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Description of document: **Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Office of Legal Counsel analysis of whether or not the sentence enhancement under 18 U.S.C. § 924(c) for possessing a semiautomatic assault weapon survived the sunset repeal of the semiautomatic assault weapon ban in 2004, 2009**

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Source of document: Chief, Disclosure Division  
Bureau of Alcohol, Tobacco, Firearms, and Explosives  
Department of Justice  
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U.S. Department of Justice

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

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Washington, DC 20226

www.atf.gov

JUL 15 2010

REFER TO: PJC/10-1137

RE: Freedom of Information Act (FOIA) Request

This is in response to your Freedom of Information Act (FOIA) request for access to information maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF).

Your request is granted in part. We are releasing the disclosable portions of the documents that contain exempt information and withholding portions of the documents for the reasons indicated on the attached "Document Cover Sheet."

Insofar as your request has been partially denied, and deletions have been made, you have the right to request an administrative appeal by following the instructions outlined on Part III of the attached form.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter J. Chisholm".

Peter J. Chisholm

Senior Disclosure Specialist

Enclosure

**DOCUMENT COVER SHEET: EXEMPTIONS LIST AND APPEAL RIGHTS**

**Part I – Document cover sheet**

1. Requesters' name	2. File no. <p align="center">10-1137</p>	3. Requested documents were referred by the following agency:
4. Documents are being released: <input type="checkbox"/> at cost <input checked="" type="checkbox"/> without cost	5. Package ends with documents no.: - 5 -	6. Total no. of documents denied: <p align="center">- 0 -</p>

**7. Exemptions cited for information withheld on pages released: (See Part II of explanations of exemptions)**

(b)(1)     (b)(2)     (b)(3) \_\_\_\_\_     (b)(4)     (b)(5)     (b)(6)  
 (b)(7)(A)     (b)(7)(B)     (b)(7)(C)     (b)(7)(D)     (b)(7)(E)     (b)(7)(F)

**8. Documents completely withheld:**

Document no. -----Exemption	Document no. -----Exemption	Document no. -----Exemption
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

9. The records identified above have been determined to be most directly responsive to your request. Other records, described below are available upon payment of ten (10) cents per page (or at no cost if a fee waiver is granted). These records generally consist of similar or repetitive information that restates information contained in the package being released. A sample of index of these records is included in this released. The following records are available upon written request:

	No. of pages
(a) Exhibits to Report (See index on page _____)	_____
(b) Surveillance Reports (See sample page _____)	_____
(c) Interagency Telegrams and Messages (See sample page _____)	_____
(d) Property Disposition records (See sample page _____)	_____
(e) Newspaper or magazine article (See sample page _____)	_____
(f) Miscellaneous (See sample page)	_____

Note: To obtain copies of these records, identify which records you want count the pages and multiply by ten (10) cents. Send a check or money order payable to Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and mail to Chief, Disclosure Division, ATF; 99 New York Avenue., Room 1E400, Washington, DC 20226. Request promptly for best service, as files are returned to field offices fifteen (15) days after this notice is mailed to you.

(Parts II and III on reverse side)

**PART II – LIST OF FREEDOM OF INFORMATION ACT EXEMPTIONS, TITLE 5 UNITED STATES CODE 552 (b) – Information exempt from Disclosure**

- |   |  |
|---|--|
| <p>(1) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive order;</p> <p>(2) related solely to the internal personnel rules and practices of an agency;</p> <p>(3) specifically exempted from disclosure by statute;</p> <p>(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;</p> <p>(5) inter-agency or intra-agency memoranda or letter which would not be available by law to a party other than an agency in litigation with the agency;</p> <p>(6) personnel and medical files and similar files, the disclosure of which would constitute a clear and unwarranted invasion of personal privacy;</p> | <p>(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records could:</p> <ul style="list-style-type: none"><li>(a) interfere with enforcement proceedings</li><li>(b) deprive a person of a right to a fair trial or an impartial adjudication;</li><li>(c) constitute an unwarranted invasion of personal privacy;</li><li>(d) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;</li><li>(e) disclose investigative techniques and procedures;</li><li>(f) endanger the life or physical safety of law enforcement personnel</li></ul> <p>(8) contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or</p> <p>(9) geological and geophysical information and data, including maps, concerning wells.</p> |
|---|--|

**PART III – APPEAL RIGHT PROCEDURES - You have the right to appeal any item of information which has been withheld. You may challenge the withholding of the information by filing a request for an administrative appeal, write to the: Office of Information Policy, U.S. Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001.**

- (1) Your appeal must be signed by the requestor; mailed or hand-delivered and received by the U.S. Department of Justice, Office of Information Policy (OIP) within sixty (60) days of the date of our initial determination (this letter);
- (2) State that your appeal concerns ATF records, and use the "File Number" that appears in box #2 on the front of this page. Reasonably describe the requested records which the appeal concerns;
- (3) Set forth the address where the requestor desires to be notified of the determination of the Appeal;
- (4) Specify the date of the initial request and the date of the letter denying the initial request; and
- (5) Petition the OIP, to grant the request for records and state any arguments in support thereof.

