AMERICAN BAR ASSOCIATION

CENTER FOR HUMAN RIGHTS

WHITE PAPER ON THE PROPOSED ARMS TRADE TREATY AND THE SECOND AMENDMENT
FEBRUARY 26, 2013

This White Paper discusses whether the July 26, 2012, President's draft of the Arms Trade Treaty ("the proposed ATT") conflicts with the Second Amendment of the United States Constitution.[1] As detailed below, it concludes that the proposed ATT is consistent with the Second Amendment, as that provision has been construed to date by the federal courts, including the Supreme Court, of the United States.

The proposed ATT would obligate the United States to block the transfer of conventional arms across U.S. borders when certain conditions are met.[2] In particular, the proposed ATT would obligate the United States to block both exports and imports of covered arms across its borders whenever those transfers pose an overriding risk of causing certain adverse consequences, including: serious human rights abuse, war crimes, or terrorist acts.[3]

As currently drafted, the treaty would not require new domestic regulations of firearms. Given that existing statutes regulating the import and export of such weapons have withstood constitutional scrutiny in U.S. courts for decades, it is unlikely that the proposed treaty would compromise Second Amendment rights. Even if a court found that future acts of the President or Congress in implementing the Arms Trade Treaty did not comply with the Second Amendment, such acts or the Treaty itself would be void.[4]

---

[1] The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

[2] President of the U.N. Conference on the Arms Trade Treaty, Draft of the Arms Trade Treaty, art. 3, U.N. Doc. A/CONF.217/CRP.1 (Jul. 26, 2012), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.217/CRP.1&Lang=E [hereinafter Draft ATT].

[3] *Id.* art. 3(3).

[4] *See* Reid v. Covert, 354 U.S. 1, 18 (1957) (Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty); *see also* De Geofroy v. Riggs, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments.").

A. The Second Amendment Does Not Apply to Most Weapons Addressed by the Arms Trade Treaty

Article 2(1) of the proposed ATT states that the Treaty shall apply to all conventional arms within the following categories at a minimum: (a) battle tanks, (b) armoured combat vehicles, (c) large-calibre artillery systems, (d) combat aircraft, (e) attack helicopters, (f) warships, (g) missiles and missile launchers; and (h) small arms and light weapons.[5]

The Supreme Court's seminal decision in *District of Columbia v. Heller*[6], held that the Second Amendment applies only to firearms that are "typically possessed by law-abiding citizens for lawful purposes,"[7] but not to "dangerous and unusual weapons."[8] Examples given in *Heller* of firearms that are not protected by the Second Amendment included "short-barreled shotguns,"[9] "machineguns,"[10] and automatic "M-16 rifles."[11] Applying *Heller* to the proposed ATT, the Second Amendment right to "keep and bear arms" does not apply to most of the military or other conventional weapons referenced in the proposed ATT.

At the same time, *Heller* made clear that some handguns are protected by the Second Amendment, [12] which is directly applicable to the small arms and light weapons provisions in the proposed ATT. While the Second Amendment covers a narrow class of weapons included within the scope of the proposed ATT, the Amendment generally does not cover to the conduct addressed by the treaty, namely the import and export of weapons.

B. The Second Amendment Does Not Apply to Exports

The focus of the proposed ATT is the export of arms from one country to another.[13] Federal courts have historically afforded the political branches broad discretion to regulate the export of weapons from the United States given the profound national security implications of the global arms trade.[14]

The Second Amendment is generally inapplicable to arms exports. Though the amendment protects "the right of the people to keep and bear Arms," it does not protect the right to supply arms to persons who are not themselves among "the people" of the United States.[15] In other words, the Second Amendment does not protect either a right to arm aliens abroad or a right for aliens to receive American weapons. The proposed ATT's potential implications for most

---

[5] Draft ATT, *supra* note 1.
[6] Dist. of Columbia v. Heller, 554 U.S. 570 (2008) (invalidating ban on handgun possession in the home).
[7] *Id*. at 625.
[8] *Id*. at 627.
[9] *Id*. at 621-22 (citing United States v. Miller, 307 U.S. 174 (1939)).
[10] *Id*. at 624.
[11] *Id*. at 627.
[12] *See id.* at 629 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon.").
[13] *See* Draft ATT, *supra* note 1, arts. 3, 4, 6,10.
[14] *See, e.g.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 239 (1936) (upholding arms embargo on the grounds that "there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected countries."); United States v. Chi Tong Kuok, 671 F.3d 931 (9th Cir. 2012).
[15] *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 274-75 (1990) (holding that the Fourth Amendment's protection of "the people" did not apply to an individual who "was a citizen and resident of Mexico with no voluntary attachment to the United States.").

firearms exports therefore pose no Second Amendment concern. To the extent that the ATT would require the regulation of exports from U.S. persons in the United States to U.S. persons abroad, any constitutional concerns could be addressed through carefully tailored legislation or a narrow reservation to the treaty that does not compromise the overall object and purpose of the treaty.[16]

