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Thomas R. Thompson

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FORM OR SUBSTANCE? DEFINITIONAL ASPECTS OF ASSAULT WEAPON LEGISLATION

THOMAS R. THOMPSON

ON JANUARY 17, 1989 in Stockton, California, Patrick E. Purdy dramatically altered the national gun control debate. Using an AK-47 purchased in Oregon to avoid disclosure of his California criminal record,¹ a seventy-five-round-capacity drum magazine, and a thirty-five-round-capacity banana clip, Purdy fired 110 rounds of 7.62 millimeter bullets across an elementary school playground, killing five children and wounding twenty-nine others and a teacher.² Purdy quickly became a symbol of the failure of gun control legislation to both sides of the gun control debate. Pro-gun control organizations viewed the episode as an example of the dangers of unregulated firearms;³ anti-gun control forces regarded the incident as an example of the failure of the criminal justice system to deal effectively with criminals.⁴

Immediately after the incident, many persons and organizations began calling for restrictions on the sale and purchase of "assault" weapons.⁵ Gun control advocates had focused their attention on handguns or ammunition; consequently, there had been little attempt to restrict such weapons separate from other rifles or shotguns. Following the Purdy incident, however, in 1989 at least eighteen states, the District of Columbia, and the federal government addressed the issue of assault weapon control.⁶

Members of the Florida Legislature proposed four bills relating to the control of assault weapons during the 1989 Regular Session. After much publicity and debate, one bill passed both houses and was approved by the Governor.

1. Washington Post, Jan. 19, 1989, at A11, col. 1.

2. *Id.* at A10, col. 3; Washington Post, Jan. 18, 1989, at A1, col. 6.

3. See NATIONAL COALITION TO BAN HANDGUNS, ASSAULT WEAPONS AND THEIR NEED TO BE BANNED (1989); 2 HANDGUN CONTROL, INC., LAW ENFORCEMENT BULLETIN 1 (1989).

4. See 2 UNIFIED SPORTSMEN OF FLORIDA, FLORIDA FIRING LINE 1 (1989); SECOND AMENDMENT FOUNDATION, BAN ON SEMIAUTOMATICS: UNCONSTITUTIONAL HYSTERIA 4 (1989).

5. See Washington Post, Jan. 20, 1989, at A3, col. 4; Washington Post, Jan. 19, 1989, at A26, col. 1.

6. Telephone interview with Eric Ellman, Staff Member, National Coalition to Ban Handguns (June 28, 1989); Tallahassee Democrat, April 23, 1989, at B1, col. 4.

This Comment reviews Florida's current law relating to assault weapons and discusses the bills proposed during the 1989 Session. It also discusses the manner in which other states and the federal government have approached this issue. This Comment focuses on the various approaches to defining assault weapons used in legislation throughout the nation, and examines the operation of one such federal statute. Finally, this Comment assesses the definitional forms the Legislature should use in any future assault weapon legislation. Neither the constitutional right to bear arms nor the issue of a waiting period for the purchase of firearms is addressed.

I. FEDERAL LAW

The federal government has expressly not preempted the field of firearms legislation.⁷ Federal law does, however, prohibit the sale of firearms or ammunition to a person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user of controlled substances, or a mental defective.⁸ Federal law also requires that certain weapons be registered with the Bureau of Alcohol, Tobacco, and Firearms (BATF), and that purchasers of these weapons undergo a background check.⁹ Any transfer of a destructive device, machine gun, short-barreled shotgun (barrels under nineteen inches), or short-barrelled rifle (barrels under sixteen inches) requires prior authorization through the BATF. Such authorization is given only after the BATF has completed a comprehensive background check of the purchaser and the purchaser has paid a transfer tax (generally \$200.00)¹⁰

The BATF also prohibits the importation of firearms¹¹ regulated by 26 U.S.C. § 5845(a) and not "generally recognized as particularly suitable for or readily adaptable to sporting purposes."¹²

II. FLORIDA LAW AS OF 1988

The Florida Legislature has expressly preempted the field of firearms and ammunition.¹³ The only regulation counties may impose is

7. See 18 U.S.C. § 927 (1982).

8. *Id.* § 922(d).

9. 26 U.S.C. § 5812 (1982).

10. See *id.* §§ 5811-5812.

11. 18 U.S.C. § 925(d) (1982). The BATF acts as the delegate of the Secretary of the Treasury in these matters. See *Shyda v. Director, Bureau of Alcohol, Tobacco, and Firearms*, 448 F. Supp. 409 (M.D. Pa. 1977). The Secretary of the Treasury was given broad discretion in defining and administering the import prohibition largely because of the difficulty of defining weapon characteristics. S. REP. NO. 1501, 90th Cong., 2d Sess. 38 (1968).

12. 18 U.S.C. § 925(d) (1982).

13. FLA. STAT. § 790.33(1) (1989).

an optional three-working-day waiting period for the purchase of firearms.¹⁴

Under existing Florida law, the use of a firearm or other weapon in the commission of a felony results in an increase of severity of the penalty by one degree.¹⁵ The possession of a firearm in the commission of a violent crime results in a mandatory minimum sentence of three years with no gain time.¹⁶ The possession, while hunting, of a center-fire semiautomatic rifle having a magazine capacity of more than five rounds, or a shotgun capable of holding more than three shells at once, is also prohibited.¹⁷

III. THE LAW IN OTHER JURISDICTIONS

No state statutes distinguishing between assault weapons and hunting rifles or shotguns existed as of January 1989. The only state differentiating among rifles is West Virginia.¹⁸ The West Virginia statute requires citizens to obtain a permit from the superintendent of public safety and approval by the governor before they can possess or transport any "machine gun, submachine gun, or what is commonly known as a high powered rifle," as well as ammunition for those weapons.¹⁹ The statute does not define any of these terms.

In the aftermath of the Stockton tragedy, at least eighteen state legislatures have considered bills imposing bans, background checks, or waiting periods on purchases of assault weapons.²⁰ Virginia was the first state to pass such a statute. Virginia's statute does not use the term "assault weapon,"²¹ but instead imposes a mandatory criminal record check on purchasers of pistols or semiautomatic, center-fire rifles which are provided by the manufacturer with a magazine capacity of more than twenty rounds; designed by the manufacturer to accommodate a silencer or bayonet; or equipped with a bipod, flash suppressor or folding stock.²² The Maryland legislature has enacted a

14. *See id.* § 790.33(2)(a).

15. *Id.* § 775.087(1).

16. *See id.*; *see also id.* § 944.277.

17. FLA. ADMIN. CODE R. 39-12.002(3) (1987). Hunting at night is also illegal. *Id.* 12.002(2).

18. *See* W. VA. CODE § 61-7-8 (1988).

