Bureau of Alcohol, Tobacco, Firearms, and Explosives

Amended Definition of "Adjudicated as A Mental Defective" and "Committed to; A Mental Institution"	)	Docket No. ATF 51P RIN 1140-AA47

Firearms Industry Consulting Group's
Comments in Opposition to Proposed Rule ATF 51P

Joshua G. Prince,
Chief Counsel
Firearms Industry Consulting Group,
a Division of Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505
888-313-0416

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On January 7, 2014, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF" or the "Agency") published a Notice of Proposed Rulemaking ("NPR") in the Federal Register at Volume 79, pages 774 through 777, to institute this rulemaking proceeding with respect to an individual "adjudicated as mental defective" or "committed to a mental institution" pursuant to the Gun Control Act ("GCA"), 18 U.S.C. § 921, et seq. ATF's current regulations under the GCA are codified at 27 C.F.R. Part 478.

The Firearms Industry Consulting Group ("FICG"), a division of Prince Law Offices, P.C., represents numerous individuals, gun clubs, and Federal Firearms Licensees ("FFLs") in Pennsylvania with regard to State law issues. Furthermore, in relation to federal issues, FICG represents numerous FFLs across the United States in all matters relating to firearms. FICG actively works to defend, preserve, and protect constitutional and statutory rights of firearms owners, including through Article I, Section 21 of the Pennsylvania Constitution and the Second Amendment to the United States Constitution. In this comment, FICG represents the interests of its respective clients.

FICG's purpose is:

> To provide legal representation in the protection and
> defense of the Constitutions of Pennsylvania and the United States,

> especially with reference to the inalienable right of the individual citizen guaranteed by such Constitutions to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens.

FICG's interest in this matter stems from its representation of numerous Pennsylvania citizens and FFLs nationwide who could be harmed, including individual fundamental, inalienable rights being limited, by enactment of this proposal. In response to the NPR, FICG offers this public comment for consideration with respect to the proposed rule.

FICG opposes the proposed rulemaking for the reasons set forth below and in the Exhibits to this Comment incorporated herein by reference; however, FICG encourages ATF, to the extent it finds that it has authority to enter into rulemaking in defining "adjudicated as a mental defective" and "committed to a mental institution," to clarify that those terms do not include an adjudication or commitment (1) that occurs in the absence of due process; (2) that occurred when the person was under the age of 21; (3) that was for observation; (4) where the individual, post-commitment, serves the state or federal government and in such capacity possesses a firearm; or (5) where the individual, post-commitment, files for explosives relief from disability and is granted relief by ATF.

I. ATF IS AN IMPROPER AGENCY FOR RULEMAKING ON DEFINING OR CLARIFYING WHAT CONSTITUTES "ADJUDICATED AS A MENTAL DEFECTIVE" AND "COMMITTED TO A MENTAL INSTITUTION," AS THE FEDERAL BUREAU OF INVESTIGATION IS TASKED WITH THE INTERPRETATION OF WHAT CONSTITUTES A PROHIBITED PERSON UNDER 18 U.S.C. § 922(g).

As ATF is not the proper agency for defining or clarifying what constitutes "adjudicated as a mental defective" and "committed to a mental institution," because the FBI is empowered

with the interpretation of 18 U.S.C. § 922(g), ATF cannot proceed with any rulemaking in relation to this NPR. *See*, *United States v. Mead Corp.*, 533 U.S. 218 (2001).

The Brady Handgun Violence Prevention Act (Brady Act), Public Law 103-159, 107 Stat. 1536 (1993), required the implementation of the National Instant Check System (NICS), pursuant to 18 U.S.C. § 922(t).[1] The Attorney General delegated the implementation and control of the NICS system, including providing for an appeal process for erroneous denials, to the FBI. *See*, 28 C.F.R. §§ 25.1, 25.3.[2] Pursuant to 28 C.F.R. § 25.5,

> (a) The FBI will be responsible for maintaining data integrity during all NICS operations that are managed and carried out by the FBI. This responsibility includes:
>
> (1) Ensuring the accurate adding, canceling, or modifying of NICS Index records supplied by Federal agencies;
>
> (2) Automatically rejecting any attempted entry of records into the NICS Index that contain detectable invalid data elements;
>
> (3) Automatic purging of records in the NICS Index after they are on file for a prescribed period of time; and
>
> (4) Quality control checks in the form of periodic internal audits by FBI personnel to verify that the information provided to the NICS Index remains valid and correct.
>
> (b) Each data source will be responsible for ensuring the accuracy and validity of the data it provides to the NICS Index and will immediately correct any record determined to be invalid or incorrect.

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[1] Not all states are NICS states, such as Pennsylvania. In these non-NICS states, referred to as Point of Contact (POC) states, the state law enforcement agency tasked with performing background checks queries the NICS Index maintained by FBI. *See*, 28 C.F.R. § 25.2 defining POC as "a state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS. A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching

[2] *See*, 28 C.F.R. § 25.3 holding:

> (a) There is established at the FBI a National Instant Criminal Background Check System.
>
> (b) The system will be based at the Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306-0147.
>
> (c) The system manager and address are: Director, Federal Bureau of Investigation, J. Edgar Hoover F.B.I. Building, 935 Pennsylvania Avenue, NW, Washington, D.C. 20535.

See also, 28 C.F.R. § 25.2 defining *NICS Index* as "the database, to be managed by the FBI, containing information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm. The NICS Index is separate and apart from the NCIC and the Interstate Identification Index (III)."

More importantly, pursuant to 28 C.F.R. § 25.6, it is the FBI that is to determine whether or not an individual is prohibited when a NICS check is performed.[3]

> (c)(1) The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:
>
> (i) Verify the FFL Number and code word;
>
> (ii) Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL;
>
> (iii) Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and
>
> (iv) Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check:
>
> (A) "Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III.
>
> (B) "Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law. A "Delayed" response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first. (Example: An FFL requests a NICS check on a prospective firearm transferee at 9:00 a.m. on Friday and shortly thereafter receives a "Delayed" response from the NICS. If state offices in the state in which the FFL is located are closed on Saturday and Sunday and open the following Monday, Tuesday, and Wednesday, and the NICS has not yet responded with a "Proceed" or "Denied" response, the FFL may transfer the firearm at 12:01 a.m. Thursday.)
>
> (C) "Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate 18 U.S.C. 922 or state law. The "Denied" response will be provided to the requesting FFL by the NICS Operations Center during its regular business hours.

[3] *See also*, FBI's Fact Sheet regarding NICS on its website declaring that it is the NICS operator that makes the decision as to whether provide a response of proceed, delayed, or denied, *available at* http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet.

Moreover, where an individual believes he or she was erroneously denied, the FBI, not the ATF, is tasked with the responsibility of processing the appeal. Pursuant to 28 C.F.R. § 25.10

> (c) If the individual wishes to challenge the accuracy of the record upon which the denial is based, or if the individual wishes to assert that his or her rights to possess a firearm have been restored, he or she may make application first to the denying agency, i.e., either the FBI or the POC.

And

> (d) … The FBI will consider the information it receives from the individual and the response it receives from the POC or the data source. If the record is corrected as a result of the challenge, the FBI shall so notify the individual, correct the erroneous information in the NICS, and give notice of the error to any Federal department or agency or any state that was the source of such erroneous records.

Maybe even more enlightening is Section 25.6(j)(2) that goes on to declare that FBI is to respond to an inquiry from ATF in relation to a civil or criminal enforcement matter relating to the Gun Control Act or National Firearms Act, because it is FBI, not ATF, that not only controls the database but also determines the prohibited status of an individual.

Accordingly, pursuant to 28 C.F.R. §§ 25.6, 25.10, and 25.6, it is the FBI, not ATF, that is to determine whether an individual is prohibited under 18 U.S.C. § 922(g). Therefore, as ATF is not the proper agency for defining or clarifying what constitutes "adjudicated as a mental defective" and "committed to a mental institution," because the FBI has been empowered with the interpretation of 18 U.S.C. § 922(g), ATF cannot proceed with any rulemaking in relation to this NPR.[4]

[4] As it is assumed that ATF will ignore this clear restriction on its power instead of requesting FBI to enter into rulemaking, the remaining issues are raised in the alternative, presupposing that ATF will find that it has authority to define or clarify "adjudicated as a mental defective" and "committed to a mental institution."

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

ATF has repeatedly violated the basic obligations designed to permit meaningful public participation in this and previous rulemaking proceedings, such as ATF 41P. Despite efforts by FICG and other interested persons to encourage compliance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501-559, other statutory provisions governing rulemaking, and fundamental due process, ATF has persisted on a course that ensures a waste of time and resources by all involved. It should be clear that ATF cannot proceed to promulgate a final rule without publishing a proper NPR and providing the necessary documents and opportunity for *meaningful* public comment.

A. *ATF Failed to Make Available the Underlying Congressional Record and Information Upon Which It Purportedly Relied in Formulating its Proposed Rule*

The NPR was published on January 7, 2014, indicating that certain Congressional Records, studies and information were relied upon in formulating ATF 51P. As of March 29, 2014, the rulemaking docket only contains a copy of the NPR and lacks any supportive documentation, including the relied upon Congressional Records, studies and underlying information. *See*, Exhibit 1.

In ATF 51P, the ATF relies upon the legislative history/debate of the 1968 Gun Control Act, its prior September 6, 1996 NPR (Notice No. 839; 61 Fed. Reg. at 47095), the comments received in relation to 61 Fed. Reg. 47095, it final rule in relation to 61 Fed. Reg. 47095 (62 Fed. Reg. at 34634), the Bureau of Justice Statistics, State Court Organization (2004), and the NICS Improvement Amendments Act of 2007, Public Law 110-180, tit. I, sec. 101(c)(1), 121 Stat.

2559, 2562-63 (2008); however, these are noticeable absent from the rulemaking docket. *See*, Exhibit 1.[5]

GCA Congressional History

It is extremely clear from the text of the NPR that ATF has relied heavily upon the Congressional history of the Gun Control Act in formulating ATF 51P. The NPR states:

> The legislative history of the Gun Control Act indicates that Congress intended that the prohibition against the receipt and possession of firearms would apply broadly to "mentally unstable" or "irresponsible" persons. *See, e.g.,* 114 Cong. Rec. 21780 (1968) (statement of Rep. Sikes); *id.* at 21832 (statement of Rep. Corman); *id.* at 22270 (statement of Rep. Fino); *see also, e.g., id.* at 21791 (statement of Rep. Thompson). This proposed amendment would clarify the application of the definition and specifically identifies those persons found not guilty by reason of mental disease or defect as included within the definition of "adjudicated as a mental defective."

ATF's reliance on the Congressional history reflects the importance that ATF ascribes to the legislative intent; yet, it fails to provide the public with an opportunity to review the entire Congressional debate on this topic, instead of the snippets that it chooses to restate and which support its contention. Although an administrative agency is required to support its contentions and references in its docket, even an internet search for this debate fails to yield a positive result. Therefore, the public is left questioning the quotes restated and the context in which they were provided. [6]

61 Fed. Reg. 47095, 62 Fed. Reg. 34634 and Comments

The ATF also places heavy importance on its prior rulemaking, 61 Fed. Reg. 47095, and the comments received in relation to it. The NPR declares:

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[5] FICG previously notified ATF during the rulemaking proceedings for ATF 41P that it had failed to provide referenced documents in the docket. ATF ignored FICG's inquiries and FOIA requests in that matter.

[6] The veracity of the ATF is questionable given its past history of "Institutional Perjury" before the courts. *See infra*, Section II, Subsection C.

> On September 6, 1996, ATF published in the Federal Register a notice of proposed rulemaking (NPRM) in which it proposed definitions for the terms "adjudicated as a mental defective" and "committed to a mental institution" as used in 18 U.S.C. 922(g)(4) (Notice No. 839; 61 FR 47095). The proposed definition of "adjudicated as a mental defective" published at 61 FR 47098 included determinations by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease is a danger to himself or to others or lacks the mental capacity to contract or manage his own affairs. The proposed definition also included a finding of insanity by a court in a criminal case.

And

> In response to the 1996 NRPM, ATF received a number of comments from the public and from federal and state agencies. Some comments suggested additional language to clarify the definition of "adjudicated as a mental defective" or included information not originally considered by ATF. Among the comments ATF received was a recommendation from the Department of Defense (DOD) that the definition of "adjudicated as a mental defective" be amended to specifically include "those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b [*sic*] of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b." DOD suggested this addition to conform to the National Defense Authorization Act for 1996, Public Law 104-106, 110 Stat. 186, which amended subchapter IX of the Uniform Code of Military Justice (UCMJ) to include procedures for the commitment of military personnel for reason of a lack of mental responsibility (See Notice No. 839; 62 FR 34634 (June 27, 1997)). ATF incorporated DOD's suggestion into its final rule published in the Federal Register on June 27, 1997 (Notice No. 839; 62 FR 34634).

Although this is in reference to a prior NPR, which was implemented as a final rule, 62 Fed. Reg. 34634, since ATF relies upon its prior NPR, comments submitted in relation to it, and the final implemented rule, 62 FR 34634, for purposes of ATF 51P, these documents must be provided to the public. Although a copy of 61 Fed. Reg. 47095 and 62 Fed. Reg. 34634 are available at https://www.federalregister.gov/citation/61-FR-47095 and https://www.federalregister.gov/citation/62-FR-34634, respectively, there a multiple articles for both, and none of the comments are available. *See*, Exhibit 2.

Therefore, ATF has denied the public the opportunity for meaningful review and comment.

Bureau of Justice Statistics, State Court Organization (2004)

Additionally, ATF 51P relies upon the Bureau of Justice's 2004 report; yet does not include it in the docket:

> Most states also have laws authorizing state courts to find a person either incompetent to stand trial or not guilty by reason of insanity. *See* Bureau of Justice Statistics, State Court Organization (2004), pp. 199-202.

NICS Improvement Amendments Act of 2007, Public Law 110-180

More importantly, in 2007 the Congress was concerned with ATF's over-zealous enforcement and interpretation of those who were "adjudicated as mental defective" or "committed to a mental institution" and implemented the NICS Improvement Amendments Act of 2007, Public Law 110-180. Although ATF mentions it and specifically relies on it in the NPR, a copy of it is not included in the docket.

> NICS Improvement Amendments Act of 2007, Public Law 110-180, tit. I, sec. 101(c)(1), 121 Stat. 2559, 2562-63 (2008). A person who falls in one of these exemptions is not prohibited from shipping, transporting, possessing, or receiving a firearm or ammunition that has traveled in interstate or foreign commerce. These exemptions do not apply to any person adjudicated, in any criminal case or under the UCMJ, to be not guilty by reason of insanity or based on lack of mental responsibility, or found incompetent to stand trial. *Id.*

And

> As previously noted, the NICS Improvement Amendments Act of 2007 provides that adjudications and commitments by a federal agency may not be reported to NICS when the adjudication or commitment is expunged, or when other criteria are met.

As is explained, *infra* Section IV, the "other criteria" that ATF noticeably leaves out is criteria that seemingly goes against that which ATF is attempting to implement in this NPR. Therefore, it is absolutely necessary that public be provided a copy of the NICS Improvement Amendments Act so to properly respond to ATF 51P.

* * *

As a result ATF has failed to provide any of the documents underlying the NPR in the docket and therefore denied meaningful public consideration and comment.

It has long been understood that "[t]he process of notice and comment rule-making is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." *Connecticut Light & Power Co. v. NRC,* 673 F.2d 525, 528 (D.C. Cir. 1982). "If the [NPR] fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Id*. at 530. Providing access to underlying and relied upon materials has long been recognized as essential to a meaningful opportunity to participate in the rulemaking process. Where, as here, ATF acknowledges in the NPR that these documents were considered and relied upon in formulating the proposed rule, it is difficult to comprehend how ATF can refuse to make these documents available to persons interested in commenting on the proposed rule.

The APA "'requires the agency to make available to the public, in a form that allows for meaningful comment, the data the agency used to develop the proposed rule.'" *American Medical Ass'n, v. Reno,* 57 F.3d 1129, 1132-33 (D.C. Cir. 1995) (quoting *Engine Mfrs. Ass'n v. EPA,* 20 F.3d 1177, 1181 (D.C. Cir. 1994)). In order to ensure that rules are not promulgated on

the basis of data that to a "critical degree, is known only to the agency," the agency must make available the "methodology" of tests and surveys relied upon in the NPR. *Portland Cement Ass'n v. Ruckelshaus,* 486 F.3d 375, 392-93 (D.C. Cir. 1973).

An agency commits serious procedural error when it fails to reveal the basis for a proposed rule in time to allow for meaningful commentary. *Connecticut Power & Light,* 673 F.2d at 530-31. The notice and comment requirements

> are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

International Union, United Mine Workers of America v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

In this rulemaking proceeding, ATF refused to provide access to the documents that underlie all the key assumptions referenced in the NPR, from the details regarding the Congressional history, to its prior rulemaking, including comments, on this issue, to portions of the law that are contrary to its proposal. The lack of access to those materials has seriously hindered the ability of interested persons to address anything that underlies the numerous assertions in the NPR. Congress established the *Federal Register* and enacted the APA to ensure *all* members of the interested public would have access to the same information regarding an agency's rules and a fair opportunity to be heard in the formulation of those rules. Bringing forth any such material in support of a final rule will do nothing to remedy the fact that those materials were not available to inform the interested persons preparing public comments. If ATF intends to revise Part 478 in the manner proposed, ATF needs first to lay the foundation for a proposal and then expose that foundation to meaningful critique.

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*

In the NPR, ATF did not identify a single instance where an individual who was "adjudicated as mental defective" or "committed to a mental institution," under 27 C.F.R. § 478.11, was able to obtain, in lawful commerce, and utilize a firearm in commission of a crime. More importantly, ATF 51P does not identify a single instance where the proposed changes to Section 478.11 would have prevented an individual from obtaining and utilizing a firearm in the commission of a past crime. Indeed, such examples are completely absent from the NPR, likely because such incidents are rare to non-existent. The knee-jerk reaction to implement these changes to Section 478.11 are the result of mass-shootings, such as Sandy Hook and Aurora, where even if the proposal was adopted, it would not have precluded Adam Lanza[7] or James Holmes.[8]

As ATF has failed to provide any examples of incidents where ATF 51P would have prevented the commission of a crime, there is simply *no evidence of any problem* that existing law does not address.

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

The procedural irregularities in this proceeding would undermine the efforts of an agency with a sterling reputation for fairness and candor. ATF has a well-documented record of

[7] It appears undisputed in the media reports that although Adam Lanza's mother was seeking to have him committed, he never was committed to a mental institution. *See*, http://www.motherjones.com/politics/2012/12/mental-health-background-check-newtown-shooting-adam-lanza.
[8] It is undisputed that James Holmes purchased his firearms through a Federal Firearms Licensee, who conducted a background check on him.

"spinning" facts and engaging in outright deception of the courts, Congress, and the public. Examples of such conduct can be seen in its regulation of NFA firearms as detailed in the Motion in Limine filed in *United States v. Friesen,* CR-08-041-L (W.D. Okla. Mar. 19, 2009). *See* Exhibit 3. In light of that record, there is an even greater need for ATF to provide the underlying documents that would permit scrutiny of whether it has fairly characterized issues in the NPR.

1. *ATF's "Institutional Perjury" Before the Courts*

ATF's NFA Branch Chief, Thomas Busey, advised ATF employees in the course of a training program that the National Firearms Registration and Transfer Record ("NFRTR") database had an error rate "between 49 and 50 percent" in 1994. Exhibit 3, p. 14. Yet, despite acknowledging such a high error rate, he observed that "when we testify in court, we testify that the database is 100 percent accurate. That's what we testify to, and we will always testify to that." *Id.* Judges have overturned their own imposition of criminal convictions upon learning of this information, *see, e.g., id.,* pp. 16-17, information that should have routinely been provided to defense counsel in advance of trial as *Brady* material.[9] *See also id.,* p. 6. It is difficult to imagine a more powerful admission that an agency had knowingly, repeatedly misled courts.

This blatant "institutional perjury" took place not only in the context of criminal prosecutions but also in support of numerous probable cause showings for search warrants. Indeed, NFA Branch Chief Busey expressly addressed that situation. Despite acknowledging an NFRTR error rate of 49 to 50 percent, he told his ATF audience "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4 waved in

[9] In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court required that government investigators and prosecutors provide criminal defendants with potentially exculpatory information.

your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that happen." *Id.,* p. 15.

Using data obtained from ATF in response to FOIA requests, Eric M. Larson demonstrated that ATF apparently had added registrations to the NFRTR years after the fact, reflecting the correction of errors apparently never counted as errors. *Id.,* pp. 21-28. While reassuring courts as to the accuracy of the NFRTR, at the same time ATF seemed to be adding missing information to the database when confronted with approved forms that had not been recorded in the database. *Id.,* pp. 26-28. As a result of the questions raised by Mr. Larson, both ATF and the Treasury Department Inspector General conducted investigations. *Id.,* pp. 29-31.

In the course of the resulting investigations ATF's Gary Schaible recanted sworn testimony he had given years earlier in a criminal prosecution. *Id.,* pp. 30-33. The Inspector General's October 1998 report rejected Mr. Schaible's effort to explain away his prior sworn testimony, concluding: "National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed." *Id.,* pp. 32-33. It is difficult to understand how ATF could routinely provide Certificates of Nonexistence of a Record ("CNRs") to courts without disclosing that an unknown number of records were destroyed rather than processed for the NFRTR.[10]

2. *ATF's Deception in Congressional Oversight*

In response to a Congressional inquiry, a DOJ Inspector General advised that a request for documents that reflected errors in the NFRTR had been "fully processed" when, in fact, the

[10] In *Friesen* itself, the prosecution introduced duplicate ATF records of the approved transfer of a NFA firearm (bearing the identical serial number), but differing in the date of approval. Exhibit 3, pp. 48-49. ATF could not explain the situation. *Id.,* p. 49. Nor could ATF find the original documents underlying the computerized entries. *Id.,* p. 52.

documents had merely been sent to another component -- ATF itself -- so as to delay disclosure. *See* Exhibit 3, pp. 12-14. Moreover, ATF changed the meaning of terms like "significant" errors thereby frustrating any attempt to ascertain the true error rate. *See id.,* p. 19. So too, when a congressionally-mandated audit found a "critical error" rate in the NFRTR of 18.4%, the Treasury Department Inspector General seemingly manipulated audit procedures at the instigation of the NFA Branch so as to produce a more acceptable figure. *Id.,* pp. 35-39.

Congress remained sufficiently concerned about inaccuracies in the NFRTR to appropriate $1 million (in Fiscal Years 2002 and 2003) for ATF to address remaining issues. *Id.,* p. 39. In 2007, however, Dr. Fritz Scheuren advised Congress that "serious material errors" continued to plague the NFRTR that ATF "has yet to acknowledge". *Id.,* p. 41.

As recently as June 2012, failure to answer questions about ATF's botched "Fast and Furious" gun-walking operation prompted the House of Representatives to find Attorney General Holder in both civil and criminal contempt. *See* John Bresnahan & Seung Min Kim, "Attorney General Eric Holder Held in Contempt of Congress," *Politicio,* June 26, 2012 (Exhibit 4). Moreover, ATF apparently planned to publish a proposed rule in December that flagrantly disregarded the limitations on its appropriations. In the latest Semi-Annual Regulatory Agenda, ATF projects a December 2013 publication of a proposed rule (RIN 1140-AA41) addressed to FFLs. A recent press report indicates that ATF has already submitted the draft to OIRA for review. *See* Julian Hattem, "Feds Consider New Gun Regs," *The Hill,* Nov. 20, 2013 (Exhibit 5). That report quotes the White House as saying the proposed regulations "would target cases where guns go missing 'in transit.'" *Id.* Yet, it would seem that such a proposal flies in the face of a prohibition on spending any ATF appropriations "to promulgate or implement any rule

requiring a physical inventory of any business licensed under section 923 of title 18, United States Code."[11]

3. *ATF's Misleading of the Public*

When, after a prolonged period of evasion, ATF finally produced a transcript of NFA Branch Chief Busey's remarks in the training session in response to FOIA requests, the transcript had been "corrected" by ATF's Gary Schaible to minimize damage to ATF. *See* Exhibit 3, p. 17. Among those corrections, Mr. Schaible asserted that he was unaware that any ATF employee had ever testified that the NFRTR was 100% accurate.

In order to frustrate public inquiries into the Waco Raid, ATF participated in a game of "shifting the paperwork and related responsibilities" among DOJ components and other law enforcement agencies. *Id.,* pp. 13-14.

Former Acting Chief of the NFA Branch, Mr. Schaible, testified that ATF repeatedly -- in 2000, 2001, 2002, 2003, 2005, 2008 -- approved NFA transfer forms without following procedures to update the information in the NFARTR. *See* Exhibit 6, pp. 398-414. The consequence of those failures was that members of the public received contraband machineguns accompanied by genuine ATF-approved forms indicating that the purchaser had acquired a legally-registered firearm, only to have ATF subsequently seize the machineguns from innocent purchasers.

[11] ATF appropriations are continued through January 15, 2014 by virtue of § 1101(a)(2) of the Continuing Appropriations Act, 2014, H.R. 2775. Sections 103 and 104 make clear that prior restrictions on ATF use of funds remain in effect. The law referenced as the source of the continued appropriations is Public Law 113-6. That law, the Consolidated and Further Continuing Appropriations Act, Public Law 113-6 (2013), § 110, substitutes "2013" for "2012" in Public Law 112-55, Division B, § 113(b)(3), thereby continuing ATF appropriations subject to all the same limitations as the prior year. Public Law 113-6 then explicitly states: "That, in the current fiscal year and any fiscal year thereafter, no funds made available by this or any other Act shall be expended to promulgate or implement any rule requiring a physical inventory of any business licensed under section 923 of title 18, United States Code." The referenced licensed businesses are FFLs.

* * *

ATF's long record of shading the truth to mislead courts, Congress, and the public, underscores the serious nature of the procedural irregularities in this rulemaking. In order to permit meaningful public participation, ATF must set aside its secretive tendencies and provide access to the materials it has placed in issue.

III. ATF'S PROPOSED RULE RAISES IMPORTANT CONSTITUTIONAL ISSUES

Because judicial review of any final rule promulgated by ATF may consider not only compliance with the APA but also all alleged violations of the U.S. Constitution, *see Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979), it is incumbent upon ATF to take such considerations into account in this rulemaking proceeding.[12] Where, as here, agency rulemaking would inherently impact constitutional rights, that impact is among the matters the APA requires the agency to consider in evaluating regulatory alternatives and to address in a reasoned explanation for its decision. *See R.J. Reynolds Tobacco Co. v. FDA,* 696 F.2d 1205 (D.C. Cir. 2012); *Pearson v. Shalala,* 164 F.3d 650 (D.C. Cir. 1999). Furthermore, an agency regulation is not entitled to a presumption of constitutionality, unlike an enactment of the Congress. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44, fn 9 (1983)(*holding,* "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.")

[12] Agency determinations with respect to constitutional issues, however, are not entitled to any deference on judicial review. *See J.J. Cassone Bakery, Inc. v. NLRB,* 554 F.3d 1041, 1044 (D.C. Cir. 2009) (*quoting Lead Indus. Ass'n Inc. v. EPA,* 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)).

Nowhere in the NPR did ATF demonstrate the slightest awareness that it is proposing to regulate in an area involving fundamental constitutional rights.

A. *The Second Amendment*

Congress has not amended the GCA[13] since the U.S. Supreme Court confirmed that "the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008). Consequently, it would seem exceptionally important for ATF to consider the background constitutional issues in formulating policy, particularly where ATF's proposed rule would add significant new burdens to the exercise of this constitutional right by law-abiding citizens.[14] Where fundamental, individual constitutional rights are at issue, an agency engaged in rulemaking cannot rely on a conclusory assertion in order to "supplant its burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez v. Florida Dep't of Business & Professional Regulation,* 512 U.S. 136, 146 (1994)

With respect to the Congress's enactment of the GCA and specific language that an individual is prohibited "who has been adjudicated as a mental defective or who has been committed to a mental institution," while the Court in Heller, in *dicta*, stated "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," one cannot be said to be mentally ill merely because of one

[13] Although the Congress did enact the NICS Improvement Amendments Act of 2007, Public Law 110-180, it was approved January 8, 2008, prior to the Court's holding in *Heller*.

[14] The *Heller* Court identified several purposes served by the Second Amendment including (1) "to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force," (2) "self-defense" which the Court termed "the *central component* of the right itself," and (3) "hunting." *Id.* at 599. Since self-defense is the core central component of the Second Amendment and individuals would be stripped of this fundamental right if "adjudicated as a mental defective" or "committed to a mental institution," it is imperative that ATF consider the constitutional ramifications of ATF 51P.

isolated involuntary commitment. *Heller*, 554 U.S. at 626. While ATF cannot invalidate or remove the statutory language of "being committed to a mental institution," the ATF can refuse to enforce an unconstitutional or improper law[15] and must interpret it in relation to the safeguards of the Second Amendment and Supreme Court jurisprudence.

