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HIGH-POWERED CONTROVERSY: GUN CONTROL, TERRORISM, AND THE FIGHT OVER .50 CALIBER RIFLES

*Allen Rostron**

I. INTRODUCTION

Near the end of the First World War, the German army introduced powerful new anti-tank rifles, and the U.S. military realized that it needed a similar weapon. Legendary American firearm designer John Browning answered the call by developing a heavy-duty machine gun and a new type of .50 caliber ammunition for it.¹ Although rapid improvement in armor plating soon made it obsolete as an anti-tank weapon, Browning's machine gun proved to be enormously successful when deployed against personnel and less heavily armored vehicles.² Military forces throughout the world continue to use it today.³ The ammunition for this gun became known as .50 Browning Machine Gun or .50 BMG.

In the early 1980s, a handful of gun enthusiasts around the country, tinkering in their garages and workshops, began making rifles chambered to fire the mighty .50 BMG ammunition cartridges.⁴ Rather than delivering a rapid barrage of fire like a machine gun, these rifles were designed for methodical shooting with exceptional accuracy and power at long distances. The U.S. military soon realized the value of these new rifles and purchased some of them for Marines to use in the first war against Iraq.⁵ Since then, .50 BMG rifles have proliferated rapidly, moving into military and law enforcement arsenals throughout the

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1. See FRANK C. BARNES, CARTRIDGES OF THE WORLD 101, 356 (10th ed. 2003); MELVIN M. JOHNSON, JR., RIFLES AND MACHINE GUNS 34-35 (1944).

2. Fed'n of Am. Scientists, Military Analysis Network, *M2 .50 Caliber [12.7mm] Machine Gun "Ma Duce,"* at <http://www.fas.org/man/dod-101/sys/land/m2-50cal.htm> (updated Jan. 21, 1999).

3. BARNES, *supra* note 1, at 356.

4. Charles Cutshaw, *An American Success Story: Barrett's .50 BMG Rifles*, GUNS MAGAZINE, Nov. 2001, at 40; Keith Pagel, Fifty Caliber Shooters Ass'n, *A Brief History of .50 Browning Machine Gun Cartridge Development*, at http://www.fcsa.org/articles/other/brief_history.html.

5. Cutshaw, *supra* note 4, at 47, 63.

world as well as into the hands of thousands of American civilian shooters.

The rifles' success has been followed by controversy. In recent years, they have become one of the hottest points of contention in America's perpetual debate over guns and the laws controlling them. On September 13, 2004, Governor Arnold Schwarzenegger signed legislation that made California the first state in the nation to ban these rifles.⁶ Similar bills have been introduced in several other state legislatures and in Congress.

On one side, gun control advocates and some legislators contend that no legitimate reason exists for civilians to have weapons capable of not only killing people but also penetrating armored cars, destroying aircraft, or igniting hazardous materials, all with precision accuracy at distances of well over a mile. They submit that it is only a matter of time before America learns a painful lesson about what these rifles can do in the hands of a terrorist or some other malicious individual.

On the other side, those who make, sell, and shoot .50 BMG rifles paint a very different picture. They insist that these guns pose no special threat to anyone and have been unfairly demonized. Although .50 BMG rifles are powerful weapons, their supporters point out that many other firearms are powerful as well. Compared to those other guns, .50 BMG rifles are large, heavy, expensive, and difficult to shoot and conceal. Criminals rarely use them, but many competitive target shooters and a few hunters do because they enjoy the challenge of extremely long-range shooting. As the leading manufacturer of these guns put it, a .50 BMG rifle is just a "toy for a big boy."⁷

Gun control remains an extraordinarily polarizing issue in this country. Legal scholars have shown how bad rhetoric from both sides has degraded the debate,⁸ and recently have begun to explore how individuals' deeply entrenched cultural orientations drive their attitudes toward gun policy questions regardless of the evidence and merits of the issues.⁹

6. Jordan Rau & Nancy Vogel, *Gov. Signs Bill Banning .50-Calibers*, L.A. TIMES, Sept. 14, 2004, at B4.

7. Barbara Vobejda & David B. Ottaway, *The .50-Caliber Rifle; On Streets, Firepower for an Army; Police Fear Weapon Is Falling into Wrong Hands*, WASH. POST, Aug. 17, 1999, at A1 (quoting Ronnie G. Barrett). On a recent news broadcast, Barrett described his product as a "high-end adult recreational toy." *60 Minutes* (CBS television broadcast, Jan. 9, 2005).

8. See Dan M. Kahan, *The Gun Control Debate: A Culture-Theory Manifesto*, 60 WASH. & LEE L. REV. 3 (2003); Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992); Jesse M. Ruhl et al., *Gun Control: Targeting Rationality in a Loaded Debate*, 13 KAN. J.L. & PUB. POL'Y 413 (2004).

9. See Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53

The controversy over whether civilian access to .50 BMG rifles should be banned or heavily restricted is a microcosm of this country's broader debate over guns. It provides a striking illustration of how fiery rhetoric and instinctive reactions to it can inflame passions while impeding progress toward sensible assessment of the facts and careful weighing of competing interests in the regulation of firearms.

This Article analyzes the issues surrounding these rifles and how they should be regulated. Striving to focus on facts and steer clear of hyperbole, it concludes that the truth lies somewhere between the lines drawn by the warring factions aligned on either side of the debate. While many of the arguments against tighter legal controls on these rifles are not compelling, many of the proposals made to establish such controls are flawed as well. The debate over these weapons provides an illuminating means of looking at the larger conflict over guns and violence in this country and how progress could be made toward real solutions.

The Article begins with background information on guns and an introduction to .50 BMG rifles. Part II provides a basic explanation of significant distinctions among various types of firearms and how they function. In particular, it explains what "caliber" means and why it is only one ingredient in the mix of elements that determines the capabilities of a firearm and its ammunition. After putting that general foundation in place, Part II then focuses on .50 BMG rifles and describes their origins and important characteristics.

Turning to the legal context surrounding firearms, Part III explains how .50 caliber became a significant threshold under federal law. It describes the strict regulatory system that generally governs firearms exceeding .50 caliber and explains how it differs from the more limited legal controls that apply to firearms of .50 caliber or less.

Part IV describes the contentious debate that has arisen over how .50 BMG rifles should be treated under America's gun laws. After gun control advocates sounded alarms about these weapons, legislators began pushing measures that would subject the rifles to much greater restrictions or even ban them. The debate took on a new intensity after September 11, 2001, as forces on both sides argued about whether our enhanced awareness of the risks of terrorism should affect our attitudes toward regulation of these rifles.

Part V reviews the principal arguments that have been made against greater regulation of .50 caliber BMG rifles. Some of those arguments

are misleading, such as the notions that these weapons are not significantly more powerful than ordinary hunting rifles or that they are comparable to large-caliber guns used in America more than a century ago. Contrary to what some of their defenders suggest, .50 BMG rifles are exceptionally powerful, capable of firing with distance, force, and accuracy substantially beyond that of other rifles.

Those who oppose stricter regulation of .50 BMG rifles also contend that these guns are rarely or never used by criminals. As Part V explains, although rarely used in everyday sorts of crimes, .50 BMG rifles have a record of turning up in the hands of people with a particularly disconcerting interest in powerful weaponry, from anti-government militias and apocalyptic religious cults to disturbed individuals involved in standoffs with police. The risk of these weapons being used by terrorists is real, as shown by manufacturers' assertions about the rifles' potent capabilities, as well as their use in a string of sniper shootings against British soldiers and police in Northern Ireland.

The most challenging argument offered against proposals to tighten controls on .50 BMG rifles is that such measures will lead inevitably to further restrictions on other types of guns. These "slippery slope" concerns are the greatest impediment to achievement of sound laws and policies that balance the interests of gun owners and everyone else in society, but gun control proponents have made little headway in alleviating them and, ironically, have done much to exacerbate them.

In Part VI, this Article recommends better approaches to regulation of .50 BMG rifles and other exceptionally powerful firearms. Part VI describes how existing proposals have erred by focusing exclusively on caliber, a superficially appealing but ultimately misguided way to distinguish firearms that should be subject to stricter controls. Drawing on a British proposal, it further explains how regulations could be crafted that squarely address the real issue—the power of the firearm.

Part VI then turns to the central issue of whether .50 BMG rifles should be subject to greater controls. These rifles pose serious public policy questions that demand careful weighing of the legitimate interests that law-abiding Americans have in owning and using these firearms against the dangers that the guns pose in the hands of terrorists or other criminals. Bringing these rifles into the regulatory regime already in place for machine guns and certain other weapons under the National Firearms Act¹⁰ would provide a reasonable means of reducing the risk while preserving law-abiding shooters' access to the rifles. Part VI ends with several suggestions about how legislators might attempt to address

10. 26 U.S.C. §§ 5801-72 (2000).

slippery slope concerns in proposing new measures aimed at .50 BMG rifles.

I certainly cannot pretend to be a disinterested observer of these matters, having worked for several years as a lawyer for an organization on the gun control side of the issue. The quality of the debate over guns can improve only if everyone, including those with the strongest leanings in one direction or the other, attempts to assess the issues in a rigorous manner and to consider how things look from all points of view.

II. SITUATING .50 BMG RIFLES IN THE UNIVERSE OF FIREARMS

Any effort to discuss existing or proposed regulation of .50 BMG or other large-caliber rifles must begin with a basic understanding of distinctions among different types of firearms, how they work, and how their capabilities can be measured.

A. Rifles

Firearms can be divided into two simple categories: handguns and long guns.¹¹ Rifles are one of the principal types of long guns. A rifle's bore (the tunnel inside of the barrel) is rifled, meaning it has spiral grooves. This rifling causes the bullet to start spinning as it moves through the bore and to continue spinning as it flies toward its target, greatly increasing the weapon's accuracy and range.

A rifle's ammunition is a cartridge composed of several essential elements: a bullet, a propellant such as gunpowder, an impact-sensitive primer, and a metallic case that holds all of those things together.¹² When the shooter pulls the trigger, the firing pin strikes and ignites the primer, the primer ignites the propellant, and the combustion of the propellant sends the bullet flying through and out of the rifle's barrel.

After the bullet is gone, the empty cartridge case is left behind in the rifle's firing chamber and must be ejected to make room for the next

11. The controversy surrounding .50 caliber rifles should not be confused with the debate over .50 caliber handguns, sparked by Smith & Wesson's introduction of a .50 caliber revolver in 2003. See Greg Gatlin, *Latest Magnum Carries Big Bang*, BOSTON HERALD, Feb. 14, 2003, at 31. Although no more powerful than a standard deer hunting rifle, Smith & Wesson's .50 caliber revolver is very powerful compared to other handguns and may be capable of penetrating some body armor worn by police. See VIOLENCE POLICY CENTER, *VEST BUSTER: THE .500 SMITH & WESSON MAGNUM* (2004).

12. Rifles and cartridges have either a rimfire or centerfire design. In rimfire ammunition, the primer is located inside a soft outer rim around the edge at the bottom of the cartridge case. In a centerfire cartridge, the primer is located in the center of the base of the cartridge case. The most powerful rifles are centerfire, since centerfire cases are much stronger and can withstand much higher pressures than rimfire cases. BARNES, *supra* note 1, at 11, 433-34.

round. For many rifles, this is accomplished by manual force supplied by the shooter. For example, a bolt-action rifle operates by means of a small rod or handle that the shooter manipulates to eject a spent cartridge case and to lock a new round into position to be fired. Firearms can operate by a variety of other manual loading mechanisms including lever action, pump action, and slide action.

Other rifles are self-loading and require no manual action by the shooter to place a new round in the chamber after firing. In these rifles, the explosive force created by firing one round not only sends a bullet flying toward its target, but also ejects the spent cartridge from the gun and thus permits the next round from the ammunition magazine to move into the firing chamber.

Self-loading firearms are either automatic or semi-automatic. An automatic weapon, or machine gun, fires more than one shot with a single pull of the trigger.¹³ In contrast, semi-automatic firearms fire only a single round each time the shooter pulls the trigger.

Shotguns are the other principal type of long gun. Unlike a rifle, a shotgun traditionally has a smooth bore with no grooves, and each round of ammunition consists of a plastic or paper shotshell containing many small pellets rather than a single bullet.¹⁴ The distinction between rifles and shotguns is blurred somewhat because shotshells can be loaded with a single slug rather than pellets, ammunition makers produce shotgun slugs with rifling grooves carved into them, and gun manufacturers have more recently begun making many shotguns with rifled barrels.¹⁵ In most instances, however, the traditional line between rifles and shotguns remains easy to draw.

B. Caliber

Firearms are frequently described and categorized by caliber. The term “caliber” can be used in two different senses. The first concerns the fit between bullet and barrel. A weapon’s caliber in this sense is simply the size of the bore—the diameter of the inside of the barrel.¹⁶

13. See 26 U.S.C. § 5845(b)(2000). A fully automatic weapon will fire continuously until the trigger is released or the ammunition is exhausted. Other automatic weapons fire only a short burst, such as three rounds, each time the shooter pulls the trigger.

14. BARNES, *supra* note 1, at 452-54. As defined by federal law, a rifle uses a “fixed cartridge to fire only a single projectile through a rifled bore,” while a shotgun uses a “fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile.” 18 U.S.C. § 921(a)(5), (7); 26 U.S.C. § 5845(c)-(d).

15. BARNES, *supra* note 1, at 453-54.

16. The caliber of a shotgun is usually measured in “gauge,” a unit of measurement based on the number of round balls that could be produced from a pound of lead if each ball’s diameter matched the

The size of the bore obviously determines the size of the ammunition the weapon can fire. The caliber can be expressed in hundredths or thousandths of an inch or in metric units. A .25 caliber rifle fires bullets that are one-quarter of an inch in diameter, while a 9mm pistol fires bullets that are 9 millimeters in diameter.¹⁷

The term “caliber” can also be used in a second sense that concerns the fit between the cartridge and the firing chamber. A firearm must have a chamber of a size suitable for the configuration of the cartridge to be loaded into it, as well as a barrel that matches the diameter of the bullet to be fired through it. Ammunition cartridges thus can have the same “caliber” in one sense—bullet diameter—but vary in other dimensions, such as the width of the cartridge case or the overall length of the cartridge. For example, a .338 Winchester Magnum cartridge and a .338 Lapua Magnum cartridge have bullets of the same diameter, but the latter cartridge is both wider and longer.¹⁸

To add a further layer of variety, any given cartridge case can be loaded with a range of different bullets and types and amounts of propellant. One .223 Remington cartridge might be loaded with 25 grains of Varget powder and a bullet weighing 80 grains, while another might be loaded with a different quantity of another powder and a lighter or heavier bullet.¹⁹ Different “loads,” or combinations of propellants and bullets, will yield different results when the gun is fired.

C. Ballistics

In assessing the capabilities of a firearm and its ammunition, caliber is therefore only one small part of the story. The force with which a bullet strikes its target is a function of the bullet’s mass and velocity, not its diameter. All other things being equal, a heavier bullet is more powerful than a lighter one, and a faster moving bullet is more powerful than a slower one.

size of the shotgun’s bore. In other words, a higher caliber shotgun has a lower gauge.

17. To complicate matters, the name given to a particular firearm or cartridge often gives only a rough indication of its actual caliber. For example, .450 Marlin, .458 Winchester, and .460 Weatherby Magnum cartridges all contain bullets .458 inches in diameter. BARNES, *supra* note 1, at 7, 103; see L.R. WALLACK, *AMERICAN RIFLE DESIGN AND PERFORMANCE* 131 (1977) (noting that names are “often chosen for their sound, for their alliteration, and for their promotional aspects; or perhaps to ride the coattails of another, already popular, cartridge”).

18. See BARNES, *supra* note 1, at 103.

19. The weight of bullets and propellant is customarily measured in grains. One pound equals 7,000 grains.

Ammunition's power is customarily measured by the amount of kinetic energy produced, expressed in foot-pounds.²⁰ The ammunition's "muzzle energy" is the number of foot-pounds of energy that the bullet has at the moment it exits the firearm's barrel. As the bullet flies through the air, its velocity gradually decreases, and therefore its energy decreases as well. A .458 Winchester round with a bullet weighing 500 grains might have a muzzle velocity of 2,100 feet per second, generating a muzzle energy of nearly 5,000 foot-pounds,²¹ but the energy would gradually decrease as the bullet slowed. By the time the bullet traveled 500 yards, its velocity might be only 1,200 feet per second and the bullet's remaining energy would be only about 1,600 foot-pounds.

The bullet's weight is obviously determined by the type and quantity of metal of which it is made. The muzzle velocity is a more complex matter, dependent upon a number of factors affecting the "internal ballistics" of the firearm, such as the size of the bullet, the quantity of propellant in the cartridge, the type of propellant (particularly how fast it burns), and the length of the firearm's barrel (because that determines the amount of time the bullet is being pushed by the gases produced by combustion of the propellant).²² Higher caliber cartridges thus tend to be more powerful than lower caliber cartridges, because a wider bullet may be heavier and a wider cartridge case may contain more propellant, but the link between caliber and energy is only a rough correlation.

Once the bullet leaves the firearm, the extent to which the bullet's velocity and energy decrease during its flight becomes a matter of "external ballistics."²³ A host of factors determine how far the bullet goes and how fast it continues to move, from the shape of the bullet and the amount of spin put on it by the firearm's barrel, to the weather and other environmental conditions.

20. Kinetic energy can be calculated according to the following basic formula:

$$\text{Energy} = \frac{1}{2} \times \text{mass} \times \text{velocity}^2.$$

Velocity is measured in feet per second. Bullets are typically measured in grains. Since that is a unit of weight rather than mass, a slight adjustment to the formula must be made to produce a result measured in foot-pounds:

$$\text{Energy (in foot-pounds)} = \text{weight (in grains)} \times \text{velocity (in feet per second)}^2 \div 450,400.$$

There are many other ways to measure a cartridge's power, such as by the bullet's momentum (mass times volume), but kinetic energy is by far the most common. See Donna Cline, Aero Ballistics Online, *Bullet Energy & Momentum* (2000), at <http://www.aeroballisticsonline.com/ballistics/bulletenergy.html>.

21. The muzzle energy would be $500 \times 2120^2 \div 450400$, which is approximately 4,989 foot-pounds. The figures in this example are based on WALLACK, *supra* note 17, at 150-51.

22. See, e.g., BILL RIVIERE, *THE GUNNER'S BIBLE* 6-9, 123-28 (1965).

23. *Id.* at 9-10.

Finally, “terminal ballistic” considerations determine what happens after the bullet reaches its target.²⁴ Different bullets are designed to do different things on impact. For example, some bullets have hollow points designed to “mushroom” or flatten out, while others have full metal jackets designed to prevent the bullet from fragmenting or deforming within its target. The former would be more likely to take down a deer and the latter would be more likely to penetrate harder material, even if they each hit their targets with the same amount of energy.

