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TAKING A BITE OUT OF VIOLENT CRIME

*Michael G. Lenett**

I. INTRODUCTION

On a warm, sunny morning at 11:42 a.m. on January 17, 1989, Patrick Purdy walked into the crowded schoolyard of Cleveland Elementary School in Stockton, California armed with his AK-47 semiautomatic rifle, and opened fire on the nearly 400 children who were playing outside for recess. Two minutes and over 100 rounds of ammunition later, five children lay murdered and twenty-nine other children and one teacher lay wounded.

There are over one million semiautomatic assault weapons, such as Uzis, AK-47s, and TEC-9s, on the streets of America today. These weapons originally were designed specifically for combat. But their combat features, huge ammunition clips, and easy availability has made them useful for civilian combat—against police, against rival youth gangs, against competing drug traffickers. Innocent bystanders are caught in the crossfire. Until Congress finally acted to ban these military-style weapons last year as part of omnibus anti-crime legislation, they were manufactured and sold freely to felons, drug traffickers, youth gangs, and hate groups, wreaking havoc and death across the nation. They were sold immediately, over-the-counter, to anyone who filled out a form and showed some identification. Although hundreds of innocent people had been killed or injured by semiautomatic assault weapons and such weapons had been linked to countless incidents of violent crime for decades, the Stockton massacre hit a sore nerve in the general public. This was not a fight among rival organized crime groups or inner-city gangs, where violent crime, though tragic, was not shocking. These were young children playing in an elementary school playground. This was not a private act of revenge or murder for profit, deplorable but common in American history. It was an act of random violence against innocent children. This was not an accident, an unfortunate tragedy. This was cold, calm, and calculating. This was not an isolated shot or two in a bank robbery, drug bust, or car theft—all familiar events broadcast on the television news nearly every night. This was a spray-fired hail of 106 rounds of ammunition. And this was no revolver or hunting rifle. This was a weapon of war. And this was a different kind of war.

America has always had a special relationship with firearms. Many of our nation's greatest and most enduring images include firearms—local militias banding together to defeat the British, cowboys fighting Indians and forging the

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great frontier, self-reliant outdoorsmen hunting for food and sport, lawmen fighting the lawless to establish law and order. One need only think of John Wayne, Clint Eastwood, Rambo, the Minutemen, Butch Cassidy, Jesse James, Wyatt Earp, Bonnie and Clyde, Al Capone, and Jeremiah Johnson to realize that the firearm has made an indelible mark upon America's national character. Largely as a result of the prominent place of the gun in American history, America has developed a high tolerance for gun crime, enduring more of it than any other industrialized nation.

Though many different types of solutions have been tried, the problem of violent crime has been for the most part intractable. To many, the solution lies in fundamental improvements in education, decreases in poverty, and increases in employment. Others emphasize enhancements of deterrence through increased penalties and increases in incarceration or the death penalty. Although limited and piecemeal efforts have been made in all of these areas, large structural or comprehensive efforts have proved too costly, financially or morally, for society to bear.

One approach America historically has been reluctant to take to reduce violent crime is to reduce the availability of firearms. Although Congress has on occasion acted to regulate firearms, it has done so reactively, tentatively, and mostly ineffectively. In 1934, for example, Congress reacted to widespread Prohibition-era organized crime violence and such notorious criminals as John Dillinger by requiring those possessing machine guns and other "gangster weapons" to register them; Congress did not ban civilian possession of machine guns until 1986, and even then exempted all machine guns then lawfully owned. In 1968, in response to increasing crime and violence throughout the decade, a dramatic proliferation of handguns, and the assassinations of Martin Luther King and John and Robert Kennedy, Congress passed the Gun Control Act. That Act set forth categories of persons who should not have guns, but did not provide a mechanism for checking whether a person fell into one of the prohibited categories; it prohibited assault weapons from being imported into the United States, but did nothing to prohibit domestic assault weapons.

Americans may have correctly discerned that banning all guns is not an appropriate (or constitutional) solution. But every so often, an event or series of events—mob violence, assassination—jars the national consciousness and incites public demand for reasonable and measured gun *control*.

Stockton was just such an event. Its tolerance of rising crime already stretched to the limit and its anger and frustration with Congressional inability to make significant headway at a peak, the public simply could not understand why they had to tolerate these guns in their neighborhoods. Surely there was a line to be drawn somewhere, and while reasonable people could differ as to the proper place, most agreed that, wherever the line was, *these* guns had crossed it.

To be sure, there had been many different types of gun control efforts underway at the local, state and federal levels for many years, some of which included measures to ban or limit the supply of semiautomatic firearms. But the Stockton massacre caused such public outrage and demand for legislative action

that it galvanized a distinct campaign within the larger gun control effort. The movement to ban semiautomatic "assault weapons" was born. Within a month of the Stockton incident, measures had been introduced in Congress to restrict assault weapons.

II. THE NEED FOR A COMPREHENSIVE NATIONAL SOLUTION

A. *Background of Firearm Regulation*

The two primary federal statutes governing firearms are the National Firearms Act of 1934 (NFA)¹ and the Gun Control Act of 1968 (GCA).² The NFA established strict registration requirements on fully automatic firearms such as machine guns and short-barrelled shotguns and rifles.³ The law requires anyone purchasing one of these weapons to submit to an application process that includes fingerprints, a photograph, a four to six-month waiting period and background check, and a \$200 transfer tax. The GCA established licensing requirements for manufacturers, dealers, and importers of firearms; prohibited interstate mail-order sales of firearms; prohibited all interstate sales of handguns; and set forth categories of persons, like minors and felons, to whom firearms or ammunition may not be sold.⁴ In addition, the GCA authorized the Secretary of the Treasury to prohibit the importation of firearms which are not "particularly suitable for or readily adaptable to sporting purposes."⁵

Thus, fully automatic firearms and short-barrelled shotguns and rifles have been strictly regulated since 1934, and the Bureau of Alcohol, Tobacco, and Firearms (ATF) has had broad authority to prevent the importation of non-sporting semiautomatic firearms⁶ since 1968. Semiautomatic assault weapons, by contrast, have been virtually unregulated, and ATF has not had the authority to regulate their manufacture or sale within the United States.

1. 26 U.S.C. § 5801 (1988 & Supp. V 1993).

2. 18 U.S.C. §§ 921-28 (1988 & Supp. V 1993).

3. Congress has outlawed the private possession of machine guns and the manufacture and importation of machine guns for sale to civilians. 18 U.S.C. §§ 922(b)(4), 922(b)(o) (1988).

4. There have been several important amendments to the GCA, including a ban on the manufacture and importation of armor-piercing ammunition ("cop-killer bullets") in 1986, 18 U.S.C. § 922(a)(7) (1988), and a ban on the manufacture, importation, possession, and transfer of firearms not detectable by security devices ("plastic guns") in 1988, 18 U.S.C. § 922(p) (1988).

5. 18 U.S.C. § 925(d) (1988). This provision was intended to "curb the flow of surplus military weapons and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting." S. Rep. No. 1097, 90th Cong. 2d Sess. 80, *reprinted in* 1968 U.S.C.C.A.N. 2112, 2167. In 1989, the Bush Administration permanently banned the importation of 43 models of semiautomatic assault weapons which were determined not to have a sporting purpose.

6. A semiautomatic firearm differs from automatic and manually operated firearms in its mechanics. An automatic weapon, commonly known as a machine gun, will continue to fire as long as the trigger is depressed or until the ammunition magazine is emptied. A semiautomatic weapon will fire one round and instantly load the next round with each pull of the trigger. A manually operated firearm fires one round with each pull of the trigger and requires some manual action to load each round. This means that a semiautomatic fires a little more slowly than an automatic, but much faster than a manual. When San Jose police test-fired an Uzi, a 30-round magazine was emptied in slightly less than 2 seconds on full automatic while the same magazine was emptied in just 5 seconds on semiautomatic.

B. A Multidimensional Problem

Semiautomatic assault weapons pose a multifaceted problem for American society. Whether viewed from the criminological, sociological, or epidemiological perspective, assault weapons exacerbate violent crime, hinder law enforcement, burden the public health care system, and disparately harm minorities and the young.

ATF gun trace reports provide overwhelming evidence that assault weapons are used disproportionately in crime as compared with other firearms.⁷ ATF statistics show that although semiautomatic assault weapons comprise only one-half of one percent of the 211 million privately-owned firearms in America, they accounted for *eight* percent of all firearms traced to crime during 1986 to 1993.⁸ In other words, assault weapons were about sixteen times more likely to be traced to crime than conventional weapons during this period.⁹ During this period, at least 29,058 assault weapons were used to commit crimes in the United States and the actual figure is probably much higher.¹⁰ Since ATF traces less than ten percent of all gun crimes, these numbers could actually be ten times higher or more—that would mean at least 290,000 assault weapon crimes over that eight-year period.¹¹ As a result, notwithstanding the relatively small percentage of assault weapon violence as compared to all gun crimes or all violent crime, a ban on semiautomatic assault weapons is one of the most obvious and effective anti-crime measures that can be taken.

The impact of assault weapons on violent crime is more dramatically

7. Measuring with precision the impact of assault weapons on crime is difficult since most local police are not required to report the make and model of firearms used in crime. However, ATF conducts gun traces for local police nationwide and its gun trace reports do identify the make and model of each gun traced. ATF therefore provides the best available statistics regarding assault weapon crime. Since ATF conducts approximately 50,000 gun traces out of a total of about 650,000 gun crimes each year, ATF's reports can provide only estimates of the total use of assault weapons.

The National Rifle Association (NRA) prefers to cite statistics from two sources which are not as accurate as ATF's reports: its own studies of police reports, which generally note only the caliber of the gun and whether it was a handgun, rifle, or shotgun; and the FBI Uniform Crime Reports, which indicate only whether the gun was a handgun, rifle, or shotgun. It is impossible in either case to determine the percentage of semiautomatic assault weapons as defined under the law.

8. See ATF Gun Trace Reports (1986-93); see also Treasury Secretary Lloyd Bentsen, statement at press conference with Senator Feinstein and Representative Schumer (Apr. 26, 1994) [hereinafter cited as Bentsen Statement]; see also Testimony of Kenneth T. Lyons, International Brotherhood of Police Officers, before the Senate Committee on the Judiciary (Aug. 3, 1993) (reporting that the California Assembly Office of Research found that 83% of state agencies experienced a significant or moderate increase in the use of assault weapons over the last five years).

9. In addition, they are preferred by criminals over law abiding citizens eight to one. Bentsen Statement, *supra* note 8.

10. ATF Gun Trace Reports (1986-93). These crimes included 1,578 homicides, 940 assaults, 224 robberies, and 4,500 narcotics violations from 1986 to 1992. ATF Gun Trace Reports (1986-92).

11. The Atlanta Journal-Atlanta Constitution performed a study of all guns traced by ATF between January 1, 1988 and March 27, 1989. See Jim Stewart & Andrew Alexander, *Assault Guns in America: Assault Weapons Muscling in on the Front Lines of Crime*, ATLANTA J./ATLANTA CONST., May 21, 1989, at A01. Although assault weapons have proliferated even more since 1989, the 1989 study found: assault weapons were used in 1 of every 10 crimes; assault weapons accounted for nearly 30% of all firearms traced to organized crime, gun trafficking and crimes committed by terrorists in the United States; and of the thousands of gun models sold in the United States, just 10 assault weapons accounted for 12.4% of the nation's drug-related crime. *Id.*

illustrated by the steady barrage of tragic events in communities across the nation:

- On October 29, 1994, Francisco Duran fired a hail of twenty-nine rounds at the White House with a semiautomatic rifle in what may have been an attempt to assassinate the President.
- On December 7, 1993, the country was shocked by the shooting on a Long Island commuter train in which a gunman used a 9-millimeter semiautomatic pistol with a fifteen-round magazine to shoot twenty-three people, killing six and wounding twenty. The gunman had with him one hundred rounds of ammunition in a canvas bag, including a large supply of hollow-point bullets that expand on impact to expose sharp edges and inflict maximum damage.
- On July 1, 1993, gunman Gian Luigi Ferri killed eight people and wounded six others at the San Francisco law offices of Pettit & Martin, using two TEC-DC9 semiautomatic assault pistols with fifty-round magazines.
- On February 28, 1993, while attempting to serve federal search and arrest warrants at the Branch-Davidian compound in Waco, Texas, four ATF special agents were killed and sixteen others were wounded with an arsenal of assault weapons. According to ATF, the cult was hoarding at least 123 AR-15s, forty-four AK-47s, two Barrett .50 calibers, two Street Sweepers, an unknown number of MAC-10 and MAC-11s, twenty 100-round drum magazines, and 260 large-capacity banana clips. The weapons were bought legally from gun dealers and at gun shows.
- On January 25, 1993, a Pakistani national who had purchased a semiautomatic AK-47 assault rifle equipped with a thirty-round magazine from a northern Virginia gun shop, shot five people, killing two employees of the Central Intelligence Agency, in the front yard of the most security-conscious facility in the country.
- On October 16, 1991, twenty-three people were killed and nineteen others wounded in Killeen, Texas, when a deranged madman with a Glock-17, Ruger P89, and six large capacity magazines drove his truck through a cafeteria window and began randomly shooting at the lunchtime crowd.
- Before that there was Patrick Purdy, who in January 1989, committed his slaughter using a copy of an AK-47 and a one hundred-round drum magazine and a thirty-round banana clip. Purdy shot 106 rounds in less than two minutes.

These are just some of the most recent and most publicized tragedies.¹² Every day, semiautomatic assault weapons are on the front lines of violent crime.

Semiautomatic assault weapons pose an especially dangerous problem for law enforcement. Notwithstanding the fact that some people use these notoriously inaccurate weapons for hunting or sporting purposes, they are far too

12. See *infra* note 42 for a discussion of incidents involving the AR-15.

often used for what they are best suited for—crime and killing people. It is not surprising then that police report that these military-style weapons have become the weapons of choice for mass murderers, drug traffickers, youth gangs, and hate groups. Law enforcement officials often report that they are being outgunned by criminals and drug dealers on the street armed with semiautomatic assault weapons.¹³

It often goes unrecognized that semiautomatic assault weapons also pose a considerable public health epidemic.¹⁴ Emergency room doctors complain that the wounds of assault weapons victims look like the wounds of war. Since 1968, more than 300,000 Americans have been murdered by firearms. In 1992 alone, more than 35,000 people were killed by gunfire. Today, only cars cause more fatal injuries than firearms, and guns are expected to take the lead very soon.¹⁵ And we cannot even begin to count the number of non-fatal injuries from firearms that are treated each year.¹⁶ Homicide has replaced AIDS as the tenth leading cause of death in America, and it is the second leading killer of those between the ages of fifteen and twenty-four. Aside from the toll on human lives, the economic and health care costs from gun violence are staggering. A 1989 study for the Centers for Disease Control and Prevention estimated the lifetime economic cost of gun violence in 1985 at \$14.4 billion.¹⁷ Assault weapons place an overwhelming burden on an already beleaguered health care system in America.

13. See generally Testimony of Robert Scully, National Association of Police Organizations; Fred Thomas, International Association of Chiefs of Police; and Kenneth T. Lyons, International Brotherhood of Police Officers before the Senate Committee on the Judiciary (Aug. 3, 1993). Semiautomatic assault weapons can easily be converted into fully automatic weapons. Lyons Testimony. As Stephen Higgins, former Director of the ATF has put it:

Almost daily ATF special agents and other federal, state, and local police see the spread of assault-type weapons on the streets. It is the general consensus of law enforcement officials that the ever-increasing presence of assault-type rifles in the illicit drug trade and in other types of crime places the safety and the very lives of the American public in immediate peril. The proliferation of these weapons and their massive firepower also poses a tremendous threat to the lives of federal, state, and local police officers, who are outgunned by the criminals they encounter on the streets.

Ban These Weapons, PHOENIX GAZETTE, Mar. 2, 1993, at A12.