While "mentally ill" is not defined in Black's Law Dictionary, "mental illness" is defined as "[m]ental disease that is severe enough to necessitate care and treatment for the afflicted person's own welfare or the welfare of others in the community."[16] In Pennsylvania, "mentally ill" is defined as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *See* 18 Pa.C.S. § 314(c). Since an individual who is committed on one isolated occasion because of the stressors of life is not one who suffers from a "mental disease or defect," he cannot be said to be suffering from a mental illness or being "mentally ill."

ATF's current interpretation of Section 922(g)(4) prohibits anyone who at any time *ever* was *allegedly* classified as mentally ill, regardless of the circumstances surrounding the classification, the nature of the mental illness, any treatment sought by the person, whether the mental illness was temporary in nature, likelihood of reoccurrence, or the likelihood of managing the mental illness should it persist. The rule can simply be described as a one-and-done rule. Such a broad prohibition unnecessarily engulfs a significant number of individuals who are truly not mentally ill and are fully in control of their mental facilities thereby posing no extraordinary

[15] The President and Department of Justice, in relation to non-constitutional rights, have refused to enforce the immigration laws against illegal immigrants, who have not committed substantial criminal acts. *See*, http://townhall.com/columnists/iramehlman/2013/01/03/believe-president-obama-on-immigration-he-will-not-enforce-most-laws-even-after-an-amnesty-n1477877/page/full and http://www.foxnews.com/politics/2014/03/31/enforcement-crisis-documents-show-68000-criminal-aliens-released-last-year/. *See also*, Federation for American Immigration Reform, *President Obama's Record of Dismantling Immigration Enforcement*, (Exhibit 7).

[16] BLACK'S LAW DICTIONARY, 1007 (8th ed. 2007)

threat to the public at large, but who are wrongfully branded as somehow mentally defective for the remainder of their lives and stripped of their constitutional rights. *See*, *Wolfe v. Beal*, 477 Pa. 477, 479 (Pa. 1978) (*declaring* "We cannot ignore the fact that many people in our society view mental illness with disdain and apprehension.").

Additionally, as an individual who voluntarily commits himself to a mental institution is not included in the definition of "committed to a mental institution,"[17] ATF already acknowledges that the underlying mental condition is not the triggering criteria, as the same individual, with the same mental condition, could either retain his Second Amendment rights or become prohibited, merely based on whether or not he elects to be involuntarily or voluntarily committed or the commitment is deemed to be for observation purposes.[18] This additionally raises substantial Equal Protection issues and concerns that ATF needs to address, as the same individual, with the same condition, is being treated differently under the law based solely on the actions of the hospital.[19]

B. *The Fifth and Fourteenth Amendments*

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law" and the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. const. amends

[17] 27 C.F.R. § 478.11 (*declaring* "The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution")

[18] ATF is encouraged to further clarify a commitment for observation purposes, as many individual are committed in Pennsylvania, pursuant to 50 P.S. § 7302, for 24 – 48 hrs for observation and then released. As explained *infra* Sections III., B. and V., E., many of these commitments are the result of the individual merely being under the influence of alcohol and are not suffering from any form of mental illness.

[19] It has been this attorney's experience that many individuals elect to be voluntarily committed; yet, the medical facility executes the paperwork for the individual to be involuntarily committed. Furthermore, it has been my experience that frequently involuntary commitment paperwork is executed in haste, followed by the individual voluntarily agreeing to commitment. Furthermore, there are substantial financial incentives for hospitals to involuntarily commit individuals, raising due process concerns. ATF is encouraged to clarify that in these occasions, the individual is deemed not to be "committed to a mental institution."

V. and XIV. Unfortunately, many who are committed are afforded no due process, resulting in courts and the ATF previously finding that state commitment statutes were invalid, and providing individuals, in many instances, with no mechanism for relief.

1. *Many Commitment Statutes Lack Due Process*

The right to procedural due process is "absolute." *Carey v. Piphus*, 435 U.S. 247, 266 (1978), Higgins v. Beyer, 293 F.3d 683, 694 (3d Cir. 2002). In this regard, it is different from other "fundamental" rights such as freedom of speech or freedom of religion, which may always be balanced against competing interests. The right to due process is triggered when the government seeks to deprive citizens of legally cognizable liberty or property interests.[20] *See*, *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1256 (3d Cir. 1994); *Cipriani v. Lycoming County Housing Authority*, 177 F.Supp.2d 303, 319 (M.D. Pa. 2001); *Veit v. North Wales Borough*, 800 A.2d 391, 397 (Pa. Cmwlth. Ct. 2002).

A civil commitment entails the "massive deprivation of liberty. Collateral consequences, too, may result from the stigma of having been adjudged mentally ill…" *In re Ryan*, 784 A.2d 803, 807 (Pa. Super. Ct. 2001). Unfortunately, this deprivation is often accomplished without probable cause and on hearsay evidence. In re R.D., 739 A.2d 548, (Pa. Super Ct. 1999). In Pennsylvania, an individual can be involuntarily committed, pursuant to 50 P.S. § 7302, simply based on a doctors signature and without any of the normal due process safeguards, such as the right to a hearing, the right to counsel, the right to confront one's accuser, the right to submit and

[20] The liberty and property interests to which due process attaches are those identified in the text of the federal and state constitutions. Additionally, the property interests entitled to constitutional protection "are often expressly created by state statutes or regulations." Stana v. School District of the City of Pittsburgh, 775 F.2d 122, 126 (3d Cir. 1985) *citing* Perry v. Sinderman, 408 U.S. 593, 601-02 (1972).

challenge evidence and the right to a neutral arbiter.[21] Even more disconcerting is the fact that neither a pre- nor post-deprivation hearing is convened regarding the commitment or to determine the necessity of preventing the subject of a short-term Section 302 commitment from coming into contact with a firearm.[22] Unfortunately, Pennsylvania is not the only state that does not provide for due process in civil commitments. See, *US v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (*holding* that Maine's civil commitment lacked the necessary procedural due process safeguards and was therefore insufficient to trigger the federal disability.)[23]

It was due to the lack of due process that previously caused ATF to issued a determination that "A [sic] involuntary detention under 50 PA. Cons. Stat. § 7302 does not constitute a commitment to a mental institution within the meaning of 27 C.F.R. § [478].11," because "Section 7302 provide for temporary emergency measures and as such fall short of the "formal commitment" described in section [478].11." *See*, U.S. Department of Treasury, ATF Priv. Ltr. Rul. (Sept. 4 1998) (Exhibit 12). The determination continues, "Unlike a person detained pursuant to section 7302, a person facing extended involuntary treatment (up to 20

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[21] The absence of these due process requirements resulted in the Third Circuit demanding strict adherence to statutory commitment requirements. Benn v. Universal Health System, Inc., 371 F.3d 165, 175 (3d Cir. 2004).

See also, *In re Ryan,* 784 A.2d 803, 807-808 (Pa. Super. Ct. 2001) (*holding* "The time limitations mandated … were instituted to protect the due process rights of those subject to involuntary commitment and must be strictly followed."

See in addition, Paul S. Applebaum, "Civil Mental Health Law: Its History and Its Future," 20 Mental & Physical L. Rep. 599, 1996 (Exhibit 15) at 600 (declaring "If involuntary commitments, through ostensibly a civil proceeding, were to result in deprivations of liberty analogous to those in the criminal system, the substantive criteria would have to be rigorous and the procedures comparable." He explained that "substantive criteria" included "rights to notice, subpoena of witnesses, assistance of an attorney, testimonial silence, exclusion of hearsay, evidence, and proof beyond a reasonable doubt, among others." Id.

[22] In Barry v. Barchi**,** 443 U.S. 55 (1979), the U.S. Supreme Court struck down a New York statute, which permitted the suspension of a horse trainer's license, if the horse, post-race, tested positive for drugs because it failed to provide for a post-deprivation hearing. "[I]t was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment." Id. at 66.

[23] It must be noted that Maine' statute, Me.Rev.Stat. tit. 34–B, § 3863 (2011), provided for more procedural safeguards than Pennsylvania's, as Section 3863 requires that a judge sign the application confirming compliance with procedural requirements.

days) pursuant to section 7303 is afford a variety of due process rights including counsel, notice, and hearing." *See id*. The determination concludes, "Given the lack of due process provisions afforded by 50 PA. Cons. Stat. § 7302, the limited duration of a detention pursuant to it, the fact that its apparent primary purpose is to provide mental health officials time to observe a detainees and make an assessment, and the existence of more formal commitment procedures under Pennsylvania law, we conclude that a detention under 50 PA. Cons. Stat. § 7320 does not constitute a commitment for purposes of 18 U.S.C. § 922(g)(4)." *See id*.

It was this same concern for due process that caused the ATF to state in its prior rulemaking on the definition of "adjudicated a mental defective" and "committed to a mental institution" that "it [is] clear that a *formal* adjudication or commitment by a court, board, commission or similar legal authority is *necessary* before firearms disabilities are incurred;" that "It will not include persons who suffer from mental illness but have not been adjudicated by a lawful authority or committed to a mental institution;" and that "It would also not include persons who have been adjudicated to be suffering from a mental illness but who are not a danger to themselves or to others or do not lack the capacity to contract or manage their own affairs."[24] 61 Fed. Reg. at 47097 (emphasis added).

However, by the early 2000's, ATF would informally reverse this determination, without the issuance of a new determination and without explanation for the basis. My contact with Philadelphia ATF Chief Counsel Kevin White confirms that ATF's current position is that a Section 7302 commitment is prohibiting under 18 U.S.C. § 922(g)(4).

[24] ATF fails to state whether this interpretation is still valid or whether it seeks through ATF 51P to reverse its prior interpretation. As nothing in ATF 51P discusses the none inclusion of those "adjudicated to be suffering from a mental illness but who are not a danger to themselves or to others or do not lack the capacity to contract or manage their own affairs," the public is denied an opportunity to properly comment on the proposal.

Interestingly, this position seems to be in direct violation of the Congress's mandate in the NICS Improvement Amendments Act of 2007, Public Law 110-180, that an individual is not considered prohibited as a result of being adjudicated or committed if it is "based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority." Sec. 101(c)(1)(C). In fact, ATF 51P completely ignores the Congress's dictate in the NICS Improvement Amendments Act. *See infra*, Section IV.

a. Many states do not require any demonstration of *present* mental disability prior to commitment.

Some states provide that in order for a person to be involuntarily committed – for evaluation or otherwise – the individual must have presented a danger to himself or others. *See e.g.* 50 P.S. 7302; A.R.S. § 36-520; A.S. § 47.30.705. However, this is not true for all states and the apparent trend is to "chip[] away at the hegemony of the dangerousness standard." *See* Paul S. Applebaum, "Civil Mental Health Law: Its History and Its Future," 20 Mental & Physical L. Rep. 599, 600, 1996 (Exhibit 15). The State of Washington, for example, does not require that an individual present a danger to himself or others prior to commitment; all that is required is that the person "is gravely disabled." W.R.C.A. § 71.05.240. "Gravely disabled" *may* be demonstrated by danger of physical harm, but it can be independently demonstrated if the individual "manifests severe deterioration" in the ability to care for himself. W.R.C.A. § 71.05.020(16).

Wisconsin goes even further. All that is required to involuntarily commit an individual in Wisconsin is that he "evidences *either* incapability of expressing an understanding of the advantages and disadvantages or accepting medication or treatment and the alternatives, *or* substantial incapability of . . . mak[ing] an informed choice as to whether to accept or refuse

medication or treatment." W.S.A. § 51.20(1)(a)2(e). The only harm that must be shown is the *possibility* of future harm, based on lack of medical or psychiatric treatment, due to the patient's "incapability" of determining whether to seek out help. *Id.* Rather than being challenged by mental health advocates, Wisconsin has been praised as a "leader[]" and "a state that has been on the forefront of mental health legislation."[25]

In light of the recent shootings involving mental illness – Aurora, Sandy Hook, and the April 2 Fort Hood shooting – there has been an increase in the calls for looser standards for hospitalization or commitment of those deemed mentally ill.[26] It certainly appears, then, that the actions taken by legislatures will be towards looser initial commitment standards, rather than on the protection of the constitutional right to due process, *inter alia.*

If the standards for initial commitment for evaluation purposes are relaxed, then under ATF's interpretation of "committed to a mental institution," countless more individuals will be deprived of a fundamental, constitutional right without any – or very little - due process. Most states do not require a judicial determination or hearing prior to the initial commitment.[27] If ATF considers *any* involuntary commitment to trigger the federal firearms disability, then individuals who have been committed based on suspicion that they *might*, in the future, inadvertently cause harm to themselves through perceived neglect, will be deprived of their right to keep and bear arms without any sort of judicial involvement.

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[25] Steven K. Erickson, Michael J. Vitacco, and Gregory J. Van Rybroek, *Beyond Overt Violence: Wisconsin's Progressive Civil Commitment Statute as a Marker of a New Era in Mental Health Law.* 2005 Marquette Law Review, *available at* http://mentalillnesspolicy.org/ivc/dangerousness-standard-wisconsin.html.

[26] *See* Keith Ablow, "Fort Hood: Yet another tragedy from a broken mental health care system" *Fox News*, April 3, 2014, *available at* http://www.foxnews.com/health/2014/04/03/fort-hood-yet-another-tragedy-from-our-broken-mental-health-care-system/.

See also, Mary Sanchez, "Better gun laws needed to protect the mentally ill." Kansas City *Gazette*, April 2, 2014, *available at* http://thegazette.com/2014/04/02/better-gun-laws-needed-to-protect-the-mentally-ill/.

[27] Alabama is a notable exception, providing that a probable cause hearing is required in order to detain an individual even prior to a full hearing. Ala.Code § 22-52-8.

b. The inclusion of outpatient treatment in the definition of "committed to a mental health institution" violates the constitutional rights of those "committed."

The proposal to include those who have been involuntarily committed to outpatient procedures in the definition of "committed to a mental health institution" casts a wide net and includes those who are not dangerous to the community or to themselves. *See* Michael Allen and Vicki Fox Smith, "Opening Pandora's Box: The Practical and Legal Dangers of Involuntary Outpatient Commitment," *Psychiatric Services*, Vol. 52, No. 3 (March 2001), at 342 (Exhibit 13). As Allen and Fox state:

> Outpatient commitment is not typically used for people who are currently dangerous; such individuals are generally held in inpatient settings. Nor does it seek to protect those who are currently incompetent to make treatment decisions. Rather, it seeks to override the expressed wishes of a legally competent person *who is thought* to have some *potential to become* dangerous or gravely disabled in the future.

Id. (Emphasis added). Thus, there is no necessary finding that the individual is a danger to himself or others, or that the person is actually, or currently, mentally disabled.

There are at least three different forms of outpatient treatment but all of which require a court order. *See*, John Monahan, et al., "Mandated Community Treatment: Beyond Outpatient Commitment," *Developments in Mental Health Law*, Vol. 21, No. 1 (December 2001) (Exhibit 14), at 1 (*declaring* that "Outpatient commitment refers to a court order that directs a person who has a serious mental disorder to adhere to prescribed community treatment plan and to be hospitalized for failure to do so if the criteria for involuntary hospitalization are met"). One form resembles "conditional release from a hospital," where a patient is released on the condition that he or she continues a prescribed course of treatment. *Id.*, at 7-8. Another form allows an individual who meets the criteria for inpatient treatment to elect outpatient treatment. *Id.*, at 8.

The third type is strictly preventative and is designed for people who do not meet the criteria for hospitalization, but are believed to be at risk of "decompensation to the point that they will qualify for hospitalization if left untreated." *Id.* Given the large discrepancy as to what constitutes involuntary "outpatient" treatment, ATF's current proposal to include it in the definition of "committed to a mental health institution" is troubling.

The state has *no* interest, compelling, legitimate, or otherwise, in committing those individuals who are not a danger to themselves or others, or who are not currently mentally ill. *See Addington v. Texas*, 441 U.S. 418, 426 (1979). In some places, however, those individuals who are not currently dangerous or mentally ill, but who are "at risk" of "decompensation" may be involuntarily committed to outpatient treatment. The serious constitutional implications are obvious: where the government has no interest, but acts in a manner that deprives an individual of a constitutionally protected, fundamental right, such as the right to keep and bears arms for self defense, the government has acted unconstitutionally. *See*, supra Section III, A. ATF's inclusion of outpatient treatment in its definition of "committed to a mental health institution" therefore encroaches on a fundamental right and invites litigation.

2. *There Exists No Mechanism For Relief*

The statutory scheme provided for by 18 U.S.C. §§ 922(g)(4), 925(c) and the NICS Improvement Amendments Act of 2007, violates due process because it fails to afford those "adjudicated as a mental defective or . . . admitted to a mental institution" a genuine opportunity to petition for relief from the firearms prohibition.

This is not the first time the statutory scheme was challenged as violating Due Process. *See Galioto v. Department of Treasury*, 602 F.Supp. 682 (D.N.J. 1985). In *Galioto*, a previous

version of § 925(c) was challenged because it provided felons with the opportunity to petition for firearms relief, but denied mentally ill individuals the same opportunity. *See id*. at 690. The federal district court in *Galioto* held that the "statute is unconstitutional because… it presumptively denies former mental patients the opportunity to establish that they no longer present the danger against which the statute was intended to guard." *See id.* "The statute in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous." *See id.* Furthermore, "The statute is irrational because… it relies on psychiatric evidence introduced in one proceeding to impose a burden on an individual, and then refuses to accept the same evidence when the individual seeks to have the burden removed." *See id.* The "failure to afford a former mental patient a hearing on his current mental competence for the purpose of overcoming a civil disability . . . amounts to a denial of due process." *See id.* By the time *Galioto* reached the Supreme Court, however, the issue was rendered moot because Congress amended § 925(c) to allow for those prohibited based on a civil commitment to petition for relief from a firearms disability. *See Department of Treasury v. Galioto*, 477 U.S. 556 (1986).

Unfortunately, the plight of individuals who have been committed does not end there. While the current language of Section 925(c) provides that a "person who is prohibited… may make an application to the Attorney General for relief from the disabilities imposed by Federal law with respect to [firearms], and the Attorney General may grant such relief if… the applicant will not likely act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest," someone classified as mentally ill remains unable to petition for relief from a federal firearms disability, pursuant to Section 925(c). *See id.* The reason is that Congress never funded the application program. *See* Gregory J. Pals, Judicial

Review Under 18 U.S.C. § 925(c): Abrogation Through Appropriations?, 76 Wash. U. L.Q. 1095, 1098 (1998) (Exhibit 8). With respect to the funding:

> Since 1992… Congress has eliminated funding for BATF investigations or action on these applications. Typical appropriations measures have provided that 'none of the funds appropriated herein shall be available for relief from Federal firearms disabilities under 18 U.S.C. § 925(c).' Subsequently BATF refuses to process individual applications for relief.

See id. at pp.1098-1100. This prohibition through appropriations is continuing yet today, through the Consolidated Appropriations Act, 2014, Public Law 113-76 (Exhibit 9). Today, the BATFE (Bureau of Alcohol, Tobacco, Firearms and Explosives) will not even permit privately funded applications for firearms' relief. *See* Joshua Prince, Can You Fund Your Own Federal Relief Determination if You Are a Prohibited Person?, *Prince Law Offices, P.C.'s Blog*, *available at* http://blog.princelaw.com/2011/05/26/can-you-fund-your-own-federal-relief-determination-if-you-are-a-prohibited-person/ (Exhibit 10). *See also*, U.S. Department of Justice, ATF Priv. Ltr. Rul. (May 11, 2011) (Exhibit 11).

The failure to fund the program further compounds the issue for someone prohibited pursuant to § 922(g)(4) because without a determination from ATF, the prohibited individual is cut off from judicial review of the prohibition. *See United States v. Bean*, 537 U.S. 71 (2002). Section 925(c) also provides that "any person whose application for relief of disabilities is denied by the Attorney General may file a petition with the United States district court… for judicial review of such denial." *See id.* Given this language and the ATF's refusal to entertain applications for relief, the prohibited individual in *Bean* appealed the letter he received from BATF "explaining that 'since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief from Federal firearms disabilities" to the appropriate federal district court. *See Bean* at 74-75. The district court

granted the petitioner federal firearms relief, a decision that was affirmed by the Fifth Circuit Court of Appeals. *See id.* at 73. The Supreme Court, however, reversed. *See id.* at 78.

The Supreme Court stated that "inaction by ATF does not amount to a 'denial' within the meaning of § 925(c)." *See id.* at 75. "The text of § 925(c) and the procedure it lays out for seeking relief make clear that *an actual decision* by ATF on an application is a prerequisite for judicial review, and that mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application." *See id.* 75-76. As a result, "accordingly, we hold that the absence of an actual denial of respondent's petition by ATF precludes judicial review under § 925(c), and therefore reverse the judgment of the Court of Appeals." *See id.* at 78.

Nevertheless, the Court in *Bean* was not presented with the issue of whether an individual has the right to fund his own relief determination, pursuant to Section 925(c). However, ATF has refused to permit an individual to fund his own relief determination; therefore making an individual who is "adjudicated as mental defective" or "committed to a mental institution" prohibited for life from purchasing and possessing firearms and ammunition. *See*, Exhibit 11.[28]

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[28] ATF's interpretation that precludes it from accepting funding from an individual for his own firearms relief determination is less than persuasive.

First, ATF contends that the current appropriation restriction is "a clear indication that Congress does not want the ATF to act on such applications [firearms relief determinations];" however, it fails to explain why the Congress has not struck 18 U.S.C. 925(c) from the law. Is it that Congress does not want ANY relief determinations to be made; or, is it that the Congress does not want to provide for publicly funded relief determinations? Given the language of the appropriations bill and the absence of Congressional action to eradicate 18 U.S.C. 925(c), it seems clear that the Congress is only speaking to the use of public money.

Second, ATF argues that Title 31 of the United States Code, Section 1341 "prohibits any officer or employee of the United States Government from 'making an expenditure exceeding an amount available in an appropriation…" But, who is asking for an expenditure? Black's Law Dictionary, Eighth edition, defines an expenditure as "1. The act or proceed of paying out; disbursement. 2. A sum paid out." The request is to privately fund a relief determination, not for the ATF to pay out any money. While the result may be that the ATF would utilize the privately funded relief determination money to pay its employees for their time (*see also,* Third argument), Section 1341 only prohibits them from expending more than which is allocated. Hence, if the relief determination cost was estimated to be $1000, the individual paid the $1000, and the cost for the determination was going to exceed $1000, the ATF would be prohibited from using any additional funds over the $1000 mark. However, if the individual paid the additional required funds, there exists no violation of Section 1341.

(footnote continued)

Although the NICS Improvement Amendments Act of 2007 provides for relief determinations in limited circumstances, it requires the state to certify to the Attorney General that it has complied with the requirements. In states, such as Pennsylvania, where there has been no certification or where the statutory requirements are not met, the individual is foreclosed from ever being able to obtain relief. *See*, *Rehlander*, 666 F.3d at 49, fn. 4 (*holding* that based on the state and federal law at that time, the defendants were deprived of their right to keep and bear arms without due process and without any mechanism for relief).

The result is that any person who was committed at some point in his life for any reason, remains in the same position as the prohibited individual in *Galioto*. No procedure exists in many states for a person who is "adjudicated as mental defective" or "committed to a mental institution" to challenge the permanent prohibition on his fundamental right to bear arms. As a result, an individual is unequivocally denied any and all opportunities to restore his right to self-defense and all other core protections of the Second Amendment. Therefore, the statutory scheme of § 922(g)(4) "presumptively denies former mental patients the opportunity to establish that they no longer present the danger against which the statute intended to guard," which amounts to a "denial of due process." *See id.* at 690.

ATF is encouraged to resolve this issue by clarifying that an individual, who has been committed to a mental institution and is not committed again in a five year period, is not

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(footnote continued)

Lastly, ATF contends that Title 31 of the United States Code, Section 3302 provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim" and, as a result, any funds received would have to be placed into a Government's general account and not an account of the ATF. It should be noted that Section 3302 only requires that the money be deposited with the Treasury and there is nothing within Section 3302 that precludes the keeping of separate accounts or disbursement of those accounts to Departments of the U.S. Government. Moreover, Section 3302(c)(1) requires the Secretary to issue receipts reflecting the deposit. Accordingly, there exists no issue with tracking or accounting for the money.

considered to be an individual committed to a mental institution after that five year period of being commitment free. This will help ensure that individuals, who do not suffer from a "mental illness" or who are not "mentally ill," but rather suffered from an isolated incident of decompression or depression are not barred for life from possessing and purchasing firearms and ammunition, while permitting the state and federal governments to assess the individual's mental status over the five year period.

IV. ATF'S PROPOSAL EXCEEDS ITS STATUTORY AUTHORITY

From the outset, it is clear that the Congress sought to limit possession of firearms by the mentally ill, not by those who have a momentary and isolated event of decompression. ATF has turned the statutory scheme (as well as Congress's intent, including its dictate in the NICS Improvement Amendments Act of 2007) on its head, imposing ever more draconian burdens on law-abiding citizens who seek to purchase and possess firearms and ammunition, while diverting resources to do so from investigating and prosecuting criminals who use illegal means to obtain and utilize firearms.

As the U.S Supreme Court declared in *Chevron*, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Court went on fn 9 to declare, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." See, e.g., *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *SEC v. Sloan*, 436 U.S. 103, 117–118, (1978); *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745–746 (1973); *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968); *NLRB*

v. Brown, 380 U.S. 278 (1965); *FTC v. Colgate–Palmolive Co.*, 380 U.S. 374, 385 (1965); *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932); *Webster v. Luther*, 163 U.S. 331, 342 (1896). The Court would later declare in *Brown & Williamson*, "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (citing to *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). Moreover, the Court held, "And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, as well as the agency, must give effect to the unambiguously expressed intent of Congress'." *Id.* at 125-26 (citing to *Chevron* at 842–843).

The Congress, aware of ATF's over-zealous interpretation of the GCA and more specifically the definitions of "adjudicated as mental defective" and "committed to a mental institution," sought to constrain ATF's interpretation in enacting the NICS Improvement Amendments Act of 2007. Yet, the NPR completely ignores the Congress's dictate that: (1) adjudications and commitments that have been "set aside" are not prohibiting;[29] (2) where the person post-adjudication/commitment "has been fully released or discharged from all mandatory treatment, supervision, or monitoring," he is not prohibited;[30] (3) where the person has been "found by a court, board, commission, or other lawful authority to no longer suffer from the mental health condition that was the basis of the adjudication or commitment," he is not

[29] Sec. 101(c)(1)(A). Commitments that have been expunged are also specifically excluded but the NPR does reference this fact.
[30] Id.

prohibited;[31] (4) where the person has been found to be "rehabilitated through any procedure available under law," he is not prohibited;[32] and (5) where a person has been adjudicated or committed "based solely on a medical finding of disability, without an opportunity for a hearing by a court, board, commission, or other lawful authority," he is not prohibited.[33]

As an administrative agency cannot enact regulations in direct violation of statutes implemented by the Congress and ATF 51P seeks to amend the current regulation, Section 478.11, in violation of the Congress's unambiguous dictates, the NPR's proposed amendments to the definitions of "adjudicated as a mental defective" and "admitted to a mental institution" must be abandoned to the extent they conflict with the NICS Improvement Amendments Act of 2007.

V. PROPER CLARIFICATIONS OF "ADJUDICATED AS A MENTAL DEFECTIVE" AND "COMMITTED TO A MENTAL INSTITUTION"

ATF should take this opportunity to enact proper clarifications of "adjudicated as a mental defective" and "admitted to a mental institution" that comport with Constitutional protections and the Congressional intent.

A. *Neither "adjudicated as a mental defective" nor "committed to a mental institution" include any adjudication or commitment, absent due process safeguards.*

ATF should clarify, consistent with its prior rulemaking,[34] determination[35] and the Congress's mandates in the NICS Improvement Amendments Act of 2007,[36] that an individual is

[31] Sec. 101(c)(1)(B)
[32] Id.
[33] Sec. 101(c)(1)(C)
[34] "[I]t [is] clear that a *formal* adjudication or commitment by a court, board, commission or similar legal authority is *necessary* before firearms disabilities are incurred;" that "It will not include persons who suffer from mental illness but have not been adjudicated by a lawful authority or committed to a mental institution;" and that "It would also not include persons who have been adjudicated to be suffering from a mental illness but who are not a danger to
(footnote continued)

not prohibited pursuant to 18 U.S.C. § 922(g)(4), where, in the absence of due process, the individual is "adjudicated as a mental defective" or "committed to a mental institution." *See supra,* Sections III, B. and IV. ATF should specifically declare that where an individual is adjudicated or committed without a pre- or post-deprivation hearing, the individual is not considered to be prohibited pursuant to 18 U.S.C. § 922(g)(4).

