Bureau of Alcohol, Tobacco, Firearms, and Explosives

Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity With Respect to Making or Transferring a Firearm	)	Docket No. ATF 41P RIN 1140-AA43

Firearms Industry Consulting Group's Supplemental Comments in Opposition to Proposed Rule ATF 41P

Firearms Industry Consulting Group ("FICG"), a division of Prince Law Offices, P.C., filed its comment (8364, 8365)[1] in this proceeding by hand on December 9, 2013, so as to incorporate many of the materials the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") had posted to the docket. Because ATF did not post a large percentage of public comments prior to December 9, however, it is now necessary to submit this Supplemental Comment to address issues only now coming to light. As of January 16, 2014, ATF was still posting comments to the docket so there can be no objection that it is impracticable to consider this Supplemental Comment along with material submitted on or before December 9.

FICG's Comment cited several public submissions that, at that time, had not yet been posted to the docket. Now that docket entries are available for those cited materials, that information is identified below:

FICG Page Reference	Author	Comment Number
67	Glenn D. Bellamy	4978
63, 67, 72-73	J.A.K.	5693
41, 51, 65, 76	Silencer Shop	6401

[1] ATF assigned a unique identification number (distinct from the "tracking number") that begins with the prefix ATF-2013-0001- to each comment posted to the electronic docket. For ease of reference, throughout FICG's comments other matter filed as public comments was be cited by the four digits that follow that prefix.

Comments posted in this proceeding after FICG submitted its comment provide additional support for arguments FICG advanced. Some subsequently-filed comments raised new issues that FICG finds worthy of further examination. In addressing those matters, FICG retains the structure of its comment for ease of integration of the new information.

I. PROCEDURAL IRREGULARITIES HAVE DENIED INTERESTED PERSONS A MEANINGFUL OPPORTUNITY TO COMMENT ON THE PROPOSED RULEMAKING

A. *ATF Failed to Make Available the Underlying Studies and Other Information Upon Which It Purportedly Relied in Formulating Its Proposed Rule*

FICG detailed its efforts to obtain supporting information from ATF and ATF's repeated refusal to make available a single page of material to support the proposed regulation (pages 2-7), thereby frustrating the meaningful opportunity to submit public comments. In addition to failing to place any supporting material in the rulemaking docket, ATF also failed to provide any documents in response to several Freedom of Information Act ("FOIA") requests. FICG recounted how ATF and, on administrative appeal, the Department of Justice ("DOJ") employed tactics that simultaneously denied responsive documents while delaying the opportunity to seek timely judicial intervention (pages 4-5 and notes 1 & 2). That gamesmanship continues with DOJ asserting by letter dated January 16, 2014 -- that is, after the December 9, 2013 end to the comment period -- that ATF's purported grant of FICG's request which provided nothing but a copy of the NPR itself did not constitute an "adverse determination". *See* Exhibit 43. While at least one request for documents pertinent to the rulemaking date back to January 2013 and others to September 2013, the National Firearms Act Traders and Collectors Association ("NFATCA") reported on January 8, 2014, that it expected a "ton of data inbound" from an "approved" FOIA request it had submitted only in late November 2013. *See* Exhibit 44. It thus seems ATF continues to favor certain organizations while denying information to the general public.

B. *ATF Failed to Describe a Single Situation Illustrating the Problem It Purports to Address; The Entire Rulemaking Seems to Rest on a False Premise*

2. *The Texas LLC Situation*

FICG explained, both in the comment filed on behalf of David M. Goldman (1899) and in the comment it filed on its own behalf, that ATF's description of three incidents fails to demonstrate that a prohibited person ever improperly attained access to a NFA firearm through association with a legal entity. For example, with respect to the Texas LLC situation, ATF's description did not account for the fact that a prohibited person could be employed at a facility where NFA firearms are present without necessarily being deemed to have "constructive possession" of them, let alone actual, physical possession (pages 12-13). The Comment of NFA-ILA references a letter from ATF that further supports that view, explaining how a prohibited person sleeping under the same roof as where NFA firearms are stored could avoid violation of law. *See* Exhibit 45.

D. *ATF Provided Conflicting Information Regarding Implementation of Any New Rule, Potentially Providing False Reassurance to Persons Interested in Filing Comments*

FICG's Comment described the confusion resulting from ATF's failure to clarify how any new rule would be implemented with respect to applications pending approval, noting additional public submissions that expressed concern with that issue (page 19 n.11). To that list of concerned commenters one can now add the American Silencer Association (Comment 7909), p. 3, and NFATCA (Comment 7998), p. 7, as well as Comments 6751 and 8330.

In addition, the American Silencer Association ("ASA") reported that its Board had a meeting with ATF *after* December 9 and based on that meeting ASA stated: "Until the ruling is released, we will not know if forms that are already in the transfer process will be exempt from

the proposed requirements." *See* Exhibit 46. If ASA correctly reported ATF's statement in that regard, ATF seemingly now takes a different position than it offered previously.

F. *ATF Did, in Fact, Fail to Accept or Post Comments*

2. *ATF Failed to Provide a Ninety-Day Comment Period*

FICG's Comment observed that ATF ignored requests to extend the comment period despite the fact that the docket was unavailable for significant portions of that period (pages 23-25). To the list of additional comments that requested an extension one can add Comments 7916 and 8289.

3. *ATF Selectively Delayed Reviewing and Posting Comments Received*

FICG's Comment recounted ATF's bizarre handling of public submissions in this proceeding (pages 25-26). Other interested parties have complained that ATF did not timely post comments to the docket. *E.g.,* Comment 8110.

ASA reported that by January 15, 2014, ATF had already determined to exclude "about 1000" submitted comments from the docket. *See* Exhibit 46. If that report is true, there is no indication ATF has advised anyone submitting comments that, despite initial acceptance, ATF now plans to disregard the submission. ATF has not identified which comments it plans to ignore or the specific basis for doing so. ATF continues to delay posting comments. As of January 15, 2014, more than five weeks after December 9, more than twelve percent (1142 of 9504) of the comments received had not been posted to the docket. The delay in processing has denied interested persons the opportunity to cure any defect ATF now claims.

G. *ATF Has Distorted the Public Comment Process by Apparently Submitting Hearsay Information Via Proxies*

FICG's Comment demonstrated how information apparently attributable to ATF was submitted in the form of comments (pages 27-30). In the course of that explanation, FICG noted

ATF's practice of having non-public meetings with non-governmental personnel to discuss the formulation of regulations (page 29 n.14). FICG also noted that ATF selectively provided information regarding its proposed regulation rather than making it publicly available (pages 17-18 & Exhibit 12). Based on a report on ASA's Website, it would appear that ATF has continued the practice of providing information to audiences it selects -- even during the course of this active rulemaking proceeding -- rather than make the information available to the general public.

ASA stated that its Board "met with the leadership of the NFA Branch of the ATF" on January 14, 2014, "with the focus of the conversation centered on ATF 41P." *See* Exhibit 46. ASA seemingly learned from ATF new information about retroactive application of any new regulation, ATF's plan to exclude from consideration "about 1000" of the comments received, and the time frame within which ATF plans to move forward. *Id.* FICG requested more details about the referenced meeting and any similar meetings, as well as requesting that ATF provide advance public notice of such meetings. *See* Exhibit 47.

H. *ATF's Prior Lack of Candor Demonstrates a Heightened Need for Procedural Regularity*

2. *ATF's Deception in Congressional Oversight*

FICG cited prior examples where ATF has misled Congress as to its activities (pages 33-34). ATF has also circumvented Congress by repeatedly claiming regulatory authority in excess of the statutory scheme.

a. *ATF's 1988 Rulemaking*

On March 31, 1988, ATF published a set of final regulations. *See* 53 Fed. Reg. 10490. Several provisions did not withstand judicial review.

- Although Congress itself defined what constituted the "manufacture" of firearms, ATF adopted a regulation with a broader definition that would have potentially subjected gunsmiths to the licensing requirements of

manufacturers. *See* 53 Fed. Reg. at 10490 to 10491 (revising 27 C.F.R. § 178.11 definitions of "manufacture", "manufacturer", and "engaged in the business"). On judicial review, this regulation was invalidated on summary judgment and ATF did not even seek appellate review. *National Rifle Ass'n v. Brady,* 914 F.2d 475, 478 n.2 (4th Cir. 1990), *cert. denied,* 499 U.S. 959 (1991).

- So too, Congress specified the precise information that FFLs were required to record with respect to the transfer of firearms for a personal firearms collections and explicitly stated: "That no other recordkeeping shall be required." 18 U.S.C. § 923(c). Nonetheless, ATF's 1988 regulations mandated additional information. *See* 53 Fed. Reg. at 10504 to 10505 (adding 27 C.F.R. § 178.125a(4)). Again, ATF's rule did not survive judicial review, with the court observing that "Congress could hardly have been more clear" and that ATF acted contrary to "the plain language of the statute." *See Brady,* 914 F.2d at 483-84.

- With respect to the statutory requirement for recordkeeping of the acquisition and disposition of curios and relics, ATF extended the requirement to mandate an inventory of curios and relics already in the possession of a licensed collector. *See* 53 Fed. Reg. at 10504 (adding 27 C.F.R. § 178.125(f)). On judicial review, the court again found that ATF's regulation "impermissibly expands on the requirements of the statute." *Brady,* 914 F.2d at 484. ATF's "regulation create[d] a whole new recordkeeping requirement above and beyond the requirements provided for by the plain language of the statute." *Id.* The court rejected ATF's attempted justification for the rule, noting ATF "stretches the language of the statute 'to the breaking point.'" *Id.*

In language ATF should heed in all rulemaking, the court chided ATF that "enforcement problems" alone do not permit ATF to ignore the statutory text; the appropriate avenue in such situations is a request that Congress amend the statute. *See id.* at 484-85.

b. *ATF's Enforcement Against Sales Away From the Premises*

Congress prohibited "any person except a . . . licensed dealer, to engage in the business of . . . dealing in firearms." 18 U.S.C. § 922(a)(1). Although a FFL must have "premises from which he conducts business," *id.* § 923(d)(1)(e)(i), that requirement "exists so that regulatory authorities will know where the inventory and records of a licensee can be found." *Brady,* 914 F.2d at 480. Congress expressly contemplated that FFLs could deal in firearms away from the

specified premises. *E.g.,* 18 U.S.C. § 923(j) (permitting licensees to "temporarily" deal in firearms at gun shows and events); *id.* (authorizing FFLs to "conduct business away from their business premises" with other FFLs); *id.* (expressly preserving "any right to display, sell, or otherwise dispose of firearms or ammunition, which is in effect before the date of the enactment [of FOPA]"). Nonetheless, even after Congress had enacted FOPA with its express rebuke of ATF's over-zealous enforcement, ATF referred for prosecution several cases on the theory that a FFL selling firearms away from the premises identified on the license constituted dealing without a license.