19. *Id.*

20. Assault weapon legislation has passed in California, Virginia, Maryland, and Massachusetts. It is pending or has failed in Colorado, Connecticut, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Rhode Island, Tennessee, Texas, and Washington. Interview with Eric Ellman, *supra* note 6.

21. *See* VA. CODE ANN. § 18.2-308.2:2 (1989).

22. *See id.*

statute requiring a seven-day waiting period and a background check for those purchasing one of thirty semiautomatic weapons.²³

California also has enacted an assault weapon statute.²⁴ The statute creates a new class of firearms known as "assault weapons," which are described generally as firearms having "such a high rate of fire and capacity for firepower that [their] function as a legitimate sports or recreational firearm is substantially outweighed by the danger that [they] can be used to kill and injure human beings."²⁵ The statute lists as assault weapons and regulates fifty-four makes and models of rifles, pistols, and shotguns as well as similar and modified models.²⁶ Those possessing weapons considered assault weapons before June 1, 1989 were required to register the weapons by January 1, 1991, and could sell the weapons to non-gun dealers only until January 1, 1990.²⁷ After June 1, 1989, the statute requires Californians to obtain a permit to purchase assault weapons and keep the weapons beyond January 1, 1990.²⁸

The California law also creates a procedure to designate additional types of firearms as assault weapons.²⁹ The attorney general in a county with more than 1,000,000 people may file a petition asking a court to temporarily suspend the manufacture or sale of a particular weapon which is identical to or only slightly altered from a listed assault weapon.³⁰ A hearing to consider permanently designating the weapon an assault weapon follows.³¹ To so permanently designate the weapon, the attorney general must show by a preponderance of the evidence that the weapon at issue is an assault weapon. The court's final decision is appealable.³² Interestingly, the court has no power to declare completely new weapons assault weapons, because a designation of an assault weapon must be based on the characteristics and design of a previously named assault weapon.³³

23. See MD. CODE ANN. art. 27, § 481E (1989).

24. CAL. PENAL CODE § 12275.5 (West 1990).

25. *Id.*

26. *Id.* §§ 12276-12276.5. Other slight modifications listed include, but are not limited to, case deflectors for left-handed shooters, larger magazine capacity, different caliber (in excess of .22 caliber) and bayonet mounts. *Id.*

27. *Id.* § 12285.

28. *Id.* § 12286.

29. See *id.* § 12276.5.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

IV. FLORIDA'S 1989 LEGISLATIVE SESSION

During the 1989 Regular Session, Senator Jack Gordon,³⁴ and Representatives John Cosgrove³⁵ and David Flagg,³⁶ each sponsored bills banning the sale or transfer of ownership of defined assault weapons. Additionally, Senator Howard Forman³⁷ sponsored a bill creating a commission to study assault weapons.

A. Senate Bill 400 and House Bill 1117

Senate Bill 400,³⁸ sponsored by Senator Gordon, and House Bill 1117,³⁹ sponsored by Representative Cosgrove, both banned the sale or transfer of ownership of assault weapons.⁴⁰ Using identical language, the bills defined assault weapons as any center-fire gun with the ability to accept a detachable magazine or clip of ten rounds of ammunition or greater.⁴¹ These bills also banned specific weapons and prohibited the transfer of ownership of any weapon readily restorable to an operating assault weapon as well as any clips capable of holding more than ten rounds of ammunition which were compatible with assault weapon use.⁴² These identical bills met similar fates. Senate Bill 400 died in the Committee on Judiciary-Criminal and House Bill 1117 died in the Criminal Justice Committee.⁴³

B. Senate Bill 831

The purpose of Senate Bill 831 was not to ban any particular firearms, but rather to create an ongoing Commission on Assault Weapons.⁴⁴ Every two years this Commission was to submit to the Governor and Legislature a report categorizing firearms as either assault weapons or legitimate sports and recreational firearms.⁴⁵ The

34. Dem., Miami Beach.

35. Dem., Miami.

36. Dem., Gainesville.

37. Dem., Hollywood.

38. Fla. SB 400 (1989).

39. Fla. HB 1117 (1989).

40. *Id.*; see also Fla. SB 400 (1989).

41. Fla. HB 1117, § 1 (1989); Fla. SB 400, § 1 (1989).

42. Fla. HB 1117, § 1 (1989); Fla. SB 400, § 1 (1989). The listed weapons specifically banned were: AR-15; all Uzi models; Ingram MAC-10 and MAC-11; Heckler and Koch series 91, 93 and 94; Armalite AR-180; AK-47; AKM-47; all Avtomat Kalashnikov weapons; M1-A; M-14; all Auto Ordinance semiautomatic carbines; and "Street Sweeper" type shotguns.

43. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 89, SB 400; *id.*, HISTORY OF HOUSE BILLS at 409, HB 1117.

44. See Fla. SB 831, § 1 (1989).

45. *Id.*

Commission's membership was to be balanced between pro- and anti-gun control groups, with two members from both the National Rifle Association (NRA), an anti-gun control lobby, and Cool-It, Florida, a pro-gun control lobby.⁴⁶ Two members also would be chosen by the President of the Senate and the Speaker of the House, and one citizen member would be appointed by the Governor.⁴⁷

The bill also proposed a minimum eight-year term of imprisonment for the use of an assault weapon during the commission of a felony.⁴⁸ The provision defining assault weapons listed several weapons by name, including: firearms readily convertible into assault weapons; any parts capable of being used for such a conversion; any semiautomatic center-fire rifle capable of accepting at least a ten-round magazine; any semiautomatic center-fire pistol capable of accepting at least a twenty-round magazine; and shotguns with a barrel of less than nineteen inches long and a folding stock, or a magazine capacity of more than twenty rounds.⁴⁹ The definition recognized a long list of exceptions, including semiautomatic firearms built before 1954, rim-fire weapons, antiques or relics, and those guns permanently incapable of firing.⁵⁰ Finally, Senate Bill 831 required the registration of all assault weapons in Florida and banned advertisement of the sale of the weapons after October 1, 1991.⁵¹

Committee Substitute for Senate Bill 831 limited the Commission to a one-year existence and required, by March 1, 1990, a report to the Legislature and Governor cataloging the types of weapons used in crimes in Florida.⁵² The membership of the Commission was to remain the same, except that two members would be drawn from both the pro- and anti-gun control groups as a whole,⁵³ rather than exclusively from the NRA and Cool-It Florida organizations. The substitute bill provided no definition of an assault weapon and limited the crimes to which the eight-year mandatory prison term applied to violent or drug-related crimes committed with a machine gun or a semi-

46. *Id.* § 1(1)(a), (b).

47. *Id.* § 1(1)(d), (e), (f).

48. *Id.* § 2(2)(b).

