity Element

In Nixon v. Administrator of General Services, the Supreme Court specifically rejected the position that legislation singling out a specific group or individual by name necessarily constituted a bill of attainder. The statute at issue in Nixon, the Presidential Recordings and Materials Preservation Act, was challenged as an unconstitutional bill of attainder because it directed the Administrator of General Services to take custody of the Presidential papers and tape recordings of former President

Richard Nixon. 443 U.S. at 429. The Supreme Court determined that "the fact that [the Act] refers to [President Nixon] by name does not automatically offend the Bill of Attainder Clause." Id. at 472. The Court's determination was based, in part, upon the notion that "[h]owever expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress . . . that legislatively burdens some persons or groups but not all other plausible individuals." Id. at 472.

The Court's reference in Nixon to United States v. Brown is also instructive in this regard. In Brown, the Court distinguished the Labor Management Disclosure Act of 1959, which made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union and was held to be an unconstitutional bill of attainder, from a provision in the Banking Act of 1933, which disqualified identifiable members of a group of officers and employees from serving as officers of Federal Reserve Banks. 381 U.S. at 453-54. The Court reasoned that the latter piece of legislation did not constitute a bill of attainder despite the fact that it prohibited conduct on the part of designated individuals or classes of individuals. In sum, as the Court succinctly stated in Nixon, "specificity of the law [alone] does not call into play the Bill of Attainder clause." Nixon, 433 U.S. at 471 n.33.

The conclusions reached by the Court in Nixon and Brown make

it abundantly clear that the prohibition of the transfer, manufacture, and production of certain semiautomatic assault weapons specifically by name does not render § 921(a)(30)(A)(viii) and (ix) a bill of attainder. Additional firearms, beyond those specifically identified in the statute, may also be deemed semiautomatic assault weapons within the definition of "semiautomatic assault weapon" contained in § 921(a)(30)(B), (C), and (D). It is significant that the statute "casts a wider net" and it is the conclusion of this court that it was not the intent of Congress to punish specific individuals—in this case Navegar and Penn Arms—but rather, it was to regulate certain types of firearms. See Fresno Rifle and Pistol Club, 965 F.2d at 728.

2. The Punishment Element

Having concluded that the inclusion of a weapon-specific prohibition alone does not carry the day for plaintiffs, the second criterion must be considered. In order to succeed in their challenge to the constitutionality of the statute, plaintiffs must demonstrate that the statute at issue "'inflict[ed] punishment' within the constitutional proscription against bills of attainder." Nixon, 433 U.S. at 472-73 (quoting Lovett, 328 U.S. at 315). See also Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984)

("The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group."); Brown, 381 U.S. at 456-60; Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866).

In considering whether a statute inflicts punishment within the constitutional proscription of bills of attainder, three inquiries must be made:

(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record "evinces a[n] . . . intent to punish."

Selective Service Sys., 468 U.S. at 852 (quoting Nixon, 433 U.S. at 473). Consideration of these factors must establish that the statute at issue imposes more than merely "burdensome consequences." Nixon, 433 U.S. at 472. Upon inquiry into the three components of punishment, this court concludes that plaintiffs are unable to establish that they have suffered impermissible punishment with the proscriptions of the Bill of Attainder Clause.

a. The Historical Meaning of Legislative Punishment

Traditionally, bills of attainder have often imposed a penalty of death with lesser punishments imposed by bills of pains and penalties. Cummings, 71 U.S. (4 Wall.) at 323. The

Supreme Court has explained that the "Constitution proscribes [the] lesser penalties [including those imposed by bills of pains and penalties] as well as those imposing death." Selective Service Sys. 468 U.S. at 852. See also BellSouth, 144 F.3d at 62 (noting that "[a]s early as 1810 . . . in Fletcher v. Peck . . . Chief Justice Marshall noted in dictum that the prohibition on bills of attainder ought to extend to legislation subjecting specified persons to penalties short of death—what the framers called 'bills of pains and penalties.'").

