The Legal Side

by Mark Barnes

THE MAKING OF "SEMIAUTOMATIC ASSAULT RIFLES" BY LAW ENFORCEMENT OFFICERS

I recently received a letter from one of my readers, a law enforcement officer, posing some interesting and novel legal questions about the making of "semiautomatic assault rifles." Since others may benefit from these questions and my answers, I want to share them in this month's column. The officer stated:

"I am a licensed FFL dealer in a midwestern state and a full time deputy sheriff for a county. My co-workers often come to me with questions and requests about firearms. The deal is, several people are building their own AR-15s in all sorts of configurations. Everyone so far has legal lengths, but I have some concerns about other issues. I have read that law enforcement is exempt from this assault weapon ban stuff, which I know is true to an extent. If the rifle is being made by the officer for use by the officer during performance of his official duties, then are we limited by anything other than the departmental approval of the weapon? Do the post ban receivers have to be stamped "LAW ENFORCEMENT ONLY"? Do NFA laws apply as far as barrel length? Are my co-workers bound for federal prison?" [Redacted and edited for privacy reasons]

First, let's discuss the general Federal ban on "semiautomatic assault weapons" in the Gun Control Act of 1968, specifically 18 U.S.C. § 922(v). Section 922(v) prohibits the manufacture, transfer, or possession of such a weapon, with certain exceptions. One exception is for so-called "grandfathered" weapons, that is, weapons lawfully possessed under Federal law on the date of enactment, September 13, 1994. For purposes of the prohibition, "semiautomatic assault weapon" is defined in 18 U.S.C. § 921(a)(30)(A) to include any of the firearms specifically listed in the statute, as well as "copies or duplicates" of such firearms. A Colt AR-15 rifle is among the listed firearms. Taking the Colt AR-15 as an example, a person would likely have a "copy or duplicate" of the firearm if he took a Colt AR-15 receiver, or an AR-15 type receiver made by a company other than Colt and having a different model designation, and built a rifle with all the semiautomatic assault weapon features found on the Colt AR-15.

A "semiautomatic assault weapon" is also defined in section 921(a)(30)(B) as a semiautomatic rifle that has an ability to accept a detachable magazine and has at least two of the features listed in the statute. These features are a folding or telescoping stock, a pistol grip that protrudes conspicuously beneath the action, a bayonet mount, a flash suppressor or threaded barrel designed to accommodate a flash suppressor, and a grenade launcher.

Curiously, a rifle, or "copy or duplicate" of a rifle, on the list of prohibited assault weapons in section 921(a)(30)(A) also falls within the section 921(a)(30(B) definition of rifles having two or more of the specified features. For example, a Colt AR-15, or a "copy or duplicate" of a Colt AR-15, is expressly listed in subparagraph (A) as a prohibited assault weapon. Yet, it contains three of the assault weapon features specified by subparagraph (B) and falls within that definition as well. These features are a pistol grip, a bayonet mount, and a flash suppressor. If the "features test" in subparagraph (B) covers all the rifles defined in subparagraph (A), why did Congress enact a redundant definition of these rifles in subparagraph (A)? That definition would hardly seem necessary, a clear case of legislative "overkill." The likely answer is that the drafters lacked adequate technical know-how about firearms.

Thus, any person may lawfully construct a semiautomatic rifle such as an AR-15 type weapon for his own use without violating section 922(v) if the rifle does not contain two or more of the assault weapon features listed in section 921(a)(30)(B). If the rifle does not contain two or more of these features, it would not be a banned "copy or duplicate" of a Colt AR-15 because it would not have all the features of the Colt firearm.

One of the exceptions to the prohibition in section 922(v) is the transfer of a "semiautomatic assault weapon" to, or possession of such weapon by, a law enforcement officer employed by a Federal or State agency for purposes of law enforcement (whether on or off duty). (See 18 U.S.C. § 922(v)(4)(A).) I find nothing in the law that would preclude such an officer from lawfully making and possessing his own weapon for official use. However, the making and possession should be solely for official, not personal, use. In addition, I would strongly advise the officer to obtain his department's written authorization to make the weapon for use in carrying out official duties. This should be on department letterhead signed by the chief law enforcement officer of the department or his authorized delegate. Copies of the authorization should be retained by the maker and the department.