The 1992 resolution of the International Association of Chiefs of Police states: "The increase of criminal mayhem perpetrated by individuals having access to semi-automatic weapons continues to increase and escalate daily, as evidenced by the national and worldwide criminally-initiated tragedies that have befallen innocent victims."

14. See generally Stephen P. Teret, *Litigating for the Public's Health*, AMERICAN JOURNAL OF PUBLIC HEALTH (Aug. 1986); Garen J. Wintemute et al., *The Epidemiology of Firearm Deaths Among Residents of California*, W. J. MED. (Mar. 1987).

15. See SUSAN P. BAKER ET AL., THE INJURY FACT BOOK 129 (1984).

16. In 1972, the National Health Interview Survey estimated that the ratio of non-fatal firearm injuries to deaths was five to one. Arthur L. Kellerman et al., *The Epidemiologic Basis for the Prevention of Firearm Injuries*, ANN. REV. PUB. HEALTH (1991).

17. Dorothy P. Rice et al., *Cost of Injury in the United States: A Report to Congress*, 1989, UNIVERSITY OF CALIFORNIA INSTITUTE OF HEALTH AND AGING AND JOHNS HOPKINS UNIVERSITY INJURY PREVENTION CENTER. This study also estimated direct hospitalization costs at \$911 million. A study of D.C. hospitals has found that the health care costs of firearm injuries can have a devastating effect on hospitals. John Billings & Nina Teicholz, *The Costs of Criminal Violence in District of Columbia Hospitals*, DISTRICT OF COLUMBIA HOSPITAL ASSOCIATION (Oct. 1991).

Moreover, the effects of widespread access to assault weapons on youth and minorities are devastating. Assault weapons have made their way onto the urban streets of America, into the neighborhoods, and into the schools. As a result of easy access to assault weapons, youth gang violence has taken on a far more deadly dimension. And children, especially in inner cities and especially minorities, have turned to assault weapons and other firearms to settle their disputes.¹⁸

The causes of the problem stem in large part from insufficient and inconsistent regulation of the manufacture, sale, and possession of assault weapons. In the wake of the Stockton incident, the public was shocked to learn how easily available such deadly semiautomatic assault weapons are in this country. Unlike automatic weapons such as machine guns, which have been heavily restricted since 1934,¹⁹ semiautomatic weapons have been legally sold with almost no federal or state restrictions in most states. Essentially, semiautomatic weapons have been sold on the honor system. Anyone eighteen or older could walk into a gun store, show some identification, sign a form (which no one checked) claiming that he or she was not legally prohibited from possessing a gun, and walk out with an AK-47 or Uzi assault weapon and ammunition within minutes. Although federal law prohibits felons, fugitives, drug addicts, and the mentally ill from purchasing or possessing firearms,²⁰ in order to obtain a firearm, even a semiautomatic assault weapon, such persons merely needed to deny that they fell into any of the prohibited categories. Moreover, for \$30 a year, anyone can become a licensed dealer to sell assault weapons.²¹ Hence, one aspect of the problem has been the lack of effective sale

18. The fastest growing category of homicide is juvenile gang killings, which rose an astonishing 371% from 1980 to 1992. *Nature of Murder Shifts; Weapons Remain the Same*, U.S.A. TODAY, Dec. 5, 1994, at 12A. Murder is now the third leading cause of death for elementary and middle school children ages 5 to 14. Given current trends, more than half the persons arrested for homicide will soon be under the age of 21. See FBI Uniform Crime Reports 1988-1993 (showing percentage increase in murder and non-negligent manslaughter arrests by those under age 21 from 32.0% in 1988 to 43.6% in 1993).

Kids are increasingly using guns to kill. The number of children aged 10 to 17 who used guns to commit murder skyrocketed 79% during the 1980's. Out of 852 juvenile gang killings in 1992, 95% involved guns. USA TODAY, Dec. 5, 1994, at 12A. Kids are dying by guns. The firearm death rate (including homicides, suicides, and accidental shootings) among teenagers aged 15-19 increased 77% from 1985 to 1991, to an all-time high of 23.5 deaths per 100,000. For these teenagers, gunshot wounds have been the second leading cause of death (after traffic accidents) since 1988. Between 1985 and 1990, the firearm death rate for black males aged 15-19 more than doubled, and the homicide rate nearly tripled. Lois A. Fingerhut, *Firearm Mortality Among Children, Youth, and Young Adults 1-34 Years of Age, Trends and Current Status: United States, 1985-1990*, CENTERS FOR DISEASE CONTROL AND PREVENTION/NATIONAL CENTER FOR HEALTH STATISTICS (Mar. 23, 1993). Although no statistics are available as to the percentage of children killed by semiautomatic assault weapons, between 1979 and 1991, nearly 50,000 children were killed by guns—the same number of American battle casualties in the Vietnam War. Gun violence now takes the life of a child every two hours.

19. See National Firearms Act of 1934, codified at 26 U.S.C. § 5801 (1988 & Supp. V 1993).

20. 18 U.S.C. § 922(d), (g) (1988 & Supp. V 1993).

21. The Brady Act set the fee for federally licensed firearm dealers at \$200 for three years or \$90 for three-year renewals of valid licenses. Prior to the Act, the fee had been \$10 a year or \$25 a year for pawnbrokers. 18 U.S.C. § 923(a)(3)(B) (1988 & Supp. V 1993). Former Secretary of the Treasury Lloyd Bentsen, in announcing the Clinton Administration's support for an increase in the fee as well as tougher scrutiny of licensed dealers and applicants, noted that the actual cost of processing licenses is \$600 per year. Treasury Secretary Lloyd Bentsen, Remarks at the Federal Law Enforcement Training Center Awards Ceremony, Washington, D.C., Jan. 4, 1994.

and possession restrictions on assault weapons.

Another aspect of the problem has been inconsistent manufacture and sale restrictions. Since 1968, semiautomatic assault weapons have been banned from importation into the United States.²² However, according to ATF estimates, as much as seventy-five percent of assault weapons were being made in the United States. American manufacturers were simply copying the designs of previously imported assault weapons that were banned. Then American manufacturers used the copied designs to make the previously imported assault weapons here in the United States. For example, after ATF outlawed the importation of a South African riot-control shotgun called the Striker-12 in 1986, American manufacturers developed and sold copies of the Striker-12, changing its name to the Street Sweeper and actually advertising it as a weapon barred from importation. The same thing occurred with the USAS-12 assault shotgun, which was banned as imported from South Korea, but which was subsequently manufactured in the United States under a different name. Moreover, although ATF banned the importation of forty-three models of assault *rifles* in 1989, it allowed the importation of assault *pistols* to continue freely.²³

Thus, notwithstanding the import ban, which itself has not been strictly enforced, there was no mechanism to prohibit the domestic manufacture and sale of semiautomatic assault weapons. It made little public policy sense to ban the importation of assault weapons yet allow them to be freely made and sold domestically. ATF needed the legal authority to act against those manufacturing, selling, and possessing semiautomatic assault weapons in the United States, and there had to be some mechanism for enforcing such restrictions nationwide.

Unlike at the federal level, there had been a good measure of success at the state and local levels in passing legislation to ban or restrict semiautomatic assault weapons. In 1989, in the wake of the Stockton massacre, California became the first state to ban the sale of assault weapons. New Jersey followed suit in 1990. Hawaii banned assault pistols in 1992. Connecticut banned assault weapons in 1993. In 1994, Maryland became the fifth state to enact an assault weapons ban. In addition, more than thirty cities and counties across the country have taken similar action, including Albany, Atlanta, Boston, Chicago, Cleveland, Denver, and Los Angeles.

But piecemeal state regulation proved insufficient to markedly reduce the problem of assault weapons, regardless of the strength of individual states' efforts. Strong state laws have been evaded by wrongdoers who purchase banned weapons in a state with weak laws and import them into a neighboring state in which the weapons are banned.²⁴ This dilemma was clearly highlighted

22. 18 U.S.C. § 925(d) (1988).

23. For example, after the ATF banned the importation of the HK-94 assault rifle, Germany's Heckler and Koch began exporting a pistol version, the P-94, to the U.S.

24. See Testimony of Fred Thomas, International Association of Chiefs of Police, before the Senate Committee on the Judiciary (Aug. 3, 1993); Testimony of Kenneth T. Lyons, International Brotherhood of Police Officers, before the Senate Committee on the Judiciary (Aug. 3, 1993); Testimony of N.J. Governor Jim Florio before the Senate Committee on the Judiciary (Aug. 3, 1993).

by the San Francisco law office shooting. California bans semiautomatic assault weapons, but the gunman simply went to neighboring Nevada (which has no assault weapons ban) to purchase two TEC-DC9 assault pistols and came back into California to commit his slaughter. New Jersey has experienced the same evasion of its assault weapon law by criminals who go across state lines into Pennsylvania to get their assault weapons and then bring them back into New Jersey.

Thus, the problem of semiautomatic assault weapons demanded a *comprehensive, national* solution. Otherwise, even strong state laws would be thwarted by weak or nonexistent laws in other states.

III. LEGISLATIVE HISTORY

After a five-and-a-half-year legislative fight, the assault weapons ban finally passed in the waning days of the 103d Congress as part of omnibus anti-crime legislation.²⁵ To gain a thorough understanding of the new law, it is useful to briefly review the background of firearm regulation and early attempts to pass an assault weapons ban and then more closely examine the legislative history of the bill in the 103d Congress.

A. "Shot Down": Early Failed Attempts

Notwithstanding the Stockton massacre and the many other assault weapon incidents both before and afterward, initial efforts to ban semiautomatic assault weapons were unsuccessful, largely due to the political clout and opposition of the NRA.

Three weeks after the Stockton shooting, Senator Howard Metzenbaum (D-Ohio) introduced the first Senate bill to ban assault weapons on February 8, 1989.²⁶ Metzenbaum was a battle-hardened veteran of gun control, who had successfully fought for the bans against plastic guns and cop-killer bullets and was leading the effort to enact the Brady Bill. Senator Dennis DeConcini (D-Ariz.) followed shortly thereafter with his own bill.²⁷ DeConcini, who had once been named "Legislator of the Month" by the NRA, now broke with the NRA by supporting a limited ban on assault weapons.

Although various other bills to ban assault weapons were introduced in both the House and Senate, the Metzenbaum and DeConcini bills were the most important, framing the issue for most members of Congress and the general public. It was their persistence, along with that of Charles Schumer (D-N.Y.) in

25. H.R. 3355, the Violent Crime Control and Law Enforcement Act of 1994, passed the House on August 21, 1994, passed the Senate on August 25, 1994, and was signed into law by President Clinton on September 13, 1994. The assault weapons ban, titled the Public Safety and Recreational Firearms Use Protection Act, is Title XI of that law. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

26. S. 386, 101st Cong., 1st Sess. (1989); see also 135 CONG. REC. S1322 (daily ed. Feb. 8, 1989) (bill introduced by Sen. Metzenbaum).

27. S. 747, 101st Cong., 1st Sess. (1989); see also 135 CONG. REC. S3614 (daily ed. Apr. 11, 1989) (bill introduced by Sen. DeConcini).

the House, in pressing the issue year after year that ultimately led to the ban's prominent place on the policy agenda of the 103d Congress.

The essential features of the original Metzenbaum bill in the 101st Congress formed the basis of a comprehensive approach that carried through to the eventual law. These included: a ban on the manufacture, transfer, or possession of specifically named assault weapons, except those that were lawfully possessed before the ban took effect ("grandfathered" weapons); a ban on copies, or substantially similar versions, of the listed weapons; a ban on additional assault weapons through designation by the Secretary of the Treasury in consultation with the Attorney General; registration and background check requirements for possession and future transfers of grandfathered weapons; and a ban on large magazines holding more than ten rounds of ammunition. Whereas Metzenbaum's bill was a comprehensive ban, DeConcini opted for an incremental approach and an emphasis on reducing the use of assault weapons in the commission of drug crimes. His original bill included a list of fifteen banned assault weapons (later reduced to nine); a provision whereby the Secretary of the Treasury and Attorney General could recommend to Congress that additional weapons be banned; a record-keeping requirement for purchases or transfers of assault weapons; and enhanced penalties for using assault weapons in drug crimes.

In the 101st Congress, both Metzenbaum and DeConcini tried to move their respective bills through the Senate Judiciary Committee so that they might be attached to omnibus anti-crime legislation that was making its way through Congress. By the time their bills came up for committee action, however, it was clear to Metzenbaum that his bill was considered too strong by many on the committee. Rather than risk a losing vote, Metzenbaum decided to throw his support behind DeConcini's bill in order to get that bill approved by the committee, while preserving his ability to offer his own bill on the Senate floor as an alternative. DeConcini's bill was favorably reported by the Judiciary Committee and included in the Senate's omnibus crime bill.

By the time the crime bill came up for consideration on the Senate floor in May 1990, the NRA had mounted such strong opposition among members to any assault weapons ban that Metzenbaum realized there was little chance of strengthening the DeConcini measure. In fact, there would be an effort to strike the DeConcini ban from the bill. Nevertheless, in a tactical maneuver, Metzenbaum went ahead and offered his bill as an amendment to DeConcini's provision, ensuring that his stronger measure would be voted on before voting on the weaker DeConcini bill and would thereby bear the brunt of the opposition. The strategy of pushing the stronger bill first to flank the DeConcini provision worked. The defeat of the Metzenbaum amendment dissipated opposition to the DeConcini measure, which seemed mild in comparison, and the latter survived (albeit barely) when a subsequent amendment to strip it from the crime bill failed 48-52.

In the House, an amendment offered on the floor to gut an assault rifle ban passed and when the House-Senate conference committee met to reconcile the

bills, the House conferees balked at the Senate's assault weapons ban. In a last-ditch frenzied effort to pass a crime bill in the final hours of the 101st Congress, the conference committee stripped the bill of all controversial measures, including the assault weapons ban. The remaining bill was passed by Congress and was signed into law by President Bush on November 29, 1990.

In the 102d Congress, a new Senate omnibus crime bill again included DeConcini's assault weapons bill and this time there was no effort to strip it in the Senate, which passed its crime bill with the assault weapons ban. Again, however, the House refused to accept the measure, voting to strip a ban on thirteen types of assault weapons and ammunition clips of more than seven rounds from its crime bill by a vote of 247-177 on October 17, 1991—one day after the deadliest gun slaying in U.S. history in Killeen, Texas. Once again, when the House-Senate crime bill conference met, it voted to drop the Senate's assault weapon ban. The compromise conference report then passed the House on November 27, 1991, but was filibustered in the Senate. With the threat of a veto by President Bush looming, the Senate voted three times to break the filibuster, but failed each time, and the crime bill was killed.

B. "Against All Odds": Surprise Victory in the Senate

As the 103d Congress began, the overwhelming conventional wisdom was that it would be futile to move the assault weapons bill in the same Congress as the Brady Bill. It was considered impossible to defeat the NRA on two major gun control initiatives in the same Congress, and the Brady Bill was a higher priority for the Clinton Administration and had somewhat greater support. Notwithstanding the long odds, an unusual compromise struck in the Senate and escalating public outrage over the rising tide of assault weapon killings combined to fuel a breakthrough victory in the Senate that swept across the capitol to the House.

Metzenbaum and DeConcini in the Senate and Schumer in the House continued to keep attention focused on the issue and press legislation. Early on in the first session of the 103d Congress, Metzenbaum and DeConcini again introduced their assault weapons bills, S. 653 and S. 639, respectively. It was clear as the new Congress got underway, that, notwithstanding previous failures, momentum was building in support of the ban. With each legislative battle, supporters were learning from their losses and redirecting efforts accordingly. In addition, the bases of support were broadening. All of the major national law enforcement organizations were now solidly behind assault weapon legislation and were making their presence felt on Capitol Hill. Organizations like the Children's Defense Fund were warning of the growing impact of assault weapons, and firearms in general, on children and minorities. Medical groups and emergency room doctors began to stress the health costs of firearm violence and the difficulties of treating victims of assault weapons. Labor, religious, and civic groups added to the clamor for action. With the change to a Democratic Administration, it was widely perceived that a breakthrough might soon be

possible. The open question, however, was whether the momentum would be bolstered or dissipated by the anticipated passage of the Brady Bill.