Throughout history, the list of punishments proscribed by the Bill of Attainder Clause "has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." Selective Service Sys., 468 U.S. at 852. As the Court of Appeals for the District of Columbia Circuit noted in BellSouth, "the Court's four major decisions invalidating statutes on Bill of Attainder Clause grounds have all involved legislation preventing specific classes of persons from pursuing certain occupations." BellSouth, 144 F.3d at 64. The first two cases, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) and Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1866), struck down restrictions imposed immediately after the Civil War that prohibited individuals from holding certain employment if they either aided the Confederacy or if they refused to swear on oath that they never assisted the Confederacy during the Civil War. The second two cases, United States v. Lovett, 328 U.S. 303

(1946) and United States v. Brown, 381 U.S. 437 (1965), involved restrictions on members of the Communist Party during the Cold War that terminated the salaries of these members or prohibited them from serving as officers or employees of labor unions.

Although plaintiffs in the instant case argue that the restrictions imposed upon them by § 921(a)(30)(A)(viii) and (ix) impose burdens historically associated with punishment, this argument clearly without merit. Plaintiffs present no indication that their business is solely and completely linked to the production of the weapons identified by the statute at issue or that they are unable to produce other firearms that are not made unlawful by the statute. Although plaintiffs contend that if they were to violate § 922(v)(1) of the Act, then they would lose their licenses to manufacture any type of firearm, the decision to violate § 922(v)(1) and thereby incur the accompanying criminal penalty is theirs alone. Plaintiffs have not been denied the ability to participate in a specified field of employment or a particular vocation and therefore, the type of economic burden imposed on plaintiffs in terms of financial loss, see Navegar, 914 F. Supp. at 633-35 (discussing financial impact on plaintiffs), does not rise to the level of punishment traditionally proscribed by the Bill of Attainder Clause. See Fresno Rifle & Pistol Club, 965 F.2d at 728 (reaching the same conclusion with respect to a bill of attainder challenge to portions of a California statute prohibiting the manufacture,

transfer, or possession of certain firearms by name).

b. Furtherance of Nonpunitive Legislative Purposes

The second inquiry which must be conducted requires a reviewing court employ a functional test to determine whether the challenged legislation, in light of the types and severity of the burdens it imposes, can reasonably be said to further nonpunitive legislative purposes. BellSouth, 144 F.3d at 65. See also Nixon, 433 U.S. at 475-76. The Supreme Court has explained that even though a particular burden may not traditionally be considered to fall within those proscribed by the Bill of Attainder Clause, the second inquiry is essential. "To ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder, we must determine whether the challenged statute can be reasonably said to further nonpunitive goals." Selective Service Sys., 468 U.S. at 853-54. See also BellSouth, 144 F.3d at 65 ("[T]he second factor prevents Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups."). The Court of Appeals for the District of Columbia Circuit has commented on the importance of this factor by stating that "[t]he line of Supreme Court law on the Bill of Attainder Clause indicates that legislation will survive

Bill of Attainder attack if the statute furthers nonpunitive legislative purposes." Siegel v. Lynq, 851 F.2d 412, 418 (D.C. Cir. 1988).

In order to establish that § 921(a)(30)(A)(viii) and (ix) serves only punitive purposes, plaintiffs must demonstrate that there no legitimate legislative purposes are apparent, for it is only in such instances that "it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." Nixon, 433 U.S. at 476.

Plaintiffs are simply unable to meet this burden in the instant case. Section 921(a)(30)(A)(viii) and (ix) is an intricate part of federal legislation designed to eradicate the serious threat to the safety and health of the nation by semiautomatic assault weapons. See H.R. Rep. No. 489 at 12 ("The threat posed by criminals and mentally deranged individuals armed with semi-automatic assault weapons has been tragically widespread. . . . [T]he use of semiautomatic assault weapons . . . continues to grow. H.R. 4296 will restrict the availability of such weapons in the future."). As discussed previously, the House Report accompanying the bill that became the statute at issue included references to extensive testimony offered to the Subcommittee on Crime and Criminal Justice detailing the devastating violence wrought by semiautomatic assault weapons. See H.R. Rep. No. 489 at 13-19. The congressional findings and legislative history accompanying other closely related federal firearms regulations