49. *Id.* § 3(2)(a).

50. *Id.* § 3(2)(c).

51. *Id.* § 3(3).

52. See Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 15, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (testimony of Sen. Forman).

53. See Staff of Fla. S. Comm. on Judiciary-Crim., CS for SB 831 (1989) Staff Analysis (May 15, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

automatic firearm with a twenty-round or greater capacity magazine.⁵⁴

At the committee hearing, this substitute bill was presented as a means of gathering further information on the issue and determining the effect an assault weapons ban would have.⁵⁵ Senator Robert Johnson⁵⁶ voiced objections to the mandatory penalty arrangement; he preferred the eight-year term to be in addition to, rather than included within, a prison term for a violent or drug-related crime.⁵⁷

Committee Substitute for Senate Bill 831 passed the Judiciary-Criminal Committee,⁵⁸ but was withdrawn when House Bill 573 passed as an identical substitute.⁵⁹

C. House Bill 573

House Bill 573 sought to prohibit possession of assault weapons, which it defined in almost the same manner as Senate Bill 831. However, House Bill 573 allowed semiautomatic center-fire rifles a magazine capacity of nineteen rounds, instead of nine, and shotguns a magazine capacity of ten rounds, instead of nineteen.⁶⁰ The exceptions listed in the two bills were identical.⁶¹

After being assigned to the House Committee on Criminal Justice and House Appropriations Committee,⁶² the bill was referred by the Committee on Criminal Justice to its Subcommittee on Prosecution and Punishment,⁶³ which added four amendments to the bill and favorably recommended it to the full Committee.⁶⁴ One amendment altered the original intent of the bill by allowing possession of an assault weapon properly registered with the state.⁶⁵ Another amendment also banned the sale or transfer of ownership of assault weapons, but ex-

54. *Id.*

55. Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 15, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

56. Repub., Sarasota.

57. Fla. S., Comm. on Judiciary-Crim., tape recording of proceedings (May 15, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (testimony of Sen. Johnson).

58. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 198, SB 831.

59. *Id.*

60. Fla. HB 573, § 2(a)(4), (5) (1989).

61. *See id.* § 2(c).

62. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF HOUSE BILLS at 132, HB 573.

63. *Id.*

64. *Id.*

65. Tallahassee Democrat, April 26, 1989, at B4, col. 12.

cepted sales or transfers to a law enforcement agency.⁶⁶ Another amendment made the bill more type specific by providing a list of approximately two dozen semiautomatic weapons affected by the bill.⁶⁷

In the Committee on Criminal Justice, Representative R.Z. Safley⁶⁸ proposed an amendment that would have substituted a limit on magazine capacity for the registration requirements and ban on sales.⁶⁹ The amendment, which limited handgun clips to twenty rounds and rifle clips to five rounds,⁷⁰ failed in a vote of the Committee.⁷¹

Representative Charles Canady⁷² then proposed another amendment limiting the capacity of gun clips.⁷³ This amendment required the registration of all detachable box magazines capable of being loaded with more than twenty rounds of center-fire ammunition possessed before October, 1989.⁷⁴ The amendment also banned sales of these magazines after that date.⁷⁵ The Committee adopted Representative Canady's amendment as a substitute for the entire language of the bill.⁷⁶

Representative Ron Glickman⁷⁷ then proposed an amendment requiring assault weapons to be secured and fitted with a trigger lock when not being used for target shooting or hunting, or when being transported for the purpose of same.⁷⁸ This amendment was defeated on a voice vote of the Committee.⁷⁹

The final amendment was introduced by Representative Canady. He proposed increasing minimum mandatory prison terms for the use of machine guns or semiautomatic weapons in crimes involving vio-

66. *Id.*

67. *Id.*

68. Repub., Clearwater.

69. Fla. H.R., Comm. on Crim. Just., tape recording of proceedings (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (testimony of Rep. Safley).

70. *Id.*

71. *Id.*

72. Dem., Lakeland.

73. See Fla. H.R., Comm. on Crim. Just., tape recording of proceedings (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (testimony of Rep. Charles Canady).

74. *Id.*

75. See Staff of Fla. H.R. Comm. on Crim. Just., CS for HB 573 (1989) Staff Analysis (May 6, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

76. Fla. H.R., Comm. on Crim. Just., tape recording of proceedings (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

77. Dem., Tampa.

78. See Fla. H.R., Comm. on Crim. Just., tape recording of proceedings (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (testimony of Rep. Glickman).

79. See *id.*

lence or drug trafficking to five years from the present three years.⁸⁰ This amendment was approved by the Committee on a voice vote.⁸¹ As passed by the Committee on Criminal Justice, Committee Substitute for House Bill 573 was so completely altered that it merely made possession of high capacity detachable magazines illegal and increased the penalties for the use of automatic or semiautomatic weapons in some crimes.

Committee Substitute for House Bill 573 was next addressed by the House Appropriations Committee, where Representative Flagg attempted to restore the bill to its original form, which provided for the banning of listed assault weapons.⁸² However, as the Appropriations Committee generally considers only fiscal and not substantive changes to a bill, the proposal was deferred to consideration by the full House.⁸³ After determining that the bill would require \$354,223 in start-up costs and \$551,647 in recurring costs, for a total first year cost of \$905,870, the Appropriations Committee approved the measure and sent it to the full House.⁸⁴

On the House floor, Representative Flagg again introduced the amendment to ban six specific assault weapon types,⁸⁵ stating that "these weapons are designed to kill human beings and kill them quickly,"⁸⁶ and reminding his colleagues that "guns don't die, people do."⁸⁷

Representative Ron Johnson⁸⁸ also proposed a substitute amendment⁸⁹ providing for the creation of a temporary commission on assault weapons and a mandatory minimum prison term of eight years for felonies involving violence or drug trafficking committed while in possession of a semiautomatic rifle with a high capacity detachable magazine or machine gun.⁹⁰ This amendment was designed to

80. *Id.*

81. *Id.*

82. Tallahassee Democrat, May 24, 1989, at B5, col. 6.

83. *Id.*

84. See Staff of Fla. H.R. Approp. Comm., CS for HB 573 (1989) Staff Analysis (May 23, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

85. FLA. H.R. JOUR. 782 (Reg. Sess. May 30, 1989). The types listed were Uzi firearms, TEC-9, TEC-22, AK-type firearms, MAC-10 and MAC-11, AR-15, and shotguns with revolving cylinders known as the "Street Sweeper" and "Striker 12." *Id.* Rep. David Flagg chose these weapons based on an informal poll which asked state representatives to name the most dangerous firearms available. Interview with Robin Hassler, Staff Dir., Fla. H.R. Comm. on Crim. Just., Tallahassee, Florida (August 11, 1989).