Courts rejected ATF's theory. Relying on the "plain meaning of the statute," the Sixth Circuit held that a license is not location specific. *United States v. Caldwell,* 49 F.3d 251, 251, 252 (6th Cir. 1995). Rather, merely by reading "what is included in the statute and what is omitted from the statute", the court observed that "the statute contains no language striping the dealer's licensed status for selling firearms away from the licensed premises." *Id.* at 252. Indeed, the court observed that ATF's position in that case stood in contrast with ATF's assertions in other contexts. "The government may not have it both ways. A licensed firearms' dealer is not unlicensed for liability under § 922(a)(1)(A), yet licensed for purposes of record-keeping requirements." *Id.* at 253. The court thus precluded ATF from a self-contradictory interpretation of the statute designed to expand liability beyond its plain language.

Despite the rejection, a decade later ATF tried again. In *United States v. Ogles,* 440 F.3d 1095 (9th Cir. 2006) (en banc), in the district court the prosecution took "the position that a federal firearms license is location specific and that a licensee like Ogles who sells firearms outside of his designated area acts in an unlicensed capacity within the meaning of [18 U.S.C.] § 922(a)(1)(A)." 440 F.3d at 1098. The district court rejected that argument. *See id.* at 1098,

1103. On appellate review, the *en banc* Ninth Circuit agreed that "[t]he district court properly understood the statute," *id.* at 1099, and observed: "If the government believes that additional conduct should be penalized, then its remedy lies with *Congress,* not with the courts." *Id.* (emphasis added). That is, once again the judiciary determined that ATF had disregarded the directive from Congress and simply sought to impose new *criminal* liabilities on its own. In his separate opinion, Judge Reinhardt asserted that the court did not go far enough in rebuking "the legal absurdity" of ATF's position. *Id.* at 1105 (Reinhardt, J., concurring in part and dissenting in part). He emphasized that Ogles had been convicted under an interpretation of the statute that, for the first time, at oral argument before the *en banc* court, the government disavowed, conceding that the conviction was "invalid" and "unlawful" and "wrongful." *Id.* at 1105-06. Yet, "without any evident embarrassment", *id.* at 1105, ATF pressed to have the conviction affirmed. Judge Reinhardt observed: "The judicial shell game the government has played with the court in this case is, in my view, wholly inappropriate and entirely unacceptable." *Id.*

c. *ATFs "Straw Purchase" Doctrine*

Perhaps the highest-profile example of ATF's usurpation of regulatory authority beyond the statutory scheme is the "straw purchase" doctrine currently under review by the U.S. Supreme Court in *Abramski v. United States,* No. 12-1493 (oral argument scheduled Jan. 22, 2014). ATF acknowledges that an individual who is not a prohibited person may purchase a firearm as a gift for another individual. ATF further acknowledges that where the recipient of such a gift is not himself a prohibited person, he could have made the purchase himself. Yet, through logical contortions, ATF maintains that a non-prohibited person who buys a gun to make a gift of it to another non-prohibited person may be criminally prosecuted. Apart from the lack

of congressional enactment of any such criminal prohibition, one might ask where is the *material* misstatement on any ATF form if the recipient of the gifted firearm is not a prohibited person.

3. *ATF's Misleading of the Public*

FICG catalogued ATF's blatant disregard of the APA in this proceeding. In addition, FICG referenced several past examples where ATF has misled the public (pages 34-35). There are many more examples.

a. *ATF's Past Frustration of Public Participation*

ATF's past disregard of APA requirements when previously revising the very regulations at issue in the current proceeding may be added to that list of prior examples of misleading the public. When ATF revised its regulation to omit from the list of acceptable CLEOs all federal officials previously identified, ATF did so without complying with applicable APA requirements. ATF asserted no notice and comment procedure was required, and that even the protection of a delayed effective date could be ignored. *See* 50 Fed. Reg. 41680, 41781 (Oct. 15, 1985) (citing 5 U.S.C. § 553(b), (d)). ATF maintained that it was "impracticable and unnecessary" to follow those procedures as the changes were merely "minor" and "nonsubstantive." *Id.*

i. *The 1985 Revision Did Not Qualify for the "Good Cause" Exception to Notice and Comment Procedure*

The mere recital of the words "impracticable" and "unnecessary" are insufficient to properly invoke the good cause exception of 5 U.S.C. § 553(b)(3)(B). That exception from APA procedures is limited in scope.

> [T]he good cause exception is to be 'narrowly construed and only reluctantly countenanced. *State of New Jersey v. EPA,* 626 F.2d 1038, 1045 (D.C. Cir. 1980). It is 'not [an] escape clause[] that may be arbitrarily utilized at the agency's whim.' *American Fed'n of Gov't Employeees v. Block,* 655 F.2d 1153, 1156 (D.C. Cir.

> 1981). 'Rather, use of the[] exception[] by administrative agencies should be limited to emergency situations . . . .' *Id.*

Tennessee Gas Pipeline v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992). As a result, ATF was required to demonstrate a factual basis for its assertion at the time of its 1985 notice. *Id.* at 1145-46. Its failure to do so foreshadows the cavalier disregard of the APA requirements in this current proceeding. ATF confronted nothing resembling an "emergency situation" and failed to articulate any harm that would flow from delay in order to provide public participation. Moreover, public participation at that time may well have obviated the increased use of legal entities that now prompts ATF's concern.

ii. *The 1985 Revision Did Not Qualify for the "Rules of Procedure" Exception to Notice and Comment Procedure*

ATF's unexplained assertion that its 1985 change in the regulation was "nonsubstantive", 50 Fed. Reg. at 41781, without further explanation also cannot be credited as a meaningful claim that the CLEO certification requirement was merely a procedural rule. ATF employed notice and comment procedures to adopt the requirement that it then sought to revise in 1985. *See* 36 Fed. Reg. 7059, 7065 (Apr. 14, 1971); 36 Fed. Reg. 14255, 14255, 14262 (Aug. 3, 1971). That approach is consistent with the "narrow cast to the exceptions to section 553, permitting an agency to forego notice and comment only when the subject matter or circumstances of the rulemaking divest the public of any legitimate stake influencing the outcome." *Air Trans. Ass'n v. Dep't. of Transportation,* 900 F.2d 369 (D.C. Cir. 1990), *vacated as moot,* 933 F.2d 1043 (D.C. Cir. 1991). ATF could not properly claim the exception from APA notice and comment requirements merely because a regulation "is capable of bearing the label 'procedural.'" *Id.* (citing *Reeder v. FCC,* 865 F.2d 1298 (D.C. Cir. 1989) (per curiam)). Under the "functional analysis" governing the distinction, "this exception to notice and comment rulemaking" is

applicable to rules "'organizing [agencies'] *internal* operations.'" *Id.* (quoting *American Hosp. Ass'n v. Bowen,* 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton v. Marshall,* 648 F.2d 694, 707 (D.C. Cir. 1980))).

iii. *Subsequent History Underscores the Importance of Public Participation in the 1985 Revision*

The subsequent history that ATF now acknowledges well demonstrates the dramatic substantive change ATF implemented without the benefit of any input from State and local officials, on the one hand, or Federal Firearms Licensees and purchasers of NFA firearms, on the other hand. By removing U.S. Attorneys and U.S. Marshals from the list of acceptable CLEOs, ATF fundamentally changed the CLEO certification regime to rest on the whim of State and local officials alone, simultaneously placing a greater burden upon those State and local officials who would provide certifications while increasing the burden on purchasers of NFA firearms to either find a CLEO willing to sign or incur the expense of establishing a legal entity.

ATF's entire rationale for eliminating U.S. Attorneys and U.S. Marshalls from the list of acceptable CLEOs reflects an internal inconsistency in ATF's approach to the issue. The federal officials were removed based on their objections that "the certifications required them to perform services outside their normal operations as they did not have direct access to the background data necessary to provide proper certifications." 50 Fed. Reg. at 41681. Yet that same objection could be raised by any number of State and local officials that ATF now requires an applicant to exhaust as a prerequisite to challenging ATF's insistence on a CLEO certification. Many State court judges, for example, have made clear that they lack the procedures and direct access to the

data needed to act as ATF contemplates. *See, e,g,,* Verified Statement of Thomas F. Braddock, Jr. (Exhibit 38), Letter from Court Administrator (Ex. 38(B)).[2]

If ATF had provided a forum for public discussion of the CLEO certification requirement in 1985, it may well be that ATF would have confronted problems before the large increase in the use of legal entities that purportedly prompts ATF to offer the currently-proposed rule. By excluding public input into the 1985 revision, however, on claims that the change was "minor" and would only impact ATF's internal procedures, ATF misled the public and created a regime that forced many law-abiding citizens to establish legal entities in order to exercise their rights.

b. *ATF's Recent Frustration of Public Participation*

On December 17, 2013, ATF released its Ruling 2013-5 with respect to the use of electronic records by FFLs. Despite being captioned as a "ruling" it is clear that the matter is not a ruling in any form of adjudication but rather is a rule within the meaning of the Administrative Procedure Act ("APA") because it is of general applicability and future effect. 5 U.S.C. § 551(4). Despite purporting to respond to "inquiries from members of the firearms industry," Ruling 2013-5, p. 1, the ruling does not indicate that it is binding solely upon those members with mere precedential impact on others. By its terms, the ruling establishes a generally applicable standard for all FFLs who maintain acquisition and disposition records. "Specifically, ATF authorizes licensed importers, licensed manufacturers, licensed dealers, and licensed collectors to maintain their firearms acquisition and disposition records electronically, provided all the following conditions are met." Ruling 2013-5, p. 4. Moreover, as ATF's Questions and

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[2] Mr. Braddock's experience documents the observation of Philip Webb that "ATF is mistaken to assume that if it identifies different officers as CLEOs that there are an equivalent number of available options." Comment 7802. To the extent potential CLEOs either do not believe they have the authority ATF purports to grant them or simply defer to the judgment of a different CLEO --as did Pennsylvania Attorney General Kathleen G. Kane -- they are not viable options.

Answers regarding ATF Ruling 2013-5 make clear, the ruling has future effect. "All licensees who held variances that have now been rescinded will have 180 days from the issuance of Ruling 2013-5 to apply for a new variance." General applicability and future effect are precisely what distinguishes regulation from adjudication. Nonetheless, ATF has not even published the matter in the *Federal Register.* As the regulation explicitly purports to dictate how FFLs who have been maintaining electronic records must alter their practices, there can be no doubt that the rule was required to be published in order to ensure proper notice to regulated entities.[3]

ATF simply announced its new ruling (without properly publishing it), without affording any opportunity for public participation. There can be no doubt that ATF stated that the ruling is binding upon FFLs. ATF asserted that variances permitting FFLs to maintain electronic records under standards ATF previously articulated (in ATF Ruling 2008-2) are automatically rescinded with its new rule, demonstrating that the new rule is not more liberal.[4] New limitations on the use of cloud storage and the requirement for semi-annual back-up (in addition to the daily back-up requirements), for example, well illustrate the new restrictions. Because the ruling purports to establish a legally binding norm on regulated parties, it is a legislative rule that required notice-and-comment rulemaking. *E.g., Syncor Int'l Corp. v. Shalala,* 127 F.3d 90 (D.C. Cir. 1997); *United States Telephone Ass'n v. FCC,* 28 F.3d 1232 (D.C. Cir. 1994).

