

MUCH ADO ABOUT NOT VERY MUCH: THE EXPIRATION OF THE ASSAULT WEAPONS BAN AS AN ACT OF LEGISLATIVE RESPONSIBILITY

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INTRODUCTION

Few issues evoke such passionate public and political support as assault weapons bans.¹ Polls show public approval for banning such weapons at sixty-eight percent.² Both 2004 presidential candidates favored renewing the existing Federal Assault Weapons Ban (AWB).³ The Senate voted in March 2004 to renew the ban.⁴ Yet Congress allowed the AWB to expire in September 2004.⁵ The conventional account calls the ban's expiration a failure of election-year politics.⁶ This article, however, offers a different perspective: the expiration of the AWB was due not to mere congressional ineptitude, but rather to responsible legislative inaction. The AWB was a flawed law that

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1. Throughout this article the term "assault weapons" is confined to the definition used in the Federal Assault Weapons Ban. 18 U.S.C. § 921(a)(30) (2000) (repealed 2004).

2. Sheryl Gay Stolberg, *Effort to Renew Weapons Ban Falters on Hill: Democrats Fault Bush for Lack of Action*, N.Y. TIMES, Sept. 9, 2004, at A1 (noting study released that week by Annenberg Public Policy Center of University of Pennsylvania).

3. See *Transcript of Debate Between Bush and Kerry, With Domestic Policy the Topic*, N.Y. TIMES, Oct. 14, 2004, at A22. But see Jodi Wilgoren, *In Magazine Interview, Kerry Says He Owns Assault Rifle*, N.Y. TIMES, Sept. 26, 2004, at A33 (quoting Senator John Kerry stating he kept Chinese assault rifle as reminder of his military service).

4. A renewal of the AWB passed 52–47 as an amendment to a bill shielding gun manufacturers from lawsuits (along with amendment to close gun-show loophole). However, the bill itself was defeated 90–8 after the NRA and White House withdrew support when the amendments were attached; Republicans called the amendments "poison pills." See Sheryl Gay Stolberg, *Senate Leaders Scuttle Gun Bill Over Changes*, N.Y. TIMES, Mar. 3, 2004, at A1.

5. The ban expired on September 13, 2004. See 18 U.S.C. §§ 921–922 (2000).

6. Stolberg, *supra* note 2 (noting that although President Bush supported its renewal, he refused to push Congress to reauthorize AWB, perhaps because he needed NRA endorsement for 2004 reelection, which NRA withheld until sunset of AWB).

failed to achieve its purposes and created gridlock in Congress. With its expiration comes the possibility of finding common ground on more meaningful gun control legislation.

This article focuses solely on the expiration of the Assault Weapons Ban.⁷ Part I begins with a brief discussion of the political environment that resulted in its passage as part of the Violent Crime Prevention and Law Enforcement Act of 1994;⁸ it then outlines the law, focusing on the statute's definition of assault weapons. Part II describes two serious flaws in the ban. First, the ban's definition of assault weapons did not reflect particularly dangerous firearms; the ban therefore failed to reduce the lethality of weapons available to the public. Second, the ineffective structure of the AWB provided easy access to assault weapons compounded by low compliance rates by the public. Part III argues that, despite the substantial public support for renewing the ban, Congress's failure to do so was a legitimate act of political judgment that was beneficial from several perspectives. While opponents of gun control welcome the ban's expiration, those who support gun control should not be discouraged. The end of the AWB may provide the opportunity to develop consensus on other gun control measures.

I.

THE MUCH ADO

A. *The Politics of the 1994 Federal Assault Weapons Ban*

In the late 1980s and the early 1990s, several factors coalesced to make the assault weapons ban a prominent issue in national politics. Public support for controls on assault weapons expanded as a result of high-profile incidents involving semiautomatic weapons.⁹ Polls

7. 18 U.S.C. §§ 921(a)(30)–(31), 922(v)–(w) (2000) (repealed 2004). This article is not meant to argue that assault weapons bans in general are flawed; rather, it argues that the AWB was flawed. Although some general discussion of gun control will follow, this piece avoids broader discussion on the worthiness of gun control. Moreover, it does not address arguments regarding the Second Amendment or the constitutionality of various gun control measures, reserving such a contentious topic for a more suitable forum. Instead, the narrow scope of this article is the AWB, its passage, its structure, its efficacy, and, most timely, its recent expiration.