D. .50 Caliber Rifles

A dizzying variety of firearms and ammunition have been developed over the years. Early firearms tended to fire large bullets at relatively low speeds. For example, the muskets used in the American Revolution were generally .69 to .80 caliber, while the primary infantry weapons of the Civil War were .58 caliber.²⁵

As technology progressed, gun makers developed rifles and cartridges that fired increasingly smaller bullets, but with greater velocity and power. Many different types of .50 caliber rifles became popular over the years, including one that served as the standard U.S. military rifle from 1866 to 1873, and others that were among the primary tools of buffalo hunters in the 1870s.²⁶ Technological innovation continued and the caliber of the standard U.S. military rifle shrank from .50 to .45 and then again to just .308 by the end of the nineteenth century.²⁷

The .50 caliber ammunition that John Browning invented for his new machine gun shortly after World War I was quite different from any of the .50 caliber rounds that preceded it.²⁸ Compared to those and most other rifle ammunition, the .50 BMG cartridge case is massive, capable of being loaded with a huge quantity of propellant powder that can push very heavy bullets to high speeds.²⁹ Often mounted on aircraft, tanks, ships, or other military vehicles, machine guns firing these powerful .50 BMG rounds proved to be highly effective “against personnel, light

24. *Id.* at 10-11.

25. BERKELEY R. LEWIS, SMALL ARMS AND AMMUNITION IN THE UNITED STATES SERVICE 40, 46, 50, 124 (1956).

26. BARNES, *supra* note 1, at 158-61.

27. *Id.* at 56, 96, 161.

28. *See supra* notes 1-3 and accompanying text.

29. BARNES, *supra* note 1, at 101. The bullet in a .50 BMG cartridge is actually .510 or .511 inches in diameter. *See id.* at 103. The bore of a .50 BMG barrel is only one half inch in diameter, however, because the bullet travels through the wider space created by the rifling grooves cut into the bore.

armored vehicles; low, slow flying aircraft; and small boats” in World War II, and they remain in widespread use today.³⁰

Armorers eventually began generating versions of .50 BMG ammunition with special characteristics for particular military applications. These included “armor piercing” rounds for use against heavily protected targets such as armored vehicles and concrete bunkers, “tracer” rounds that create a trail of light so that the shooter can see the trajectory of the bullets being fired and correct the gun’s aim until it is on the target, and “incendiary” rounds with bullets containing a compound that detonates on impact to ignite a target containing flammable material.³¹

A few military shooters eventually realized that .50 BMG ammunition could be used not only for machine guns, but also for more selective and highly precise shooting at extremely long distances.³² For example, during the Vietnam War, legendary U.S. Marine sniper Carlos Hathcock modified a .50 caliber machine gun, adding a special scope and converting it to fire single shots rather than firing automatically, and used it to kill a person from a distance of nearly a mile and a half, setting a record for the longest confirmed kill made by a sniper in combat.³³

Such stories piqued the interest of civilian shooters.³⁴ By the early 1980s, several small businesses had begun making and selling .50 BMG rifles to those seeking the ultimate in long-range riflery. In 1985, fans of the rifles formed the Fifty Caliber Shooters Association, an organization that sponsors shooting competitions and today has more than 3,500 members.³⁵

The most successful of these fledgling rifle makers was Ronnie Barrett, whose Model M82A1 became the premier .50 caliber rifle after the U.S. military purchased significant quantities of them for use in the first war against Iraq.³⁶ The Barrett rifles won wide acclaim in that war as snipers used them to take out Iraqi armored personnel carriers and to detonate land mines from a mile away.³⁷

30. Fed’n of Am. Scientists, *supra* note 2.

31. See Fed’n of Am. Scientists, Military Analysis Network, *Caliber .50 Cartridges*, at <http://www.fas.org/man/dod-101/sys/land/50.htm> (updated Oct. 25, 1998).

32. Fed’n of Am. Scientists, *supra* note 2.

33. See Linda S. Caillouet, *Ace Sniper in Vietnam, NLR Native Dies at 57*, ARK. DEMOCRAT-GAZETTE, Feb. 26, 1999, at A1; Jim Spencer, *A Quiet Man Uniquely Qualified to Stalk and Kill*, CHI. TRIB., Sept. 7, 1986, at C1. Hathcock’s record was recently broken. See *infra* note 56.

34. See John McCoy, *The REALLY Big Five-Oh*, CHARLESTON DAILY MAIL, Feb. 23, 2001, at 1D.

35. Fifty Caliber Shooters Ass’n, *Fact Sheet*, at <http://www.fcsa.org/articles/about.html> (last visited Mar. 11, 2005).

36. Cutshaw, *supra* note 4, at 47, 63.

37. *Id.* at 63; Jim Morris, *This Gun Can Pierce Inch-Thick Steel a Mile Away; Benign for Target Shooters or Malevolent for Terrorists?*, DALLAS MORNING NEWS, June 20, 2004, at 1H; Bruce Porter, *The Big, Bad, Fun*

The military snipers in the first Iraq war used two newly developed and extremely effective types of .50 caliber ammunition. The first, “Saboted Light Armor Penetrator” or “SLAP” ammunition, consists of a .50 BMG cartridge case configured to fire a .30 caliber bullet at an extremely high velocity for exceptional armor piercing capability.³⁸ The second, Raufoss multipurpose ammunition, combines armor piercing, explosive, fragmentation, and incendiary functions.³⁹ The Raufoss rounds are designed to penetrate armor and then explode inside the target for maximum anti-personnel and fire-starting effect.

The civilian market for .50 BMG rifles has expanded steadily since the first Iraq war, with a small but growing number of ardent gun enthusiasts moving up to these rifles for long-range target shooting and hunting.⁴⁰ While Barrett Firearms remains the premier manufacturer, an assortment of other small companies produce the rifles as well.⁴¹

These rifles are large weapons. For example, the classic Barrett M82A1 rifle weighs over twenty-eight pounds and stretches nearly six feet.⁴² Custom-made rifles for elite competition shooting may weigh many times that amount.⁴³ A .50 BMG rifle typically has a detachable bipod so that it can rest on the ground, a shooter’s bench, or other surface while being fired. Other models are smaller and easier to fire from the shoulder. Barrett produces a “bullpup” rifle that is less than four feet long and weighs twenty-two pounds, touting it as perfect for shooters preferring a “smaller, lightweight .50 caliber rifle.”⁴⁴ One source described an earlier version of Barrett’s bullpup rifle as “obviously designed as a cheap anti-helicopter weapon, suitable for use against highly mobile targets when fired from the shoulder.”⁴⁵ The rifles also

Gun, N.Y. TIMES, Nov. 26, 2000, § 6 (magazine), at 106.

38. See Fed’n of Am. Scientists, Military Analysis Network, *M903 Caliber .50 Saboted Light Armor Penetrator (SLAP)*, *M962 Saboted Light Armor Penetrator Tracer (SLAPT)*, at <http://www.fas.org/man/dod-101/sys/land/slap.htm> (updated Sept. 12, 1998).

39. See Nordic Ammunition Co., Medium Calibre Division, *Multipurpose Concept*, at http://www.nammo.com/medium_calibre/index.html (last visited Mar. 11, 2005).

40. See Naomi Snyder, *Gunmaker Is Surviving Fight Against .50-Caliber*, TENNESSEAN, Jan. 9, 2005, at 1E (reporting that .50 BMG rifles have been used for elk hunting, but are really suited for larger game such as elephants and rhinoceros).

41. Eli Kintisch, *Easy Shot: The NRA v. National Security*, NEW REPUBLIC, Jan. 20, 2003, at 18, 20 (reporting estimate that two dozen companies manufactured .50 BMG rifles as of 1999).

42. Barrett Firearms, *Barrett M82A1*, at http://www.barrettrifles.com/rifles/rifles_82A1.htm (last visited Mar. 11, 2005).

43. See Porter, *supra* note 37.

44. “Bullpup” is a design configuration, with the ammunition magazine behind the trigger rather than in front, that reduces the length of a rifle. See Barrett Firearms, *Barrett M95*, at http://www.barrettrifles.com/rifles/rifles_95.htm (last visited Mar. 11, 2005).

45. *Barrett M82A1*, WORD IQ ENCYCLOPEDIA, at http://www.wordiq.com/definition/Barrett_M82A1 (last visited Mar. 11, 2005).

can be disassembled to make them easier to transport. One manufacturer asserts that its rifle can be disassembled into five parts, none longer than thirty-two inches, in less than a minute.⁴⁶

Even the smallest .50 BMG rifles, measuring less than four feet and weighing less than twenty pounds, dwarf ordinary rifles.⁴⁷ For example, a Winchester 94 rifle, probably the most popular deer hunting rifle in American history, is about three feet long and weighs less than seven pounds.⁴⁸ The substantial extra weight is primarily attributable to the fact that a rifle's components must be built strong enough to withstand the enormous pressure generated by firing .50 BMG ammunition.⁴⁹

The .50 BMG rifles are also expensive. Prices vary greatly from manufacturer to manufacturer, but are higher for semi-automatic rifles than those requiring manual loading. The current retail prices in Barrett's line range from \$7,300 for a semi-automatic rifle with a ten-round magazine, to \$5,200 for a bolt action rifle with a five-round magazine, to \$3,200 for a bolt action rifle that holds just a single cartridge at a time.⁵⁰ Prices for rifles made by other companies dip below \$2,000.⁵¹

The ammunition for a .50 BMG rifle costs a few dollars per round, at least two or three times the price of normal hunting cartridges.⁵² Armor piercing, tracer, and incendiary ammunition are widely available, as well as ordinary ball rounds.⁵³

46. E.D.M. Arms, *Windrunner M96 .50 Cal. BMG*, at <http://www.edmarms.com/products/m96.htm> (last visited Mar. 11, 2005); see also Press Release, First Defense Int'l Group, New Model .50 Cal Rifle, at http://www.firstdefense.com/html/arms_new_50_caliber.htm (last visited Mar. 11, 2005) (introducing new model with removable barrel and adjustable sliding stock for "compact" and "discreet" carry).

47. Serbu Firearms makes a .50 caliber carbine rifle that is less than four feet long and weighs 17 pounds. See Serbu Firearms, *The BFG-50*, at <http://www.serbu.com/bfg50.htm> (last visited Mar. 11, 2005).

48. WINCHESTER RIFLES AND SHOTGUNS, 2004 CATALOG, at 50-51 (2004), available at <http://www.winchesterguns.com>.

49. See Porter, *supra* note 37. The lighter .50 caliber rifles thus cannot fire loads as powerful as the heavier models, and consequently have a shorter range.

50. Barrett Firearms' website (<http://www.barrettrifles.com>) listed those prices for the M82A1, M95, and M99 rifles, as of August 1, 2004.

51. See Kintisch, *supra* note 41, at 18 (reporting .50 caliber rifles for sale in Virginia for as little as \$1,250); East Ridge Gun Co., at <http://www.statearms.com/shorty.html> (last visited Mar. 11, 2005) (offering State Arms "Shorty" model for \$1,800); Precision Ballistics, at <http://www.precisionballistics.biz> (last visited July 15, 2004) (selling PB 50 rifle for \$1,750). These prices do not include the cost of a scope, an essential accessory for accurate shooting at long distances.

52. East Ridge Gun Co., *F.A.Q.*, at <http://www.statearms.com/faq.html> (last visited Mar. 11, 2005) (stating that military surplus .50 BMG costs approximately \$1.75 to \$2.50 per round and custom .50 BMG costs approximately \$3.00 to \$5.00, compared to \$0.50 to \$1.00 per round for normal hunting ammunition); see also McCoy, *supra* note 34 (reporting that cheapest military surplus .50 BMG ammunition starts at \$1.50 per round).

53. OFFICE OF SPECIAL INVESTIGATIONS, U.S. GEN. ACCOUNTING OFFICE, GAO/OSI-99-14R, AVAILABILITY OF MILITARY .50 CALIBER AMMUNITION 2 (1999) (reporting that military surplus armor piercing, incendiary, and tracer rounds are all sold on civilian market); see, e.g., Sportsman's Guide, at

The extent to which civilian shooters have access to SLAP and Raufoss multipurpose rounds, the most potent military ammunition, is more controversial. Some reports strongly suggest that these rounds occasionally leak out of military stockpiles and into civilian hands,⁵⁴ while others contend that they are never available and that the offers to sell them that occasionally appear on the Internet are hoaxes.⁵⁵

These rifles deliver plenty of bang for the buck. Their effective range—the distance at which they can be used accurately—is more than one thousand yards for good shooters and more than two thousand yards for the best.⁵⁶ Fifty caliber rifles are particularly effective at penetrating lightly armored vehicles or positions at medium to long distances. For example, according to U.S. military manuals, ordinary .50 BMG ball ammunition can penetrate an inch of armor plate at a distance of thirty-five meters, two inches of concrete at two hundred meters, or one inch of concrete at fifteen hundred meters, while an armor piercing round can penetrate one inch of armor plate at a distance of two hundred meters and 0.3 inches at fifteen hundred meters.⁵⁷ A SLAP round can penetrate armor about two to three times thicker at any given range.⁵⁸ A Raufoss round can penetrate an inch of steel from a distance of more than a mile away.⁵⁹

Shooting a .50 BMG rifle generates a stupendous amount of noise.⁶⁰ The recoil is far less severe than most shooters expect, however, thanks to muzzle brakes that redirect the force of the propellant gases exiting

www.sportsmansguide.com/cb/cb.asp?a=784554 (last visited July 1, 2004) (offering incendiary ammunition); Watson's Weapons, at <http://watsonswapons.com/ammo.htm> (last visited Mar. 18, 2005) (offering Armor Piercing Incendiary Tracer ammunition). State or local laws may restrict certain types of ammunition. For example, California bans incendiary and tracer ammunition. See CAL. PENAL CODE § 12301(a)(1) (West 2000).

54. See VIOLENCE POLICY CENTER, REALLY BIG GUNS: EVEN BIGGER LIES 32-37 (2004).

55. See Fifty Caliber Inst., *The Top Ten Lies About .50cal Rifles*, at <http://www.fiftycal.org/Top%20Ten%20Lies/toptenliesabout.html> (last visited June 30, 2004).

56. Competitive shooting with .50 BMG rifles is typically done at a distance of 1,000 yards. Winners of those competitions can fire a group of shots that do not stray more than a few inches from one another. See, e.g., Larry Porter, *.50 Calibers of Fun*, OMAHA WORLD HERALD, Apr. 21, 2002, at 10C. A Canadian sniper set a new world record by killing an Al Qaeda fighter in Afghanistan with a .50 caliber shot from a distance of 2,657 yards, or a bit over a mile and a half. Stephen Thorne, *U.S. Bullets Help Canadian Snipers Set World Record*, TORONTO STAR, July 10, 2002, at A12.

57. See U.S. DEP'T OF ARMY, FIELD MANUAL NO. 23-65, BROWNING MACHINE GUN CALIBER .50 HB, M2 §§ 1-7(e) (1991); U.S. MARINE CORPS, MCGWP 3-35.3, MILITARY OPERATIONS ON URBANIZED TERRAIN (MOUT) B-8 (1998).

58. Fed'n of Am. Scientists, *supra* note 38 (stating that SLAP ammunition's maximum effective range is 1500 meters against 3/4 inch High Hard Armor).

59. U.S. MARINE CORPS, *supra* note 57, at B-8.

60. Fifty caliber rifles manufactured by ArmaLite come complete with earplugs and Tylenol. See ArmaLite, Inc., *The AR - 50 Caliber Rifle*, at <http://www.armalite.com/sales/catalog/rifles/ar50.htm> (last visited May 13, 2005).

the barrel. Barrett Firearms touts its .50 caliber rifles as having “the felt recoil of a 12-gauge shotgun.”⁶¹ While they spare the shooter’s shoulder, the muzzle brakes make the guns even louder and send a tremendous shock wave out and back from the sides of the rifle.

Among many of those who love guns and shooting, the .50 BMG rifles have achieved iconic status. They appeal to those who want “the biggest of the big” and the “ultimate in long-range performance and precision.”⁶²

III. THE SIGNIFICANCE OF THE .50 CALIBER THRESHOLD UNDER CURRENT FEDERAL LAW

Fifty caliber was an important threshold under federal law long before .50 BMG rifles became popular among civilian shooters. Firearms above .50 caliber are subject to the National Firearms Act (NFA),⁶³ a statute that imposes requirements and restrictions much more stringent than those that apply to .50 BMG rifles and other firearms of equal or smaller caliber.

A. *The National Firearms Act*

The first major push for federal regulation of guns came in the early 1930s, driven by fears of organized crime as well as a pistol-wielding anarchist’s attempt to assassinate President-elect Franklin Roosevelt.⁶⁴ After rejecting broader proposals that would have reached all handguns, Congress passed the NFA, a measure applicable only to the types of “gangster” weapons then regarded as the greatest threats to public safety, including machine guns, silencers, and short-barreled or “sawed-off” rifles and shotguns. Ostensibly a tax provision, the NFA created a regulatory system strictly controlling access to these weapons, as well as facilitating revenue collection.

More than thirty years later, in the wake of Martin Luther King Jr.’s and Robert Kennedy’s assassinations, Congress substantially revised federal firearm laws. Among many other things, the enactments

61. Barrett Firearms, *supra* note 42; see also Daniel Lilja, *The McBros 50 BMG Action*, at <http://www.fcsa.org/articles/1995-3/mcbros.html> (last visited Mar. 18, 2005) (explaining that recoil of .50 caliber rifles is not severe and that firing .50 caliber rifle with good muzzle brake is similar to shooting .308 Winchester rifle loaded with heavy bullets); East Ridge Gun Co., *supra* note 52 (stating that .50 caliber rifle can have less recoil than common hunting rifles).

62. Lilja, *supra* note 61.

63. See National Firearms Act of 1934, 26 U.S.C. §§ 5801-72 (2000).

64. See ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 104 (2d ed. 1998); JOSH SUGARMANN, *NATIONAL RIFLE ASSOCIATION: MONEY, FIREPOWER, AND FEAR* 29 (1992).

expanded the scope of the NFA regulatory regime, adding a new category of military “destructive devices” to the existing list of gangster weapons.⁶⁵ In addition to explosives like grenades and mines, the statute defined the term “destructive device” to include any firearm “the barrel or barrels of which have a bore of more than one-half inch in diameter”—any firearm exceeding .50 caliber.⁶⁶ Supporters of the measure focused on the need for greater regulation of “large-caliber military-type weapons, such as bazookas, mortars, and antitank guns.”⁶⁷

There was “[u]niversal agreement” in Congress on the need for stricter controls on those highly dangerous devices, but opponents of the new law argued that it went too far and disregarded the distinction between military weaponry and sporting firearms.⁶⁸ They proposed an alternative measure that was narrower in several respects, applying only to weapons with bores larger than 0.78 inches and containing an exclusion for all rifles and shotguns.⁶⁹

Congress opted to enact the more restrictive version of the legislation and therefore subjected firearms above .50 caliber to the NFA regulatory framework. However, the legislation also carved out several exceptions, such as antique firearms, shotguns particularly suitable for sporting purposes, and rifles intended to be used solely for sporting, recreational, or cultural purposes.⁷⁰ Federal regulations give the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) the authority to determine whether a firearm qualifies for those exclusions from the NFA requirements.⁷¹ Virtually all shotguns exceed the one-half inch bore limit,⁷² but have been exempted from the NFA because they are suitable

65. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, Title IV, § 902, 82 Stat. 197 (codified at 18 U.S.C. § 921(a)(4) (2000), and 26 U.S.C. § 5845(f)).

66. *Id.*

67. S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2168; see *id.* at 2200, 2304-05; H.R. REP. NO. 90-1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4416; see also Note, *Firearms: Problems of Control*, 80 HARV. L. REV. 1328, 1330 (1967) (noting that NFA was deficient because it did not extend to “large-bore military weapons totally unsuited for hunting, such as bazookas, antitank weapons, rocket-launchers, and cannons”).