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[3] FOIA requires agencies to publish in the *Federal Register* "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), and "each amendment, revision, or repeal of the foregoing," *id.* § 552(a)(1)(E).

[4] In a separate "Questions and Answers" statement ATF asserts that variances so rescinded are rescinded in full, eliminating both authority to maintain electronic records as well as authority to maintain consolidated records. Burying that statement in a guidance document that explains a new regulation that ATF never published in the *Federal Register* hardly affords regulated parties the notice required by the APA and fundamental due process.

What distinguishes substantive rules that require notice and comment rulemaking, on the one hand, from interpretive rules and general statements of policy, on the other hand, "is that a substantive rule *modifies* or adds to a legal norm based on the agency's *own authority*." *Syncor Int'l,* 127 F.3d at 95. Where, as here, the agency's statement "does not purport to construe any language in a relevant statute or regulation" but instead "uses wording consistent only with the invocation of its general rulemaking authority to extend its regulatory reach," *id.,* the label applied by the agency is meaningless and court's will hold the agency to the procedural requirements for promulgating substantive rules.

Although ATF 2013-5 has several paragraphs setting forth the requirements of 18 U.S.C. § 923(g)(1)(A) and ATF's implementing regulations, *see* ATF 3013-5, pp. 2-3, there is no textual connection between those requirements and the list of conditions that follows, *id.,* pp. 4-5. Rather than offer a causal explanation how each of the numbered requirements derives from any of the cited regulations, ATF instead invoked the Director's authority to "approve an alternate method or procedure" under 27 C.F.R. §§ 478.22, 479.26. In light of those circumstances, it would seem that the APA mandates an opportunity for public comment *before* ATF may implement this new rule, particularly as it purports to rescind prior rulings upon which regulated parties have relied in establishing recordkeeping systems.

c. *"Fast and Furious"*

One of ATF's own Special Agents detailed the lengths to which ATF (and DOJ as well) misled the public with regard to the "gun walking" scheme that armed Mexican drug gangs, ultimately resulting in the death of at least one Border Patrol officer. *See generally* John Dodson, *The Unarmed Truth: My Fight to Blow the Whistle and Expose Fast and Furious* (2013). A second, independent account of the public deception was introduced by a different

ATF Special Agent. *See* Jay Dobyns, "Introduction," in Katie Pavlich, *Fast and Furious: Barak Obama's Bloodiest Scandal and Its Shameless Cover-Up* (2012).

II. ATF'S PROPOSED RULE RAISES IMPORTANT CONSTITUTIONAL ISSUES

A. *The Second Amendment*

FICG demonstrated in its Comment (pages 35-37) that ATF must address the *de facto* ban that would exist in some jurisdictions by virtue of extending the CLEO certification requirement. The experience of Thomas F. Braddock, Jr., is particularly informative (page 61). Since FICG filed its Comment, Mr. Braddock has been denied by yet an additional CLEO despite the lack of any disqualifying factors in his background. *See* Exhibit 48. One comment ATF posted subsequently estimated the scope of such a *de facto* ban as reaching *seventy percent* of the population of Texas alone. *See* Comment 7772.

1. *"Silencers" or "Suppressors" Are Not Properly Subject to the NFA*

FICG demonstrated in its Comment (pages 37-38) that silencers are not properly subject to the NFA. Other comments continue to support that view. *E.g.,* Comment 8367.

2. *Short-Barreled Shotguns, Short-Barreled Rifles, and "Any Other Weapons" Are Not Properly Subject to the NFA*

FICG explained in its Comment (page 40) that for users with certain physical characteristics, a SBS or SBR may be the only form of shotgun or rifle such individuals can effectively wield. Several later-filed comments illustrate the point. Geraldine Lospinso, "a 71-year-old female with limited upper body strength" wrote that she cannot handle the added weight of a longer gun and that actual live-fire tests at a range demonstrate that the SBR is her best personal defense option. *See* Comment 8108. She further observed that "many women" as well as the disabled have the same preference for a SBR. *Id.* She seems to be correct. *E.g.,* Comment 7946, p. 5. Paul Gardner, who was paralyzed from the waist down in the service of our

Nation, wrote that the lighter weight of a SBR and its resulting change in center of gravity permits him to shoot without the danger of falling forward out of his wheelchair. *See* Comment 8065.

B. *Federalism Concerns*

1. *Undermining the Autonomy of States to Set Statewide Firearms Policy*

FICG's Comment (page 42) observes that Pennsylvania is hardly unique in establishing State-wide policy with respect to firearms that preempts the policy-setting ability of political subdivisions and their officers. In addition to the cases from Arizona and Washington, there are many other sources demonstrating the breadth of that practice. *See, e.g.,* Ariz. Rev. Stat. § 13-3108(A) ("a political subdivision of this state shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale, transfer, purchase, acquisition, gift, devise, storage licensing, registration, discharge, or use of firearms or ammunition"); 22 Del. Code. § 111 ("municipal governments shall enact no law, ordinance or regulation prohibiting, restricting or licensing the ownership, transfer, possession or transportation of firearms or components of firearms or ammunition"); Fla. Stat. § 790.33 ("the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto"); Ga. Stat. § 16-11-173(b)(1) ("No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows; the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms or components of firearms; firearms dealers; or dealers in firearms components."); Kan. Stat. § 12-

16, 124(a) ("No city or county shall adopt any ordinance, resolution or regulation, and no agent of any city or county shall take any administrative action, governing the purchase, transfer, ownership, storage or transporting of firearms or ammunition, or any component or combination thereof."); Md. Crim. Law Code § 4-209(a) ("the State preempts the right of a county, municipal corporation, or special taxing district to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun."); 25 Maine Rev. Stat. § 2011 ("The State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies."); Mich. Stat. § 123.1102 ("A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms"); Miss. Stat. § 45-9-51 ("no county or municipality may adopt any ordinance that restricts or requires the possession, transportation, sale, transfer or ownership of firearms or ammunition or their components"); N.C. Stat. § 14-409.40(a) ("It is declared by the General Assembly that the regulation of firearms is properly an issue of general, statewide concern, and that the entire field of regulation of firearms is preempted from regulation by local governments except as provided by this section."); Nev. Rev. Stat. § 244.364 ("the Legislature reserves for itself such rights and powers as are necessary to regulate the transfer, sale, purchase, possession, ownership, transportation, registration and licensing of firearms and ammunition in Nevada, and no county may infringe upon those rights and powers"); Ore. Rev. Stat. § 166.170(1) ("Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any

element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly."); S.C. Code § 23-31-510 ("No governing body of any county, municipality, or other political subdivision in the State may enact or promulgate any regulation or ordinance that regulates or attempts to regulate: (1) the transfer, ownership, possession, carrying, or transportation of firearms, ammunition, components of firearms, or any combination of these things"); S.D. Codified L. § 8-15-13 ("No township may pass any ordinance that restricts possession, transportation, sale, transfer, ownership, manufacture, or repair of firearms or ammunition or their components."); Tenn. Code § 39-17-1314(a) ("no city, county, or metropolitan government shall occupy any part of the field of regulation of the transfer, ownership, possession or transportation of firearms, ammunition or components of firearms or combinations thereof"); Tex. Local Gov't Code § 229.001(a) ("a municipality may not adopt regulations relating to: (1) the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, air guns, ammunition, or firearm or air gun supplies"); 24 Vt. Stat. § 2295 ("no town, city or incorporated village, by ordinance, resolution or other enactment, shall directly regulate hunting, fishing and trapping or the possession, ownership, transportation, transfer, sale, purchase, carrying, licensing or registration of traps, firearms, ammunition or components of firearms or ammunition"); W. Va. Code § 8-1-5a(p)(3)(A) ("municipalities participating in the Municipal Home Rule Pilot Program, pursuant to this section, shall not restrict in any manner the right of any person to purchase, possess, transfer, own, carry, transport, sell or store any revolver, pistol, rifle or shotgun, or any other firearm, or any ammunition or ammunition components to be used therewith, or the keeping of gunpowder so as to directly or indirectly prohibit the ownership of the ammunition, or, to restrict in any manner the right of any person to purchase, possess, transfer, own, carry, transport, sell or store any other

firearm accessory or accoutrement, under any order, ordinance or rule promulgated or enforced by the municipality"). Additional comments have expressed the same concern that ATF's proposal improperly interferes with the ability of States to establish and maintain policy. *E.g.,* Comment of Texas Law Shield LLP (7796), p. 7.

2. *Intruding on State Law Governing Corporations, Trusts, and LLCs*

Many comments supported the concern raised by FICG (pages 43-44) that the proposed rule would intrude into areas traditionally governed by State law, introduce uncertainty, and upset carefully established plans. *E.g.,* Comments 6601, 6605, 6610, 6615, 6617, 6621, 6625, 6630, 6631, 6637, 6638, 6643, 6646, 6652, 6653, 6659, 6662, 6668, 6671, 6672, 6677, 6682, 6696, 6697, 6705, 6712, 6721, 6727, 6760, 6781, 6810, 6853, 6858, 6878, 7090, 7098, 7126, 7133, 7176, 7210.

4. *Unfunded Mandate on CLEOs*

FICG observed that ATF's proposed rule would impose additional financial burdens on State and local governments (pages 45-46). Subsequently-filed comments underscore the concern with such an unfunded mandate. *E.g.,* Comments 6636 and 8368.

III. ATF'S PROPOSAL EXCEEDS ITS STATUTORY AUTHORITY

A. *Congress Prohibited "Undue or Unnecessary" Restrictions*

FICG explained that Congress limited ATF's cope of statutory authority by enacting FOPA (pages 47-50). As the Supreme Court underscored, "the findings [in FOPA] explained that additional legislation was necessary to protect law-abiding citizens with respect to the acquisition, possession, or use of firearms for lawful purposes." *Bryan v. United States,* 524 U.S. 184, 187 (1998).

B. *Independent of FOPA, ATF Lacks Statutory Authority*

FICG identified numerous significant issues that demonstrate ATF lacks statutory authority to implement its proposed regulation (pages 50-52). The Gun Owners of America, Inc. and Gun Owners Foundation submitted a comment further demonstrating that ATF lacks statutory authority to impose any CLEO certification requirement. *See* Comment 7989, p.6; *see also* Comment 8368.