8. Pub. L. No. 103-322 (1994) (repealed 2004).

9. Arguably the highest-profile incident occurred just days before President George H.W. Bush's inauguration, when Patrick E. Purdy opened fire at a Cleveland school with an AK-47, killing five children and wounding thirty other people before shooting himself. See Samuel C. Patterson & Keith R. Eakins, *Congress and Gun Control*, in *THE CHANGING POLITICS OF GUN CONTROL* 45, 57 (John M. Bruce & Clyde Wilcox eds., 1998) ("This and other incidents involving 'assault weapons'—semiautomatic, magazine-loaded rifles, shotguns, or handguns—precipitated growing

demonstrated overwhelming support for banning assault weapons.¹⁰ Federal law enforcement officers reported that in 1993, assault weapons were involved in just over eight percent of violent crimes, even though they comprised only one percent of firearms nationwide.¹¹ Politicians could thus rely on several different sources—polling data and crime studies, as well as prominent incidents of violent crime—to promote legislation aimed at the prohibition of semiautomatic weapons.¹²

Despite popular support, Congress was slow to pass a ban on assault weapons. In 1989, President George H.W. Bush signed an executive order banning imports of assault weapons.¹³ However, it was not until 1993 that Senator Dianne Feinstein (D–CA) introduced an assault weapons ban that eventually passed both houses of Congress and was signed into law in 1994.¹⁴ Despite stiff opposition, the Senate passed the AWB by a margin of one vote.¹⁵ In the House of Representatives, it took a powerful vote switch by Representative Henry Hyde (R–IL) for the bill to leave committee,¹⁶ passing in the House by a dramatic two-vote margin.¹⁷ President Clinton signed the AWB into law on September 13, 1994.¹⁸

public and government concern.”). See also Jeffrey Y. Muchnick, *The Assault Weapons Ban—Saving Lives*, 20 U. DAYTON L. REV. 641, 643 (1995) (listing several high-profile incidents that sparked efforts to ban assault weapons).

10. See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 101 (3d ed. 2004); see also Jonathan Alter, *How America’s Meanest Lobby Ran Out of Ammo*, NEWSWEEK, May 16, 1994, at 24, 25 (quoting Rep. Butler Derrick’s declaration on House floor that “if this bill fails, we are no longer a democracy.”).

11. SPITZER, *supra* note 10, at 125.

12. See Margaret Carlson, *Giving up the Gun: The Conversion of Henry Hyde*, TIME, May 16, 1994, at 42 (describing Rep. Henry Hyde’s decision to support assault weapons ban, precipitated in part by document on high-profile Chicago killings brought to his attention by Sen. Dianne Feinstein in effort to sway his vote).

13. See RICHARD POE, *THE SEVEN MYTHS OF GUN CONTROL: RECLAIMING THE TRUTH ABOUT GUNS, CRIME, AND THE SECOND AMENDMENT* 11 (2001).

14. See WILLIAM J. VIZZARD, *SHOTS IN THE DARK: THE POLICY, POLITICS, AND SYMBOLISM OF GUN CONTROL* 141 (2000) (noting that Sen. Feinstein led Senate effort and authored compromise bill that eventually passed).

15. A vote to kill Senator Feinstein’s AWB was narrowly defeated 49–51, but it passed by a margin of 56–43 once it was attached to the larger crime bill. See Patterson & Eakins, *supra* note 9, at 58.

16. SPITZER, *supra* note 10, at 122.

17. The final House vote, in May 2004, was 216–214. Patterson & Eakins, *supra* note 9, at 59.

18. *Id.*

For the next few years, the ban withstood Republican threats of repeal, largely due to President Clinton's protection.¹⁹ Although the issue dropped below the public radar, the National Rifle Association (NRA) and other gun lobbies continued to oppose the federal ban, seeking its repeal—or at least its sunset in 2004.²⁰

B. *The Structure of the Federal Assault Weapons Ban*

The final incarnation of the AWB was a patchwork of prohibitions and concessions necessary for the bill's passage. The AWB made it illegal to "manufacture, transfer, or possess" assault weapons,²¹ which it defined in several ways. First, the statute declared that nineteen individual firearms, including copycats, were assault weapons.²² These firearms included semiautomatic versions of the well-known AK-47, Uzi, and TEC-9, as well as other weapons chosen for their distinctively military or futuristic appearance.²³ Second, the AWB set forth a list of criteria; rifles, pistols, and shotguns meeting any two of the criteria were deemed assault weapons.²⁴ The list included characteristics such as: "(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."²⁵ Lastly, the AWB included a prohibition on "large capac-

19. The last attempt to repeal the ban came in 1996, when the repeal passed decisively in the House (239–173), failed to reach the floor of the Senate, and would likely have been vetoed by President Clinton. SPITZER, *supra* note 10, at 125.

20. See Howard Fineman & Michael Isikoff, 'We're Not Running Now': *Guns: A Defiant NRA Gives Clinton an Opportunity*, NEWSWEEK, May 29, 1995, p. 42 (noting that NRA gave over \$1 million to congressional campaigns in 1994 alone). President Clinton believed that the AWB and the lobbying efforts of the NRA cost the Democrats roughly twenty seats in the 1994 Republican landslide in the House of Representatives. See David B. Kopel, "Assault Weapons," in GUNS: WHO SHOULD HAVE THEM 159, 160 (David B. Kopel ed., 1995). More recently, the NRA was accused of strategically withholding its endorsement for President George W. Bush's second term until the AWB expired. See Stolberg, *supra* note 2, at A1.