86. Tallahassee Democrat, May 31, 1989, at C5, col. 2.

87. Orlando Sentinel, May 31, 1989, at B1, col 1.

88. Dem., Panama City.

89. FLA. H.R. JOUR. 783 (Reg. Sess. May 30, 1989).

90. See *id.*

make the provisions of Committee Substitute for House Bill 573 parallel the provisions of Committee Substitute for Senate Bill 831. After a short debate, the House approved Representative Johnson's substitute amendment by a vote of 63-51.⁹¹

After adopting an amendment to the title, the full House approved the bill by a vote of 112-3 and certified it to the Senate.⁹² On the Senate floor, Senator John Grant⁹³ brought Committee Substitute for House Bill 573 up for a vote as a substitute for the pending Committee Substitute for Senate Bill 831; the bill passed unanimously, 40-0.⁹⁴ Governor Martinez approved the measure on July 5, 1989.⁹⁵

V. THE ACTIONS OF THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

The Bureau of Alcohol, Tobacco, and Firearms (BATF), through the Treasury Department, is responsible for enforcing federal firearms laws,⁹⁶ including restrictions on the importation of weapons. One such restriction limits importation to weapons generally recognized as having sporting purposes.⁹⁷ Any dealer seeking to import weapons must apply to the BATF, which evaluates the weapons for their sporting suitability.⁹⁸ Up until 1989, only two firearms were denied importation permits,⁹⁹ which suggests that the evaluation process was not overly rigorous.

Following the Stockton slayings, newly inaugurated President Bush asserted that no new firearms laws were needed because the "laws on the books" provided adequate protection.¹⁰⁰ He concluded that stricter enforcement of existing laws would be sufficient.¹⁰¹ To that end President Bush directed William Bennett, Director of the Office

91. *Id.*

92. *Id.* at 784.

93. Dem., Tampa.

94. FLA. S. JOUR. 897 (Reg. Sess. June 2, 1989).

95. Ch. 89-306, 1989 Laws of Florida 1994.

96. 18 U.S.C. § 925(d) (1982).

97. *Id.*; see *supra* note 12 and accompanying text.

98. *Id.*

99. In 1986, the BATF found the Striker 12 shotgun to have only military or law enforcement uses, and consequently denied its importation. Later that year, the BATF found the USAS-12 shotgun unsuitable for recognized sporting purposes. See BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES (1989) 4-5 [hereinafter BATF REPORT] (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). The BATF's decision on the USAS-12 shotgun was upheld. See Gilbert Equipment Co. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989).

100. 25 WEEKLY COMP. PRES. DOC. 210 (Feb. 16, 1989); *id.* at 222 (Feb. 21, 1989).

101. *Id.*

of National Drug Control Policy, to determine how the proliferation of AK-47-type weapons could be abated without infringing on the rights of legitimate sportsmen.¹⁰²

Mr. Bennett and Stephen E. Higgins, Director of the BATF, determined that the spread of such weapons could be curtailed without infringing on the rights of sportsmen by using the "sporting purpose" requirement of importation.¹⁰³ Bennett and Higgins decided that the BATF would reevaluate the suitability of importing previously approved AK-47 types.¹⁰⁴ During this reevaluation, the BATF would not consider pending applications for the importation of AK-47-type weapons and would disallow further importation under already approved permits.¹⁰⁵ This initial suspension of importation applied to five weapon types: the AKS-type weapons, Uzi Carbines, FN/FAL-type weapons, FN/FNC-type weapons, and Steyer AUG semiautomatic weapons;¹⁰⁶ together these weapons accounted for eighty-four percent of the semiautomatic rifles imported in 1987.¹⁰⁷

Within two weeks, the BATF added to this list other weapons generally indistinguishable in terms of design, appearance, and function to close a loophole in the initial suspension.¹⁰⁸ In total, the BATF suspended pending applications and outstanding permits for 700,000 weapons,¹⁰⁹ a number seven times higher than the number of imports of the same weapons in 1988.¹¹⁰

102. *Id.* at 294 (March 7, 1989); *see also id.* at 359 (March 16, 1989).

103. *See* Memorandum from Stephen Higgins, Dir., Bureau of Alcohol, Tobacco, and Firearms, to Assistant Secretary (Enforcement) (March 14, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) [hereinafter Memorandum of March 14, 1989] (relying on 18 U.S.C. § 925(d) (1982)).

104. *Id.*

105. *See* Memorandum from Stephen Higgins, Dir., Bureau of Alcohol, Tobacco and Firearms, to Assistant Secretary (Enforcement) (March 29, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). This action was upheld in *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989).

106. *See* Memorandum of March 14, 1989, *supra* note 103.

107. Of 83,695 semiautomatic weapons imported into the United States in 1987, AKS weapons totalled 57,758, Uzi types 7,166, FN/FNC types 5,192, Steyer AUG types 293, and FN/FAL types 0. Therefore, 70,409 of the 83,695 semiautomatic weapons imported in 1987 were temporarily banned. Importation data from BATF Public Affairs Division (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

108. These firearm types were: Algimec AGM1; AR180; Australian Automatic Arms SAR; Beretta AR-70 and BM-59; CIS SR88; Heckler Koch 91, 93, and 94; G3SA; K1; K2; AR-100; M14S; MAS-223; SIG 550SP and 551SP; SKS with detachable magazine; AK-22; AP74; Galil/22; M-16/22; Unique F11; and the Erma EM1.22. BATF Press Release (April 5, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). These firearms accounted for 8,786 imported firearms in 1987, bringing the total to 79,195, or 95% of the semiautomatic firearms imported in 1987.

109. BATF Press Release (July 7, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee Fla.).

110. *Id.*

A. *Applicability of Listed Firearms to Class of Assault Rifles*

The weapons reevaluated by the BATF generally were chosen based on the following criteria: military appearance, large magazine capacity, and status as a semiautomatic version of a machine gun.¹¹¹ To complete the evaluation, the BATF established an internal "Working Group,"¹¹² which initially decided to designate the class of weapons examined "semiautomatic assault rifles." Such rifles would be distinguished by certain characteristics common to modern military assault weapons—in addition to their ability to fire at, kill, or disable an enemy.¹¹³

1. *Distinguishing Physical Characteristics*

In evaluating semiautomatic assault rifles and comparing them to illegal fully automatic military assault weapons, the Working Group found that semiautomatic assault rifles have a variety of physical features and characteristics which, taken together, distinguish them from traditional sporting rifles. These features and characteristics include: ability to accept detachable magazines, folding stocks, pistol grips, bayonet mounts, flash suppressors, bipods, the ability to launch grenades, and night sights.¹¹⁴

(a) *Large Capacity Magazines*

Virtually all military weapons have the ability to accept large capacity magazines,¹¹⁵ which provide the capacity to fire and reload rapidly. While some traditional sporting firearms use detachable magazines, they generally have relatively small magazine capacities.¹¹⁶ In addition, many states, including Florida, have limits on magazine capacity for hunting purposes.¹¹⁷ Consequently, the Working Group determined that the design or sale of a firearm with a large magazine would be a factor in evaluating the purpose of the weapon.¹¹⁸

(b) *Folding Stocks*

Many military weapons also have folding stocks, which allow greater concealability and portability.¹¹⁹ While such guns may be fired

111. BATF REPORT, *supra* note 99, at 1.

112. *Id.*

113. *Id.* at 6.