68. See S. REP. NO. 90-1097, reprinted in 1968 U.S.C.C.A.N. at 2290, 2298.

69. See *id.* at 2299.

70. See Gun Control Act of 1968, Pub. L. 90-618, Title I, § 102, Title II, § 201, 82 Stat. 1214 (amending 18 U.S.C. § 921(a)(4) and creating 26 U.S.C. § 5845(f)).

71. See 27 C.F.R. § 478.27 (2004); T.D. 221, 1972-1 C.B. 777.

72. Only the smallest and least powerful shotguns fall below the .50 caliber threshold, such as .410 shotguns typically used to hunt rabbits and squirrels. For example, the bore of a 12 gauge shotgun, a popular choice for duck hunting, is 0.73 inches in diameter.

for sporting purposes.⁷³ The .50 caliber threshold remains crucial for other firearms including rifles.

*B. The Vital Differences Between Regulation of
NFA Weapons and Other Firearms*

Machine guns, large-caliber rifles, and other weapons governed by the NFA are subject to much tighter regulation and control than ordinary guns. In particular, law enforcement agencies have a high degree of control over NFA weapons, including discretion over who acquires them and a comprehensive record of everyone who possesses them.

To obtain an NFA weapon, a person must pay a \$200 transfer tax⁷⁴ and submit an application to ATF that includes two sets of fingerprints, a recent photograph, and a sworn affidavit stating the applicant's reasons for acquiring the weapon.⁷⁵ The applicant also must obtain a certification from the chief local law enforcement officer stating that acquisition of the weapon would not violate any laws and that the person obtaining the weapon will use it only for the lawful purposes disclosed on the application.⁷⁶ Local law enforcement officials have no legal obligation to certify any application and have complete discretion over whether to do so.⁷⁷ In addition to that screening by local law enforcement, the Federal Bureau of Investigation (FBI) conducts an investigation of each applicant. The approval process generally takes several months to complete.⁷⁸

73. ATF has refused to exempt only a few shotguns, such as semi-automatic "Streetsweeper" shotguns that hold a dozen shells and are specifically designed for riot control and combat use. *See Demko v. United States*, 216 F.3d 1049 (Fed. Cir. 2000); ATF Rulings 94-1, 94-2, 1994-1 ATF Q.B. 19 (1994), available at 1994 WL 575785.

74. 26 U.S.C. § 5811 (2000). The \$200 tax does not apply to transfers between two persons who are licensed manufacturers, importers, or dealers of NFA weapons, *id.* § 5852(d), but the NFA requires those persons to pay special taxes on an annual basis. For example, a dealer selling NFA weapons must pay a special "Class 3" occupational tax of \$500 per year in addition to obtaining the Federal Firearms License required for dealers selling ordinary firearms. *See* 27 C.F.R. § 479.32(b) (2004). As a result, weapons governed by the NFA regulatory regime are sometimes referred to as "Class 3" or "Class III" weapons and those who sell them are called "Class 3" or "Class III" dealers.

75. The form is technically a tax return submitted by the transferor of the weapon, although it must be certified by the transferee and includes the transferee's photograph, fingerprints, and identifying information. *See* 27 C.F.R. §§ 478.98, 479.85 (2004); ATF Form 4, Application for Tax Paid Transfer and Registration of Firearm, § 13(d).

76. ATF Form 4, *supra* note 75, § 17.

77. Tennessee is an exception. Under a law recently enacted there, a sheriff or police chief must certify an NFA application within 15 days unless the applicant is prohibited from having a firearm by Tennessee law. *See* TENN. CODE ANN. § 39-17-1361 (2003).

78. *See, e.g.*, 149 CONG. REC. S2601 (daily ed. Feb. 24, 2003) (statement of Sen. Feinstein) (citing ATF as indicating that approval generally takes about 60 days); HEAVY METAL ARMORY, AN INTRODUCTION TO LEGAL CLASS 3 OWNERSHIP 15 (2004) (stating that initial transfers to individuals generally take three months, although subsequent transfers can be quicker).

Outside the NFA's boundaries, purchasers of firearms are subject to much less thorough screening. The Brady Handgun Violence Prevention Act requires background checks to be conducted on people who purchase firearms, but only if they buy from a licensed gun dealer.⁷⁹ A substantial portion of gun sales thus fall outside the Brady Act's reach because they do not involve licensed dealers, from friendly transactions among friends or neighbors, to purchases from unlicensed individuals offering guns for sale on the streets, at gun shows, or through classified advertisements in newspapers.⁸⁰ The NFA does not have such gaps in its coverage, because its application and approval process must be completed even for an isolated purchase of one weapon from a private individual not in the business of selling firearms.⁸¹

Even if they buy from licensed dealers, purchasers of non-NFA firearms are subject to much less intense scrutiny than those seeking to obtain NFA weapons. A background check under the Brady Act essentially consists of a database search. The potential purchaser fills out an ATF form, shows a drivers license or other identification, and the dealer contacts a state or federal law enforcement agency to ask for approval to make the sale.⁸² That agency searches for the individual in computer databases containing criminal history and other records.⁸³ The vast majority of these background checks take only a few minutes to complete, resulting in an immediate indication to the dealer whether the sale is approved or denied.⁸⁴

The law enforcement agencies conducting the Brady background checks generally do not look at anything other than contents of the databases, unless something in a database raises a red flag requiring further investigation, such as when the database shows an arrest on felony charges without indicating whether it resulted in a conviction.⁸⁵ Even in those circumstances, the additional investigation is limited, since the dealer may proceed with the sale if it does not receive a "denied" response within three business days.⁸⁶ Thousands of convicted felons

79. See Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)-(t) (2000). Some state and local laws impose additional requirements.

80. See Philip J. Cook et al., *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 68-69 (1995) (describing "secondary market" beyond reach of Brady Act).

81. See 27 C.F.R. § 479.84 (2004).

82. The FBI conducts about half of the Brady Act background checks, while state law enforcement agencies perform the remainder. See FBI, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) 2001/2002 OPERATIONAL REPORT 1-2 (2003).

83. See FBI, *NICS Program Summary*, at <http://www.fbi.gov/hq/cjisd/nics.htm> (last visited Mar. 18, 2005).

84. See FBI, *supra* note 82, at 8.

85. See 145 CONG. REC. 13,430-31 (1999) (statement of Rep. McCollum).

86. See 18 U.S.C. § 922(t)(1)(B)(ii) (2000); ATF, IMPLEMENTATION OF THE BRADY LAW 6 (1999).

and other prohibited purchasers have obtained firearms despite the Brady Act because of “delayed denials” issued too late to stop the transfer of the firearm.⁸⁷

Moreover, a Brady background check is merely a “negative” check to determine whether a criminal record or other disqualifying information exists for the name provided; it is not a “positive” check to determine whether the name is real or belongs to the person buying the gun.⁸⁸ As a result, the Brady system can be defeated using false identification—a “person” who does not exist will pass the background check.

A purchaser seeking approval to obtain an NFA weapon undergoes much more rigorous screening than a person buying an ordinary firearm. However effective it may be, the Brady system depends entirely on an objective determination of whether a purchaser falls within one of the defined categories of people prohibited from purchasing firearms. The NFA application and approval process gives far greater discretion to law enforcement agencies and more closely resembles a basic security clearance than does a simple database search.⁸⁹

The NFA system continues to give law enforcement a higher level of oversight even after a transfer occurs. For example, the registered owner of an NFA weapon must obtain permission from ATF before transporting it to another state, whether taking it there temporarily or permanently.⁹⁰ In addition, ATF maintains a permanent, centralized registry of information about the ownership of every NFA weapon.⁹¹ Although statutes restrict disclosure and use of information from the registry,⁹² law enforcement agents pursuing criminal investigations can obtain access to the information in some circumstances.⁹³

87. See ATF, *supra* note 86, at 11-14.

88. U.S. GEN. ACCOUNTING OFFICE, GAO-01-427, FIREARMS PURCHASED FROM FEDERAL FIREARM LICENSEES USING BOGUS IDENTIFICATION (2001); U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOV'T REFORM, SPECIAL INVESTIGATIONS DIVISION, MINORITY STAFF REPORT, LYING & BUYING: USING FALSE IDENTIFICATION TO OBTAIN FIREARMS (2001).

89. The Gun Runner, *National Firearms Act*, at <http://www.gunrunner.com/NFA.html> (last visited Mar. 18, 2005).

90. See 18 U.S.C. § 922(a)(4) (2000); ATF Form 5320.20, Application to Transport Interstate or to Temporarily Export Certain National Firearms Act (NFA) Firearms.

91. The registry is known as the “National Firearms Registration and Transfer Record.” 26 U.S.C. § 5841 (2000); 27 C.F.R. § 479.101 (2004).

92. See 26 U.S.C. § 5848 (providing that information from NFA application and registration process generally cannot be used as evidence in criminal proceeding against person required to submit that information). Since the NFA is a tax measure, information in the NFA registry is also subject to statutory restrictions on disclosure of tax returns and information derived from them. See *id.* § 6103.

93. See *id.* § 5848 (providing that information from NFA application and registration process can be used in prosecution for furnishing false information or for any offense occurring after filing of application or registration); *id.* § 6103(h)-(i) (providing for variety of circumstances in which information can be disclosed to federal law enforcement agents).

No similar registry exists for non-NFA firearms.⁹⁴ Most of the information generated by law enforcement agencies conducting Brady Act background checks is not retained. Law enforcement agencies maintain a permanent record of those who fail the background check, but they must destroy all records of a background check within twenty-four hours if the purchaser passes the check and receives approval to purchase the firearm.⁹⁵

As a result, when police investigating a crime recover a non-NFA firearm, they generally must rely on an ATF trace of the gun, a cumbersome process that yields limited information even when completed successfully. Tracing requires the use of records that are in the hands of manufacturers, distributors, and dealers dispersed throughout the country, rather than stored centrally. Tracing is a valuable investigative tool, but it is limited because it provides no information about transactions that may occur after a gun is purchased from a retailer.⁹⁶ The information it produces is much less complete than that provided by comprehensive registration of NFA weapons.

Requirements concerning losses or thefts of firearms are also stricter under the NFA. The owner of a registered NFA weapon must immediately report to ATF any loss or theft of the weapon.⁹⁷ No such requirement exists for non-NFA firearms.⁹⁸

Whether a firearm is governed by the NFA can also affect the minimum age required to obtain the weapon. An NFA weapon cannot be transferred to or possessed by anyone less than twenty-one years of age.⁹⁹ Non-NFA firearms are subject to a complex array of age requirements that vary from state to state, but in most states a person can lawfully acquire a non-NFA firearm before reaching the age of twenty-one, and in many circumstances even before reaching the age of eighteen.¹⁰⁰

94. *See Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 131-32 (D.C. Cir. 2000) (noting that comprehensive, centralized registry exists for machine guns and other NFA weapons, but not for other firearms).

95. In the past, the FBI maintained records of all background checks for six months. *See National Instant Criminal Background Check System*, 66 Fed. Reg. 35567 (July 6, 2001). The Department of Justice proposed cutting the record retention period, *see id.*, and Congress enacted a measure in 2004 requiring destruction of the records within 24 hours. Consolidated Appropriations Act, Pub. L. No. 108-199, div. B, tit. VI, § 617(a)(2) (2004).

96. *See ATF, CRIME GUN TRACE REPORTS (2000) NATIONAL REPORT A-4 (2002)*. A large portion of attempted traces are unsuccessful, meaning that ATF is unable to track the gun all the way down to the point of identifying the retail dealer who sold the gun and the customer who purchased it. *See id.* at 68.

97. 27 C.F.R. § 479.141 (2004).

98. For non-NFA firearms, only licensed dealers are required to report thefts or losses. *See* 18 U.S.C. § 923(g)(6) (2000).

99. *See* ATF Form 4, *supra* note 75, § 13(d).

100. For example, while federal law prohibits licensed dealers from selling handguns to anyone under

Firearms governed by the NFA thus are subject to much stricter controls than other guns. In particular, law enforcement agencies have a far greater level of discretion about who acquires NFA weapons and more information about who possesses them.

C. Recent Bans on Machine Guns and Assault Weapons

In recent years, Congress has imposed several other important limitations on private possession of military-style weaponry, but none of those measures specifically targeted large-caliber firearms. In 1986, Congress cut off the supply of new machine guns to the civilian market, allowing automatic weapons already registered under the NFA to remain in circulation but banning new machine guns from being sold to anyone other than the military and law enforcement agencies.¹⁰¹ The machine gun ban, a last-moment addition to the Firearm Owners' Protection Act, became law in bizarre fashion and never underwent any real debate in the House or Senate.¹⁰²

In 1994, Congress went a step further and banned the manufacture of "semiautomatic assault weapons,"¹⁰³ a new category of firearms meant to cover the semi-automatic versions of military machine guns.¹⁰⁴ The law defined what constitutes an "assault weapon" in several

21 years of age, federal law and most states' laws only require a person to be 18 years of age to acquire a handgun from a source other than a licensed dealer. See 18 U.S.C. § 922(b)(1), (x) (2000); OPEN SOCIETY INST., GUN CONTROL IN THE UNITED STATES: A COMPARATIVE SURVEY OF STATE FIREARM LAWS, chart 2 (2000). The age limits for rifles and shotguns are generally even lower than for handguns. See 18 U.S.C. § 922(b)(1) (requiring person to be 18 years old to purchase long gun from licensed dealer); OPEN SOCIETY INST., *supra*, chart 2 (noting that minimum age for acquiring long guns from unlicensed source is 18 or lower in most states).

101. See Firearm Owners' Protection Act, Pub. L. 99-308, § 102(9), 100 Stat. 449, 452-53 (1986) (codified at 18 U.S.C. § 922(o) (2000)).

102. The machine gun ban was one of the few "gun control" provisions in the Firearms Owners' Protection Act, a statute that relaxed federal gun laws in many important respects. The machine gun provision was inserted into the act in the House, without debate, on a questionable voice vote occurring just seconds before the expiration of the time allotted for consideration of amendments. 132 CONG. REC. 7086-87 (1986). Some observers claimed the amendment carried only because the acting chair favored the amendment and ignored calls from the House floor for a recorded vote. See David T. Hardy, *The Firearm Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 625 & n.217, 671 (1987). The act's supporters in the Senate chose to accept the House version of the legislation, including the machine gun provision, rather than go to conference to fight it and risk losing ground on other aspects of the legislation. See Howard Kurtz, *NRA Urging Repeal of Ban on Sale of New Machine Guns*, WASH. POST, Aug. 28, 1986, at A2.

103. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, §§ 110101-03, 110105-06, 108 Stat. 1796 (codified at 18 U.S.C. §§ 921(a)(30), 922(v)(1) (2000)).

104. The same legislation also banned "large capacity ammunition feeding devices," defined as magazines holding more than ten rounds of ammunition. *Id.* § 110101, 110103-05 (codified at 18 U.S.C. §§ 921(a)(31), 922(w)(1)(2000)).

different ways. First, it contained a specific list of banned firearms, such as the Colt AR-15 (the semi-automatic version of the M-16 machine gun used by the U.S. military) and the Intratec TEC-9 (a pistol based on the design of the KG-99 submachine gun).¹⁰⁵ In addition to banning weapons by name, the law banned firearms having certain combinations of characteristics. For example, it prohibited semi-automatic rifles with detachable ammunition magazines and any two or more of the following characteristics: a folding stock, pistol grip, bayonet mount, flash suppressor, threaded barrel, or grenade launcher.¹⁰⁶ To dispel any notion that this definition covered a broad swath of hunting rifles and other sporting firearms, the law also contained a long list of firearms not covered by the ban and prohibited any of those weapons from being removed from the exempted list.¹⁰⁷ The list of protected weapons included several .50 BMG rifles.¹⁰⁸

Passing by a narrow margin,¹⁰⁹ the assault weapon ban generated intense controversy. Critics insisted that it drew distinctions among weapons based on superficial cosmetic features rather than significant functional differences, while proponents argued that the statute successfully identified a category of weapons with military characteristics that set them apart from conventional firearms.¹¹⁰ Banning only the manufacture and sale of new weapons, the law contained “grandfather” provisions permitting sale and possession of assault weapons already manufactured before its enactment date.¹¹¹ In addition, the legislation was not permanent. It contained a ten-year sunset provision; the assault weapons ban therefore expired on September 13, 2004, when Congress failed to take action to renew it.¹¹²

Although largely overshadowed by the federal assault weapons ban, some states have their own legislation restricting sales of assault weapons, and those laws have become more important after the expiration of the federal ban. Most of the state provisions do not affect

105. See 18 U.S.C. § 921(a)(30)(A) (2000).

106. *Id.* § 921(a)(30)(B).

107. *Id.* § 922(v)(3), app. A.

108. The .50 BMG rifles on the exempt list included Barrett Model 90 and the McMillan Combo M87/M88 50-Caliber rifles. See *id.* § 922 app. A.

109. See William J. Eaton, *Assault Weapons Ban Clears House by Slim Margin*, L.A. TIMES, May 6, 1994, at A1.

110. H.R. REP. NO. 103-489, at 17-20, 43, 45 (1994), reprinted in 1994 U.S.C.C.A.N. 1820, 1825-28, 1835, 1837.

111. 18 U.S.C. § 922(v)(2) (2000).

112. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 110105, 108 Stat. 1796; Jamie Stockwell & Karin Brulliard, *No Cheers Over Gun Ban's End*, WASH. POST, Sept. 14, 2004, at B1.

.50 caliber rifles, but a few ban or impose special restrictions on certain semi-automatic models.¹¹³

IV. THE DEBATE OVER .50 BMG RIFLES

Controversy soon surrounded the .50 BMG rifles as they grew more popular among civilian shooters. The Violence Policy Center, an organization that advocates extremely tight restrictions on access to firearms,¹¹⁴ has led the fight for additional regulation of these rifles. A variety of organizations have lined up in opposition, from the National Rifle Association to groups with a narrower focus such as the Fifty Caliber Shooters Association and the Fifty Caliber Institute.

A. Alarm About Sniper Weapons

The Violence Policy Center first stirred controversy about .50 caliber rifles with the release of a special report on military sniper rifles being sold to civilians.¹¹⁵ It issued the report in early May 1999, just two weeks after the shootings at Columbine High School focused national attention on the issue of gun violence. The report addressed sniper rifles in general, including “heavy” weapons like .50 BMG rifles, “intermediate” weapons firing .338 Lapua Magnum rounds, and “standard service caliber” weapons firing smaller ammunition.¹¹⁶

The report defined a sniper rifle as any rifle “purpose-designed” for military or police sniping, relying heavily on firearm manufacturers’ own decisions to refer to their products as “sniper,” “counter-sniper,” or “tactical” rifles.¹¹⁷ By doing so, the report essentially condemned a set of weapons distinguished by the fact that they are built very carefully so as to be consistently more accurate than other rifles.¹¹⁸ This sort of

113. California’s assault weapon statute applies to semi-automatic rifles, of any caliber, with certain features. For example, the Barrett M82A1 rifle is banned because it has a detachable ammunition magazine and a pistol grip. *See* CAL. PENAL CODE § 12276.1 (West 2000 & Supp. 2005). Connecticut’s statute bans the Barrett M82A1 by name. CONN. GEN. STAT. ANN. § 53-202a(a)(1) (West 2001). Maryland’s statute does not ban any .50 caliber rifles, but it imposes special restrictions on semi-automatic Barrett .50 caliber rifles and “copies” of them produced by other manufacturers. MD. CODE ANN., PUB. SAFETY § 5-101(p)(2)(ix) (2003). Anyone seeking to acquire such a weapon must submit a special application, undergo a state police investigation, complete a firearm safety training course, and endure a seven-day waiting period. *Id.* §§ 5-117 to 5-124.