21. 18 U.S.C. § 922(v)(1) (2000) (repealed 2004).

22. The nineteen firearms banned include the Kalashnikov (the AK-47); Uzi; Galil; Beretta Ar70 and SC-70; Colt AR-15; Fabrique National FN/FAL, FN/LAR, and FNC; SWD M-10, M-11, M-11/9, and M-12; Steyr AUG; INTRATEC TEC-9, TEC-DC9, and TEC-22; Street Sweeper; and Striker 12. 18 U.S.C. § 921(a)(30)(A) (repealed 2004).

23. See Kopel, *supra* note 20, at 162–63.

24. See 18 U.S.C. § 921(a)(30)(B) (repealed 2004) (criteria for semiautomatic rifles); *id.* § 921(a)(30)(C) (repealed 2004) (criteria for semiautomatic pistols); *id.* § 921(a)(30)(D) (repealed 2004) (criteria for semiautomatic shotguns). The Act's criteria-based prohibitions, combined with the nineteen weapons expressly prohibited, covered roughly 200 models of firearm. See Kopel, *supra* note 20, at 162.

25. 18 U.S.C. § 921(a)(30)(B) (repealed 2004).

ity ammunition feeding devices”—ammunition clips containing more than ten rounds.²⁶

The bill also included several concessions crafted to garner sufficient support in Congress. First, a provision expressly exempted over 650 firearms from the ban.²⁷ These were deemed “recreational” weapons, and were protected in order to appease hunters.²⁸ Second, the ban included two grandfather clauses, exempting any firearm or large capacity ammo clip produced or purchased before the enactment of the AWB.²⁹ Third, the law included a sunset clause providing for the ban’s expiration after ten years.³⁰ Fourth, the AWB mandated a government study to measure the effectiveness of the ban.³¹

II.

THE NOT VERY MUCH

Although the AWB was intended to remove dangerous weapons from the streets, the law did little to achieve this goal. It failed to prohibit particularly dangerous weapons, because the firearms encompassed in the statute’s definition of assault weapons were not uniquely lethal compared to weapons that remained legal under the ban.³² Furthermore, concessions during the legislative process made the AWB unsuccessful in achieving its second purpose—removing these weapons from the public.³³ Ultimately, the questionable evidence associating assault weapons with crime, coupled with the continuing availability of assault weapons after the ban, raise doubts as to whether the AWB addressed the underlying crime problem.³⁴

A. *Marginal Reduction in Lethality*

The term “assault weapon” is itself intimidating, conjuring images of the powerful, rapid-fire weapons used by the military or in

26. *Id.* §§ 921(a)(31)(A), 922(w)(1) (repealed 2004).

27. *Id.* § 922 app. (repealed 2004).

28. Kopel, *supra* note 20, at 162; *see also* Muchnick, *supra* note 9, at 641 (“By including the list of exempted firearms, Feinstein was able to persuade a majority of Senators to support the amendment, which survived a motion to table by one vote.”).

29. 18 U.S.C. §§ 922(v)(2), 922(w)(2) (repealed 2004).

30. *See id.* §§ 921, 922.

31. *See id.* § 921.

32. *See* JAMES B. JACOBS, CAN GUN CONTROL WORK? 32 (2002) (“From a technical standpoint, there is no reason to divide semiautomatic rifles into ‘good’ and ‘bad’ categories.”).

33. *See* Kopel, *supra* note 20, at 186–87.

34. *See* JACOBS, *supra* note 32, at 186 (“Little, if any, crime control payoff can be expected from this ‘bad guns’ strategy.”).

action films.³⁵ These images increase fear in the public consciousness, but do not reflect the reality of assault weapons as defined by the federal government.³⁶ In fact, the weapons banned under the AWB are *not* actually automatic weapons—they cannot fire more than one round per pull of the trigger.³⁷ Guns that fire more than one round per trigger-pull have been heavily regulated since the 1930s, and nothing in the AWB affected these firearms.³⁸ Although they are dubbed “military-like,” they are not military weapons used by conventional militaries.³⁹

Assault weapons, as defined by the AWB,⁴⁰ are functionally the same as other semiautomatic guns. They fire no faster than other semiautomatic firearms not prohibited by the AWB.⁴¹ Moreover, gun control advocates’ contention that semiautomatic weapons fire at an extraordinary rate is untenable; a U.S. Navy Seal study shows they fire

35. Advocates used the fear created by public confusion regarding the character of these weapons to rally support for the AWB. See Kopel, *supra* note 20, at 191 (quoting memo from current head of Violence Policy Center who lobbied for AWB: “The semi-automatic weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.”).