Violent crime quickly became a major issue of the 103d Congress, and the assault weapons ban, along with the Brady Bill, came front and center as symbols of the public outrage over crime and soaring gun violence.²⁸ There simply was no better symbol of violent crime than guns, and there was no better symbol of violent guns than semiautomatic assault weapons. As a result, the Brady Bill and the assault weapons ban became major topics in the anti-crime debate as yet another omnibus crime bill began to take shape in the first session of the new Congress. For Senators Metzenbaum and DeConcini, who had announced their intention to retire at the end of the term, this was their last chance to pass assault weapons legislation (and for Metzenbaum, the lead Brady Bill sponsor in the Senate, his last chance to pass what had become a signature bill for him). The two campaigned intensely on behalf of the assault weapons measure, Metzenbaum even going so far as threatening to attach the bill to every piece of legislation considered on the Senate floor—a threat every Senator knew had to be taken seriously.

As the media focused attention on the assault weapons issue, it became apparent that a groundswell of public anger, resulting from the cumulative effect of a seemingly endless series of violent shootings, had finally taken its toll on the national patience. The message from the public to Congress was plain—enough was enough. The vast majority of Americans simply did not understand why military-style assault weapons were so readily available and why they had to endure a new massacre every few months. Polls showed that an assault weapons ban was supported by an overwhelming majority of the American people,²⁹ by law enforcement,³⁰ and by dozens of leading medical, labor, civic, civil rights,

28. Firearms constitute 69% of all murder weapons. Guns accounted for the entire increase in homicides from 1989 to 1993. *Nature of Murder Shifts; Weapons Remain the Same*, U.S.A. TODAY, Dec. 5, 1994, at 12A.

29. Seventy-seven percent of all Americans favored an immediate ban of semiautomatic assault weapons, according to a December 17, 1993 CNN/USA Today/Gallup poll. Another CNN/USA Today/Gallup poll taken August 17, 1994, found 71% in favor. An April 1993 LH Research nationwide poll, sponsored by the Harvard School of Public Health, found that 63% of Americans favored a federal law banning the sale of all semiautomatic guns—not just assault weapons. Even a majority of gun owners favored a ban on assault weapons. A 1994 USA Today poll found that 60% of gun owners favored a total ban on assault weapons.

30. Every major national law enforcement organization in America supported a nationwide ban on assault weapons, including the International Association of Chiefs of Police, the National Sheriffs' Association, the International Brotherhood of Police Officers, the National Association of Police Organizations, and the National Fraternal Order of Police. FBI Director Louis Freeh noted in a speech to the National Press Club on December 8, 1993:

[T]he weaponry and ammunition at the disposal of the gangs and drug dealers is staggering. The image of teenagers patrolling the streets with assault weapons is no longer something that is confined to a news story about some distant land. In too many places in our country, it has become reality. In a civilized society like ours, there is simply no place for assault weapons, which serve only to provide a source of strength and power to America's criminal elements. These weapons of destruction must be banned.

Former Director of ATF, Stephen E. Higgins, stated:

Almost daily, ATF special agents and other Federal, State, and local police see the spread of assault-type weapons on the streets. It is the general consensus of law enforcement officials that the ever-

and religious organizations.³¹ The Clinton Administration also supported the ban.³²

On September 23, 1993, Senator Joseph Biden (D-Del.) and Representative Jack Brooks (D-Tex.), the respective chairmen of the Senate and House Judiciary Committees, introduced Democratic omnibus crime bills.³³ This time, neither bill included an assault weapons ban. This was not surprising for the House, where an assault weapons ban had never been accepted and where Brooks, a long-time opponent of gun control, let it be known in no uncertain terms that he was dead set against including any assault weapons provision in the House crime bill. These circumstances meant that the Senate would be the critical focal point for initial action on the measure.

But in the Senate, Biden, himself a supporter of limited gun control (including both the Brady Bill and the assault weapons ban), opted to leave an assault weapons provision out of the crime bill. There were probably two reasons for this. The first was a concern that the highly controversial measure might bring the whole crime bill down—a not too far-fetched prospect. The second was that it was not clear which bill to include. Although the DeConcini bill had passed the Senate already several times and the Metzenbaum bill had failed its only test vote, considerable support had swung behind the stronger Metzenbaum measure in the interim. Handgun Control, Inc., the leading gun control advocacy organization headed by James and Sarah Brady, strongly backed the Metzenbaum comprehensive approach.

By mid-October it was readily apparent that immediate strong action on assault weapons had to be taken if the measure was going to pass at all, and that it was essential for the provision to be incorporated into the crime bill. A separate bill offered on the Senate floor, or a separate amendment offered to the

increasing presence of assault-type rifles in the illicit drug trade and in other types of crime places the safety and the very lives of the American public in immediate peril. The proliferation of these weapons and their massive firepower also poses a tremendous threat to the lives of Federal, State, and local police officers, who are outgunned by the criminals they encounter on the streets.

31. These included the AFL-CIO, American Academy of Pediatrics, American Association of Retired Persons, American Bar Association, American Jewish Congress, American Public Health Association, National Association of Counties, National Urban Coalition, and U.S. Conference of Mayors.

32. As President Clinton told the nation in his October 9, 1993, radio address: "We can't go along being the only country on Earth to let teenagers roam the streets with assault weapons." President Clinton, Radio Address (Oct. 9, 1993). Attorney General Janet Reno added in an October 31, 1993 op-ed in the *Orlando Sentinel*:

The President and I are committed to a national ban on semiautomatic assault weapons. These weapons have no legitimate purpose. They are being used to outgun America's police and spray bullets through this country's neighborhoods. They cause multiple injuries that emergency room doctors compare to horrible combat wounds. The men and women of America's police departments have asked their legislators to ban assault weapons. How can we ignore their plea?

At an April 26, 1994 press conference, then Treasury Secretary Lloyd Bentsen commented: "These weapons have no place in the private market. . . . If Congress is serious about addressing violent crime, it's time to vote seriously, banning the guns that sick and twisted criminals prefer." Bentsen Statement, *supra* note 8.

Former Presidents Ronald Reagan, Jimmy Carter, and Gerald Ford also supported the assault weapons ban. Letter to Members of the U.S. House of Representatives (May 3, 1994).

33. S. 1488, 103d Cong., 1st Sess. (1993); H.R. 3131, 103d Cong., 1st Sess. (1993).

crime bill, would undoubtedly be subject to an NRA-led filibuster, which would require sixty votes to overcome. Inclusion in the crime bill offered more protection since a filibuster of the entire crime bill was, at the time, much less likely and would have been easier to break with the requisite sixty votes.

So as things stood and as the time for Senate action on the crime bill approached, assault weapons legislation was out of the crime bill and the prospects of getting Biden to put it in were growing weaker every day. Biden and the Administration required ban proponents to demonstrate that there were at least fifty votes in favor of the ban; otherwise, neither would be willing to jeopardize the entire crime bill. At the time, however, the best estimation of the vote count for the Metzenbaum bill was only twenty-six firm and eleven likely supporters on one side and thirty-seven firm and nine likely opponents on the other side. In the middle were seventeen undecided or uncertain votes. If some compromise could be reached between the Metzenbaum and DeConcini bills, the vote count improved markedly—up to forty-six firm or likely supporters as compared to thirty-seven for the stronger bill. A straight DeConcini bill was estimated to garner about forty-five to forty-eight votes.

The situation posed a difficult dilemma for Metzenbaum. He recognized that if an assault weapons ban was going to be included in the crime bill and thereby stand a realistic chance of final passage, all the supporters of assault weapons legislation had to come together behind one bill. This meant some compromise between his bill and DeConcini's bill.

But Metzenbaum also recognized that there were serious drawbacks to DeConcini's bill. First, it banned only nine named assault weapons, compared to twenty in Metzenbaum's bill. In addition, unlike the Metzenbaum bill, it did not ban copies of the listed weapons. It also did not have any mechanism of banning additional weapons with the same or similar features as the weapons on the prohibited list. Metzenbaum's bill gave ATF authority to designate additional banned semiautomatic firearms if they met a criteria definition based on certain assault weapon features (the "objective criteria" test) and were not "generally recognized as being particularly suitable for or readily adaptable to sporting purposes" (the "sporting use" test). DeConcini's bill, by contrast, provided that the Secretary of the Treasury, in consultation with the Attorney General, *may recommend* to Congress that additional weapons be banned. Moreover, the DeConcini bill did not ban large capacity ammunition magazines; Metzenbaum's bill prohibited clips larger than ten rounds. Finally, DeConcini's bill included a three-year sunset provision, which meant that the ban would be lifted automatically after three years unless Congress passed a new law to extend the life of the law.³⁴ The bottom line for Metzenbaum was that DeConcini's bill,

34. DeConcini's bill also included two other provisions that were not in the Metzenbaum bill: a provision that doubled the penalty if an assault weapon was used in a drug-related crime and a provision that required purchasers and sellers of "grandfathered" assault weapons to maintain forms recording the transaction.

Both bills exempted from the ban state and federal governments and firearms lawfully possessed prior to the effective date of the ban. In addition, the Metzenbaum bill provided an exemption for purposes of testing or experimentation authorized by the Secretary of the Treasury. The Metzenbaum bill also provided a non-

if enacted, would have been easily circumvented by gun manufacturers and soon would have had no effect. Any effect it did have would have ended after only three years.

The idea of compromising on such a piece of public safety legislation—a compromise that probably would mean many lives lost—was an anathema to Metzenbaum. Metzenbaum believed that a weak law actually might do more harm than good—it would not solve the problem while it would divert legislative attention away from the issue for the near future. Based on his long experience with gun control issues, Metzenbaum felt that there would be only one bite at the apple, and that if it could not be done right it should not be done at all. The problem with this was that Metzenbaum would not be there to do it right the next time around, and the issue might founder without its chief agitator in Congress. DeConcini also would not be there next time. Schumer would be there on the House side, assuming his re-election, but it was difficult to lead the issue from the House; prior Senate passage was critical to focus pressure on the House if the measure had any hope of final passage. Would other Senate supporters really push the issue?

Metzenbaum also believed that several things had changed from prior years that bolstered the chances of passing his comprehensive bill. Public support for a strong response to the problem was very high, largely as a result of the continuous series of publicized tragedies involving assault weapons. A broad coalition of law enforcement and consumer groups preferred a comprehensive bill. In addition, the change in administrations increased the chances of passing any assault weapons bill.³⁵ If members of Congress were offered only one assault weapons measure to vote on (so that one vote would determine, in the eyes of the public, whether a member was *for* or *against* an assault weapons ban), even if that measure went further than the DeConcini bill, it probably would receive about the same number of votes as that bill. On the other hand, if Metzenbaum used his bill to flank the DeConcini bill again, he almost certainly would lose again, with many members taking advantage of the opportunity to vote for the weaker bill.

Metzenbaum decided to seek out a compromise with DeConcini that would bring all supporters together behind one bill—a compromise bill that could be portrayed as weaker than his own bill and yet retain the essential features of his comprehensive approach. He proposed to DeConcini a melding of their two bills: the ban on copies, the objective criteria test, and the ban on large ammunition magazines would be retained from the Metzenbaum bill; the shorter

exclusive illustrative list of the seven most common hunting and sporting firearms that were exempt from the ban and an explicit exemption for any firearm that had been “rendered permanently inoperable” or that was operated by bolt-action, lever-action, or slide-action.

35. On August 11, 1993, as part of his crime control package, President Clinton issued two Presidential Memoranda, one directing ATF to “take whatever steps are necessary, to the extent permitted by law, to ensure compliance with present [firearms dealer] licensing requirements” and the other directing ATF to “take the necessary steps to reexamine the current importation factoring system to determine whether the system should be modified to ensure that all non-sporting handguns are properly denied importation.” The importation of assault pistols are banned pending ATF’s review.

list of banned weapons, provision for a study by the Attorney General, and increased penalties for using assault weapons in drug-related crimes would be retained from the DeConcini bill. In addition, Metzenbaum suggested three other changes designed to make the compromise bill more politically attractive. First, the list in the Metzenbaum bill of specifically exempted hunting and sporting guns could be greatly expanded and highlighted in a separately headed section of the bill. Second, to reduce the potential that the record-keeping requirements of the DeConcini bill would be misinterpreted to require registration of firearms, that provision would be dropped. Finally, Metzenbaum proposed deleting the "sporting use" test and removing ATF discretion to designate additional banned weapons, while retaining the rest of his objective criteria definitional test.³⁶

DeConcini initially was unreceptive to such a compromise. Although he agreed that it was essential for ban proponents to get behind one bill, he was convinced that no bill stronger than his bill could pass. Accordingly, both Metzenbaum and DeConcini submitted their respective bills to Biden requesting that each be included in the crime bill, requests that would not be accepted absent some Metzenbaum/DeConcini compromise or a showing of fifty votes. Non-inclusion meant that Metzenbaum and DeConcini would be forced either to offer their bills on the floor as separate amendments to the crime bill or withdraw them altogether. There did not appear to be much difference between these choices since a separate amendment would almost certainly fail to muster the sixty votes necessary to invoke cloture and break an NRA-led filibuster against the amendment.

Around this time, Senator Dianne Feinstein (D-Cal.) became more involved in the issue. Feinstein, in her first term in Congress, had supported gun control as Mayor of San Francisco and had announced her support for a strong assault weapons ban in Congress. On September 22, 1993, the day before Biden introduced the crime bill in the Senate, she wrote to Biden requesting that he include the Metzenbaum bill in the crime bill.

But although she preferred a comprehensive approach, Feinstein also

36. The "sporting use" test had caused a great deal of confusion and misunderstanding. Under the definition of "semiautomatic assault" weapons in the Metzenbaum bill, ATF could ban an additional or newly-developed semiautomatic firearm not on the prohibited list only if it had a certain combination of combat features and was not suitable for sporting purposes. Notwithstanding the fact that ATF had already been applying this sporting use test to ban imported assault weapons and that the test was an *additional* hurdle that had to be cleared before a gun could be banned, the relatively vague and discretionary nature of the sporting use test became a lightning rod for NRA opposition. The test was especially prone to the misunderstanding or misrepresentation that the bill gave ATF total discretion to decide which guns had a sporting use and could be banned and which ones did not.

The sporting use test actually was superfluous since the rest of the objective criteria definition adequately distinguished between sporting and assault weapons. The sporting use test, therefore, could be deleted with no harm to the bill. More importantly, Metzenbaum was proposing a fundamental change in the way the objective criteria test worked. Instead of authorizing ATF to designate additional banned weapons, the new objective criteria definition (without the sporting use test) would be *self-executing*. The provision for ATF designation would be dropped. There would be no ATF discretion to directly ban particular guns (although ATF could still issue interpretive regulations to provide more detailed guidance on the meaning of certain terms in the statute). The objective features would automatically determine whether a gun was a prohibited assault weapon or not. Any manufacturer, dealer, or hunter would know that if a gun did not have the specified features, it was not banned. This self-executing approach was ultimately incorporated into the final bill that passed.

sensed the necessity for some kind of compromise. Consequently, she developed a provision that was intended to offer more assurance to hunters that their rifles and shotguns were not going to be affected by the ban. The provision explicitly exempted any semiautomatic or manual rifle or shotgun that could only hold up to three rounds of ammunition in either an internal or detachable magazine. Feinstein initially intended to offer her provision as an amendment to whatever assault weapons ban was offered on the floor.

When Feinstein sought Metzenbaum's support for the provision, he demurred, recognizing that there were several problems with the idea. The first problem was that there is no such rifle or shotgun presently manufactured that is incapable of holding more than three rounds. It is not even clear that it is technologically possible to design a firearm that is capable of accepting a detachable magazine yet limited to a certain number of rounds. Second, the Metzenbaum bill already exempted legitimate hunting and sporting guns through the exemption for *all* manually-operated firearms (regardless of how many rounds of ammunition they were capable of holding), the objective criteria definition (which exempted all semiautomatic guns that did not have at least two combat features), the exemption for ammunition magazines that held ten or fewer rounds, and the exemption of the most common hunting and sporting guns by name.