B. *Neither "adjudicated as a mental defective" nor "committed to a mental institution" include any adjudication or commitment of an individual under 18 years of age.*

ATF should take this opportunity to clarify that an individual, who, at a minimum, is under 18 years of age at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4).

1. *Treatment of juveniles under 18 U.C.S. § 922 indicates that commitments occurring prior to the age of eighteen (18) were not intended to trigger federal firearms disabilities.*

First, generally, individuals under the age of 18 are considered juveniles and incompetent. See, 18 U.S.C. § 4101, *defining* a juvenile as "(1) a person who is under eighteen years of age; or (2) for the purpose of proceedings and disposition under chapter 403 of this title because of an act of juvenile delinquency, a person who is under twenty-one years of age;" 18 U.S.C. § 5031, *defining* a juvenile as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday;" and 18 U.S.C. § 922(x)(5),

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(footnote continued)
themselves or to others or do not lack the capacity to contract or manage their own affairs." 61 Fed. Reg. at 47097 (emphasis added).
[35] *See*, Exhibit 12.
[36] Sec. 101(c)(1)(A)-(C).

defining a juvenile as "a person who is less than 18 years of age." Furthermore, in the context of federal acts of juvenile delinquency, one is considered a juvenile until attaining the age of twenty-one. 18 U.S.C. §§ 4101, 5031.[37]

In turning to 18 U.S.C. § 922(g)(4), it declares, "It shall be unlawful for any person … who has been adjudicated as a mental defective or who has been committed to a mental institution." The term juvenile is noticeably absent; yet, the Congress implemented 18 U.S.C. § 922(x) specifically in relation to juveniles and defined "juvenile" in subsection 922(x)(5). Cognizant of the Congress's apparent desire to exclude juvenile convictions, the court in *U.S. v. Davis* found that adjudications of delinquency under Virginia law do not trigger the prohibitions of 18 U.S.C. § 922(g)(1). 234 F. Supp. 2d 601, 605-06, fns. 2, 3 (E.D. Va. 2002) *aff'd sub nom*.

Furthermore, demonstrating the incompetency of one under the age of 18, the Congress mandated that in relation a violation of Section 922(x), "the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings." 18 U.S.C. § 922(x)(6).

It is unfortunate that in this day and age, many juveniles are committed to a hospital because their parents are either too busy to take care of them or lack the parenting skills necessary to assist their children through the stages of puberty and young adulthood. It has been my experience that far too many children are involuntarily committed because of: (1) divorce; (2) inability of the parent(s) to care for the child; (3) inability of the parent to understand the difficulties the child encounters through puberty and young adulthood; and (4) the ease of which the parent(s) can rid themselves of the child for a period of time, for reasons as despicable as to take a vacation.

[37] Accordingly, ATF should consider whether an individual, under the age of 21 at the time of his adjudication or commitment, is exempt under 18 U.S.C. § 922(g)(4).

When a hospital is presented with a child in one of the above-specified situations, the decision is either to refuse to accept the child and, as a result, potentially place the child in a harmful or deadly situation, or to commit the child, as states, such as Pennsylvania, do not provide the legal authority for a hospital to merely retain a child in the absence of a commitment. Unfortunately for the child, although mentally sound and not a danger to himself or others, he has just been committed.

Therefore, since Section 922(g) does not include juveniles, juveniles are generally not deemed competent and there are numerous occasions where juveniles are committed, although mentally sound and not a danger to themselves, ATF should clarify, at a minimum, that an individual, who is under 18 years of age at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4). Furthermore, FICG would encourage ATF to consider whether an individual, who is under 21 years of age at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4).

2. *State laws in relation to juveniles indicate that many states do not view juvenile commitments as prohibiting.*

Many states treat juvenile delinquency and commitments differently than they do adults.[38] For example, Texas has a separate statutory provision for the commitment of juveniles. V.T.C.A. § 55.57. Washington also utilizes a separate statutory code for juvenile commitment proceedings, R.C.W. § 71.34.010, *et seq.,* because the legislature found that "the large number of youth involved in the juvenile justice system with mental health challenges is of significant concern" and "[a]ccess to effective treatment is critical to the successful treatment of youth . . ."

[38] In addition to the states outlined below, Utah, California, and Ohio have juvenile-specific mental health courts. *See* National Center for State Courts, Mental Health Courts: State Links, available at http://www.ncsc.org/topics/problem-solving-courts/mental-health-courts/state-links.aspx

Act of March 6, 2013, ch. 179, 2013 Wa. Laws 1. While Iowa follows the same procedures for involuntarily committing both minors and adults, commitment proceedings for juveniles are conducted in juvenile court. Polk County (Iowa) Solicitor, Juvenile Bureau Website, "Mental Health and Substance Abuse Commitments."[39]

Texas requires the sealing of any juvenile record indicating that the juvenile engaged in conduct "indicating a need for supervision." V.T.C.A. § 58.003(a). Washington goes a step further and provides that the records relating to mental health proceedings of minors "are confidential and available only to the minor, the minor's parents, and the minor's attorney." R.C.W. § 71.34.335. The court may only authorize release of documents where the "appropriate safeguards for strict confidentiality" are maintained. Id.

It is estimated that twenty percent (20%) of all youth in America will experience a mental health disorder. *See*, International Society of Psychiatric – Mental Health Nurses, "Meeting the Mental Health Needs of Youth in Juvenile Justice."[40] This is very likely due to the stresses of adolescence and the natural inclination of parents and loved ones to seek help for their children, rather than regret not having done so should the juvenile harm himself or someone else. *See*, Kathleen R. Skowyra and Joseph J. Cocozza, "Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System," at vii.[41]

Research into the causes of mental health disorders supports this contention. For example, Eric Silver and Brent Teasdale conclude that "stressful life events raise the risk of mental disorder." Silver and Teasdale, "Mental Disorder and Violence: An Examination of

[39] *Available at* http://cms.polkcountyiowa.gov/attorney/Juvenile/mentalHealth.aspx
[40] *Available at* http://www.ispn-psych.org/docs/JuvenileJustice.pdf.
[41] *Available at* http://www.ncmhjj.com/wp-content/uploads/2013/12/Blueprint.pdf.

Stressful Life Events and Impaired Social Support," 52 Soc. Probs. 62, 63, 2005. Thus, rather than stressful life events causing those who are already mentally disabled to lash out violently, the stressful event *itself* causes the mental disorder. *Id.*, at 63-64. Therefore, juveniles who are committed are not necessarily permanently mentally ill; they are just more prone to the stress of life in the transition from childhood to adulthood. Hence, they are more likely to suffer from a temporary mental disorder as a result of that stress than an adult in the same situation.

Furthermore, minors who suffer from mental health conditions typically fare well after treatment, whether that treatment is voluntary or involuntary. *See* California Department of Health Care Services, "Expanding Juvenile Mental Health Courts in the Children's System of Care," at 1 ["CDHCS"].[42] Treatment for juveniles can "not only restore young people to good health, but also prevent future harmful or criminal behavior." *Id.*

In counsel's experience, the above-described situation is a frequent trigger for federal firearms disabilities. Counsel has represented numerous individuals who were committed as juveniles, suffering from stressful situations such as parental divorce, who, after treatment, experienced rapid improvement and lead successful, productive adult lives. Many later served in the military or as law enforcement, with no future mental health incidents.

Thus, to prohibit someone *solely* on the basis of a juvenile commitment runs counter to empirical evidence and experience. Juveniles are uniquely positioned; many states' statutory codes recognize this and adopt a unique juvenile code to deal with juvenile delinquency and mental health. Accordingly, ATF should distinguish juvenile commitments from adult commitments, as well.

[42] *Available at* http://www.dhcs.ca.gov/services/MH/Documents/ExpandingJuvenileMentalHealthCourts.pdf

* * *

For these reasons, ATF should clarify, at a minimum, that an individual, who is under 18 years of age at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4). Furthermore, FICG would encourage ATF to consider whether an individual, who is under 21 years of age at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4).

C. *Neither "adjudicated as a mental defective" nor "committed to a mental institution" include any adjudication or commitment of an individual, who, post-commitment or adjudication, is employed by the United States or any department or agency thereof, including the Armed Services, or any State or any department, agency, or political subdivision thereof, and in that official capacity is provided a firearm.*

ATF should take this opportunity to clarify that an individual, who, post-commitment or adjudication, is employed by the United States or any department or agency thereof, including the Armed Services, or any State or any department, agency, or political subdivision thereof, and in that official capacity is provided a firearm is not prohibited in his individual capacity pursuant to 18 U.S.C. § 922(g)(4).

18 U.S.C. § 925(a)(1) currently provides an exception for prohibited individuals that are serving the U.S. Government or state government. Specifically,

> The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

Therefore, an individual, prohibited under Section 922(g)(4), may lawfully possess and use a firearm and ammunition in his official capacity as an employee of the federal or state government, including in the Armed Services.

There exists no rational basis – *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) – to deny an individual, who, post-commitment, possesses a firearm in his official capacity as an employee of the federal or state government. Clearly, if the federal or state government finds that the individual is mentally competent enough to be entrusted with a firearm and ammunition in his official capacity, there is no basis to deny that same individual the ability to possess a firearm and ammunition in his private capacity. Yet, there are individuals that fall into this conundrum.

The Pennsylvania Superior Court recently decided the matter of *In re Application to Restore Firearms Rights of Michael L. Keyes*, 2013 PA Super 326, 83 A.3d 1016, (Pa. Super. Ct. 2013), where the Petitioner, Michael Keyes, was a Pennsylvania State Trooper, who was committed in 2008 for mental health treatment after ingesting medications while going through a divorce. He qualified in the top percentile of the Pennsylvania State Police in relation to his proficiency with firearms, including with his AR-15 patrol rifle, a Mossberg shotgun and Glock handgun. In his official capacity as a State Trooper, he is exempted from the prohibition of Section 922(g)(4); however, in his private capacity, he presumably precluded from possessing a firearm, even though the court of common pleas found that he did not pose a risk to himself or others in possession of a firearm. Clearly, an individual, such as Trooper Keyes, who is entrusted to protect the public welfare, while in the possession of numerous firearms, should not be considered one who was "adjudicated as a mental defective" nor "committed to a mental institution," as there exists no reasonable basis for such a dichotomy.

Furthermore, pursuant to the NICS Improvement Act of 2007, discussed *supra* Section IV, it would seem likely that such post-commitment state or federal employment would trigger the disqualification of the adjudication or commitment, pursuant to Sections 101(c)(1)(B) and 101(c)(2)(B).

Therefore, since Section 925(a)(1) already acknowledges that those serving the state or federal government are not prohibited pursuant to Section 922(g)(4), ATF should clarify that an individual, who, post-commitment or adjudication, is employed by the United States or any department or agency thereof, including the Armed Services, or any State or any department, agency, or political subdivision thereof, and in that official capacity is provided a firearm is not prohibited in his individual capacity pursuant to 18 U.S.C. § 922(g)(4).

D. *Neither "adjudicated as a mental defective" nor "committed to a mental institution" include any adjudication or commitment of an individual, who, post-commitment or adjudication, applies for Federal explosives relief and is granted relief by ATF.*

ATF should take this opportunity to clarify that an individual, who, post-commitment or adjudication, applies for Federal explosives relief, pursuant to 18 U.S.C. § 845(b), and is granted explosives relief by ATF, is not considered prohibited pursuant to 18 U.S.C. § 922(g)(4).

18 U.S.C. § 842(i)(4) provides, "It shall be unlawful for any person – who has been adjudicated as a mental defective or who has been committed to a mental institution." This language is identical to the language found in Section 922(g)(4). 18 U.S.C. § 845(b) provides, "A person who is prohibited from shipping, transporting, receiving, or possessing any explosive under section 842(i) may apply to the Attorney General for relief from such prohibition." Unlike the individual Federal firearms relief provision of Section 925(c), there exists no restriction in

ATF's appropriation to conduct individual or corporate Federal explosives relief determinations.[43]

Clearly, an individual, who is granted Federal explosives relief, has been determined by ATF to be able to responsibly and competently deal in, possess and use explosives, is not one who is a threat in possession of a firearm or ammunition. There exists no reasonable basis – *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) – to permit an individual to deal in, possess and use explosives, while denying that individual the ability to deal in, possess or use firearms and ammunition.

Furthermore, pursuant to the NICS Improvement Act of 2007, discussed *supra* Section IV, it would seem likely that such post-commitment relief would trigger the disqualification of the adjudication or commitment, pursuant to Sections 101(c)(1)(C) and 101(c)(2)(B).

Therefore, since Section 845 already provides ATF with the authority to grant Federal explosives relief, including for those that have been "adjudicated as a mental defective" or "committed to a mental institution," ATF should clarify that an individual, who, post-commitment or adjudication, applies for Federal explosives relief, pursuant to 18 U.S.C. § 845(b), and is granted explosives relief by ATF, is not considered prohibited pursuant to 18 U.S.C. § 922(g)(4).

[43] ATF's appropriation restrictions can be found in the Consolidated Appropriations Act of 2014, H.R. 3547, Pub. Law No. 113-76. The restriction on the use of the appropriated money for individual Federal firearms relief determinations, pursuant to Section 925(c), can be found on page 53. No restriction exists in relation to individual or corporate Federal explosive relief, pursuant to Section 845.

E. *"Committed to a mental institution" does not include temporary admission for observation.*

ATF should take this opportunity to clarify that a "temporary admission for observation" is any commitment to a mental institution that lasts less than 120 hours and which does not result in review by a court, board, commission, or other lawful authority.

Section 478.11 currently declares that "committed to a mental institution" does "not include a person in a mental institution for observation." However, what constitutes "observation" is not defined. As explain in *supra* Section III. B, there are many occasions where an individual is brought in for observation; yet, it is treated as an involuntary commitment, as there is not legal authority for the hospital to seize the person, absent a commitment. As these commitments are based solely on the signature of doctor, *see* 50 P.S. § 7302, without any due process protections and where the hospital has a financial incentive to commit the person, these occasions should constitute, at the most, observation.[44]

F. *"By a court in a criminal case" should not include the word "local."*

The NPR proposes removing "the reference to articles 50a and 72b of the UCMJ and adding by a court in a criminal case to clarify that the term includes federal, state, *local* and military courts that can find persons incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity." (emphasis added). The NPR fails to explain the basis for including the word "local" or in what context it would be utilized. As federal, state and military courts would seemingly encompass all courts able to "find persons

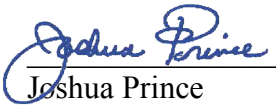
[44] By finding that such occasions only constitute "observations" or do not constitute one being "committed to a mental institution," the potential due process concerns of a fundamental right being implicated are less and the validity of the statutes can likely be upheld. *See*, *Rehlander*, 666 F.3d at 48 (1st Cir. 2012) (*holding* that Maine's civil commitment lacked the necessary procedural due process safeguards and was therefore insufficient to trigger the federal disability.)

incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity," the addition of "local" does nothing but add confusion and potentially significantly expand the breadth, without notice and opportunity to comment, of court in a criminal case. Therefore, the word "local" should be struck from the proposed definition.

CONCLUSION

For the reasons set-forth above, ATF is not the proper agency for this rulemaking endeavor and has denied meaningful public participation. As a result ATF cannot promulgate any final rule that hopes to survive judicial review without starting fresh. In doing so, ATF should consider the constitutional issues raised by the Second, Fifth and Fourteenth Amendments and the statutory dictates by the Congress in the NICS Improvement Amendments Act of 2007. More importantly, consistent with its prior rulemaking, determinations and the Congress's mandate, it should clarify that an individual is not prohibited pursuant to 18 U.S.C. § 922(g)(4), where, in the absence of due process, the individual is "adjudicated as a mental defective" or "committed to a mental institution." Furthermore, it should clarify, that an individual, who is under 18 years of age (if not 21 years of age) at the time of his adjudication or commitment, is not prohibited pursuant to 18 U.S.C. § 922(g)(4).

Respectfully submitted,



Joshua Prince
Chief Counsel
Firearms Industry Consulting Group,
a Division of Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, PA 19505
888-313-0416

April 5, 2014

LIST OF EXHIBITS

Exhibit 1: March 29, 2014 Screenshot of ATF 51P Docket

Exhibit 2: March 29, 2014 Screenshots of the Federal Register

Exhibit 3: Motion in Limine filed in United States v. Friesen, CR-08-041-L (W.D. Okla. Mar. 19, 2009).

Exhibit 4: John Bresnahan & Seung Min Kim, "Attorney General Eric Holder Held in Contempt of Congress," *Politicio,* June 26, 2012

Exhibit 5: Julian Hattem, "Feds Consider New Gun Regs," *The Hill,* Nov. 20, 2013

Exhibit 6: Excerpts of Trial Transcript in United States v. Rodman, CR-10-01047-PHX-ROS (DKD) (D. Ariz.)

Exhibit 7: Federation for American Immigration Reform, *President Obama's Record of Dismantling Immigration Enforcement* (Feb. 2013)

Exhibit 8: Gregory J. Pals, *Judicial Review Under 18 U.S.C. § 925(c): Abrogation Through Appropriations?*, 76 Wash. U. L.Q. 1095 (1998)

Exhibit 9: Excerpt of the Consolidated Appropriations Act, 2014, Public Law 113-76

Exhibit 10: Joshua Prince, *Can You Fund Your Own Federal Relief Determination if You Are a Prohibited Person?*, Prince Law Offices, P.C.'s Blog

Exhibit 11: U.S. Department of Justice, ATF Priv. Ltr. Rul. (May 11, 2011)

Exhibit 12: U.S. Department of Treasury, ATF Priv. Ltr. Rul. (Sept. 4 1998)

Exhibit 13: Michael Allen and Vicki Fox Smith, "Opening Pandora's Box: The Practical and Legal Dangers of Involuntary Outpatient Commitment," *Psychiatric Services*, Vol. 52, No. 3 (March 2001)

Exhibit 14: John Monahan, et al., "Mandated Community Treatment: Beyond Outpatient Commitment," *Developments in Mental Health Law*, Vol. 21, No. 1 (December 2001)

Exhibit 15: Paul S. Applebaum, "Civil Mental Health Law: Its History and Its Future," 20 Mental & Physical L. Rep. 599 (1996)

Exhibit 1

Definition of Adjudicated as Mental Defective and Committed to a Mental Institution

Docket Folder Summary View all documents and comments in this Docket

Docket ID: ATF-2014-0002 **Agency:** Alcohol Tobacco Firearms and Explosives Bureau (ATF)
Parent Agency: Department of Justice (DOJ)

RIN: 1140-AA47

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PR

Definition of Adjudicated as a Mental Defective and Committed to a Mental Institution

Proposed Rule **Posted:** 01/07/2014 **ID:** ATF-2014-0002-0001

Comment Now!

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Supporting Documents

No documents available.

Comments View All (112)

Dear folks: Docket No. ATF 51P The ATF proposes to dramatically expand the interpretation of the statutory phrase "committed to a mental institution" from its..."

View Comment **Submitter Name:** Anonymous, Craig **Posted:** 03/28/2014 **ID:** ATF-2014-0002-0094

169
Comments Received*

*This count refers to the total comments received on this *docket*, as of 11:59 PM yesterday, from Regulations.gov and alternate means. All comments including the bulk submissions received for this *docket* may not be posted at this time; therefore, the counts may differ between: total comments received and posted, as well as the counts shown on the Docket Folder Summary page.

Exhibit 2

FEDERAL REGISTER

The Daily Journal of the United States Government

61 FR 47095

There are multiple articles on volume 61, page 47095. Which article are you looking for?

- Fluid Milk Promotion Order; Invitation To Submit Comments on Proposed Amendments to the Order
  Pages 47093 - 47095
  A Proposed Rule by the Agriculture Department
- Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P)
  Pages 47095 - 47099
  A Proposed Rule by the Treasury Department

FEDERAL REGISTER

The Daily Journal of the United States Government

62 FR 34634

There are multiple articles on volume 62, page 34634. Which article are you looking for?

- Exchange Visitor Program
  Pages 34632 - 34634
  A Rule by the United States Information Agency
- Income Taxes
  Page 34634
  A Rule by the Internal Revenue Service
- Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P)
  Pages 34634 - 34640
  A Rule by the Treasury Department

Exhibit 3

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	Case No. CR-08-041-L
	)	
	)	
LARRY DOUGLAS FRIESEN,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION IN LIMINE TO PROHIBIT GOVERNMENT'S INTRODUCTION OR REFERENCE TO RECORDS MAINTAINED IN THE NATIONAL FIREARMS REGISTRATION AND TRANSFER RECORD

COMES NOW the Defendant, Doug Friesen, and moves this Honorable Court to prohibit the Government from introducing, mentioning, or otherwise allude or refer to any records from the National Firearms Registration and Transfer Record (NFRTR). In support of said Motion, Defendant Friesen submits the following, to-wit:

The NFRTR is a data base administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives[1] (ATF) to track legally owned machine guns and other "firearms"[2] required to be

[1] The Bureau of Alcohol, Tobacco and Firearms was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives under legislation which transferred it from the Department of the Treasury to the Department of Justice, and its law enforcement and administrative functions from the Secretary of the Treasury to the Attorney General, on January 24, 2003. 6 U.S.C § 531; 116 Stat. 2135 (2003).

[2] Under the NFA a "firearm" is a term of art, and means "(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer . . . and (8) a destructive device. The term 'firearm' shall not include an antique

registered under the National Firearms Act of 1934[3] (NFA). Said database is inaccurate and incomplete; its error rate is currently unknown; and that unless it can be independently and reliably validated, NFRTR data should be excluded as evidence in a criminal trial.

ATF routinely uses NFRTR data to justify seizing and forfeiting firearms it deems to be unregistered or illegally possessed, issuing search and/or arrest warrants, producing Certificates of Nonexistence of a Record (CNR) for NFA firearms at criminal trials which attest that no record of registration for particular firearms can be located in the NFRTR; determining that a specific firearm is not registered to a specific person; and for other law enforcement activities such as approving or disapproving applications to transfer ownership of NFA firearms.

There are no known data that reliably establish the current accuracy and completeness of the NFRTR. The last audit of the NFRTR according to Generally Accepted Government Auditing Standards (GAGAS), by the Treasury Department Inspector General (Treasury IG) in 1998, raises more questions than it answers. The reasons are that the audit (1) disclosed "critical error" rates of 4.3 percent and 18.4 percent for one category of NFRTR transactions, and (2) was limited in scope.[4] The bad news was reliably documented April 23, 1998, when Treasury IG auditor Gary Wilk reported in a Work Paper:

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firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon." 26 U.S.C. § 5845(a).

[3] 26 U.S.C. § 5801 *et seq.*

[4] These errors apply to Form 4467 data, which may be more inaccurate than the 4.3% critical error rate which can be calculated from data the Treasury IG disclosed in its December 1998 audit report. Office of Inspector General, U.S. Department of Treasury, *Audit Report on Allegations Concerning the Bureau of Alcohol, Tobacco, and Firearms' Administration of the National Firearms Registration and Transfer Record*, OIG-99-018, Dec. 18, 1998 at 12, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf. (Hereafter December 1998 Treasury IG Report.) Treasury IG auditor Carol Burgan stated that "error definitions for critical data fields during sampling" include weapon serial number and registrant's last name (each must "be 100% correct"), and "weapon description"). Work Paper F-25, Feb. 29, 1998, *available at* http://www.nfaoa.org/documents/Work_Papers_F.pdf. Treasury IG auditor Gary Wilk determined "our Discovery sample indicated a 18.4 percent error rate, one error per error Form

- **Form 4467 was a critical indicator for our audit. We determined, based on our discovery sample, that the combined error rate for original documentation and the computer database was 18.4 percent.**

- **We were able to determine that the error rate was in excess, with 95 percent confidence, +/- 7 percent, of the NFA Branch specified error rate limit of (+/-) 5 percent. Based on our Discovery error estimate we did not implement the full statistical sampling plan.**

Conclusion:

The NFA database - National firearms Registration and Firearms Record (NFRTR) does not contain less than the 5 percent error rate limit for Critical data established by the Chief, Firearms and Explosives Division, ATF.

[5]

During a June 17, 1998, meeting at Treasury Department Office of Inspector General Headquarters to discuss the foregoing audit findings, an NFA Branch representative

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4467 in a 'Critical' field." Work Paper H-1 + Attachments H1-H143, April 6, 1998, *available at* http://www.nfaoa.org/documents/Work_Papers_H.pdf.

Form 4467 ("Registration of Certain Firearms During November 1968") was used to register unregistered NFA firearms during an amnesty period from November 2, 1968, to December 1, 1968, established by the Gun Control Act of 1968 (P.L. 90-618; Stat. 1235, § 207(b)). The 1998 Treasury IG audit was limited to three categories of NFA transactions (approximately 3.3 percent of the total 2,571,766 transactions "for the years 1934 through July 31, 1998" (December 1998 report, id. at 2); none included Form 1, Form 2, Form 3, Form 4 and Form 5 categories, which account for 2,184,454 transactions (85 percent of total transactions). These forms differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture and/or deal in or import NFA firearms.

[5] Work Paper H-0, April 23, 1998 at 2, reviewed May 7, 1998, by Audit Manager Robert K. Bronstrup. In "Discovery" sampling, the auditor draws a random sample, typically 60 to 70 records or more, to determine the presence or absence of irregularities and the need for a full audit. If no irregularities are found, the data base is presumed to be error-free and a full audit is not conducted. If even 1 irregularity is found, the data base cannot be assumed to be error-free; the audit must be extended; and a larger sample drawn to reliably estimate the error rate for the data base. Herbert Arkin, *Handbook of Sampling for Auditing and Accounting.* New York: McGraw-Hill Book Company, 1984 at 132-140.

Treasury IG auditor Gary Wilk reported that after reviewing "528 records and documents" in Discovery sampling:

- **We discovered a total of 395 errors or omissions of which 176 were Critical to the NFA mission and the remaining 219 were Administrative.**

Work Paper H-0, April 23, 1998 at 1.

[redacted] asked for an explanation of the analysis results obtained by the OIG audit of the physical and electronic records maintained by ATF and known as the NFRTR. [redacted] further, added that [redacted] reason for asking was that the results obtained by the OIG audit were disappointing at best and could have serious consequences for the ATF firearms registry mission.

[6]

After Treasury IG auditor Gary Wilk "offered that perhaps ATF would prefer to identify a term other than 'critical' as the identifier for the errors identified by this audit report,"[7] one or more NFA Branch representatives asked the Treasury IG auditors to change the definition of "critical error" to obtain a lower rate, and the auditors did so. The Treasury IG did not mention or publish the 18.4 percent rate (or any other error rate) in its December 1998 report or its October 1998 report: whether "critical errors" were present in other major NFRTR categories was not addressed.

The limited audit findings the Treasury IG published regarding errors in the NFRTR as shown in the table below, copied from the December 1998 Treasury IG report, are misleading. In part the reasons are that, as will be documented in this motion, the Treasury IG auditors did violated GAGAS under at least two major standards: (1) failing to extend the audit to determine the impact of the large number of "critical errors" disclosed as the result of Discovery sampling analysis, which required them to report their effects upon the audit results, in view of the auditors' failure to fully disclose the results of their Discovery sampling analyses , and (2) failing to be organizationally independent. This motion will later discuss the implications of violating GAGAS.

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[6] Work Paper F-37, June 30, 1998 at 1, *available at* http://www.nfaoa.org/documents/Work_Papers_F.pdf. In this Work Paper, Treasury IG auditor Gary Wilk "explained that our definition [of "critical error"] had come from our understanding" of definitions provided earlier by NFA Branch representatives, who now "appeared to obtain an improved appreciation of the specific requirements that determined the outcome of the audit."

[7] Id. at 1.

SUMMARY OF SAMPLE DISCREPANCIES

	FORM 4467	LETTER	OTHER	TOTAL
[illegible]	[illegible]	179	[illegible]	[illegible]
Discrepancies on Registry Database Reports				
Name:				
Missing	2	1	0	3
Incorrect	0	0	0	0
Serial Number:				
Missing	0	0	0	0
Incorrect	1	0	0	1
Computer Records Not Found	0	10	0	10
Original Records Not Found	0	4	16	20
Miscellaneous[2]	3	0	0	3
TOTALS	6	15	16	37

Source: Database analysis results are dependent on the retrieval methods used. The results shown above are based on a combination of data retrieval methods.