36. See JACOBS, *supra* note 32, at 31 (“Contrary to popular belief, they are not automatic fire or machine guns, but semiautomatic rifles or quasi rifles that *look like* military or ‘action adventure film’ (Rambo) weapons.”) (emphasis added).

37. See *id.* Proponents of the AWB argue that assault weapons can easily be converted to automatic fire. See Gary Kleck, *Media Bias: Gun Control, Assault Weapons, Cop-Killer Bullets, the Goetz Case, and Other Alarms in the Night*, in *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE* 53, 72–74 (Don B. Kates, Jr. & Gary Kleck eds., 1997) (noting CBS news story that, using crafty editing, showed ‘gunsmith’ convert gun in period of nine minutes). However, guns that are readily convertible to automatic fire are included in the definition of “machine guns” by the Bureau of Alcohol, Tobacco and Firearms (BATF) and are heavily regulated. *Id.* at 73. Moreover, it takes hours by a skilled gunsmith to convert guns to automatics, and by doing so the gunsmith would be committing a serious felony. See Kopel, *supra* note 20, at 168.

38. Kopel, *supra* note 20, at 162 (noting that automatic fire guns have been heavily regulated since National Firearms Act of 1934, and that nothing in AWB changed law relating to automatic weapons).

39. “[T]he original military weapons had been designed as full-automatic and required significant modification to be legally sold in the unrestricted market.” VIZARD, *supra* note 14, at 25. With few exceptions, such as the Israeli Army’s use of the Uzi semiautomatic pistol, none of the federally-designated assault weapons are used by militaries. See Kopel, *supra* note 20, at 163, 218 n.18. Banning weapons because they are “military-like” raises interesting constitutional issues. See POE, *supra* note 13, at 152 (noting that AWB is first time since founding of Constitution that firearms have been banned for being military-like, which signals end to framers’ concept of citizen militia as they understood it).

40. See 18 U.S.C. §§ 921(a)(30)–(31) (2000) (repealed 2004).

41. See Kopel, *supra* note 20, at 164–65.

roughly one-tenth of a second faster than bolt-action weapons.⁴² Furthermore, when a weapon is actually aimed, the rate of fire is only about one shot per second on target.⁴³ Thus, the fear of hundreds of rounds being fired in a matter of seconds is unfounded. The AWB did prohibit large capacity clips,⁴⁴ and in that sense did reduce the firing rate of guns. However, the delay in firing caused by smaller ammunition clips is marginal due to the split second it takes for the shooter to press the release button and lock in a “new fully-loaded clip.”⁴⁵

Furthermore, the ammunition used in assault weapons is not uniquely lethal compared to the ammunition used in other weapons permitted by the federal government.⁴⁶ The two major factors that determine the destructive force of a round are its weight and velocity,⁴⁷ and rounds fired by assault weapons have less weight and a lower velocity than rounds used in many hunting rifles.⁴⁸ Because assault weapons are not automatic weapons, they do not spray ammunition at nearly the destructive force of an ordinary shotgun firing buckshot.⁴⁹ Therefore, looking purely at the firing rate and power of the firearms included under the AWB, the nineteen banned weapons are less dangerous than many weapons left untouched by the ban.

The second prong of the AWB prohibited firearms with at least two of the listed characteristics, such as a folding stock, a pistol grip, a threaded muzzle, a bayonet mount, or a grenade launcher.⁵⁰ However, these criteria have little connection to the dangerousness of the

42. *Id.*

43. *Id.* at 165.

44. 18 U.S.C. §§ 921(a)(31), 922(w)(1) (repealed 2004).

45. See JACOBS, *supra* note 32, at 32.

46. See Kopel, *supra* note 20, at 168–69.

47. *Id.* at 168.

One of the reasons that the ammunition for the military-style rifle is smaller and hence less powerful, is that it was created for soldiers who would have to carry large quantities of ammunition over long distances; in contrast, standard hunting ammunition can be heavier, since a hunter will carry only a few rounds”

Id.

48. See *id.* at 169. “The great irony of the claim that the rifles labeled semi-automatic ‘assault weapons’ are uniquely destructive is that they are the only rifles that have ever been *designed not to kill.*” *Id.* (emphasis added) (explaining that ammunition used in assault weapons was specifically designed for wounding instead of killing, because injuring enemy soldiers requires more enemy resources than outright killing).

49. See *id.* at 164. But see VIZZARD, *supra* note 14, at 143 (noting that projectiles from shotguns “disperse at random and quickly lose energy” and so do not have capacity to inflict as many lethal wounds).

