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ASSAULT WEAPONS BAN AND TAKINGS CLAUSE

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This report addresses how the Fifth Amendment Takings Clause could affect a ban on assault weapons that did not contain a “grandfather” clause (a provision allowing continued ownership of banned weapons by those who legally possess them when the ban takes effect). Please note that the Office of Legislative Research is not authorized to provide legal opinions and this report should not be construed as such.

SUMMARY

The “Takings Clause” of the Fifth Amendment to the federal constitution prohibits taking private property “for public use, without just compensation.” This prohibition applies to the states through the 14th Amendment. While the Takings Clause is often discussed in the context of land and real estate, it also applies to personal property. The clause applies to actual confiscations of property as well as to regulatory takings (e.g., laws that deprive a property owner of all beneficial use of the property).

Takings Clause cases can address a variety of issues, such as (1) whether a government action sufficiently infringed upon a property interest to constitute a compensable taking; (2) whether the taking was for public use; and (3) if compensation is required, how to value the property.

We did not find any Connecticut state or federal cases addressing whether a state law banning assault weapons, without grandfathering in current owners, would be considered a taking requiring just compensation. We found cases from other states and other federal circuits concerning Takings Clause challenges to restrictions on the possession, sale, or importation of assault weapons or similar weapons, with or without the grandfathering of current owners.

In all of the cases, the courts decided against the plaintiffs on their takings claims. But it is difficult to answer in general terms how a court would decide a challenge to an assault weapons ban. None of these rulings is binding on Connecticut and the laws at issue in each of these cases varied in several respects that are important to a taking analysis. For example, some of the laws contained a grandfather clause; some contained only temporary bans; and some placed restrictions on the sale of assault weapons but did not ban their sale.

We summarize such cases below, dividing them into two groups depending on who challenged the laws: (1) gun owners or (2) gun dealers, importers, or inventors.

As further noted below, a few of these court opinions included an analysis of the Second Amendment that does not comport with the U.S. Supreme Court's later decisions in *D.C. v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010). Generally, these earlier opinions discussed the Second Amendment issue separately from the Takings Clause issue, and it is unclear whether their Second Amendment analyses informed their takings analyses.

TAKINGS CLAUSE CHALLENGES TO RESTRICTIONS ON ASSAULT WEAPONS AND SIMILAR RESTRICTIONS

Below, we summarize several court cases addressing Takings Clause challenges to assault weapons bans or similar restrictions. Please note that this list is not exhaustive. The summaries focus on the courts' discussion of the takings issue and do not include all other issues raised in the cases.

Challenges by Gun Owners

Silveira v. Lockyer. In a 2002 case, the plaintiffs challenged amendments to the California Assault Weapons Control Act (AWCA) that strengthened restrictions on the possession, use, and transfer of assault weapons.

After the federal district court dismissed the claims, the plaintiffs appealed. The court of appeals upheld most of the law (it invalidated an exception that applied to retired police officers) (*Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002)).

Among other things, the court of appeals held that the AWCA was not a compensable taking of assault weapons. The AWCA generally banned the possession of assault weapons, but contained a grandfather clause, which allowed previous owners to retain the weapons, provided the owners registered them with the state.

Most of the opinion focused on the court's reading of the Second Amendment. Specifically, the court held that the Second Amendment did not provide an individual right to own or possess firearms, and the plaintiffs therefore lacked standing to bring a Second Amendment challenge to the AWCA. This holding is no longer valid following the U.S. Supreme Court's later decisions in *Heller* and *McDonald*.

The court briefly addressed the plaintiffs' Takings Clause challenge to the AWCA. The court found that the AWCA did not violate the Takings Clause, as "it is well-established . . . that a government may enact regulations pursuant to its broad powers to promote the general welfare that diminish the value of private property, yet do not constitute a taking requiring compensation, so long as a reasonable use of the regulated property exists" (citations omitted). According to the court, due to the grandfather clause, previous owners could "use the weapons in a number of reasonable ways so long as they register them with the state." Due to the substantial safety risks of assault weapons, "any incidental decrease in their value caused by the effect of that act does not constitute a compensable taking" (312 F.3d at 1092).

Citizens for a Safer Community v. City of Rochester. In a 1994 case, a group of citizens brought a challenge in New York state court to a Rochester ordinance which restricted the possession of automatic and semiautomatic rifles and shotguns, among other weapons (*Citizens for a Safer Community v. City of Rochester*, 164 Misc.2d 822, 627 N.Y.S.2d 193 (N.Y. Sup. 1994)). The plaintiffs challenged the ordinance on several grounds, including that it constituted an unconstitutional taking.

The court upheld the ordinance in part and overturned it in part. The court determined that the ordinance was not a ban but a reasonable regulation as to the place and circumstances where the weapons could be possessed. It determined that the ordinance's regulation of semi-automatic rifles and shotguns meeting certain criteria was a lawful exercise of the city's police power. It found certain other parts of the ordinance were unconstitutional on various grounds.