Prior regulations imposing a CLEO certification requirement were held invalid as *ultra vires*. *See Weyer v. United States,* 524 F.2d 74, 76-77 (5th Cir. 1970) (quoting *Leary v. United States,* 395 U.S. 6, 26 (1969)). In light of the strong indications that Congress has rejected the requirement itself, ATF should eliminate the CLEO certification.

IV. POLICY CONSIDERATIONS

A. *ATF's Assumptions Lack Statistical Validity*

FICG's Comment demonstrated that even crediting ATF's representations in its NPR, the referenced anecdotes did not constitute statistically significant evidence of a problem to be addressed and that ATF's method of "sampling" to support cost estimates are invalid (pages 53-56). Subsequently-filed comments support both those points. In addition, an expert statistician offered his sworn statement confirming the inadequacy of ATF's approach. *See* Verified Statement of Dr. Fritz J. Scheuren (Exhibit 49). Without more information that ATF has refused to provide, *see* Part I, one simply cannot credit speculation regarding a problem to be addressed or the estimated cost to do so.

B. *ATF Relies on False Premises*

1. *There Is Little Evidence of the Misuse of Registered NFA Firearms*

FICG's Comment addressed the relatively few instances of reported misuse of NFA firearms (pages 57-58). Comments subsequently filed in this proceeding identified additional such instances, bringing the total to five. *See* Comment of National Rifle Association Institute for Legislative Action (5368), p. 14 n.48. All the additional examples fit into the categories FICG previously identified. Either the individual using the NFA firearm in a criminal act was not a registered owner authorized to use the firearm or the registered owner was not a prohibited person when he registered the NFA firearm.

a. *Use of NFA Firearms in Crimes By Someone Other than a Registered Owner or Authorized User*

One of the instances involved the murder of the registered owner of a NFA firearm, rather than use of the firearm by the registered owner. *Rudin v. State,* 86 P.3d 572 (Nev. 2004) (en banc). ATF records revealed that the firearm was registered to the decedent, *id.* at 130, who had reported it stolen six years before his murder, *id.,* and indicated that he believed that his wife -- who was later convicted of his murder -- had taken it, *id.* Ballistic evidence showed that the decedent had been killed with the missing gun. *Id.* at 133. Clearly, the firearm was not used by the registered owner or anyone he authorized to use it.

The Supreme Court of Nevada's published *per curiam* opinion in *State of Nevada v. David Riebel,* 790 P.2d 1004 (Nev. 1990), noted in passing that one of the weapons fired during an armed robbery was a "9mm machine gun" that fired two shots before jamming. 790 P.2d at 1005. The opinion is too cursory to reveal additional details. Examination of the trial court transcript of March 14, 1988, however, reveals a more-complete picture: "ATF special agents caused a records check to be conducted, and that as a result of that records check there was no

record that the Schneider model MP 40 nine millimeter sub-machinegun used in this case . . . [was] registered to Mr. Riebel." Exhibit 50, p. 13.

b. *Use of NFA Firearms Where the Registered Owner or Authorized User Was Not a Prohibited Person Prior to the Criminal Act*

In *Galliano v. Borough of Seaside Heights,* 2007 WL 979850 (D.N.J. Mar. 20, 2007), the court addressed the killing by off-duty Seaside Heights police officer Edward Lutes, a seventeen year veteran of the force, of five of his neighbors, using a "police-issued MP-5 submachine gun" before shooting his police chief and then committing suicide. *Id.* at *1. The police department approved the purchase of the MP-5 submachine gun for Lutes in connection with his membership in the Central [Emergency Response Team]" and "Lutes received specialized training and instruction in the use of the MP-5." *Id.* at *3; *see id.* at *22. Due to his suicide, Lutes never faced criminal prosecution.[5]

In *Searcy v. City of Dayton,* 38 F.3d 282 (6th Cir.1994), off-duty police officer Roger W. Waller,[6] and his friend, Dennis Michael, shot and killed one individual and wounded another. *Id.* at 283. While investigating a suspected crack house, Waller fired his MAC-11 machine gun that he had acquired in his private capacity and that he was carrying in violation of departmental policy. *Id.* at 284. As a consequence of his September 1988 actions, Waller pleaded guilty to

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[5] Lutes' record at the time of his hiring and throughout his service was "exemplary" and he had been awarded numerous commendations. *Galliano,* 2007 WL 979850 at *2. There is no suggestion in the court's opinion that Lute would have been disqualified from possessing firearms if he had sought to register an NFA item as an individual, despite his personal problems in the months immediately preceding the shootings.

[6] Contrary to the suggestion of Comment 5420, Waller's duties for the department were purely administrative and he was not a patrol officer or detective. *See Searcy,* 38 F.3d at 284. Multiple comments suggest that the murder victim, Lawrence Hileman, was a police informant, *see* Comments 0108, 1040, 1302, 1486, 3308, 5420, 5503, and although nothing in opinions of the U.S. Court of Appeals for the Sixth Circuit and U.S. District Court for Southern District of Ohio suggest that was the case, local news coverage supports that view.

murder. *Id.* at 284-85. Waller had registered the MAC-11 as an individual, submitting forms to ATF with the signature of his CLEO. *Id.* at 285.[7]

In *State of Ohio v. Shau Chao Ho,*[8] the murder weapon as described by the newspaper account was a machinegun with a silencer. The newspaper article speculates that the crime would have been solved earlier if local law enforcement could have obtained information regarding the fact the defendant owned a machine gun, seeming to suggest that the machine gun was registered and the limitation on disclosure of information from the NFRTR hampered the investigation. Nothing in the court file identifies the specific type of firearm used in the murder.

* * *

Despite the identification of a few additional cases, the conclusion remains the same as set forth in FICG's comment: there is nothing in ATF's proposed rule that would have applied to any of the situations.

3. *ATF Misapprehends Why CLEOs Refuse to Sign Forms*

FICG demonstrated in its Comment (page 61) that many CLEOs refuse to sign forms due to an anti-gun animus. FICG specifically addressed the situation in Philadelphia where a law enforcement officer himself could not get a CLEO signature. That experience is underscored by other comments filed by residents of Philadelphia. *See, e.g.,* Comment 7156.

A comment recently posted to www.regulations.gov provides yet another powerful illustration of the anti-gun animus that motivates many CLEOs to refuse to sign forms. As Luis Rose of Sterling Arsenal observed, Fairfax County Virginia's Sheriff-Elect, Stacey Kincaid,

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[7] The facts recited in the opinion thus contradict the statement in Comment 5503 that the firearm was "police department issued".

[8] The Medina County (Ohio) Court of Common Pleas, Judge Judith A. Cross, entered sentence in docket number 98 CR 0369 on October 30, 1998. The September 14, 1992, date of this murder suggests it represents the second incident referenced in Comments 1302 and 5420.

campaigned on a platform of gun control that included a pledge to refuse to sign ATF forms for NFA firearms. Comment 5195. In the course of a primary debate on July 17, 2013, she explained her position rested on her view that "if you want to own a gun and keep yourself safe, I'm not sure that you need an arsenal of weapons of that magnitude in order to do so." Tom Jackman, "First Female Sheriff of Fairfax County Could Emerge From November Election," *Washington Post,* Oct. 21, 2013 (Exhibit 51). The incumbent sheriff, Mark Sites, stated that upon his on July 1 appointment, he had instructed his staff to no longer process ATF forms for NFA firerarms because he thought "these weapons have any part in our community." A video recording of the debate can be found here: http://www.youtube.com/watch?v=G78or8hmeVs

Many additional comments made the observation that CLEOs who were asked did not indicate that the change in wording of the certification would make a difference. *E.g.,* Comments 6610, 6615, 6616, 6636, 6696, 6718. And other comments also have observed that there is no indication that CLEOs will change their stance. *E.g.,* Comment 7796, 7989.

The fact that current and former law enforcement officers have voiced opposition to the proposed rule -- particularly the CLEO certification requirement -- is a further indication that ATF's proposed change in the wording of the certification will do nothing to address the real problem. *E.g.,* Comments 7936, 7938, 8067, 8099, 8128. Indeed, a former CLEO himself explicitly made that point. John P. Finn observed that in more than thirty years of service in law enforcement, including time as a CLEO, he processed many NFA applications and never once "discover[ed] that an [sic] bona fide applicant was a proscribed or unqualified person." Comment 7963. The entire "process served simply to waste [his] time" and ATF's proposal would do nothing "other than to expand and continue a useless and, viewed broadly, expensive procedure." *Id.*

C. *ATF Underestimates the Cost of the Proposed Rule*

1. *Number of Responsible Persons Per Legal Entity*

FICG demonstrated that ATF's estimate of the number of responsible persons per legal entity was absurdly low (pages 62-63). Subsequently-posted comments provide yet additional support that view. *E.g.,* Comment of Texas Law Shield LLC (7796), pp. 5-6; Comment of American Silencer Association (7909), p. 4; Comment of NFATCA (7998), p. 6; Comments 7125, 7946, 8360, 8361.

2. *Length of Documentation of Legal Entity*

FICG illustrated that ATF's estimate of the average length of documentation of the existence and validity of legal entities was flawed (page 63). Newly-posted comments support that observation. For example, the Comment of Anthony Wageman (6766), noted that the author's trust "is comprised of 18 articles and over 70 pages." Comment 6766, p. 4. Attorney Trent D. Woods noted that the gun trusts he drafts "are at least 65 pages long" and that he knew a substantial number of attorneys who generate trusts equally as long. Comment 7946, p. 3.

3. *Cost of Fingerprints and Photographs*

FICG explained that ATF had seemingly relied on low estimates with respect to the cost of obtaining fingerprints and photographs (pages 63-64). Comments subsequently posted to the docket confirm that observation. *E.g.,* Comment 7993 ($50 for fingerprints), 8366 ($60 for fingerprints and $20 for photographs). Other comments point out that few CLEOs are likely to certify fingerprints and photographs that have not been taken by their own agencies so that, as a practical matter, there are many fewer options from which to obtain fingerprints and photographs (as well as fewer available CLEOs to the extent an agency does not offer such services.) *E.g.* Comment of Texas Law Shield LLP (7746), Comment 8360. And, to the extent ATF's proposal

requires use of physical fingerprint cards, the fact that many law enforcement agencies have switched completely to digital prints and photos further restricts options thereby increasing travel time and limiting CLEO options. *E.g.,* Comments 7746, 8360. As a result, as such comments observe, ATF's estimate of the time needed to obtain fingerprints and photographs appears low.