114. *See, e.g.*, VIOLENCE POLICY CENTER, UNSAFE IN ANY HANDS: WHY AMERICA NEEDS TO BAN HANDGUNS (2000).

115. VIOLENCE POLICY CENTER, ONE SHOT, ONE KILL: CIVILIAN SALES OF MILITARY SNIPER RIFLES (1999).

116. *See id.* at 41-54.

117. *See id.* at 9-11, 37-39.

118. *See id.* at 3-5, 37-39 (concluding that “consistent accuracy” is most important attribute of sniper rifle).

broad attack on sniper rifles does not translate readily into specific policy proposals, since it would be difficult to arouse support for legislation based on the notion that some guns are excessively accurate. That is particularly true given the fact that gun control advocates have condemned other types of firearms for being inaccurate, such as “spray fire” assault weapons and “Saturday Night Special” handguns.¹¹⁹

The report’s primary recommendation therefore was limited to “heavy” and “intermediate” sniper rifles.¹²⁰ The Violence Policy Center urged that Congress bring these weapons within the scope of the NFA.

The Violence Policy Center released its report at a congressional hearing organized by Congressmen Henry Waxman and Rod Blagojevich.¹²¹ Before the hearing, Waxman and Blagojevich asked the General Accounting Office (GAO) to undertake a special investigation into the commercial availability of armor piercing and incendiary ammunition for .50 caliber rifles.¹²² The GAO investigators made telephone calls to ammunition dealers in several states, pretending to be interested in buying ammunition.¹²³ One caller asked for armor piercing ammunition to be shipped to Washington, D.C. and expressed an intention to use it against “something with an armored limousine and something with ballistic glass.”¹²⁴ Another told the dealer:

[I]t’s very important for me to get this, because there’s going to be some day when I am going to need this ammunition, because I’m going to be—I’m going to need to defeat an armored-type vehicle someday, I know that. . . . [Y]ou can think who drives in armored

119. See *id.* at 4-5, 29 (noting that sniper rifles’ accuracy makes them “exact opposite” of assault weapons and their “spray-fire capability to shoot indiscriminately”); VIOLENCE POLICY CENTER, BULLET HOSES: SEMI-AUTOMATIC ASSAULT WEAPONS—WHAT ARE THEY? WHAT’S SO BAD ABOUT THEM? (2003) (arguing that key danger of assault weapons is that they are designed to be indiscriminately “spray fired” from the hip rather than fired more selectively and accurately like conventional rifle); Press Release, Violence Policy Center, Backgrounder on the Manufacturer of the Gun Reportedly Used in the Alleged Shooting by Nathaniel Brazill at Lake Worth Middle School in Lake Worth, Florida (May 10, 2001) (criticizing “Saturday Night Specials” or “junk guns” as having no sporting purposes and being best suited for criminal use because of their low quality and inaccuracy).

120. See VIOLENCE POLICY CENTER, *supra* note 115, at 33. The report advocated lesser measures that would affect all sniper rifles, including banning imports and improving reporting and record-keeping requirements. *Id.* at 34-36.

121. See Transcript, Democratic Members of the House Committee on Government Reform Hold Hearing on Sniper Weapons, Fed. Document Clearing House, May 3, 1999, at 1999 WL 266350.

122. OFFICE OF SPECIAL INVESTIGATIONS, U.S. GEN. ACCOUNTING OFFICE, GAO/OSI-99-13R, AVAILABILITY OF .50 CALIBER SEMIAUTOMATIC RIFLES (1999).

123. *Id.* at 5-6.

124. Transcripts of portions of the GAO’s telephone calls are at <http://www.democrats.reform.house.gov/Documents/20050111113354-30764.pdf>.

limousines, that's why I'm going to need it someday, those people in armored limousines.¹²⁵

Another caller asked if the ammunition would be effective if he "theoretically" wanted to take down a helicopter.¹²⁶ After the dealer mentioned hunting, the caller told him "you could say I'm going to be using this for hunting also, but just hunting of a different kind."¹²⁷ Despite the callers' sinister insinuations, the dealers were not fazed, reassuring each customer that the ammunition would satisfy his needs.

B. Proposed Federal Legislation

The first federal bill aimed at .50 caliber rifles appeared in June 1999, a month after the release of the Violence Policy Center's report. While it would not have banned any weapons, the proposed legislation would have extended the NFA's requirements to reach all ".50 caliber sniper weapons," meaning any rifle capable of firing .50 BMG or any other .50 caliber cartridge.¹²⁸ Several other bills containing even more restrictive provisions have subsequently been introduced. Those bills would ban sales of new .50 caliber rifles to the civilian market in addition to requiring those already in circulation to be treated as NFA weapons.¹²⁹ None of these bills have made any significant progress toward passage.¹³⁰

Gun control proponents in Congress also set their sights on .50 caliber ammunition, particularly surplus U.S. military rounds. Talon Manufacturing, a West Virginia company, had an exclusive contract with the Department of Defense to "demilitarize" excess or obsolete military

125. *Id.*

126. *Id.*

127. *Id.*

128. H.R. 2127, 106th Cong. (1999). Several later bills contained the same provisions. *See* S. 429, 108th Cong. (2003); S. 505, 107th Cong. (2001); S. 1774, 106th Cong. (1999).

129. The first of these bills would have made .50 caliber rifles subject to essentially the same restrictions as machine guns. Sales of new weapons would be prohibited, but old weapons could continue to circulate subject to the rules imposed by the NFA. *See* H.R. 3182, 107th Cong. (2001). The most recent bill, introduced in May 2004 and again in February 2005, would go even further. Those who already own .50 caliber rifles could keep them, but they could not transfer them to anyone, even under the NFA's auspices. *See* H.R. 4292, 108th Cong. (2004); H.R. 654, 109th Cong. (2005).

130. The National Rifle Association has pointed out a serious flaw in the federal bills introduced to date. None of them contains a mechanism for those who already own .50 caliber rifles to have them registered so that possession of them will remain legal once .50 caliber rifles become subject to the NFA's requirements. *See* Nat'l Rifle Ass'n, *Sen. Feinstein's ".50 Caliber" Gun Ban*, at <http://www.nra.org/issues/factsheets/read.aspx?id=105> (posted Sept. 25, 2001). That is a very significant omission, and it obviously would have to be corrected before any such bill was enacted. The National Rifle Association instead insists that it is a deliberate omission and that the bills have been disguised as measures that would merely subject .50 caliber rifles to NFA regulation, but would actually operate as complete bans and require government confiscation of all .50 caliber rifles. *Id.*

ammunition.¹³¹ While Talon dismantled 98 percent of the surplus .50 caliber ammunition and sold it for scrap, Talon reconditioned and sold the other 2 percent to foreign militaries and the commercial civilian market.¹³² In one year, this process put approximately 180,000 rounds of surplus military .50 caliber ammunition, including armor piercing and incendiary rounds, into the civilian market.¹³³ In October 1999, Congress cut the flow of surplus armor piercing rounds to American civilians, prohibiting the Department of Defense from allowing such ammunition to be sold to any purchaser in the United States other than a law enforcement or military agency.¹³⁴

The same members of Congress leading the charge against .50 caliber rifles sought to go further and ban all sales of armor piercing rounds to civilians, regardless of caliber and whether the rounds were military surplus.¹³⁵ That proposal has made no progress.¹³⁶

C. *New Concerns About Terrorism*

The controversy over .50 caliber rifles intensified after the terrorist attacks on September 11, 2001. The Violence Policy Center quickly issued a new report focusing on the risk that terrorists could use the rifles to attack targets such as aircraft, pipelines, or chemical plants.¹³⁷ The report's most striking assertion was that Osama bin Laden had an associate purchase twenty-five Barrett .50 BMG rifles in the United

131. See OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 53, at 2.

132. *Id.* at 3-4.

133. *Id.* at 4.

134. The restriction on surplus armor piercing ammunition initially took the form of a rider on the Defense Department's annual funding appropriation, but Congress soon made it a permanent measure. See Appropriations, 2000—Department of Defense, Pub. L. 106-79, § 8126, 113 Stat. 1212 (1999); Department of Defense Appropriations Act, 2001, Pub. L. 106-259, § 8104, 114 Stat. 656 (2000); Departments of Defense and Energy—Appropriations, Pub. L. 106-398, § 382, 114 Stat. 1654 (2000) (codified at 10 U.S.C. § 4688 (2000)). The law applied to armor piercing ammunition of all calibers, but the only type of surplus armor piercing ammunition being sold to the civilian market was .50 caliber. See OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 53, at 4.

135. See H.R. 2421, 106th Cong. (1999). Congress banned certain types of "armor piercing" ammunition in 1986, a measure meant to protect police from so-called "cop-killer" bullets, but the law applied only to handgun ammunition and not rounds used exclusively in rifles. See Act of Aug. 28, 1986, Pub. L. 99-408, 100 Stat. 920 (codified at 18 U.S.C. §§ 921(a)(17), 922(a)(7)-(8) (2000)); Statement by President Ronald Reagan upon Signing H.R. 3132, 22 WEEKLY COMP. PRES. DOC. 1130 (1986).

136. When a similar measure came up for a vote in the Senate in March 2004, the Senate rejected it by a vote of 63 to 34. See 150 CONG. REC. S1634 (daily ed. Feb. 26, 2004) (statement of Sen. Kennedy proposing Senate Amendment 2619 to Protection of Lawful Commerce in Arms Act, S. 1805, 108th Cong. (2004)); 150 CONG. REC. S1974 (daily ed. Mar. 2, 2004) (reporting vote result).

137. See VIOLENCE POLICY CENTER, VOTING FROM THE ROOFTOPS: HOW THE GUN INDUSTRY ARMED OSAMA BIN LADEN, OTHER FOREIGN AND DOMESTIC TERRORISTS, AND COMMON CRIMINALS WITH 50 CALIBER SNIPER RIFLES 14, 20 (2001).

States in the late 1980s and ship them to Afghanistan to be used by Muslim militias resisting the Soviet occupation.¹³⁸ Essam al Ridi, the person who purchased the rifles for bin Laden, described the incident while testifying for the prosecution in a trial that resulted in the conviction of four al Qaeda members for their roles in the 1998 bombings of U.S. embassies in Kenya and Tanzania.¹³⁹ The report suggested that those rifles, their whereabouts now unknown, could be used in terrorist attacks or in battles with U.S. military forces in Afghanistan or elsewhere. In addition, it pointed out that al Qaeda could easily acquire more of the rifles today, since it obviously understands their potent capabilities and how to obtain them in America.

In response to the Violence Policy Center's report, Barrett Firearms acknowledged that some of its .50 caliber rifles went to Afghanistan, but asserted that the U.S. government arranged the entire transaction as part of the effort to support the Mujahideen fighting against the Soviets.¹⁴⁰ According to Ronnie Barrett, the rifles "were picked up by U.S. government trucks, shipped to U.S. government bases and shipped to those Afghan freedom fighters."¹⁴¹

Barrett's explanation is almost certainly mistaken, although it has been enthusiastically embraced by gun rights advocates and repeated in many opinion columns and other materials opposing stricter regulation of .50 caliber rifles.¹⁴² The available evidence strongly indicates that two sets of rifles made their way to Afghanistan. The U.S. government purchased a small number of Barrett .50 BMG rifles and shipped them to Mujahideen fighters in Afghanistan, as Barrett correctly remembers,¹⁴³ but those are not the same rifles that al Ridi purchased and

138. *Id.* at 26-30.

139. *The Embassy Bombings Verdict*, N.Y. TIMES, May 30, 2001, at A22. The transcript of al Ridi's testimony, given on February 14, 2001, in *United States v. Bin Laden*, No. S(7)98 CR 1023 LBS (S.D.N.Y.), is available at <http://cryptome.org/usa-v-ubl-05.htm>.

140. Barrett Firearms, *A Message from Barrett Firearms Manufacturing Inc. in Response to Recent News Articles Accusing Barrett of Selling Guns to Bin Laden*, at http://www.barrettrifles.com/news/Itr_laden.htm (last visited Mar. 18, 2005).

141. D. Ian Hopper, *U.S. Government Gave Armor-Piercing Sniper Rifles to Afghanistan, bin Laden*, ASSOCIATED PRESS, Oct. 16, 2001. Barrett recently claimed "a congressman" purchased the rifles for the Afghan fighters. See Snyder, *supra* note 40.

142. See, e.g., Steve Bonta, *Gun Grab Revival*, NEW AMERICAN, Feb. 11, 2002, http://www.thenewamerican.com/artman/publish/article_894.shtml; Lawrence P. Farrell, Jr., *Assault on the Small Arms Industrial Base*, NAT'L DEF., Feb. 1, 2002, at 4; Andrew Massimilian, *Properly Used, Rifles Aren't a Safety Threat*, TIMES UNION (Albany), May 5, 2004, at A10; John R. Lott, Jr., Editorial, *Banning Guns Won't Stop Terrorism*, HARTFORD COURANT, Mar. 18, 2002, at A7; Dave Kopel & Timothy Wheeler, *Guns and (Character) Assassination*, NAT'L REV. ONLINE, Dec. 21, 2001, at <http://www.nationalreview.com/kopel/kopel122101.shtml>.

143. TOM DIAZ, VIOLENCE POLICY CENTER, THE U.S. GUN INDUSTRY AND OTHERS UNKNOWN: EVIDENCE DEBUNKING THE GUN INDUSTRY'S CLAIM THAT OSAMA BIN LADEN GOT HIS 50 CALIBER SNIPER RIFLES FROM THE U.S. AFGHAN-AID PROGRAM 3, 8 (2002); Press Release, Violence Policy

shipped to bin Laden.¹⁴⁴ Barrett certainly did not deliberately supply arms to anti-American terrorists, but that does not undercut the incident's significance as a cautionary demonstration of how al Qaeda or other foreign terrorists might obtain weapons like .50 BMG rifles in the future.

In any event, the controversy over .50 caliber rifles has become inextricably linked to the subject of terrorism. Additional reports by the Violence Policy Center hammered on potential use of .50 caliber rifles by terrorists, particularly the threat that the rifles might pose to civil aviation, a resonant issue after September 11.¹⁴⁵ Legislators pushing for tighter restrictions on .50 caliber rifles began touting their proposals as antiterrorism measures, saying the issue was "a matter of national security" rather than gun control.¹⁴⁶

D. State and Local Legislation

Frustrated by inaction at the federal level, gun control advocates soon began pushing for state and local restrictions on .50 caliber rifles. California became the primary battleground. After several years of fighting over the issue,¹⁴⁷ the California legislature passed a measure banning sales and strictly limiting possession of .50 BMG rifles.¹⁴⁸ During his campaign for governor in 2003, Arnold Schwarzenegger had

Center, CIA Letter Raises Further Doubts About Barrett Story on Sale of 50 Caliber Sniper Rifles to Bin Laden (Aug. 6, 2002), available at <http://www.vpc.org/press/0208cia.htm>.

144. The three U.S. government officials who coordinated the supply of aid to the Afghan resistance agree on this point. In addition, al Ridi testified that he went to Afghanistan to help line up the sights on the rifles when the Afghan fighters had trouble shooting them accurately, a fact that makes little sense if these rifles flowed to Afghanistan through U.S. government channels. DIAZ, *supra* note 143, at 7-8.

145. TOM DIAZ, VIOLENCE POLICY CENTER, "JUST LIKE BIRD HUNTING": THE THREAT TO CIVIL AVIATION FROM 50 CALIBER SNIPER RIFLES (2003); VIOLENCE POLICY CENTER, CREDIT CARD ARMIES—FIREARMS AND TRAINING FOR TERROR IN THE UNITED STATES (2002); VIOLENCE POLICY CENTER, SITTING DUCKS: THE THREAT TO THE CHEMICAL AND REFINERY INDUSTRY FROM 50 CALIBER SNIPER RIFLES (2002).

146. 149 CONG. REC. S2596 (daily ed. Feb. 24, 2003) (statement of Sen. Feinstein). The federal bill aimed at the rifles received a new name reflecting the focus on terrorism, becoming the "Anti-Terrorism Military Sniper Weapon Reclassification Act." S. 429, 108th Cong. (2003).

147. A bill aimed at .50 BMG rifles was introduced in 2002, but died in committee. *See* Assem. 2222, 2001-2002 Leg., Reg. Sess. (Cal. 2002). In 2003, the state Assembly passed a bill banning the rifles, but a state senate committee killed it, with some reports suggesting it may have been scuttled by then-Governor Gray Davis because he did not want to face the prospect of signing a controversial bill as he fought the recall effort that eventually knocked him out of office. James P. Sweeney, *Assembly Votes to Limit Sales of Certain 50 Caliber Rifles*, COPLEY NEWS SERV., June 4, 2003 (reporting that bill should pass easily in Senate unless entangled by politics surrounding recall); *see also* James P. Sweeney, *Gun Lobby Scores Victory in Assembly Committee*, COPLEY NEWS SERV., Apr. 23, 2002 (reporting possibility that Gov. Davis was behind Assembly committee's rejection of .50 caliber ban bill in 2002 as well).

148. *See* Assem. 50, 2003-2004 Leg., Reg. Sess. (Cal. 2004).

indicated that he would sign such a bill if the legislature passed it.¹⁴⁹ He kept his promise despite pressure from fellow Republicans generally opposed to new gun control measures, signing the bill into law on September 13, 2004, which happened to be the very same day that the federal assault weapons ban expired.¹⁵⁰

Technically, the California law does not impose a complete ban on acquisition of .50 BMG rifles because it allows a person to obtain such a weapon if he is granted a special permit to do so by the state's Department of Justice. However, the same rule already applies to machine guns and assault weapons in California, and the permits have been granted so rarely that the law essentially amounts to a ban on those weapons.¹⁵¹ Under a "grandfather" exception, people in California who already lawfully possess .50 BMG rifles will be permitted to keep them, provided they registered them with the state's Department of Justice within a brief grace period.¹⁵²

Even before the California legislation passed, two local jurisdictions in the state, Contra Costa County and the City of Los Angeles, had already banned sales of .50 caliber rifles within their borders.¹⁵³ These measures were largely symbolic, because they merely prohibited sales and not possession of the weapons.¹⁵⁴ For example, despite the ordinances, it remained legal for a resident of the City of Los Angeles to go to a nearby county, purchase a .50 caliber rifle there, and bring it back into Los Angeles.¹⁵⁵ Moreover, the ordinances precluded only a very small quantity of sales. Prior to enactment of the ordinances, gun dealers in the City of Los Angeles together sold fewer than ten .50 caliber weapons per year, and there were no dealers in Contra Costa County that sold any .50 caliber weapons.¹⁵⁶

149. See Herbert A. Sample, *Candidates' Stances on Gun Issues Emerge*, SACRAMENTO BEE, Sept. 3, 2003, at <http://www.sacbee.com/content/politics/story/7345017p-8289079c.html>.

150. Rau & Vogel, *supra* note 6.

151. See CAL. PENAL CODE §§ 12230, 12286 (West 2000 & Supp. 2005).

152. See Assem. 50, 2003-2004 Legis., Reg. Sess. § 11 (Cal. 2004).

153. These bans apply to .50 caliber handguns as well as rifles. L.A., CAL., MUNICIPAL CODE § 55.18 (2004); CONTRA COSTA COUNTY, CAL., ORDINANCE CODE § 54-22.006 (2004); see *supra* note 11. Several gun-related organizations have sued Contra Costa County, claiming its ordinance is unconstitutional and preempted by state statutes. See Bob Egelko, *Suit Seeks to Block .50-Caliber Rifle Ban*, S.F. CHRON., June 5, 2004, at B5. The City of Long Beach also considered passing such an ordinance, but shelved the idea to avoid being sued over it. Jason Gewirtz, *L.B. Delays .50-Caliber Gun Ban*, LONG BEACH PRESS-TELEGRAM, Dec. 17, 2003, at A1.