Your appeal will be considered by the OIP and you will be notified by mail.



U.S. Department of Justice

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

COPY

Chief Counsel

September 11, 2009

Washington, DC 20226  
www.atf.gov

201200:NKO/JAB/EME  
FE-107806

MEMORANDUM TO: Office of Legal Counsel  
United States Department of Justice

FROM: Chief Counsel  
Bureau of Alcohol, Tobacco, Firearms and Explosives

SUBJECT: Section 924(c) and the "Semiautomatic Assault Weapon"  
Sentence Enhancement

The following is ATF's analysis of the issue whether the sentence enhancement under 18 U.S.C. § 924(c) for possessing a semiautomatic assault weapon survived the sunset repeal of the semiautomatic assault weapon ban in 2004. For the following reasons, we conclude that the semiautomatic assault weapon ban was repealed when the ban expired in 2004.

In 1994, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, which, among other things, created a ban on semiautomatic assault weapons and large capacity ammunition feeding devices or "magazines". Pub. L. 103-322, Title XI, Subtitle A. In addition to banning semiautomatic assault weapons and large capacity magazines, title XI, subtitle A, § 110102 of the Act defined "semiautomatic assault weapons" by amending § 921(a) of title 18 (the definition section of the Gun Control Act) to add paragraph (30) as follows:

"(30) The term 'semiautomatic assault weapon' means--  
(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as--  
"(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);  
"(ii) Action Arms Israeli Military Industries UZI and Galil;  
"(iii) Beretta Ar70 (SC-70);  
"(iv) Colt AR-15;  
"(v) Fabrique National FN/FAL, FN/LAR, and FNC;  
"(vi) SWD M-10, M-11, M-11/9, and M-12;  
"(vii) Steyr AUG;  
"(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and  
"(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12;  
(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2  
of--  
"(i) a folding or telescoping stock;  
"(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;  
"(iii) a bayonet mount;

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- "(iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- "(v) a grenade launcher;
- "(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of--
  - "(i) an ammunition magazine that attaches to the pistol outside of the pistol grip;
  - "(ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
  - "(iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;
  - ~~"(iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and~~
  - "(v) a semiautomatic version of an automatic firearm; and
- "(D) a semiautomatic shotgun that has at least 2 of--
  - "(i) a folding or telescoping stock;
  - "(ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
  - "(iii) a fixed magazine capacity in excess of 5 rounds; and
  - "(iv) an ability to accept a detachable magazine."

Further, § 110102 of subtitle A, amended 18 U.S.C. § 924(c) "in the first sentence by inserting ' , or semiautomatic assault weapon,' after 'short-barreled shotgun,'." Finally, § 110105 of title XI, subtitle A, established the duration of the subtitle and the scope of the repeal:

This subtitle and the amendments made by this subtitle--

- (1) shall take effect on the date of the enactment of this Act; and
- (2) are repealed effective as of the date that is 10 years after that date.

Thus, the 1994 Act's ban on semiautomatic assault weapons and the enhanced penalty in § 924(c) for using one in a crime of violence or drug trafficking crime was to be removed from Title 18 on September 13, 2004. The actual sunset/repeal provision was never placed in 18 U.S.C. § 922(v) (assault weapon ban) or (w) (magazine ban), or in § 924(c).

In 1998, Congress enacted Public Law 105-386. The fundamental purpose of that law was to change 18 U.S.C. § 924(c) in response to the Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995). For a thorough discussion of the legislative history, please see the Federal Firearms Manual at Section 6.1 (<http://10.173.2.12/usao/eousa/ole/usabook/fire/06fire.htm>).

Prior to Bailey, § 924(c) prohibited the use or carrying of a firearm during or in relation to a crime of violence or drug trafficking crime. Various courts of appeals had upheld convictions that expanded the "use" prong to instances, for example, where firearms were kept in close proximity to drug stashes. The Supreme Court narrowed the term "use" to require "active

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employment.” In response, Congress enacted Public Law 105-386, which added a prohibition for possessing a firearm “in furtherance of such crimes.” Notably, at that point in time, the ban on semiautomatic assault weapons and the enhanced sentencing provision under § 924(c) for using one in a crime of violence or drug trafficking crime still had roughly six more years before the repeal provision in the 1994 Act took effect. The 1998 Act had to give effect to the 1994 Act by including the enhancement for using a semiautomatic assault weapon. The 1998 Act and its legislative history are otherwise silent regarding the enhancement for semiautomatic assault weapons and its repeal in 2004. And, as noted above, the repeal/sunset provision in the 1994 Act was never part of § 924(c); thus, the 1998 Act’s revision of § 924(c) had no effect on the expiration of the semiautomatic assault weapon enhancement.