5. *Hearing Loss*

FICG explained how added regulatory obstacles to the acquisition and sharing of silencers (or "suppressors") would impose massive costs in terms of hearing loss (pages 65-66). To further underscore the magnitude of such costs, one subsequently-filed comment observed that the Department of Veterans Affairs alone "spends approximately 1 billion a year on treating tinnitus in our military veterans." Comment 7818. The increased incidence and severity of hearing loss as a result of ATF's proposal prompted opposition from medical doctors aware of the danger, *e.g.,* Comments 6674, 6826, as well as individuals who already suffer from some measure of hearing loss, *e.g.,* Comments 6877, 7120, 7813, 8169, and shooters who have experienced the benefits of using a silencer in a range of different environments, *e.g.,* Comments 6610, 6704, 6755, 7123, 7125, 7182, 8012, 8065.

D. *The Proposed Rule is Unworkable*

FICG detailed the practical problems with implementation of ATF's proposed rule (pages 66-67 and Comment of David M. Goldman (Comment 1899), pp. 39-40). The comment of attorney Michael Taylor adopted a different analysis to make the same point. In essence, ATF's rule grants CLEOs extraterritorial control of residents without regard for the different laws of a jurisdiction where the resident acts or where the firearm is stored and used. *See* Comment 7346. In our federal system, the U.S. Constitution does not permit one State to project its regulatory regime into the jurisdiction of another State. *See Sullivan v. Oracle Corp,* 254 P.3d 237, 246

(Cal. 2011) (citing *Healy v. The Beer Institute,* 491 U.S. 324, 336-37 (1989)). The Supreme Court of Connecticut summarized the doctrine disfavoring the extraterritorial application of statutes:

> Many state courts have applied this principle to state statutes. *See Avery v. State Farm Mutual Automobile Ins. Co.,* 385 N.E.2d 801 (2005) (noting "longstanding rule of construction in Illinois which holds that a statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute" (internal quotation marks omitted)); *Consumer Protection Division v. Outdoor World Corp.,* 603 A.2d 1376 (Md. App.) ("as a general rule, one [s]tate cannot regulate activity occurring in another [s]tate, and ... in deference to that principle, regulatory statutes are generally construed as not having extra-territorial effect unless a contrary legislative intent is expressly stated"), *cert. denied,* 610 A.2d 796 (Md. 1992); *Sexton v. Ryder Truck Rental,* 320 N.W.2d 843 (1982) (because "[t]he general rule of law is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction ... [i]n order for a statute to have extraterritorial application, there must be clear legislative intent" (citations omitted; internal quotation marks omitted)). As these cases reveal, the primary reason for the presumption against the extraterritorial application of statutes is that states have limited authority to regulate conduct beyond their territorial jurisdiction.

Abel v. Planning & Zoning Comm'n, 998 A.2d 1149, 1157 (Conn. 2010) (internal parallel citations omitted). And even when Congress legislates, courts require a clear statement to overcome the presumption against extraterritorial application of law. *E.g., Morrison v. National Australia Bank Ltd.,* 561 U.S. 274 (2010); *Small v. United States,* 544 U.S. 385, 388-91 (2005). Where, as here, ATF is operating with, at best, delegated authority, it should hesitate to assume it may grant such extraterritorial authority to CLEOs.

V. LESS BURDENSOME ALTERNATIVES TO ATF'S PROPOSED RULE

B. *A More-Nuanced Approach With Respect to Responsible Persons*

FICG explained that the gross overbreadth of ATF's proposed definition of a "responsible person" rendered the rule unworkable. FICG suggested an alternative approach following that in the context from which ATF seems to have borrowed the concept (pages 73-75). Subsequently-posted comments provide additional support for that approach. *E.g.,* Comments 6610, 6638, 6642, 6696.

Philip Webb detailed how he spent more than seventy hours seeking to obtain CLEO certification only to be denied consistently despite the lack of any disqualifying feature in his background. Comment 7802. Illustrating the irony of ATF's approach, he determined that it was easier to get a license as a FFL SOT than to obtain approval to accept the transfer of a single NFA firearm. As FICG pointed out in its Comment, it is utterly bizarre that ATF has adopted (and now proposes to expand) a requirement that makes it more difficult to obtain permission to own a single NFA firearm than it is to receive authority to deal in such firearms in bulk.

D. *A More-Nuanced Approach with Respect to NFA-Regulated Firearms*

FICG pointed out that there are differences among classes of NFA-regulated firearms that warrant consideration of something other than a one-size-fits-all imposition of additional regulatory burdens (pages 76-77). Subsequently-posted comments made the point, for example, that a quicker, less-burdensome process should be available with respect to the acquisition of silencers. *E.g.,* Comments 6645, 6689, 7796. Comments also support the view that SBSs, SBRs, and AOWs could be subject to less-restrictive regulations. *E.g.,* Comments 7796 and 8361.

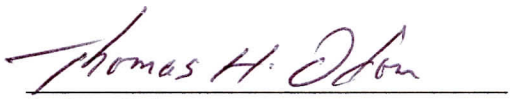
E. *A More-Nuanced Approach With Respect to Legal Documentation*

In the event ATF determines to require the submission of documentation of the existence and terms of a legal entity, there are less-burdensome alternatives than requiring submission of all exhibits, schedules, amendments, together with a the entire legal instrument. With respect to trusts, for example, the Comment of Anthony Wageman (6766) suggested that ATF require only an "Affidavit of Trust" (or, as it is known in some jurisdictions, a "Certificate of Trust"), in lieu of the more-lengthy trust document. Such a document would identify the settlor and trustees of the trust without requiring the submission of pages and pages of provisions that address, for example, the distribution to beneficiaries at some remote time. To the extent ATF is disinclined to carefully distinguish among different types of trusts with vastly different provisions, there would seem to be little need for ATF to review more information than that contained in an Affidavit of Trust or Certificate of Trust.

* * *

Thank you for your consideration of this additional material.

Respectfully submitted,



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January 21, 2014

LIST OF EXHIBITS

Exhibit 43: DOJ Letter to Thomas H. Odom, dated Jan. 16, 2014

Exhibit 44: NFATCA Posting Regarding Approved FOIA Request, dated Jan. 8, 2014

Exhibit 45: Letter from ATF Acting Special Agent in Charge, Dallas Field Division, dated Jan. 6, 2009.

Exhibit 46: http://americansilencerassociation.com/an-update-on-41p/

Exhibit 47: Letter from FICG to ATF dated Jan. 15, 2014.

Exhibit 48: Letter from Pennsylvania Attorney General Kathleen G. Kane to Joshua Prince, dated Jan. 7, 2014.

Exhibit 49: Verified Statement of Dr. Fritz J. Scheuren

Exhibit 50: *State of Nevada v. David Riebel,* Case No. 18897, Hearing on Motions, Mar. 14, 1988, Transcript of Proceedings

Exhibit 51: Tom Jackman, "First Female Sheriff of Fairfax County Could Emerge From November Election," *Washington Post,* Oct. 21, 2013 http://www.washingtonpost.com/blogs/local/wp/2013/10/21/first-female-sheriff-of-fairfax-county-could-emerge-from-november-election/

Exhibit

43

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

January 16, 2014

Thomas H. Odom
Prince Law Offices, P.C.
646 Lanape Road
Carlisle, PA 17015
todom@princelaw.com

Re: Appeal Nos. AP-2014-00986 &
AP-2014-01186
Request Nos. 14-0172 &
14-[unknown]
ADW:MTC

VIA: E-mail

Dear Mr. Odom:

You attempted to appeal from the failure of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to respond to your request for access to records concerning proposed ATF Rule No. 14P.

Department of Justice regulations provide for an administrative appeal to the Office of Information Policy only after there has been an adverse determination by a component. See 28 C.F.R. § 16.9(a) (2013). As no adverse determination has yet been made by ATF, there is no action for this Office to consider on appeal.

As you may know, the Freedom of Information Act authorizes requesters to file a lawsuit when an agency takes longer than the statutory time period to respond. See 5 U.S.C. § 552(a)(6)(C)(i). However, I can assure you that this Office has contacted ATF and has been advised that your requests are currently being processed. Furthermore, I have learned that ATF has yet to assign a tracking number to the request you refer to as 14-[unknown] in your appeal. If you are dissatisfied with ATF's final response, you may appeal again to this Office.

This Office has forwarded a copy of your letter to ATF. I suggest that you contact ATF's Requester Service Center at 202-648-8740 for further updates regarding the status of your request.

Because I am closing your underlying appeals, your request for expedited treatment of these appeals is moot.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue

litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

Sean R. O'Neill
Chief
Administrative Appeals Staff

By: Anne D. Work

Anne D. Work
Senior Counsel
Administrative Appeals Staff

Exhibit

44

National Firearms Act Trade & Collectors Association (NFATCA)
January 8

We have a ton of data inbound from a FOIA request that actually got approved (!). In the mean time...

Do you have a "problem free" Form 1 or Form 4 application that has taken more than 9 months to approve? When I say "problem free" I am referring to an application that does not have errors or additional documentation requested from NFA Branch. So no "I forgot to enclose a check," "I left a box bl... See More

Like · Comment · Share 3

Adam Kraut

What was the information that you requested in the FOIA request? When did you file that request if you would please share.

Sat at 10:28AM · Like

National Firearms Act Trade & Collectors Association (NFATCA)

We requested specific data regarding the processing of the various NFA forms by NFA Branch over time and also specific metrics on the eForms system as it relates to NFA.

Yesterday at 9:09AM · Like

Adam Kraut

When did you file that request?

Yesterday at 1:26PM · Like

National Firearms Act Trade & Collectors Association (NFATCA)

The "official" FOIA request went out on 11/21/13. I know that the data pull has mostly been completed by the branch. I am told that the hold up is with the disclosure folks. Sadly, one part holding up another part is a common government story...

Yesterday at 3:25PM · Like

Exhibit

45

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Dallas Field Division

1114 Commerce Street, Room 303
Dallas, Texas 75242

www.atf.gov

JAN 0 6 2009

CA:DA:105314
KJH

[redacted]

Dear [redacted]

Be advised that if you cohabitate with individuals who are prohibited from possessing firearms and ammunition you must take steps to secure firearms and ammunition from the prohibited persons. I hope the following information is of assistance.

As provided in Title 18, United States Code, section 922(g);

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The term "possess" as used in section 922(g) has been interpreted by the courts to mean not only the actual physical handling of a firearm or ammunition, but also the constructive possession of firearms or ammunition. A person constructively possesses a firearm or ammunition when the person has the ability to exercise dominion and control over the item. That is, a person who has the ability to access firearms or ammunition within a residence or in a vehicle has constructive possession of that firearm.

Where a person who is not subject to Federal firearms disabilities shares a residence with a person who is subject to the Federal firearms disabilities imposed by section 922(g), the nonprohibited person must take steps to ensure that the

001

46

[redacted]

prohibited person does not have access to firearms or ammunition stored or maintained within the residence. Securing the firearms and ammunition in a locked container to which the prohibited person does not have a key or combination would prevent a prohibited person from accessing firearms or ammunition stored or maintained within a residence. Please be advised that the same steps would be required for the transportation of firearms in a vehicle in which the prohibited person was travelling.