The upshot was that the Feinstein amendment was a political ploy that would have had no practical effect beyond the Metzenbaum bill but which ran the very real risk of actually backfiring politically. The NRA would certainly point out that the amendment was an empty concession and a specious attempt to placate hunters. Although it seemed doubtful that the provision could provide political cover to any Senator searching for a way to support the legislation, Feinstein insisted that she was picking up votes with it. She also had decided that the illustrative list in the Metzenbaum bill of the most common hunting and sporting guns exempt from the ban should be expanded to show everyone exactly how many guns would not be affected by the legislation and, by implication, how limited the assault weapon measure was. She began to circulate a list of all known hunting and sporting guns that would not be banned under the Metzenbaum definition of assault weapons, some 670 firearms. Over the next few weeks, she conducted an intense lobbying campaign to other members and the media, claiming that with her new amendment and the list of 670 exempt guns she was broadening the bill's protection of hunters.

As the time for floor consideration of the crime bill drew near, Metzenbaum and DeConcini decided that they either had to come up with a compromise bill or suffer near-certain defeat on a cloture vote. This time, DeConcini was willing to explore a compromise bill along the lines of Metzenbaum's earlier proposal, although he insisted upon including a sunset provision. DeConcini proposed the three-year sunset from his bill, Metzenbaum proposed a fifteen-year sunset, and they settled on ten years. Metzenbaum and DeConcini also decided that Feinstein would be the best person to take the lead in offering the compromise amendment on the floor. After all, she was up for reelection and they were not.

Also, she had positioned herself as the third party of compromise between Metzenbaum and DeConcini and had appeared to be making some progress in her direct member-to-member lobbying efforts.

The compromise legislation that emerged and that would be offered on the floor substantially tracked the initial Metzenbaum proposal to DeConcini. The legislation included all of the essential features from Metzenbaum's comprehensive bill: the list of banned assault weapons, the ban on copies, the self-executing objective criteria test (without ATF discretion and the sporting use test), and the ban on large capacity ammunition magazines. It also included the provisions for increased penalties for drug-related crimes, record-keeping, a study by the Attorney General, and a sunset from the DeConcini bill. Finally, Feinstein added her provision exempting rifles and shotguns that could not hold more than five rounds (up from her earlier proposal of three rounds) and an appendix listing the 670 hunting and sporting weapons that would not be covered by the ban. In keeping with the political angle she had taken from the beginning, Feinstein dubbed the compromise bill the "Public Safety and Recreational Firearms Use Protection Act."³⁷

When the Senate began consideration of the crime bill on November 3, 1993, supporters of the assault weapons ban estimated that they had forty-six or forty-seven votes, with fifteen Senators still undecided or whose votes were uncertain. On November 9, Feinstein offered the compromise bill as an amendment, joined by Metzenbaum, DeConcini, and eleven other cosponsors.³⁸

Republicans³⁹ initially decided not to filibuster the amendment, in all likelihood because such a move would have been tremendously unpopular and because it would have held up a bill that they liked a great deal. Instead, they tried to table the amendment, by which a vote of fifty-one Senators would kill it. The motion to table was barely defeated by a vote of fifty-one to forty-nine.⁴⁰ Eight days later, on November 17, the amendment came up for final passage and it passed by a vote of fifty-six to forty-three (five additional Senators having joined in support).⁴¹ On November 19, the crime bill, with the ban on assault weapons, was approved by the Senate ninety-five to four.⁴²

37. See generally Glenn F. Banting, *Feinstein Faces Fight for Diluted Gun Bill*, L.A. TIMES, Nov. 9, 1993, at A5.

38. 139 CONG. REC. S15429 (daily ed. Nov. 9, 1993).

39. The reference here and elsewhere to Republicans as being in opposition to the assault weapons ban or gun control in general is not meant to convey that all Republicans oppose gun control or that all Democrats support gun control, neither of which is true. A small number of Republicans have supported, and a somewhat larger block of Democrats have opposed, gun control measures. Rather, the shorthand reference reflects an overall party position in opposition to gun control measures in general and the assault weapons ban in particular.

40. 139 CONG. REC. S15461 (daily ed. Nov. 9, 1993). The swing vote in defeating the motion was provided by Senator Ben Nighthorse Campbell (D-Colo.).

41. 139 CONG. REC. S15816 (daily ed. Nov. 17, 1993).

42. 139 CONG. REC. S16301 (daily ed. Nov. 19, 1993). The Senate crime bill, as passed, substituted the House designation H.R. 3355 for the Senate number S. 1607.

C. *"A House Divided": Trouble and A Narrow Victory in the House*

The victory in the Senate was both stunning and short-lived, for the NRA dug in for a long, protracted fight in the House, where the assault weapons ban eventually survived by the slimmest of margins.

The crime bill had stalled in the House due to strong opposition to the assault weapons ban as well as the Racial Justice Act (a provision in the Senate bill that allowed evidence of racially discriminatory imposition of the death penalty to be considered in sentencing for capital crimes). Brooks had vowed that he would never allow the assault weapons provision to be included in the House crime bill.

Finally, on March 18, 1994, Brooks introduced a new omnibus crime bill in the House, which was jointly referred to six different committees for consideration. Not surprisingly, it did not include any measure on assault weapons. The bill was called up ten days later under a special rule governing the floor procedure that precluded the assault weapons ban from being offered as an amendment.

This was neither unexpected nor lamented by House supporters of the assault weapons ban. Considering that they were roughly thirty votes short of passing the measure, House supporters had not pressed to have assault weapons considered as an amendment to the crime bill. They needed more time to continue lobbying members under a strategy that involved a vote on a separate assault weapons bill after the crime bill had passed in the House but before the House-Senate conference had concluded. Proponents hoped that would give them the extra time they needed to garner enough votes to pass a separate bill. They believed that if they were successful and the assault weapons bill passed, the conference committee would be forced to accept the provision in the final crime bill.

The House strategy entailed considerable risk. Everything depended on timing, a separately passed assault weapons bill, and the ultimate inclusion of that bill in the crime bill conference report. The assault weapons ban had to be included in the crime bill to pass because, if left as a separate bill, it would have to be sent back to the Senate, where it would be much more vulnerable to a filibuster outside the context of the crime bill.

The separate House vote also became necessary because Brooks announced that he would not accept an assault weapons provision in conference without an up or down vote on a separate assault weapons bill and that he would not even convene the conference prior to that vote. Brooks was both confident that the House would defeat the assault weapons bill and eager to avoid a conference ambush. He personally strongly opposed the assault weapons bill, but if the House conferees rejected the assault weapons ban in conference, he would take the lion's share of the blame for killing the highly popular measure. He might also be dooming the crime bill to defeat in the Senate, where Republicans who did not like the outcome of the crime bill conference might combine with enough

Democrats who did not like a crime bill without a ban on assault weapons to defeat the crime bill. On the other hand, if the House conferees accepted the Senate assault weapons provision in conference, he would be blamed by the NRA and might even be dooming the crime bill to defeat in his own House. Either way, it looked like a no-win situation for Brooks.

Requiring a separate House vote on assault weapons prior to conference, however, potentially transformed the dilemma into a win-win situation for him. If the bill were defeated, he would be on solid ground in refusing to accept it in conference; if it passed, he would be seen as having no choice but to allow it to be considered in conference despite his own opposition. Either way, the separate floor vote put the matter largely out of Brooks' hands and that is, probably, exactly where he wanted it.

On April 20, the House crime bill passed without the assault weapons ban. Attention then focused on the upcoming separate assault weapons vote in the House. Schumer quickly shepherded an assault weapons bill through the Judiciary Committee. Although the House assault weapons bill⁴³ was modelled on and contained all of the essential features of the Senate bill, the House bill differed from the Senate bill in several minor respects.⁴⁴ Reflecting the closeness of the House vote, the House version also included a couple of clauses that had no legal effect but were added to satisfy a few House members.⁴⁵

By the third week of April, both proponents estimated that they were still about fifteen votes shy of passing the assault weapons bill.⁴⁶ After an intensive lobbying effort by proponents in both houses and the Clinton Administration, including at least a dozen last-minute personal phone calls by the President to individual members, the assault weapons bill passed the House by the narrowest of margins, 216-214, on May 5, 1994.⁴⁷

43. H.R. 4296, 103d Cong., 2d Sess. (1994).

44. Whereas the Senate bill's ban on copies covered "types, replicas, or duplicates in any caliber" of the named assault weapons, the House bill referred to "copies or duplicates." This change was made by Schumer in the House in response to a concern that the ban on weapons of the same "type" as the weapons on the prohibited list was too broad. The House bill's omission of the words "in any caliber" apparently was simply an oversight. In addition, whereas the Senate version exempted exportation of assault weapons from the ban, the House version did not. Feinstein had inexplicably added the export exemption to the Senate version (it was not in either the Metzenbaum or DeConcini bills). Since it was hypocritical to ban the importation and domestic manufacture of assault weapons in the interest of public safety, yet allow them to be freely exported to other countries, Schumer deleted the exemption. The House version included an exemption for transfers by licensed dealers to police authorized to purchase the weapons for official use and an exemption for agency transfers of retiring police officers' service firearms. These exemptions had been requested by national police organizations during the debate in the House. In addition to the differences discussed above, there were a few other technical or stylistic changes. *See also supra* note 37.

45. Both of these clauses referred to the list of 670 hunting and sporting guns that were not covered by the ban. One stated: "The fact that a firearm is not listed in Appendix A shall not be construed to mean that [the ban] applies to such firearm." This clause is meaningless since a firearm could not be banned unless it met the definition of a semiautomatic assault weapon in the legislation. The other clause added the proviso: "No firearm exempted by this subsection may be deleted from Appendix A so long as this Act is in effect." Such a provision is, of course, ineffectual, since it cannot bind future Congresses.

46. *See generally* Mary McGrory, *House Crime Bill Shoots Blanks*, WASH. POST, Apr. 19, 1994, at A2.

47. 140 CONG. REC. H3116 (daily ed. May 5, 1994). 177 Democrats were joined by 38 Republicans and 1 Independent in voting for the bill, while 137 Republicans and 77 Democrats voted against it. Representatives Richard Lehman (D-Cal.) and Andrew Jacobs Jr. (D-Ind.) changed their vote from "nay" to "yea" to allow passage of the bill.

D. "Just Pawnbrokers in the Game": Crime Bill Conference #1

Notwithstanding that both houses had now passed an assault weapons ban, persistent opposition by Brooks, the chairman of the crime bill conference, required a last-minute compromise to keep the measure in the crime bill.

It was more than two months after the House passed the assault weapons ban before the crime bill conference convened to work out a final bill. Brooks knew, with the House vote, that he no longer could fend off an attempt to have the measure included in the crime bill and shifted his strategy toward weakening the substance of the legislation. In a pre-emptive move, Brooks circulated his own assault weapons proposal in the weeks prior to the conference.⁴⁸ Among other things, the Brooks proposal:

- Deleted the AR-15, the third leading assault weapon, from the list of banned assault weapons;
- Eliminated the ban on copies of the listed weapons;
- Deleted the objective criteria test for defining and banning assault rifles and shotguns and eviscerated the test for assault pistols;⁴⁹
- Raised the limit on banned large capacity ammunition magazines from ten to twenty rounds;⁵⁰ and
- Deleted from the definition of banned ammunition magazines combinations

48. See generally Mitchell Locin, *Hyde to Support Weapons Ban*, CHI. TRIB., July 26, 1994, § 1, at 3.

49. The House and Senate assault weapon bans defined a semiautomatic assault pistol as a pistol that accepts a detachable magazine and has at least two of the following features:

1. An ammunition magazine that attaches to the pistol outside of the pistol grip;
2. A threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
3. A shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;
4. A manufactured weight of 50 ounces or more when the pistol is unloaded; and
5. A semiautomatic version of an automatic firearm.

The Brooks proposal would have drastically changed this definition by eliminating the threaded barrel criterion, limiting the barrel shroud criterion to those which are specifically designed to dissipate heat, raising the weight criterion from 50 to 60 ounces, and revising the semiautomatic version of a machine gun criterion. These changes were all technically crafted to exempt most assault pistols. Since a threaded barrel is a feature principally designed to accommodate silencers and other non-sporting attachments, its removal as a criterion is difficult to explain other than that it would allow some assault pistols that would otherwise be covered by the ban to escape coverage. The proposed change to the barrel shroud language would effectively eliminate it as a criterion, since barrel shrouds for handguns are designed primarily to give the shooter something to hold onto and are generally not designed to dissipate heat. The change in the weight criterion also would have made that criterion inapplicable to some assault pistols otherwise banned. Finally, the change in the phrasing of the semiautomatic version of a machine gun criterion was designed to cause disputes over whether the semiautomatic version or the automatic version was produced first. See ATF Comments to Proposed Revision of Semiautomatic Assault Weapon Legislation, July 16, 1994 [hereinafter ATF Comments].

ATF concluded that "[t]hese changes would result in a number of pistols which would be subject to regulation under the House/Senate bill not being regulated under the proposal." *Id.* For example, the dilution of the definition would have had the practical effect of allowing manufacturers to produce guns similar to the Uzi, TEC-9, and SWD M-10, such as the A.A. Arms AP9 and Calico M-950 pistols.

50. This change would have exempted most handgun magazines from regulation as well as a significant number of rifle and shotgun magazines. As ATF explained, "[t]he significance is that 20 rounds is a standard assault rifle magazine, and quadruple that of the common sporting rifle magazine of 5 rounds. Many of the tragic crimes committed with assault rifles probably involved 20 round magazines. In any event, the carnage would not have been reduced if the murderer had been limited to only 20 rounds of high power ammunition."

of parts from which such magazines could be assembled.⁵¹

In a nutshell, the Brooks proposal was a carefully crafted attempt to virtually gut the assault weapons ban and was highly favorable to the NRA.

Brooks' proposal to delete the AR-15 from the ban was especially offensive to ban proponents and would have, by itself, largely eviscerated the legislation. The AR-15 is the semiautomatic copy of the military M-16 machine gun, which replaced the M-14 in Vietnam and has since served as the standard rifle of the U.S. armed forces. In 1959, production of the AR-15 was licensed to Colt Firearms in Hartford, Connecticut. In 1989, Colt voluntarily stopped selling the AR-15 to civilians in response to the Bush Administration's ban on the importation of assault weapons, including a ban on reimportation of the AR-15 into the United States. When Colt was sold in 1990, the new owners reversed that decision and resumed the manufacture and sale of a "modified" AR-15 to civilians, renaming it the "Sporter."

According to ATF gun trace reports, the AR-15, which was often sold with a twenty or thirty shot magazine, was the third top assault weapon most frequently traced to crime from 1986 to 1993. It ranked in the top four in each of those eight consecutive years. In 1993, it was second. Over these eight years, it was traced to over 4,000 crimes, and since ATF traces only ten percent of the guns used in crime each year, that figure could be as high as 40,000.⁵²

51. As ATF explained, "elimination of the combination of parts language would permit avoidance of the prohibitions of the bill by manufacturing and selling unassembled magazines with a single, readily obtainable part missing." ATF Comments, *supra* note 49. Purchasing "kits" of "replacement" parts has been a common means of converting semiautomatic weapons into illegal machine guns. See, e.g., U.S. NEWS & WORLD REP., June 1993 (One of the ways Branch Davidian leader David Koresh was able to amass an arsenal of machine guns was by purchasing replacement part kits for M-16 machine guns.). According to ATF: "Even though [some gun dealers are] convicted felons they continue to conduct business because the company distributes gun parts and not firearms." ATF Comments, *supra* note 49.