50. 18 U.S.C. §§ 921(a)(30)(B)(i)–(v) (2000) (repealed 2004).

weapon or a particular crime problem.⁵¹ Although folding and telescoping stocks make long guns marginally easier to conceal, they are still more difficult to conceal than legal handguns,⁵² and are primarily used for easier carrying and storage.⁵³ Protruding pistol grips permit the firer to shoot from a position off the shoulder, but they do not give assault weapons a shooting position different from all handguns.⁵⁴ Further, while threaded muzzles allow easy attachment of flash suppressors (which reduce the flash emitted from the barrel) or muzzle breaks (which reduce the “kick” when the weapon is fired), a gunsmith can attach these features regardless of whether the weapon has a threaded barrel “like true military assault rifles.”⁵⁵ These features do allow for more comfortable and accurate shooting, but this is “a dubious basis for classifying a firearm as uniquely suitable for prohibition.”⁵⁶ Finally, and most absurdly, the AWB prohibits bayonet mounts and grenade launchers.⁵⁷ Bayonets can be fixed to guns regardless of whether the firearm has a mount, and it is doubtful that “criminals charging their victims with a bayonet”⁵⁸ pose a great crime concern. Similarly, the criminal use of grenade launchers is more fantasy than reality.⁵⁹ Further, grenades and grenade launchers, like machine guns, are already heavily regulated.⁶⁰

The nineteen expressly-prohibited weapons and the criteria system raise serious doubt as to whether the weapons banned by the AWB were actually more lethal than those permitted. Assault weap-

51. See Joseph P. Tartaro, *The Great Assault Weapons Hoax*, 20 U. DAYTON L. REV. 619, 637 (1995) (“none of these characteristics has significantly contributed to any special public or law enforcement menace”).

52. See Kopel, *supra* note 20, at 172–73.

53. See WILLIAM WEIR, *A WELL REGULATED MILITIA: THE BATTLE OVER GUN CONTROL* 186 (1997) (noting that even weapons with folding stocks cannot be hidden in a person’s pocket).

54. See Kopel, *supra* note 20, at 171. In fact, pistol grips may actually make it more difficult to shoot from the hip as the “shooter’s arm has to reach around the stock, making hip-shooting marginally more difficult.” WEIR, *supra* note 53, at 186.

55. See Kopel, *supra* note 20, at 171.

56. *Id.* at 172.

57. 18 U.S.C. §§ 921(a)(30)(B)(iii), (v) (2000) (repealed 2004). See James Bovard, *The Assault on Assault Weapons*, WALL ST. J., Jan. 6, 1994, at A12 (AWB and similar assault weapons bans “contain provisions apparently written by people spooked after watching too many Arnold Schwarzenegger movies.”).

58. Kopel, *supra* note 20, at 173.

59. “[N]either the Justice Department nor the Bureau of Alcohol Tobacco and Firearms could provide a single example of either grenade launchers or bayonets attached to assault weapons being used in any violent crime in the U.S. (Grenade launchers were used by the FBI in their final assault in Waco, but the FBI would not be affected by the bill.)” Bovard, *supra* note 57, at A12.

60. See Kopel, *supra* note 20, at 173.

ons as defined in the AWB are not automatic weapons and do not fire rounds that are any more dangerous than common handguns, shotguns, and hunting rifles. Furthermore, the criteria system and the ban on large capacity clips are only marginally related to limiting the lethality of weapons available to potential criminals. In the end, the law failed to address the dangers of particularly lethal weapons, and instead focused on technical details that inspire fear but do not pose any particular threat.⁶¹

B. *Eluding the Ban*

Not only was the AWB flawed in terms of the weapons it banned, but it also failed to limit the public's access to such firearms.⁶² One concession made during the congressional debate was the inclusion of grandfather clauses, which limited the application of the AWB to newly manufactured weapons and clips while permitting legal possession, sale, or transfer of existing assault weapons and large capacity ammunition clips.⁶³ Because of these provisions, the production and sale of assault weapons substantially increased as individual citizens and dealers stocked up on weapons in order to circumvent the impending ban.⁶⁴ Gun manufacturers made minor cosmetic changes to make their weapons compliant⁶⁵ and even increased demand by specifically marketing these "new" weapons as "post-ban."⁶⁶ Some have argued that this surge in demand actually increased the number of assault weapons on the market.⁶⁷ The incoherent grandfather clause and cri-

61. See *supra* note 35 and accompanying text.

62. See JACOBS, *supra* note 32, at 186. But see Linda Feldmann, *Assault-Gun Ban Fades Away*, CHRISTIAN SCI. MONITOR, Sept. 10, 2004, at 1 (citing Brady Center study showing that "crimes traceable to assault weapons declined by 66%" since AWB took effect, but noting that such crimes represent small percentage of overall gun crime—5% before AWB, 1.6% prior to law's expiration).