As provided in Title 18, United States Code, section 922(d):

> It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person –
>
> (1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .

A person who sells or otherwise provides a firearm or ammunition to a person they know or have reasonable cause to believe has been convicted of a crime punishable by imprisonment for a term exceeding one year is subject to not more than ten years imprisonment, a fine of up to $250,000, or both. See Title 18, United States Code, section 924(a)(2). In addition, a person who assists the possession of firearms or ammunition by a person convicted of a crime punishable by imprisonment for a term exceeding one year may be charged with aiding and abetting a violation of Title 18, United States Code, section 922(g)(1). See Title 18, United States Code, section 2.

Sincerely yours,

[redacted]
Acting Special Agent in Charge
Dallas Field Division

002

1-6

ACKNOWLEDGEMENT OF NOTICE

I hereby acknowledge that ATF Special Agent _____, has advised me of the provisions of 18 U.S.C. § 922(d) which makes it unlawful for any person to dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person has, among other things, been convicted of a crime punishable by imprisonment for a term exceeding one year.

I have further been advised that AFT Special Agent _____, has advised me that she has reason to believe that _____ is a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year.

I hereby acknowledge that I understand that it would be a violation of 18 U.S.C. § 922(d) for me to deliver or return the following firearm to _____ while he is subject to the Federal firearms disabilities.

Signed: _____

Printed name: _____

Date: _____

Firearm(s) identified as: _____

Exhibit

46

CLICK HERE TO RECEIVE EMAIL UPDATES

AN UPDATE ON 41P

Written by ASA on January 15, 2014 - Comments

On January 14th, the Board of the American Silencer Association met with the leadership of the NFA Branch of the ATF. The meeting was cordial and productive, with the focus of the conversation centered on ATF 41P. After SHOT Show, we will post a full debrief of the meeting. For now, we would like to give you a brief update.

In all, there were 9,504 comments received on the Federal Register. Of those, around 1,000 were disqualified for vulgarity, anonymity, or non-applicability. As you know, the overwhelming majority of comments were in opposition to the proposed CLEO signoff requirement. The ASA comment can be viewed here: ASA Comment

The standard timeframe for a final ruling is generally six months after the close of the comment period. However, because of the overwhelming amount of comments submitted, the final ruling will likely take at least a year to be issued. This is because each qualified comment must be responded to by the ATF in writing. With nearly 8,500 qualified comments, this will take quite some time.

After the final ruling is issued, there are generally 60 days before implementation. Until the ruling is released, we will not know if forms that are already in the transfer process will be exempt from the proposed requirements. However, if history is an example, it is likely that all forms received by the ATF prior to the implementation of the final regulation will be exempt.

The ASA is proud to represent this industry, and proud to have your support. Were it not for your comments, the CLEO signoff would have easily passed. Your efforts have made the administration think twice about requiring the antiquated and unnecessary signoff requirements for all transfers. The ASA will continue to work to ensure that it is removed. With your help, we will succeed!

This entry was posted in *41P, American Silencer Association, Educational, Law Enforcement, NFA, Silencers are Legal, The Industry* and tagged *41P, American Silencer Association, ASA, ATF, ATF 41P, Federal Register, NFA, Silencer, Silencer Industry, Suppressor, Suppressor Industry*. Bookmark the *permalink*. *Post a comment* or leave a trackback: *Trackback URL*.

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CATEGORIES

- 41P
- American Silencer Association
- Educational
- Law Enforcement
- NFA
- NRA
- Silencers are Legal
- The Industry
- Uncategorized

TAGS

ARCHIVES

- January 2014
- December 2013
- February 2012

Exhibit

47

FIREARMS INDUSTRY CONSULTING GROUP

A Division of Prince Law Offices, P.C.

Warren H. Prince
Karl P. Voigt IV
Joshua Prince
Thomas R. Beveridge
Eric E. Winter
Alexander Elliker
Phillip Alan Simon
Thomas H. Odom
Allen R. Thompson
Ian Friedman
Stanley Kuter, Esquire

Bechtelsville	1-610-845-3803
Allentown	1-610-770-1151
Bethlehem	1-610-814-0838
Camp Hill	1-717-731-0100
Lancaster	1-717-393-7002
Lebanon	1-717-274-9250
North Wales	1-215-412-0800
Pottstown	1-610-326-4200
Pottsville	1-570-621-8828
Reading	1-610-375-8425
Toll Free	1-888-313-0416
Fax	1-610-845-3903

January 15, 2014

Brenda Raffath Friend, Esquire
Bureau of Alcohol, Tobacco, Firearms, and Explosives
Office of Regulatory Affairs, Enforcement Programs and Services
Mailstop 6N-602
99 New York Avenue, NE,
Washington, DC 20226

RE: **ATF 41P**

Dear Attorney Friend,

I am writing with respect to a January 15, 2014, posting by the American Silencer Association ("ASA") on their Website that reports a private meeting between the ASA Board and the Bureau of Alcohol Tobacco, Firearms, and Explosives ("ATF"). ASA reports:

> January 14th, the Board of the American Silencer Association met with the leadership of the NFA Branch of the ATF. The meeting was cordial and productive, with the focus of the conversation centered on ATF 41P. . . . In all, there were 9,504 comments received on the Federal Register. Of those, around 1,000 were disqualified for vulgarity, anonymity, or non-applicability. . . .

You may read the full posting at http://americansilencerassociation.com/an-update-on-41p/.

In light of the fact that this purported meeting took place during the process of ATF's rulemaking proceeding and that the proceeding was the "focus of the conversation", I would like to know (1) who attended the meeting, (2) whether a transcript or recording was made, (3) whether ATF will be placing minutes of the meeting in the rulemaking docket, and (4) whether

ATF provided any advance public notice of the meeting.

To the extent ATF has held similar meetings during the pendency of the rulemaking proceeding, I request similar information with respect to each such meeting. In the event ATF plans any future meetings, I would hope ATF would provide advance public notice and I specifically request notification of any such meetings.

If ATF has determined to exclude "around 1000" public comments, please identify those comments by the assigned docket number. I am uncertain what ATF means by "non-applicability" of a submitted comment, let alone upon what legal authority ATF purports to rely in excluding comments from the docket.

After reading this letter, please place it in the rulemaking docket.

Yours truly,
Prince Law Offices, P.C.,

tho/web
Matter No. 31821
By fax: Brenda Raffath Friend, Esquire

Thomas H. Odom
todom@princelaw.com

Exhibit

48

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA 17120

KATHLEEN G. KANE
ATTORNEY GENERAL

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA 17120
(717) 787-3391

January 7, 2014

Joshua Prince, Esquire
Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505

Re: Request for Signature
ATF Form 1

Dear Attorney Prince:

Attorney General Kathleen G. Kane has asked me to respond to your recent correspondence on behalf of your client, Thomas Braddock, concerning the above-captioned matter.

The Attorney General has given very careful consideration to your request and after researching the applicable statutes and case law, the Attorney General will not sign AFT Form 1 as the Commonwealth's chief law enforcement officer. Local law enforcement officials, who are more familiar with Mr. Braddock and his ongoing efforts in this regard, have already declined to execute the ATF application on Mr. Braddock's behalf. The Attorney General sees no reason to disagree with their assessment of the circumstances and their decision.

Sincerely,

Lawrence M. Cherba
Executive Deputy Attorney General
Director, Criminal Law Division

LMC/pjc
SR-52964-QX2Y

Exhibit

49

VERIFIED STATEMENT OF FRITZ J. SCHEUREN, Ph.D.

My name is Dr. Fritz J. Scheuren. I am the Vice President for Statistics and Methodology at the National Opinion Research Center at the University of Chicago. I am a past President of the American Statistical Association. In addition to my academic experience, I also served the federal government as Director of the Statistics of Income Division of the Internal Revenue Service and as Chief Mathematical Statistician of the Social Security Administration. In those positions I helped to establish standards and methodologies to ensure administrative agencies generate statistically valid data. A copy of my *curriculum vitae* is attached to this statement.

I am familiar with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Notice of Proposed Rulemaking ("NPR") published on September 9, 2013, in volume 78 of the *Federal Register* at pages 55014 through 55029. I am also aware both that the Firearms Industry Consulting Group ("FICG") requested that ATF make available certain information referenced in the NPR that apparently underlies ATF's analysis and that ATF has, to date, declined to provide any of that requested information.

As pertinent to a statistical inquiry, there are two classes asserted in the NPR that demand investigation. In my view they share certain common flaws:

> *First,* and most vitally, is the issue of whether ATF made a statistically significant basis to conclude that the existing system of regulation should be revised. ATF made only three anecdotal references relative to the overall population of matters subject to ATF regulation.[1] An anecdote is not a sound statistical argument. Hence they did not satisfy this test.
>
> *Second,* with respect to estimating the costs that would be imposed by ATF's proposed rule, ATF purported to derive values from samples of "randomly selected" applications. ATF concluded "that each legal entity has an average of two responsible persons,"[2] and

[1] 78 Fed. Reg. at 55016, 55023.

[2] 78 Fed. Reg. at 55020.

that "the average number of pages in the corporate or trust documents" required to be submitted is "15 pages."[3]

A. *There Is No Statistically Valid Evidence of the Problem to be Addressed*

Pursuant to the National Firearms Act ("NFA"), ATF maintains a registry of certain firearms in its National Firearms Registration and Transfer Record. More than 3,000,000 firearms are listed in that registry. I am familiar with that registry and have previously testified as an expert with respect to its reliability.

ATF's entire rulemaking effort is apparently premised on no more than three examples of situations over an unspecified number of years in which, according to ATF's unverifiable assertion, a responsible person hypothetically had access to a NFA firearm held by a legal entity other than a Federal Firearms Licensee ("FFL"). ATF reported that 40,700 such legal entities sought permission to make or acquire a NFA firearm in 2012 alone.[4] ATF estimated an average of two responsible persons associated with each of those legal entities, for a total of 81,400 individuals gaining access to NFA firearms in 2012 alone. The number of individuals who have access to NFA firearms through association with a legal entity is cumulative, not simply the number approved in any one year. ATF's publication *Firearms Commerce in the United States Annual Statistical Update* (2013) contains year-by-year data on NFA firearms and associated forms dating back to 1990.[5] But ATF's summary failed to distinguish between forms submitted by non-FFL legal entities and other applicants.

The use of legal entities to hold NFA firearms was authorized by Congress in the NFA itself, enacted in 1934. ATF acknowledged that hundreds of legal entities annually made or

---

[3] 78 Fed. Reg. at 55021.

[4] 78 Fed. Reg. at 55020.