52. The AR-15 is especially prominent in violent crime. On February 22, 1994, a drug-abusing 17-year-old with an AR-15 engaged in a shoot-out with police in Los Angeles and shot Christy Hamilton, a rookie police officer. See L.A. TIMES, Feb. 23, 1994, at A1. On January 31, 1994, a former student opened fire on a Seattle schoolground, using an AR-15 to shoot a teacher in the back, killing her. On October 30, 1993, an avowed "child-hater" sniper in El Cajon, California, opened fire with an AR-15 in a parking lot, killing a woman and her 9-year-old daughter and wounding 5 others. On August 10, 1993, Dion Terres entered a local McDonald's in Kenosha, Wisconsin armed with an AR-15 and another assault weapon and began a random shooting spree, killing three. On February 28, 1993, while attempting to serve federal search and arrest warrants at the Branch-Davidian compound in Waco, Texas, four ATF special agents were killed and 16 others were wounded with an arsenal of assault weapons that included 123 AR-15s. On December 27, 1992, a gunman with an AR-15 entered a tavern in Minnesota and fired a hail of bullets, killing two and wounding two others. See STAR TRIB., May 11, 1994, at 1A. In October 1992, a gang sniper in a Chicago housing project shot and killed a 7-year-old boy with an AR-15 as he was walking to school holding his mother's hand. On August 15, 1991, Chicago Housing Authority police officer Jimmie Lamar Haynes was shot and killed with an AR-15 as he and two fellow officers were walking back to their patrol cars after being relieved of guard duty.

On March 21, 1991, a 15-year veteran of the Dayton, Ohio police force, William "Steve" Whalen, was shot and killed, and another officer was wounded, by a mentally ill man armed with an AR-15. On April 25, 1990, a 22-year-old involved in a gang fight shot 30 rounds from his AR-15 into an apartment where a 4-year-old girl slept, killing her. See ATLANTA J./ATLANTA CONST., June 25, 1991, at C3. On April 15, 1985, Missouri State Highway Patrol Troopers Jim Linegar and Allen Hines stopped a van during a routine traffic stop. The driver, a member of a neo-Nazi terrorist group, opened fire on the two officers with an assault weapon, killing Linegar and seriously wounding Hines. The assailant fled, and found in the van were two AR-15s and a host of other assault weapons. These are just a sampling of AR-15 incidents over the past decade.

If the AR-15 were exempted from the ban on assault weapons, it probably would become the leading assault weapon in America virtually overnight. As word spread of its exemption from the ban, production would expand and sales would escalate. The NRA knew that making such an exception would drastically reduce the effectiveness of the ban and provide a basis for arguing later that the ineffective law should be repealed. But the NRA might also have realized that it would be blamed for every subsequent death caused by an AR-15. Brooks and other opponents might have realized that they too would be blamed and have a tough time explaining why they exempted one of the most notorious assault weapons after both houses had passed a bill including the weapon. They might also have recognized the poor image of putting law enforcement more at risk at the same time that the crime bill was putting 100,000 more police on the street. They might have recognized all of these daunting prospects, for the AR-15 exemption was withdrawn from later proposals.

The Brooks proposal essentially would have reduced the assault weapons ban to nothing more than a list of prohibited weapons, notwithstanding that the House and Senate definitions of semiautomatic assault weapons were almost identical and no amendments even were offered to the definitions during the extensive debates in both houses. Under the Brooks bill, weapons with the same characteristics and capabilities as the ones on the prohibited list, whether manufactured presently or developed in the future, would not have been banned. ATF concluded that the Brooks proposal "undermines any effort to seriously address the assault weapons menace, and leaves assault rifles virtually unaffected by the bill. . . . The proposal would permit the importation, manufacture, and possession of weapons with features virtually identical to those specifically banned by name."⁵³

By the time the crime bill conference convened, Brooks' proposal had been so thoroughly repudiated by ban proponents and the media that Brooks never actually offered it in conference. Instead, to placate the NRA, Brooks insisted on a wholly unrelated exemption for pawnbrokers from the Brady Law. This was Brooks' "price" for convening the conference and allowing assault weapons to be considered in conference. Metzenbaum strongly objected to this demand, which amounted to nothing more than weakening the Brady Law in exchange for assault weapons legislation.⁵⁴ It was widely perceived, however, that Brooks "needed something" to give the NRA as political cover for allowing an assault

53. ATF Comments, *supra* note 49.

54. The pawnbroker exemption was neither a random nor a minor proposal. Background checks initiated by pawnbrokers had proved to be the most effective means of catching felons and other prohibited persons attempting to obtain firearms under the new Brady Law. See generally Richard Lacayo, *A Small-Bore Success*, TIME MAG., Feb. 20, 1995, at 48 (in Houston, of 199 gun sales blocked by the Brady Law in its first three weeks, 177 involved pawnbroker transactions); Debbie Howlett, *Bonus: Background Checks Turn Up Criminals*, USA TODAY, Apr. 15, 1994; Nancy Mathis, *ATF: It's Working: First 30 Days of Brady Law Called A Success*, HOUSTON CHRON., Mar. 31, 1994, at 11A (in Dallas, 98% of the blocked gun sales were pawnbroker transactions; President Reagan's would-be assassin, John Hinckley Jr., obtained his gun from a Dallas pawnshop). According to Handgun Control, Inc., 26-32% of Brady denials in California in the first four months after the law took effect involved pawnbroker transactions. Consequently, the NRA was determined to exempt pawnbrokers, which, of course, would make the Brady Law much less effective.

weapons ban and certain other gun control measures in the crime bill. Schumer in particular insisted that it was politically necessary to make this concession to Brooks.

In the end, Metzenbaum reluctantly relented to the pawnbroker exemption and he, joined by fellow conferees DeConcini and Ted Kennedy (D-Mass.), moved to insert an assault weapons provision into the bill.⁵⁵ Recognizing the critical political bargaining and closeness of the assault weapons vote in the House, Metzenbaum decided to offer the House version of the ban (with a few minor changes) rather than the Senate version. After the House bill had passed, the Fraternal Order of Police (FOP) expressed concern that the language of the exemption they had requested for police officers was not broad enough. As a result, broader language, negotiated between Metzenbaum and the FOP, was included to ensure that there would be no interference with access by law enforcement officers to the banned weapons and magazines so long as such access was for law enforcement purposes. Also after the House bill had passed, the Nuclear Regulatory Commission (NRC) had requested an exemption for contractors responsible for maintaining security at federally licensed nuclear facilities. Language negotiated between Metzenbaum and the NRC was added providing for such a limited exemption.

In accordance with a prior agreement of the Senate conferees reached just prior to the House vote on assault weapons, the Metzenbaum amendment also dropped the record-keeping requirements that had been included in both the House and Senate bills. That provision, derived from the DeConcini bill, required licensed dealers and private parties to complete and retain a federal form whenever a grandfathered assault weapon was transferred. This resembled a system of registration to some members of the House who agreed to vote for the bill only on condition that the provision subsequently be dropped in conference. In keeping with that agreement, the provision was omitted.

The Metzenbaum amendment also modified the grandfather clause so that all weapons lawfully possessed "under Federal law" prior to the effective date of the ban would be exempted. The grandfather clause in the House and Senate bills did not contain such a qualification; consequently, assault weapons had to be lawfully possessed under both state and federal law in order to be exempt. The "under Federal law" qualification meant that assault weapons would not have to be lawfully possessed under *state* law in order to be grandfathered. This qualification was not to Metzenbaum's liking, but he acceded to a request to include it by Schumer, who insisted that it was necessary to gain the support of some House members from New Jersey.⁵⁶

55. In moving the amendment, Metzenbaum stated: "For all the new cops on the street and increased penalties, the crime bill will do nothing to take dangerous weapons out of the hands of criminals unless we get military-style weapons of war off the streets. There simply can be no serious anti-crime legislation without banning these military-style weapons of war."

56. New Jersey bans assault weapons, so under the original language those weapons would not have been exempt grandfathered weapons. Some congressmen from New Jersey believed that if New Jersey removed its state ban in the future, the weapons that had been unlawful under state law should be eligible for the grandfather exemption. The change in the grandfather clause does not affect the power of states to ban or

Finally, the Metzenbaum amendment reinserted the Senate language, inadvertently omitted in the House bill, which banned copies of the named assault weapons “in any caliber.”⁵⁷

In the conference, there was no threat to the assault weapons provision on the Senate side, as the five Democratic conferees—Biden, Kennedy, Metzenbaum, DeConcini, and Patrick Leahy (D-Vt.)—were solidly behind the measure and could outvote the four Republican conferees opposed to the ban—Orrin Hatch (R-Utah), Strom Thurmond (R-S.C.), Alan Simpson (R-Wyo.), and Charles Grassley (R-Iowa). On the House side, however, the vote was more uncertain. Of the six Democrats on the panel, five were in favor of the ban (with Brooks opposed). Of the four Republicans on the panel, three were against and one, Henry Hyde (R-Ill.), was the swing vote. Hyde, who had voted against the ban in 1991 but had voted in favor of the ban this time, had come under intense pressure from the NRA. If he voted against the ban, the House conferees would deadlock five to five and the ban would fail. Hyde, however, stuck with his recent position and the House conferees voted six to four in favor of including the assault weapons ban.⁵⁸ The conferees approved the final crime bill conference report on July 28.

E. “The Guns of August”: Final Gambits, the Endgame, and Passage

Although most did not realize it at the time, the battle for assault weapons and the crime bill was still far from over. Despite tremendous pressure to compromise on the assault weapons ban, which included pressure from high-level Democrats in both houses, the Senate Democratic conferees held firm for a strong bill. Nevertheless, were it not for a critical error in overreaching by Brooks, the assault weapons ban would have been much weaker.

After the conference, the crime bill again stalled in the House. Republicans and some like-minded Democrats, who complained about the assault weapons ban and the crime prevention programs (which they labeled “pork” and “social spending”) in the bill, were joined by some members of the Congressional Black Caucus and others who objected to the sixty new death penalty crimes in the bill in blocking consideration of the bill on the House floor. The NRA played a particularly prominent role in engineering the turnabout from the House’s approval of the crime bill in April.⁵⁹ On August 11, the House defeated

otherwise regulate assault weapons.

57. See *supra* note 36. Even the Brooks proposal had included the “in any caliber” language.

58. Hyde said that he changed his mind from his earlier opposition because “these are weapons of enormous destruction. . . . [T]heir only purpose is to kill a lot of people in a hurry.” Perry Bender, *House Panel Endorses Ban on Some Assault Weapons*, U.S.A. TODAY, Apr. 29, 1994, at 6A. When asked if he would change his mind again, he replied: “I just think that the vote I cast is a right one and I know of no reason to change it.” Mitchell Locin, *Hyde to Support Weapons Ban*, CHI. TRIB., July 26, 1994, § 1, at 8.

59. The NRA spent at least \$196,749 in political action committee contributions on 40 Democrats and 35 Republicans who switched from voting in favor of the House crime bill in April to voting to block its consideration in August, all of whom voted against the assault weapons ban in May. Michael Ross, *Gap Narrows in Stand Off Over Anti-Crime Bill*, L.A. TIMES, Aug. 18, 1994, at A1.

consideration of the crime bill on a 225 to 210 procedural vote.

This was considered by most, both within Congress and without, to be the death-knell for the crime bill. But over the next week, President Clinton made an all-out effort to convince certain House members to change their vote and to broker a compromise with Republicans that would allow the crime bill to be voted on in the House.⁶⁰ The efforts paid off, and on Friday, August 19, the House took the extraordinary action of recommitting the conference report back to a second conference. Conferees were given until noon that Sunday to produce a new conference report.

The crime bill conferees worked virtually around the clock Friday and Saturday, August 19 and 20, in a frantic attempt to renegotiate an agreement on a second conference report. While other issues were being worked out, an intense effort was made by the Clinton Administration, Biden, Schumer, Mike Synar (a House Democratic conferee who supported the assault weapons ban), and others, to persuade the other four Senate Democratic conferees (Metzenbaum, DeConcini, Kennedy, and Leahy) to compromise on the assault weapons ban. The former parties argued that the big picture had to be kept in mind—revising a multitude of issues in the crime bill at this stage in a combination sufficient to satisfy enough members with differing interests was an extremely delicate process and assault weapons was only one (albeit a major one) of these issues. Moreover, resuscitating the crime bill had become of critical importance to the Clinton Administration.

The four Senate Democratic conferees began to receive a succession of draft proposals from Brooks, all of which resembled the proposal he circulated prior to the first conference—all carefully drafted to effectively gut the assault weapon ban. Rather than being minor changes to the bill that passed both houses and the first conference, they were completely new bills and were total nonstarters for the four conferees. The latter would have considered minor modifications to the bill but they were not willing to discuss a fully rewritten draft that represented the NRA's idea of an assault weapon ban.

Finally, Biden and Schumer attempted to break the impasse. They proposed to the four conferees an outline of a compromise bill which they represented had Administration support and which they had reason to believe would be acceptable to Brooks, the House conferees, and House Republicans. The crux of their proposal was to delay the effective date of the ban and set up a mechanism of prior congressional review of ATF decisions to ban any assault

60. See generally Joe Davidson, *Clinton Gets Three Converts on Crime Bill*, WALL ST. J., Aug. 18, 1994, at A2; *Reaching a Deal on the Crime Bill*, WASH. POST, Aug. 18, 1994, at A1; Steven A. Holmes, *Blacks Relent on Crime Bill*, N.Y. TIMES, Aug. 18, 1994, at A1. In particular, critical momentum was provided by some members of the Congressional Black Caucus in the House who had voted to block floor consideration of the crime bill because of its new death penalties and the absence of the Racial Justice Act but announced that they would reverse their positions on the procedural vote because of the bill's assault weapons ban and prevention programs. *Id.*

weapons that were not on the prohibited list.⁶¹

Initially, the four conferees, led by Metzenbaum and DeConcini, resisted such a compromise. They recognized that the proposal entailed significant concessions that would considerably weaken the bill. ATF would be required to make a list of all existing assault weapons, and any that were inadvertently left off the list would become grandfathered and exempt from the ban. Also, requiring further congressional action to implement the ban against copies and other assault weapons meeting the objective criteria test would undermine the legislation, especially if the subsequent Congress was more conservative, as seemed likely at the time. Most significant, the proposal would supplant the mechanism for a self-executing, automatic, and immediate ban of assault weapons not on the prohibited list (i.e., the objective criteria definition) with an ATF designation/congressional review process that meant further delays and potential vetoes of decisions to ban assault weapons. After having forged the Metzenbaum/DeConcini/Feinstein compromise to pass the bill in the Senate, in no small measure due to the *removal* of ATF discretion to ban guns in favor of a self-executing objective criteria test, Metzenbaum and DeConcini were not eager to unravel the approved scheme. Moreover, the delays would give manufacturers extra time to produce thousands of grandfathered weapons.

In addition, it was not made clear exactly whose votes would be gained by agreeing to the compromise. Metzenbaum and DeConcini were reluctant to make any concessions at this point on the basis of vague estimates or general assurances. And the four conferees were particularly unwilling to make any more concessions solely to placate Brooks, who had from the beginning moved to block the assault weapons ban at every turn with heavy-handed threats and intimidation and who had already extracted the Brady Law pawnbroker exemption in the first conference.

Biden made a strong and influential plea to his four colleagues that this compromise was necessary to prevent the fragile repatching of the crime bill from falling apart. But when several of the problems with the proposal were explained to him, he agreed that some areas needed to be fixed. Not wanting to bring the whole crime bill down, but determined to maintain an effective assault weapons ban, the four conferees agreed that Metzenbaum and Schumer would draft legislative language for an acceptable proposal along the lines of the compromise, fixing the major flaws but still including a delay of the effective date and a congressional review procedure.

