



President
Mark W. Pennak

February 28, 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 OPPOSITION to HB 810.

To be clear, this opposition is based on the Bill as drafted. **MSI 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.** Under the federal definition, an “auto-sear” is **already defined** as a machinegun. Incorporating the federal definition would thus legalize auto-sears in the same way they are already illegal under federal law and accomplish the regulatory objective of this Bill. In the absence of such an amendment, the Bill makes a mess of the existing regulatory framework and should receive an unfavorable report for that reason alone.

The Bill: This Bill amends MD Code, Public Safety, § 5-101(n) to add a new definition for a “switch/auto-sear” as A DEVICE THAT IS DESIGNED AND INTENDED FOR USE IN CONVERTING A FIREARM INTO A WEAPON THAT 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 Bill then adds a new Section to the Criminal Law Article, MD Code, Criminal Law, § 4-305.2, to provide that A PERSON MAY NOT: (1) TRANSPORT A SWITCH/AUTO-SEAR INTO THE STATE; OR (2) MANUFACTURE, POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE A SWITCH/AUTO-SEAR. A violation of new Section 305.2 is punishable by imprisonment for up to three years, and/or a fine of \$5,000. MD Code, Criminal Law, § 4-306.

Existing Federal Law:

Existing federal and State law already regulate the possession of machine guns. 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, undergo an exhaustive background investigation, including fingerprinting by the ATF, pay a transfer tax on the firearm and notify local law enforcement officials. 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 only machineguns that may be lawfully possessed by such persons 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 machineguns are now extremely expensive. Possession without complying with these provisions is a serious federal felony under 18 U.S.C. § 922(o) and is punishable by imprisonment for 10 years. See 18 U.S.C. § 924(a)(2). See also 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).

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 auto-sears, including the “auto-sear” addressed by this Bill. 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”).

Existing State Law:

Maryland law likewise regulates machine guns. 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 auto-sears. We are opposed only to the way this Bill accomplishes that task. Indeed, as should be apparent, the “auto-sear” banned by this Bill is **already** a machinegun under federal law because federal law, Section 5845(b), expressly encompasses “parts” of machineguns including auto-sears. Persons apprehended with auto-sears in their possession can

be turned over to the United States Attorney who may (and undoubtedly will) prosecute such persons under federal law.

A simple amendment to the definition of a machine gun under Maryland law would likewise allow prosecutions in Maryland **under the statutory framework established by existing State law**. 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 an auto-sear illegal under 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, can be prosecuted pursuant to MD Code, Criminal Law, § 4-405, just as they may be prosecuted under federal law pursuant to Section 922(o) and Section 5861(d).

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 auto-sear for special treatment while leaving other parts of machine guns unaddressed. Doing so 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.).

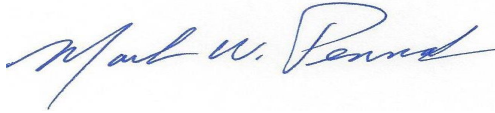
The Bill’s approach of separately addressing auto-sears outside of the existing regulatory framework established by Maryland law, also risks criminalizing registered collectors whose possession of a machine gun is fully consistent with existing federal and State law. Amending Section 4-401(c) to incorporate 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 written, thus needlessly creates ambiguity in a criminal statute. 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.”).

The federal definition of a machinegun has been in use for decades. Maryland’s existing regulatory framework for machine guns has likewise been in existence for decades. There is no good reason for this Bill to abandon Maryland’s existing framework or deviate from federal definition. Doing so 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. The Bill should be amended to so provide. In the absence of such amendment, the Bill should receive an unfavorable report.

Sincerely,



Mark W. Pennak
President, Maryland Shall Issue, Inc.
mpennak@marylandshallissue.org