[5] *Firearms Commerce in the United States Annual Statistical Update,* Exhibits 6, 7, 7a (2013).

acquired NFA firearms. The NPR recited that the number of such forms increased from 840 in 2000, to 12,600 in 2009, to the 40,700 in 2012.[6] The total number of legal entities with NFA firearms is known only to ATF but would seem to number in the tens of thousands.[7] The number of individuals with access to NFA firearms via association with a legal entity would represent a multiple of the number of legal entities.[8]

With even the 81,400 individuals ATF counted for calendar year 2012 having access to NFA firearms, three examples represent such a minute fraction that no statistically valid prediction can be made that there are any other instances of this problem. ATF has refused to make available any information regarding the three examples that would permit meaningful inquiry into whether they are at all representative of the problem ATF claims now requires attention.

If, nonetheless, ATF were to go forward with its effort to formulate and impose a new rule, whatever benefits ATF claims would seem to require discount to reflect the very few instances in which there is any reason to believe the new rule would provide additional protection. That is, by one possible measure, the *marginal* benefit of added restrictions could be on the order of 3/81,400 or so. Stated, otherwise, the marginal cost needs to be multiplied by a factor of 81,400/3 to be measured against the total benefit.

---

[6] 78 Fed. Reg. at 55016.

[7] If the number of such forms averaged 840 for each year from 2000 through 2008, and averaged 12,600 for each year from 2009 through 2011, the total number of such forms through the end of 2012 would total over 80,000. But that computation assumes, as ATF seemed to assume, that each form represented a unique legal entity rather than that a legal entity submitted two or more forms.

[8] Calculation of the number of individuals with access to NFA firearms as a multiple of the number of legal entities assumes, as ATF seemed to assume, that no individual is associated with two or more legal entities.

B. *ATF's Sampling Methods for Cost Estimates Are Invalid*

Both ATF's estimate of the average number of responsible persons per legal entity and its estimate of the average length of documentation of a legal entity fail to demonstrate that they complied with basic safeguards to ensure valid results.[9] ATF's brief description and refusal to provide documentation of the methodology employed raise more questions than the NPR answers. For any valid result, it is essential that ATF used methods that ensure against selection bias but there is no indication ATF did so.

In one estimate, ATF surveyed a sample of "applications for corporations, LLCs, and trusts,"[10] while in the other estimate ATF surveyed a sample of only "corporation or trust documents."[11] ATF provided no explanation for including LLC documents in one sample and not the other.

I find it most troubling that in one instance ATF considered a sample "of 39 recent randomly selected paper (hardcopy) applications,"[12] while in the other instance ATF reviewed "documents for 50 recently randomly selected paper (hardcopy) submissions."[13] Without a valid explanation for the difference in sample sizes the results are highly suspect.

No explanation was offered for either sample size, let alone the discrepancy between the two. A sample size designed to produce a valid result in which one can have confidence requires consideration of whether the population from which the sample is selected is relatively homogeneous. ATF did not evidence any appreciation of that fundamental concept. ATF

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[9] 78 Fed. Reg. 55020, 55021.

[10] 78 Fed. Reg. at 55020.

[11] 78 Fed. Reg. at 55021.

[12] 78 Fed. Reg. at 55020.

[13] 78 Fed. Reg. at 55021.

refused to disclose the actual data from each entry in the sample, thereby concealing the range of variation within the sample. There is no reason to believe that the population of 40,700 applications from which the samples were drawn (if, indeed, they were drawn from the pool of applications in 2012) reflected a homogeneous group for such a small sample to have evidential value.[14] Indeed, the public comments filed in this proceeding suggest a wide diversity as authors indicated the number of trustees (or other responsible persons) and length of legal instruments. The comment FICG submitted on behalf of David M. Goldman (docket entry ATF-2013-0001-1899) documented the wide variations within the population from which ATF purported to randomly select its sample.[15] In such a heterogeneous population, a much larger sample size of the population of 40,700 (if that is from where they were drawn) would be required to produce a statistically valid estimate of the characteristics of an "average" legal entity.

* * *

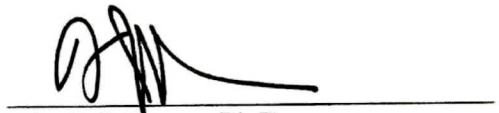
There is no statistically-significant evidence of the problem ATF purports to address with the proposed rule, even if one credits the three anecdotes. In weighing costs and benefits of the proposed rule, ATF must discount the benefits (or multiply the costs) to reflect the very few examples from the large population of individuals with access to NFA firearms via legal entities. ATF estimates of the number of responsible persons per legal entity and the length of documentation of each legal entity cannot form the basis for any valid evaluation of the costs of the proposed rule as a result of lack of transparency in methodology, inadequate description of

[14] At best, given what has been presented, the work may have value in an exploratory study, but not in a confirmatory effort, as would seem to be required in support of rulemaking. An exploratory study is merely a preliminary step to ascertain whether to undertake a full study of the issue.

[15] Comment of David M. Goldman (1899), Part II(C), Part IV(A) & (B).

the data in the sample, the likelihood of selection bias, the unexplained difference in the sample sizes, and the small sample size relative to the overall population.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2014.



Fritz J. Scheuren, Ph.D.

FRITZ J. SCHEUREN, PH.D.

EDUCATION

Ph.D.	(Mathematical Statistics) The George Washington University (1972)
M.A.	(Statistics) The George Washington University (1970)
B.A.	(English Literature) Tufts University (1963)

PROFESSIONAL EXPERIENCE

2001 to Present Vice President, Statistics, National Opinion Research Center (NORC) at the University of Chicago

Dr. Scheuren joined NORC as Vice President for Statistics and Methodology to work on a major effort then just getting underway in late 2001 to help the Department of Interior with its handling of Individual Indian Money (IIM) Trust fund records. He led in the production of (literally) a 100 major NORC research reports, most of which have been compiled into compendia and are available online. He is an overall editor in this series and its principal author. This role allowed him to employ his considerable sampling and audit expertise. He has testified on this Indian Trust work and his team at NORC were involved in a 0.5 billion dollar settlement, most of which just was distributed to IIM Accountholders.

Following the 2000 Presidential Election NORC became increasingly involved in US Election measurement issues. In fact, since 2004 Dr. Scheuren has become very active on voting. For example, he led a *pro bono* exit polling activity in Albuquerque NM in 2004 and in Columbus OH in 2006, where he was the NORC Co-Project Director. The 2006 experience arose because NORC, as a public service, sponsored a telephone survey of eligible voters in two Ohio counties to determine whether they experienced any problems with the voting process. NORC has continued to conduct follow-up election polls and even did a poll as part of the 2012 US Presidential Election. Scheuren's 2008 book Elections and Exit Polls, with Wendy Alvey was an outgrowth of his and his students and colleagues efforts.

Dr. Scheuren has been heavily involved in overseas consulting to support US efforts to address our country's response to the Millennium Development Goals and more recently estimating the number of US citizens/voters living mainly outside the United States. Dr. Scheuren also advises on HIPAA privacy protection matters, as he remains heavily involved in privacy and confidentiality issues beginning with his days at IRS and SSA. Occasionally he also engages on minor one-off efforts outside NORC. For example, Dr. Scheuren has submitted expert testimony before both the New Jersey Legislature and later the US Senate on how to statistically audit voting in 2008 and in 2011 on federal gun registration in Oklahoma and on the recent Haitian Presidential election, having volunteered earlier in Haiti right after the January 12, 2010, Earthquake. In February 2013, he testified as an expert in Bethel, Alaska.

1999 to 2001 Senior Fellow, The Urban Institute

Dr. Scheuren was in overall statistical charge of the Urban Institute's National Survey of America's Families (NSAF), part of the effort made to measure the impact of US welfare reform. In addition to his managerial duties, he was the editor and a principal author in the 1997 and 1999 NSAF Methodology Series (33 volumes). That survey was a major part of the Urban Institute's ***Assessing the New Federalism*** project, with nearly 300 publications on welfare reform and related issues. At the time his distribution of NSAF data and metadata won praise as an example of best practice among web-distributed statistical datasets.

1996 to 1999 National Technical Director and Principal, Statistical Sampling & Economics Group, Ernst and Young, LLP (E&Y)

Dr. Scheuren was a Principal at E&Y, working in the National Tax Division where his practice covered many federal as well as state taxation issues, including sales and use taxes. He had considerable representational experience before regulatory and legislative bodies, including the US Congress. His sample designs built extensively on existing client operating records and, hence, were very informative and economical. He led a team that critically examined an audit of the major telecoms by the Federal Communications Commission and was able to achieve a useful compromise for all concerned.

1994 to 1996 Visiting Professor of Statistics, The George Washington University (GWU)

Professor Scheuren taught the entire sampling sequence while a visiting professor at The George Washington University, plus many service courses. While there, he set up a graduate certificate program in survey research, on which he still advises. His extensive consulting eventually drew him away from full-time teaching. His consulting on tax issues, both audit and information issues, was what brought him to Ernst and Young.

1980 to 1994 Director, Statistics of Income Division, Internal Revenue Service (IRS)

As the long time Director of the Statistics of Income Division, Dr. Scheuren, using the quality improvement ideas of Deming and Juran, completely transformed the organization. Its statistical activities, computer hardware and software, and customer focus were all modernized. His efforts mainly dealt with issues of national importance to the economy and he was recognized for this with the prestigious Shiskin Award in Economic Statistics (1995).

1973 to 1980 Chief Mathematical Statistician, Social Security Administration (SSA)

Dr. Scheuren, as the chief spokesperson at Social Security for statistical methodology, made major advances in the formulation and especially the delivery of statistical data to outside researchers and the public at large. His work included, among other matters, assessing the results of large-scale administrative and survey studies and occasionally representation of the agency before Congress. He sponsored and participated in seminal work on the handling of missing data, including a role in the creation of "Multiple Imputation" (as described in his November 2005 paper in the ***American Statistician***.)

RECENT PROFESSIONAL SERVICE ACTIVITIES

Human rights projects include US and overseas work done involving Armenia, East Timor, Guatemala, Haiti, Peru, Republic of Georgia, Russia, South Africa, Vanuatu, plus Afghanistan refugees in Pakistan and Kosovar refugees in Albania. He has helped train Iraqi pollsters in Jordan and Turkey and is continuing to support Iraq democracy and resettlement efforts.