63. See 18 U.S.C. §§ 922(v)(2), (w)(2) (2000) (repealed 2004).

64. See JACOBS, *supra* note 32, at 32. David Kopel claims that the AWB, together with the Brady Bill, produced "the fastest, largest mass armament in human history." Kopel, *supra* note 20, at 187. Some gun manufacturers created a two-year supply of new inventory, and a ten-year supply of large-capacity clips. *Id.* See also PETER HARRY BROWN & DANIEL G. ABEL, *OUTGUNNED: UP AGAINST THE NRA: THE FIRST COMPLETE INSIDER ACCOUNT OF THE BATTLE OVER GUN CONTROL* 89 (2003) (noting manufacturer of TEC-9 flooded marketplace with 100,000 guns in year before AWB took effect).

65. BROWN & ABEL, *supra* note 64, at 89 (noting that Navegar Company modified TEC-9s "often by simply changing the name and thereby skirting the law").

66. For example, the Bushmaster XM-15 rifle, used in the 2002 Washington, D.C.-area sniper attacks, was "marketed and sold as a 'post-ban carbine' weapon." Editorial, *Lessons From a Sniper's Gun*, CHRISTIAN SCI. MONITOR, Oct. 29, 2002, at 10.

67. See JACOBS, *supra* note 32, at 186; see also Kopel, *supra* note 20, at 187 ("the major effect of the law will have been to stimulate a massive increase in ownership of precisely the items which the law sought to eliminate.").

teria system may have undermined the intent of the AWB: they allowed people to retain and transfer existing weapons, make minor adjustments to firearms to make them compliant, and may have increased assault weapons possession.

Although the law could be easily avoided by purchasing grandfathered or adjusted weapons, many people still did not comply with the ban. David B. Kopel suggests that “[p]erhaps no laws in American history have been more universally ignored than ‘assault weapon’ prohibitions.”⁶⁸ Various municipal assault weapons bans have resulted in estimated compliance rates as low as one percent.⁶⁹ Such noncompliance may not be entirely subversive, since gun owners may find the details of the prohibition confusing and inadvertently purchase banned weapons.⁷⁰ Additionally, individuals may purposely ignore the ban for other reasons. The AWB “enrich[es] organized crime” by creating a black market, and subsequent profit, for banned weapons.⁷¹ Individuals may have concerns for protecting themselves that trump their desire to comply with the federal law.⁷² Also, many gun owners feel it is a constitutional right to own assault weapons, and such bans alienate them from police attempting to enforce the ban.⁷³ For these reasons, both unintentional and intentional, compliance with the AWB was poor.

C. Reducing Crime?

Despite flaws in the legislation, the question still remains whether or not prohibiting assault weapons prevents crime. Given their widespread availability, criminals would likely be able to acquire assault weapons if they desired.⁷⁴ Moreover, faced with an under-inclusive AWB, a criminal would simply turn to other legal weapons; the ban would only limit a criminal’s options, but would not prevent

68. Kopel, *supra* note 20, at 186. Manufacturers attempted to subvert the ban by increasing production before the ban took effect, and *Guns and Ammo* magazine published a feature explaining to readers how to bury guns properly. *See id.* at 187.

69. Cities like Cleveland and Boston had compliance “rates estimated at 1%.” JACOBS, *supra* note 32, at 150. Lending more support to doubts regarding compliance is the fact that “out of the 100,000 to 300,000 assault rifles estimated to be in private hands in New Jersey, [only] 947 firearms were registered” under New Jersey’s assault rifle registration law. *Id.*

70. *See id.* at 186.

71. *See* Kopel, *supra* note 20, at 185.

72. *Id.*

73. *Id.*

74. *See supra* Part II, Section B. *See also* JACOBS, *supra* note 32, at 186 (“Little, if any, crime control payoff can be expected from this ‘bad guns’ strategy.”).

the crime itself.⁷⁵ Proponents of renewing the ban claim that assault weapons are currently used in two-thirds fewer crimes than before the AWB,⁷⁶ but other empirical evidence suggests that “assault weapons . . . are rarely used in crimes.”⁷⁷ Fewer than ten percent of all murders and manslaughters involved long guns (of which semiautomatic rifles are a small subset).⁷⁸ Contrary to the common perception, assault weapons are used in only about one percent of all police gun murders.⁷⁹ The Justice Department study mandated by the AWB⁸⁰ was also equivocal: noting that assault weapons are not commonly used in crimes and that Bureau of Alcohol, Tobacco and Firearms (BATF) tracing statistics were down since the AWB, but that there were generally more weapons available to the public which could possibly reach criminal hands.⁸¹ The broad access to existing weapons, the ease of displacement, and the lack of solid empirical evidence that assault weapons are used in crimes casts serious doubt as to whether the AWB acted to reduce crime.

III.