154. Banning possession of .50 caliber rifles might exceed the authority of a California city or county. See CAL. GOV'T CODE § 53071 (West 1997); Mariel Garza, *Bratton Backs .50-Caliber Ban*, L.A. DAILY NEWS, May 28, 2003, at N4.

155. See Chip Johnson, *Supes' Ban on Big Guns Will Have Little Pop*, S.F. CHRON., Apr. 2, 2001, at F1.

156. *County Bans Sale of High-Caliber Rifle*, L.A. TIMES, Apr. 8, 2004, at B6; Press Release, California Rifle & Pistol Ass'n, LA Politics Has Chased All but Four Fircarm Dealers out of the City (June 5, 2003).

Measures to ban or impose additional legal restrictions on .50 caliber rifles have been introduced in a handful of other states in recent years.¹⁵⁷ New York has come closest to approving such a measure. In March 2004, one house of the New York legislature passed a bill that would completely ban .50 caliber rifles in that state.¹⁵⁸ The proposed law would not even provide a “grandfathering” exemption for weapons already lawfully possessed before the ban took effect. Those who complied with the law and surrendered their .50 caliber rifles to state police within 30 days would be entitled to compensation for the weapon’s fair market value, up to a maximum of \$8,500.

The battle over .50 caliber rifles so far has generated no other enactments except a Connecticut ban on armor piercing and incendiary .50 caliber ammunition.¹⁵⁹ The fight over .50 caliber rifles will continue, however, and it is likely to spread to other states, cities, and counties.

V. ASSESSING THE ARGUMENTS AGAINST GREATER REGULATION OF .50 BMG RIFLES

The case against stricter regulation of .50 BMG rifles essentially is founded upon several crucial assertions. These arguments have been repeated many times, with remarkable consistency, by everyone from gun makers and National Rifle Association lobbyists to grassroots gun enthusiasts writing to their local newspapers. Some of these arguments wilt under careful scrutiny, while others raise issues more difficult to resolve.

157. New Jersey legislators recently introduced bills that would ban possession of .50 caliber rifles in that state. *See* S. 1546, 211th Leg., Reg. Sess. (N.J. 2004); Assem. 3942, 210th Leg., Reg. Sess. (N.J. 2003). Connecticut legislators recently proposed a bill that would have banned the sale of .50 caliber rifles and required a permit to possess such a rifle. S. 714, 2005 Leg., Jan. Sess. (Conn. 2005); *see also* S. 1405, 2001 Leg., Jan. Sess. (Conn. 2001). Illinois legislators introduced a variety of bills aimed at .50 caliber rifles and ammunition in 2001, but those bills encountered strong resistance from the National Rifle Association and died in committee. *See* H.R. 1946, 2315, 2359, 3690, 4173, 4176, 92d Gen. Assem., Reg. Sess. (Ill. 2001). Legislators in the state of Washington recently introduced a measure to ban the sale of .50 BMG rifles and require registration of those already possessed in the state. S. 5593, 59th Leg., 2005 Reg. Sess. (Wash. 2005).

158. Assem. 7039, 2003 Leg., 226th Ann. Leg. Sess. (N.Y. 2003); *see also* Assem. 4471, 2005 Leg., 228th Ann. Leg. Sess. (N.Y. 2005); S. 2590, 2005 Leg., 228th Ann. Leg. Sess. (N.Y. 2005); Assem. 10543, 2003 Leg., 227th Ann. Leg. Sess. (N.Y. 2004); S. 4453, 2003 Leg., 226th Ann. Leg. Sess. (N.Y. 2003); Assem. 9452, 2001 Leg., 224th Ann. Leg. Sess. (N.Y. 2001); Assem. 1534, 2001 Leg., 224th Ann. Leg. Sess. (N.Y. 2001); S. 742, 2001 Leg., 224 Ann. Leg. Sess. (N.Y. 2001).

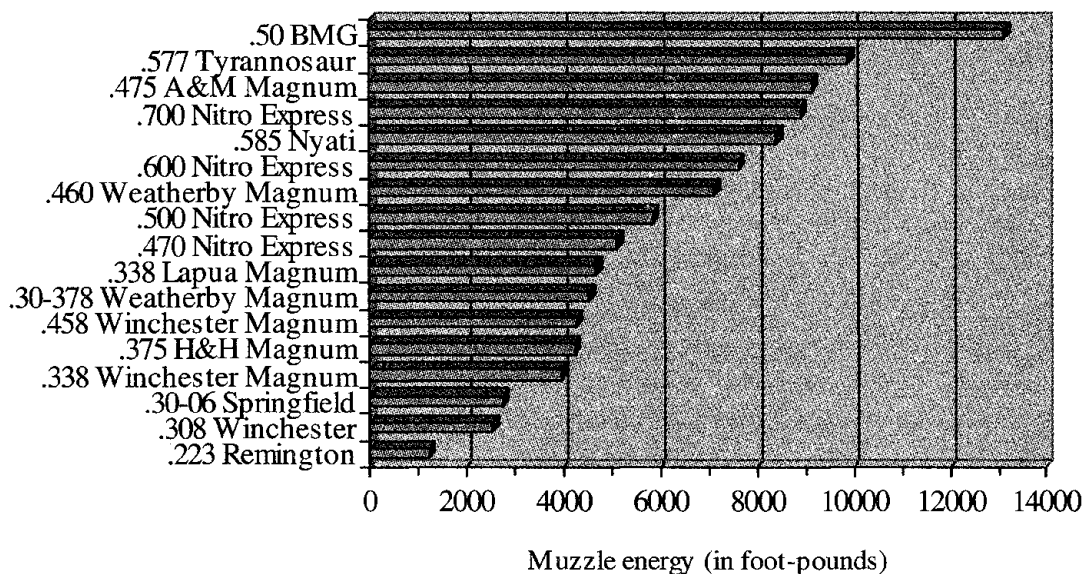
159. CONN. GEN. STAT. ANN. § 53-202I (West Supp. 2004) (enacted by 2001 Conn. Acts 01-130 § 2 (Reg. Sess.)).

A. The Power of .50 BMG Rifles

Those who argue against greater regulation of .50 BMG rifles often downplay the power of these weapons. They insist that these rifles really are not that different from ordinary firearms but have been arbitrarily singled out for attack. For example, gun maker Ronnie Barrett claims that his products have been unfairly “demonized” and that their ammunition is “only marginally more potent than other high-powered cartridges.”¹⁶⁰ These arguments are misleading, but they often pass unchallenged, in part because the people making them often know significantly more about firearms and ammunition than the reporters, legislators, and others to whom the arguments are addressed.

The truth is that .50 BMG rifles are exceptionally powerful firearms. The graph in Figure 1 illustrates how the muzzle energy of a .50 BMG round compares to a variety of other modern rifle ammunition.

Figure 1: Comparing .50 BMG ammunition to other rifle cartridges



160. Morris, *supra* note 37; see also Amanda Vogt, *May Wants to Limit Sale of Sniper Rifle*, CHI. TRIB., Jan. 22, 2002, at L1 (quoting Illinois State Rifle Association president as saying .50 caliber rifles are comparable in power and accuracy to common hunting rifles); Transcript, *supra* note 121, at 40 (testimony of James Schmidt on behalf of Fifty Caliber Shooters Association) (claiming that “elephant gun” cartridges, such as .500, .600, and .700 Nitro Express, are “far more powerful” than .50 BMG).

Figure 1 is based on data from the latest edition of *Cartridges of the World*, an encyclopedic guide to sporting ammunition.¹⁶¹ Although the graph obviously does not include every type of ammunition in existence, it contains a fair sample illustrating how the .50 BMG round compares to other ammunition used for hunting and target shooting.¹⁶² In particular, it includes all of the cartridges routinely cited by those who argue that .50 BMG rifles have been arbitrarily attacked and that many other rifles have comparable capabilities.

The power generated by .50 BMG rifles is extraordinary. The first eight cartridges listed below .50 BMG in Figure 1 are ammunition for African safari hunting rifles used to shoot dangerous, thick-skinned animals such as elephants and rhinoceros.¹⁶³ Rifles farther down the graph in Figure 1, generating less than 5,000 foot-pounds of energy, are still very powerful weapons. A .458 Winchester Magnum rifle is suitable for hunting any of the world's largest and most dangerous game animals,¹⁶⁴ while the .375 H&H Magnum and .338 Winchester Magnum cartridges are overpowered for all but the largest North American animals, such as elk, moose, and grizzly bears.¹⁶⁵ The .30-06 Springfield, near the bottom of the graph and producing only about 3,000 foot-pounds of energy, is the most popular cartridge for American hunters.¹⁶⁶ The last cartridge on the graph, .223 Remington, is currently the standard military round used by U.S. and NATO troops.¹⁶⁷

Rifles firing .50 BMG rounds thus possess an exceptional amount of power compared to other rifles used for hunting and target shooting today. A few rifles fire heavier bullets, and some achieve higher bullet

161. See BARNES, *supra* note 1. Each type of cartridge can be loaded with different combinations of powder and bullets that would produce a range of muzzle energy figures. See *supra* note 19 and accompanying text. Figure 1 and Figure 2 are based on the average muzzle energy of the loads listed for each cartridge in *Cartridges of the World*. That provides a rough but fair means of illustrating the relative power of the cartridges. The data is consistent with figures contained in other sources, such as the online listings at <http://www.ammoguide.com>.

162. For example, the graph does not include certain military ammunition that far exceeds the power of .50 BMG rounds, such as the 20mm cartridges fired from rotary barrel cannons mounted on U.S. fighter aircraft. See BARNES, *supra* note 1, at 497-99. *Cartridges of the World* mentions two other rifles, a .950 JDJ and a .50 McMillan FatMac, that exceed the .50 BMG's power. Both are custom-made curiosities firing ammunition made from cartridge cases for 20mm cannons, and neither has been produced in any significant quantities. See *id.* at 210, 267. *Cartridges of the World* also lists several variants of .50 BMG ammunition that are higher in caliber but less powerful than .50 BMG. See *id.* at 213, 267 (describing .729 Jongmans and .700 JDJ cartridges made by "necking up" .50 BMG cartridge cases and loading higher caliber bullets into them).

163. *Id.* at 98-100, 209, 212, 266, 385, 388-90. For example, .700 Nitro Express is "more than adequate for any game animal found anywhere on this planet. *Id.* at 390.

164. *Id.* at 98.

165. *Id.* at 74, 85.

166. *Id.* at 59.

167. *Id.*

velocities, but none can rival .50 BMG rifles' remarkable combination of bullet size and speed. Moreover, the gap between the destructive capabilities of .50 BMG rifles and other firearms is even greater than measurements of muzzle energy indicate, because .50 BMG is a standard military caliber used for huge quantities of armor piercing, incendiary, and other special purpose ammunition.¹⁶⁸ No similar supply of special military rounds exists for .577 Tyrannosaur or any of the other extremely powerful hunting rifle cartridges.

Despite these facts, people who argue against stricter regulation of .50 BMG rifles use several tactics to minimize the difference between these rifles and other firearms. One is to suggest that caliber—the diameter of the bullet—is what matters in evaluating the capabilities of a firearm or its ammunition.¹⁶⁹ An article by Dave Kopel and Timothy Wheeler, two prolific and knowledgeable opponents of gun control measures, makes .50 BMG rifles sound only marginally more powerful than other rifles by referring exclusively to caliber:

Are .50-caliber target rifles lethal weapons? Certainly. But so is a .458-caliber rifle, and so is a .475-caliber rifle—both of which are very powerful hunting rounds. If gun prohibitionists want to argue that rifles which have barrels .50 inches in diameter are too big, but rifles which have barrels .475 inches in diameter are great sporting guns, let them make that argument. If they want to argue for banning .50 caliber guns as a first step towards banning .475, .458, and any other calibers they can ban, let them make that argument too—but not with hysterical claims that .50-caliber weapons are somehow utterly different from other guns.¹⁷⁰

John Lott, another prominent critic of most gun control proposals, put it even more bluntly: “Other than the attempt to link .50-caliber rifles with terrorists, the decision to demonize these particular guns and not .475-caliber hunting rifles is arbitrary. The difference in width for these bullets is a trivial 0.25 inches.”¹⁷¹

168. See *supra* notes 31, 38-39, 53-55 and accompanying text.

169. Those who argue for stricter regulation of .50 caliber rifles have unwittingly helped to encourage this by framing their proposals entirely in terms of caliber. See *infra* Part VI.A.

170. Kopel & Wheeler, *supra* note 142; see also Edward T. Stevenson, Letter, *One Gun at a Time*, WASH. TIMES, May 6, 2004, at A20 (“Yes, .50-caliber bullets may penetrate armor just like a .30-caliber hunting bullet, the difference being that the .50 caliber bullet makes a 1-inch hole while the .30-caliber hunting bullet makes a 1/3-inch hole.”); Fifty Caliber Inst., *Latest Developments in the Commercial US .50 Caliber Ammunition Market*, at <http://www.fiftycal.org/News%20-Archive/newcommercial50b.html> (last visited June 30, 2004) (“A real expert knows: the difference between firing one of these cartridges and any standard .30 caliber cartridge is that the hole in the target is only 2/10 of an inch wider.”).

171. Lott, *supra* note 142; John R. Lott, Jr., Editorial, *Don't Unfairly Target .50-Caliber Rifles*, CHI. SUN-TIMES, Nov. 6, 2001, at 32.

These writers are correct that other rifle cartridges are very powerful, but they understate the gap between .50 BMG rounds and other cartridges by focusing exclusively on caliber. The difference between .50 inches and .458 or .475 inches may be trivial, but the difference between the power of .50 BMG rifles and other rifles being made today is not.

The debate over these weapons is filled with other instances in which those arguing against legal restrictions on .50 BMG rifles insist that they are no more potent than other firearms. Lawyers lobbying local government officials have asserted that these rifles may have a maximum effective range of over one mile “but many guns shoot that far.”¹⁷² James Schmidt, a .50 caliber ammunition maker, testified on behalf of the Fifty Caliber Shooters Association at a congressional hearing in 1999 and told the legislators that popular hunting rifle cartridges such as .375 H&H Magnum, .338 Lapua Magnum, and .30-378 Weatherby Magnum are just as deadly at long distances as a .50 BMG rifle.¹⁷³ In fact, none of those cartridges even remotely approaches the power of .50 BMG rounds.¹⁷⁴

The National Rifle Association has used a somewhat different maneuver, arguing that .50 BMG rifle bullets are not “the heaviest or the fastest available to sportsmen” and that they are “significantly lighter than hunting bullets introduced more than a century ago, and they travel slower than many commonplace rifles used for deer hunting and varmint control.”¹⁷⁵ That is literally true, but misleading because it compares each characteristic of the bullets—weight and velocity—in isolation rather than in combination, a meaningless comparison. Many nineteenth-century hunting rifles fired very heavy bullets, but they did so at relatively low velocities. Likewise, many small-caliber hunting rifles today fire bullets at higher velocities than a .50 BMG rifle, but those bullets are miniscule compared to the bullet that comes out of a .50 BMG cartridge. By failing to consider the combined effect of bullet weight and velocity, the National Rifle Association makes it sound as though a .50 BMG rifle is just another firearm. That is like saying a football player with a miraculous combination of size and speed is nothing special because there are sumo wrestlers who are much bigger and whipper-thin track stars who can run faster.

172. Letter to Contra Costa County Board of Supervisors from C.D. Michel on behalf of National Rifle Association and California Rifle & Pistol Association (Aug. 11, 2003), *available at* <http://www.nramembers.councils.com/local/coco/50/index030811.shtml>.

173. Transcript, *supra* note 121, at 35-36, 38, 41. In the hearing transcript, .30-378 is written as “3378.” *Id.*

174. *See* BARNES, *supra* note 1, at 66, 76, 85.

175. Nat'l Rifle Ass'n, *.50 Caliber Rifles—Latest Bugaboo from Anti-Gun Fringe*, at <http://www.nraila.org/Issucs/FactSheets/Read.aspx?ID=102> (posted Aug. 28, 2001).

The National Rifle Association's reference to nineteenth-century hunting arms is particularly misleading. Others arguing against stricter regulation of .50 BMG rifles frequently make similar arguments, pointing out that muskets with bores larger than .50 caliber were common in the days of the Founding Fathers or that hunters on the American frontier in the late nineteenth century shot buffalo with .50 caliber rifles.¹⁷⁶ They have a valid point to the extent they are merely trying to show that a ban on all .50 caliber rifles and ammunition, with no exception for antique firearms, would be absurdly overbroad.¹⁷⁷ These arguments go further than that, however, and imply that .50 BMG rifles are really nothing new. They assert that the .50 caliber rifles of the nineteenth century, like their modern counterparts, "could be quite powerful, since some were designed for buffalo hunting."¹⁷⁸ With their evocative historical imagery, these arguments suggest that legislators and gun control advocates have suddenly and hysterically created an issue out of something that has been a part of American life for centuries.

Although the .50 caliber rifles of the nineteenth century were powerful weapons, used for military purposes as well as hunting buffalo and other large animals,¹⁷⁹ none of them even remotely approached the power of modern .50 BMG rifles. Figure 2 illustrates how the muzzle energy of a .50 BMG round compares to a variety of .50 caliber rounds introduced in the second half of the nineteenth century.¹⁸⁰ The .50 BMG rifles in use today are approximately five to ten times more powerful than the .50 caliber rifles of the heyday of buffalo hunting.

176. See, e.g., James J. Jentes, Letter, *One Gun at a Time*, WASH. TIMES, May 6, 2004, at A20; Kopel & Wheeler, *supra* note 142; Erich Pratt, *VPC's .50 Caliber Misfire*, Oct. 2001, at <http://www.gunowners.org/op0140.htm>.

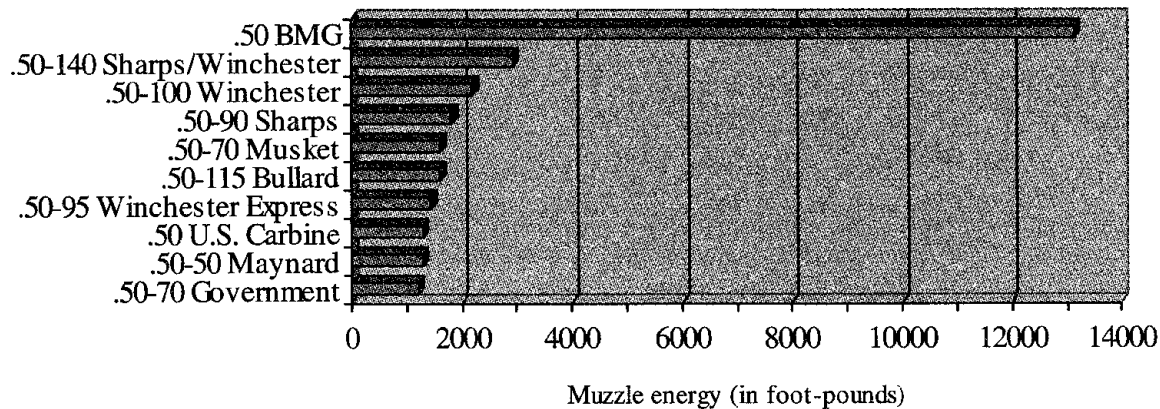
177. See *infra* notes 270-72 and accompanying text.