President, American Statistical Association, 2005
Member Board of Scientific Councilors, National Center for Health Statistics, 2003 to 2004.
Member Advisory Board for Evaluation of AmeriCorp Program, 2003 to present
Member, Committee on Scientific Freedom and Responsibility, American Association for the Advancement of Science, 2002 to 2007

Vice-President American Statistical Association, 1999 to 2001
Scientific Secretary, International Association of Survey Statisticians, 1997
National Academy of Sciences, Committee on Applied and Theoretical Statistics, 1994 to 1997
President, Washington Statistical Society, 1991 to 1992

Editor in Chief, **Statistical Journal of the IAOS**, April 2013
Associate Editor, ***Survey Methodology***, 1986 to present
Associate Editor, ***The American Statistician***, 2003 to 2006

Associate Editor, ***Journal of the American Statistical Association***, 1989 to 1996
Associate Editor, ***Journal of Business and Economic Statistics***, 1983 to 1989

Adjunct Professor of Statistics, The George Washington University, 1985 to present
USDA Graduate School Statistics Advisory Board, 1989 to present
Advisory Board Member, George Mason University Statistics Department, 1999 to 2006

HONORS

First Recipient for ASA Peace Award for Contributions for Betterment of Society (2012)
Distinguished George Washington University Alumni Achievement Award (2006)
American Immigration Lawyers Association Human Rights Award (2005)
Harry V. Roberts Statistical Advocate Award (2004)

Chartered Statistician, Royal Statistical Society (2003)
American Statistical Association Founders Award (1998)
Julius Shiskin Award for contributions to U.S. economic statistics (1995)

Finalist, Senior Executive Association Executive Excellence Award (1992)
Elected Member, the International Statistical Institute (1988)
Fellow, the American Association for the Advancement of Science (1984)
Fellow, the American Statistical Association (1981)

BOOKS PUBLISHED (8):

Mollie Orshansky: The Beginning of a New Paradigm (with Joan Turek, et. al 2013), Oral History of the Eloise Cobell Indian Trust Case (with Leslie Graham et al. 2013), ASA Presidential Papers (2010), Elections and Exit Polling (2008), Statistical Methods for Human Rights (with Jana Asher et. al 2007), Data Quality and Record Linkage Techniques (with Thomas Herzog et. al 2007), What is a Survey (2004), Through a Statistician's Black Bag (with Elizabeth Scheuren, 1995)

BOOKS IN PREPARATION (3):

Data Quality and Record Linkage Techniques, Second Edition.
Kuhn's and the Census Class of 1940
Profiles of Statistical Leadership

OTHER PUBLICATIONS (NEARLY 500):

Nearly 500 applied and theoretical papers, monographs, and books focused on the sampling of operating records, survey design, process quality, auditing, and the handling of missing data. Dr. Scheuren also submitted many reports orally and in writing before regulatory and judicial bodies, here in the United States and internationally.

CITATIONS:

Full citations of Dr. Scheuren's publication record are provided on request. Some presentations that were not submitted later to proceedings may have been omitted.

Exhibit

50

Case No. 18897

-oOo-

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

THE HONORABLE NORMAN C. ROBISON, DISTRICT COURT JUDGE

-oOo-

THE STATE OF NEVADA,

Plaintiff,

-vs-

DAVID RIEBEL,

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS

MARCH 14, 1988

MINDEN, NEVADA

APPEARANCES:

For the Plaintiff: BRENT T. KOLVET
District Attorney
Minden, Nevada

For the Defendant: NORMAN C. HERRING
406 N. Nevada
Carson City, Nevada

Reported by: SUZANNE KUES ROWE, CSR, RPR, CP
Nevada CSR #127

ORIGINAL

Mac Richmond investigator on it. That is one of the psychological problems in this case, is that there may be a multiple personality syndrome involved.

THE COURT: If that's the case, that's just another reason why he might be a danger to the community.

I've got to cut this off. I'm going the tell you straight up. I am not going to be the one that turns him loose on the community. If the Supreme Courts want to do that, make your motion. The motion to reduce bail is denied.

MR. KOLVET: Your Honor, if I may just correct the record somewhat.

THE COURT: Let's make it brief.

MR. KOLVET: It will be -- Your Honor, there is an affidavit on file with respect to the search warrant that was requested by Richard Stoltz of the Department of -- Bureau of Alcohol and Tobacco and Firearms, that on October 26th, 1987, ATF special agents caused a records check to be conducted, and that as a result of that records check there was no record that the Schneider model MP 40 nine millimeter sub-machinegun used in this case or the homemade .22 caliber silencer were registered to Mr. Riebel.

I just wanted that fact mentioned.

THE COURT: I've already ruled on the motion. Remanded to the custody of the Sheriff. Bail will remain. Make your motion to the Supreme Court.

Exhibit

51

The Washington Post Print

First female sheriff of Fairfax County could emerge from November election

By Tom Jackman, Updated: October 21 at 5:00 am

The actual job of being the sheriff of Fairfax County usually is not as exciting as the campaign for the job. The job is not the police chief, as it is in Loudoun County; it's the operator of the county jail, the guardian of the county courthouse and the server of civil papers like subpoenas and evictions, as it is in Alexandria, Arlington and Prince William.

The campaigns, on the other hand, usually involve a decent helping of mud, such as two years ago when Republicans attacked incumbent Democrat Stan Barry for entering the county's deferred retirement program and then continuing to hold office.

But Barry retired mid-way through his term. And this election, the mud has been fairly low-key, with the worst dirt being whether voters care that the Democratic nominee, sheriff's Capt. Stacey Kincaid, may own an assault rifle, or that the Republican nominee, former Fairfax City Officer Bryan Wolfe, has had his truck and property repeatedly vandalized since he entered the race. If neither of those issues blows up in the next two weeks, Kincaid is poised to become the first female sheriff of Fairfax County, ending a 271-year hold on the job by the previous 76 men.

In increasingly liberal Fairfax, the race may have been won in July, when Kincaid outmaneuvered current acting Sheriff Mark Sites for the Democratic nomination. This race featured two prominent Fairfax politicos working behind the scenes: former Fairfax board chairman and Secretary of the Commonwealth Kate Hanley advising Kincaid, and ex-Sheriff Barry, son of former county clerk and state Sen. Warren Barry, guiding Sites. Barry promoted Sites rapidly through the ranks to chief deputy, in a way which irked some of the rank-and-file, and had him in position to be named acting sheriff when Barry retired in June.

But Kincaid, 48, was getting invaluable assistance from Hanley, who is not only a family friend but also wants to see more women get elected to public office, which is hard to argue with. Kincaid is a 26-year veteran of the sheriff's office who has worked in all four of its divisions, and is very knowledgable about the internal issues such as the budget and promotions process, civil service protection and mentally challenged inmates that are the nuts-and-bolts problems facing the sheriff. Not sexy issues, to the public, but the major items the next sheriff will deal with.

So Kincaid racked up endorsements from professional groups and key Democrats, actively courted immigrant communities, campaigned tirelessly — her Facebook page of events attended is endless — and then trounced Sites in a heavily attended caucus at W.T. Woodson High School, 63 percent to 37 percent.

At that point, the Republicans didn't even have a candidate. Up stepped Wolfe, 52, who retired after 26 years as a Fairfax City patrol officer and sergeant, and he received the Republican nomination in August. Two independents, security analyst Robert Rivera and propane salesman Chris DeCarlo, also joined the ballot. Rivera, who worked as an Arlington sheriff's deputy for five years in the 1990s and has held a variety of jobs since, including helping oversee military police forces in Afghanistan, said he would make the Fairfax sheriff's office more visible in the community. DeCarlo, who is also running for a delegate's seat, admitted at one forum he only recently learned what the sheriff does. He then performed a rap about "catching these thieves," which is not what the sheriff does.

Wolfe is a considerably more serious candidate, and one of the first things he did was to file a Freedom of Information Act request for all of Kincaid's e-mails and phone records, which he said cost him about $4,000. What he received were some e-mails indicating that Kincaid apparently legally purchased a couple of AR-15 rifles from a dealer in Maine earlier this year. Then several months later at a Democratic debate, in discussing "assault weapons," Kincaid said, "if you want to own a gun to keep yourself safe I'm not sure that you need an arsenal or weapons of that magnitude in order to do so."

Wolfe said he decided to enter the race after hearing that comment, since it was apparently common knowledge in the sheriff's office that Kincaid had such guns. "That upset me tremendously that she said that," said Wolfe, "She's a hypocrite."

Kincaid said, "I'm a law enforcement officer, the only one in this race, and I have guns." She said she had passed background checks and purchased guns legally, but declined to say what specifically she owns. "I'm pretty sure the community has an expectation that law enforcement officers have weapons and are proficient with the same ones the bad guys use. I'm not hypocritical. I support expanding background checks, which my opponent who is an NRA member does not. I don't make the laws, I support the laws."

As the only county-wide office on the ballot this year, Kincaid and Wolfe have participated in nine community forums sponsored by the League of Women Voters that also featured various Fairfax state delegate races. In those forums, Wolfe has raised eyebrows by saying he would immediately seek to fire a handful of Fairfax deputies who he feels are unacceptable for various legal or ethical violations, and he would not grant deputies civil service protections. He wants more mental health training for deputies, and said he would donate his salary to charity. Wolfe also said the county jail needs cameras with recording capacity to capture any possible misdeeds by deputies or inmates. And in a recent forum, Wolfe vented about four recent vandalism incidents against his vehicles, his home flower beds and his signs. He said this was because "I have the courage to run for sheriff."

Kincaid said she would not fire anyone and would sign an agreement to place deputies under civil service protection, in which they cannot be fired at will and can appeal disciplinary actions to a county board. She said there are plenty of cameras already in the county jail, monitored 24/7, and that the system is being upgraded. But installing a massive recording system would be very costly and "is a solution in

search of a problem," since there are only about two complaints of excessive force filed against deputies per year.

Kincaid wants to make the sheriff's promotional process more "fair and transparent," to ensure that the staff "reflects the diversity of our community." She has said at many public appearances that "we don't have a diverse command staff with one white woman and five white guys." Kincaid said she would develop citizen outreach groups in Fairfax's minority communities. She also wants to reduce recidivism by working with the business and labor communities to develop training for inmates, and she wants to work more with the mental health community to help those with mental illness both during and after confinement.

Rivera, who has also been a car salesman and a McDonald's franchise operator in addition to a military security consultant, said he wanted deputies to make more public appearances to increase the visibility and desirability of the sheriff's office. He said he wanted to make the jail less of a holding facility for those with mental illness, possibly by releasing them with tracking bracelets.

The financial aspect of the campaign is notable mainly for the utter lack of support that Republicans have given Wolfe so far. While Kincaid has a variety of donations from local Democratic groups and officials, including one last month from former Sheriff Barry, Wolfe reports only two donations total: $50,000 from his father-in-law, Alexandria dermatologist Joseph Kaufman, and $150 from the George Mason Republican Women. Wolfe has loaned himself another $75,000 (his wife is also a dermatologist), so he has outraised Kincaid $125,000 to about $77,000 from two sources. Rivera reports raising $1,500 as of Sept. 30 and DeCarlo has raised $175 for his two races.

And because no one would really object to a rapping sheriff, here is DeCarlo's campaign rhyming platform. He apparently also rides a horse, which a sheriff could do, but might be impractical for guarding inmates or securing the courthouse.