further bolster the conclusion that a nonpunitive legislative purpose for § 921(a)(30)(A)(viii) and (ix) exists and "legitimate justifications for passage of the Act are readily apparent." Nixon, 433 U.S. at 476. Furthermore, in light of the evidence before the court, it would be unreasonable to conclude that the statute at issue "rests upon a congressional determination of blameworthiness and a desire to punish [plaintiffs]." Id. at 476. See also Springfield Armory, Inc. v. City of Columbus, 805 F. Supp. 489, 495 (S.D. Ohio 1992) (considering a challenge to a weapon-specific firearm ban by the city of Columbus and concluding that "as a matter of law the ordinance, on its face, was designed to serve a nonpunitive purpose, namely, the protection of the people of Columbus from the perceived danger posed by certain firearms"). Accordingly, it is the conclusion of this court that the nonpunitive purposes of the statute clearly outweigh the burdens imposed on plaintiffs.⁸

c. The Motivational Test

8. In their opposition to the government's motion for summary judgment, plaintiffs contend the government's arguments with respect to the second inquiry are belied by the fact that certain firearms are exempted from coverage under § 922(v)(1). This argument is of little assistance to plaintiffs. As stated by the Supreme Court in Nixon, the prohibition against bills of attainder is not a substitute for equal protection. See Nixon, 433 U.S. at 471 ("However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine.").

The final inquiry to be conducted requires the court to determine "whether the legislative record evinces a congressional intent to punish." Nixon, 433 U.S. at 478. In BellSouth, the Court of Appeals noted that the third inquiry is closely linked to the second inquiry and "in practice appears to differ from the second only in inviting a journey through legislative history." BellSouth, 144 F.3d at 67.

Plaintiffs' arguments with respect to this inquiry can be disposed of quickly as plaintiffs have failed to present the type of "unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down." Selective Service Sys., 468 U.S. at 855-56 (quoting Flemming, 363 U.S. at 619). Unlike the Communist Party members in Brown who established that the statute at issue in that case, which prevented them from occupying the position of officers or employees in labor unions, intended to "inflict[] deprivations on . . . blameworthy or tainted individual[s] in order to prevent [their] future conduct," Nixon, 433 U.S. at 476 (discussing the holding in Brown), plaintiffs have failed to make any similar showing in this case. Plaintiffs' bare assertions also stand in stark contrast to the House Report accompanying the statute struck down in Lovett which expressly characterized individuals as "subversive . . . and . . . unfit . . . to continue in Government employment." H.R. Rep. No. 448, 78th Cong., 1st Sess. 6 (1943).

The court's independent evaluation of the legislative record accompanying both the Violent Crime Control and Law Enforcement Act and prior federal firearms legislation eliminates any notion that Congress intended to punish plaintiffs in enacting § 921(a)(30)(A)(viii) and (ix). "[T]he decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts [the] major concern[s] that prompted the bill of attainder prohibition." Nixon, 433 U.S. at 480.

In sum, because the challenged statute does not fall within the historical meaning of legislative punishment, furthers nonpunitive legislative purposes, and fails to evince any congressional intent to punish, it is the conclusion of this court that § 921(a)(30)(A)(viii) and (ix) is not a bill of attainder with respect to plaintiffs in this case.

V. Conclusion

For the reasons set forth herein, it is the conclusion of this court that Congress did not exceed its authority under the Commerce Clause in enacting § 922(v)(1) and the court also finds that § 921(a)(30)(A)(viii) and (ix), when read in conjunction with § 922(v)(1), is not a bill of attainder with respect to plaintiffs in this case. Accordingly, defendant's motion for summary judgment is granted and plaintiffs' motion for summary

judgment is denied. This case stands dismissed with prejudice.

A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

Date: