President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

March 26, 2024

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO HB 810

I am the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law, federal firearms law, and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License and a certified NRA instructor in rifle, pistol, personal protection in the home, personal protection outside the home, muzzle loading, as well as a range safety officer. I appear today in OPPOSITIONS to HB 810, as amended and passed by the House.

MSI opposed HB 810 as it was originally drafted because the Bill would have broadly banned "auto sears" outside the existing Maryland statutory scheme, discussed below, and thus swept into that ban legitimate collectors whose possession of machine guns (including auto sears) is completely legal under existing State and Federal law. **MSI made clear that it would not be in opposition if the Bill were amended to change the existing Maryland definition of a "machine gun" to incorporate the federal definition. Nor is MSI opposed in the slightest to a ban on possession of "Glock switches" which are the devices that this Bill attempts to regulate**. As detailed below, existing State law already bans the possession of Glock switches. If further regulation is desired to make such possession doubly illegal, the better course is to incorporate the existing federal definition of "machine gun" into State law. Under the federal definition, an "auto-sear" and a "Glock switch" are **already** machineguns. Incorporating the federal definition would thus illegalize auto-sears and Glock switches in the same way they are already illegal under federal law. In the absence of such an amendment, the Bill creates a confusing mess of the existing regulatory framework.

The Bill:

As amended and passed in the House, the Bill attempts to limit the broad sweep of the original Bill by redefining the term "auto sear" to encompass the mechanism by which a "Glock switch" functions. Specifically, the Bill now defines "auto sear" to mean "A DEVICE THAT APPLIES FORCE TO A FIREARM'S TRIGGER BAR TO PREVENT IT FROM LIMITING THE WEAPON TO FIRING

ONLY ONE ROUND EACH TIME THE TRIGGER IS DEPRESSED. The Bill then adds such devices into existing Maryland Code section that bans "rapid fire trigger activators," MD Code, Criminal Law, §4-305.1. The Bill does so by redefining such "activators" in existing law to delete the reference to "trigger." As thus amended the Code would encompass any "rapid fire activator" (including the newly defined auto sear") into the existing definition. That definition includes "any device, including a removable manual or power–driven activating device, constructed so that, when installed in or attached to a firearm: (i) the rate at which the trigger is activated increases; or (ii) the rate of fire increases. See MD Code, Criminal Law, §4-301(m). Such devices are then incorporated into the existing bans imposed by Section 4-305.1. These amendments are welcome because they lessen (but do not eliminate) the potential criminalization of legitimate collectors. That said, the point remains that the Bill, even as amended, is unnecessary because existing law already bans the Glock switch. The Bill, as amended, inappropriately fails to define its terms, misuses existing industry terms and fails to apply existing federal and State law.

The Bill Is Both Unnecessary and Too Broad

The premise of the Bill is that amendments to existing law are necessary to allow the prosecution for possession of a Glock switch. The thought appears to be that because Section 4-305.1 purports to regulate "rapid fire **trigger** activators" it does not regulate a Glock switch because a Glock switch does not "activate" the "trigger." But that premise is simply wrong because it ignores the existing definition of "rapid fire trigger activator." As noted, a "rapid fire trigger activator" is defined to include "**any device** when installed in or attached to a firearm: (i) the rate at which the trigger is activated increases; **or** (ii) the rate of fire increases." See MD Code, Criminal Law, §4-301(m). These provisions are **disjunctive,** so **either** part of the definition will suffice to regulate a device. See *Plank v. Cherneski*, 469 Md. 548, 620, 231 A.3d 436 (2020) ("Maryland courts generally interpret 'or' in the disjunctive sense when they construe statutes."), citing *SVF Riva Annapolis, LLC v. Gilroy*, 459 Md. 632, 642, 187 A.3d 686 (2018).

Here, "the rate of fire increases" dramatically and unquestionably when a Glock switch is "installed in" or "attached to" a Glock pistol. A Glock switch is thus a "rapid fire trigger activator" **by definition** under existing law. That it doesn't "activate the trigger" is irrelevant. Under current law, MD Code, Criminal Law, §4-305.1, a person may not transport, manufacture, possess, sell, offer to sell, transfer, purchase or receive" such a device. Section 4-305.1 does **not** require that the "device" be installed on the firearm. Thus, current law has been used to successfully prosecute the mere possession of a Glock switch in Montgomery County. The City of Baltimore could do the same. That it has not done so is inexplicable. This is not rocket science. The Bill is simply unnecessary.

In any event, the Bill, as amended, is too broad as it fails to define "TRIGGER BAR" and thus may still be read to include collector firearms that operate without a conventional auto-sear. Specifically, a "trigger bar" is not a "auto sear." A normal auto sear is **not** a device that "applies force to the trigger bar." The trigger assembly of a full auto weapon usually (not always) has (1) the hammer (2) the

disconnector (3) an auto sear, and (4) the trigger (the thing you pull to set off the firing sequence). It does not have a "trigger bar."

The Bill was apparently amended by looking up the definition of a Glock switch in Wikpedia. https://en.wikipedia.org/wiki/Glock_switch. The patent on a Glock switch does indeed use the term "trigger bar" to describe a Glock switch and thus, in that context, that definition may make sense if the Bill were amended to address only a Glock switch. See Patent US5705763A. https://worldwide.espacenet.com/patent/search/family/024751089/publication/US5705763A?q=pn%3DUS5705763A. But the Bill is not limited to Glock switches and does not define "trigger bar." Rather, the Bill equates a "trigger bar" to an actual "auto sear" commonly used in machine guns. But an "auto sear" is a much different sort of device. In common usage, an "auto sear" is designed to hold the hammer in the cocked position until the firearm's bolt has returned all the way forward to battery. The "auto sear" then releases the hammer and discharges the weapon again. Again, an "auto sear" does not involve an "trigger bar."

In contrast, a Glock switch is shaped like a metal nail stuck in a small metal box and is relatively easily attached to the rear of the slide of a Glock pistol. As the Bill indicates, the Glock switch suppresses the "trigger bar" of a Glock pistol. Without such a switch, the trigger bar would otherwise engage the striker mechanism and prevent fully automatic fire. In striker pistols, like Glock, there is no "hammer" or an "auto sear" as such. Rather pulling the trigger releases the firing pin directly without being struck by a hammer. Converting a Glock pistol with a Glock switch is relatively simple. Converting other striker pistols, such as those made by Sig Sauer and Smith & Wesson, is much more demanding and difficult, even though those pistols likewise make use of a trigger bar. As a result, there are no "Sig switches" or "S&W switches" on the streets.

A few antique machine guns, such as the WWII-era M-3 "Grease Gun" and the British "Sten Gun," also operated without a hammer or an "auto sear." In these antique guns the trigger releases the bolt which functions as the striker, just as the trigger releases the striker in modern striker pistols. These antique guns are highly prized by collectors and may be legally possessed under existing federal law by going through the procedures established by federal and State law, as detailed below. These collector items are likewise not found on the streets for the simple reason that legally owned machine guns are almost **never** used in crime, as one might expect given the extensive vetting of legitimate owners conducted by the ATF. https://gunmagwarehouse.com/blog/have-legally-owned-automatic-weapons-been-used-in-crime/. **Only** Glock switches are the perceived problem and Glock switches are **already** illegal under State and federal law.

Existing Federal Law

A "machinegun" is an item controlled by the National Firearms Act of 1934, 26 U.S.C. § 5801, *et seq* ("the NFA") along with other items, such as suppressors, short-barreled rifles, and short-barreled shotguns. Under federal law, to acquire or possess a machinegun, the person must first register with the ATF, undergo an exhaustive background investigation, including fingerprinting by the ATF, pay a

transfer tax on the firearm and notify local law enforcement officials that you are seeking to acquire a machine gun. See 26 U.S.C. §§ 5811, 5812. See generally 27 C.F.R. § 479.105(b), 27 C.F.R. §§ 479.84, 479.85. No possession is allowed until the ATF has approved the transfer. 26 U.S.C. § 5812(b). The process takes many months.

With specified exemptions, such as for Class III federal firearms licensees and State and federal law enforcement officers, the only machineguns that may be lawfully possessed by civilians are those manufactured **prior to** the enactment of the 1986 amendments to the Gun Control Act of 1968. See 18 U.S.C. § 922(o). Such pre–1986 machineguns are now extremely expensive, with many costing more than $20,000. Possession without complying with these provisions is a serious federal felony. See 18 U.S.C. § 922(o) (banning possession); 18 U.S.C. § 924(a)(2) (making a violation of Section 922(o) a 10-year federal felony); 26 U.S.C. § 5861(d) (criminalizing the possession of an unregistered machinegun); 26 U.S.C. § 5871 (punishing a violation of Section 5861(d) by imprisonment for 10 years and a $10,000 fine). As explained below, a Glock switch **is** a machine gun under federal law and the Glock switch was not even invented until well after 1986. See https://patents.google.com/patent/US5705763A/en. Thus, as a rule, civilians, including collectors, may not legally possess a Glock switch **at all** under federal law.