114. *Id.* at 6-8.

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 7-8. Florida allows a magazine capacity of five rounds while hunting. FLA. ADMIN. CODE R. 39-12 (1987).

118. See BATF REPORT, *supra* note 99, at 7.

119. *Id.*

with the stocks folded, to do so sacrifices accuracy.¹²⁰ Although folding stocks might make weapons more suitable for a sporting purpose such as backpacking, most traditional sporting rifles do not have this feature. Accordingly, the Working Group found the presence of folding stocks indicative of a military, rather than a sporting, purpose.¹²¹

(c) *Pistol Grips*

The straight-line design of many military weapons dictates the use of a well-defined pistol grip beneath the action of the gun.¹²² Without a pistol grip, holding and firing the weapon would be difficult.¹²³ A pistol grip also allows for one-handed firing and greater control during automatic firing.¹²⁴ By contrast, traditional sporting rifles use a grip built into the wrist of the stock; in addition, one-handed firing is not usually used in hunting or target competitions.¹²⁵ Therefore, the Working Group determined that well-defined pistol grips had no sporting purpose.¹²⁶

(d) *Flash Suppressors*

Flash suppressors serve two functions. By dispersing a flash from the muzzle, they help conceal a shooter's position, especially at night.¹²⁷ Flash suppressors also help control the muzzle climb of a rifle fired at fully automatic.¹²⁸

Suppression of a muzzle flash does not enhance the performance of a sporting firearm. While controlling muzzle climb is beneficial in reacquiring a target, other attachments exist to achieve this result.¹²⁹ Therefore, flash suppressors were found to have no traditional sporting purpose.¹³⁰

(e) *Bipods*

Bipods or bipod mounting points are integral parts of many military weapons.¹³¹ They provide stability and support when firing in a

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.* "Muzzle climb" is the tendency of the weapon's recoil to force the barrel up, and off target, during continuous automatic fire.

129. *Id.* at 8.

130. *See id.*

131. *Id.*

prone position.¹³² Though bipods are available for use by many traditional sporting rifles, sporting rifles generally are not equipped to accommodate them.¹³³ Instead, such bipods simply clamp onto the rifle itself.¹³⁴ The Working Group therefore determined that under-wire bipods or bipod mounts are military characteristics.¹³⁵

(f) Night Sights

Hunting is generally illegal at night. Consequently, the Working Group concluded that the use of night sights or their integration onto rifles serves no sporting purpose.¹³⁶

(g) Bayonet and Grenade Launching Capability

Finally, the Working Group determined that the ability to mount a bayonet or a grenade launcher onto a rifle is a purely military trait with no sporting use.¹³⁷

2. *Semiautomatic Versions of Machine Guns*

Next the Working Group examined the origins of each weapon.¹³⁸ Most military weapons are selective fire,¹³⁹ that is, they are able to fire in an automatic or semiautomatic mode. Because automatic fire weapons may not be imported into the United States,¹⁴⁰ manufacturers of such weapons converted them to semiautomatic for the sole purpose of marketing them in the United States.¹⁴¹ Obviously, the original purpose of such weapons was military, not sporting.¹⁴² Therefore, the Working Group examined the origin of each weapon and whether the weapon was a semiautomatic version of a machine gun to determine the original use of each weapon.¹⁴³

3. *Cartridge Size*

Finally, the Working Group considered the size of the cartridge case accepted into the rifle's chamber. It determined that modern military

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.*

136. *Id.* In Florida, hunting is allowed only from one half hour before sunrise to one half hour after sunset. FLA. ADMIN. CODE R. 39-12.002(2) (1987).

137. BATF REPORT, *supra* note 99, at 7-8.

138. *Id.* at 8.

139. *Id.*

140. 18 U.S.C. § 922 (1982).

141. BATF REPORT, *supra* note 99, at 8.

142. *Id.*

143. *Id.* at 6, 8.

assault weapons generally accept center-fire cartridge cases of 2.25 inches or less.¹⁴⁴ While some traditional sporting firearms also accept cartridges of this size, such weapons do not have the features listed above. Hence, the Working Group determined that cartridge size is a possible characteristic of weapons not used for sporting purposes.¹⁴⁵

The Working Group acknowledged that none of the traits discussed above was determinative when considered individually. Accordingly, the Working Group considered all relevant traits in determining whether a specific type of rifle should be classified as a semiautomatic assault rifle.¹⁴⁶ As a result of its findings, the Working Group determined that most firearms on the suspension list were properly included in the semiautomatic assault weapon list.¹⁴⁷ The only exceptions to this were six types of .22 caliber rimfire rifles and the Valmet Hunter.¹⁴⁸

The .22 caliber rimfire weapons were very similar in appearance to the military assault weapons, but used different ammunition and firing mechanisms.¹⁴⁹ The .22 caliber rifles also were not semiautomatic versions of a machine gun but were generally recognized as suitable for small game hunting.¹⁵⁰

The Valmet Hunter's design was originally based on the operation mechanism of the AK-47,¹⁵¹ but was substantially changed to have characteristics more like those of a traditional sporting rifle.¹⁵² The Valmet Hunter's receiver had been modified, and its bayonet, pistol grips, and flash suppressor had been removed.¹⁵³ Also, the trigger was moved to the rear of the altered receiver to facilitate use of the trigger with a wrist grip built into the stock.¹⁵⁴ The Working Group determined that the cumulative effect of these changes indicated that the Valmet Hunter should be removed from the semiautomatic assault weapon list.¹⁵⁵

B. Scope of "Sporting Purpose"

The Working Group next examined the meaning of "sporting purpose" as used in the statute. To do so the Working Group consulted

144. *Id.* at 9.

145. *See id.*

146. *Id.*

147. *See id.*

148. *Id.* The six .22 caliber rifles the Working Group allowed to be imported were the AK-22, AP-74, Galil/22, M16/22, Unique F11, and the Erma EM1.22. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; *see also id.* at attachment 6.

152. *Id.* at 9.

153. *Id.*; *see also id.* at attachment 6.

154. *Id.* at 9.