When the four conferees tried to offer the new compromise draft to Brooks, Brooks would not even take it and instead handed them back another of his

61. In an effort to reverse the losing 225-210 threshold procedural vote in the House, the Administration and Democratic leaders had been working behind the scenes on a four-point compromise with Republicans to modify the crime bill. One of those points involved modifying the assault weapons ban by delaying the effective date of the ban, requiring Congress to approve or disapprove the application of the ban to any gun not on the prohibited list, shortening the sunset of the bill, increasing the size of permissible ammunition magazines, or some combination of these proposals. See generally Kenneth J. Cooper, *Clinton Gains Votes in Crime Bill Fight: GOP Demands for More Cuts Cloud Outcome*, WASH. POST, Aug. 18, 1994, at A1. Eventually, these proposals made their way into conference discussions.

totally rewritten bills that was even weaker than the previous ones. This was a critical error by Brooks and a turning point in the conference negotiations. Ban proponents were offering to make major modifications to the assault weapons ban that had passed the House, Senate, and the first crime bill conference. Notwithstanding this considerable compromise, which the Clinton Administration, Biden and the other Senate Democratic conferees, and Schumer and the other House ban proponents were all prepared to make, Brooks refused even to look at it, insisting that everyone only work off of his new bill drafts.

Brooks' obstinance infuriated Biden. Biden had made every conceivable effort to secure a reasonable compromise, only to be met with unreasonable dismissals and heavy-handed demands. As Biden told the other conferees, the time for compromise was over. They would go back into the conference united behind the same bill that had passed in the first conference without any changes; Brooks would simply be outvoted and that would be that. If the crime bill fell apart, which appeared to be a distinct possibility, so be it. Biden was satisfied that the other four Senate Democratic conferees had made a genuine effort to meet Brooks and the NRA halfway, and that was all that could be asked of them. If the other side refused to budge, then they would have to answer to the American public.

At around midnight on Saturday, the conference reconvened. As the conference was getting underway, Representative John Dingell (D-Mich.) asked Metzenbaum if he would agree to clarify the ban on ammunition magazines. Dingell, recognizing that the bill banned *possession* of magazines and firearms as well as their manufacture and sale, was concerned that there might be unwarranted prosecutions against persons found possessing grandfathered magazines that would otherwise be banned. He also thought that the law should more explicitly state that it applied prospectively only—to magazines manufactured after the effective date of the law. Metzenbaum saw no substantive objection to this request; it entailed minor technical changes that did not affect the substance or in any way undermine the legislation and represented no more than clarifications of what was otherwise intended. As Dingell, an NRA board of directors member, might use his considerable influence in the House to temper opposition to the assault weapons provision if his concerns were addressed, Metzenbaum agreed to make the requested changes.⁶²

62. Consequently, the grandfather clause relating to magazines was amended to clarify that all magazines that were lawfully possessed "on or before" the effective date would be exempt from the ban. In addition, it was clarified that the government has the burden of proving that a person who possesses a banned magazine has violated the law and is not eligible for an exemption. Also, it was clarified that if a magazine does not bear the serial number required on all large capacity ammunition magazines manufactured after the effective date, it would be presumed to be a grandfathered magazine exempt from the ban. Such a presumption could be rebutted, of course, by evidence of effacement of the serial number or other evidence. If the magazine does have the serial number it would be clear that it was a banned magazine that could only be possessed by persons exempt from the ban, such as law enforcement or the military. Finally, a requirement that large capacity magazines be sold only by licensed dealers was deleted as unnecessary in light of the total ban on manufacture, sale, and possession except for certain purposes.

Notwithstanding these compromises with Dingell, the next day Dingell opposed the assault weapons provision on the House floor. 140 CONG. REC. H959 (daily ed. Aug. 21, 1994). Dingell supported final

As expected, the assault weapons ban was approved by both the House and Senate conferees and the second conference was concluded in the early hours of Sunday, August 21. Later that day, the House passed the conference report by a vote of 235 to 195. In the Senate, however, Republicans filibustered the bill over its assault weapons ban and money for crime prevention programs. They circulated a list of further changes to the bill, which they demanded in exchange for ending their filibuster, but which, if enacted, would have required a third conference. In effect, they were trying to kill the bill while looking as if they were still trying to improve it.⁶³

But Senate Republicans had difficulty convincing much of the media and the public that all they were trying to do was improve the bill. The problem with their position was three-fold. First, it was obvious that the NRA was going to fight the ban on assault weapons to the bitter end no matter what other changes were made to the bill. Second, their rejection of Senate Majority Leader George Mitchell's (D-Maine) proposal to take up and vote on all of their proposals separate from the crime bill betrayed their real motives. If all they wanted was the changes, then it should not have mattered to them how they were considered. But separate consideration meant that the ban on assault weapons would go through and for that reason they rejected Mitchell's proposal. Third, their demand for a cloture vote (requiring sixty votes) to end their filibuster, even if any or *all* of their proposed amendments were agreed to, also made their intentions clear. Even if they got everything they wanted, they still wanted the opportunity to block final passage of a bill that included a ban on assault weapons.⁶⁴

Here the Senate stood in a situation where the most comprehensive crime bill in American history, demanded by the American people to deal with what

passage of the crime bill, however, and he later resigned from the board of directors of the NRA.

63. Senate Republicans argued on the Senate floor that they were not holding up the crime bill because of the assault weapons ban, but this argument proved difficult to maintain in light of their fierce opposition to the provision from the very beginning. It was also widely known that the NRA, which vigorously opposed the crime bill because of the assault weapons ban, played a large role in organizing and supporting the filibuster. Finally, when it became public that one of the items on their list of demands was a motion to strike the assault weapons ban, they realized that they had to change their tack. To a large segment of Americans, their insistence on striking from the crime bill a provision to reduce civilian access to assault weapons did not make any sense.

As a result, Senate Republicans made a new proposal to amend the assault weapons provision rather than strike it. The fact that they had made a new proposal in order not to drop their opposition to the assault weapons ban but to weaken it, confirmed Democratic charges that it was the NRA behind the filibuster. Republicans realized that it was unnecessary to take the politically unpopular move of trying to directly strip assault weapons from the bill in the Senate. So long as they did anything to change the bill in the Senate, even adopt one amendment, it would require the bill to be sent once again to the House where the assault weapons provision was at great risk. They felt confident that, if given another opportunity, the House would kill the assault weapons ban.

64. *See generally* Senate Floor debate from August 22 to August 25, 1994. In one of the most candid moments of the entire floor debate, a slip by Republican Senator Ted Stevens (Alaska) revealed the real GOP motives. Mitchell was arguing that the Republicans were trying to force a 60-vote requirement regardless of whether their proposals were accepted when Stevens interrupted to explain: "That is guns. That is guns. We want a chance to see who is violating the Second Amendment, but we are willing to do it whenever you are ready." 140 CONG. REC. S12449 (daily ed. Aug. 24, 1994). The next day, in a colloquy with Senator Patty Murray (D-Wash.), Stevens acknowledged that some Republicans wanted the 60-vote requirement because of the assault weapons provision. 140 CONG. REC. S12493 (daily ed. Aug. 25, 1994).

they considered to be the most important problem facing the nation, was being held hostage because of a provision designed to reduce the killing from semiautomatic assault weapons that seventy percent of the American people supported (but that the NRA opposed). Finally, on August 25, 1994, the Senate invoked cloture to break the Republican filibuster and passed the crime bill conference report, clearing the measure for the President.⁶⁵ President Clinton signed the crime bill into law on September 13, 1994. The assault weapons ban took effect that day.

IV. HOW THE ASSAULT WEAPONS BAN WORKS

The Public Safety and Recreational Firearms Use Protection Act consists of four primary features: 1) a list of named banned firearms; 2) a ban on copies of the listed weapons; 3) a ban on all weapons meeting a specified criteria definition; and 4) a ban on large capacity ammunition magazines.

The operative provision of the assault weapons ban states: "It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon."⁶⁶ The Act defines the prohibited "semiautomatic assault weapons" in two ways: by listing some weapons by name and by defining the rest according to a test based on certain firearm characteristics.

A. *The List of Banned Weapons*

The prohibited list consists of the most infamous and dangerous of all semiautomatic assault weapons and was intended to illustrate the types of weapons that are the target of the legislation.⁶⁷ It was designed to assuage any

65. 140 CONG. REC. S12600 (daily ed. Aug. 25, 1994). One other procedural vote was necessary prior to the cloture vote. Another parliamentary tactic Republicans had used to block passage of the crime bill was raising a point of order that the bill violated the Congressional Budget Act of 1974, which required 60 votes to waive. Their asserted ground was that the crime bill changed budget rules and contained matters within the jurisdiction of the Senate Budget Committee without having been approved by that committee. But Senator Biden charged that Republicans were raising spending objections to disguise their opposition to the assault weapons ban. The Senate voted to waive the Budget Act. 140 CONG. REC. S12557 (daily ed. Aug. 25, 1994); see generally WASH. TIMES, Aug. 19, 1994, at A14.

66. 18 U.S.C. § 922(v)(1) (Supp. VI 1994).

67. The List derives almost entirely from the original Metzenbaum bill developed in February 1989:

The Avtomat Kalishnikov (AK) was developed in 1947 in the Soviet Union and is the most widely used assault rifle in the world. The semiautomatic versions in the United States were manufactured in China and Yugoslavia and come standard with a 30-shot magazine. Importation of the AK was banned in 1989. According to ATF gun trace reports, the AK was one of the top five assault weapons most frequently traced to crime for four consecutive years, 1988-91.

The Uzi and Galil are manufactured in Israel. The Uzi was designed as a submachine gun with a compact design to facilitate concealability, and was intended for use by all branches of the Israeli armed forces. It is also used by armed forces in other countries, such as Germany and the Netherlands, as well as by the U.S. Secret Service. The semiautomatic version comes standard with a 20-shot magazine. In 1989, importation of the carbine version was banned but not the pistol version. According to ATF gun trace reports, the Uzi was one of the seven assault weapons most frequently traced to crime for six consecutive years, 1986-91. The Galil was developed to serve as a submachine gun, assault rifle, and light machine gun. It can accept a grenade launching attachment. The semiautomatic version of the Galil rifle comes standard with a 25-shot magazine and was banned from importation in 1989.

The Beretta AR-70 assault rifle is currently manufactured in Italy and is used in the armed forces in a

concerns that legitimate hunting or sporting guns were the object of the ban.

The prohibited list⁶⁸ consists of:

any of the firearms, or copies or duplicates of the firearms in any caliber, known as—

- (i) Norinco, Mitchell, and Poly Technologies 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, FN/LAR, 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

Weapons on the prohibited list are banned “in any caliber.” This language

number of countries, including Italy, Jordan, and Malaysia. The semiautomatic version comes standard with 8 and 30-shot magazines and was banned from importation in 1989.

The FN-FAL (also called the LAR) assault rifle is manufactured by Fabrique Nationale of Belgium and in many countries around the world, and was manufactured in the United States as well. It is used by the armed forces of more than 90 countries all over the world, including Belgium, Canada, Chile, Ecuador, Ireland, Libya, and Venezuela. The semiautomatic version comes standard with a 20-shot magazine and was banned from importation in 1989. The FNC is the light carbine version manufactured in Belgium and was intended for use by infantry operating in jungle, mountainous, or similar terrain. The semiautomatic version comes standard with a 30-shot magazine and was banned from importation in 1989.

The MAC-10 submachine gun, also known as the M-10, was developed for the Military Armament Corporation in 1970. It is currently manufactured in the U.S. and has been used by several armies, including that of the former Yugoslavia. The MAC-11, or M-11 (and the M-11/9 and M-12) are of the same basic design. They are externally threaded at the muzzle to take a suppressor and compactly designed to facilitate concealability. MAC went out of business in 1978 and the rights to some of its guns passed to Sylvia and Wayne Daniels (S.W.D.) of Smyrna, Georgia. The semiautomatic version of the M-11 comes standard with a 32-shot magazine. According to ATF gun trace reports, the MAC-10/MAC-11 was one of the top four assault weapons most frequently traced to crime for six consecutive years, 1986-91.

The Steyr AUG assault rifle was developed by Steyr-Daimler-Puch of Austria in conjunction with the Austrian Army and has been used extensively by the Austrian Army and various other armies around the world, including Malaysia, several middle eastern countries, and select armed forces and police groups in the U.S. and Great Britain. It was designed to be light with a particular emphasis on use from vehicles. The semiautomatic version comes standard with a 30 or 40-shot magazine and was banned from importation in 1989.

The prototype for the TEC-9 (or TEC-DC9 or TEC-22) assault pistol was originally designed for the South African government by one of their research laboratories. It was refined in Sweden and ultimately produced by a Miami company. The semiautomatic comes standard with a 36-shot magazine. According to ATF gun trace reports, one of every five assault weapons traced to crime is a TEC-9, and it was the assault weapon most frequently traced to crime for three consecutive years, 1989-91. It is particularly prominent in drug crime.

The Striker-12 assault shotgun was designed and developed in South Africa as a military and police riot gun. It is currently manufactured in South Africa and was manufactured in the United States. With its revolving-cylinder magazine, it can fire twelve 12-gauge shotgun shells in less than three seconds. Due to its light weight, it can be fired with one hand as a pistol, from the hip with the aid of a front grip, or from the shoulder. When the South African manufacturer tried to import the Striker into the U.S., AFT denied an import license. As a result, a domestic manufacturer began production in 1986, renaming it the Street Sweeper. According to ATF gun trace reports, the Street Sweeper/Striker-12 was one of the top fifteen assault weapons most frequently traced to crime for three consecutive years, 1989-91.

For a description of the AR-15, see *supra* note 43 and accompanying text.

68. 18 U.S.C. § 921(a)(30)(A) (Supp. VI 1994).

prevents firearms manufacturers from merely changing the caliber of a prohibited weapon and making some other slight modification in order to evade the ban.⁶⁹ Also, banned weapons (whether on the prohibited list or covered by the criteria definition) that are manufactured after the effective date of the law under one of the exemptions to the ban are required to have a serial number clearly indicating that they were manufactured after the ban. This is to aid law enforcement of the ban.

B. The Ban on Copies

The legislation also bans “copies or duplicates” of the listed assault weapons.⁷⁰ The rationale for banning copycat models is to prevent manufacturers from being able to evade the prohibition simply by changing the names of the weapons on the prohibited list and making slight modifications.⁷¹

This is a very real problem. American manufacturers, up until the day the ban took effect, were producing copies of semiautomatic assault weapons that have been banned from being imported into the country or banned under certain state laws.⁷² For example, after ATF banned the importation of a South African riot control shotgun called the Striker-12 in 1986, American manufacturers subsequently marketed a copy of the Striker-12, which they renamed the Street Sweeper, even boasting that it was barred from importation. The same thing occurred with the USAS-12 assault shotgun, which was banned as imported from South Korea, but which is now manufactured in the United States under a different name. Also, the gunman in the San Francisco law firm slaughter used an Intratec TEC-DC9, a virtually identical copy of a TEC-9, which is specifically banned by name under California law.

This is strong evidence that, for a truly effective ban, it is not enough for Congress just to list the prohibited weapons, no matter how long that list is. There must be some mechanism to restrict copies or duplicates of banned assault weapons. A ban of only specifically named weapons simply would create incentives for manufacturers to make minor modifications and change the names of weapons to avoid the prohibition. Experience under state assault weapons bans has made clear that gun manufacturers will look for and seize upon any potential loophole in the law.

69. It is possible that a change in caliber—for example, from a 22 millimeter to a 9 millimeter—coupled with other slight modifications, would result in the weapon not being covered by the ban on “copies or duplicates” or by the objective criteria definition.

70. 18 U.S.C. § 921(a)(30)(A) (Supp. VI 1994).

71. The criteria definition, explained below, requires a firearm to possess at least two assault weapon features to be covered by the ban. With respect to the named weapons on the list, however, the copy ban was intended to prevent manufacturers from evading the ban by changing the weapons’ names and modifying them to include even one assault weapon feature.

72. See generally David Johnston, *List Shows Link of U.S. Weapons to Banned Semiautomatic Imports*, N.Y. TIMES, June 25, 1989, § 1, at 20.

C. The Objective Criteria Definition

The second way in which the Act defines prohibited semiautomatic assault weapons—the objective criteria test—is the heart of the law. Aside from the list of prohibited weapons and copies of those weapons, the legislation automatically extends the ban to the manufacture, sale, or possession of additional firearms that meet the specified definition. Separate definitions are provided for rifles, shotguns, and pistols, but all three definitions focus on those objective features that distinguish assault weapons from legitimate hunting or sporting guns.