178. Kopel & Wheeler, *supra* note 142.

179. See BARNES, *supra* note 1, at 158-61, 357; *supra* note 26 and accompanying text.

180. See BARNES, *supra* note 1, at 101, 158-61, 357. The graph in Figure 2 is based on data generated in the same manner as the graph in Figure 1. See *supra* note 161.

Figure 2: Comparing .50 BMG ammunition to .50 caliber rifle cartridges developed in the second half of the nineteenth century



Rifles firing .50 BMG rounds certainly are not the only firearms powerful enough to cause significant harm. For example, a pair of snipers managed to kill ten people and terrorize the Washington, D.C. area for weeks in 2002 with a much less powerful .223 caliber rifle.¹⁸¹ At the same time, suggesting that .50 BMG rifles are no more powerful than ordinary hunting rifles, or suggesting that they are comparable to eighteenth and nineteenth century antique arms, is an unfair means of avoiding the real issues surrounding these weapons.

B. Criminal Use of .50 BMG Rifles

Some gun law opponents attempt to downplay the unique power of .50 BMG rifles, but others argue that these firearms are extraordinary in ways that make them particularly unlikely to be used in crimes. They contend that these rifles are too expensive, too big, too heavy, and too loud to be a suitable weapon for most criminal purposes.¹⁸²

181. Stephen Hunter, *The Bushmaster XM15: A Rifle Known for Its Accuracy*, WASH. POST, Oct. 25, 2002, at A10.

182. See, e.g., Todd Browning, Letter, *Sniper Rifles Are an Irrelevant Concern*, ATLANTA J. & CONST., Sept. 7, 1999, at 8A; Tom Buckthorpe, Letter, *Sniper Guns Expensive*, ARK. DEMOCRAT-GAZETTE, Sept. 4, 2001, at B7; James M. Coombe, Letter, *Violence Policy Center Has Its Own Agenda*, CINCINNATI ENQUIRER, Aug. 31, 2001, at B7; Richard L. Fisher, Letter, *Gun Ban Freaks Play Word Games on Rifles*, CHATTANOOGA TIMES FREE PRESS, Apr. 3, 2001, at B7; J.R. Labbe, *Employing Tragedy as a Policy Lever*, FORT WORTH STAR-TELEGRAM, Oct. 18, 2001; Lott, *supra* note 142. The major organizations lobbying against restrictions on .50 caliber rifles make the same argument. See, e.g., Fifty Caliber Shooters Ass'n, *Position Statement*, at http://www.fcsa.org/articles/position_statement.html (last visited Mar. 21, 2005); Nat'l Rifle Ass'n, *Action Alert: NRA-ILA Grassroots Alert*, Mar. 26, 2004, at <http://www.nraila.org/currentlegislation/actionalerts/read.aspx?id=214>.

These assertions are largely true, although often somewhat exaggerated. For example, .50 caliber advocates emphasize the prices of the more expensive guns or the weights of the heavier weapons¹⁸³ without mentioning the existence of cheaper and lighter models.¹⁸⁴ Likewise, they often suggest that the weapons' recoil is too extreme for anyone to handle in the midst of committing a crime,¹⁸⁵ when in fact those who make and sell the guns frequently represent that the recoil is no worse than that of ordinary hunting rifles and shotguns.¹⁸⁶

Despite the exaggerations, the primary problem with these assertions about .50 BMG rifles is not that they are wrong, but that they are beside the point. No one is seriously concerned about these rifles being used in everyday crimes on American streets. ATF traces several hundred thousand firearms used in crimes each year¹⁸⁷ and generally no more than two or three of them are .50 caliber rifles.¹⁸⁸ Indeed, these rifles have almost never been used in any crimes in which a smaller, less powerful weapon would suffice. Unless a criminal needs to fire a round from extremely long range or with extraordinary force, using a .50 BMG rifle is overkill. Tom Diaz, the principal author of the Violence Policy Center's reports on these rifles, readily acknowledges that "[i]t's not reasonable to think that somebody's going to be lugging this thing around, knocking off 7-Elevens."¹⁸⁹

The real concern is that .50 BMG rifles could be well suited for select types of particularly harmful attacks. Past incidents suggest that this concern cannot be easily dismissed. In particular, police have often found these rifles in the arsenals of individuals or groups alleged to have strong and potentially violent antigovernment agendas. The most prominent example is David Koresh and his Branch Davidian followers, who had several .50 BMG rifles in their compound at Waco and apparently used them in their firefight with ATF agents.¹⁹⁰ A few years

183. See, e.g., David Dwiggin, Letter, *Hyperbole on Rifle*, OMAHA WORLD HERALD, Aug. 20, 1999, at 22; Fred Lebrun, *.50-Caliber Gun Ban Ill-Advised*, TIMES UNION (Albany), Apr. 22, 2004, at C1; Stevenson, *supra* note 170; Dave Waits, *Firearms Opponents Distort the Facts*, CINCINNATI ENQUIRER, Aug. 29, 2001, at B9.

184. See *supra* notes 42-53 and accompanying text.

185. For example, James Schmidt, a .50 caliber ammunition maker and member of Fifty Caliber Shooters Association's board of directors, testified at a congressional hearing that a .50 BMG rifle's recoil is "many times that of a standard rifle." Transcript, *supra* note 121, at 34.

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

187. ATF, ATF PERFORMANCE AND ACCOUNTABILITY REPORT 12 (2002).

188. OFFICE OF SPECIAL INVESTIGATIONS, U.S. GEN. ACCOUNTING OFFICE, GAO/OSI-99-15R, .50 CALIBER RIFLE CRIME 3 (1999) (reporting that, from November 1992 to March 1999, ATF conducted 18 traces of .50 caliber rifles connected to criminal activity).

189. Morris, *supra* note 37.

190. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 4; U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOV'T REFORM, MINORITY STAFF REPORT, SUSPECT ORGANIZATIONS AND

earlier, ATF arrested members of another “doomsday religious cult” who were building underground bunkers in Montana to await the end of world and had used false identification to purchase hundreds of firearms including ten .50 BMG rifles.¹⁹¹ Police seized another from an Ohio religious cult leader when they arrested him for the ritualistic murder of five of his followers.¹⁹²

Extremist militia groups have demonstrated a strong appreciation for .50 BMG rifles as well. Police found such a rifle in the arsenal of the North American Militia, a group plotting to assassinate Michigan’s governor, a U.S. senator, and all the federal judges in the Western District of Michigan.¹⁹³ Police recovered another from the home of a West Virginia militia member arrested for plotting to bomb an FBI office.¹⁹⁴ After Royal Canadian Mounted Police recovered a .50 BMG rifle and large quantities of ammunition at a remote location in 1996, they determined that a militia group from Texas had smuggled the gun into Canada in order to use it for paramilitary training there.¹⁹⁵ A year before their long standoff with the FBI, the Freemen of Montana attempted to purchase two hundred .50 BMG rifles, but the seller realized the Freemen’s check was bogus just before he shipped the weapons.¹⁹⁶ Until ATF shut him down, a convicted felon with close ties to the militia movement sold over five hundred .50 BMG “kits” through the mail, enabling purchasers to assemble their own rifles without undergoing background checks or even having serial numbers stamped on the guns.¹⁹⁷

Police have also seized these rifles from a Florida podiatrist convicted of plotting to massacre Muslims at local mosques in retaliation for the September 11 attacks,¹⁹⁸ a “survivalist/tax protestor” in Georgia who used false identification to purchase over a hundred firearms including two .50 BMG rifles,¹⁹⁹ a “white supremacist/tax protestor” in Louisiana

INDIVIDUALS POSSESSING LONG-RANGE FIFTY CALIBER SNIPER WEAPONS 7-9 (1999).

191. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 3-4.

192. Kate Callen, *Ohio Cult Leader Admitted Killings, Affidavit Says*, UNITED PRESS INT’L, Jan. 12, 1990. For a report about the search for a .50 caliber rifle and other weapons in the arsenal of extremists who killed a police officer and wounded two sheriff’s deputies before disappearing into the desert, see Greg Burton, *Mystery Still Shrouds ’98 Desert Manhunt*, SALT LAKE TRIB., Apr. 10, 2000, at B1.

193. VIOLENCE POLICY CENTER, *supra* note 137, at 38; *MSNBC Investigates: The .50-Caliber Militia* (MSNBC television broadcast, May 14, 2001) [hereinafter *MSNBC*].

194. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 4.

195. *Id.*; *Canadian Police Find Paramilitary Cache*, UNITED PRESS INT’L, Oct. 26, 1996.

196. Tom Kenworthy & Serge F. Kovalcski, “*Freemen*” *Finally Taxed the Patience of Federal Government*, WASH. POST, Mar. 31, 1996, at A1.

197. *MSNBC*, *supra* note 193; Dennis Wagner, *Mesa Gun Advocate Is Jailed After Raid*, ARIZ. REPUBLIC, June 20, 2000, at 2B.

198. Christopher Goffard, *Design for Massacre Draws 12-Year Term*, ST. PETERSBURG TIMES, June 20, 2003, at 1B.

199. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 4.

who had over forty firearms including a .50 BMG rifle in his residence during a six-day standoff with police,²⁰⁰ a white supremacist in Connecticut who believed the apocalypse was imminent and went to jail on gun and bomb-making charges,²⁰¹ and an illegal alien who was attempting to amass a stockpile of weapons including .50 BMG rifles.²⁰² A pair of these rifles also appeared in the “small armory of sophisticated and expensive weapons” assembled by a pair of Wisconsin neo-Nazis convicted of armed robbery and murdering a police officer.²⁰³

While some law enforcement agencies acquire .50 BMG rifles for sniper use, the weapons have shown up on the other side of a number of police standoffs.²⁰⁴ A Kansas City man used a .50 BMG rifle and other firearms to fire a hail of shots at police and emergency workers, tearing holes through several fire trucks and an ambulance.²⁰⁵ After using a smaller caliber firearm to fatally wound one officer during a standoff with police, a mentally disturbed man in Michigan tried to haul his .50 BMG rifle to his front door to use against other officers as they approached the house in armored vehicles, but the man collapsed from gunshot wounds before he could open fire.²⁰⁶

These rifles also have been used occasionally by other sorts of criminals who believe they have a special need for tremendous firepower. For example, robbers used one in an attack on an armored delivery truck in Georgia in 1992.²⁰⁷ The rifles also have been found during execution of drug search warrants in several states²⁰⁸ and at the scene of a shootout among drug cartel members in Mexico.²⁰⁹ A Colorado man

200. *Id.*; U.S. HOUSE OF REPRESENTATIVES, *supra* note 190, at 7.

201. William Kaempffer & Brian McCready, *Missing “Super Gun” Found*, NEW HAVEN REGISTER, June 20, 2004; Aaron Leo, *Lawyer: Gun Discovery “Overblown”; Jailed Client Revealed Location of Sniper Rifle*, CONN. POST, June 21, 2004.

202. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 3.

203. VIOLENCE POLICY CENTER, *supra* note 137, at 39; Rogers Worthington, *Possible Links Between Robbers, Far Right Sought*, CHI. TRIB., July 10, 1995, at 1. For reports about other .50 caliber rifles contained in weapons stockpiles seized by police, see James Barron, *New Jersey Blast Kills a Woman; Police Find a Weapons Stockpile*, N.Y. TIMES, Mar. 4, 1990, § 1, at 29; Evie Gelastopoulos, *Officer Who Allegedly Pulled Gun on Revere Teens Called “Weirdo,”* BOSTON HERALD, Sept. 18, 1997, at 5; Henry K. Lee, *Two Albany Men Charged in Gun Cache Case*, S.F. CHRON., Sept. 22, 1999, at A19; *Condo Full of Ammunition*, ORLANDO SENTINEL, Apr. 12, 2002, at B5; *Montana Tax Protester Is Shot During Raid*, N.Y. TIMES, July 20, 1995, at A17.

204. For reports of standoffs in which a .50 caliber rifle was present but not used, see Marion Davis, *Man Who Held Police at Bay with Gun Sentenced to Probation*, PROVIDENCE J.-BULL., Mar. 20, 1998, at 3B; *Dad Faces Assault Charges*, TIMES-PICAYUNE (New Orleans), Apr. 5, 1996, at B3; Janice L. Habuda, *Man Held in Standoff*, BUFFALO NEWS, Aug. 20, 1996, at B1.

205. Mike McGraw, *.50-Caliber Weapon Packs Lethal Punch*, KAN. CITY STAR, Feb. 27, 2004, at 6.

206. U.S. HOUSE OF REPRESENTATIVES, *supra* note 190, at 5-6; Vobejda & Ottaway, *supra* note 7.

207. VIOLENCE POLICY CENTER, *supra* note 137, at 35.

208. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 4; Jill Taylor, *Drug Ring Infiltration Results in Multiple Arrests, Seizures*, PALM BEACH POST, Mar. 10, 2001, at 3C.

209. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 3-4; *cf. Around the Globe*, SEATTLE

mounted a .50 BMG rifle on the bulldozer he customized with special armor and used during a rampage in which he destroyed or damaged a dozen buildings.²¹⁰

Albert Petrosky went shopping for a .50 BMG rifle in Colorado in March 1995, just after his estranged wife obtained a restraining order against him. One dealer thought Petrosky was a “kook” and refused to make the sale, even though Petrosky offered to pay \$1,000 over the rifle’s price, but Petrosky obtained a .50 BMG rifle from another store two days later.²¹¹ The next day, he used a handgun to kill his wife and another person inside a grocery store and then went out to the parking lot, with his .50 caliber rifle and a smaller-caliber SKS rifle, to wait for police to arrive. When a sheriff’s deputy drove into the parking lot, Petrosky killed him with the SKS rifle and then started firing at the police cruiser with the .50 caliber weapon.²¹²

These rifles also have been used by terrorists overseas. The Irish Republican Army used .50 BMG rifles acquired from the United States to carry out a series of deadly sniper attacks that killed nine British soldiers and police officers in Northern Ireland in the early 1990s,²¹³ and federal law enforcement agencies apparently have investigated several other instances of these rifles being exported to foreign terrorist organizations.²¹⁴ *60 Minutes* recently reported on a small group of Americans who purchased and shipped hundreds of .50 BMG rifles to the Kosovo Liberation Army for use in that guerilla force’s fight for independence from Serbia.²¹⁵

Fifty caliber rifle advocates disregard these incidents when they continue to insist that the weapon has “a real nice record” and has never

TIMES, June 27, 2004, at A21 (reporting Mexican authorities’ concern about Mexican drug gangs obtaining firearms in United States, particularly .50 caliber rifles).

210. See Kirk Mitchell, *Bulldozer Tailor-Made for Granby Rampage*, DENVER POST, June 25, 2004, at B1.

211. Charlie Brennan, *Authorities Investigate Gun Sale*, ROCKY MTN. NEWS, May 1, 1995, at 4A; Charlie Brennan, *Deputy Says Petrosky Fired at Him*, ROCKY MTN. NEWS, Mar. 23, 1996, at 34A.

212. Charlie Brennan, *Jury Hears Grim Inventory of Petrosky’s Rampage*, ROCKY MTN. NEWS, Mar. 29, 1996, at 23A; Ginny McKibben, *Petrosky Remorse Pivotal*, DENVER POST, Apr. 26, 1996, at B-01.

213. Andrew Buncombe, *IRA Death Squad Jailed for 600 Years*, INDEPENDENT (London), Mar. 20, 1999, at 2.

214. OFFICE OF SPECIAL INVESTIGATIONS, *supra* note 188, at 3. A pair of .50 caliber rifles also may have played a role in a plot to assassinate Cuban president Fidel Castro. Near the coast of Puerto Rico in 1997, the U.S. Coast Guard stopped a yacht carrying four Cuban-American men and found a hidden stash of .50 caliber rifles and ammunition. One of the men confessed that the group had plans to assassinate Castro when he arrived at an airport on a small Venezuelan island for an upcoming summit meeting, either by shooting his airplane or shooting him as he exited the aircraft. U.S. HOUSE OF REPRESENTATIVES, *supra* note 190, at 1-2. A jury acquitted the accused men, although some reports suggest it did so out of sympathy for their cause rather than doubts about their intentions. See Myriam Marquez, *Puerto Rican Jury’s Acquittal of Cubans Sends Castro Message*, ORLANDO SENTINEL, Dec. 13, 1999, at A14.

215. *Buying Big Guns? No Big Deal*, Mar. 20, 2005, at <http://www.cbsnews.com/stories/2005/03/18/60minutes/main681562.shtml>.

been used in any crime.²¹⁶ The fact that a .50 BMG rifle would be a poor choice for the vast majority of crimes does not eliminate the risk that it would be a potent tool for committing others, perhaps with far deadlier consequences.

C. *The Potential Use of .50 BMG Rifles by Terrorists*

In addition to glossing over troubling incidents in the past, the defenders of .50 BMG rifles denigrate the notion that these weapons would be of any real value to terrorists in the future. They accuse politicians and groups like the Violence Policy Center of cynically exploiting the tragic events of September 11 and wildly exaggerating the capabilities of the rifles.²¹⁷ They insist that terrorists can easily obtain much more destructive weapons, from missiles to chemical weapons, and therefore regulating access to .50 caliber rifles is pointless.²¹⁸

These arguments go too far. The potential use of .50 BMG rifles in acts of terrorism is a legitimate public policy issue that deserves to be examined and debated. Reasonable minds can disagree about the extent of the danger and whether it merits any legislative or regulatory action, but the defenders of these rifles too often fail to engage the issue fairly on the merits. For example, some .50 caliber rifle owners apparently consider any suggestion that the rifles might be used by terrorists to be the equivalent of saying that everyone who owns or shoots these weapons is a terrorist.²¹⁹ The Fifty Caliber Institute devotes most of its energy to refuting grossly exaggerated assertions about the rifles, such as the idea that one could be used to destroy a modern tank or to bring down a jet flying at high altitudes, without addressing the legitimate policy issues raised by the rifles' actual capabilities.²²⁰ The National

216. Morris, *supra* note 37 (quoting .50 caliber rifle maker Ronnie Barrett). The National Rifle Association and Fifty Caliber Shooters Association continue to insist that no .50 caliber rifle has ever been used in a criminal incident in the United States. Fifty Caliber Shooters Ass'n, *supra* note 182; Nat'l Rifle Ass'n, *supra* note 182.

217. See, e.g., Bonta, *supra* note 142; Mark Howard, *Another Smoke Screen*, TAMPA TRIB., Nov. 11, 2001, at 3; Ed Hoyer, Jr., *Fear Used to Promote Rifle Proposal*, HARTFORD COURANT, Oct. 29, 2001, at A6; Rob Johnson & John Shiffman, *Big-Gun Maker Says Targeting Him is Unfair*, TENNESSEAN, Oct. 9, 2001, at 5A (interviewing gun maker Ronnie Barrett); Kopel & Wheeler, *supra* note 142; Rick Partlow, *Shameful Nonsense*, TAMPA TRIB., Nov. 11, 2001, at 3; Fifty Caliber Shooters Ass'n, *supra* note 182; Nat'l Rifle Ass'n, *supra* note 175.