Law enforcement officers making their own semiautomatic assault weapons for official use should also be aware that an officer would violate section 922(v) if he retained the weapon after retirement from, or termination of his employment

with, the department. However, section 922(v) makes an exception for an officer with respect to a weapon transferred to him by the agency when his employment ceases. For an officer to fall within this exception, it would be necessary for him to transfer his personally owned weapon, including title, to the department so that the department could then make the required "transfer." If the weapon is not transferred in this manner, the officer should dispose of it. A proper disposition would be to a law enforcement agency or another officer authorized to possess and use the weapon in the performance of official duties.

Is a law enforcement officer required to place a serial number or other markings on a semiautomatic assault weapon he makes for official use? The statutory requirements relative to the marking of such weapons are contained in 18 U.S.C. § 923(i). The statute requires licensed importers and manufacturers to identify each firearm imported or manufactured by means of a serial number on the frame or receiver. In the case of a "semiautomatic assault weapon," the statute requires the serial number to show the date on which a weapon was manufactured. Recognizing that the serialization of these weapons to show the precise date of manufacture serves no purpose, ATF issued its implementing regulation in 27 C.F.R. ¤ 478.91(a)(2) to only require that the weapon be marked "RESTRICTED LAW ENFORCEMENT/GOVERNMENT USE ONLY." This marking alone shows that the weapon is restricted under section 922(v).

In my view, the marking requirements in the statute and regulations are clearly imposed only upon licensed importers and manufacturers, not licensed dealers or unlicensed persons who lawfully make their own firearms for law enforcement use. Nevertheless, I would recommend that these persons voluntarily mark the weapons they make with the wording "RESTRICTED LAW ENFORCEMENT/ GOVERNMENT USE ONLY" and that the markings comply with the depth requirements provided in the regulations at 27 C.F.R. ¤ 478.92(a). At a minimum, the markings would reinforce and provide further evidence that the maker's intent in producing the firearm was only for the permitted lawful purpose.

In building an AR-15 rifle or any other semiautomatic assault weapon, a law enforcement officer is cautioned that the making of a weapon may be subject to the National Firearms Act (NFA). If so, NFA requirements must be complied with. Among other things, NFA firearms include "a rifle having a barrel or barrels of less than 16 inches in length," as well as "a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." (see 26 U.S.C. ¤ 5845(a)) Prior to making such a weapon, the maker must apply with ATF to make and register it on ATF Form 1, pay the $200 making tax, and receive ATF approval prior to the making. The making would be approved if the maker is not prohibited by law from making or possessing the weapon. *If the weapon is also a "semiautomatic assault weapon" for purposes of the GCA, its NFA registration will not remove it from GCA controls over such weapons. Thus, both the NFA and the GCA will simultaneously apply to the weapon.*

Additionally, law enforcement officers and others are cautioned not to make a machinegun. As provided by 18 U.S.C. § 922(o), it is unlawful for any person to transfer or possess a machinegun. One of the principal exceptions is the transfer and possession of a machinegun that was lawfully possessed (that is, registered under the NFA) prior to May 19, 1986. There is no exception for a law enforcement officer to make his own machinegun, even if the firearm will be used only in the performance of duties on behalf of a law enforcement agency. Under the regulations in 27 C.F.R. ¤ 479.105, machineguns may only be lawfully imported or manufactured by persons qualified under the NFA to do business in NFA weapons for distribution to government entities or to qualified NFA dealers for use as "sales samples" for demonstration to such entities.

Finally, in building a weapon such as an AR-15, the maker should avoid the use of M16 fire control components in the rifle. These may cause the weapon to fire automatically. In that event, ATF would classify the weapon as a machinegun.

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