[8]

Sworn testimony in *Freisen* by NFRTR custodian Denise Brown in this Court on September 17, 2008, about the current accuracy of the NFRTR was not informative or encouraging. When asked by defense counsel "how accurate are the NFRTR records?" Custodian Brown replied: "I don't have a number." When asked to confirm whether "there are inaccuracies in them [NFRTR data], are there not, ma'am?," she answered "Yes, there are."[9]

ATF officials have willfully failed to disclose that ATF has (1) lost or destroyed firearm registration documents, (2) added registration documents provided by firearms owners to replace those which ATF lost, destroyed, or could not locate, (3) knowledge that the NFRTR contains

[8] December 1998 Treasury IG Report at 12, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf.

[9] *United States of America vs. Larry Douglas Friesen*, Case No. CR-08-41L, United States District Court for the Western District of Oklahoma, Transcript of Jury Trial, Vols. I-VIII, Sept. 17-Oct. 1, 2008, before the Honorable Tim Leonard, U.S. District Judge at 75-76. (Hereafter *United States of America vs. Larry Douglas Friesen* (2008).)

serious material errors that affect the reliability of its certifications in federal court that a particular firearm is not registered to a defendant, and (4) from time to time, depending on the circumstances, inconsistently applied various definitions of "critical error" in characterizing errors in the NFRTR, as this motion will document. Their actions, reported in documents created and published by the Government since 1979, particularly during the 1990s and continuing to present, violate due process, and obstruct justice.[10] There is evidence, discussed throughout this motion, that ATF has been withholding *Brady* material[11] by failing to disclose potentially exculpatory evidence at criminal trials. Both the Attorney General and his predecessor (Secretary of the Treasury) have failed to establish a new amnesty period to correct errors in the NFRTR because firearm registration documents are missing, as will be shown is required by the Criminal Division of the Department of Justice. Consequently, ATF's use of NFRTR data whose validity and reliability has not been independently established does not represent an acceptable standard for federal law enforcement in criminal prosecutions.

The Congress heard testimony in 1979 that ATF alleged J. Curtis Earl, a federally licensed NFA dealer, illegally possessed 475 unregistered firearms.[12] More than two decades later, the attorney who represented Mr. Earl informed a Subcommittee Chairman during a 2001 Congressional hearing about continuing inaccuracies in NFRTR records, that Mr. Earl

> [T]urned to his file cabinet and began to produce the original records of their registration, and one by one the firearms came off the floor and back onto his

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[10] There are no published law review articles on the NFRTR, and little pertinent case law. The most comprehensive legal review of NFRTR issues to date is in an unpublished article. Joshua Prince, "Violating Due Process: Convictions Based on the National Firearms Registration and Transfer Record when its 'Files are Missing'" (2008), *available at* http://www.nfaoa.org/documents/Violating_Due_Process20Aug2008.pdf

[11] *Brady vs. Maryland*, 373 U.S. 83 (1963).

[12] Congressional Hearing, Committee on Appropriations, United States Senate, *Oversight Hearings on Bureau of Alcohol, Tobacco and Firearms*, 96th Cong., 1st Sess. at 39 (1979), *available at* http://www.nfaoa.org/documents/1979_Hearing_Excerpts.pdf.

racks. At the end, he could show that he had registered every single one of these 475 firearms. ATF's records were grossly incorrect.[13]

In November 1979, in response to a request by then-Senator James A. McClure, the Criminal Division of the Department of Justice stated if ATF determines that "a particular individual or weapon is registered" and ATF finds that its "files are missing," then "the only solution would be to declare another amnesty period."[14] . Sections of this Memorandum that include the preceding quoted phrases are reproduced below.

No amnesty period was established as the result of Mr. Earl's case.

seventeen problem areas in the record system (see pp 3-4). The most significant of these in terms of its effect on the validity of a certification is where both the index card and the registration record are missing. It must be explained, however, that the only way to determine whether this situation exists is by first knowing that a specific individual or weapon is registered and the finding that both files are missing. Obviously, if the individual has never registered a firearm or if the firearm has never been registered by anyone, no record whatsoever will exist. The report does not suggest that this problem actually existed and it cites no examples where both records were determined to be missing.5/ Indeed, none of the BATF personnel we interviewed were aware of any case where this happened. Most of

5/ If this problem actually existed, the only solution would be to declare another amnesty period. The Secretary is empowered to do this under existing legislation.
15

[13] Letter to Ernest S. Istook, Jr., Chairman, Subcommittee on Treasury, Postal Service and General Government dated April 10, 2001, from David T. Hardy, Esq., *available at* http://www.nfaoa.org/documents/BardHard.pdf.

[14] U.S. Department of Justice, Criminal Division, *Memorandum: Response to letter from Senator McClure*, by Philip B. Heymann and Lawrence Lippe, Nov. 29, 1979 at 4, *available at* http://www.nfaoa.org/documents/DOJamnestyMemo1979.pdf.

Under § 207(d) of the Gun Control Act of 1968, the Secretary of the Treasury (now the Attorney General) is empowered to administratively establish unlimited numbers of amnesty periods lasting up 90 days per amnesty period, with immunity from prosecution, "as the Secretary determines will contribute" to purposes of the NFA, upon publication in the *Federal Register* of his intention to do.

[15] Id. at 4.

In 1997, as the result of allegations by Eric M. Larson, a private citizen,[16] the Chairman, House Committee on Government Reform and Oversight, directed the Treasury IG to audit the NFRTR.[17] One of the audit reports, published in 1998, describes the use and results of Discovery sampling to establish there were "discrepancies" in three categories of NFRTR data, including missing or incorrect name; missing or incorrect serial number; computer records not found; and original records not found.[18] The Treasury IG failed to investigate a credible allegation that "ATF had registered firearms for which the agency had no documentation, but their owners did,"[19] and "did not include a review of the accuracy of ATF's certifications in criminal prosecutions that no record of registration of a particular weapon could be found" in the NFRTR.[20]

Continuing efforts by citizens, federally licensed firearms dealers and gun collectors, and testimonies and statements from 1996 to 2001 at Congressional hearings involving the accuracy

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[16] Eric M. Larson has been a Senior Analyst, U.S. Government Accountability Office (GAO), since 1987. Mr. Larson's research, Congressional testimonies from 1996 to 2001, and continuing work involving the NFRTR has been and continues to be done in his personal capacity as a private citizen, and does not represent the policy or position of GAO.

[17] Letter from Dan Burton, Chairman, Committee on Government Reform and Oversight, House of Representatives dated June 25, 1997, to the Honorable Valerie Lau, Inspector General, Department of the Treasury. Work Paper D-4, October 14, 1997, by Diane Kentner at 5, *available at* http://www.nfaoa.org/documents/Work_Papers_D.pdf. Chairman Burton's letter states: "From the correspondence and testimony I received . . . it appears that the concerns raised by Mr. Larson may be valid and legitimate. Consequently, I believe an investigation by the OIG into [his] allegations would be appropriate to reveal any possible improprieties or mismanagement at the ATF, and to recommend solutions that would improve and strengthen ATF's registration and record-keeping of firearms."

[18] December 1998 Treasury IG Report at 12, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf. The 1998 Treasury IG reports do not use the term "critical error," and instead refer to them as "discrepancies."

[19] Congressional Research Service, *Memorandum: ATF's National Firearms Registration and Trasfer Record: Issues Regarding Data Accuracy, Completeness, and Reliability*, by William J. Krouse, Nov. 28, 2005 at 12, *available at* http://www.nfaoa.org/documents/CRSmemoNFRTR0001.pdf. The memorandum also states: "While the OIG found discrepancies in the sampled records . . . the critical error rates were not given in the text of the audit report. Nevertheless, based on its own findings and ATF efforts to improve the NFRTR, the Treasury OIG chose not to perform a full sampling and audit of the NFRTR." Id. at 14.

[20] Id. at 12.

and completeness of the NFRTR resulted in another Government examination of the NFRTR. In the June 2007 report of its "review" of the NFRTR, the Department of Justice Inspector General (Justice IG) stated:

> We reviewed ATF processes related to requesting records checks from the NFRTR and determined that when an error is detected, the NFA Branch staff thoroughly research the NFRTR and the imaging database to find out if a weapon is actually registered. Additionally, the NFA requires owners to retain the approved NFA weapons application as proof of a weapon's registration and make it available to ATF upon request. **If the NFA weapons owner can produce the registration paperwork, ATF assumes the error is in the NFRTR and fixes it in the database.**[21] [emphasis added]

The Justice IG's finding that "ATF assumes the error is in the NFRTR and fixes it in the database" when firearms owners produce copies of their registration documents leaves unanswered questions. Commenting on the foregoing determination, Stephen P. Halbrook, a nationally and internationally recognized authority on U.S. firearms law, observed:

> . . . if the owner or the executor of a deceased owner cannot find the registration paperwork, which may be lost or destroyed, and if the record cannot be found in the NFRTR, then a voluntary abandonment of the firearm may be induced or even a criminal prosecution initiated. On such issues the report is not sufficiently informative.[22]

The loss or destruction of an NFA firearm registration document by anyone is not a trivial matter because all violations of the NFA are serious felony offenses, and the penalties are substantial.[23] Persons who are convicted of illegal possession of a machine gun are singled out for particularly harsh treatment. The reason is that under Title 18 § 922(o), the Government is

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[21] U.S. Department of the Justice, Office of Inspector General, *The Bureau of Alcohol, Tobacco, Firearms and Explosives' National Firearms Registration and Transfer Record*, I-2007-006, June 2007 at 31, *available at* http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf. Hereafter June 2007 Justice IG Report.

[22] Stephen P. Halbrook. *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 575.

[23] Violators may be fined not more than $250,000, and imprisoned not more than 10 years, or both. In addition, any vessel, vehicle or aircraft used to transport, conceal or possess an unregistered NFA firearm is subject to seizure and forfeiture, as is the weapon itself. 49 U.S.C § 781-788, 26 U.S.C. § 5861 and § 5872.

not required to prove that a machine gun is not registered to convict a defendant of Possession of Unregistered Firearm.

The 2007 determination appears to meet the standard the Criminal Division of the Department of Justice established in 1979 for a new amnesty period as "the only solution" when ATF's "files are missing."

When Eric M. Larson filed a FOIA request to the Justice IG to obtain copies of the Work Papers created during its review of the NFRTR, to further clarify its determination, the Justice IG responded by sending them to ATF's Disclosure Division for processing.[24]

It is unusual for an Inspector General to send Work Papers to an agency over which it has oversight responsibility for FOIA processing, because of the potential for conflict of interest it represents for both the agency and the Inspector General. Despite Mr. Larson's repeated efforts to obtain them, ATF has thus far not provided copies of the requested Work Papers. A copy of the July 25. 2008, letter ATF sent to Mr. Larson after receiving the Work Papers from the Justice Department IG, appears on the next page.

[24] Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF dated July 25, 2008, to Eric M. Larson, bearing identifier REFER TO: 08-726.

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington, DC 20226
www.atf.gov

JUL 25 2008

REFER TO: 08-726

Mr. Eric Larson
P.O. Box 5497
Takoma Park, MD 20913

Re: Work Papers – Report Number 1-2007-006

Dear Mr. Larson:

This is in reference to your Freedom of Information Act request, that you submitted to the Department of Justice. Your request was forwarded to this Agency together with a large volume of records.

It is our intent to grant your request in part. We are sorry that our processing has been delayed but we will endeavor to provide a response as soon as possible.

We are processing your request as an "all others requestor" therefore you are entitled to 100 free copies and 2 free hours of search. We will inform you if we anticipate any costs for copies that are not covered by the foregoing.

We regret the delay and will do all we can to provide a response.

Sincerely,

Marilyn R. LaBrie
Team Leader, Disclosure Division

The Government still declines to establish an amnesty period to correct errors in the NFRTR. For example, in a January 14, 2009, letter, the Department of Justice Deputy Inspector General Paul K. Martin told Senator Barbara Mikulski, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations, the following:

U.S. Department of Justice

Office of the Inspector General

January 14, 2009

The Honorable Barbara A. Mikulski
United States Senate
Hart Senate Office Building
Suite 503
Washington, D.C. 20510-2003

Attention: Benson Erwin

Dear Senator Mikulski:

We received your correspondence of October 28, 2008, forwarding a letter from Mr. Eric Larson regarding the Office of the Inspector General's (OIG) review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) management of the National Firearms Registration and Transfer Record (NFRTR) database and Mr. Larson's Freedom of Information Act (FOIA) request to the OIG. We will first address the concern with the OIG's review of the NFRTR and, second, with Mr. Larson's FOIA request.

Mr. Larson stated in his letter that he was concerned that the OIG did not review the "material inaccuracies" in the NFRTR and these errors "expose innocent firearms owners to legal jeopardy." Mr. Larson also asks the OIG to issue an opinion on the need for an amnesty period to register National Firearms Act (NFA) weapons. We are aware of Mr. Larson's concern about errors in the NFRTR and his desire for a new amnesty period for the registration of additional NFA weapons. However, our review focused on ATF's management of the NFRTR and the processing of NFA weapons' forms and did not address the issue of an amnesty period. The OIG has no opinion on the establishment of a new amnesty period in which to register NFA weapons. While our review found that there are some technical and programming issues that could cause administrative errors in records, we also found that ATF is taking the appropriate actions to correct these issues and is proactively correcting any errors found in individual records. Moreover, we found no instance in which errors in the NFRTR resulted in inappropriate criminal charges against individuals or federal firearms licensees.

Regarding Mr. Larson's FOIA request, the OIG received a FOIA request from Mr. Larson on July 26, 2007, seeking information pertaining to our review, including the work papers associated with the review. We have fully processed this request.

On August 16, 2007, we provided Mr. Larson with a copy of the report relating to our review. By letter dated September 18, 2007, we informed Mr. Larson that the work papers contained three categories of material: (1) documents that originated with other offices/agencies; (2) public source documents; and (3) documents generated by the OIG that contain information originating from other offices/agencies. We asked Mr. Larson whether he wanted copies of the public source material and whether he wished us to refer the material originating with the other offices/agencies to those entities. We also informed him that we would process the documents generated by the OIG after consultation with the other offices/agencies.

By letter dated September 27, 2007, Mr. Larson responded that he wanted copies of the public source documents and that we should make the referrals to the other entities. We thereafter referred to the Department of the Treasury and the ATF documents that originated with their offices. We informed Mr. Larson of these referrals, telling him that the Department of the Treasury and ATF would respond directly to him regarding the referred documents. We also sent Mr. Larson copies of the public source material.

After consulting with ATF regarding the OIG-generated material, we informed Mr. Larson on December 5, 2008, that these documents were exempt from disclosure pursuant to 5 U.S.C. §552(b)(5). We also informed Mr. Larson regarding his right to appeal our determination.

We are forwarding a copy of this letter to Mr. Larson.

Please feel free to contact us if you have additional questions about the work of the OIG.

Sincerely,

Paul K. Martin
Deputy Inspector General

cc: Mr. Eric Larson

While Deputy Inspector General Martin correctly states "[w]e have fully processed" Mr. Larson's FOIA request, his statement is misleading because the Justice IG transferred the documents Mr. Larson requested to ATF for FOIA processing. The Justice IG's action is reminiscent of how the Government long avoided disclosing documents pertinent to Waco in

response to a FOIA request by shifting the paperwork and related responsibilities between the Department of Justice, ATF, and the Texas Rangers, before a Federal District Judge ordered a halt to such evasions and ordered that the documents be produced for his Court, and they were.[25]

"Institutional Perjury": The Busey Videotape and *LeaSure*

The most recent efforts to persuade ATF to render the NFRTR accurate and complete originated from statements about its inaccuracy during an October 1995 "ROLL CALL TRAINING" session at ATF headquarters that was also videotaped.[26] During the session, which was broadcast throughout ATF, then-NFA Branch Chief Thomas Busey stated " . . . **when we testify in court, we testify that the database [NFRTR] is 100 percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be 100 percent true."**[27] (Emphasis added). Asserting the error rate in the NFRTR was recently reduced as the result of activities of a "quality review team," Mr. Busey stated:

> . . . when I first came in a year ago, our error rate was between 49 and 50 percent, so you can imagine what the accuracy of the NFRTR could be, if your error rate's 49 to 50 percent. The error rate now is down to below 8 percent, and that's total. That's common errors and critical errors.[28]

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[25] David T. Hardy, *This Is Not An Assault: Penetrating the We of Official Lies Regarding the Waco Incident*. Xlibris Corporation, 2001 at 91-108.

[26] A certified copy of the session is transcribed under the title "ROLL CALL TRAINING, 10-95, TOM BUSEY." *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 104th Cong., 2d Sess., Part 5 at 182-205, *available at* http://www.nfaoa.org/documents/1996testimony.pdf. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997*.)

[27] Id. at 192.

[28] Id. at 202. Mr. Busey was apparently referring to an internal ATF "Quality Review" initiative that "commenced operations on July 25, 1994," according to a "productivity report" prepared February 9, 1996. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 1st Sess., Part 5 at 102, *available at* http://www.nfaoa.org/documents/1997testimony.pdf. (Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998*.)

In response to Mr. Larson's FOIA request for information about the quality review initiative Mr. Busey described, ATF sent approximately 100 loose pages consisting of weekly reports and other documents. The result of the

Mr. Busey's statements that ATF personnel "always testify" in court that the NFRTR "is 100 percent accurate," and "[a]s you probably well know, that may not be 100 percent true." were termed "institutional perjury" by an attorney who learned of the videotape, obtained a transcript of Mr. Busey's statements by filing a FOIA request, and published an article about the incident.[29] During the session Mr. Busey also said the error rate in the NFRTR was between 49 percent and 50 percent in the year before he arrived, and "we know you're basing your warrants on it, you're basing your entries on it, and you certainly don't want a Form 4[30] waved in your face when you go in there to show that the guy does have a legally-registered [NFA firearm]. I've heard that's happened. I'm not sure."[31]

The videotape of Mr. Busey's remarks, now available on the Internet, has more impact than his published words. The reasons are that Mr. Busey's statements were not spontaneous remarks; Mr. Busey prepared his statements in advance, can be seen reading them, and smirks while saying: "I've heard that's happened. I'm not sure." In response to Mr. Larson's FOIA request for a copy of the Busey videotape, ATF responded:

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initiative is unclear because it is not apparent whether there was a final report, and there are no separate explanations or summaries of the weekly reports.

[29] "Institutional Perjury," by James H. Jeffries III. *Voice for the Defense*, Vol. 25, No. 8, October 1996 at 28-30; *available at* http://www.nfaoa.org/documents/Jeffriesarticle.pdf, reprinted in the *Congressional Record* (Extensions of Remarks), Vol. 142, August 2, 1996 at E1461-E1462, *available at* http://www.nfaoa.org/documents/JeffriesCongRec.pdf.

[30] ATF Form 4, currently titled "Application for Tax Paid Transfer and Registration of Firearm," is prepared in duplicate original and used to transfer the ownership of registered NFA firearms. After ATF approves the Form 4 application, ATF (1) keeps one approved copy for entry into the NFRTR, and (2) sends the other approved copy to the firearm owner (transferor), who must subsequently transfer the firearm (and the other approved copy) to the new owner (transferee) within a reasonable time or cancel the transfer. The NFA prohibits the physical transfer of the firearm by the transferor to the transferee before ATF approves the transfer.

[31] Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, available at* http://www.nfaoa.org/documents/1996testimony.pdf.

> **You have requested "a complete and unredacted copy of the videotape created by the Bureau of Alcohol, Tobacco and Firearms which pictures Mr. Thomas Busey,Chief, National Firearms Act Branch, during a "Roll Call Training Session, on about October 18, 1995". Your request is denied pursuant to Title 5, U.S.C. 552 (b)(6) as release of this video tape would constitute an invasion of Mr. Busey's privacy.** [32]

The Busey videotape was used, in part, to overturn five convictions of John D. LeaSure for possession of unregistered firearms in a May 1996 bench trial, during which ATF Specialist Gary Schaible testified he was aware of "occasions . . . in the NFA Branch of clerks throwing away transmissions because they don't want to fool with them" rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).[33] Under cross-examination, when asked "that's one of the things [NFA Branch clerks throwing away documents] that could happen to you?," Mr. Schaible replied "Certainly."[34]

Citing Mr. Schaible's testimony (in which he also confirmed the Busey video had been broadcast throughout and was common knowledge within ATF Headquarters), the presiding Judge ruled " . . . it throws a disagreeable proposition on my finding somebody guilty on records when their chief man [Mr. Busey] says they were 49 percent wrong," and dismissed five

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[32] Letter from Marilyn R. LaBrie, Disclosure Specialist, ATF, to Eric M. Larson dated March 18, 1998, bearing symbols L:D:MRL 98-514. *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*. Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 105th Cong., 2d Sess., Part 5 at 170, *available at* http://www.nfaoa.org/documents/1998testimony.pdf. Hereafter Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*.

A videotape of the training session was obtained by an attorney who subpoenaed it for trial and made a copy when the U.S. Attorney that prosecuted the case failed to submit a timely order to the court to prohibit its public disclosure, *available at* http://www.nfaoa.org/documents/rollcal_highlights.mp4

[33] *United States of America vs. John Daniel LeaSure*, Crim. No. 4:95cr54, E.D. Va.—Newport News Div., Transcript of Proceedings before the Honorable John A. MacKenzie (May 21, 1996) at 42-43, *available at* http://www.nfaoa.org/documents/LeaSureTrial.pdf. (Hereafter *United States of America vs. John Daniel LeaSure (1996).)*

[34] Id at 42-43.

convictions under the NFA for possession of unregistered firearms.[35] The *LeaSure* transcript states that Mr. Schiable was a witness "called on behalf of the Government, having been first duly sworn, was examined and testified" to the above facts.[36] ATF did not appeal the verdict.

ATF acted to contain the damage resulting from Mr. Busey's statements by (1) adding "corrections" by Mr. Schaible to transcribed copies of the videotape of Mr. Busey's remarks disclosed by ATF in response to FOIA requests, and (2) requesting the Audit Services Division of the Department of the Treasury to audit the NFRTR. On February 13, 1996, Mr. Schaible stated under penalty of perjury that, to the best of his knowledge, no NFA Branch personnel have ever testified that the NFRTR is 100 percent accurate, and "the reference to an error rate of 49-50 percent is based on an informal, undocumented estimate by personnel from the Firearms and Explosives Regulatory Division."[37]

In *Rith*, a 1999 court case that included a challenge to the accuracy and completeness of the NFRTR arising from the Busey videotape, after hearing opposing evidence the Court ruled "[t]he record establishes that the NFRTR database has sufficient guarantees of trustworthiness to satisfy the Sixth Amendment."[38] The Court based its opinion on (1) statements by Mr. Busey that "a quality review team . . . instituted in 1994" had reduced "the critical-error rate to below three percent," and (2) "a copy of an audit performed February 7, 1996, by the Audit Services Division of the Department of the Treasury" showing a 1.5 percent "critical-error" rate.[39] The

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[35] Id. at 45.

[36] Id. at 23.

[37] Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1997, available at* http://www.nfaoa.org/documents/1996testimony.pdf.

[38] *United States of America vs. Rith*, 164 F.3d 1323 at 1336, 51 Fed. R. Evid. Serv. 197 (10th Cir. 1999). Hereafter *United States of America vs. Rith* (1999).

[39] Id. at 1336.

Court added: "the accuracy of the registration check is buttressed by a second level review by a branch chief."[40] It is unclear whether the Audit Services Division of the Department of the Treasury published a formal report of its 1996 audit of the NFRTR; the audit processes it followed are unknown and may not have been fully disclosed to the Court.

ATF and the Audit Services Division may have perpetrated a fraud upon the Court in *Rith*. The reasons are that (1) Mr. Busey's statements about improvements in the "critical-error" may have been self-serving, (2) there is no evidence that a final report on the "quality review team" accomplishments was rendered, or that the results of the "accomplishments" and reduction of the "critical-error" rate were independently validated, (3) it is unclear whether the 1996 audit was conducted according to GAGAS, and (4) the Audit Services Division auditors may have been improperly influenced by NFA Branch representatives to manipulate the outcome of the audit.

The Audit Services Division is a sister component of ATF; has no oversight authority over ATF; and the purpose of the audit was to establish that the NFRTR was accurate enough to justify criminal prosecutions. It is improbable that one component of a federal law enforcement agency would engage in conduct that would reflect badly upon another component, or the agency itself; and questioning the legal basis for a federal law enforcement activity would be sensitive because of potential legal liabilities, such as overturning convictions and payments to citizens for damages for wrongful convictions.

There are reasons to doubt the independence of Treasury Department and other Government officials regarding their characterization of "errors" in the NFRTR. There are also reasons to question the validity and reliability of Mr. Busey's characterization of what he termed

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[40] Id. at 1336.

"common errors" and "critical errors" and "error rate" in the October 1995 "ROLL CALL TRAINING" session because (1) these terms do not correspond to terms used by the quality control team, and (2) inspection of "Weekly — Quality Review Report" documents disclose that the quality review team manipulated the NFRTR error rate by changing the definition of "Significant Error" by renaming it "Error."[41] Error and error rate reports created by the quality review team, obtained via a FOIA request by Mr. Larson, are not straightforward and their meaning is difficult to interpret; for example, one weekly report states:

> Since 6/30/94 reviewed 25611 Errors 1567 Significant errors 373
> Common Error rate .01% Significant error rate .01%[42]

No valid and reliable overall error rate of any type could be identified from any of the documents because numbers of "Errors" and "Significant errors" were different among nearly 100 different weekly reports ATF disclosed in responding Mr. Larson's FOIA request.

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[41] ATF's "Quality Review" team manipulated the definition of "error" as follows. One document states: "On approximately October 3, 1994, we began defining and separating the significant errors from the common errors," and this document defined "Significant Errors" as shown below:

> Significant Errors: 1. Mispelled and/or Incomplete names.
> 2. Voided application--didn't indicate current firearm possessor.
> 3. $200/$5 remittance not posted.
> 4. Never mailed approved form to transferor
> 5. Approved wrong firearm to transferee.
> 6. Approved form never updated in NFRTR.

Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 103, *available at* http://www.nfaoa.org/documents/1997testimony.pdf.

Another weekly report reclassified "Significant Errors" as "Errors" except for slightly changing one type of error, namely, "2. Voided application - - didn't indicate previous owner," as shown below:

> Errors: 1. Mispelled and/or Incomplete names.
> 2. Voided application--didn't indicate previous owner.
> 3. $200/$5 remittance not posted.
> 4. Never mailed approved form to transferor
> 5. Approved wrong firearm to transferee.
> 6. Approved form never updated in NFRTR.

Id. at 104.

[42] Id. at 103.

NFRTR Data Inaccuracies: Early Statistical Evidence, 1992 to 1996

Because of Mr. Busey's statements that records of Forms 4 could not be located in the NFRTR, Mr. Larson sought to determine if there was any independent statistical evidence that ATF had lost or destroyed NFA registration documents by analyzing publicly available NFRTR data on "NFA registration activity" from 1992 to 1996. Mr. Schaible's testimony *LeaSure* indicated that ATF may have added registration documents obtained from firearms owners to the NFRTR after discovering that NFA Branch clerks had thrown documents away rather than work on them.

Under a FOIA request, Mr. Larson obtained copies of reports of annual "NFA registration activity" from 1992 to 1996 from the NFA Branch, which list 11 categories of firearms registration activity represented in the NFRTR.[43] Inspection of the data indicates that some data lack face validity; that is, does not measure what it purports to measure. The reason is that there are records of NFA registration activity during and prior to the 1920s, a logical impossibility because the NFA was not enacted until 1934. Just as when a clock incorrectly strikes 13 on the hour, causing one to question what hour it really is and raising doubts about

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[43] The NFRTR data Mr. Larson obtained are available in Eric M. Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms*. Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 5-6, *available at* http://www.nfaoa.org/documents/CritiqueofI998IGreports.pdf.

The NFRTR data categories are: Form 1, Form 3, Form 4, Form 5, Form 6, Form 9, Form 10, and Form 4467, and differ according to whether the applicant is a private citizen, government agency, or Special Occupational Taxpayer (SOT) licensed to manufacture, import, and/or deal in NFA firearms, and whether the transfer is tax paid or tax exempt. Form 2, currently titled "Notice of Firearms Manufactured or Imported," is a record of notice to ATF used exclusively by and sent to ATF by SOTs, not an application form. The "Letter" category has been used to register or transfer NFA firearms when ATF forms have not been available, but these transactions are uncommon.