The court concluded that the ordinance's limitation on an owner's right to sell his or her guns did not constitute a Fifth Amendment taking, because the ordinance did not (1) prevent the sale of guns within the city, (2) limit licensed gun dealers, or (3) limit city residents from disposing of their guns outside of the city. Rather, the ordinance required that any gun sale in the city could only occur through a licensed gun dealer. The court concluded the ordinance thus did not "result in the taking of any property for public purpose or otherwise" (164 Misc.2d at 834).

It is important to note that in other sections of the opinion, the court analyzed the Second Amendment in a manner that is contrary to the U.S. Supreme Court's later decisions in *Heller* and *McDonald*.

Fesjian v. Jefferson. In a 1979 case, gun owners in the District of Columbia challenged a refusal by police to register certain firearms. That refusal was based on a D.C. statute which banned the registration of new handguns and machine guns, but contained a grandfather clause. The plaintiffs claimed several constitutional violations, including a Takings Clause violation. The D.C. Court of Appeals denied all of the plaintiffs' claims (*Fesjian v. Jefferson*, 399 A.2d 861 (D.C. 1979)).

The plaintiffs argued that the government had to compensate them for the guns denied registration, as the statute's methods for disposal of their guns would not provide them fair market value (e.g., a quick sale outside of the district or surrendering the guns to the police). The court disagreed. It noted that, even assuming that the statue authorized a taking, such a taking was an exercise of legislative police power to prevent perceived public harm, rather than an exercise of eminent domain for public use. Accordingly, the government did not have to provide just compensation.

Challenges by Gun Dealers, Importers, and Others

Akins v. U.S. In a 2008 case, an inventor sued the federal government in the Court of Federal Claims after the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) overturned its earlier ruling and

classified the invention as a machine gun (which prohibited it from being sold, with limited exceptions). ATF required the inventor and manufacturer to remove recoil springs from the device and surrender the springs to ATF, rendering the devices non-functional.

The plaintiff sought just compensation for the alleged taking because the (1) surrender of the springs was a physical taking and (2) classification of the device as a machine gun was a regulatory taking (*Akins v. U.S.*, 82 Fed. Cl. 619 (2008)).

The court granted the government's motion to dismiss. The court held that there was no compensable taking, because the property was not taken for "public use." Rather, it was taken pursuant to the police power conferred on ATF by Congress in the law banning the sale of machine guns. The court also held that the plaintiff's regulatory takings claim was invalid because his expectancy interest in selling the device free from federal regulation was not a property interest under the Fifth Amendment.

Mitchell Arms, Inc. v. U.S. In a 1992 case, an arms importer brought a takings challenge in the U.S. Claims Court in the wake of ATF's decision to (1) revoke import permits for semiautomatic, assault-type rifles and (2) reconsider the suitability of importing certain other weapons. The plaintiff argued that when an importer relies upon an import license to make investment decisions, the license becomes a property interest and thus cannot be revoked without just compensation.

After revoking the permits, ATF allowed the importer to reconfigure the weapons, and the importer was able to sell approximately half of its import quantity in reconfigured form. The court rejected the argument that the loss of the opportunity to sell the weapons in their original configuration was a compensable taking, as the court found the importer did not have a property interest within the meaning of the Fifth Amendment (*Mitchell Arms, Inc. v. U.S.*, 26 Cl. Ct. 1 (1992)).

The court noted that the licenses did not convey to the importer the "rights of unrestricted use, enjoyment, and disposal characteristic of private property" (26 Cl. Ct. at 4). The licenses were not transferable and did not convey an exclusive right of use. There was also no guarantee that they could be renewed or that they would not be revoked.

The court noted that "the Government's power to determine in the first instance the circumstances under which a license may be issued necessarily implies the power to also determine the circumstances appropriate to its revocation" (*Id.* at 5).

The court also rejected the argument that the importer's investment in reliance on the license changed the analysis. The court noted that "government as we know it would soon cease to exist if such exclusively governmental functions as the control over foreign commerce could not be accomplished without the payment of compensation to those business interests that have chosen to operate within this highly regulated area" (*Id.*).

The importer also alleged that a three-month moratorium on issuing import licenses for certain other weapons resulted in lost profits, requiring just compensation. The court held that as the importer did not have an enforceable right to a license, there was no taking.

Gun South, Inc. v. Brady. Another case involved a decision by the U.S. treasury secretary to temporarily suspend the importation of semiautomatic assault rifles for 90 days (*Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989)). A firearms dealer sued to enjoin the government from interfering with the delivery of firearms imported under permits issued before the temporary suspension. A federal district court granted the injunction without addressing the dealer's constitutional claims. A federal court of appeals overturned the injunction.

Among other issues, the firearms dealer argued that the temporary suspension constituted a taking of property without just compensation. The appellate court agreed with the government that the proper venue to pursue that claim was the claims court. But the court also noted that "[e]ven if we had jurisdiction to consider this claim, we note that the temporary suspension does not constitute a taking." The court noted that (1) the government acted "in a purely regulatory capacity and does not profit from its actions," (2) there was only a temporary suspension on importation rather than a permanent or total deprivation of property, and (3) although the firearms dealer "may have had a reasonable investment-backed expectation, [the dealer] does not demonstrate that the suspension will unreasonably impair the value of the rifles" (877 F.2d at 869).

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