Questions for the Record from Senator Charles E. Grassley
for David Kopel
U.S. Senate Committee on the Judiciary
Hearing on "Firearm Accessory Regulation and Enforcing Federal and State Reporting to the National Instant Criminal Background Check System"
December 6, 2017

On December 5, 2017, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") announced it was initiating the process of promulgating a federal regulation interpreting the definition of "machinegun" in the National Firearms Act and Gun Control Act to include bump stocks.

1. In your opinion, how might bump stocks fit in the current statutory definition of machinegun?

Answer: They do not fit. According to the National Firearms Act of 1934, a "machinegun" is "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, **by a single function of the trigger.** The term shall also include the frame or receiver of any such weapon, **any part designed and intended solely and exclusively**, or combination of parts designed and intended, **for use in converting a weapon into a machinegun**, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. section 5845(b). The same definition also appears in the Gun Control Act. 18 U.S.C. section 921(a)(23). (bolding added).

As ATF ruled in 2011, a simple bump stock is not a "machinegun," because it does not make a firearm fire more than one shot by a single function of the trigger.

As ATF testified in the Dec. 6 Senate Judiciary Committee hearing, ATF presently believes that there is some rationale by which it can reclassify bump stocks as machine gun conversion kits. ATF's Dec. 19, 2017, "Advance notice of proposed rulemaking" gives no hint about the new rationale might be. http://14544-presscdn-0-64.pagely.netdna-cdn.com/wp-content/uploads/2017/12/2017-27898.pdf

As I noted in response to a question from Chairman Grassley at the Dec. 6 hearing, the *Chevron* deference rule has often allowed administrative agencies to get away with imposing extremely creative and dubious regulations. So it is possible that a new ATF regulation, in defiance of the statutory language, might be upheld by the courts.

However, because ATF is (or should be) bound by the statutory definition, Congress, not ATF, is the proper authority to change federal law, so that bump stocks would be more strictly regulated.

2. What should be done with bump stocks that have already been purchased by consumers?

The worst possible result would be for those items to enter the black market, where they would be particularly available to evildoers. With the unique and awful exception of the Las Vegas criminal, no one has ever used a bump stock in a crime. This indicates that the current owners of bump stocks are no danger to society. Rather, the danger would arise if their property were turned into contraband, with no compensation; then, some current owners might be tempted to dispose of them by selling them surreptitiously, and those sales could eventually lead to some bump stocks being obtained by criminals.

Accordingly, any new law should do everything possible to encourage current owners to keep their bump stocks, rather than selling them illicitly. One approach would be to amend the National Firearms Act, by adding bump stocks to the list of items that are registered and taxed pursuant to the NFA. Current bump stock owners could keep their property by properly registering it with ATF, as an NFA item. Congress could set the applicable tax at a nominal amount, such as $5. A high tax would necessarily have some effect in discouraging registration.

Ever since the National Firearms Act became law in 1934, very few properly-registered NFA items have been used in crimes. The historical record thus indicates that NFA registration would help to perpetuate the non-use of bump stocks in crimes, by their current owners.

NFA items are transferable, providing that the transferee and transferor comply with the NFA tax and registration, and receives prior approval from ATF. This would not be a problem for bump stocks because, again, the use of properly registered NFA items in crime is close to nil.

3. Bump stock devices can be easily manufactured by 3D printers or by other means. How should the ATF or Congress attempt to regulate devices that can be easily manufactured in someone's garage?

Trying to prevent home manufacture of firearms or accessories is likely to be an exercise in futility. It would probably require banning 3D printers, and further require an Internet censorship system that would be extremely intrusive, and perhaps not very successful.

In the United States, no one is currently proposing the prohibition of 3D printers. Instead, some persons advocate that digital tool manufacturers embed various software or technology controls in their machines. These would be supplemented by a more intrusive surveillance system conducted by the FBI or NSA. The amount of necessary surveillance would be enormous and would raise serious Fourth Amendment questions.

The problem with built-in technology controls, and with expanded surveillance, is that both approaches are likely to be least effective against the most dangerous adversaries. There are always workarounds for technological limitations and for surveillance. Terrorists, after all, sometimes have covert support from foreign intelligence agencies. Even the true "lone wolf"

tends to plan his attack for months, providing ample time to overcome whatever legal restrictions are nominally in place.

When we consider the home production of bump stocks, the difficulty in suppressing home production becomes even more severe. Based on current technology, home production of bump stocks would be much easier than for firearms. A bump stock, after, is just a collection of plastic parts. The internal working parts of a firearms (the "action") of a firearm must be extremely rugged; they have to be able to withstand repeated gunpowder explosions.

For actual firearms, today's 3D printers, which use plastic, are just beginning to be able to produce firearms that will last longer than several shots. But plastic bump stocks, like other accessories that are attached to the outside of a firearm, would be much easier to produce with conventional 3D printers, and at a quality perhaps not too far from current industrial manufacture.

Moreover, a 3D-printed bump stock is hardly the only way to make a normal firearm shoot as fast as a machine gun. Indeed, a patent application by a bump stock manufacturer describes one simple technique:

> One such bump firing technique is known as the "belt loop" method. To execute the belt loop method, the operator first places the firearm next to his or her hip and hooks one finger through both the trigger mechanism and a belt loop in the his or her clothing. The opposite hand is placed on the hand guard, which is attached to the barrel of the firearm. When the firearm is pushed forward by the operator, the trigger is activated by the finger to discharge a bullet. The recoil from the bullet pushes the firearm backwards away from the trigger finger, allowing the trigger to re-set. Forward force must be applied to the hand guard in order to activate the firing mechanism for each round that is fired. However, this may be achieved in very rapid succession.
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> Although able to achieve a high rate of firing, the belt loop has many safety and accuracy issues. For example, to correctly operate many firearms with the belt loop method, the operator's arm must be placed in the path of hot gasses being expelled from the ejection port of the firearm. This could lead to skin burns or possibly pinch the operator's sleeve or skin in the action. Another issue with the belt loop method arises because the operator cannot have a firm grip on the stock or the pistol grip of the firearm. Because the belt loop method only works if the firearm is held loosely with one hand, and the chances of the operator losing control of the firearm are greatly amplified. Because of this unnatural and unbalanced firing grip, the firearm is very difficult to aim and control during the belt loop method.