Treasury IG auditors reported that ATF has not formally defined the "Other" category, and stated it included "a procedure where movie industry supply houses and movie industry property masters filed applications by telegraph in lieu of filing a Form 3 in order to expedite processing by ATF." October 1998 Treasury IG Report at 18, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf.

what hour it really was during all the other times the clock was supposed to be striking correctly on the hour during previous strikes, records of NFA registration activity before 1934 raise doubts about the accuracy of records of NFA registration activity for other years.

These data tables of NFA registration activity during 1992 to 1996 are reproduced below in the same form ATF sent them to Mr. Larson.

DATA THROUGH 12/31/92 — BUREAU OF ALCOHOL, TOBACCO AND FIREARMS — NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON — RUN: 2/01/93 13:31

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1992	357	71296	26852	6527	46462	2	20385	289	68		30	172040
1991	224	78062	20914	5390	42117	1	36848	258			35	183849
1990	692	88893	22823	6807	56015	4	27877	289	43		134	203577
1989	271	69932	23605	8165	31198	12	18133	281	51		106	151754
1988	342	24860	39747	7699	8319	2	1475	403	66		450	83361
1987	409	17427	34492	8311	9388	2	745	324	144	1	717	71960
1986	935	69957	22946	5158	4888		528	381	181	5	749	105724
1985	645	14666	15512	3524	6245	1	1306	334	45	1	726	43805
1984	534	14846	14720	3911	5437	1	1506	294	3	3	335	41590
1983	458	11143	11132	3203	3872	27	248	367	4	1	29	29684
1982	324	7720	11417	2770	2671	9	1	481	2	3	37	25435
1981	270	7181	8148	3734	2718	24	1	341	10	1	18	22566
1980	163	3872	6830	3648	1636	6	1	329	7	4	23	15109
1979	108	3284	6988	2150	1515	13	6	353	5	1	28	14441
1978	88	1458	5498	1879	1257	7	1	729	5	6	17	10909
1977	77	1988	6806	1535	1737	2	1	598	14	1	22	11973
1976	38	878	10943	979	1754	20	5	457	3	39	26	15136
1975	78	1399	3279	567	1830	18	3	615	10		49	7846
1974	29	1017	2941	579	1688	9	3	507	15	5	8	6821
1973	16	1351	2833	353	1782	5	7	513	8	17	16	6101
1972	50	4017	1963	261	1511	14	9	639	33	84	19	8580
1971	24	2241	289	36	251	18		311	1959	26	19	5086
1970	38	191	19	10	24	16		1	1563	272	34	2168
1969	36	768	41	13	41	8	1		1148	2086	19	4865
1968	1510	1277	366	192	935	7		6	29	54487	37	58864
1967	909	1144	386	181	844	2			5	64	10	3465
1966	908	1293	435	134	1062	2				8	20	3856
1965	841	1246	428	142	1047	7		1	1	2	21	3736
1964	744	937	275	139	699	6		1		3	4	2888
1963	709	728	291	126	868	5	4		1	2	8	2672
1962	734	1111	272	204	789	3			1	14	7	3135
1961	809	1466	548	152	1338	5		1	4	2	4	4321
1960	790	657	314	148	654	28			2	6	1	2592
1950 TO 1959	6629	5955	2165	1150	2917	861	16	2	6	23	47	19771
1940 TO 1949	6574	7231	4784	561	4985	8455	5	2	4	9	57	32307
1930 TO 1939	11422	191	568	15	786	22	1	14	26	25	1280	14250
1920 TO 1929	12	4	12	2	7	1				6	9	53
PRIOR TO 1920	1	36	21	2	57	1	2	1	1	4	15	121
UNKNOWN	12	304	32	22	170	6	24		6	58	3513	4147
TOTAL	38766	521183	349593	79573	250462	9614	169140	9110	5457	57187	8671	1398656

DATA THROUGH 12/31/93

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/04/94 7:11

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1993	299	187362	27228	7769	67625		27905	405	11		25	238609
1992	357	75756	26854	6556	46561	2	20391	289	40		25	176809
1991	226	78157	28983	5400	42126	1	36834	258			33	184016
1990	692	89697	22858	6821	56084	4	27827	289	44		132	206448
1989	271	69927	23728	8176	51218	12	18133	281	51		184	151893
1988	342	24851	39767	7703	8370	2	1473	403	66		450	83627
1987	489	17491	36519	8318	9421	2	745	324	143	1	714	72087
1986	936	70211	22959	5162	4903		528	381	181	5	744	106008
1985	645	14728	15520	3526	6280	1	1386	334	45	1	725	43111
1984	534	14849	14725	3913	5437	1	1586	294	3	3	336	41601
1983	458	11142	11144	3204	3078	27	248	367	4	1	29	29782
1982	325	7728	11420	2771	2674	9	1	481	2	3	37	25451
1981	270	7168	8148	3735	2720	23	1	341	10	1	18	22375
1980	162	3875	6830	3040	1637	6	1	329	7	4	22	15111
1979	108	3285	6998	2150	1513	13	6	354	5	1	19	14444
1978	80	1430	5497	1878	1257	7	1	729	4	6	17	10906
1977	77	1987	6089	1535	1737	2	1	590	14	1	22	11975
1976	38	879	10945	979	1754	19	5	459	3	59	26	15138
1975	78	1399	3280	567	1831	18	3	613	10		49	7848
1974	29	1817	2961	579	1689	9	3	587	15	5	8	6822
1973	16	1351	2030	553	1783	5	7	513	8	17	15	6098
1972	50	4828	1963	261	1511	14	11	638	33	84	19	8504
1971	24	2242	289	36	251	10		311	1959	26	19	5087
1970	38	192	18	10	23	16		1	1566	272	32	2168
1969	36	760	65	13	42	8	1		1140	2818	18	4871
1968	1509	1278	368	193	935	7		6	29	54485	37	58849
1967	909	1143	306	181	844	2			5	64	10	3464
1966	908	1293	435	134	1062	2				8	20	3856
1965	841	1246	428	142	1047	7		1	2	2	21	3737
1964	744	937	275	139	699	6		1		3	4	2888
1963	709	720	291	126	808	3	4		1	2	8	2672
1962	734	1111	272	205	789	3			1	14	7	3136
1961	810	1466	548	152	1330	5		1	4	2	4	4322
1960	791	657	514	148	655	20			2	6	1	2594
1950 TO 1959	6629	5956	2164	1151	2915	860	16	2	6	23	47	19769
1940 TO 1949	6572	7230	4783	363	4908	8456	5	2	4	9	57	32309
1930 TO 1939	11422	191	548	15	706	22	1	14	26	25	1280	14250
1920 TO 1929	12	4	12	2	7	1				6	10	54
PRIOR TO 1920	1	34	21	2	37	1	2	1	1	4	15	121
UNKNOWN	12	320	32	25	263	6	24		6	58	3749	4493
TOTAL	39867	634228	337325	87413	318520	9612	136989	9517	5451	57189	8908	1644219

DATA THROUGH 12/31/94

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/26/95 16:03

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1994	1278	180150	22498	7858	62258		35392	2857	2		1	232246
1993	309	108830	27658	7819	67739		28118	687	11		19	240861
1992	358	78161	26878	6568	46587	2	20366	298	48		21	177271
1991	225	78280	21018	5411	42243	1	36814	261			29	184282
1990	691	89287	22888	6859	56066	4	27504	289	44		130	203733
1989	271	69582	23755	8176	31138	12	18132	281	51		96	151494
1988	341	25164	39769	7787	8586	2	1473	483	66	1	648	83760
1987	412	17188	34556	8321	9461	2	745	328	144	1	708	71730
1986	938	78278	22978	5172	6905		527	381	181	3	737	106092
1985	645	14742	15534	3329	6281	1	1386	334	45	1	722	43140
1984	535	14848	14738	3915	5437	1	1586	296	3	5	536	41608
1983	454	11137	11145	3207	3878	27	248	367	4	1	26	29694
1982	325	7724	11414	2770	2674	9	1	481	2	3	37	25440
1981	270	7127	8152	3737	2720	23	1	342	18	1	18	22401
1980	162	3073	6829	3064	1637	6	1	329	7	4	22	15114
1979	108	3285	6988	2151	1515	13	6	354	5	1	18	14644
1978	88	1430	5497	1879	1257	7	1	730	4	6	16	10987
1977	77	1987	6010	1537	1737	2	1	590	14	1	22	11978
1976	30	879	10947	983	1756	19	5	458	3	39	26	15145
1975	79	1601	3280	567	1831	18	3	614	18		48	7851
1974	29	1818	2961	579	1690	9	3	587	15	5	8	6824
1973	16	1353	2852	353	1785	5	7	513	8	18	14	6102
1972	38	4828	1963	261	1511	14	11	638	33	84	19	8584
1971	24	2241	289	36	250	10		311	1960	26	19	5086
1970	38	192	18	10	23	16		1	1567	271	32	2168
1969	36	768	43	13	42	8	1		1148	2816	18	4877
1968	1518	1277	568	193	935	7		6	29	54485	36	58864
1967	909	1141	306	181	844	2			5	64	9	3461
1966	902	1295	436	136	1859	2				8	28	3856
1965	841	1246	429	142	1047	7		1	2	2	28	3737
1964	744	934	276	139	698	6		1		3	4	2805
1963	789	728	291	126	808	3	4		1	2	8	2672
1962	734	1115	277	205	787	3			1	14	7	3143
1961	818	1463	548	153	1329	5		1	4	2	4	4319
1960	792	657	314	148	655	28			2	6	1	2595
1950 TO 1959	6631	5952	2164	1152	2915	859	16	2	6	23	44	19766
1940 TO 1949	6571	7230	4695	363	4914	8452	5	2	4	9	56	32301
1930 TO 1939	11422	196	548	17	708	22	1	14	26	26	1268	14248
1920 TO 1929	12	4	12	2	8	1				6	9	54
PRIOR TO 1920	1	36	22	2	37	1	2	1	1	4	15	122
UNKNOWN	30	329	33	26	273	6	24	1	4	57	3159	3944
TOTAL	40362	735622	340421	95398	381082	9607	172224	12379	5456	57196	8252	1877919

DATA THROUGH 12/31/95

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

RUN: 1/02/96 11:28

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1995	1124	95445	17277	8959	66367	2	31503	1492	19			221688
1994	1272	104681	22794	7878	62350		35384	2865	2			237138
1993	508	108202	27696	7837	67741		28117	496	11		18	240626
1992	358	76156	24883	6573	66593	2	28564	290	68		21	177258
1991	225	78255	21828	5428	62246	1	34884	262			25	184266
1990	691	81266	22912	6835	54870	6	27497	389	66		138	265728
1989	273	69548	23761	8181	51158	12	18128	281	51		96	151685
1988	341	25129	39798	7712	8588	2	1475	483	66	1	445	83758
1987	412	17181	34546	6338	9441	2	745	320	144	1	787	71749
1986	959	70501	22976	5174	6989		527	381	183	3	735	108328
1985	645	16750	15540	5532	6293	1	1306	334	45	1	720	43167
1984	555	14850	14737	3916	5457	1	1506	294	3	3	336	41618
1983	455	11156	11158	3297	3067	27	248	367	6	1	25	29787
1982	326	7251	11421	2773	2674	9	1	681	2	3	35	25473
1981	270	7182	8157	3741	2721	23	1	342	18	1	18	22414
1980	142	5876	6827	3046	1638	6	1	336	7	4	20	15117
1979	188	3205	4988	2151	1516	13	6	354	5	1	18	14465
1978	82	1434	5458	1878	1258	7	1	738	4	6	16	18930
1977	77	1987	6810	1537	1737	2	1	598	14	1	22	11978
1976	39	888	12948	985	1757	19	5	458	3	39	26	15168
1975	79	1482	3288	548	1835	18	3	614	18		68	7857
1974	29	1018	2962	579	1693	9	3	587	15	5	7	6824
1973	16	1353	2033	353	1781	5	7	513	9	18	15	6101
1972	58	4821	1964	262	1511	14	11	636	33	84	19	8567
1971	26	2242	289	36	251	10		511	1965	26	18	5092
1970	38	192	18	18	23	16		1	1547	271	52	2168
1969	54	761	45	15	42	8	1		1141	2017	17	4079
1968	1518	1292	368	194	935	7		4	29	54543	35	58877
1967	989	1141	394	181	844	2			5	64	9	3441
1966	952	1293	457	136	1059	2				8	29	3857
1965	863	1248	429	142	1047	7		1	2	2	28	5739
1964	744	934	276	139	698	8		1		3	4	2805
1963	799	720	291	126	858	5	4		1	2	8	2872
1962	756	1115	277	205	787	5			1	14	7	3143
1961	811	1463	548	153	1329	5		1	4	2	4	4320
1960	792	657	314	148	656	28			2	6	1	2596
1950 TO 1959	4683	5961	2168	1152	2916	859	16	2	6	23	45	19770
1940 TO 1949	6574	7231	6195	363	6917	8652	5	2	6	9	55	32387
1930 TO 1939	11427	198	547	17	718	22	1	16	26	27	1263	14252
1920 TO 1929	12	6	12	2	0	1				6	9	54
PRIOR TO 1920	1	36	21	2	58	1	2	1	1	4	13	120
UNKNOWN	60	549	32	25	336	6	24	1	9	57	1377	4276
TOTAL	41534	835380	578162	103558	447588	9649	283495	13888	5487	57214	8435	2106544

DATA THROUGH 12/31/96 — BUREAU OF ALCOHOL, TOBACCO AND FIREARMS — RUN: 1/06/97 8:52

NFA REGISTRATION ACTIVITY - ANNUAL COMPARISON

YEAR	F1	F2	F3	F4	F5	F6	F9	F10	LTR	4467	OTHER	TOTAL
1996	1253	96677	17197	6367	67769	1	40225	1262	21			230716
1995	1125	99075	17529	8086	66522	2	37332	1487	28			225978
1994	1273	104543	22796	7887	62351		35388	2868	2			237892
1993	301	100226	27716	7858	67752		28116	486	11		16	240312
1992	358	76127	26896	6577	46597	2	20363	298	49		39	177269
1991	226	78229	21858	5423	42275	1	36783	262			22	184257
1990	641	89257	22916	6843	54881	4	37496	289	46		129	203748
1989	271	69559	23769	8186	31143	12	68128	281	69		94	151492
1988	341	25125	59805	7716	8369	2	1473	483	66		445	83759
1987	416	17183	34557	8331	9445	2	745	328	142		706	71765
1986	939	70656	22988	5174	4946		527	381	178	1	731	106521
1985	645	14832	15539	3537	6375	1	1506	335	45		718	43531
1984	535	14852	16759	3919	5438	1	1507	294	3		336	41624
1983	455	11157	11149	3208	3089	27	248	367	4		25	29719
1982	326	7759	11424	2771	2676	9	1	481	2		34	25483
1981	271	7131	8162	3741	2722	25	1	342	18		18	22421
1980	162	3877	6826	3046	1638	6	1	338	7		29	15113
1979	108	3285	6987	2151	1516	15	6	354	5		18	14445
1978	88	1458	5501	1878	1258	7	1	736	4		15	10946
1977	77	1986	6814	1538	1746	2	1	591	14	1	19	11985
1976	38	888	10944	983	1758	19	5	458	3	36	26	15164
1975	79	1482	3280	569	1835	18	3	613	10		48	7857
1974	29	1018	2965	579	1440	9	3	589	15	5	7	6827
1973	16	1354	2853	354	1700	5	7	515	9	10	12	6101
1972	38	4021	1964	262	1513	14	11	639	33	85	10	8590
1971	24	2263	209	36	252	10		312	1965	26	18	5895
1970	39	192	18	18	23	16			1567	271	51	2167
1969	36	761	43	15	42	8	1		1148	2053	17	4116
1968	1511	1320	568	196	935	7			29	54585	55	58906
1967	909	1141	586	181	844	2			5	64	9	3461
1966	902	1295	637	336	1068	2				8	20	3858
1965	845	1246	429	142	1068	7			2	2	28	3739
1964	744	934	276	139	698	6				3	4	2804
1963	789	728	291	126	808	3	4		1	2	8	2672
1962	736	1115	277	205	787	3			1	14	7	3163
1961	512	1464	548	154	1338	5			4	2	4	4323
1960	792	457	314	148	656	20			2	6	1	2596
1950 TO 1959	6638	5961	2165	1152	2917	859	14	2	6	23	45	19786
1940 TO 1949	6575	7232	4697	564	4919	8456	4	2	6	18	54	32927
1930 TO 1939	11649	199	564	17	718	22	1	14	27	27	1267	14759
1920 TO 1929		4	4		1					5	5	19
PRIOR TO 1920		11	8		4						5	28
UNKNOWN	68	353	92	25	334	6	24	1	10	58	3872	4780
TOTAL	42818	935587	395562	118814	515673	9612	244717	15866	5588	57223	8876	2348578

Mr. Larson arranged the Form 4 data from 1992 to 1996 by and across single years to determine if the number of registrations changed over time. As shown in the following table, the total number of Form 4 registrations increased by 625 during 1992 to 1996, for registrations that occurred since 1934 by single years through 1996 and during unknown years (registrations for

years in and before 1968 have been combined). Mr. Larson reported these results in 1997 in Congressional testimony, as shown below.

Table 4

Form 4 (Tax-Paid) Transfers from 1934 to 1996, and During Unknown Years, as Reported by ATF During 1992 to 1996 in the National Firearms Registration and Transfer Record: Calculations Showing Results of Annual and Overall Changes Have Been Added

Year	1992 (1)	1993 (2)	Change (2)-(1)= (3)	1994 (4)	Change (4)-(2)= (5)	1995 (6)	Change (6)-(4)= (7)	1996 (8)	Change (8)-(6)= (9)	Change, 1992-96
1996								6,367	0	0
1995						8,059	0	8,086	+27	+27
1994				7,838	0	7,870	+32	7,887	+17	+49
1993		7,749	0	7,819	+70	7,837	+18	7,850	+13	+101
1992	6,527	6,556	+29	6,568	+12	6,573	+5	6,577	+4	+50
1991	5,390	5,400	+10	5,411	+11	5,420	+9	5,423	+3	+33
1990	6,807	6,821	+14	6,830	+9	6,835	+5	6,841	+6	+34
1989	8,155	8,176	+11	8,176	0	8,181	+5	8,186	+5	+21
1988	7,699	7,703	+4	7,707	+4	7,712	+5	7,714	+2	+15
1987	8,311	8,318	+7	8,321	+3	8,330	+9	8,331	+1	+20
1986	5,158	5,162	+4	5,172	+10	5,174	+2	5,174	0	+16
1985	3,524	3,526	+2	3,529	+3	3,532	+3	3,537	+5	+13
1984	3,911	3,913	+2	3,915	+2	3,916	+1	3,919	+3	+8
1983	3,203	3,204	+1	3,207	+3	3,207	0	3,208	+1	+5
1982	2,770	2,771	+1	2,770	-1	2,770	0	2,771	+1	+1
1981	3,734	3,735	+1	3,737	+2	3,741	+4	3,741	0	+7
1980	3,040	3,040	0	3,044	+4	3,046	+2	3,046	0	+6
1979	2,150	2,150	0	2,151	+1	2,151	0	2,151	0	+1
1978	1,879	1,878	-1	1,879	+1	1,878	-1	1,878	0	-1
1977	1,535	1,535	0	1,537	+2	1,537	0	1,538	+1	+3
1976	979	979	0	983	+4	983	0	983	0	+4
1975	567	567	0	567	0	568	+1	569	+1	+2
1974	579	579	0	579	0	579	0	579	0	0
1973	353	353	0	353	0	353	0	354	+1	+1
1972	261	261	0	261	0	262	+1	262	0	+1
1971	36	36	0	36	0	36	0	36	0	0
1970	10	10	0	10	0	10	0	10	0	0
1969	13	13	0	13	0	13	0	13	0	0
1968	192	193	+1	193	0	194	+1	194	0	+3
< 1968	2,780	2,785	+5	2,792	+7	2,791	-1	2,983	+192	+203
Unknown	22	23	+1	26	+3	25	-1	25	0	+3
CHANGE			+92		+150		+100		+283	+625
Totals		79,573	87,413		95,338		103,558		110,014	

Data source: Bureau of Alcohol, Tobacco and Firearms. All numbers shown in boldface type were calculated by Eric M. Larson.

[44]

Mr. Larson's analysis used arithmetic calculations to determine if there are changes in NFRTR data, which could mean that registrations were being added after the fact, years after

[44] Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1998* at 71, *available at* http://www.nfaoa.org/documents/1997testimony.pdf. Mr. Larson found similar patterns of apparent additions of registrations for Forms 1, 2, 3, 5, 4467, and "Letter" and "Other" categories.

ATF approved the original registration and concluded NFRTR reporting for a given year. For example, the number of registrations for 1992 changed from 6,527 to 6,556 in 1993, a difference of 29; similarly, the number of registrations for 1992 changed from 6,568 in 1994 to 6,573 in 1995, an increase of 12. Inspection of these Form 4 data disclose that the number of registrations in 1992 (6,527) increased to 6,577 in 1996. Put another way, ATF added 50 registrations during 1992 to 1996, for the year 1992, which gives the appearance that ATF could have added 50 Forms 4 to the NFRTR during that period. Using the same arithmetic calculations to analyze total Form 4 registrations for all years from 1992 to 1996, Mr. Larson determined that total registrations increased by 625; again, the implication is that ATF may have added 625 Forms 4 to the NFRTR after being unable to locate them in the NFRTR, and NFA firearms owners provided ATF with copies of their approved Forms 4. Note that 203 registrations were added for years in or before 1968.

In an effort to determine whether he may have made any errors of fact or omission, Mr. Larson asked NFA Branch officials if the increases in registrations resulted from ATF added copies of lost or destroyed NFA registrations back into the NFRTR, after obtaining them from firearms owners, or if there was another explanation. NFA Specialist Gary N. Schaible told Mr. Larson if an error was detected on a form and the form was misclassified, it would be reclassified as a Form 4, a Form 4467 or whatever form was correct, and that it would be re-entered in the NFRTR in the year that the registration occurred.[45] Mr. Schaible also stated "I assume that's happened," in response to Mr. Larson's question: "Has ATF ever added a firearm to the NFRTR, after a lawful owner produced a valid registration, because ATF had no record of the firearm in

[45] Id. at 95

the NFRTR?"[46] In addition to Mr. Schaible's comments, NFA Branch Chief Nereida W. Levine told Mr. Larson in a January 7, 1997, letter that correcting errors in entering data according to Form number or year of registration "may result in an adjustment to previously generated statistics."[47] NFA Branch Chief Levine concluded:

> finally, you asked whether a firearm would be added to the Registry if a person possessed a valid registration that was not in the Registry. The document the person possesses is his or her evidence of registration. It would be added to the National Firearms Registration and Transfer Record if the information was not already in the Record.[48]

If no registrations were added to the NFRTR, explanations by NFA Branch representatives that changes in annual "NFA registration activity" could result from correcting errors in Form number and/or year of registration means such changes would be a "zero-sum" game, and represent classification errors. In other words, if the annual changes resulted from reclassified data, total registrations from all categories would not change.

To determine if the number of total registrations did not change, Mr. Larson analyzed total registrations (for all categories) for each year from 1992 to 1996 using the same arithmetic calculations he used to analyze Form 4 data. He found that total registrations increased each year and totaled 18,869 for the period from 1992 to 1996, and that registrations had been added to all NFRTR data categories for each year.

Mr. Larson concluded the discrepancies he observed in NFA registration activity, and statements by ATF representatives, required additional evidence to reliably determine the reason(s) for the increased number of reported registrations. While ATF personnel adding

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[46] Id. at 97. This question was asked and answered twice.

[47] Letter from Nereida W. Levine, Chief, NFA Branch, Bureau of Alcohol, Tobacco and Firearms, dated Jan. 7, 1997, to Eric M. Larson, bearing symbols E:RE:FN:GS. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 110-111, *available at* http://www.nfaoa.org/documents/1998testimony.pdf.

[48] Id. at 41.

registrations was one possible explanation, there was insufficient statistical and evidence upon which to reliably base such a conclusion. For example, there also could have been flaws in computer software, problems with reporting functions resulting from editing, inadequate internal quality controls or checks, and so forth, so Mr. Larson concluded that a formal investigation was needed, and did not present his findings as definitive. Because he was unable to conduct additional research according to standard social sciences practices, Mr. Larson asked appropriate Government officials to determine if ATF was adding registrations to the NFRTR.[49]

Coverups in an internal ATF investigation, and audit of the NFRTR by the Treasury IG

ATF and the Treasury IG conducted separate investigations in 1997 and 1998, respectively, of allegations by Mr. Larson that ATF had mismanaged the NFRTR, and there is valid and reliable evidence that each entity avoided determining whether ATF had added registrations. Each covered up facts and failed to diligently investigate Mr. Larson`s complaint. All of Mr. Larson`s allegations will not be reviewed in this motion, but it is instructive to note that the Treasury IG censored his most serious allegation. Although an audit Work Paper dated October 10, 1997, prepared Treasury IG auditor Diane Kentner, states the following:

[49] Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848) and considered "tax return" information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to visit the NFA Branch to inspect NFRTR data or observe procedures involving NFA registration activities conducted by NFA Branch personnel.

Because the names and addresses of individual NFA firearms owners and SOTs are also protected from disclosure, it was not possible for Mr. Larson to conduct ordinary social science research, such as drawing representative random samples to try and contact or survey them to investigate what their experiences may have been regarding NFA paperwork for guns in their inventory for which they had valid registration documents, but for which ATF could find no record in the NFRTR. Similarly, Mr. Larson was legally prohibited from accessing the computerized NFRTR data base, and thus was unable to inspect these data, run tabulations and cross-tabulations, or conduct other analyses.

(OIG Follow Up)

- **Did ATF add additional firearms to the NFRTR that were originally registered on Form 1 or 4467 during 1934 to 1971, for which ATF lost or destroyed original records.** [redacted][50]

there is no evidence in either of its 1998 reports on the NFRTR, or in the 1998 audit Work Papers, that the Treasury IG fully investigated Mr. Larson's allegation.

Mr. Larson's original allegation, reproduced below, states:

> **1. ATF employees have deliberately destroyed original firearm registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by ATF Special Agent Gary N. Schaible.[3] In analyses of data made public by ATF, I found that during 1992 to 1996, ATF may have added 119 or more firearms to the NFRTR which were originally registered on Form 1 or Form 4467 during 1934 to 1971, for which ATF lost or deliberately destroyed the original records.**[51]

The Treasury IG censored Mr. Larson's allegation in its October 1998 audit report, and is reproduced on the following page.

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[50] Work Paper D-5, October 10, 1997 at 1, available at http://www.nfaoa.org/documents/Work_Papers_D.pdf.

[51] Letter to Valerie Lau, Inspector General, Office of Inspector General, Department of the Treasury, dated May 10, 1997, from Eric M. Larson. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999*at 99, *available at* http://www.nfaoa.org/documents/1998testimony.pdf.

Form 1 ("Registration of Firearms") was used from 1934 to 1968 to register unregistered NFA firearms; after 1968 it was titled "Application to Make and Register a Firearm" because the Gun Control Act of 1968 prohibited the registration of unregistered NFA firearms after the 1968 amnesty period expired (a citizen can "make" and register an NFA firearm by paying a $200 tax and first obtaining ATF's approval to do so). ATF created Form 4467 "Registration of Certain Firearms in November 1968") under § 207(b) of the 1968 Act to accept registrations of unregistered firearms, with immunity from prosecution, during the amnesty period from November 2, 1968, to December 1, 1968.

The year 1971 specified in Mr. Larson's complaint relates to a different allegation that ATF had improperly registered unregistered NFA firearms after the 1968 amnesty period expired. Such registrations would violate the NFA, because "[n]o firearm may be registered by a person unlawfully in possession of the firearm after December 1, 1968, except that the Director, after publication in the FEDERAL REGISTER of his intention to do so, may establish periods of amnesty, not to exceed ninety (90) days in the case of a single period with such immunity from prosecution as the Director determines will contribute to the purposes of" the NFA, as stated ATF's published regulations in the *Code of Federal Regulations*, 1969 edition at 93. See 26 C.F.R. 179.120(a)(3)(b), *available at* http://blog.princelaw.com/assets/2008/7/7/1969-CFR-ATF-amnesty-regs.pdf.