In 2004, before the repeal became effective, the Criminal Division provided guidance to the field on the effect of the repeal. With regard to § 924(c), the guidance states:

6. What effect does the expiration have on 18 U.S.C. § 924(c) cases involving semiautomatic assault weapons where the violation occurred after September 13, 2004?

The Department's position is that the 10 year mandatory minimum for using, carrying or possessing a semiautomatic assault weapon in violation of 18 U.S.C. § 924(c) has expired. As noted above, the AWB made semiautomatic assault weapons another class of firearms that when used during a violation of 18 U.S.C. § 924(c) resulted in a mandatory 10 year consecutive sentence. The expiration of the AWB in its entirety under the express provisions of PL 103-322 results in the removal of the term "semiautomatic assault weapon" from 18 U.S.C. § 924(c). Further, even if the AWB had not amended § 924(c) to add "semiautomatic assault weapon" (and subsequently repealed it), the expiration has removed the definition from 18 U.S.C. § 921(a), leaving any interpretation of § 924(c) dependent on a historic definition or a common law interpretation of the phrase. In arriving at its position, the Department also considered that § 924(c)(1) was substantially rewritten in 1998. However, there is nothing in the legislative history to indicate that in rewriting § 924(c)(1), Congress intended to effectively repeal the sunset provision for semiautomatic assault weapons in § 924(c). The Department, therefore, determined that the sunset provision was still applicable.

Q &As On The Effect of the Expiration of the Assault Weapons Ban (AWB)  
(<http://10.173.2.12/usao/eousa/ole/usabook/fire/appxd.htm>).

In 2005, West published its annual Federal Criminal Code and Rules without “semiautomatic assault weapon” as an enhancement to § 924(c), and West continued to do so every year until this

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year when the phrase reappeared without comment in the 2009 publication. West's 2004 edition of the Code notes on page 656 that amendments to § 924(a)(1)(B) (penalty provisions for violating ban on assault weapons and magazines) and (c)(1) "are repealed effective September 13, 2004." According to West representatives, the clause was reinserted this year because it is present in the official government code. According to the U.S. House of Representatives, legislative revision counsel, the code is published with the most recently enacted version of a statute. In fact, the legislative revision counsel asked the Department to let him know if we conclude that the clause has been retained in error. It also bears noting that no one disputes that the definition of "semiautomatic assault weapon" was removed from § 921(a) as a result of the sunset provision.

A fundamental canon of statutory construction is that a repeal of a statute by implication is disfavored. As the Supreme Court noted in Branch v. Smith, 538 U.S. 254, 273 (2003), "[w]e have repeatedly stated, however, that absent 'a clearly expressed congressional intention,' Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), 'repeals by implication are not favored,' Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 89 S.Ct. 354, 21 L.Ed.2d 334 (1968). An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.' Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936)."

What if any effect the 1998 Act has on the 1994 Act presents a unique question: Does the 1998 Act repeal part of a general repeal provision in the 1994 Act that was to take effect six years after the 1998 Act was enacted even though the 1998 Act is fully silent with regard to the repeal provision of the 1994 Act, and did not in any way alter the amendment made to § 924(c) by the 1994 Act? We think the answer is "no." To give such effect to the 1998 Act amounts to a partial implied repeal of the 1994 Act.

First, applying the principles set forth above in Branch v. Smith, we note first that there is no express congressional intent in the 1998 Act to repeal the sunset of the semiautomatic assault weapon ["the Clause"] enhancement in § 924(c). The mere re-enactment of § 924(c) without mention of the upcoming repeal of the Clause does not constitute an expression of intent because the repeal of the Clause was never part of § 924(c) and its expiration date was six years away. Further, the inclusion of the Clause in the 1998 Act was actually required by the 1994 Act until 2004, and so retaining the Clause cannot be reasonably interpreted to express a congressional intent to keep the Clause indefinitely. Ironically, not to include the Clause in 1998 would have itself been an implied repeal of the part of the 1994 Act that created the enhancement in the first place.



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Second, when enacted in 1998, the new version of § 924(c) was not in conflict with the 1994 Act. Additionally, we do not believe they are in irreconcilable conflict even after 2004. The 1998 Act does not cover the whole subject of title XI, subtitle A of the 1994 Act and is not clearly intended as a substitute. As noted above, the fundamental purpose of the 1998 Act was to create a "fix" to the Bailey case. The purpose of subtitle A of the 1994 Act was to ban semiautomatic assault weapons and create a penalty enhancement in 18 U.S.C. § 924(c) for the use of such weapons in a crime of violence or drug trafficking crime for the life of the ban only. The inclusion of the Clause in the 1998 Act was required by the law at the time and shows nothing of Congress' intent as to its continued viability more than six years later. Therefore, the 1998 Act's version of § 924(c) cannot be found to have effectively repealed the 1994 Act's sunset provision for the semiautomatic assault weapons clause.<sup>1</sup>

  
Stephen R. Rubenstein