155. *Id.*

the statute's text, legislative history and relevant case law, as well as prior interpretations by the Firearms Evaluation Panel and the BATF.¹⁵⁶

The Working Group found the language of the statute to imply a narrow interpretation of "sporting purpose," as it provides for a general prohibition of the importation of firearms with limited specified exceptions.¹⁵⁷ The legislative history of the Gun Control Act of 1968¹⁵⁸ indicated that "sporting purpose" was intended to refer to target shooting, skeet and trap shooting, and hunting, but not to every conceivable activity involving the use of a firearm.¹⁵⁹ Otherwise the "sporting purpose" limitation would be meaningless. Moreover, the Firearms Evaluations Panel of 1968 had previously determined that "plinking" (shooting at random objects such as cans) was not a sport, but rather a pastime or diversion.¹⁶⁰

Based on previous BATF interpretations, the Working Group also determined that reference to a "sporting purpose" was meant to contrast with military and law enforcement applications or competitions, therefore eliminating these activities from consideration as sporting purposes.¹⁶¹ Accordingly, the Working Group gave "sporting purpose" a narrow interpretation,¹⁶² which included hunting and competitive target shooting but not plinking and military or law enforcement competitions.¹⁶³

C. Suitability For "Sporting Purpose"

Applying this narrow interpretation of "sporting purpose" to weapons previously determined to be semiautomatic assault weapons, the Working Group investigated each weapon's suitability for use in recognized "sporting purposes."¹⁶⁴ To accomplish this, it examined technical and marketing data, expert opinions, and the recommended and actual uses of the weapons.¹⁶⁵ The Working Group also considered the advertisements and technical articles regarding these weapons

156. *Id.* at 10.

157. *Id.*

158. 18 U.S.C.A. § 921 (1982).

159. *Id.*; see also 114 CONG. REC. 27461-63 (1968).

160. Firearms Advisory Panel, minutes of December 10, 1968; see also BATF REPORT, *supra* note 99, at 10.

161. BATF REPORT, *supra* note 99, at 10-11; see *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989) (upholding interpretation).

162. BATF REPORT, *supra* note 99, at 10.

163. *Id.*

164. See *id.* at 11.

165. See *id.*

to see how each weapon was marketed, and for what uses each was recommended.¹⁶⁶ Additionally, the Working Group sent questionnaires to hunting guides, state game and fish commissions, hunting associations, competitive shooting groups, and hunting/shooting magazine editors to determine the extent to which these weapons were used or recommended for use in a "sporting purpose."¹⁶⁷

The Working Group determined that the majority of advertising for the weapons did not indicate any sporting uses.¹⁶⁸ Of fifty technical evaluations, only five contained recommendations for hunting use.¹⁶⁹ The remainder of the advertisements and evaluations recommended uses such as self defense, "plinking" or military use.¹⁷⁰

The hunting associations responding to the questionnaires placed no restrictions on their members as to the use of weapons, the caliber of bullets, or the capacity of magazines.¹⁷¹ However, seventy-three percent of the 706 hunting guides responding indicated that their patrons used only bolt or lever action rifles for hunting.¹⁷² Only about two percent of the hunting guides indicated that their patrons had ever used any of the weapons on the temporarily banned list for hunting.¹⁷³

Editors of hunting and shooting magazines also supplied recommended uses. Eleven of fourteen recommended these weapons for target use, while nine of fourteen recommended the weapons be used in hunting.¹⁷⁴ The Working Group found these recommendations to be inherently contradictory.¹⁷⁵ The characteristics used by some editors to show that the weapons were good for hunting were used by other editors to demonstrate the firearms were totally unfit for anything but military use.¹⁷⁶

Finally, the responses by competitive shooting groups and state game and fish commissions indicated that while the temporarily suspended weapons were not prohibited from hunting or target shooting uses, such firearms were rarely used for these purposes.¹⁷⁷ As a result of the survey's findings, the Working Group determined that while the semiautomatic assault weapons can be used for hunting or target

166. *See id.* at 12.

167. *See id.*

168. *See id.*

169. *Id.* at 13.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The actual figures were 10 out of 706. *Id.*

174. *Id.* at 13.

175. *Id.* at 13-14.

176. *Id.*

177. *Id.* at 15.

shooting, they are not generally recognized as particularly suitable for these purposes.¹⁷⁸

D. *Conclusions of the Bureau of Alcohol, Tobacco, and Firearms*

The Working Group concluded that all of the weapons temporarily banned from importation, with the exception of the six types of .22 caliber rimfire firearms and the Valmet Hunter, were properly classified as semiautomatic assault weapons.¹⁷⁹ The Working Group also concluded that semiautomatic assault weapons were not generally recognized as particularly suitable for or readily adaptable to sporting purposes.¹⁸⁰ Therefore, the Working Group concluded that the weapons identified as semiautomatic assault weapons did not fall within the exception created by 18 U.S.C. § 925(d)(3), and therefore should not be importable.¹⁸¹ These conclusions and recommendations were approved by both the Director of the BATF and President Bush.¹⁸²

Realistically, the actions taken by the BATF will not significantly affect the market for semiautomatic firearms in the United States. The BATF controls only the importation of firearms and has no authority over domestically produced firearms. As may be expected, domestic gun manufacturers, especially the smaller ones, immediately began to increase production of semiautomatic firearms, taking advantage of the opportunity to maximize profits in what had become a seller's market.¹⁸³ The regulation of these domestic producers of semiautomatic assault weapons was therefore left to the states.

VI. AN ANALYSIS OF ASSAULT WEAPON LEGISLATION DEFINITIONS

By passing Committee Substitute for House Bill 573, the Florida Legislature has taken two steps toward the regulation of semiautomatic assault weapons: increasing mandatory minimum prison terms for the use of these weapons during the commission of certain crimes and creating a commission to study the problem. The purpose of the increased penalties is to deter the use of these weapons in crimes.¹⁸⁴ The purpose of the Commission on Assault Weapons is to make "re-

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See Letter from Daniel Black to the Director of the BATF (July 6, 1989) (forwarding letter attached to BATF REPORT, *supra* note 99); see also N.Y. Times, July 8, 1989, at 6, col. 1.

183. See N.Y. Times, July 14, 1989, at 1, col. 1. As of July, 1989 there were an estimated three million semiautomatic weapons in the United States. *Id.*

184. Fla. CS for HB 573, § 1 (1989).

commendations to combat the unlawful use of assault weapons in the state."¹⁸⁵

Before the next legislative session, the Commission on Assault Weapons will issue a report recommending ways to combat illegal use of assault weapons. Assuming the Commission recognizes a need for further action, steps not taken in 1989 will require reexamination. As was true during the 1989 Session, crucial to any future legislation will be the following question: how does one define an assault weapon and pass effective legislation containing this definition without interfering with traditional hunting and sporting activities?