C. Import Restrictions are Constitutionally Valid

With regard to the importation of commonly used firearms, the proposed ATT likewise encounters no Second Amendment shoal. The proposed ATT contains the following provisions that relate to the importation of commonly used firearms:

- Each importing State Party shall put in place adequate measures that will allow them to regulate, where necessary, imports of conventional arms under the scope of this Treaty. Each importing State Party shall also adopt appropriate measures to prevent the diversion of imported conventional arms under the scope of this Treaty to the illicit market or for unauthorized end use.[17]
- Each State Party shall adopt appropriate legislative, administrative or other measures to regulate, where necessary and feasible, conventional arms covered by this Treaty that transit or transship through its territory.[18]

In general, it is currently unlawful for any person "except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce."[19] Firearms permanently imported Permanent importation into the United States of firearms by any of the above entities is subject to the Arms Export Control Act ("AECA")[20] and is regulated by the Bureau of Alcohol, Tobacco, and Firearms ("ATF").[21] These regulations contain provisions to prevent diversion and unauthorized end use. All importers of firearms on a list prescribed in the ATF regulations must be registered by the ATF and all importation of such firearms must be authorized pursuant to a permit issued by the Bureau.[22] The permit application must include detailed information on the purchase(s), including the specific purpose of importation, including final recipient information if different from the importer.[23]

It is therefore highly unlikely that current U.S. regulations would be considered "inadequate" and "inappropriate" within the meaning of the proposed ATT. Further, since the

---

[16] The proposed treaty also requires state parties to "maintain national records, in accordance with its national laws and regulations, of the export authorizations or actual exports of the conventional arms under the scope of this Treaty[.]" Draft ATT, *supra* note 1, art. 6(4). Such records "may" include the "end users." *Id.* art.10(2). To the extent that the proposed treaty recognizes the right of foreign sovereigns to impose registration requirements as a condition of export, it raises no Second Amendment issues.

[17] Draft ATT, *supra* note 1, art. 7(2).

[18] *Id.* art. 9(1).

[19] 18 U.S.C § 922 (2006).

[20] Section 38, Arms Export Control Act of 1976 22 U.S.C § 2778 (2006).

[21] 27 C.F.R. § 447.1 (2012). Similar regulations governing transit and transshipment of firearms, called "temporary imports" in U.S. statutes, are implemented by the Department of States through the International Trafficking in Arms Regulations. 22 C.F.R. § 123.1 (2012).

[22] 27 C.F.R. § 447.31-46 (2012).

[23] 27 C.F.R. § 447.42 (2012).

implementation of the treaty will be done by national governments, the determination that the regime is inadequate would have to be made by the Executive Branch and Congress. To the extent that new concerns arise that may require additional legislation, the language of the proposed ATT ensures that state parties have the discretion to address these concerns within the bounds of their own constitutional requirements.

The AECA has withstood constitutional scrutiny for decades.[24] While it has not been challenged on Second Amendment grounds, it would likely withstand such scrutiny. The Court in *Heller* went out of its way to say that the Second Amendment should not be read to "cast doubt" on a number of existing firearms regulations.[25] Most relevant here, *Heller* disclaimed any adverse consequences for "laws imposing conditions and qualifications on the commercial sale of arms."[26] Finally, post-*Heller*, federal courts have upheld restrictions like registration requirements and licensing fees because they do not impose a severe burden or affect the core rights–i.e. "defense of hearth and home" by "law-abiding, responsible citizens."[27] There is no reason to expect a different standard would apply to the ATT.

D. Conclusion

If the United States signs and ratifies the ATT, in its most recent iteration in the President's text of 26 July 2012, the United States retains the discretion to regulate the flow of weapons into and out of the United States in a manner consistent with the Second Amendment.

Heller firmly grounds individual and family access to major types of guns in the home. Since import restrictions cannot infringe on the right of any protected form of firearm to be manufactured in the United States and made available to American citizens, there is no plausible way to imagine that a *Heller*-centered right might be impinged by what is essentially a trade treaty. Therefore, U.S. ratification of the treaty would not infringe upon rights guaranteed by the Second Amendment.

[24] *See, e.g.*, Chi Mak v. United States, 683 F.3d 1126 (9th Cir. 2012) (rejecting a First Amendment challenge); U.S. v. Chi Tong Kuok, 671 F.3d 931(9th Cir. 2012) (rejecting a challenge based on the "non-delegation" doctrine); U.S. v. Hsu, 364 F.3d 192 (4th Cir. 2004) (rejecting a "vagueness" challenge).
[25] Dist. of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).
[26] *Id.*
[27] *See, e.g.* United States v. Rene E., 483 F.3d 8 (1st Cir. 2009) (statutorily regulating juvenile access to handguns did not violate the constitutional right to keep and bear arms and was permissible on public safety grounds); Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012) (limiting handgun possession in public to those who showed special need for self-protection is not inconsistent with the Second Amendment).