A prohibited semiautomatic assault rifle is defined as:

a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher.⁷³

A prohibited semiautomatic assault pistol is defined as:

a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—

- (i) an ammunition magazine that attaches to the pistol outside of the pistol grip;
- (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
- (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;
- (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and
- (v) a semiautomatic version of an automatic firearm.⁷⁴

A prohibited semiautomatic assault shotgun is defined as:

a semiautomatic shotgun that has at least 2 of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a fixed magazine capacity in excess of 5 rounds; and
- (iv) an ability to accept a detachable magazine.⁷⁵

73. 18 U.S.C. § 921(a)(30)(B) (Supp. VI 1994).

74. 18 U.S.C. § 921(a)(30)(C) (Supp. VI 1994).

75. 18 U.S.C. § 921(a)(30)(D) (Supp. VI 1994).

The objective features used in the criteria test are all designed for combat rather than hunting or sport:

- *A folding stock on a rifle or shotgun.* This feature sacrifices accuracy for advantages such as concealability and mobility in close combat. Hunting guns are designed with fixed stocks for maximum accuracy at far distances.
- *A pistol grip on a rifle or shotgun.* This facilitates firing from the hip, allowing the shooter to spray-fire the weapon. A pistol grip also helps stabilize the weapon during rapid fire. Needless to say, no hunter or sportsman spray-fires from the hip, which is a very inaccurate way of shooting.
- *A barrel shroud for a pistol.* This is designed to cool the barrel and allow the shooter to steady the gun so the firearm can shoot many rounds in rapid succession. Again, hunters and sportsman do not need such a feature.
- *A threaded barrel designed to accommodate a silencer.* Silencers are good for assassination but not so helpful for hunting or target shooting.
- *A threaded barrel designed to accommodate a flash suppressor.* This feature also serves no useful hunting or sporting purpose. A flash suppressor allows the shooter to remain concealed when shooting at night, an advantage in combat.
- *A barrel mount designed to accommodate a bayonet or grenade launcher.* This obviously serves no hunting or sporting purpose.
- *The capability to accept large-capacity ammunition magazines.* Large magazines enable the shooter to continuously fire dozens of rounds without reloading. Standard hunting rifles are equipped with no more than 3 or 4-shot magazines.

The features of the criteria definition are designed for one purpose—to kill as many people as possible as quickly as possible. No hunter or sportsman needs these features. To make absolutely certain that there would be no legitimate hunting or sporting gun affected by the ban, the definition requires a firearm to be a semiautomatic and possess at least *two* of the specified features to be covered by the prohibition. So the provision defines and prohibits semiautomatic assault weapons while at the same time protecting legitimate hunting and sporting guns.

The reason for the objective criteria provision is simple. It is clear that any list of banned weapons would soon become obsolete. It makes little public policy sense to approach the problem of semiautomatic assault weapons in a piecemeal fashion, expecting Congress to get together over and over again to add newly developed or redesigned assault weapons to a list. If the law had simply banned a list of assault weapons and copies of those weapons, manufacturers would have gone right back to the lab to develop new assault weapons with slightly modified features and new names in order to avoid the prohibition. Therefore, in order to provide a comprehensive solution, the law provides for the

future through the use of this mechanism for prohibiting all semiautomatic assault weapons, whether manufactured presently or developed in the future. The test thus ensures that the prohibition remains current.

The NRA has claimed that it is impossible to distinguish a semiautomatic assault weapon from a hunting gun. Not so. Hunting guns are designed to be fired from the shoulder and to maximize the accuracy of a precisely aimed projectile. Hunting guns are carefully aimed because, as any hunter will attest, the first shot is the best shot. Assault weapons are not so much aimed as pointed in the direction of a target. They are designed to be fired from the hip in a hail of indiscriminate gunfire, sacrificing accuracy for rapid spray-fire. Assault weapons generally have shorter barrels and folding stocks, allowing for easier concealment. Hunters have no reason to conceal their firearms and generally use longer, more accurate, barrels and fixed stocks. In addition, assault weapons are commonly equipped with large-capacity ammunition magazines, enabling the shooter to continuously fire dozens of rounds without reloading. Standard hunting guns are usually equipped with no more than three or four shot magazines.

Moreover, since 1989, ATF has been making this distinction in banning the importation of semiautomatic assault weapons which are not suitable for sporting purposes by applying the "sporting use test."⁷⁶ ATF has determined that assault weapons can be distinguished from hunting and sporting weapons by their combat hardware: for example, large-capacity ammunition magazines, pistol grips, bayonets, flash suppressors, silencers, grenade launchers, folding stocks, and night sights.

The definition in the Act is based on the same types of objective criteria used by ATF to ban imports under the sporting use test and on those recognized by law enforcement as having no hunting or sporting purpose.⁷⁷ It makes no sense to ban imported assault weapons yet allow them to be freely manufactured and sold in the United States. There is little difference, for example, between the Striker 12, which is banned from importation into the country, and the Street Sweeper, which is domestically manufactured and was not banned until the Act took effect. There is no difference between imported and domestically manufactured semiautomatic assault weapons that would justify banning the former but not the latter.

As explained earlier, there were two ways in which the criteria definition could have operated. Congress could have granted the discretion to ATF to apply a sporting use and criteria test and ban weapons under that test or it could have set up a self-executing definition that would automatically ban weapons meeting the definition. The former was the original design of the Metzenbaum bill, but the latter became incorporated into the compromise with DeConcini and

76. After an extensive study by ATF, the Bush Administration concluded "that there are viable, clear differences between semiautomatic assault rifles, and semiautomatic rifles used in traditional sports."

77. See ATF, Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (July 6, 1989); Testimony of Kenneth T. Lyons, International Brotherhood of Police Officers, before the Senate Committee on the Judiciary (Aug. 3, 1993).

Feinstein, the House Bill, the conference report, and ultimately, the law.

D. Large-Capacity Ammunition Magazines

The Act also prospectively bans the transfer or possession of “large capacity ammunition feeding devices,” which are defined as magazines that contain more than ten rounds of ammunition.⁷⁸ The magazine ban applies to both internal and external magazines. Otherwise, manufacturers could evade the ban simply by building firearms with huge internal magazines. All large-capacity magazines manufactured after the date of enactment (for one of the exempted purposes or parties) must bear a serial number clearly indicating that they were manufactured after such date.

Prior to the Act, large-capacity magazines were totally unrestricted by federal law. They could be legally manufactured, imported, and possessed by anyone and sold to anyone, even a felon. They could be purchased and sold through the mail. Anyone could purchase a thirty, fifty, even a one hundred-round ammunition magazine.

The idea to restrict large-capacity magazines was not a new one. Former President Bush, a long-time hunter and NRA member, tried to ban large-capacity magazines of more than fifteen rounds. As he remarked at the National Peace Officers’ Memorial Day service on May 15, 1989: “One thing we do know about these assault weapons is that they invariably are equipped with unjustifiably large magazines.” Even Republican South Carolina Senator Strom Thurmond, a staunch pro-gun advocate, introduced Bush’s ban on large-capacity magazines as part of the President’s 1989 crime package. In doing so, he noted: “As a direct response to the deadly firepower used by drug kingpins, hired thugs, and other violent offenders, the President is calling for important restrictions on clips and magazines that hold more than fifteen rounds. Legitimate sportsmen and hunters can still pursue their avocation without undue interference.” In one of the more colorful statements about large clips, Barry Goldwater, a life member of the NRA, said: “I’ve been a member of the NRA, I collect, make and shoot guns. I’ve never used an automatic or semiautomatic for hunting. There’s no need to. They have no place in anybody’s arsenal. If any s.o.b. can’t hit a deer with one shot, then he ought to quit shooting.”

The fact of the matter is that nobody really needs a large-capacity thirty-round ammunition magazine or a seventy-five-round drum magazine to spray-fire at targets or game. Civilians do not need that kind of firepower. According to the Sporting Arms and Ammunition Manufacturers’ Institute, which

78. 18 U.S.C. § 921(a)(31) (Supp. VI 1994) 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 [this Act] 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 operating only with, .22 caliber rimfire ammunition.

Id.

represents the major American gun manufacturers, "[t]raditional centerfire semiautomatic rifles and shotguns generally have an ammunition capacity of 5 rounds, and semiautomatic shotguns used for waterfowl hunting must be capable of firing no more than 3 shots before reloading."⁷⁹ Most states limit the magazine capacity allowed for hunters to between three and seven rounds. Quite simply, hunters and marksmen do not need large-capacity ammunition magazines because they do not spray-fire at targets or animals. But drug traffickers, youth gangs, and other criminals frequently use semiautomatic assault weapons equipped with large-capacity ammunition magazines to gun down victims in spray-fired drive-by shootings and other violent crimes. As ATF has stated, "large capacity magazines are indicative of military firearms."⁸⁰

The importance of a restriction on large-capacity magazines was dramatically illustrated by Colin Ferguson's recent shooting spree aboard a Long Island Railroad commuter car. The ban on high-capacity ammunition magazines would have done a lot of good there. During his shooting spree, Ferguson paused and reloaded his fifteen-shot ammunition magazine twice, and was finally jumped by some passengers as he paused to reload a third time. If he had been forced to pause sooner and more often because his gun was limited to a fewer number of rounds, he might have been stopped earlier and some lives might have been saved.

E. Other Features of the Law

In addition to the four main features discussed above, the law requires the Attorney General to conduct a study of the effectiveness of the ban over an eighteen-month period commencing seventy-eight months after enactment and to report to Congress on the results within eight years. The law also imposes a ten year and/or \$10,000 penalty for violations involving violent crime or drug trafficking and a five year and/or \$5,000 penalty for other violations. Also, the law sunsets after ten years, unless extended by Congress.

F. What the Law Does Not Do

As the assault weapons ban represents only a moderate gun control measure, it is useful to review what the law does *not* do.

First, notwithstanding the usual NRA arguments that some people hunt with Uzis and AK-47s, the ban does not affect legitimate hunting and sporting guns. The law contains multiple layers of protection against affecting any

79. *Position Paper of the Sporting Arms and Ammunition Manufacturers' Institute*, submitted to the Senate Subcommittee on the Constitution. In addition, ATF has reported: "Most traditional semiautomatic sporting firearms, designed to accommodate a detachable magazine, have a relatively small magazine capacity. In addition, some States have a limit on the magazine capacity allowed for hunting, usually 8 rounds or less." REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES, July 6, 1989.

80. REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP ON THE IMPORTABILITY OF CERTAIN SEMIAUTOMATIC RIFLES, July 6, 1989.

hunting or sporting guns. For example, the assault weapon ban does not apply to any manually operated gun. This includes revolvers or any slide-action, pump-action, bolt-action, or lever-action guns.⁸¹ The vast majority of hunters use manual rifles and shotguns since semiautomatics are not as accurate as manuals. No hunters use semiautomatic pistols and nearly all semiautomatic shotguns have internal magazines that hold a maximum of five rounds and do not have any of the features listed in the objective criteria test. In fact, most state hunting laws prohibit hunting with rifles or shotguns that have ammunition magazines that hold more than three to five shots.

In addition, the objective criteria test is designed to prohibit only the most dangerous semiautomatic assault weapons—firearms that are the farthest thing from hunting and sporting guns. For example, only if a rifle was a semiautomatic, was capable of accepting a detachable ammunition magazine, and possessed two or more combat features could it be covered by the ban.

Further, the Act includes a non-exclusive list of 670 hunting and sporting guns that are exempt from the ban.⁸² The list grew out of a shorter list in the Metzenbaum bill, Metzenbaum's proposal to DeConcini to expand the list, and Feinstein's following through on that proposal. The list is not necessary to the law since none of the listed guns would be covered by the definition of semiautomatic assault weapons in the legislation, but was added for political purposes and to assure hunters and sportsmen that their guns were not affected. Moreover, the absence of a firearm on the list does not necessarily mean that it is banned.⁸³ It would still have to meet the definition of prohibited "semiautomatic assault weapons."

Second, again contrary to NRA claims, the law does not ban the entire class of semiautomatics. This is because all assault weapons are semiautomatics but not all semiautomatics are assault weapons. There are many legitimate semiautomatic rifles, shotguns, and pistols that do not have the killing capacity of assault weapons. The Act exempts semiautomatic rifles that cannot accept a detachable magazine that holds more than five rounds of ammunition and semiautomatic shotguns that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.⁸⁴ The Act also exempts semiautomatic rifles, shotguns, or pistols that have less than two of the objective criteria and are not on the prohibited list.

Third, the law does not confiscate legally owned guns or ammunition magazines; it applies prospectively only. The "grandfather clause" in the Act

81. 18 U.S.C. § 922(v)(3)(B)(i) (Supp. VI 1994). The ban also does not apply to firearms that have been "rendered permanently inoperable" or to "antique" firearms. *Id.* § 922(v)(3)(B)(ii), (iii). Antique firearms are defined in the Gun Control Act as those manufactured prior to 1898. *Id.* § 921(a)(16).

82. The ban does not apply to any of the weapons listed in Appendix A to the Act. 18 U.S.C. § 922(v)(3)(A) (Supp. VI 1994). Appendix A lists approximately 670 rifles and shotguns (but no pistols) under the following categories: Centerfire Rifles—Autoloaders, Lever & Slide, Bolt Action, and Single Shot; Drillings, Combination Guns, and Double Rifles; Rimfire Rifles—Autoloaders, Lever & Slide Action, Bolt Action, and Single Shot; Competition Rifles—Centerfire & Rimfire; and Shotguns—Autoloaders, Slide Actions, Over/Unders, Side by Sides, Bolt Action, and Single Shots.

83. 18 U.S.C. § 922(v)(2) (Supp. VI 1994).

84. 18 U.S.C. § 922(v)(3)(C)-(D) (Supp. VI 1994).

provides that the ban “shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.”⁸⁵ Therefore, anyone who lawfully possessed a gun or ammunition magazine prior to the effective date of the law, even if it is a “semiautomatic assault weapon” or “large capacity ammunition feeding device” under the respective definitions, would lawfully possess the gun or ammunition magazine after the ban.⁸⁶ Also, any gun or ammunition magazine that was lawfully possessed before the ban could be lawfully transferred, sold, or purchased without violating the ban.

Fourth, as explained earlier, the Act does not give ATF the power or discretion to prohibit any legitimate hunting or sporting gun. Instead, the prohibition is designed to be self-executing. Guns that meet the definition are banned and those that do not are not banned. Although ATF has authority to issue regulations clarifying the meaning of certain terms in the definition,⁸⁷ it is not necessary for ATF to take any affirmative regulatory action before a weapon is banned.

Fifth, the Act does not require anyone to register any gun or require any special record keeping or transaction forms. The provision in the original Metzenbaum bill requiring grandfathered weapons to be registered, and the provision in the DeConcini bill requiring the preservation of transaction records, were dropped as the bill progressed through Congress.

Finally, the Act does not interfere with law enforcement. Exemptions are provided for law enforcement, military, and testing purposes.⁸⁸

V. FUTURE PROSPECTS

With the passage of the assault weapons ban, the Brady Bill,⁸⁹ the prohibition against juvenile possession of handguns or ammunition,⁹⁰ the

85. 18 U.S.C. § 922(v)(2) (Supp. VI 1994). Large-capacity ammunition magazines are grandfathered in the same way. *Id.* § 922(w)(2).

86. 18 U.S.C. § 922(w)(4) (Supp. VI 1994) provides that the government bears the burden of proof that a person has violated the ban on large capacity ammunition magazines and that the absence of the required serial number would entitle the owner to a rebuttable presumption that the magazine was manufactured prior to the ban (but *not* a presumption that it was lawfully *possessed* prior to the ban).

87. For example, ATF will probably have to issue regulations specifying how manufacturers must mark the required serial number on assault weapons and large capacity magazines in a manner that prevents the easy obliteration of the markings.

88. 18 U.S.C. § 922(v)(4) (Supp. VI 1994).