Allegation 1. Destruction of Documents

"ATF employees have deliberately destroyed original firearms registration documents that they are required by law to maintain, as noted in sworn testimony in 1996 by [an ATF Specialist]." [52]

In the internal 1997 ATF investigation, which was completed before the Treasury IG started audit work to investigate Mr. Larson's allegations, Mr. Schaible contradicted his testimony in *LeaSure* about NFA Branch employees destroying NFA documents in 1994 by stating under oath to ATF Special Agent and internal investigator Jeff Groh:

> In response to Larson's first allegation regarding testimony in U.S. District Court, made reference to certain documents being destroyed at the NFA Branch. stated he made the comments in reference to thousands of Title II firearms manufactured by that were being exported to Various manufacturers were forwarding the paperwork for these firearms. However, not all of the paperwork was entered properly into the NFA system. It was suspected that some of the contract employees had destroyed some of the documents in an effort to reduce case load. admits that Lerson may have construed from his testimony that ATF employees were destroying documents, but this was not the case. suggested that if there was an increase in any NFA firearm registrations, it may have resulted from the changes made to reflect different form numbers being located and entered or from the transposition of registration dates on the original form. Such changes would have been added to the NFRTR.[53]

The October 1998 Treasury IG report stated that Mr. Schaible

> . . . was referring to an incident in 1988 when NFA Branch management suspected that two contract employees were disposing of documents. These contract employees were

[52] October 1998 Treasury IG Report, at 7, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf.

[53] "[REDACTED], et al." Report of Investigation, by [REDACTED], Bureau of Alcohol, Tobacco and Firearms, September 8, 1997 at 90. Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1999* at 102-103, *available at* http://www.nfaoa.org/documents/1998testimony.pdf.

Mr. Schaible's reference to "Title II firearms" refers to Title II of the Gun Control Act of 1968 (Title II is also, but less commonly, known as the National Firearms Act of 1968); consequently, NFA firearms are also referred to as Title II firearms. Special Agent Groh, representing ATF Internal Investigations, contacted Mr. Larson and advised that he had been assigned to investigate his allegations, is the author of the foregoing Report of Investigation.

> immediately removed from their assignment to the NFA Branch. The employees could not be hired or fired since they were employed by a contractor.[54]

In *LeaSure*, Mr. Schaible testified under oath he was aware of "occasions . . . in the NFA Branch of clerks throwing away transmissions because they don't want to fool with them" rather than process them (Mr. LeaSure testified he FAXed registration documents to ATF in 1994, and ATF claimed it was unable to find a record of them).[55] Under cross-examination, asked "that's one of the things [NFA Branch clerks throwing away documents] that could happen to you?," Mr. Schaible replied "Certainly."[56] In response to a question whether "people have been transferred and fired as a result of that, haven't they," Mr. Schaible answered: "The only situation I can remember is, no, they weren't transferred. No, they weren't fired. They eventually quit, yes, but, no, nothing like transferred or fired." When asked "Did [ATF] ever continue anybody in that particular job after they threw something away, threw an important transmission away or destroyed it or put it in the shredder or whatever they did? [ATF] continued them doing that kind of work?" Mr. Schaible said "With monitoring, yes."[57]

Regarding Mr. Schaible's contradictory statements, made under oath, the October 1998 Treasury IG audit report concluded:

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[54] October 1998 Treasury IG Report at 7, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf.

[55] *United States of America vs. John Daniel LeaSure* (1996) at 42-43, *available at* http://www.nfaoa.org/documents/LeaSureTrial.pdf.

[56] Id. at 42-43.

[57] Id. at 43.

Our review of the allegations showed that:

1. National Firearms Act (NFA) documents had been destroyed about 10 years ago by contract employees. We could not obtain an accurate estimate as to the types and number of records destroyed.

58

The limited scope of the Treasury IG audit is troubling because Discovery sampling analysis disclosed a large number (176) of "critical errors"[59] which the Treasury IG failed to mention or publish in either of its 1998 audit reports, compared with 37 "discrepancies" it identified in its December 1998 report;[60] and despite finding large numbers of "critical errors," there was no effort to reliably estimate the accuracy and completeness of the NFRTR.

The 1998 Treasury IG audit also raises reasonable doubt about the validity of Certificates of Nonexistence of a Record (CNR) that ATF provides to courts to certify that no record of registration for particular firearms can be located in the NFRTR. The reason is that the Treasury IG auditors formally declined to evaluate the accuracy of procedures ATF uses to search the NFRTR to legally justify issuing CNRs, which are also issued to attest that specific firearms are not registered to specific persons. NFRTR data are also routinely used for other law enforcement activities, including legal justifications for issuing search warrants.

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[58] October 1998 Treasury IG Report at 1, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf.

[59] Work Paper H-0, April 23, 1998, at 1.

[60] December 1998 Treasury IG Report, at 12, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf. The "discrepancies" identified in the December 1998 Treasury IG Report are identified as "critical errors" in audit Work Papers.

The "Objectives, Scope and Methodology" section of the December 1998 Treasury IG report states:

> Our scope did not include a review of the accuracy of ATF's certifications in criminal prosecutions that no record of registration of a particular weapon could be found in the registry. We also did not evaluate the procedures that ATF personnel use to search the registry to enable them to provide an assurance to the court that no such registration exists in specific cases. Accordingly, this report does not provide an opinion as to the accuracy of the registry searches conducted by ATF.
>
> Audit work was performed from October 1997 through May 1998. Our review generally covered ATF's administration of the registry for the period October 1, 1996 through March 31, 1998.
>
> Our work was conducted in accordance with Government Auditing Standards issued by the Comptroller of the United States, and included such audit tests as we determined necessary.[61]

According to the edition of *Government Auditing Standards* the Treasury IG used in its audit of the NFRTR, the Treasury IG auditors failed to comply with an applicable audit standard, "abuse," as stated below:

> Abuse is distinct from illegal acts and other noncompliance. When abuse occurs, no law, regulation, contract provision, or grant agreement is violated. **Rather, the conduct of a government program falls far short of societal expectations for prudent behavior.** Auditors should be alert to situations or transactions that could be indicative of abuse. **When information comes to the auditors' attention (through audit procedures, tips, or other means) indicating that abuse may have occurred, auditors should consider whether the possible abuse could significantly affect the audit results. If it could, the auditors should extend the audit steps and procedures, as necessary, to determine if the abuse occurred and, if so, to determine its effect on the audit results** [emphasis added].[62]

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[61] Id. at 4.

[62] See Chapter 6, "Field Work Standards for Performance Audits." *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 75.

There is no statement in the 1998 Treasury IG reports that the auditors (1) considered whether decreasing the "critical error" rate at the request of the audited party at interest (NFA Branch representatives) to achieve a desired result "could significantly affect the audit results," or (2) attempted "to determine its effect on the audit results." In a Work Paper documenting the 1998 audit procedures and activities, the Audit Manager attested that "abuse" was not an issue:

	Ref.	Initials	N/A	Remarks
2.12 Auditors have been alert to situations or transactions that could be indicative of illegal acts or abuse, and have extended audit steps as necessary (GAS 6.26, 6.32, 6.35). (Support is statement in audit guidelines to be alert to these situations or transactions, and any related work performed.)	A-1	RKB		Report deals with allegations of ATF mismanagement of its registry

[63]

The conduct of the Treasury IG auditors, who under *Government Auditing Standards* are required to be "independent,"[64] clearly "falls far short of societal expectations for prudent behavior." The reasons are that the Treasury IG auditors (1) manipulated audit procedures at the request of NFA Branch representatives for the purpose of deliberately decreasing the "critical error" rate of the NFRTR because the 18.4 percent "critical error" rate the Treasury IG auditors found was "disappointing at best and could have serious consequences for ATF's firearm

[63] Work Paper Bundle A, page 5. The initials RKB are those of Treasury IG auditor Robert K. Bronstrup, identified in Work Paper A-1 as the "Lead Auditor"; and as "Audit Manager" in the October 1998 Treasury IG report at 27, and December 1998 Treasury IG report at 49.

[64] *Government Auditing Standards*, by the Comptroller General of the United States. 1994 Revision. Washington, D.C.: U.S. Government Printing Office, 1994 at 22. See Chapter 3, "General Standards," which states: "In all matters relating to the audit work, the audit organization and the individual auditors, whether government or public, should be free from personal and external impairments to independence, should be organizationally independent, and should maintain an independent attitude and appearance."

registry mission," (2) left unanswered whether "critical errors" exist in other NFRTR categories, (3) failed to reliably estimate the "critical error" rate of the NFRTR, as required by Discovery sampling rules and procedures, by increasing the size of the sample and conducting additional analysis, (4) chose to avoid resolving reasonable doubts (created by their audit findings) about the accuracy and completeness of the NFRTR, and by extension the validity and reliability of ATF's Certifications of Nonexistence of a Record (CNRs) that "provide an assurance to the court that no such registration [for an NFA firearm] exists in specific instances."

Congressional Hearings on the NFRTR from 1996 to 2001, and related issues

Each year from 1996 to 2001, Mr. Larson and other concerned citizens provided testimony or statements to the Congress about the accuracy and completeness of the NFRTR.[65] The most important outcomes of these testimonies and statements were (1) the 1998 Treasury Department Inspector General audit of the NFRTR, and (2) appropriations language that allocated $1 million to ATF, with instructions to use it to render the NFRTR accurate and complete. There is no evidence, however, that either of the foregoing outcomes rendered the NFRTR accurate and complete, or resulted in a valid and reliable estimate of the NFRTR error rate. Consequently, the accuracy of the NFRTR is still currently unknown.

The Treasury IG auditors did not follow GAGAS to reliably estimate the "critical error" rate of the NFRTR database, in part, because NFA Branch representatives inappropriately requested them to manipulate the definition of "critical error" to achieve a lower rate, but that is not the whole story. The reason is that the Treasury IG auditors requested an Assistant Director at the U.S. Government Accountability Office to advise them how to conduct Discovery

[65] These Congressional testimonies and statements are listed in Mr. Larson's VITA, which has been separately submitted to this Court, and include a variety of issues not relevant to *Friesen*; they are not listed or reviewed in this motion.

sampling in its 1998 audit,[66] and with knowledge of correct procedures for doing so declined to follow his advice. Consequently, the "critical error" rate for the NFRTR database was not estimated in the 1998 audit.

Mr. Larson's requests to top Government officials with oversight responsibility over ATF to conduct meaningful oversight, particularly over ATF's continuing mismanagement of the NFRTR, failed. For example, when Mr. Larson expressed concerns to Treasury Department Inspector General David C. Williams about the integrity of the 1998 audit based on the Treasury IG censoring his most serious allegation against ATF, and that the audit was conducted during a period that included the regime of the his corrupt predecessor (who resigned in 1998 following Senate hearings documenting her misconduct), Dennis S. Schindel, Assistant Inspector General for Audit, responded in a January 7, 1999, letter:

[66] The Treasury IG auditors informally requested Barry Seltser, Assistant Director and Manager, Design, Methodology and Technical Assistance Group, U.S. Government Accountability Office (GAO), for advice in conducting sampling procedures and data analysis in its 1998 audit of the NFRTR. At a January 20, 1998, meeting at GAO Headquarters, which included Sidney Schwartz, Mathematical Statistican, GAO; Carol Burgan, Auditor [DELETED], Robert Bronstrup, Audit Manager, and Gary Wilk, Auditor:

Mr. Seltser suggested that we use "discovery" sampling for the top three Forms that we were concerned about (Form 4467, Other, and Letter categories). In discovery sampling, about 60-70 items are selected from each category and tested for "critical" and "non-critical" errors. If no errors are found in this discovery sample, then we could make a statement about the category. If errors are found, then we must expand our sample based on a mathematical formula.

Work Paper F-19, prepared by Carol Burgan, January 24, 1998 at 1.

The Treasury IG auditors did not follow Mr. Seltser's recommendation to "expand our sample based on a mathematical formula" after discovering "critical errors" in the Discovery samples. Mr. Seltser's advice was informal; representative of the kind of informal advice GAO typically and often renders to Executive Branch agencies upon request; and GAO was not involved in the Treasury IG's 1998 audit of the NFRTR.

Dear Mr. Larson:

Mr. Williams has asked me to respond to your letter of November 5, 1998. In that letter you expressed concern that the previous Inspector General, Valerie Lau and others may have tried to compromise a congressionally directed audit of the firearm registration practices of the Bureau of Alcohol, Tobacco and Firearms (ATF). Since my office oversaw the work, I assured Mr. Williams and wish to assure you that no effort to influence the audit occurred.
[67]

In March 1999, Mr. Schindel told Mr. Larson the 1998 audit "determined there were errors in the [NFRTR] based on statistically valid sampling methodologies." He added that ATF "is operationally responsible for correcting the errors in the [NFRTR] data base," and it is "ATF's management responsibility to identify and correct all of the records that may be in error in the registry."[68]

Similarly, Mr. Larson expressed concerns to then-ATF Director John W. Magaw, who answered them in a November 19, 1999, letter:

Your allegations concerning my staff are totally without foundation. I have been advised of all your allegations concerning the Bureau of Alcohol, Tobacco and Firearms' (ATF) administration of the National Firearms Act (NFA), beginning with your attempts in 1987 to have certain firearms removed from the statute up through the recent issuance of the Office of the Inspector General (OIG) reports. I have reviewed the OIG reports and agree with my staff that most of your allegations are without merit.

[67] Eric M. Larson, *Work Papers on Errors in the National Firearms Registration and Transfer Record, and Other Issues Regarding the Bureau of Alcohol, Tobacco, and Firearms.* Prepared for the Honorable Pete Sessions, House of Representatives, Washington, D.C., April 2, 1999 (unpublished), inserted at 36-37, *available at* http://www.nfaoa.org/documents/CritiqueofI998IGreports.pdf.

[68] Letter from Dennis S. Schindel, Assistant Inspector General for Audit, Office of Inspector General, Office of Inspector General, Department of the Treasury dated March 25, 1999, to Eric M. Larson.

> We have carefully considered the recommendations made by the OIG and are working to ensure that the NFRTR continues to be an accurate and reliable database of firearms transactions.
>
> [69]

The foregoing statements by Assistant Inspector General for Audit Schindel and ATF Director Magaw, each of whom were key Government officials who had major and significant federal law enforcement responsibilities in 1999, are not worthy of belief.

Congress appropriated $500,000 for fiscal year 2002 for ATF to use "with the aim of reducing processing times and ensuring the completeness and accuracy of the NFRTR."[70] The appropriations hearing records included questions by the Subcommittee on Treasury, Postal Service and General Government about the NFRTR, including the need for "[a]n independent, annual audit of the [NFRTR] database covering registration to retrieval," and when it would be "possible to confirm the completeness and accuracy of the NFRTR."[71] Congress again appropriated $500,000 for fiscal year 2003 for improving ATF's licensing and regulatory operations, "including making significant progress in correcting remaining inaccuracies within the NFRTR database."[72]

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[69] Letter from John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms dated November 19, 1999, to Eric M. Larson at 1 and 3, *available at* http://www.nfaoa.org/documents/MagawLetter1999toLarson.pdf.

[70] Report No. 107-152, to accompany H.R. 2590, Treasury, Postal Service, and General Government Appropriations Bill, 2002. 107th Cong., 1st Sess., House of Representatives (2001) at 20. These funds were approved in The Treasury and General Government Appropriations Act, 2002, P.L. 107-67, 115 Stat. 514 (2001).

[71] "Regulatory Processes and Resources," *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002*. Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 107th Congress, 1st Sess., Part 1 at 476-479.

[72] Report No. 107-575, to accompany H.R. 5120, Treasury, Postal Service and General Government Appropriations Bill, 2003. 107th Cong., 2d Sess., House of Representatives at 19 (2001). These funds were approved in Report No. 108-10, Conference Report to accompany H.J. Res. 2, 108th Cong., 1st Sess. at 1324-1325 (2003).

The Subcommittee was influenced by an independent statistical expert, Dr. Fritz J. Scheuren, who advised them in response to its request for his review of responses ATF provided to three questions asked by the Subcommittee.[73] Dr. Scheuren stated, in part:

> **Technology question. My reading of the OIG reports suggests that very serious problems were uncovered in ATF's recordkeeping systems. In fact, in my long experience, I cannot think of any instance where poorer results were obtained. I was greatly troubled, therefore, by ATF's comment that it " ... found nothing in the OIG report to justify a statutory or administrative change..." The automation**
>
> **Conclusions. I can only offer a qualified opinion on the ATF's answers but if their responses are to be taken at face value, two conclusions arise: (1) ATF has serious material weaknesses in its firearm registration system which it has yet to acknowledge and (2) the ATF steps taken to improve its recordkeeping clearly lack thoroughness and probably lack timeliness as well.**
>
> **Recommendations. Let me offer three recommendations to the Committee for its consideration: (1) ATF should be asked to engage an outside audit organization to give a more complete assessment of the weaknesses in their existing firearms system. The scope of the OIG audit was too narrow. These audits should be annual, including a full test of the system from registration to retrieval. The Post Office has such audit practices and offers a model of the completeness needed. (2) ATF should be asked to conduct a thorough benchmarking effort looking at recordkeeping practices and how they are changing both within government and in organizations like insurance companies that have to keep files for long periods. This benchmarking will require another (separate) outside contractor experienced in conducting such studies. (3) The use of record linkage technologies to test and update the ATF firearms system to reduce its isolation are worth study. A match with the SSA decedent file is an example, but there are other government systems that might be looked at too. Possibly legislation would be needed but before seeking legislation ATF should engage one or more experts in record linkage techniques as consultants on the present "matchability" of the system and needs for its future "matchability."** [74]

Dr. Scheuren's influence is evident in the following exchange between the Subcommittee and ATF, which subsequently occurred during ATF's appropriations hearing:

> **Question: An independent, annual audit of the database covering registration to retrieval?**
>
> **Answer: We do not believe an independent audit of the database is needed. The ongoing efforts we are making to ensure the completeness and accuracy of the NFRTR by imaging and indexing the documents, performing database verification, and linking the retrieval system with the imaging system will result in strong internal controls for the NFRTR.** [75]

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[73] *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002.* Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 107th Cong., 1st Sess., Part 3 at 23-25, *available at* http://www.nfaoa.org/documents/2001statement.pdf. (Hereafter Congressional Hearings, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002.*) Fritz J. Scheuren, Ph.D., a past elected President of the American Statistical Association, is currently Vice President, Statistics, National Opinion Research Center (NORC), University of Chicago.

[74] Letter from Fritz J. Scheuren dated May 23, 2000, to the Honorable Jim Kolbe, Chairman, Subcommittee on Treasury, Postal Service, and General Government. Id. at 24-25.

There is currently no evidence that ATF has satisfactorily complied with Congressional instructions to render the NFRTR accurate and complete. The Treasury IG terminated another NFRTR audit in 2002 before it was completed, and a former staff member stated: "We found there were still serious problems with the NFRTR data that, to the best of my knowledge, are still uncorrected."[76]

In 2007, seven years after his Congressional statement, because private citizens expressed concerns to him about the accuracy and completeness of the NFRTR, Dr. Scheuren reanalyzed the NFRTR database situation. In a December 11, 2007, letter, to the Congress, Dr. Scheuren reiterated and expanded his concerns about the consequences of "serious material errors" in the NFRTR that ATF "has yet to acknowledge," and added: "In my considered professional judgment, these errors render the NFRTR questionable as a source of evidence in federal law enforcement."[77]

In or about 2006, possibly in response to the Justice IG's "review" of the NFRTR, ATF created a new form entitled "Firearms Inspection Worknote: NFA Inventory Discrepancies," a

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[75] Congressional Hearing, House of Representatives, *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 2002.* Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives. 107th Cong., 1st Sess., Part 1 at 479, *available at* http://www.nfaoa.org/documents/NFRTRdocpack.pdf, at Tab 4.

In October 2008, Mr. Larson filed a FOIA request to ATF for (1) documents pertinent to this "imaging system" and how it may help render the NFRTR accurate and complete by "imaging and indexing the documents," including any evaluation of the accuracy and completeness of the "imaging system"; that is, whether complete documentation is available for firearms for original registration and each subsequent transfer; (2) documents that describe the search procedures ATF uses to provide assurances to the Court that no record of a firearm registration can be located in the NFRTR, and (3) a copy of the current NFRTR procedures manual. ATF has not provided any documents in response to any of the foregoing FOIA requests to date.

[76] For additional information, see Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice*. 2008-2009 Edition. Thomson West Publishing, 2008 at 572-573.

[77] Letter to the Honorable Alan B. Mollohan, Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives dated December 11, 2007, by Fritz J. Scheuren, Vice President, Statistics, National Opinion Research Center, University of Chicago, at 1, available at http://www.nfaoa.org/documents/Scheuren_Committee_Chair_Letter.pdf.

copy of which Mr. Larson obtained by a FOIA request.[78] A copy of this form is reproduced as received by Mr. Larson from ATF on the following page.

[78] Letter to Averill P. Graham, Chief, Disclosure Division, Bureau of Alcohol, Tobacco, Firearms and Explosives dated January 24, 2007, by Eric M. Larson, *available at* http://www.nfaoa.org/documents/FOIA-FRTRJan2007.pdf.

NFA Inventory Discrepancies

PURPOSE: To reconcile discrepancies disclosed between the licensee's inventory/records
SOURCE/SCOPE:
NOTE:

Licensee Name: [redacted] | UI Number: 0

#	Manufacturer/Importer	Model	Type	Caliber/ Gauge	Serial Number	Date Transferred or Received	Transferred to or Received From:	Nature of the discrepancy	In Inventory Yes/No

Prepared By: | Date:

0 | 01/00/00

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NFA Inventory

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In his January 2007 FOIA request, Mr. Larson also requested ATF to provide

> **2) Written or audio instructions to ATF personnel which provide guidance and/or definitions of what constitutes an "error" or "discrepancy" in the NFRTR. These would include classroom training materials, flash cards, a manual or similar guide, instructions imparted via DVD, videotape or similar mediums of communication. These instructions would most likely be given to ATF Inspectors, but may also be given to Legal Document Examiners, ATF Special Agents, and others.**
>
> [79]

ATF stated that a search failed to locate such documents responsive to Mr. Larson's FOIA request, and he appealed. In a letter dated October 2, 2007, Janice Galli McLeod, Associate Director, Office of Information and Privacy, Department of Justice, stated:

> After carefully considering your appeal, I am affirming ATF's action on your request. ATF conducted a search for records responsive to your request and was unable to locate any records pertaining to the National Firearms Registration and Transfer Record documentation you referred to in your request. I have determined ATF's response was correct.[80]

Associate Director McLeod's statement may be valid and reliable evidence that ATF and the Department of Justice have improperly denied a FOIA request. It is hard to believe that a form ATF inspectors are supposed use to record "discrepancies" in the NFRTR database after encountering them during compliance inspections of SOTs would not have been given instructions regarding and procedures to follow in to reliably identify and report suspected "discrepancies," when the stated "purpose" of the form is to "reconcile discrepancies" in the NFRTR. It is not reasonable to believe ATF has not defined the term "discrepancy," because otherwise there would be no reason for the new form to exist.

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[79] Id. at 1.

[80] Letter to Eric M. Larson from Janice Gail McLeod, Associate Director, Office of Information and Policy, U.S. Department of Justice dated October 2, 2007, bearing identifiers RE: Appeal No. 07-1961, Request No. 07-458, BE:REG. *available at* http://www.nfaoa.org/documents/McLeodDOJletter2007.pdf.

According to SOTs who have been inspected in or after 2006, ATF personnel who encounter a discrepancy in NFRTR data are required to assign each discrepancy a "control number" and forward the information to the National Firearms Act Branch for resolution. Are there not tabulations, analyses, and other performance measures used to evaluate the accuracy and completeness of the NFRTR? Are there no records of the type and number of discrepancies? Associate Director McLeod's statement that no documents responsive to Mr. Larson's FOIA request can be found at National Firearms Act Branch is unworthy of belief.

***Giambro*: A 2007 federal court case involving the NFRTR**

In 2008, the United States Court of Appeals for the First Circuit upheld the validity of NFRTR data, including its use in twice creating a Certificate of Nonexistence of a Record, in affirming a conviction for Possession of Unregistered Firearm.[81] The Court of Appeals based its decision mainly on *Rith*, testimony on the NFRTR's reliability by ATF Specialist Gary N. Schaible, and stated "[a]lthough both the *Rith* court and the district court here acknowledged past

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[81] *United States of America* vs. *Dario Giambro*, United States Court of Appeals for the First Circuit, No. 08-1044, October 2, 2008, *available at* http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=08-1044P.01A. Hereafter Court of Appeals, *United States of America vs. Dario Giambro (2008)*.

The Court of Appeals decision was based on *United States vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings, before the Honorable George Singal, U.S. District Judge, Sept. 25, 2007, *available at* http://www.nfaoa.org/documents/GiambroTrial1.pdf; rest of transcript continued at http://www.nfaoa.org/documents/GiambroTrial2.pdf. Hereafter *United States of America* vs. *Dario Giambro* (2007).

The firearm, a Model 1908 Marble's Game Getter Gun, is a low-powered small-game over-and-under combination gun (has .22 long rifle/.44 Game Getter barrels 12" in length) with a folding shoulder stock, and was designed mainly for trappers, hunters and outdoorsmen. The Model 1908 Game Getter is classified as "Any Other Weapon" under the NFA (26 U.S.C. § 5845(a)(5)), was last manufactured in 1914. In excellent condition, accompanied by the original box, a 12" barrel Model 1908 Game Getter is valued at $2,500 or more. Ned Schwing, "Marble's Game Getter Gun NFA, Curio or Relic," *2005 Standard Catalog of Firearms: The Collector's Price & Reference Guide*. 15th Edition. Iola, Wisconsin: KP Books, 2004 at 728.

problems with the NFRTR, both emphasized that the ATF has addressed problems with the database and improved its reliability."

The Court of Appeals did not state that it specifically reviewed either of the 1998 Treasury IG audit reports, or the 2007 Justice IG report (all were introduced in *Giambro*), in its opinion and went on at length to affirm the District Court decision to exclude Mr. Larson as an Expert Witness. In particular, the Court of Appeals cited the District Court finding that Mr. Larson's motion in limine testimony[82] was not "based upon sufficient facts or data," not "the product of reliable principles and methods," and that Mr. Larson had not "applied the principles and methods reliably to the facts of the case."[83] The Court of Appeals stated that "suppositions . . . and conjecture abound[ed]" in Mr. Larson's testimony, and the District Court "was well within its discretion" to "conclude that . . . the data on which Larson based his analysis was 'purely anecdotal.'"[84]

The Court of Appeals decision was criticized the same day it was published.[85]

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[82] *United States of America vs.Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Transcript of Proceedings before the Honorable George Z. Singal, United States District Judge, Sept. 24, 2007, *available at* http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf. Hereafter Larson testimony, *United States of America vs.Dario Giambro* (2007).

An enhanced version of Mr. Larson's testimony, with insertions of the Exhibits to which he referred has been created for ease of reference to said Exhibits, is *available at* http://www.nfaoa.org/documents/GiambroLarsonMotionInLimineTestimonyWithExhibits.pdf.

[83] Court of Appeals, *United States of America* vs. *Daria Giambro* (2008).

[84] Id.

[85] See "CA1: First Bends to Help Government Prove Negative in Antique Gun Registration Case," Oct. 2, 2008. The critique states: "*US v.Giambro*, No. 08-1044 affirms a conviction for possessing an antique gun. (He was acquitted of a number of state charges.) The least interesting issue is under 26 U.S.C. 5861(d), where the court holds that the defendant need not have specific knowledge of the registration requirement, but just knowledge of the statutory elements of the guns subject to the registration requirements. More interesting is the admission of the ATF's 'Certificates of Nonexistence' of a registration record. The maker of the certificate testified. The First's analysis isn't that satisfactory. It basically says 'other circuits have upheld their use' even though there used to be problems. Finally, and without much analysis, the First says that it was fine for the District Court to exclude the testimony of an expert witness that had done some statistical analysis on the reliability of the ATF's system of gun registration. Because the First speaks in broad, general terms (and throws around words like 'Daubert'), it doesn't

Mr. Larson's motion in limine testimony was based upon, and is not materially different from, most of the evidence presented in this motion. It was not until his motion in limine testimony in *Giambro* that Mr. Larson concluded ATF had been adding firearm registrations to the NFRTR after being confronted with NFA firearms owners with their copies of the registrations, based on the 2007 Justice IG report, and that is what he stated.[86] For more than a decade, Mr. Larson qualified his concerns that, e.g., ATF "may have" added registrations to the NFRTR after losing their copies or records of them, because Mr. Larson did not believe the evidence he cited was sufficiently conclusive.[87] It was only after the Justice IG report reported in 2007 that ATF had added registration documents to the NFRTR that he concluded otherwise (the Treasury IG confirmed his allegation that "National Firearms Act (NFA) documents had been destroyed").[88]

Giambro differs from *Friesen* because (1) Mr. Giambro never contended the NFRTR was inaccurate with respect to him, and told one of his attorneys he had not registered the firearm.[89]

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seem like it was taking this issue seriously." *Available at* http://appellate.typepad.com/appellate/2008/10/ca1-first-bends.html.