LEGISLATIVE RESPONSIBILITY

The common storyline is that election-year politics prevented the AWB’s renewal.⁸² One September 2004 poll showed that sixty-eight percent of the public supported its renewal.⁸³ In March, the Senate voted fifty-three to forty-six for renewal of the AWB before the bill to which it was attached was abandoned.⁸⁴ Despite this popular support, this article argues that the expiration of the AWB was responsible leg-

75. See JACOBS, *supra* note 32, at 186 (“Banning some models simply shifts purchasers to unbanned models.”)

76. Dianne Feinstein, *Gun Profits for Votes: It’s Enough to Make You Sick*, L.A. TIMES, Sept. 10, 2004, at B11. However, simply because fewer assault weapons were used in crimes does not necessarily mean that the AWB reduced crime. See JACOBS, *supra* note 32, at 186 (explaining that studies using BATF traces are flawed because (1) local police are more likely to send “strange looking” guns to BATF, and (2) crime guns sent to BATF include those that are unlawfully possessed for reasons unrelated to the AWB).

77. See JACOBS, *supra* note 32, at 32.

78. *Id.* at 186.

79. Kopel, *supra* note 20, at 182 tbl.4.3.

80. See 18 U.S.C. § 921 (2000).

81. See JEFFREY A. ROTH & CHRISTOPHER S. KOPER, NAT’L INST. FOR JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–1996 (Mar. 1999), at <http://www.ncjrs.org/pdffiles1/173405.pdf>.

82. See Stolberg, *supra* note 2, at A1.

83. *Id.* (citing study by Annenberg Public Policy Center of University of Pennsylvania).

84. See Stolberg, *supra* note 4, at A1.

islative inaction. Gun rights supporters obviously benefit from the expiration of the ban, but those favoring greater gun controls can also benefit from the opportunity to move forward on less-polarizing gun control legislation. This complex outcome means that the expiration of the AWB was not a matter of Congress simply ignoring public will in favor of rewarding special interests. Rather, Congress's inaction removed a failing law and may end gridlock on other pressing and more effective gun control measures.

A. *A Gun Rights Win*

The expiration of the AWB is a victory for gun rights supporters, both for the obvious reason—removal of gun regulation—and for subtle reasons that made the AWB particularly volatile.⁸⁵ Because the AWB seemed ineffective and unnecessary, opponents viewed it as more than mere gun control: it was seen as the first step toward prohibiting all semiautomatic weapons.⁸⁶ Senator Feinstein hardly dispelled this fear; when confronted with the question as to why the AWB did not include all semiautomatics she replied, “We couldn’t have gotten it through Congress.”⁸⁷ This concern resonated broadly in Washington. As Senator Russ Feingold (D–WI) explained his turn-about on the floor of the Senate:

Although I voted for the ban on certain kinds of semiautomatic weapons in 1994, I have come to believe that it is a largely arbitrary and symbolic measure. Citizens see it as a first step towards confiscating their firearms. I will, therefore, vote against its reauthorization.⁸⁸

Thus, the NRA remained strongly opposed to the ban, arguing that the AWB represented a move toward greater confiscation. Because of this stance, the NRA appeared extreme, losing some of its grassroots base,⁸⁹ its traditional support from police associations,⁹⁰

85. “Laws like this reflect and fan the flames of the symbolic conflict between gun owners and gun controllers, with little, if any, relevance to the crime problem.” JACOBS, *supra* note 32, at 32.

86. See Bovard, *supra* note 57, at A12 (claiming that Sen. Feinstein’s assault weapons ban amendment was widely perceived as “‘foot in the door’ to far more extensive gun bans”). See also WEIR, *supra* note 53, at 153 (noting that some gun control advocates viewed AWB as part of a “one-step-at-a-time approach” to wider prohibition).

87. Bovard, *supra* note 57, at A12 (quoting answer to question posed by Christian Science Monitor).

88. 150 CONG. REC. S1964 (daily ed. Mar. 2, 2004) (statement of Sen. Feingold).

89. See PETER SQUIRES, GUN CULTURE OR GUN CONTROL?: FIREARMS, VIOLENCE, & SOCIETY 118 (2000) (discussing NRA’s post-AWB use of anti-government rhetoric, which led to ousting of hardliners and softer stance on AWB).

and some of its political capital.⁹¹ With the AWB out of the spotlight and the NRA's stubborn position unnecessary, the NRA has the opportunity to regain its base and recast its image.

B. *Not a Gun Control Defeat*

In addition, the AWB's expiration is not a complete loss for those seeking greater gun controls. If the purposes of gun control are reducing crime and removing dangerous guns from the public, it is not clear that the AWB was effective.⁹² With the AWB off the table, it may be possible to make progress toward other legislative goals that will not be viewed by gun rights supporters as a step toward confiscation.⁹³

The unfortunate result of the assault weapons debate was the provocation and galvanization of the NRA, a powerful lobbying organization, into an entrenched position.⁹⁴ Since the passage of the AWB, no other significant federal gun control legislation has passed.⁹⁵ "More than any other gun control topic, the 'assault weapon' controversy has made more difficult the formation of any kind of unifying consensus on national gun policy."⁹⁶ This gridlock prevents more important issues, which may offer the possibility of cooperation, from being addressed by Congress. As Gary Kleck points out:

[T]he legislative process is warped by inducing lawmakers to focus on highly publicized but substantively trivial side-show issues, such

90. See Patterson & Eakins, *supra* note 9, at 62–63; see also SQUIRES, *supra* note 89, at 64 ("Unfortunately for the NRA . . . its increasingly inflexible position on the right to bear arms—all arms, any arms—caused this alliance to fragment when it lobbied against proposals to outlaw so-called 'cop-killer' bullets and assault weapons.").

91. Jonathan Alter, *How American's Meanest Lobby Ran Out of Ammo*, NEWSWEEK, May 16, 1994, at 24 ("The NRA, the most fearsome Washington lobby in the entire postwar era, has itself become a useful target. Some politicians now find that being attacked by the organization bolsters their reputation for independence.").

92. See *supra* Part II. But see Stolberg, *supra* note 2 (quoting Senator Charles E. Schumer (D-NY) criticizing repeal as an "Alice in Wonderland situation of repealing a law that everyone agrees has been overwhelmingly successful").

93. But see JACOBS, *supra* note 32, at 51 ("The NRA's opposition to practically every gun control proposal is substantially explained by its belief that each proposal is a step toward prohibition and confiscation.").

94. See *supra* note 20 and accompanying text. As a result, the NRA spent large sums of money combating gun control supporters in the 1994 congressional election. See JACOBS, *supra* note 32, at 49–50. See also SQUIRES, *supra* note 90, at 79 (describing antagonistic positions taken by both sides and substantial political resources devoted to issue of assault weapons).

95. The one exception is the 1996 Domestic Violence Offender Gun Ban, which prohibited firearms possession for individuals convicted of misdemeanor domestic violence or subject to a court order regarding activities such as stalking. See 18 U.S.C. §§ 922(g)(8)–(9) (2000).

96. Kopel, *supra* note 20, at 159.

as bans on “assault weapons,” plastic guns, “cop killer” bullets, and “Saturday Night Specials,” rather than addressing more serious, but perhaps less exciting, control measures like gun buyer background checks or improved enforcement of existing bans on criminal possession and unlawful carrying of guns.⁹⁷

By alienating gun owners and hardening their powerful interest groups through the AWB, little compromise was possible. The dearth of enacted legislation over the last decade, despite gun control’s public popularity, indicates this stalemate.

CONCLUSION

The expiration of the AWB has not led to the doomsday scenario some had predicted.⁹⁸ Ultimately, the AWB’s expiration probably has had as little impact on crime as its passage.⁹⁹ Gun rights groups welcomed the end of a law seen as a step closer to complete prohibition of firearms. Yet the expiration of the ban also has benefits for those seeking broader gun controls. With this divisive issue off the table, the future is less bleak for gun control issues with the potential to create consensus. For example, the gun control loophole, gun safety locks, or stricter enforcement of existing regulations can be meaningfully discussed now that the AWB is gone. Though many see the AWB as a casualty of politics, its expiration is an example of legislative responsibility. The expiration serves the public by promoting discussion and allowing opportunities for more meaningful gun safety measures, rather than polarizing interest groups over a largely symbolic ban.

97. Kleck, *supra* note 37, at 89 (emphasis added).

98. On the day the AWB expired, presidential hopeful Senator John Kerry declared that President Bush had “chose[n] to make the job of terrorists easier and to make the job of America’s police officers harder” Jodi Wilgoren, *Kerry Faults Bush for Failing to Press Weapons Ban*, N.Y. TIMES, Sept. 14, 2004, at A21. Senator Schumer called the ban one of the “most effective measures against terrorism that we have.” John R. Lott, Jr., *Assault Weapons Ban Was Useless Anyway*, L.A. TIMES, Sept. 10, 2004, at B11.

99. “Nothing of substance will change in the gun industry after the sunset The difference between the post-ban versions of assault weapons such as the AR-15 and their banned counterparts is entirely trivia.” Richard Simon, *Assault Weapons Ban Ends Quietly*, L.A. TIMES, Sept. 10, 2004, at A1 (quoting Kristen Rand, legislative director for gun control advocate Violence Policy Center). One gun industry executive remarked: “Our sense is that when we wake up on the morning of the 14th, there is not going to be any monumental change The sun-setting of the law is a media event, not a major sales event.” *Id.*