Federal law sets forth a definition of a machinegun applicable to these provisions in 26 U.S.C. § 5845(b), which provides:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, **any part** designed and intended solely and exclusively, or combination **of parts** designed and intended, for use in converting a weapon into a machinegun, and any **combination of parts** from which a machinegun can be assembled if such parts are in the possession or under the control of a person.
> (Emphasis added).

As emphasized, this definition expressly includes "any part" used exclusively in a machinegun or any combination of parts that could be used to convert a firearm into a machinegun. That definition includes all actual auto sears. See, e.g., *United States v. Bailey*, 123 F.3d 1381, 1389 (11th Cir. 1997) (conviction affirmed for possession of a "drop-in autosear" that could be used to convert a firearm into a M-16 machinegun); *United States v. Cash*, 149 F.3d 706, 707 (7th Cir. 1998) (noting "auto sears are treated as machine guns").

The same is true of "Glock switches." See, e.g., *United States v. Rice*, 2023 WL 8253814 at *3 (11th Cir. 2023) ("Rice [the defendant] conceded that the Glock switch qualified as a device designed to convert a semiautomatic pistol into a machinegun, 26 U.S.C. § 5845"); *United States v. Lane*, --- F.Supp.3d ---, 2023 WL 5663084 at *13 (E.D. Va. 2023) ("18 U.S.C. § 922(o) makes it "unlawful for any person to transfer or possess a machinegun." The parties do not appear to

presently dispute that the Defendant's 'Glock switch' counts as a 'machinegun' under the statute."); *United States v. Fisher*, 2024 WL 589115 at *1 (W.D.N.C. Feb. 13, 2024) ("the Defendant was indicted for possessing 'a machinegun conversion kit, commonly referred to as a Glock Switch, a part designed solely and exclusively for use in converting a weapon into a machinegun.'").

Existing State Law Regulates Machine Guns But Does Not Regulate "Parts."

Current Maryland law defines a "machine gun" to mean "a loaded or unloaded weapon that is capable of automatically discharging more than one shot or bullet from a magazine by a single function of the firing device." MD Code, Criminal Law, § 4-401(c). Maryland law requires the annual registration of a machine gun with the Maryland State Police and that registration necessarily presupposes that the machinegun already has been registered with the ATF under federal law. See MD Code, Criminal Law, § 4-403. Possession of a machine gun is governed by MD Code, Criminal Law, § 4-402)(b)(4), which provides that "[t]his subtitle does not prohibit or interfere with * * * the possession of a machine gun for a purpose that is manifestly not aggressive or offensive." This provision allows possession by collectors who otherwise lawfully possess machine guns under federal law and who register with the State Police. Section, § 4-402(b)(4).

That point is reiterated in MD Code, Criminal Law, § 4-405(c), which provides that a "person may not possess or use a machine gun for an offensive or aggressive purpose" and Section 4-405(d) which punishes such possession or use with imprisonment by up to 10 years. Section 4-405(a) provides:

> Possession or use of a machine gun **is presumed to be for an offensive or aggressive purpose** when:
> (1) the machine gun:
> (i) is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun is found;
> (ii) is in the possession of, or used by, an unnaturalized foreign-born person or a person who has been convicted of a crime of violence in any state or federal court of the United States; or
> **(iii) is not registered as required under § 4-403 of this subtitle**; or
> (2) empty or loaded shells that have been used or are susceptible of being used in the machine gun are found in the immediate vicinity of the machine gun. (Emphasis added).

A violation of Section 4-405 is a misdemeanor and is punishable by imprisonment "not exceeding 10 years." MD Code, Criminal Law, § 4-405(c).

Consistent with Section 4-405(c)(1)(iii), Section 4-405 has been interpreted not to apply to otherwise lawfully possessed machineguns that are possessed as a keepsake or for non-aggressive or non-offensive purposes. *Boyer v. State*, 666 A.2d 1269, 1275-76, 107 Md.App. 32 (1995), *cert. denied*, 672 A.2d 622, 341 Md. 647 (1996) (the statute "can in no way be 'a trap for those who act in good faith'"). And that makes sense. Law-abiding gun collectors who have jumped through all the

hoops imposed by the ATF, including paying the ATF transfer tax, going through the intensive background investigation by the ATF and registering their machinegun with the Maryland State Police are not a problem in Maryland (or anywhere else).

The Bill Would Needlessly Create Confusion In Existing Law.