218. See, e.g., Labbe, *supra* note 182 ("Forget the anthrax and the nuclear devices. Terrorists are going to use .50-caliber rifles to bring America to her knees."); see also Fifty Caliber Inst., *VPC Attacks on 50cal Rifles Go from Unrealistic to Simply Pathetic*, at <http://www.fiftycal.org/News%20Archive/vpcnews.html> (last visited June 30, 2004).

219. See, e.g., Bill Saunders, Letter, *Against Gun Measure*, CONTRA COSTA TIMES, Nov. 23, 2003, at 4; Robert N. Villanova, Letter, *Gun Ban Is Exercise in Profiling*, HARTFORD COURANT, Nov. 5, 2001, at A8.

220. See Fifty Caliber Inst., *supra* note 55; Fifty Caliber Inst., *supra* note 218.

Rifle Association mocks the notion that .50 BMG rifles could be used to destroy significant parts of the national infrastructure, such as radar dishes and microwave transmission devices, saying that “[o]f course, while those kinds of things make good reading in a novel, they do not occur in America.”²²¹ These groups should be evaluating the actual risks posed by the rifles, not shooting down straw arguments or blithely insisting that no legitimate issue even exists.

The rhetoric on the other side of the debate is often just as bad. Politicians fulminating against .50 BMG rifles frequently exaggerate their capabilities²²² or say other things about them that are not true, such as that no one uses these guns for legitimate purposes like hunting or target shooting.²²³ While their underlying facts are generally very sound, the Violence Policy Center’s reports often have a similarly hyperbolic tenor. For example, the tempest over exactly how Osama bin Laden acquired his twenty-five Barrett rifles might have been avoided if the Violence Policy Center’s report had emphasized that the incident occurred at a time when al Qaeda was fighting the Soviet army, eliminating any insinuation that Barrett had purposefully supplied arms to an American enemy.²²⁴ The inflammatory style utilized by legislators and in these reports is certain to arouse those who already favor stricter gun controls, but is equally likely to drive away anyone on the other side.

Setting aside the rhetoric and concentrating on the facts surrounding potential terrorist use of .50 BMG rifles, the truth probably lies somewhere in between the positions of the two warring factions. These rifles are surely not the most devastating weapons that terrorists could unleash, but they pose a danger that should not be ignored. Persuasive proof of that can be found in the words of the companies who make and sell these weapons and know their capabilities quite well. Barrett Firearms promotes its .50 BMG rifles to the military with claims that

221. Nat’l Rifle Ass’n, *supra* note 130.

222. *See, e.g.*, 149 CONG. REC. S2600 (daily ed. Feb. 24, 2003) (statement of Sen. Feinstein) (claiming that .50 caliber rifles are “capable of piercing light armor at more than 4 miles” and destroying tanks); 145 CONG. REC. 19,926 (1999) (statement of Sen. Durbin) (claiming that .50 caliber armor piercing ammunition can rip through tanks from more than one mile away); Transcript, Senator Lautenberg Holds News Conference on Guns and Terrorism, Fed. Document Clearing House, Nov. 18, 2003, at 2003 WL 22714705 (claiming .50 caliber rifle “can penetrate six inches of steel plating”).

223. *See, e.g.*, H.R. 4292, 108th Cong. § 2(3) (2004) (declaring “these firearms are neither designed nor used in any significant number for legitimate sporting or hunting purposes”); Assem. 7039, 2003 Leg., 226th Ann. Leg. Sess. § 1 (N.Y. 2003) (declaring that .50 caliber rifles have “no acceptable purpose”); 145 CONG. REC. 19,926 (1999) (statement of Sen. Durbin) (denying that anyone hunts with .50 caliber rifles and saying “[t]here would be little left of the hapless animal, although I suppose fragments of it could come already barbecued if a .50 caliber incendiary shell were used”); Maureen O’Donnell, *Blagojevich Urges Sniper Rifle Ban*, CHI. SUN-TIMES, Oct. 22, 2001, at 11 (quoting Rep. Rod Blagojevich as saying “There is no legitimate civilian purpose for this gun”).

224. *See supra* notes 138-44 and accompanying text.

they are “capable of destroying multi-million dollar aircraft with a single hit delivered to a vital area,” such as the compressor section of a jet’s engine or the transmission of a helicopter.²²⁵ According to Barrett, “many of the same targets for rocket and mortar fire can be neutralized” with a .50 caliber rifle, such as armored personnel carriers, radar dishes, and communications vehicles.²²⁶ Another manufacturer attests that its rifle “can be used to ‘attack various materiel targets such as parked aircraft, radar sites, ammunition, petroleum and various thinned-skinned materiel targets.’”²²⁷ The weapons plainly have potent capabilities that a terrorist could exploit.

Military and counterterrorism experts agree. An assessment of the rifles by *International Defense Review* stated that “from an operational standpoint, the closest parallel weapon to a 0.50-calibre rifle is probably the 60mm mortar.”²²⁸ A RAND Corporation report warned the Air Force in 1995 that .50 caliber rifles could be used in attacks on air bases.²²⁹ The ACT Group, a counterterrorism consulting firm, complained that the Transportation Security Administration underestimates the threat that .50 caliber rifles pose to commercial aviation, such as if a team of snipers surrounding an airport fired incendiary rounds at aircraft on a tarmac.²³⁰ Gal Luft, a former lieutenant colonel in the Israeli army and codirector of the Institute for the Analysis of Global Security, called .50 caliber rifles “lethal against slow-moving planes.”²³¹ The U.S. Army describes them as “valuable psychological weapons” because of their “ability to shoot through all but the heaviest shielding material, and their devastating effects” on targets such as parked aircraft, missiles, and fuel storage tanks.²³²

Federal law enforcement experts agree as well. When .50 BMG rifles first became popular in the 1980s, the Secret Service argued unsuccessfully that they should be banned.²³³ Elijah Bowron, former director of the Secret Service, confirmed that the rifles pose a significant security

225. DIAZ, *supra* note 145, at 17 (quoting Barrett Firearms marketing brochure).

226. *Id.* at 9 (quoting Barrett Firearms marketing brochure).

227. Matthew L. Wald, *Threats and Responses: Airline Safety; Citing Danger to Planes, Group Seeks Ban on a Sniper Rifle*, N.Y. TIMES, Jan. 31, 2003, at A13 (quoting E.D.M. Arms marketing material).

228. VIOLENCE POLICY CENTER, *supra* note 115, at 2 (citing *A Tale of Two Fifties; 0.50-Calibre Sniper Rifles Gain Popularity*, INT’L DEF. REV., June 1, 1994, at 67).

229. VIOLENCE POLICY CENTER, *supra* note 137, at 53 (citing DAVID A. SHLAPAK & ALAN VICK, “CHECK SIX BEGINS ON THE GROUND”: RESPONDING TO THE EVOLVING GROUND THREAT TO U.S. AIR FORCE BASES 54-55 (1995)).

230. Morris, *supra* note 37.

231. Kintisch, *supra* note 41.

232. U.S. DEP’T OF ARMY, FIELD MANUAL 3-06.11, COMBINED ARMS OPERATIONS IN URBAN TERRAIN § 6-4(d) (2002).

233. Vobejda & Outaway, *supra* note 7 (interviewing former ATF official Joe Vince).

threat.²³⁴ Jack Kiloren, a senior ATF official, agreed that it “will never become the mass gun used in crime,” but it is a “tremendous threat” for “the most shocking and horrifying crimes” such as assassinations and assaults on law enforcement officers.²³⁵

Fifty caliber rifles currently are not a major focus of those tasked with safeguarding the nation against terrorism. According to a spokesperson, the Department of Homeland Security is concerned about any weapons that might be used by terrorists, but has put no special emphasis on these rifles.²³⁶ State Department officials told the staff of one member of Congress that the administration had stopped exports of the rifles in order to keep them out of the hands of foreign terrorists,²³⁷ but the State Department subsequently denied that any permanent change in policy had occurred.²³⁸

Plausible scenarios in which terrorists could make use of .50 BMG rifles’ potent capabilities range from long-range sniper killings to attacks on helicopters, chemical plants, railroad or truck tanks carrying hazardous materials,²³⁹ or even nuclear facilities.²⁴⁰ These rifles are not the greatest security risk facing the United States, but the potential for terrorist use of the weapons is significant enough to merit serious consideration of measures that could be taken to minimize the dangers.

D. Armed Resistance to Tyranny

The debate over .50 BMG rifles would not end even if everyone agreed on the terrorist threat posed by them, for some contend that it is essential for these rifles to remain in private hands precisely because they have such potent destructive capabilities. They want to ensure that private citizens have the means to wage war against the government if necessary to prevent tyranny and to preserve freedom in America.

234. Porter, *supra* note 37; CNN Transcript No. 99101700V55 (Oct. 17, 1999).

235. CNN, *supra* note 234.

236. Morris, *supra* note 37.

237. Letter from Henry A. Waxman, Ranking Minority Member, House of Representatives Committee on Government Reform, to Colin L. Powell, Secretary of State, U.S. Department of State (Dec. 19, 2001), available at <http://democrats.reform.house.gov/Documents/20040830101621-29404.pdf>.

238. Kintisch, *supra* note 41; Press Release, Violence Policy Center, U.S. Gun Industry Targets Europe for Sale of 50 Caliber Sniper Rifles (May 1, 2002).

239. *Death on Wheels*, WASH. POST, Dec. 7, 2003, at B8. In 2003, an Ohio auto worker angry at corporate America was convicted of plotting to bomb a steel plant because it hired non-union workers. His initial ideas included using a .50 caliber rifle to shoot a truck delivering oxygen to the factory, but he later decided to attack the plant with a smaller caliber rifle equipped with a grenade launcher. See John Caniglia, *Man Gets Prison Term in AK Steel Bomb Plot*, PLAIN DEALER (Cleveland), Mar. 28, 2003, at B1.

240. *Homeland Security*, FED. TIMES, Sept. 22, 2003, at 8 (reporting criticism of Nuclear Regulatory Commission for making mock terrorist attacks at nuclear plants too easy by failing to equip mock terrorists with .50 caliber rifles).

From this perspective, the fact that .50 BMG rifles might someday be used to assassinate government officials, attack armored vehicles, or take down helicopters is a reason *not* to ban or otherwise severely restrict access to them. As one leader of the militia movement put it, “the .50-calibers are our liberty teeth.”²⁴¹

Many of those who strongly oppose gun control measures subscribe to some version of this view and regard it as a fundamental reason for the Second Amendment’s existence.²⁴² Some see no indication that our nation is heading toward tyranny at the moment and simply believe that a well-armed citizenry will help to ensure that it stays that way. Others fear that the need for armed resistance to government may be more imminent.²⁴³

Organizations like the Fifty Caliber Shooters Association shy away from relying on this argument, understandably reluctant to call attention to the potential use of .50 caliber rifles against government. Lobbyists cannot hope to persuade legislators by telling them “You should not restrict access to these weapons because your constituents will need them to assassinate you if you step out of line.” The more militant segments of the .50 caliber community are not as inhibited and send letters to government officials warning them that legislation banning .50 caliber rifles could provoke violent resistance.²⁴⁴ The issue splits the .50 caliber community, with some contending that incendiary political rhetoric hurts the cause and others insisting that much more is at stake than hunting and target shooting and that it trivializes the subject to pretend otherwise.²⁴⁵

Arguments about the need for armed resistance to tyranny are difficult to prove or disprove. The issue ultimately comes down to a person’s most fundamental beliefs about our country, the government, and the future. Some will regard the possibility of .50 caliber rifles being misused as a small price to pay for the bulwark against tyranny provided by widespread and unimpeded access to them. Others will be far more

241. *MSNBC*, *supra* note 193 (quoting Michigan Militia commander Ron Gaydosh).

242. The legal literature on this point is voluminous. See, e.g., Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643 (1995); Brent J. McIntosh, *The Revolutionary Second Amendment*, 51 ALA. L. REV. 673 (2000).

243. For examples, visit <http://www.freerepublic.com> on the Internet or the “talk-politics-guns” newsgroup on Usenet and read the comments following virtually any posting concerning regulation of .50 caliber rifles.

244. For examples, see the letters archives at <http://www.keepandbeararms.com>.

245. For an illustration of the tension between these different approaches to the .50 caliber issue, see George Skelton, *Massive Rifle Needs Regulation to Keep It Out of the Hands of Terrorists*, L.A. TIMES, Apr. 18, 2002, at 8 (containing remarks by John Burt), and David Codrea, *An Open Letter to John Burt, Chairman, Fifty Caliber Shooters Policy Institute*, Apr. 21, 2002, at <http://www.keepandbeararms.com/information/XcIBViewItem.asp?ID=3362>.

troubled by the specter of .50 caliber rifles being used in acts of terrorism perpetrated by foreign enemies or by misguided patriots like Timothy McVeigh. Neither side is likely to make much progress trying to convince the other that it has misjudged the risks.²⁴⁶

E. The Slippery Slope

Those who argue against stricter regulation of .50 caliber rifles have a closely related argument in their arsenal. They contend that any measures increasing regulation of these rifles will lead down a slippery slope toward increasingly severe restrictions on those and other firearms.²⁴⁷ The Fifty Caliber Shooters Association argues that any legislation limiting access to the rifles will enable anti-gun forces to “get their nose under the tent to do what has occurred in several other countries, attack every center fire rifle cartridge as powerful weaponry.”²⁴⁸ Lawyers for the National Rifle Association asserted that a proposed ban on sales of .50 caliber rifles in one county was “nothing more than the latest incremental effort of the gun ban lobby toward banning firearms from civilian possession.”²⁴⁹ Gun maker Ronnie Barrett believes that “creeping socialism” will “keep gnawing away until one day we wake up and we don’t have a shotgun to go quail hunting with or we don’t have a nice deer rifle to go deer hunting.”²⁵⁰

Like arguments about the potential need for armed resistance to government tyranny, slippery slope concerns are difficult to prove or disprove because they involve predictions about the future rather than assessments of existing facts. Moreover, gun rights advocates have some reasonable grounds for their concerns. For example, they can point out that current legislative proposals address only .50 caliber rifles, but the Violence Policy Center has argued that less powerful weapons like .338 Lapua Magnum rifles represent almost as much of a threat as the .50 BMG.²⁵¹ They can cite comments by legislators like Sen. Diane

246. Cf. Kahan & Braman, *supra* note 9, at 1311-23 (arguing that consequentialist arguments about how gun laws affect crime are not likely to persuade many people because gun control debate is really about conflict between deeply held cultural views).

247. See, e.g., Bonta, *supra* note 142; Labbe, *supra* note 182; Nat’l Rifle Ass’n, *supra* note 182; Stevenson, *supra* note 170; Timothy Wheeler, Claremont Inst., *Goldilocks Gun Control*, Oct. 31, 2000, at <http://www.claremont.org/projects/doctors/001031wheeler.html>.

248. Fifty Caliber Shooters Ass’n, *supra* note 182.

249. Letter, *supra* note 172; see also Press Release, Illinois State Rifle Ass’n, ISRA: State Rep. Karen May’s Gun Hoopla Is Just Red Herring (Jan. 10, 2002) (asking state legislator and gun control organization supporting .50 caliber rifle ban to “show some courage of conviction and state plainly that their proposal is designed to be the first step toward the eventual banning and confiscation of all privately held firearms”).

250. CNN, *supra* note 234.

251. VIOLENCE POLICY CENTER, *supra* note 115, at 8; Transcript, *supra* note 121, at 39.

Feinstein, who introduced legislation to tighten regulation of .50 caliber rifles by saying:

This bill will not ban the sale, use or possession of .50-caliber weapons. The .50-caliber shooting club will not face extinction, and “legitimate” purchasers of these guns will not lose their access—even though that, too, might be a reasonable step, since I cannot imagine a legitimate use of this gun.²⁵²

They also can point to the fact that the federal assault weapons ban enacted in 1994 listed several .50 BMG rifles among the sporting firearms protected from that law’s reach,²⁵³ but now the same politicians and gun control organizations who promoted that law condemn those rifles as having no legitimate sporting purpose.²⁵⁴

All of that feeds into the more general conviction, widespread among gun owners and routinely advanced by organizations like the National Rifle Association, that every gun control proposal is part of a grand scheme to eliminate all civilian access to guns.²⁵⁵ Even gun owners who do not fear a broad conspiracy have plausible reasons to suspect that a ban on .50 caliber rifles could increase the likelihood of restrictions being imposed later on some other firearms. Those who want to implement tighter controls on the rifles must be attentive to those slippery slope concerns and cannot cavalierly dismiss them.

VI. A BETTER APPROACH TO REGULATION OF .50 BMG RIFLES AND OTHER EXCEPTIONALLY POWERFUL FIREARMS

Although some of the arguments against stricter controls on .50 BMG rifles are misguided, the proposals that have been advanced for regulating these weapons have flaws as well. In particular, all of the measures that have been advanced in Congress and state and local legislatures have been framed in terms of caliber. The real issue should be the power of the weapon, not bullet diameter.

252. 149 CONG. REC. S2601 (daily ed. Feb. 24, 2003) (statement of Sen. Feinstein); *see also id.* at S2602 (“If we are to continue to allow private citizens to own and use guns of this caliber, range, and destructive power, we should *at the very least* take greater care in making sure that these guns do not fall into the wrong hands.”) (emphasis added).

253. 18 U.S.C. § 922(v)(3), app. A (2000); *see supra* notes 107-08 and accompanying text.

254. *See* Kopel & Wheeler, *supra* note 142; Nat’l Rifle Ass’n, *supra* note 130.

255. For a thorough examination of the nature of slippery slope arguments, with many examples drawn from the gun control debate, *see* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

A. Regulating Firearms Based on Power Instead of Caliber

Having decided that certain rifles being sold today are so powerful that they should be subject to tighter controls and observing that those rifles happen to be .50 caliber, legislators have drafted their proposals entirely in terms of caliber. Every one of the bills introduced in Congress aims at rifles capable of firing .50 caliber cartridges,²⁵⁶ as do most of the bills introduced in state legislatures.²⁵⁷ The legislation enacted in California is even more specific, applying only to rifles designed to fire ammunition having the exact dimensions of a .50 BMG round, such as a cartridge case length of 3.91 inches and a case base diameter between .800 and .804 inches.²⁵⁸

Drafting legislation that way may seem reasonable if .50 BMG rifles are the only weapons currently on the market that concern these legislators, but it is a short-sighted approach. To craft sensible policy, legislators must consider not only what firearms exist today, but also those that could be made tomorrow. If Congress prohibits .50 caliber rifles, gun makers could evade that law by designing rifles and cartridges of a slightly smaller caliber, such as .49 caliber, that would be outside the new law's reach but would have essentially the same performance characteristics as the banned items.²⁵⁹ Indeed, the California enactment is so specific that a gun maker would only need to change one of the dimensions of the cartridge case by a few thousandths of an inch to avoid the legislation's reach. By the time the California ban on .50 BMG rifles took effect, Barrett Firearms was already hard at work designing a new rifle that would be just as powerful but use a slightly smaller bullet in order to avoid the ban.²⁶⁰ Another manufacturer announced that it would be redesigning its .50 BMG rifles to fire ammunition that has dimensions slightly different from .50 BMG and was developed several

256. For citations to those bills, see *supra* notes 128-29.

257. See *supra* notes 157-59.

258. Assern. 50, 2003-2004 Legis., Reg. Sess. §§ 3, 9 (Cal. 2004).

259. See, e.g., Brooks A. Pangburn, Letter, L.A. TIMES, Apr. 24, 2002, B12 (California Metro), at 12 ("But ultimately I see no problem with this bill. Should it pass, gun makers and gunsmiths will simply alter the cartridge slightly—perhaps making it .49 caliber—and then re-barrel existing rifles. Problem solved, and perfectly legal."); Christopher P. Silver, Opinion, *Our New War on "Terrorism,"* RIGHTTURN (Univ. of Wash.), Dec. 4, 2001 ("Or, consider the idea that as soon as .50 calibers are made illegal, gunmakers just might come out with, say, .499 caliber rifles."), available at <http://students.washington.edu/right/12-4-01/rifles.htm>.