United States patent no. 8,127,658 (Mar. 12, 2012).

Instead of using "belt loop" method, a person can also rig up a trigger pulling device using a small electric motor, a battery, and a cam. This will make the trigger pull faster and smoother than a human can achieve. The level of difficulty is about equal to a middle school science

project. This project is illegal under current law, but a person who is intent on mass murder is by definition not deterred by the potential of capital punishment or life in prison, and so is unlikely to be deterred by arms regulation laws.

The broad problem for much of the present arms control system is the changes that are taking place in arms manufacture. Before 1800, firearms and accessory manufacture was mainly "artisanal." That is, firearms and accessories were made one at a time, mainly by home craftsmen.

As mass production techniques improved in the 19th century, firearms manufacture became primarily industrial. Factories of company such as Remington, Colt's, or Smith & Wesson could make firearms that were superior to, and much less costly, what a home craftsman could produce.

Artisanal production never went away, and today it is becoming increasingly important. One reason is the spread of 3D printing. Another reason that very high-quality milling and lathing—using machines with computer numerical controls—is now affordable for home workshops.

In eras when firearms production is almost entirely industrial (e.g., in the 1950s), supply-side regulations that apply to corporate firearms manufacturers may work fairly well. Also in the 1950s, only a small number of highly industrialized nations states were capable of major firearms manufacture, and only a few of them were significant exporters. In a world dominated by industrial manufacture, if the government says that a regulated business can manufacture some types of firearms or accessories, but not other types, the manufacturers will comply. Thus, the items that the government does not want to exist will not be made, and no one will be able to obtain them.

Today, supply-side controls are becoming less and less relevant and effective. The issue is not yet important in the United States, because the lawful market, while strictly regulated, allows ordinary persons to have their choice of a wide variety of quality firearms. In Australia, however, where laws are more prohibitory, artisanal manufacture is increasingly being used to evade industrial controls. The same is starting to be true in California, regarding to subset of firearms that California prohibits by falsely labeling them as "assault weapons."

Because supply-side gun controls are going to become less and less effective, governments should focus on demand-side control. That is, discouraging people from wanting to commit crimes with guns. Criminal penalties (e.g., an extra sentence for using a gun in a robbery, rather than using a knife) are an example a long-standing type of demand-side control.

Although statutory laws against criminal use or possession are already severe, some areas have enforcement problems. For example, in Chicago, the same felons get repeatedly arrested for weapons charges. They serve much shorter sentences than the law allows; as soon as they get out of jail, they quickly find an illegal gun on the black market. Later, they get arrested, serve another short sentence, and the cycle continues.

Elsewhere, strict laws are misenforced and target law-abiding citizens. Notoriously, New Jersey has a mandatory 3.5 year sentence for unlicensed carry, hardly ever issues permits, and

persecutes non-dangerous persons from other states. For example, a young woman named Shaneen Allen had a carry permit from her home state of Pennsylvania, drove through New Jersey, and was saved from the mandatory prison sentence only by the negative publicity created by her arrest. Most victims of misenforcement are not so fortunate.

One underused form of demand-side control is providing better mental health care. Studies are mixed about whether people suffering from severe mental illness are more violent than the general population. Studies are unanimous that such people are *victimized* by violent criminals at a higher rate. Studies are also unanimous that severe mental illness, particularly schizophrenia, is strongly related to increased perpetration of homicide, and that is even more so for mass murders. (Of course the vast majority of people suffering from schizophrenia do not commit any violent crimes.) The data are detailed in my article, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 HOWARD LAW JOURNAL 715 (2015), http://davekopel.org/HEW/Reforming-mental-health-law.pdf. Thus, providing more help to people with mental illness would be a helpful form of demand-side crime control.

A completely prohibitory statute, such as S. 1916, would probably encourage artisanal production of bump stocks. As with most black markets, the illicit price would be much higher than the price in a regulated, lawful market, so some artisanal producers would be tempted by the hefty profits available. Necessarily, those illicit producers would not be very scrupulous about whom they sold to.

Prohibition would invert the current market. At present, the market for bump stocks consists almost entirely of low-risk, nonviolent "gun nerds." They buy a bump stock to have some fun at the target range. Only one criminal has ever used a bump stock. If industrial production were replaced with artisanal production, then producers would be manufacturing with intent for illegal sale; since illegal arms makers prefer to sell to buyers with known criminal records (who are more likely to be bona fide buyers, rather than undercover agents), statutory prohibition would likely lead to more bump stocks being sold to more high-risk criminals.

In contrast, keeping bump stocks lawful, but highly regulated, within the National Firearms Act structure would somewhat discourage an artisanal market from developing. Most buyers, presumably, would prefer to go through the lawful NFA registration process, and purchase an industrially-made product of known quality—as opposed to paying a higher black market price for a product whose quality would be unknown.

The risk of encouraging black market production is another reason why strict regulation under the National Firearms Act, rather than prohibition under the proposed S. 1916 system, appears to be a superior approach for public safety.