MSI is not opposed to State regulation of machine guns, including auto sears and Glock switches. As should be apparent, the Glock switch mechanism banned by this Bill is **already** a machinegun under federal law because federal law, Section 5845(b), expressly encompasses "parts" of machineguns. A Glock switch is also a "rapid fire trigger activator" and is thus already illegal under existing State law. Persons apprehended with auto-sears or Glock switches in their possession can be turned over to the United States Attorney who may prosecute such persons under federal law. Federal authorities are known to be vigorous in their enforcement of Section 922(o) and Section 5861(d).

A simple amendment to the definition of a machine gun under Maryland law to incorporate the federal definition would likewise allow prosecutions in Maryland **under the statutory framework established by existing State law regulating machine guns**. The current Maryland definition of machine gun in MD Code, Criminal Law, § 4-401(c), does not specifically mention parts. To clearly make possession of a Glock switch illegal under these provisions of Maryland law, the General Assembly need only incorporate the federal definition of machinegun (Section 5845(b)) into State law by amending the definition of machine gun in MD Code, Criminal Law, § 4-401(c), to so provide. In that way, parts of machine guns, such as auto sears and Glock switches, can be prosecuted pursuant to MD Code, Criminal Law, § 4-405, just as they may be (and are) prosecuted under federal law pursuant to Section 922(o) and Section 5861(d). As noted, under existing State law, possession of an unregistered machinegun is a 10-year misdemeanor.

Such an incorporation of federal law would also provide clarity by incorporating the existing body of federal case law where the courts have vigorously enforced the federal definition under Section 922(o) and Section 5861(d). In contrast, this Bill needlessly singles out the oddly defined auto-sear for special treatment while leaving other parts of machine guns unaddressed. It is thus wildly underinclusive. By doing so, the Bills risks creating confusion in the law as it may, as a consequence, be argued that other parts of a machinegun, as defined by federal law, Section 5845(b), would not be treated as a machine gun because such parts have not been specifically and separately identified as such in this Bill. *Office & Prof. Employees Int'l v. MTA,* 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982) ("It is a settled principle of statutory construction that the Legislature's enumeration of one item, purpose, etc. ordinarily implies the exclusion of all others."). See also Sutherland, 2A Statutory Construction §§ 47.23, 47.24 (4th ed. 1984 rev.).

The Bill's approach of addressing the mechanism (applying force to an undefined "trigger bar") used in Glock switches outside of the existing regulatory framework for machine guns risks criminalizing registered legitimate collectors whose possession of a machine gun is fully consistent with existing federal and State

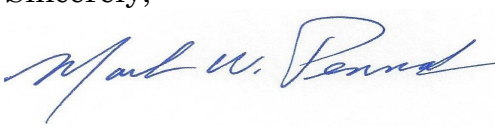
law. Amending Section 4-401(c) to incorporate the federal definition would avoid that unintended result because existing Maryland law does not criminalize possession by persons who have otherwise complied with federal law and who have registered their machinegun with the State Police under State law. As noted, existing State law, Section 4-402(b)(4) and Section 4-405(a)(1)(iii) provide a safe harbor for collectors who have registered their machine guns with the State Police.

The Bill, as amended, thus needlessly creates ambiguity in a criminal statute because it uses an undefined term, "trigger bar," in its definition of "auto sear," the latter being an industry term for a different part with a different meaning. Clarity in such statutes is highly desirable as a matter of constitutional law. See, e.g., *Johnson v. State*, 240 Md.App. 200, 201 A.3d 644 (2019) (noting that "sentencing provisions that fail to 'state with sufficient clarity the consequences of violating a given criminal statute' may be invalid on constitutional grounds"), quoting *United States v. Batchelder*, 442 U.S. 114, 123 (1979). See also *United States v. Lanier*, 520 U.S. 259 (1997) ("[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.").

There is no good reason for this Bill to abandon Maryland's existing framework or deviate from the federal definition. As noted above, Section 4-305.1 **already** bans a Glock switch and that ban has been used to prosecute the possession of Glock switches in Maryland. The Bill is thus unnecessary. Even assuming *arguendo* the need for additional legislation, the Bill would create needless uncertainty whereas incorporating the federal definition into the existing Maryland framework would be fully responsive to the concerns giving rise to the Bill (Glock switches) and allow Maryland to prosecute the possession of parts of machine guns, including Glock switches, just as such possession is prosecuted by federal authorities. The federal definition of a machinegun has been in use for decades and is well-understood. Maryland's existing regulatory framework for machine guns has likewise been in existence for decades.

In sum, there is no need to reinvent this wheel. We urge an unfavorable report unless the Bill is amended to incorporate the federal definition of machinegun into existing State law definition of machine gun. Good governance requires nothing less.

Sincerely,



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