[86] Larson testimony. *United States of America vs. Dario Giambro* (2007) at 67-68.

[87] It would have been inappropriate for Mr. Larson to attempt to estimate or publish (such as in a professional, refereed journal) a "critical error" rate of, e.g., ATF adding firearm registrations it had lost or destroyed to the NFRTR, because any such estimate would not have been based on valid and reliable evidence.

Results of Discovery sampling analysis by Treasury IG auditors in 1998 provided valid and reliable evidence of "critical errors" in the NFRTR database, but the auditors failed to extend the audit as GAGAS required and estimate the "critical error" rate, or explain the effect of these "critical errors" upon the audit. Because the NFA (26 U.S.C.A. § 5848) and the tax code (26 U.S.C. § 6103) each prohibit Mr. Larson from accessing these data, he was unable to estimate the "critical error" rate for NFRTR data.

[88] October 1998 Treasury IG Report at 1, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-009-1998.pdf.

[89] An unexplored aspect of *Giambro* is whether his late father — from whom Mr. Giambro inherited the Game Getter and 203 other firearms, and who instructed him to always keep an accompanying "certificate" in the original wooden box provided by the manufacturer along with the gun — had registered the Game Getter or acquired it through a lawful transfer approved by ATF, and ATF withheld the registration record to enable a prosecution after Mr. Giambro was acquitted in state court of an unrelated firearm wounding charge on grounds of self-defense. This

(2) that attorney misunderstood the NFA and attempted to register the firearm on Mr. Giambro's behalf, and (3) both attorneys petitioned the District Judge to exclude Mr. Giambro's statements and the attempt by one attorney to register the firearm, because the NFA prohibits using information resulting from an attempt to register an NFA firearm in criminal prosecutions,[90] which could have predisposed the District Judge to fail to adequately consider evidence at trial that the NFRTR is inaccurate and incomplete.

In *Friesen*, this Court questioned the reliability of NFRTR data

On September 17, 2008, this Court expressed concerns about the validity and reliability of NFRTR data in *Friesen*, in part because the "government has relied almost exclusively" upon NFRTR data in "many of its exhibits."[91] In further explaining the reasons that "persuade[d] me to allow the testimony [of Dr. Scheuren] and overrule the motion" by the Government to exclude him as an Expert Witness, the Court stated:

> One is, of course, the duplicate records of Exhibit 100, and then the government's record of the same firearms, which both appear — I've never heard satisfactorily explained why there were two of those records. Secondly, the other relationship to the issue over the accountability of the other guns that are on the government's chart. And thirdly, the issue.

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unexplored aspect is significant because (1) there are no independent checks on whether ATF personnel are truthful about their inability to locate a registration document, (2) as the evidence in this motion has reliably documented and contends, there is reasonable doubt regarding ATF's integrity in characterizing the accuracy and completeness of NFRTR data, (3) there has been no publicly known independent evaluation of the adequacy of the search procedures ATF uses to certify to a court that a particular firearm is not registered, and (4) it is not uncommon for persons who inherit registered NFA firearms to be unaware of the need to apply to have ownership of the firearm transferred to them. In such cases, as long as the firearm remains in the chain of inheritance, ATF does not typically initiate criminal action and allows a reasonable time for the firearm to be transferred to the lawful heir. Based on Mr. Giambro's statement, he did not register the Game Getter. It is unclear whether (1) the Game Getter was registered to Mr. Giambro's father (ATF attested that it was not), and (2) Mr. Giambro was aware of the legal requirement for a registered NFA firearm to be transferred to a lawful heir after the death of the registered owner. Because Mr. Giambro may have been suffering from mental illness to some extent, which could have further complicated his legal situation, he did not fully participate in his own defense. Mr. Giambro, whose assets include a $3.5 million passbook savings account, chose to remain in jail for 5 months until trial because he believed the Government would make corrupt use of the bail money he would have had to post to be released.

[90] *United States of America vs. Dario Giambro*, United States District Court, District of Maine, Criminal Action, Docket No. 07-14-P-S. Motion in Limine re: Evidence of Disclosure of Information During Compliance Attempt (26 U.S.C. 5989), July 24, 2007, *available at* http://www.nfaoa.org/documents/GiambroPart6.pdf.

[91] *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI at 1012.

> the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR].[92]

Regarding this Court's first concern, NFRTR Custodian Denise Brown's failure to satisfactorily explain the existence in NFRTR records why there are two approved Forms 2 bearing different dates and the same serial number (E683) as that of the STEN machine gun that ATF acknowledges it lawfully transferred to Mr. Friesen in 1996, indicates a lack of knowledge of the NFRTR database and, possibly, of procedures NFA Branch personnel use to file or retrieve firearm registration documents (or records of them).[93]

Relevant to this Court's second concern was "the other relationship to the issue over the accountability of the other guns" the Government introduced into evidence to try and explain the characteristics of the STEN machine gun at issue in *Friesen*. ATF's characterization of "weapon description" of the STEN machine gun as a Mark II,[94] a point this motion will further

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[92] Id., Vol. VI at 1011-1012.

[93] Defense counsel asked NFRTR Custodian Denise Brown to explain the significance of a Form 2 dated April 20, 1986, entered as Defense Exhibit 100, bearing serial number E683, provided to the defense under Discovery. The Government said the NFRTR contains a record that a STEN machine gun bearing serial number E683 is registered to Mr. Friesen (Vol. I, Id. at 15). Custodian Brown testified that the firearm ATF approved for transfer to Mr. Friesen was "E683, STEN Mark II . . . approved February 22, 1996" (Id. at 48-49), and that the "birthing document" for that E683 STEN Mark II is a certified Form 2 dated May 14, 1986, submitted to ATF by manufacturer Charles Erb (Id. at 68).

[94] At issue in *Friesen* is whether the STEN machine gun bearing serial number E683 manufactured by Mr. Erb is the same one he manufactured, or if another STEN machine gun bearing serial number E683 was substituted in its place. Consequently, also at issue is the accuracy of the STEN "weapon description" based on (1) data from the NFRTR, and documentation in the custody of ATF, and (2) examinations of the STEN seized by ATF, by ATF officials, by Mr. Erb, by transferees who previously owned the STEN, and by a defense Expert Witness. The Government contends the STEN that ATF lawfully transferred to Mr. Friesen is a Mark II, based on the description on the Form 2 submitted by Mr. Erb (Id. at 15) and by previous transferees who were available to testify, all of whom denied that the STEN in *Friesen* was the STEN they had previously owned, and by others as described below. Because one previous transferee is deceased (Vol. IV at 674-675), descriptions by other previous transferees are not described in this motion.

After examining the firearm at trial in *Friesen*, Mr. Erb testified it was not the gun he manufactured "as E683" (Vol. IV at 590); was "made to resemble a STEN Mark III" (Id. at 574); and that the gun "is a MARK III" (Id. at 579). Len Savage, an Expert Witness for the defense who examined the STEN testified: "It appears to be a Sten Mark II-S tube that was completed with Sten Mark III components." Vol. VII at 1349. Mr. Erb testified: "The barrel is the same on a Mark III and a Mark II. They are the same length." Vol. IV at 589.

develop, is relevant to the Court's second concern. Defense counsel agrees that ATF approved the lawful transfer of a STEN machine gun bearing serial number E683 to Doug Friesen in 1996, and disagrees with the Government's characterization of that STEN as a Mark II. Defense counsel notes that to validate the its description of the STEN machine gun bearing serial number E683 as a Mark II, the Government sought "confirmatory" information that the Mark II description was valid and reliable. The Government sought this "confirmatory" information because Dr. Scheuren testified: "I find the existing [NFRTR] records are quite useful in an exploratory setting, but they are not accurate enough by themselves to be used in a confirmatory way," including "for purposes of prosecution."[95]

The Government asked Dr. Scheuren if NFRTR data could be reliably verified each time the firearm was transferred by independently obtaining such data from each transferee, he would consider the NFRTR data to be accurate for that firearm. Dr. Scheuren replied in the affirmative. On redirect, defense counsel asked " . . . although you didn't come here to testify about this, if there is a break in the link, for example, one of these witnesses didn't testify, would that cause you a concern?" Dr. Scheuren answered: "[I]f there was gap in the evidence, yes. If there was a chain of custody break, yes." The significance of Dr. Scheuren's answer is that "one of these witnesses" is a deceased transferee,[96] which breaks the chain of evidence.

Also at issue is whether the STEN machine gun manufactured by Mr. Erb was (1) an unfinished tube, not a finished receiver, (2) finished by Mr. Erb as a STEN Mark II, (3) finished by someone other than Mr. Erb in as a STEN Mark II, Mark II-3, or Mark III, or (4) whether Mr. Erb registered air on one or both of the Forms 2 he submitted to ATF; that is, that Mr. Erb had not physically manufactured a STEN Mark II or a finished or unfinished receiver.

The issue of who manufactured or finished the STEN machine gun in *Friesen* has not been resolved.

[95] Id., Vol. VI at 1024.

[96] Id., Vol. IV at 674-675.

This Court's third concern about *Friesen* — "the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR]"[97] — is justified for three major reasons.

First, the "critical error" rate of the NFRTR is currently unknown, and efforts to discern or estimate it even informally are compromised because (1) ATF officials changed the definition of a "Significant Error" in 1995 by renaming it an "Error," and (2) Treasury IG auditors manipulated the definitions of "critical error" in 1998 at the request of NFA Branch representatives, to subjectively lower the "critical error" rate of the NFRTR. Dr. Scheuren testified that "in fact, their reworking of the original 1998 data is data fishing. And you cannot make a statement about the reliability, the probability of your being right with that data fishing, that exercise. So they should have done another audit sample.[98]

Second, relevant to *Friesen*, there is no law or regulation that requires ATF to physically inspect an NFA firearm at the time of its original manufacture (or as a condition of or during any subsequent transfer), and ATF has not presented any evidence that it has done so. Because one transferee who possessed the STEN machine gun bearing serial number E683 is deceased, the chain of evidence has been broken and it is not possible to reliably confirm even by sworn statements of all living previous transferees that ATF's contention that STEN is a Mark II is correct. Even if all living transferees so testified, there is no logical reason for any of them to testify to a "weapon description" with which the Government disagrees, because doing so would put the onus of alleged illegal manufacture of the STEN upon that previous transferee and subject him to the hazards of prosecution.

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[97] Id., Vol. VI at 1012.

[98] Id., Vol. VI at 1030.

Third, although ATF has identified "weapon description" as a "critical" data field,[99] that is not the most critical problem with the NFRTR data ATF uses and the concern stated by this Court in *Friesen* about "the issue, the fact that the government has relied almost exclusively on many of its exhibits which are records from the [NFRTR]."[100] The reason is that based on ATF's inability to physically locate original documents that literally are NFRTR data, there is reasonable doubt whether Exhibits based on NFRTR data that the Government entered into evidence in *Friesen* are based on valid and reliable evidence. During the 1998 audit ATF was unable to provide original documentation to validate computerized data routinely generated by the NFRTR. ATF's inability to locate original documents to reliably validate computerized NFRTR data is an audit finding in the December 1998 Treasury IG report as follows:

> ATF provided copies of other records to clarify the [37] discrepancies [reported in our audit results]. These other records, for example, included microfiche records and other registry database reports. We examined these records but we could not fully determine if the records sufficiently resolved the discrepancies.[101]

ATF's inability to locate original documents, and the Treasury IG auditors' inability to reliably validate computerized NFRTR data, is further discussed in an audit Work Paper that was not reviewed and signed by Audit Manager Robert K. Bronstrop until December 18, 1998, the

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[99] Treasury IG auditor Carol Burgan stated that "error definitions for critical data fields" include "weapon description." Work Paper F-25, Feb. 19, 1998, at 1. During a January 21, 1998, meeting at ATF Headquarters that included ATF participants ("[redacted], Chief, Firearms and Explosives Division," and [redacted]), Carol Burgan, Auditor [redacted], and Gary Wilk, Auditor, agreed that

Critical errors would include: serial number of the weapon, name of weapon owner, address of owner, date of application (if applicable), date of birth, and weapon description. Address of owner is important however, owners do not have to report intrastate moves (only interstate).

Work Paper F-22, January 26, 1998, prepared by Carol Burgan, at 1. Both Work Papers in this footnote *available at* http://www.nfaoa.org/documents/Work_Papers_F.pdf.

[100] *United States of America vs. Larry Douglas Friesen* (2008), Vol. VI, at 1012.

[101] December 1998 Treasury IG Report, at 12, *available at* http://www.nfaoa.org/documents/TreasuryOIG-99-018-1998.pdf.

same day the December 1998 Treasury IG report was published, suggesting there was the most extreme of concerns about this audit finding. In fact, less than 3 weeks before the report was issued, Treasury IG auditor Gary Wilk determined and stated the following conclusion:

> **Conclusion:** **Examination of the ATF of the photo copied records did not permit this auditor to fully determine whether the discrepancies continued to exist within the computerized NFRTR database. The materials did not clearly demonstrate that the computer system, typically in use, provides reliable and valid data when a search is performed. ATF did demonstrate that they have the capacity to generate various information from various sources but the original documentation remains missing and the accuracy of the documentation provided cannot be assured.**[102]

At the outset of *Friesen* on Sept. 17, 2008, this Court stated: "the evidence that I exclude . . . is [if] it's not relevant to this case, or secondly, it's not reliable evidence."[103] The conclusion of Treasury IG auditor Gary Wilk constitutes reasonable doubt that computerized NFRTR data are valid and reliable. To the extent any Exhibits introduced by the Government in *Friesen* are based upon computerized NFRTR data, such exhibits may not be "reliable evidence" and should be excluded by this Court as evidence in a criminal trial unless the validity and reliability of the NFRTR data upon which such Exhibits are based can be independently and reliably validated.

In addition to other evidence presented in this motion that NFRTR data are inaccurate, incomplete and, therefore unreliable, there is also valid and reliable evidence that statements by ATF inspectors (including statements of ATF inspectors involved in *Friesen*), which are based on NFRTR data may not be reliable. The reason is that the 2007 "review" of the NFRTR by the Justice IG concluded:

> . . . continuing management and technical deficiencies contribute to inaccuracies in the NFRTR database. For example, NFA Branch staff do not process applications or enter

[102] Work Paper F-52, November 30, 1998, prepared by Gary Wilk, at 1, *available at* http://www.nfaoa.org/documents/Work_Papers_F.pdf.

[103] *United States of America vs. Douglas Larry Friesen* (2008), Vol. I, at 5.

> data into the NFRTR in a consistent manner, which leads to errors in records and inconsistent decisions on NFA weapons applications. In addition, the NFA Branch has a backlog of record discrepancies between the NFRTR and inventories of federal firearms licensees that were identified during ATF compliance inspections. Further, the NFRTR's software programming is flawed and causes technical problems for those working in the database. **The lack of consistency in procedures and the backlog in reconciling discrepancies, combined with the technical issues, result in errors in the records, reports, and queries produced from the NFRTR. These errors affect the NFRTR's reliability as a regulatory tool when it is used during compliance inspections of federal firearms licensees.**[104] [emphasis added]

The Justice IG evaluators did not define the terms "error" or "discrepancy" in the 2007 report, and their "review" did not include determining the extent to which NFRTR data are accurate and complete. The 2007 Justice IG report acknowledges lack of an NFRTR procedures manual and inadequate training of staff.[105] "Supervisors' inadequate training led to variations in their direction and inconsistent decisions about approving or disapproving NFA weapons registration and transfer applications."[106]

NFRTR data that cannot be independently and reliably validated should be excluded from a criminal trial

The totality of evidence presented and documented in this motion establishes that federal law enforcement officials, and representatives of the Treasury Department, have willfully engaged in systematic efforts to cover up the fact that the NFRTR contains serious material errors, and that its error rate is currently unknown, among other issues relevant to *Friesen*. The Treasury Department's successor, the Department of Justice, has also declined to consider valid and reliable evidence that the NFRTR is inaccurate, incomplete and. therefore, unreliable.

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[104] June 2007 Justice IG Report at iii, *available at* http://www.nfaoa.org/documents/DOJ-OIG2007NFRTRreport.pdf.

[105] "The NFA Branch does not provide staff with a comprehensive standard operating procedures manual," and NFA Branch staff stated that they did not have adequate written direction on how to enter data such as abbreviations in the NFRTR . . . and who has responsibility for correcting errors in the NFRTR." Id. at v.

[106] Id. at v-vi.

Attestations or testimonies about NFRTR data by ATF and other Government officials are, as demonstrated in this motion, not worthy of belief.

The totality of the breadth, depth and diversity of reliably documented evidence presented in this motion justifies this Court prohibiting the Government from using any NFRTR data that cannot be independently and reliably validated in prosecuting Doug Friesen in a criminal trial.

Reasonable doubt about the accuracy and completeness of the NFRTR has been reliably established by a variety of documented evidence published by a diverse array of Government entities that include (1) the Executive Branch (Justice IG, Treasury IG, ATF, Audit Services Division of the Treasury Department); (2) the Legislative Branch (Congressional Research Service, the Congress in the *Congressional Record*, Congressional Hearings in 1979 and during 1996 to 2001; and "report language" in reports on appropriations bills; and (3) the Judicial Branch (the sworn testimony of and official documents presented by ATF officials in *Friesen*).

Also regarding the Judicial Branch, in 2007 the Government implied Mr. Larson's research was not customary or diligent when he was asked by an Assistant United States Attorney during a federal court hearing to confirm that he " . . . never had personal or direct access to any ATF documents internally? And you've never had personal or direct access to the NFRTR?"[107] Because NFRTR data are protected from disclosure under the NFA (26 U.S.C.A. § 5848), and are also considered "tax return" information prohibited from disclosure under the tax code (26 U.S.C.A. § 6103), it was not legally possible for Mr. Larson to obtain "personal or direct access" to the NFRTR and related documents under the NFA; moreover, neither could any other person, with the limited exception discussed below.

[107] Larson Testimony, *United States of America vs. Dario Giambro* (2007) at 79, *available at* http://www.nfaoa.org/documents/GiambroMotionInLimine-LarsonTestimony.pdf.

To any extent ATF may claim that NFRTR documents, data or records of them are protected "tax return" information that cannot be disclosed and decline to provide that information to defense counsel under any Discovery motion, ATF cannot decline to disclose that information to this Court. The reason is that after reviewing pertinent statutes, ATF determined in 1978:

> the return submitted by the transferor. Except for section 6103(o)(1) which authorizes the disclosure of subtitle E (i.e., Chapters 51-53) tax information to Federal employees whose official duties require such information, the only disclosure subsection regarding Chapter 53 returns and return information is section 6103(d) governing disclosure to State tax officials,[108]

Since this Court is constituted by a Federal employee "whose official duties require such information," there is no legal basis for ATF to refuse to disclose "tax return" information if it is relevant and required, including potentially exculpatory evidence under *Brady*. Accordingly, to the extent this Court believes it could be better informed about the accuracy and completeness, and validity and reliability, of NFRTR data by obtaining documents or information that may constitute "tax return" information, Doug Friesen respectfully requests this Court to consider compelling ATF to disclose such information for review by this Court for these proceedings.

Conclusion

For the reasons set forth above, Defendant requests this Honorable Court grant a hearing on this motion and, thereafter to exclude, under F.R.E. 803(10), any evidence

[108] Memorandum to Director, ATF, from ATF Chief Counsel regarding Freedom of Information Act Appeal of [redacted] dated August 18, 1980, bearing symbols CC-18,778 RMT, at 14, *available at* http://www.nfaoa.org/documents/ATFmemoTaxInfo6103.pdf.

derived from a search of the NFRTR that has not been independently and reliably validated.

Respectfully Submitted.

S/ Kendall A. Sykes
Mack K. Martin, OB. # 5738
Kendall A. Sykes, OB.#21837
125 Park Avenue,Fifth Floor
Oklahoma City, Oklahoma 73102
Telephone (405) 236-8888
Facsimile (405) 236-8844
Email: Mack@Martinlawoffice.net
Kendall@Martinlawoffice.net
Attorneys for Defendant
Larry Douglas Friesen

CERTIFICATE OF SERVICE

I hereby certify that on Thursday, March 19, 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Mr. Edward J. Kumiega, Assistant United States Attorney.

S/ Kendall A. Sykes

Exhibit 4

POLITICO

Attorney General Eric Holder held in contempt of Congress

By: John Bresnahan and Seung Min Kim
June 28, 2012 04:43 PM EST

The House has voted to hold Attorney General Eric Holder in contempt of Congress over his failure to turn over documents related to the Fast and Furious scandal, the first time Congress has taken such a dramatic move against a sitting Cabinet official.

The vote was 255-67, with 17 Democrats voting in support of a criminal contempt resolution, which authorizes Republicans leaders to seek criminal charges against Holder. This Democratic support came despite a round of behind-the-scenes lobbying by senior White House and Justice officials - as well as pressure from party leaders - to support Holder.

Two Republicans, Reps. Steve LaTourette (Ohio) Scott Rigell (Va.), voted against the contempt resolution.

Another civil contempt resolution, giving the green light for the House Oversight and Government Reform Committee to sue the Justice Department to get the Fast and Furious documents, passed by a 258-95 margin. Twenty-one Democrats voted for that measure.

But dozens of other Democrats marched off the floor in protest during the vote, adding even more drama to a tumultuous moment in the House chamber.

The heated House floor fight over Holder capped a historic day in Washington, coming just hours after the Supreme Court, just across the street from the Capitol, issued its landmark ruling upholding most of Barack Obama's health care law. The passions of the day were evident inside the Capitol, where Democrats accused Republicans of ginning up the contempt vote for political purposes while Republicans continued to charge the Justice Department with a cover up on the Fast and Furious scandal.

The fight over the Holder contempt resolution also drew intense interest from outside groups ranging from the NAACP to the National Rifle Association.

In a statement released by his office, Holder blasted the contempt votes as "politically motivated" and "misguided," and he singled out Rep. Darrell Issa (Calif.), chairman of the Oversight and Government Reform Committee and lead Republican on the Fast and Furious probe, for special criticism.

"Today's vote is the regrettable culmination of what became a misguided – and politically motivated – investigation during an election year," Holder said in his statement. "By advancing it over the past year and a half, Congressman Issa and others have focused on politics over public safety. Instead of trying to correct the problems that led to a series of flawed law enforcement operations, and instead of helping us find ways to better protect the brave law enforcement officers, like Agent Brian Terry, who keep us safe – they have led us to this unnecessary and unwarranted outcome."

Holder added: "Today's vote may make for good political theater in the minds of some, but it is – at base – both a crass effort and a grave disservice to the American people. They expect – and deserve – far better."

White House officials also slammed House Republicans for the unprecedented contempt vote. White House Communications Director Dan Pfeiffer said GOP congressional leaders "pushed for political theater rather than legitimate congressional oversight. Over the past fourteen months, the Justice Department accommodated congressional investigators, producing 7,600 pages of documents, and testifying at eleven congressional hearings... But unfortunately, a politically-motivated agenda prevailed and instead of engaging with the President in efforts to create jobs and grow the economy, today we saw the House of Representatives perform a transparently political stunt.

However, Speaker John Boehner (R-Ohio), in a brief interview with POLITICO, blamed Holder for the standoff. Boehner said the Justice Department wanted to turn over some Fast and Furious documents - but not all - if the House agreed to drop the contempt resolution, a deal that neither Boehner nor Issa was prepared to make.

"The idea that we're going to turn over some documents, and whatever we turn over is all you're gonna get and you have to guarantee that you're never going to seek contempt, no deal," Boehner said.

Boehner added that Holder never sought a personal meeting with him to resolve the fight, despite suggestions from some Obama administration officials that Holder asked to do so.

(**Also on POLITICO: Report: Holder said no 'BS' on guns**)

Issa also said the House had to take such a move in order to get to the bottom of the Fast and Furious scandal.

"Throughout this process, I have reiterated my desire to reach a settlement that would allow us to cancel today's vote," Issa said. "Our purpose has never been to hold the Attorney General in contempt. Our purpose has always been to get the information that the Committee needs to complete its work, and to which it is entitled."

Issa also pointed out that then Speaker Nancy Pelosi (D-Calif.) backed a call for a contempt resolution against the Bush White House over the firing of U.S. attorneys back in 2008, which he raised to counter Democratic charges of partisanship.

The practical, immediate impact of the contempt votes will be minimal. Holder remains as attorney general with strong backing from Obama, and any criminal referral after the contempt vote is unlikely to go far.

In a floor speech before the vote, Boehner stressed that Holder and the Justice Department needed to be held accountable for not providing sufficient answers to Congress about what happened during Fast and Furious.

"Now, I don't take this matter lightly. I frankly hoped it would never come to this," Boehner said. "But no Justice Department is above the law and no Justice Department is above the Constitution, which each of us has sworn to uphold."

(**Also on POLITICO: Brown: Eric Holder should resign**)

But the GOP-led move infuriated other Democrats, especially minority lawmakers, who see racism and unbridled partisanship in the Republican drive to sanction the first African-American to hold the attorney general post in U.S. history.

The Democratic walkout was led by the Congressional Black Caucus, many of whom gathered outside the Capitol while their GOP colleagues moved against Holder.

Rep. Elijah Cummings (Md.), the top Democrat on the Oversight and Government Reform, charged that Republicans, led Issa, had been unfairly targeting Holder for months.

"They are finally about to get the prize they have been seeking for more than a year – holding the attorney general of the United States in contempt," Cummings said. "In reality, it is a sad failure. A failure of leadership, a failure of our constitutional obligations and failure of our responsibilities to the American people."

Rep. Gerald Connolly (D-Va.), who serves on the Oversight panel, called the vote "a craven, crass partisan move that brings dishonor to this body."

A procedural motion by Rep. John Dingell (D-Mich.), calling for further investigation before any contempt vote, was defeated by Republicans.

During the floor debate, a group of nine black lawmakers, led by Rep. Sheila Jackson Lee (D-Texas), raised a question of the privileges of the House, accusing Issa of interfering with the investigation and withholding critical information from Democrats. The motion disapproved of Issa for "interfering with ongoing criminal investigations, insisting on a personal attack against the attorney general of the United States and for calling the attorney general of the United States a liar on national television," which "discredit[ed] ... the integrity of the House." The motion was not allowed to proceed.

For his part, Issa insisted that the House must act in order to get to the bottom of what happened in the botched Fast and Furious program.

During this under cover operation, federal agents tracked the sale of roughly 2,000 weapons to straw buyers working for Mexican drug cartels. The sting operation failed, and weapons related to the Fast and Furious program were found at the shooting scene when a Border Patrol agent was killed in Dec. 2010.

Relying on what they said was inaccurate information supplied by the Bureau of Alcohol, Tobacco, Firearms and Explosives - which comes under DOJ - senior Justice officials told lawmakers in Feb. 2011 that no guns were allowed to "walk" to Mexico. That letter was later withdrawn by the Justice Department as inaccurate.

Issa has been investigating what happened during Fast and Furious for 16 months, and he subpoenaed the Justice Department last October. Since that time, his panel has been squabbling over what documents will be turned over. Justice officials note that 7,600 pages of Fast and Furious material has already been given to Issa, but the California Republican has demanded more.

Obama asserted executive privilege on some of the documents Issa is seeking shortly before the Oversight and Government voted on party lines to approve a contempt resolution against Holder.

Despite a face-to-face session between Issa and Holder recently, the two men never reached a compromise to end the standoff.

Since the Justice Department would have to seek an indictment of Holder - a department he oversees as attorney general - no criminal charges will be brought against him. Previous administrations, including the Bush administration in 2008, refused to seek criminal charges against White House officials when a Democratic-run House passed a criminal contempt resolution over the firing of U.S. attorneys.

Boehner's office, though, is expected to submit a criminal referral to the U.S. attorney for the District of Columbia, Ronald Machen, in the next few days, according to a Republican official.

Issa's aides have already begun discussions with the House General Counsel's office over the anticipated lawsuit against DOJ, but it is not clear when that the legal challenge will be filed.

Exhibit 5

November 20, 2013, 12:18 pm

Feds consider new gun regs

The Obama administration is working on new gun control regulations that would target stolen and missing weapons.

Police have a hard time tracking firearms that disappear from gun shops, which "just feeds the sort of already large and existing secondary market on guns," said Sam Hoover, a staff attorney with the Law Center to Prevent Gun Violence.

It is unclear precisely what the draft regulations, drawn up by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and under review at the White House's regulations office, would do.

The ATF would not comment on the draft rule, since it has not yet been released to the public, but a description provided by the White House asserts that it would target cases where guns go missing "in transit."

Currently, gun dealers with a federal license are required to tell federal agents after they discover a firearm has gone missing, but they aren't required to do routine checks.

"They can discover a gun missing today and have no idea when it went missing, which really makes that information useless to law enforcement," said Chelsea Parsons, associate director of crime and firearms policy at the Center for American Progress.