Regardless of the way in which future legislation restricts assault weapons—whether prohibiting their sale, requiring registration, mandating outright bans, or something else—a clear definition of assault weapons is necessary. Although future legislation could group all semiautomatic firearms together, such a classification seems overly broad to accomplish the intended purpose. Instead, the Legislature should consider several alternative approaches to this definitional problem: listing specific weapons, emphasizing characteristics of weapons, regulating all weapons except those specifically listed, or making a broad statement of purpose and leaving the task of working out the details to an administrative agency. Few bills or laws have relied exclusively on one of these approaches, but instead have used multiple approaches to close perceived loopholes.

A. *Listing Regulated Firearms*

California enacted the first law specifically regulating assault weapons: the Roberti-Roos Assault Weapons Control Act of 1989,¹⁸⁶ which regulates fifty-four listed weapons. Weapons on the market at the time of the law's passage, but not listed by the Act, presumably are not affected by this law. A firearm can be added to the list only if it represents a "slight modification" of a listed firearm.¹⁸⁷

Specifically listing weapons, such as California did, is rather inflexible. Such an approach will be successful only if the types of weapons available on the market remain the same and retain the same characteristics. However, prudent manufacturers will produce different weapons that may be similar in some ways to a listed firearm, but not similar enough to be a "slight modification."¹⁸⁸ Because California

185. *Id.*

186. See Cal. Penal Code § 12275.5 (West 1990); see also *supra* notes 24-33 and accompanying text.

187. See *id.* § 12276.5.

188. *Id.*

law will not regulate such new weapons, bringing such weapons within the regulatory framework will require an addition to the list of covered weapons, through the legislative process, of every new or different weapon put on the market. While this form of regulation may achieve its goals initially, it will become less and less effective and require constant attention.

B. *Emphasizing Characteristics of a Weapon*

An alternative is to base a definition on one or more specific firearm characteristics such as the firearm's ability to accept a magazine or clip with a capacity greater than a stated number of rounds of ammunition.¹⁸⁹ Virginia's background check law contains such a definition.¹⁹⁰ By its express language, Virginia's law applies to handguns with barrels of less than five inches, as well as to semiautomatic rifles capable of holding a magazine of twenty or more rounds or capable of being equipped with a bipod, flash suppressor, or folding stock.¹⁹¹ This form of definition often is used in combination with a short list of firearms,¹⁹² apparently as a catch-all for any new weapons.

This form of definition also appears more flexible than a list of regulated weapons. Basing illegality on one or two characteristics, however, may result in inconsistent application. For example, an arguably "traditional" hunting rifle such as a Ruger Mini-14 is sometimes used with a detachable magazine, in which case it becomes a "dangerous weapon" subject to further regulation and possibly prohibition. In such a case, it appears that the detachable magazine, and not the firearm, is the problem. Accordingly, a simpler course would be to regulate the magazine itself, rather than the whole gun.¹⁹³ The same argument applies to laws focusing on folding stocks, flash suppressors, bayonets, or bipods.

189. See S. 386, 101st Cong., 1st Sess. § 4(d)(11) (1989); H.R. 1654, 101st Cong., 1st Sess. § 2(a)(2) (1989); H.R. 669, 101st Cong., 1st Sess. § 1(b) (1989).

190. See VA. CODE ANN. § 18.2-308.2:2 (1989).

191. See *id.*

192. See *id.*

193. This has been proposed as a middle course between no regulation and banning or registration. President Bush has supported legislation to limit magazines to 15-round capacities. 135 Cong. Rec. S6717-04; see also H.R. 1190, 101st Cong., 1st Sess. § 3 (1989). In addition, a group of arms manufacturers called the Sporting Arms and Ammunition Manufacturers' Institute, Inc. (SAAMI) has chosen to support this course as well. SAAMI, Position Paper, at 3 (May 2, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). However, it is estimated that there are over 100 million detachable magazines in the United States, making any regulation of these a formidable task. 135 CONG. REC. H 1323-01 (daily ed. Apr. 18, 1989) (statement of Rep. Marlenee).

These individual items are not being regulated because they are not perceived to be the problem. Their presence on a firearm is seen as simply indicative of a *firearm* that may be a problem. Laws which emphasize characteristics rather than gun types may restrict the use of firearms that are not part of the problem. To avoid such a result, exceptions should be built into these laws. Therefore, while this form of definition may be more adaptable than a list of weapons would be to future market changes, such adaptability may come at some cost to accuracy and reasonableness.

C. *Creating A List Of Acceptable Firearms*

Another possible approach to the definitional problem is found in Maryland's new handgun law. Approved by referendum in November 1988,¹⁹⁴ this law creates a Handgun Roster Board, which is responsible for compiling a list of handguns useful for legitimate sporting, self protection, or law enforcement purposes.¹⁹⁵ Only handguns on this list are permitted to be sold.¹⁹⁶

This law contains specific items the Board is to consider when appraising the legitimate purposes of weapons, such as concealability, ballistic accuracy, quality of product, and utility for legitimate purposes.¹⁹⁷ The Board is authorized to place a handgun on the list by its own initiative, or when petitioned to do so. When petitioned, the Board has forty-five days to make a decision, or the petition is considered denied.¹⁹⁸ The Board's decision is appealable to the state court system.¹⁹⁹

This unique approach, which has never been tried with respect to assault weapons, assumes that all types of firearms within a regulated class are illegal. To make a firearm legal, one must prove to the Board that a firearm falls within the exceptions intended by the law. This type of a built-in assumption should be used only against a class of firearms in which, given individual scrutiny, most if not all members of that class would be deemed illegal. To ban an entire class while providing for exceptions which conceivably could be applied to a majority of that class may grow to be cumbersome and unwieldy.

194. MD. ANN. CODE art. 27, § 36F (Supp. 1989).

195. *Id.* § 36J.

196. *Id.* § 36I.

197. *See id.* § 36J(b)(2).

198. *Id.* § 36J(e).

199. *Id.* § 36J(f)(5); *see Apalachee Regional Planning Council v. Brown*, 546 So.2d 451 (Fla. 1st DCA 1989) (discussing the criteria such an approach must satisfy to comport with Florida's "delegation doctrine").

D. Broad Statement of Purpose

A final approach to defining assault weapons is to enact a broad statement of purpose which an administrative agency can use to determine the legality or illegality of specific weapons. An example of this process is found at 18 U.S.C. § 925(d)(3). In 1968, the United States Congress sought to limit the types of firearms entering the country. Rather than draw up a list of weapons or characteristics, Congress simply enacted a purpose statement.²⁰⁰ This statement, that a firearm must be "generally recognized as particularly suitable for or readily adaptable to sporting purposes"²⁰¹ to be imported, has not been altered since its inception, but has proved to be resilient against changing market conditions.