89. The House passed the Brady Handgun Violence Prevention Act (P.L. 103-159), which requires a five-day waiting period for the purchase of a handgun and a mandatory background check on handgun purchasers, on November 10, 1993. The Senate passed the Brady Bill on November 30, 1993. President Clinton signed the bill into law on November 30, 1993, and it took effect on February 28, 1994.

90. The Gun Control Act of 1968 prohibits licensed dealers from selling rifles, shotguns, or ammunition for rifles or shotguns, to persons under the age of 18 and from selling handguns or handgun ammunition to persons under the age of 21. 18 U.S.C. § 922(b)(1) (1988). The Violent Crime Control and Law Enforcement Act of 1994, which included the assault weapons ban, also prohibited *private* (i.e., non-licensed dealer) transfers of handguns or handgun ammunition to persons under the age of 18 or possession by such persons. 18 U.S.C. § 922(x) (Supp. VI 1994).

prohibition against domestic abusers' possession of firearms,⁹¹ and important gun dealer licensing reforms,⁹² the 103d Congress was the greatest gun control Congress in American history. It was a watershed Congress not only because of its significant attempts to reduce gun violence through moderate firearm regulations, but also because it broke forever the image of NRA invulnerability and gun control as a taboo subject of federal legislation.

With Republicans taking control of both houses of Congress after the November 1994 elections and with the NRA taking credit for the defeat of many pro-gun control members and the election of anti-gun control members,⁹³ however, it is likely that there will soon be efforts to scale back or reverse the assault weapons ban or other gun control legislation of the 103d Congress and possibly other firearms regulations as well.

House Speaker Newt Gingrich has promised the NRA a chance to get what it paid for, a repeal of the assault weapons ban, later this year. In early February 1995, Gingrich appointed a task force on firearms regulation, made up of six staunch anti-gun control junior members who all support repealing the ban. Four of the members received significant NRA support during the 1994 elections. In addition to repealing the assault weapons ban, the Task Force will consider what other firearms regulations to scrap, having been assured by Gingrich that "everything is on the table."⁹⁴

Public interest groups are clearly alerted to the possibility of wholesale eradication of federal firearms regulations by the Republican majority. As Handgun Control legislative director Bob Walker noted: "We've known all along that this new Congress was not going to be sympathetic to gun control . . . but this is going to be a blatant attack on America's gun laws. They're not looking to improve the laws; they're looking to dismantle them. This isn't a task

91. The Gun Control Act of 1968 prohibits any person from transferring a firearm or ammunition to any person under indictment for or convicted of a felony and possession by any person convicted of a felony. 18 U.S.C. 922(d)(1)-(g)(1) (1988). The Violent Crime Control and Law Enforcement Act of 1994 also prohibits any person from transferring a firearm or ammunition to, or possession by, any person subject to a restraining order relating to domestic abuse, which is often a misdemeanor rather than a felony under state law. 18 U.S.C. § 922(d)(8)-(g)(8) (Supp. VI 1994).

92. Among other provisions, the Violent Crime Control and Law Enforcement Act of 1994: requires licensed firearms dealers to be photographed and fingerprinted; requires dealer applicants to certify that they are in compliance with state and local laws; gives ATF more time to screen dealer applications; provides for ATF record keeping compliance inspections; requires licensees to report theft or loss of firearms within 48 hours; requires licensees to respond immediately to ATF requests for information needed in investigations; and requires the Secretary of the Treasury to notify law enforcement in each state of all licensed dealers in that state. 18 U.S.C. § 923 (Supp. VI 1994).

93. In the 1994 midterm elections, the NRA spent a whopping \$3.2 million to send anti-gun control candidates to Congress. In the Senate, there are 10 new Senators who were heavily supported by the NRA. In the House, 16 Democratic incumbents who voted for the assault weapons ban were defeated. According to Federal Election Commission records, three out of the four House Democratic incumbents were particularly targeted for defeat by the NRA (by major independent expenditures in support of their opponents) because they voted for the ban. Included among them was House Speaker Tom Foley (Wash.), who was defeated. Even President Clinton acknowledged in his recent State of the Union Address that several Democrats lost their seats because they voted for the assault weapons ban. Lacayo, *supra* note 54, at 48; Tim Curran, "Gingrich Appoints Task Force on Guns," *ROLL CALL*, Feb. 16, 1995.

94. Curran, *supra* note 93.

force, it's a wrecking crew."⁹⁵ Notwithstanding that the new Congress is much more anti-gun control than its predecessor,⁹⁶ drastic repeals of gun control measures, such as a repeal of the assault weapons ban, can be expected to meet with a Presidential veto.⁹⁷

As part of their overall effort to roll back federal government or pass a new crime bill that stresses prisons and punishments rather than gun control and prevention programs, Republicans may try to shift responsibility for firearms regulation from the federal government to the states or cut the resources of ATF to enforce regulations and monitor licensed gun dealers. They may also try to repeal or weaken certain fundamental firearms regulations such as the restrictions against interstate sales and mail-order sales, licensing requirements of pawnbrokers and other dealers, state licensing requirements to carry handguns, or the Brady Law.

Several different types of efforts may be made to weaken the ban on assault weapons short of a direct repeal of the legislation, which would be highly unpopular and controversial and would jeopardize the political gains made by the rest of the Republican legislative agenda.

For example, Republicans may seek to reduce the legislation to a simple ban of listed weapons, impose some type of congressional review procedure before weapons not on the prohibited list could be banned, or institute any of the other weakening proposals made by Brooks and others in the 103d Congress. Any of these initiatives would be debilitating to the legislation. In particular, the definition of semiautomatic assault weapons is the most important aspect of the law and is critical to its effectiveness. It is very carefully technically crafted to separate assault weapons from hunting and sporting guns. Any deletion or narrowing of that definition would permit the manufacture and distribution of semiautomatic assault weapons with features and capabilities identical or virtually identical to the assault weapons specifically prohibited by the legislation.

Any weakening of the assault weapons ban before it has had a chance to work would be a mistake. The law calls for a study of the law's effectiveness and a report to Congress by the Attorney General. It would be premature to weaken the law prior to that report. By the same token, it would also be a mistake to expect a drastic reduction in violent crime as a result of the ban. The ban is, after all, only a moderate gun control measure. The critical drawback of the legislation stems from the fact that it is more accurately a freeze than a ban; it does nothing to address the current possession of approximately one million semiautomatic assault weapons nationwide. But it will save lives in the short

95. Curran, *supra* note 93.

96. Through retirements and defeats, gun control advocates estimate that they have lost 28 to 29 votes in favor of the assault weapons ban. *Id.*; see also *supra* note 93.

97. President Clinton pledged in his 1995 State of the Union Address to veto a repeal of the assault weapons ban.

term and dry up the supply of assault weapons over the long term.⁹⁸ Since it can never be demonstrated how many lives are saved by the legislation and because it will take many years for the ban to dry up existing sources of assault weapons, the law's effectiveness in reducing violent crime can best be gauged only in the long term.

Before Congress acts rashly to overturn or weaken the law, it should consider the prohibition in its proper perspective. There are four main tiers of regulatory frameworks that could be applied to assault weapons (or any type of firearm or ammunition for that matter). The first tier, the most effective way to control assault weapons and large ammunition clips, would be a true ban—not only banning future production and sale but also confiscating (with appropriate compensation) all those currently in circulation. Such a measure has never been politically palatable for it is highly intrusive and considered by many to be constitutionally suspect; instead, Congress has always opted for prospective gun control measures, routinely including grandfather clauses in gun control legislation. The second tier—the next most stringent regulatory framework—would be to ban the prospective manufacture, sale, and possession of weapons and institute a system of licensing of owners and registration of weapons in circulation.⁹⁹ Licensing and registration of current gun owners and guns historically has been as politically unfeasible as confiscation and is an anathema to the NRA. A third tier framework would combine a prospective ban with a system of prospective licensing and registration of transfers of grandfathered weapons. While not as effective as a system of registering all weapons, this measure would be a significant crime fighting tool. Finally, the new assault weapons legislation represents a fourth tier framework, or least stringent type of measure—a prospective freeze without licensing, registration, or any other means of controlling weapons currently in circulation.

98. There is some preliminary evidence that the ban is already working to dry up the supply of grandfathered semiautomatic assault weapons. For example, a comparison of prevailing prices of assault weapons before and after the ban reveals dramatic price increases after the ban. *See, e.g.,* SHOTGUN NEWS, Aug. 10, 1993, at 15 and Jan. 20, 1995, at 65 (showing price increase of Colt Sporter from \$649 to \$1,695; Colt H-Bar increase from \$649 to \$1,595; and Colt Competition H-Bar increase from \$699 to \$1,895); SHOTGUN NEWS, Aug. 10, 1993, at 44 and Dec. 20, 1994, at 68 (showing price increase of Cobray M-11/9 from \$169.95 to \$299.95); SHOTGUN NEWS, Aug. 10, 1993 and Jan. 1, 1995, at 29 (showing price increase of Ruger Mini-14 30-round ammunition magazines from \$17.99 to \$44.99 and that 15-round, 20-round, and 40-round magazines sold out); SHOTGUN NEWS, Aug. 20, 1993, at 45 and Dec. 20, 1994, at 55 (showing price increase of Intratec TEC-9 from \$159.95 to \$299.95).

After the Bush Administration's ban on imported semiautomatic assault rifles in 1989, their use in crime dropped 45% in the first year, while the number of domestic assault weapons traced to crime remained about the same. *See* ATF Gun Trace Reports (1989 & 1990) (showing decrease from 1,237 gun traces linked to crime in 1989 to 680 in 1990). Between 1989 and 1991, the number of imported assault weapons traced to crime decreased 40% while the number of domestic assault weapons traced to crime actually increased. Murders, assaults, drug crimes, and property crimes linked to assault weapons all decreased following the import ban as a result of the ban. *See* ATF Gun Trace Reports (1989, 1990, 1991); Testimony of Robert Scully, National Association of Police Organizations, before the Senate Subcomm. on the Judiciary (Aug. 3, 1993).

99. Licensing refers to a system whereby the government issues licenses, or permits, to individuals, which entitle the holder to receive or possess a firearm. 18 U.S.C. § 923 (1988 & Supp. V 1993). Registration refers to a system whereby the government requires a record of the transfer or ownership of a specific firearm. 26 U.S.C. § 5802 (1988).

Thus, the Act represents the least intrusive and most minimal means of attempting to control assault weapon violence. In fact, rather than weakening the ban, Congress should be supplementing the assault weapons legislation with additional measures aimed at drying up the illegal black market (gun trafficking) and monitoring the legal secondary market (transfers by persons other than licensed dealers).

Toward the end of the 103d Congress, Senator Metzenbaum proposed taking the next step toward a more effective control system, at least with respect to handguns; that is, a third tier framework of prospective licensing and registration of transfers of grandfathered weapons. With Metzenbaum's "Gun Violence Prevention Act," more commonly known as "Brady 2,"¹⁰⁰ the next debate insofar as additional gun control measures are considered by a more receptive Congress will undoubtedly involve consideration of licensing and registration. Licensing permits law enforcement to conduct thorough background checks on those who possess firearms to ensure that criminals and other prohibited persons do not obtain them and allows states to set additional conditions such as gun safety training and/or testing. Registration provides law enforcement with the most effective, fastest, and most reliable means of tracing firearms used in crime and ferreting out illegal manufacture, sale, and possession. Without registration of secondary transfers, the investigative trail often leads to a dead end after the primary sale by a licensed dealer.

While licensing or registration of current gun owners has never been instituted as a part of any federal gun control measure, there are precedents for prospective registration. Many states have adopted licensing or registration schemes.¹⁰¹ Also, since 1934, the NFA has required all importers, manufacturers, and dealers in machine guns, short-barreled shotguns or rifles, silencers, and explosives to register with the Secretary of the Treasury,¹⁰² and required all transfers of such weapons to be registered to a transferee who passes a background check. There is no reason why semiautomatic assault weapons that are grandfathered or otherwise exempted under the new law should not be subject to similar requirements, especially when doing so would greatly enhance its effectiveness in reducing violent crime.

Metzenbaum's Brady 2 bill would require, among other things, prospective licensing and registration of handgun transfers. In order to receive a new handgun, an individual would have to have a valid state handgun license (a picture identification card, similar to a driver's license), which would require successful completion of a background check and a handgun safety course. To transfer a handgun, the transferor would have to check that the transferee

100. S. 1882, 103d Cong., 2d Sess. (1994).

101. Eleven states currently have a licensing system, seven of which apply only to handguns (Iowa, Michigan, Minnesota, Missouri, Nebraska, North Carolina, and New York) and four of which apply to all firearms (Hawaii, Illinois, Massachusetts, and New Jersey). Eleven states (Hawaii, Maryland, Michigan, Mississippi, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, South Carolina, and Washington) and the District of Columbia currently have some type of registration system.

102. 26 U.S.C. § 5802 (1988).

possesses a valid license, register the transfer with local police, and comply with a seven-day waiting period. President Clinton also has asked Attorney General Janet Reno to explore the idea of licensing and registration of handgun purchases. While such measures would apply only to handgun assault weapons, the regulatory model could be extended to cover all semiautomatic assault weapons.

Such a scheme of prospective licensing and registration would help close some of the politically necessary loopholes of the assault weapons law. This type of regulation is worthy of close consideration and would be both much more effective than the current fourth tier regulation and much less intrusive than the first or second tier regulatory frameworks. In fact, such a regulatory scheme, if enacted to cover all semiautomatic assault weapons and all handguns, probably would and should end the pro-active federal agenda of the gun control movement.

VI. CONCLUSION

The ban on semiautomatic assault weapons will not drastically reduce violent crime in America. The ban is not, and never was intended to be, a major piece of firearm regulation or anti-crime legislation. It was designed merely to take a bite out of a particularly offensive type of violent crime. It certainly did not warrant the degree of opposition and controversy it engendered.

Accordingly, the NRA, and others who correctly argued that a ban on assault weapons will not be a panacea for violent crime, simply missed the point. The point behind the legislation was not that banning assault weapons will reduce a major portion of violent crime, but that these military-style weapons, which are designed specifically to kill people, have no place in a civilized society. As a society, we are constantly making choices about how best to protect ourselves from the multitude of risks that confront us. We do not always act only against the largest risks nor do we take every action that might save some lives. We choose, and those choices define us as a nation. On occasion, there are relatively small risks that disproportionately offend the sensibilities of society and for that reason alone warrant immediate redress. Semiautomatic assault weapons pose just such a risk. Whatever the risk is of being killed by an Uzi or AK-47 with a thirty-round magazine, it is one that our society has deemed unacceptable. Whatever the proportion of assault weapon crime is of total violent crime, it is a portion too large to accept.

That is the point underlying the ban on semiautomatic assault weapons. We cannot tolerate innocent people being mowed down or law enforcement placed in peril by weapons that do not belong in civilian hands. It does not matter how many lives the ban will save; it will save *some* lives, and those are lives we have chosen to save. It does not matter how much the ban will reduce violent crime; it will prevent some violent crimes, and those are crimes we have chosen to prevent. When we choose to ban assault weapons, we are engaging in self-definition, we are defining America as a country in which slaughter from certain unusually dangerous weapons is simply not tolerated.

There is no reason why military-style weapons should be made available to the general public in an unrestricted manner and in unlimited quantities. Some people may enjoy hunting deer with an AK-47, but no hunter *needs* assault weapons. It was possible to hunt before the AR-15 or TEC-9 was developed. No marksman needs assault weapons. No true sportsman needs an Uzi or a Street Sweeper. There is no reason why semiautomatic assault weapons, as opposed to other guns, are necessary to defend one's self.

The assault weapons ban will cause some inconvenience to some people. But the inconvenience to law-abiding citizens who want to use assault weapons is outweighed by the many dire effects of these weapons on society—their effect on violent crime, on drug-related crime, on law enforcement efforts, on the health care system, and on children and minorities. The ban will not by itself solve the problem of gun crime, but it is a moderate and common sense measure that will help. It will take a bite out of violent crime.