260. Snyder, *supra* note 40; see also Carolyn Marshall, *California Bans a Large-Caliber Gun, and the Battle Is On*, N.Y. TIMES, Jan. 3, at A12 (reporting that .50 BMG enthusiasts "are already devising ways to alter the gun and so circumvent the law without breaking it").

years ago in Europe in response to laws banning .50 BMG rifles and ammunition.²⁶¹

The retooling required to shift to a slightly different caliber could be an expensive undertaking for manufacturers, and the new weapons would be somewhat less marketable than .50 BMG rifles because they would be unable to fire surplus military ammunition. However, it seems likely that some companies would respond to the enactment of legislation restricting .50 caliber rifles by introducing new products lying just outside the new law's boundaries—after all, Barrett and others have made such a move to cater to customers in just one state.

Gun control advocates should be particularly wary because similar sorts of innovation by gun makers have followed the enactment of other gun laws in the past. For example, gun manufacturers have skirted federal and state assault weapons bans by renaming guns and making cosmetic changes to their designs in an effort to take them outside the bans.²⁶² Gun control proponents have responded by proposing ways to amend and strengthen the bans,²⁶³ but their continual calls for more legislation lend credence to their adversaries' arguments that the initial bans would be followed by further restrictions.

Legislation aimed at .50 caliber rifles threatens to go down the same path, but a more sensible approach could be chosen. If legislators want to impose tighter restrictions on extremely powerful firearms, they should draft legislation that does exactly that. They should write laws that look to the amount of energy a firearm is capable of producing, rather than its caliber. For example, Congress could pass a measure imposing additional restrictions on firearms capable of achieving muzzle energy exceeding some specified threshold, such as 10,000 or 12,000 foot-pounds.

While the debate over high-powered rifles in the United States has focused entirely on caliber, the idea of crafting regulations based on muzzle energy has been raised in England.²⁶⁴ Until recently, the British

261. See EDM Arms, *New for 2005*, at <http://www.edmarms.com/products/510dtc.htm> (last visited Apr. 2, 2005).

262. See BRADY CENTER TO PREVENT GUN VIOLENCE, *ON TARGET: THE IMPACT OF THE 1994 FEDERAL ASSAULT WEAPONS ACT 4-5, 10-12* (2004); VIOLENCE POLICY CENTER, *UNITED STATES OF ASSAULT WEAPONS: GUNMAKERS EVADING THE FEDERAL ASSAULT WEAPONS BAN* (2004).

263. For example, California started out with a list of assault weapons banned by name, but later added a new provision defining other firearms as assault weapons based on their features. CAL. PENAL CODE §§ 12276, 12276.1 (West 2000 & Supp. 2005).

264. Many gun rights advocates would be appalled by the idea of anything connected to English firearms regulation being imported to the United States, since they consider England a tragic example of how a nation can slide down the slippery slope from moderate gun restrictions to increasingly severe ones. See, e.g., Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399 (1999).

government received expert advice on issues relating to gun regulation from a Firearms Consultative Committee consisting largely of delegates from sport shooting organizations and law enforcement agencies.²⁶⁵ The committee studied the issue of .50 BMG rifles in 2001 and recommended that they be banned.²⁶⁶ Noting that “the actual use of such weapons by terrorists in Northern Ireland takes these weapons a clear step beyond those items whose misuse is merely hypothetical,” the majority of the committee felt that the potential threat posed by the weapons outweighed any interest in using them for civilian target shooting.²⁶⁷ At the same time, the committee advised the government against simply banning guns by name or caliber. The committee noted that many firearms exist that have bores at least as large as .50 BMG rifles but “are in general considerably less dangerous,” such as large-caliber rifles for hunting big game animals and vintage muskets posing little realistic danger of misuse.²⁶⁸ To avoid inadvertently banning those guns, the committee recommended the drafting of a policy that would apply only to .50 BMG rifles and other weapons designed to fire ammunition with muzzle energies exceeding 10,000 foot-pounds.²⁶⁹

Although British gun control advocates criticized the recommendation as the work of a committee dominated by pro-shooting interests,²⁷⁰ the committee’s reasoning on this point is quite sound. Regulations based on muzzle energy would enable legislators to hit the target at which they truly intend to aim. The regulations would affect the most powerful firearms, with no potential collateral effect on other guns. Current legislative proposals, framed in terms of caliber, run a much greater risk of being overinclusive, underinclusive, or both. Drafting legislation in terms of muzzle energy would be a simpler and more sensible way to eliminate arguments that the laws would have a draconian effect on those who collect antique guns or hunt with old-fashioned muzzleloading rifles, and would make it much more difficult for gun makers to evade the law by slightly varying their products.

Bills aimed at .50 caliber rifles also have been attacked on the ground that they represent a surreptitious effort to ban shotguns. For example, the language of the bill proposed in New York refers only to .50 caliber rifles, not all .50 caliber firearms. Opponents fear that the law would be applied to shotguns because most shotguns have bores exceeding .50

265. The committee’s statutory term expired in 2004, and the government did not renew it. Rohit Jaggi, *Ministers Attacked on Firearms Body Decision*, FIN. TIMES (London), Jan. 31, 2004, at 2.

266. FIREARMS CONSULTATIVE COMM., ELEVENTH ANNUAL REPORT 11-13 (2002).

267. *Id.* at 11.

268. *Id.* at 12; *see supra* Figure 1 and accompanying text.

269. FIREARMS CONSULTATIVE COMM., *supra* note 266, at 13.

270. *See* David Barrett, *Call to Ban ‘Super-Powered’ Rifles*, PRESS ASS’N, Mar. 24, 2002.

caliber and the distinction between shotguns and rifles is hazy—shotguns can be used to fire rifled slugs and some shotguns have rifled barrels.²⁷¹ While the New York bill is clearly not intended to affect shotguns, the argument gives opponents of the bill a means of distracting attention from the real issues and inciting hunters who otherwise might care little about a ban on .50 caliber rifles. Legislation based on muzzle energy would steer clear of such controversies, since hunters' shotguns typically generate no more than a few thousand foot-pounds of energy, just a small fraction of the power of a .50 BMG rifle.

In other ways, legislation based on muzzle energy would not be quite as simple to implement as a standard based on caliber. The width of a firearm's bore can be easily and objectively measured. The muzzle energy of any one round of ammunition is also not difficult to determine, requiring only a scale to weigh the bullet and a chronograph to measure the bullet's velocity. The measure of muzzle energy that any type of firearm produces, however, is only a rough, general range not a single, exact figure.²⁷² Any legislation framed in terms of muzzle energy therefore would need to delegate some discretion to an administrative agency, such as ATF or a comparable state department, to determine which types of firearms cross the muzzle energy threshold set by the legislation. Although not purely objective, this sort of standard would be much more concrete than many other determinations that ATF and other administrative bodies routinely make concerning firearms, such as whether a certain type of gun is particularly suitable for "sporting purposes."²⁷³ The administrative burden of implementing such a standard also should not be severe, since only a tiny number of the many varieties of rifles made, sold, and used in the United States would come even remotely close to approaching a muzzle energy threshold set at 10,000 foot-pounds or higher.

Muzzle energy is neither a perfect nor a complete measure of the relative capabilities of firearms. For example, two very different rifles could have the same muzzle energy, with one firing a much lighter

271. See Thomas H. King, *Shotguns Would Fall Within Gun Bill Definition*, TIMES UNION (Albany, N.Y.), May 8, 2004, at A6; Lebrun, *supra* note 183; see also Joe Bilby, *Fifty Caliber Scare*, N.J. FEDERATED SPORTSMEN NEWS, June 2004 (describing hunters' fears that New Jersey bill would ban shotguns with rifled barrels as well as many old-fashioned black powder guns); Coombs, *supra* note 182 (claiming bills aimed at .50 caliber rifles will ban 12-gauge shotguns).

272. It should not be difficult for regulators to determine whether a particular type of firearm, in typical use, crosses a specified level of muzzle energy. Determining the maximum energy that a firearm could achieve would be a more difficult undertaking, requiring a shooter to fire increasingly powerful loads until the weapon could no longer withstand the pressure and exploded. See Jeff Quinn, *Maximum Loads*, GUNBLAST.COM, Oct. 13, 2002, at <http://www.gunblast.com/MaxLoads.htm>.

273. See, e.g., 18 U.S.C. § 925(d) (2000); 26 U.S.C. § 5845(a).

bullet at a much higher velocity than the other. Moreover, what really matters most is what the bullet does to its target, a matter affected by a complex array of external and terminal ballistic considerations beyond the amount of energy the bullet has when it exits the gun's barrel.²⁷⁴ Despite that, muzzle energy is an attractive measure because it provides a good gauge of a firearm's potency without undue complexity. Muzzle energy may not tell the whole story when it comes to comparing the power of firearms, but it provides a workable means of making distinctions far more sensible than those based entirely on caliber.

B. Balancing Interests and Risks

Whether the line is drawn in terms of foot-pounds or caliber, the ultimate question is whether certain rifles available to civilians today should be subjected to greater legal restrictions. This is a difficult public policy issue that requires a serious weighing of competing interests and concerns rather than a knee-jerk "pro-gun" or "anti-gun" reaction.

Most of the people who own and use .50 BMG rifles are responsible, law-abiding citizens. They enjoy the thrill of shooting these powerful guns and the challenge of target shooting and hunting at extremely long distances. Moreover, no regulation of these rifles could have an appreciable effect on crime rates, because eliminating these rifles would leave behind the sea of smaller, less powerful, less expensive guns perfectly suited for the assaults, robberies, murders, and other commonplace crimes committed hundreds of times every day in America.

At the same time, .50 BMG rifles have extraordinary capabilities that can be put to malevolent use. The same characteristics that make the rifles so appealing to some gun enthusiasts also have made them attractive to apocalyptic cults, antigovernment militias, and disturbed individuals stockpiling enormous arsenals of weaponry for nefarious reasons.²⁷⁵ A real and serious risk exists that these weapons will be used in the types of crimes that should concern us most, from terrorist attacks to violent confrontations between extremists and law enforcement agents.²⁷⁶

Before September 11, the balance may have been tipped against stricter regulation of these weapons. That tragedy and the heightened awareness of danger that has followed it should never be exploited or permitted to justify hysterical decisionmaking, but neither should they

274. See *supra* notes 23-24 and accompanying text.

275. See *supra* Part V.B.

276. See *supra* Part V.C.

be ignored in resolving important public policy issues affecting public safety.

The regulatory regime already in place for machine guns and other particularly dangerous weapons under the National Firearms Act provides a reasonable means of accommodating the legitimate use of .50 BMG rifles and the risks of their misuse. The guns would not be banned, but instead would become subject to the additional rules and restrictions accompanying classification as an NFA weapon, including more thorough background checks, a significant waiting period, law enforcement discretion over access to the weapons, and a comprehensive system of registration.²⁷⁷ Those requirements would provide a greater degree of control over the weapons and reduce the risk of them falling into the wrong hands, while preserving access to the guns for dedicated .50 caliber shooting enthusiasts.²⁷⁸

The most prominent manufacturer of .50 caliber rifles, Barrett Firearms, insists that subjecting these weapons to the NFA's requirements would be tantamount to banning them.²⁷⁹ Indeed, Barrett contends that tighter controls over civilian access to the rifles actually would pose a threat to national security, because they would drive Barrett and other manufacturers out of business, deprive the U.S. military of a continued supply of the weapons, and thereby jeopardize the nation's ability to combat terrorism.²⁸⁰ Despite those claims, Barrett reportedly sells only about one-fourth of its production to the civilian market,²⁸¹ and there is no reason to think that subjecting these rifles to the NFA's requirements would destroy even that quarter of Barrett's business.

Other groups lobbying against restrictions on .50 BMG rifles also insist that the NFA's requirements are too harsh, but they have not made specific, convincing arguments to support that view.²⁸² Automatic weapons have been highly regulated under the NFA for seventy years,

277. See *supra* Part III.B.

278. A more drastic means of restricting access to the rifles, short of banning them, would be to permit them to be kept only by shooting clubs and not by individuals. Sen. Dianne Feinstein and Rep. Rod Blagojevich reportedly considered introducing legislation to that effect. See Vobejda & Ottaway, *supra* note 7. Other countries, such as England, favor that approach. See Olson & Kopel, *supra* note 264, at 423, 454-55; *supra* note 264. The Soviet Union used it as well, a fact unlikely to win much support for the idea here. See Robert C. Jacobs, *Firearms Control*, 42 ST. JOHN'S L. REV. 353, 364 (1968).

279. According to Ronnie Barrett, enacting a law that put the rifles within the NFA's reach rather than banning them "would be like saying, 'I don't want to kill a person, I just want to take his blood.'" Johnson & Shiffman, *supra* note 217.

280. Letter from Ronnie G. Barrett, President, Barrett Firearms Mfg., to Bruce McPherson, Chairman, State of California Public Safety Committee (June 30, 2003), available at http://www.barrettrifles.com/news/ltr_0703.htm; Morris, *supra* note 37.

281. Johnson & Shiffman, *supra* note 217.

282. See Fifty Caliber Shooters Ass'n, *supra* note 182; Nat'l Rifle Ass'n, *supra* note 130.

and yet machine gun enthusiasts continue to pursue their interest as fervently as ever.²⁸³ The additional regulatory measures imposed by the NFA would not stop diehard fans of .50 caliber shooting from continuing to enjoy their sport, but would reduce the risk of these rifles' exceptional capabilities being put to malicious use.

C. Reducing the Slipperiness of the Slope

Finally, proponents of new regulatory controls on .50 BMG rifles and equally powerful firearms must be sensitive to slippery slope concerns and consider ways to counter them or at least not unnecessarily exacerbate them. For example, the enactment of local ordinances banning sales of .50 BMG rifles may be a step in the wrong direction.²⁸⁴ Since they have so little substantive effect, they may underscore a perception that gun control measures in general merely serve symbolic or political purposes. In addition, supporters of the local ordinances have acknowledged that they see them as a means of prodding the state legislature to act, reinforcing the idea that narrow measures presage broader ones.²⁸⁵

Legislators proposing stricter regulation of .50 BMG rifles should also consider whether they can draft measures containing explicit assurances against progress down a slippery slope. For example, the federal assault weapons law not only contained a long list of firearms exempt from the ban,²⁸⁶ but also a guarantee that no firearm could be removed from that list so long as the ban remained in effect.²⁸⁷ Rep. Dan Glickman explained why he proposed the amendment that prohibited future changes to the exempt weapons list:

I don't believe that this bill is the first step in a long road to banning guns. However, some of my constituents have expressed their fear that the Congress is moving slowly toward banning all guns for all people. We must be absolutely clear that this narrowly crafted legislation is not that first step and is not just a precursor to further, broader federal gun control and federal gun bans. Sport shooters and hunters tell me that they don't want assault weapons on the streets and in the hands of gang members any more than anyone else. But what they don't want is for Congress to take the short step to saying that the

283. See, e.g., Katya Cengel, *Just Another Peaceful Day at Knob Creek; America's Biggest Machine-Gun Shoot Draws Enthusiasts to West Point, Ky.*, COURIER-JOURNAL (Louisville, Ky.), Oct. 19, 2003, at 1H.

284. See *supra* notes 153-56 and accompanying text.

285. See, e.g., Egelko, *supra* note 153; Tamara Grippi, *County Eyes New Firearms Sales Ban: Supervisors' Proposal Takes Aim at Stopping Sales of .50-Caliber Rifles*, ARGUS (Fremont-Newark, Cal.), Mar. 21, 2004, available at 2004 WLNR 17061796.

286. See *supra* note 107-08 and accompanying text.

287. 18 U.S.C. § 922(v)(3) (2000).

hunting rifles are being used on the streets, and should be taken away. And then the handguns are being used on the streets and should be taken away.²⁸⁸

By his amendment, Glickman strived to make it “absolutely clear that the intent of Congress is that exempted guns remain exempted.”²⁸⁹

Legislators proposing measures aimed at .50 BMG rifles or other high caliber weapons should strive to follow that example rather than proceeding in piecemeal fashion. They should draw lines as solidly and permanently as possible, drafting legislation that identifies which firearms should be regulated more closely and how strict those controls should be, while providing assurances against further encroachment.

Legislators may be able to strike other sorts of deals that would help to alleviate slippery slope concerns, such as by coupling a measure imposing tighter controls on .50 BMG rifles with a proposal supported by the other side of the gun control debate. A compromise in which “each side gets some change in the current policy, so that neither side is seen as the clear winner,” would help to counter the perception that any new gun control enactment creates momentum toward additional restrictions.²⁹⁰ For example, the issue of arming commercial airline pilots could have provided a golden opportunity to do this. Legislators calling for tighter controls over .50 caliber rifles *and* arming pilots could have made a very persuasive case that their proposed legislation was antiterrorism rather than anti-gun. Although Congress has already passed legislation authorizing pilots to be armed,²⁹¹ other bills have been introduced in an effort to end delays and expedite the training required before a pilot can carry a gun into the cockpit.²⁹² Legislators should remain alert for other issues with which a constructive compromise might be produced.

VII. CONCLUSION

One member of the board of the Fifty Caliber Shooters Association said that he considered his interest in shooting these rifles to be no “different than raising schnauzers or learning how to cook.”²⁹³ No

288. H.R. Rep. No. 103-489, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1820, 1834.

289. *Id.* at 42, *reprinted in* 1994 U.S.C.C.A.N. at 1835.

290. Volokh, *supra* note 255, at 1037; *see also id.* at 1126-27, 1131-32.

291. *See* Homeland Security Act of 2002, Pub. L. 107-296, Title XIV, 116 Stat. 2135 (codified in scattered titles of U.S.C.).

292. Cockpit Security Technical Corrections and Improvements Act of 2004, H.R. 4126 & S. 2268, 108th Cong. (2004).

293. Vobejda & Ottaway, *supra* note 7 (quoting James A. Schmidt).

matter how one feels about these firearms and their regulation, .50 caliber rifles are a more serious matter than that. Those who own and shoot .50 BMG rifles know that these firearms are extraordinarily powerful, and they at least should attempt to consider whether tighter controls over them could be in everyone's best interest. At the same time, gun control advocates should try to consider the fact that some law-abiding citizens have a legitimate interest in shooting these rifles and that they also have a sincere concern that any new controls on guns today will lead to even more severe restrictions tomorrow.

A few months after the September 11 terrorist attacks, President Bush told the United Nations that "[w]e have a responsibility to deny weapons to terrorists and to actively prevent private citizens from providing them."²⁹⁴ Fifty caliber rifles are by no means the most destructive weapons that could fall into terrorists' hands, but they are powerful enough to warrant that reasonable precautions be taken. Subjecting these rifles and others exceeding a specified muzzle energy threshold to the tighter controls of the NFA system would be a reasonable measure to help ensure that the guns stay out of the wrong hands.

294. Remarks to the United Nations General Assembly in New York City, 37 PUB. PAPERS 46 (2001).