The firearms market has changed considerably since 1968. The firearms that are typically targets of assault weapons laws were not commercially introduced until the mid-70s or later;²⁰² the number of these weapons imported remained relatively low until very recently.²⁰³ However, once market conditions changed, the BATF was able to reevaluate semiautomatic firearms using the purpose statement made twenty-one years earlier. During this reevaluation, each weapon was examined thoroughly, from its origins, advertisements and recommended uses, to its characteristics and use on the target range or hunting ground.²⁰⁴ The results of these examinations were then reviewed and conclusions drawn upon these results.²⁰⁵ The conclusions of the BATF were met with widespread approval.²⁰⁶ The United States Congress is currently considering two bills that seek to employ another such purpose statement.²⁰⁷ Both bills state that semiautomatics "specifically or primarily designed as a military or law enforcement armament" may not be imported.²⁰⁸ The Secretary of the Treasury,

200. See BATF REPORT, *supra* note 99, at 3. The Senate report on the Gun Control Act of 1968 stated that "[t]he difficulty of defining weapons' characteristics . . . was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition." S. REP. NO. 1501, 90th Cong., 2d Sess. 38 (1968).

201. See 18 U.S.C. § 925(d) (1982).

202. See *Gilbert Equip. Co. v. Higgens*, 709 F. Supp. 1071, 1078 (S.D. Ala. 1989).

203. BATF Press Release (July 7, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee Fla.).

204. See BATF REPORT, *supra* note 99, at 14-19.

205. See *id.* at 22-25.

206. See Letter from Daniel Black to the Director of the BATF, *supra* note 182.

207. S. 733, 101st Cong., 1st Sess. (1989); H.R. 1154, 101st Cong., 1st Sess. (1989). Because these bills seek to restrict the importation of semiautomatic weapons, they may be unnecessary following the actions of the BATF.

208. S. 733, 101st Cong., 1st Sess. § 3(a) (1989); H.R. 1154, 101st Cong., 1st Sess. § 3(a) (1989).

through the BATF, is to determine which weapons fall within this category.²⁰⁹

While this type of statement may address a perceived problem of military style weapons on the market, it may not successfully differentiate among firearms being imported. Almost all semiautomatics were originally designed for military or law enforcement use, but some may have been altered for the commercial market.²¹⁰ Therefore, this statement could result in an excessively broad barrier to importation.²¹¹ The authors of the federal legislation may have recognized these problems, because exceptions for firearms unable to hold more than nine rounds of ammunition are written into the bills.²¹² The bills also list approximately twenty firearms that are to be considered assault weapons.²¹³ The weapons listed generally share a military origin, so it is unclear why the list was needed as they would have been banned from importation anyway.

The success of a law based on a purpose statement depends primarily on the statement itself, which must differentiate between types of firearms. If it does not do so, the addition of exceptions and/or further definitional forms will be necessary for an effective law.

VII. CONCLUSION

If the Commission on Assault Weapons determines that no problem with illegal assault weapon use exists in this state, less need for further legislation will exist. However, if the Commission recommends further legislation in this area, the broad purpose statement appears to offer the best hope for a reasonable, workable definitional form. Merely listing weapons to be regulated provides no explanation why those weapons are being regulated, and gives the impression that such weapons require further regulation simply because the Legislature says so.²¹⁴ Additionally, a list is inflexible and would require repeated legislative action.

209. S. 733, 101st Cong., 1st Sess. § 3(a) (1989); H.R. 1154, 101st Cong., 1st Sess. § 3(d)(7) (1989).

210. See BATF REPORT, *supra* note 99, at 8.

211. See *id.*

212. S. 733, 101st Cong., 1st Sess. § 3(d)(7) (1989); H.R. 1154, 101st Cong., 1st Sess. § 3(d)(7) (1989).

213. S. 733, 101st Cong., 1st Sess. § 4(2) (1989); H.R. 1154, 101st Cong., 1st Sess. § 4(2) (1989).

214. This can be seen by the manner in which the listed weapons were chosen for HB 573. Representative Flagg simply took the weapons, for the most part, from the California legislation. Compare *supra* note 85 (listing weapons covered by Fla. HB 573 (1989)) with CAL. PENAL CODE § 12275 (West 1990) (listing 54 types of weapons regulated by California).

Although the characteristic-based definitional form may be more flexible than a list, it poses additional problems. It may tend to have an effect broader than originally planned, and consequently may require many further exceptions to narrow the law's scope.²¹⁵ In addition, there seems to be no reason not to regulate the characteristic upon which the illegality is based, rather than regulating the entire firearm.

Creating a board to list acceptable firearms would also prove difficult. Initially, the presumption of illegality would be unnecessary unless many or most weapons in a class are thought to be illegal. A board would have to make decisions based on technical data and create tests and parameters for these decisions, a function best performed by those with specialized knowledge of firearms. Perhaps most importantly, the members of such a board would be political appointees and have a vested political interest in the outcome of its deliberations.²¹⁶

Because the success of the purpose statement definitional form as a guide to detailed regulations will depend initially on the statement itself, such statement should be based on the purpose or intended use of the weapon. In this regard, the statement might reflect the reasoning of 18 U.S.C. § 925(d)(3) and require a true "sporting purpose" to be shown. On the other hand, the statement might be based on requiring an intended defensive, as opposed to offensive, use. Under this scenario, a weapon with a folding stock, a bayonet mount, night sight, flash suppressor, and a seventy-five-round drum magazine would seem to be built for offensive purposes, as opposed to a semiautomatic weapon with none of those features.

An additional advantage of this definitional form is the scrutiny given each firearm before a determination is made on its regulation. An administrative agency with expertise in firearms technology, such as the Florida Department of Law Enforcement, could be authorized to conduct this evaluation. Based on its expertise, this agency could develop criteria to determine the applicability of the law to a particular weapon, just as the BATF does on the federal level.

Because of the examinations required, this approach may take longer to implement than the other approaches. Speedy implementation, however, should not be the primary goal. The primary goal

215. See, e.g., S. 386, 101st Cong., 1st Sess. § 4(d) (1989); H.R. 669, 101st Cong., 1st Sess. § 1(b)(B) (1989).

216. The Maryland Roster Board consists of nine members appointed by the Governor: the Superintendent, a representative from the association of the Chiefs of Police, a representative from the State's Attorney's Association, a handgun manufacturer, a representative from the NRA, a representative from a group called Marylanders Against Handgun Abuse, and three citizen members. MD. ANN. CODE art. 27, § 36J(a)(3) (1989).

should be meeting the needs of Florida's citizens with effective legislation, while protecting traditional sporting rights.