The White House office has 90 days to review the proposed rule before releasing it to the public and allowing them to comment.

The draft rule was sent to the White House five months after the ATF completed a **report** that found that more than 190,000 firearms were estimated to have been lost or stolen last year. The report was one of 23 executive actions President Obama announced in January to reduce gun violence in the wake of last year's shooting in Newtown, Conn.

That report helped to shine light on an often unseen corner of the gun market, supporters of stricter gun laws say.

"I think that in the area of guns and gun violence and gun commerce, we have had a complete lack of data and a lack of information," said Parsons.

She wants the ATF to be able to take stronger action to monitor and track guns that go missing.

Since 2004, an appropriations rider has prevented the ATF from requiring gun dealers to do periodic checks. Gun rights advocates say that the measure protects innocent victims of crimes from punishment by the government.

-- After this story was posted, the ATF contacted The Hill to clarify that the pending proposal would not affect the longstanding law preventing the agency from requiring gun dealers to check their inventories.

TAGS: Bureau of Alcohol, Tobacco, Firearms and Explosives, Gun control

Exhibit 6

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. **Randolph Benjamin Rodman and Idan C. Greenberg,** Defendants.	CR-10-01047-PHX-ROS(DKD)
	November 29, 2012 8:46 a.m.

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial - Day 3

(Pages 364 through 587)

Official Court Reporter:
Elaine Cropper, RDR, CRR, CCP
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 35
Phoenix, Arizona 85003-2151
602.322.7245/(fax) 602.322.7253

Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

I N D E X

TESTIMONY

E X H I B I T S

PROCEEDINGS

(Jury enters.)

(Court was called to order by the courtroom deputy.)

(Proceedings begin at 8:46.)

THE COURT: Please be seated. 08:46:25

Good morning. We're ready to go.

All right. Counsel, ready?

MR. VANN: Yes, Your Honor. Gary Schaible.

GARY SCHAIBLE,

called as a witness herein by the Government, having been first 08:47:00
duly sworn or affirmed to testify to the truth, was examined and testified as follows:

COURTROOM DEPUTY: State your name for the record, spell your last name, please.

THE WITNESS: My name is Gary Schaible. 08:47:08
S-C-H-A-I-B-L-E.

COURTROOM DEPUTY: Great. Have a seat right up here.

DIRECT EXAMINATION

BY MR. VANN:

Q. Good morning, Mr. Schaible. 08:47:42

A. Good morning.

Q. Can you please tell the jury what it is that you do?

A. I'm well, I'm assigned to the firearms and explosives division in bureau headquarters of Bureau of Alcohol, Tobacco, Firearms & Explosives and most of my time is spent in the NFA 08:47:58

branch, which is part of this division, and I would write letters, do rule-makings, provide -- well, not technical but interpretations of the statutory requirements of the National Firearms Act, occasionally process forms. I'm a custodian of the record, make sure it's maintained. 08:48:02 08:48:19

Q. And how long have you been employed at ATF?

A. 40 years.

Q. 40 years?

A. Yes.

Q. And in that 40 years, where was the majority of your time spent? 08:48:27

A. In the National Firearms Act branch.

Q. What positions have you held in the National Firearms Act branch?

A. I have been a supervisor coordinator. I have been the branch chief and a program manager which was retitled to pre-liaison analyst. 08:48:36

Q. All right. Now, before we get into the details of your job and of some the things related to this case, do you know either of the defendants sitting here today? 08:48:57

A. I know Mr. Rodman.

Q. You do know Mr. Rodman?

A. Yes.

Q. Please explain your relationship with Mr. Rodman to the jury. 08:49:09

A. Falls Church. 09:41:37

Q. All right. And do you have any knowledge of how he became involved in the investigation?

A. No.

Q. Now, moving on to another subject, I'm going to go through 09:41:51 a number of the certificates, Mr. Schaible, and I'll move as fast as I can. There's a lot of them there.

Let's take number 60. Do you have that?

A. Yes.

Q. Just a cursory review. You've seen what that is? 09:42:37

A. Yes.

Q. And what do you call that in the jargon of ATF, blue ribbon certificate?

A. A blue ribbon certificate, yes.

Q. That's a common name. 09:42:49

A. Yes.

Q. Would you explain to the members of the jury what a blue ribbon certificate is?

A. This is where someone in the NFA branch would do a search of the registry, the National Firearms Registration Transfer 09:43:01 Record, and report the results where they would, you know, say that after a diligent search of the record, this is what I found or didn't find, would sign off on it. It would go, then, to the branch chief who would sign off on the blue cover sheet saying that they basically recognize the specialist's signature 09:43:24

in this case. 09:43:28

Q. In a few sentences, that is a certificate that everything within that packet is what's in the official record, the NFRTR; right?

A. Correct. 09:43:47

Q. Okay now, if you'll go to the first few pages, there is something called a screen shot.

A. Right.

Q. And would you describe what that is?

A. For each firearm in the registry, we maintain basically a transaction history starting with the first registration and basically moving up. So whoever it's registered to at the current time would appear on the top of the list and we do some color coding in there, that if it's a magenta color, as far as the database goes, that identifies the current registrant. 09:44:01 09:44:23

Q. And you -- in the top there, the serial number of the machine gun is described.

A. Correct.

Q. And the descriptive data, the manufacturer, the type of firearm, the model, the caliber, the barrel length and the overall length are all described on the top line; correct? 09:44:43

A. Correct.

Q. And that is the same information that appears on the Forms 3 and Forms 4?

A. Right. 09:45:03

Q. Those are the six items of information; correct? 09:45:03
A. Correct.
Q. So that when -- this is a snapshot of the computer as it exists on the date that is in the upper right-hand corner?
A. I don't have a date in the upper right-hand corner. 09:45:23
Q. On the screen shot, you don't have a date and time?
A. No, not on the screen shot, no.
Q. All right. But since it's in the blue ribbon certificate, that date would be the effective date that this thing was prepared. This is a shot of the computer as it appeared on 09:45:50 that date?
A. Correct.
Q. Now, if you'll look at -- do you have number 60?
A. Yes.
Q. The description is manufacturer, MIX; type; model. That's 09:46:03 that. And the caliber is 9 millimeter. The barrel length is five seven five, 5.75 inches?
A. M'hum.
Q. And the overall length of the barrel is 11 inches; correct? 09:46:31
A. Correct.
Q. Now, if you would move down the forms to the form that went from Clark to my client, Mr. Rodman, for this machine gun.
A. Okay.
Q. How is the caliber barrel length and overall length -- 09:46:58

what appears on the form? 09:47:05

A. On the form it shows .30 caliber. The barrel length of 24 and an overall length of 41.

Q. So each of those in the screen shot, the actual database is inaccurate; correct? 09:47:21

A. They differ, correct.

Q. Right.

And when the -- the person that approved it at that time, the examiner, the people that work for you are supposed to correct the record in the NFRTR to conform to the form if 09:47:37 it's approved; right?

A. If what was shown on the form is correct, then yes.

Q. Well, if it's approved, that's what was approved; right?

A. That's what was approved. Whether it was picked up as an error is a different matter. 09:48:04

Q. Is it signed as approved?

A. Yes.

Q. So that the person who received this form received a form that is different than the description in the database?

A. Correct. 09:48:21

Q. Okay. And now if you'll move to the number 64. Do you have 64?

A. Yes.

Q. Would you read the description on the screen shot, just the caliber, barrel length, overall length? 09:49:02

A. Caliber, .45; barrel length 6.25; overall length, 11. 09:49:05
Q. And now on the Form 3 that came from Clark to Mr. Rodman, for that machine gun.
A. This is from Clark to Mr. Rodman you said?
Q. Yes. Caliber, barrel length, overall length. 09:49:35
A. Okay. It shows .30 caliber; barrel length of 24; overall length of 41.
Q. The variants in barrel length and overall length of three feet approximately; correct?
A. Yes. The overall length of 41. 09:50:03
Q. And once again, whoever approved that was supposed to change the description in the database and did not; correct?
A. Correct. If they subpoenaed that, there was something that we should look into.
Q. It would be something to look into. What was the date 09:50:26 that it was approved?
A. September 21, 2000.
Q. And in 12 years nobody looked into it; correct?
A. As far as I know.
Q. Okay. Number 58. I think that was the one you had. 57, 09:50:40 I'm sorry.
A. I have 64. Number 57.
Q. 57, yes.
A. Okay.
Q. And to save a little time, would the same discrepancies 09:51:03

appear in that one? For instance, what is the serial number? 09:51:09

A. A6042028.

Q. And what does the screen shot, the actual computer, say?

A. 9 millimeter, 5.75 barrel length, 11-inch overall length.

Q. Okay. So the same discrepancies appear in that one. 09:51:32

A. I am getting there. Yes. The form shows .30 caliber, a barrel length of 22 inches and an overall length of 49.

Q. So that this, the computer, is inaccurate as far as this machine gun is concerned as of today, as of the date of the blue ribbon certificate? 09:52:17

A. Again, they differ. The descriptions, yes.

Q. And the person that has the -- that it's registered to has a different gun than the one that's described in the database; correct?

A. Different caliber, barrel length, and overall length, yes. 09:52:35

Q. And the next one is 56. To save a little time, if you could view the same data, compare the screen shot with the transfer itself and tell me if the screen shot is accurate, whether the computer is accurate.

A. And this would be for the transfer from Mr. Clark to Mr. Rodman? 09:53:13

Q. Yes. This is serial number -- what?

A. A6042027 and, yes, our database shows 9 millimeter with a 5.75 barrel length and an 11-inch overall length. The form shows .30 caliber with a 22-inch barrel length and a 49-inch 09:53:34

overall length. 09:53:39

Q. A different description; correct?

A. Correct.

Q. Inaccurate?

A. I'm sorry? 09:53:43

Q. Inaccurate. The database is inaccurate?

A. Or the form is inaccurate.

Q. Well, the form is approved.

A. Yes.

Q. So the database shows a different description than what's 09:53:51
in the database?

A. And, again, should this have been picked up on? Maybe so.

Q. When was that approved, that form?

A. June 1, 2002.

Q. Two thousand and . . .? 09:54:12

A. Two.

Q. So in 10 years nobody has picked that up?

A. Correct.

Q. Now, the next one is number 49, Mr. Schaible, the number?

A. A6041869. 09:54:42

Q. And the description on the form transferring it to
Mr. Rodman?

A. On the form it shows .30 caliber, barrel length of 24,
overall length of 41.

Q. So the database is inaccurate on this firearm? 09:55:16

A. Again, they differ. The database shows .45, 5.75, and 11. 09:55:20
Q. And what's the date of the transfer?
A. February 21, 2001.
Q. So that hadn't been picked up in 11 years?
A. Correct. 09:55:36
Q. And the next one is number 48.
A. Okay.
Q. Serial number?
A. A6041868.
Q. The description in the screen shot, the database? 09:56:12
A. Shows .45 caliber, 5.75 barrel and 11 overall.
Q. And the form transferring it from Clark to my client?
A. .30 caliber, 24-inch barrel length, 41-inch overall.
Q. Okay. The computer, once again, is inaccurate?
A. It's different. 09:56:37
Q. And the next one is number 69.
A. Okay.
Q. Serial number?
A. 820101457.
Q. And description? 09:57:10
A. In the database, it's a .45 caliber, the barrel length of 6.25 and overall length of 11.
Q. And the form transferring it from Clark to Mr. Rodman?
A. Shows a caliber of .30, a barrel length of 22, and an overall of 36. 09:57:27

Q. Okay. And the date of the transfer? 09:57:28

A. February 20, 2008.

Q. Okay. So the database is inaccurate for that machine gun?

A. Different. 09:57:46

Q. And the final one for Mr. Rodman is number 68.

A. Okay.

Q. The serial number?

A. 820101546.

Q. And the description in the database? 09:58:27

A. .45 caliber, 6.25 barrel length, 11-inch overall.

Q. All right. And what is the description of that machine gun on the transfer form from Clark to my client?

A. It is .30 caliber, 22-inch barrel length, and 36-inch overall. 09:58:48

Q. Okay. And the date of that transfer is the same as the other; right?

A. I don't remember what the other one is. February 20, 2008.

Q. February 20, correct. And the database is inaccurate once more. That is a different machine gun? 09:58:57

A. Shows a difference in description, yes.

Q. We're nearing the end. I'm sure you'll be happy to hear that.

The next one is number 53. 09:59:13

A. Okay.
Q. This is a serial number -- what is the serial number?
A. A6042000.
Q. And the description of the machine gun as it appears in the database? 09:59:55
A. .45 caliber, 5.5 -- I'm sorry, 5.75 barrel length, 11-inch overall.
Q. And the transfer form from Clark to -- who was the transferee on that one?
A. I'm sorry. Could you ask me that again? 10:00:15
Q. The Form 3 transferring it from Clark, who is the transferee?
A. From Mr. Clark, I show a transfer to Mr. Clark but nothing --
Q. It was never transferred? 10:00:58
A. -- nothing transferred from Mr. Clark.
Q. What is the description of the machine gun that was transferred to Mr. Clark?
A. Okay. It's not shown as a machine gun.
Q. It's not a -- 10:01:10
A. It's shown as an any other weapon.
Q. Oh. Okay. And does the description match?
A. No.
Q. Okay. So that one is inaccurate?
A. Descriptions differ between a form and a database, yes. 10:01:25

Q. The database does not match the description of the registration form? 10:01:30

A. Right.

Q. Number 54, what's the serial number of that one?

A. I'm sorry, 54 or 64. 10:01:45

Q. 54. Five four.

A. Okay. That's A6042001.

Q. All right. And what is the -- how is that described in the computer?

A. .45 caliber, 5.75 barrel length, 11 overall. 10:02:21

Q. And how is that same machine gun described on the form transferring it from Mr. Clark to a Richard Simpson?

A. Okay. It is shown as a .30 caliber with a barrel length of 24 inches and an overall length of 40.

Q. And what's the date of that transfer? 10:02:50

A. October 2, 2003.

Q. All right. And so that one is inaccurate. The computer has an inaccurate description.

A. It has a different description, yes.

Q. Okay. Number 55. 10:03:05

A. Okay.

Q. What serial number is that?

A. It is A6042026.

Q. And the description in the computer, in the NFRTR?

A. Shows 9 millimeter, 5.75 barrel length, and an 11-inch 10:03:40

overall length. 10:03:46

Q. Now, that machine gun or machine gun with that serial number was transferred from Clark to Richard Simpson. Do you have the Form 3 there -- Form 4, I'm sorry.

A. Yes, sir. 10:04:00

Q. And how is that machine gun described there?

A. .30 caliber, 23-inch barrel, 45-inch overall.

Q. And so the -- once again, the database is inaccurate?

A. It is different, yes.

Q. Is it accurate? 10:04:20

A. Well, the 9 millimeter, 5.75, and 11 were what was reported upon manufacture I would believe?

Q. That would be on the Form 2 from the date of birth. Sometime before '86?

A. Right. 10:04:37

Q. Okay. And it had been transferred a number of times after that?

A. Yes, it has.

Q. And anytime the description changes and is approved, the database must be corrected; correct? 10:04:50

A. If the examiner picks up on it and sees a difference, yes.

Q. That's what the examiner is supposed to do?

A. Correct.

Q. All right.

Now, the next one is number 59. 10:05:05

A. Okay.
Q. What is the serial number of that, Mr. Schaible?
A. A6042030.
Q. All right. And what does the computer say is the description of that machine gun? 10:05:40
A. 9 millimeter, 5.75 inch barrel, 11 overall.
Q. All right. And that machine gun or machine gun with that serial number was transferred from Mr. Clark to Richard Simpson, correct, on the Form 4?
A. Correct. 10:05:57
Q. And what is the date of that transfer?
A. March 24, 2003.
Q. All right. And how is that machine gun described on the form?
A. .45 caliber, 10-inch barrel, 33-inch overall. 10:06:07
Q. Correct. Once again, the database is inaccurate.
A. It is different, yes, sir.
Q. The next-to-the-last one is number 63.
A. Okay.
Q. Serial number is what? 10:06:51
A. A6044921 (sic).
Q. And what's the description of that machine gun in the database?
A. It's a .45 caliber, 5.75 barrel, and 11-inch overall.
Q. And that machine gun was transferred on a Form 4 from 10:07:11

Clark to Richard Simpson on what date? 10:07:16

A. October 2, 2003.

Q. And what is the description?

A. On the form that --

Q. On the form. 10:07:33

A. It shows .30 caliber, 19-inch barrel, 41-inch overall.

Q. And so, once again, we have an inaccurate description in the database.

A. A different one, yes, sir.

Q. Okay. And the final one is serial number -- or number 71, 10:07:50 Exhibit 71.

A. Okay.

Q. What's the serial number on that one?

A. It is 820101589.

Q. And the description in the database? 10:08:29

A. .45 caliber, 11-inch barrel, 6.25 overall.

Q. And that machine gun was transferred from Clark to a Richard Simpson on what date on the Form 3 -- Form 4, I'm sorry.

A. March 22, 2005. 10:08:52

Q. And the description?

A. .30 caliber, 21.5-inch barrel, 49.5-inch overall.

Q. So that, once again, the database is inaccurate?

A. Yes, sir, there's a difference between the descriptions.

Q. All right. And the certificate that we talked about, the 10:09:15

blue ribbon certificate, that form is used in criminal cases all over the country to prove the registration of -- the registration or non-registration of a machine gun; correct? 10:09:22

A. It would be the certified results of a search of the database, yes. 10:09:41

Q. In other words, that's evidence that that -- that unless the machine gun in question matches the description in the database, that firearm would be declared nonregistered; right?

A. Could you ask me that one again? I'm sorry.

Q. Yes. The blue ribbon certificate is evidence, provides evidence in criminal cases all over the country all the time of the registration, non-registration of a machine gun; correct? 10:10:07

A. Correct.

Q. And if it does not match the description in the database, it's declared nonregistered; right? 10:10:28

A. Well, in this case, the certificate says I certified that the following firearm is registered to Richard Alan Simpson and it gives that machine gun.

Q. They certified to the truth of the matter; correct?

A. Certified that it's registered to Mr. Simpson. 10:10:45

Q. Now, in view of this sampling that we've just gone through, would you be surprised to learn that all 34 of the firearms that Mr. Clark transferred, the database is inaccurate? Would that surprise you?

A. Well, again, I would say there's differences in what the 10:11:08

description is.

Q. Well, a difference in a description would be inaccurate, wouldn't it?

A. And the form is part of that process. If the form is inaccurate -- we're relying on what's submitted on the form to transfer these firearms. And the form is being filed by someone who says under the penalties of perjury, I declare that I've examined this application to the best of my knowledge and believe that it is true, correct, and complete. So somewhere along the line if a description changed, someone was saying under penalties of perjury that, you know, this is the description.

Q. Well, do you have any basis to believe that he did not describe the caliber and the barrel length and the overall length accurately on the form?

A. When you say "he," who do you mean?

Q. Oh. The transferor, Clark. Clark was the transferor in each one of those.

A. Well, he's filing it under penalties of perjury.

Q. In fact, you've had them in custody since 2008 approximately. Has anyone told you that any of those descriptions were inaccurate?

A. No.

MR. SANDERS: I have no further questions, Your Honor.

THE COURT: Cross? Mr. Tate. 10:12:37

CROSS - EXAMINATION

BY MR. TATE:

Q. Good morning, Mr. Schaible. How are you, sir?

A. My voice is going. 10:12:54

Q. I understand.

Mr. Schaible, you've been with ATF in various jobs for about 40 years; correct?

A. Correct.

Q. And in that time, let's focus first on a period of time about 2006; okay? Let's focus on that period of time. What was your job in 2006? 10:13:10

A. It would have been -- I forget when my title changed but my title was either program manager or industry liaison for the NFA branch. 10:13:33

Q. Okay. And at that time, sometime during that period, let's see if we can put some kind of timeline, although I know that's about six years ago. You became aware of the Fickaretta memo; correct? Would that be fair to say?

A. I'm sorry, what memo is that? 10:13:50

Q. The memo from Theresa Fickaretta? You're not aware of the Theresa Fickaretta memo?

A. I have no idea which one you're referring to.

Q. Okay. All right. That's okay. You just told me no.

And at that time in 2006, you were made aware of by 10:14:02

Exhibit 7

President Obama's Record of Dismantling Immigration Enforcement

FAIR FEDERATION FOR AMERICAN IMMIGRATION REFORM

President Obama's Record of Dismantling Immigration Enforcement

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Foreword

President Barack Obama came to office in 2009 and pledged that during his first year of office he would enact amnesty legislation for illegal aliens living in the United States. That, of course, did not happen — not because of any lack of ideological commitment on the part of the President, but because of pragmatic considerations. Only two years earlier, President Obama, then Senator Obama, watched as President George W. Bush tried to toss the American people into the boiling cauldron of comprehensive amnesty in 2007. It didn't work. Voters angrily crashed the Capitol switchboard on the day the Senate was set to vote and as a result, fourteen Democrats joined thirty-nine Republicans to vote down the amnesty legislation.[1] The President concluded, correctly, that there just is not an appetite in Congress for another politically bruising fight over comprehensive amnesty.

Understanding that Members of Congress ultimately would not ignore the unequivocal objections of their constituents to amnesty, the Obama administration opted to adopt a strategy of dismantling immigration enforcement in order to achieve the same ends. The administration hoped that while the American people were focused on unemployment, crashing real estate values, banking scandals, health care reform, foreign policy crises, and countless other issues, they would not notice just what was actually taking place.

This report details how the Obama administration has carried out a policy of de facto amnesty for millions of illegal aliens through executive policy decisions. Since 2009, the Obama administration has systematically gutted effective immigration enforcement policies, moved aggressively against state and local governments that attempt to enforce immigration laws, and stretched the concept of "prosecutorial discretion" to a point where it has rendered many immigration laws meaningless. Remarkably, the administration has succeeded in doing all this with barely a peep of protest from Congress.

Thus, despite the fact that the U.S. Constitution grants Congress plenary authority over immigration policy, the Executive Branch is now making immigration policy unconstrained by constitutional checks and balances. This report chronologically highlights the process that has unfolded over the past three and half years. A review of the Obama administration's record shows:

- The administration's conscious effort to end policies that effectively enforce and deter illegal immigration. This includes the cessation of meaningful worksite enforcement against employers who hire illegal aliens and the removal of the illegal workers. It also includes ending effective partnership programs with state and local governments, such as the 287(g) program, that provide a structure through which state and local agencies may enforce immigration laws.

- The administration's intimidation of state and local governments determined to enforce federal immigration laws. President Obama has turned the Department of Justice into the administration's attack dog, filing lawsuits against states that pass their own immigration enforcement laws. When lawsuits fail, the Department's Civil Rights division launches meritless investigations designed to harass local governments and officials who attempt to enforce the law.

- The administration's dependence on illegal alien advocates to make U.S. immigration policy for the Executive Branch. President Obama has placed strident amnesty advocates in key positions throughout his administration. These appointees have worked openly with advocacy groups to shape a series of policies that amount to backdoor amnesty.

- Outright deception on the part of the administration designed to convince the American public that immigration laws are being vigorously enforced. The Obama administration repeatedly engages in efforts to inflate its record of deporting illegal aliens. These deceptive practices include the release of data that is later exposed to be inaccurate. The Departments of Justice and Homeland Security carefully select data to claim that our "borders are more secure than ever," even as violence along the southern border escalates to alarming proportions.

The Obama administration's strategy is to count on the fact that the public and the media will not take notice of each individual and incremental step they are taking to undermine immigration enforcement and grant de facto amnesty to as many illegal aliens as possible. This report exposes the strategy and the policy objectives behind it.

Timeline:2009

Dismantling Enforcement & Peddling Amnesty

JANUARY 29

Napolitano Delays E-Verify Requirement for Federal Contractors — Department of Homeland Security (DHS) Secretary Janet Napolitano delays the implementation of a rule requiring federal contractors with contracts over $100,000 to use the E-Verify program from February 20 to May 21. The rule was promulgated to comply with executive order 13465 by President George W. Bush, which directed federal agencies to require those they contract with to verify the work authorization of their employees.[2] The original deadline for the rule's implementation was January 15, 2009, but it was delayed due to a lawsuit filed by the U.S. Chamber of Commerce.[3]

FEBRUARY 18

President Expresses Support for Amnesty — While appearing on a Spanish language radio show, the President reasserts his support for granting widespread amnesty to illegal aliens. He also acknowledges that "politically, it's going to be tough" and says "some wonderful people on my White House staff" are already working on the issue.[4]

MARCH 18

Obama to Work with Congressional Hispanic Caucus to Address their Immigration Concerns — In an address to the Congressional Hispanic Caucus (CHC), President Obama expresses his intention to work closely with the organization to "address immigration concerns in both the short and long term." Later in the day, Obama reiterates his support for amnesty at a town hall forum.[5]

APRIL 1

Release of Illegal Aliens in Washington State Signals End of Worksite Enforcement The administration releases and grants work authorization to 28 illegal aliens previously arrested by U.S. Immigration and Customs Enforcement (ICE) agents during an investigation of the Yamato Engine Specialist plant in Bellingham, Washington. This event marks the administration's decision to actively dismantle worksite enforcement sending a clear message to illegal aliens that they will not be penalized for violating U.S. immigration law.[6]

APRIL 8

La Raza Lobbyist Turned White House Advisor: Amnesty Debate this Year — In an interview with *The New York Times*, White House Director of Intergovernmental Affairs Cecilia Muñoz, says the President "intends to start the [amnesty] debate this year."[7]

APRIL 16

Napolitano Delays E-Verify for Federal Contractors, Again — Once again, Secretary Napolitano gives federal contractors a pass and extends the deadline to comply with a regulation requiring the use of E-Verify. Compliance is delayed until June 30.[8]

APRIL 16

Obama Meets with Mexican President, Discusses Amnesty — During a press conference in Mexico with President Felipe Calderon, President Obama reiterates his pledge to pass an amnesty bill.[9]

APRIL 30

DHS Stops Effective Worksite Raids, Switches to Audits — ICE issues new worksite enforcement guidelines for all of its agents in the field. The new guidelines came as no surprise, given that Homeland Security Secretary Janet Napolitano announced after the successful enforcement action in Bellingham, Washington, that her Department would reexamine ICE's procedures more closely. While the guidelines focus on the need to criminally prosecute employers who hire illegal aliens, they do not offer anything new with respect to enforcement against employees.[10]

MAY 6

Secretary Napolitano Voices Support for the DREAM Act — In testimony before the Senate Judiciary Committee, Senator Dick Durbin (D-Ill.) asks DHS Secretary Janet Napolitano for her opinion on the DREAM Act. Telling Durbin that "the DREAM Act is a good piece of legislation and a good idea," Napolitano replies that she supported it as governor of Arizona and supports it now.[11]

JUNE 3

Administration Delays E-Verify for Federal Contractors a 3rd Time — For a third time, DHS Secretary Napolitano delays compliance with a federal regulation requiring federal contractors to use E-Verify. The rule will finally be implemented on September 8, 2009.[12]

JUNE 25

President Holds Amnesty Summit — President Obama holds a closed-door summit with pro-amnesty Members of Congress to discuss immigration policy. In a media address after the meeting the President says the "Administration is fully behind an effort to achieve comprehensive immigration reform."[13]

JULY 10

DHS Rewrites 287(g) Agreements to Curb Enforcement — DHS announces it is rewriting and standardizing the Memorandum of Agreements (MOA) with participating law enforcement agencies to ensure that 287(g) operations comport with ICE priorities, particularly the identification and removal of criminal aliens only. According to the administration, the new MOA will "address concerns that individuals may be arrested for minor offenses as a guise to initiate removal proceedings."[14]

JULY 22

Administration Discusses Dismantling Enforcement with Sanctuary City Police — Obama administration officials attend another amnesty summit, this time in Phoenix with sanctuary city law enforcement representatives. The Police Executive Research Forum (PERF) hosts the summit and participants are highly critical of local enforcement tools like 287(g) and voice support for a massive guest worker program.[15]

AUGUST 10

On Second Trip to Mexico, Obama says Amnesty Moving by End of Year — On his second trip to Mexico in only four months, President Obama predicts that Congress will pass an amnesty bill in 2010 and start moving the debate by the end of the year. He says, "Secretary Napolitano is coordinating these discussions."[16]

OCTOBER 21

USCIS Director Reiterates Administration's Support of Amnesty — When asked during a press conference at the Foreign Press Center, "[W]hat do you think about the future of illegal immigrants?" U.S. Citizenship and Immigration Services (USCIS) Director Alejandro Mayorkas responds, "The President has spoken about his belief that a path to citizenship should be created as part of comprehensive immigration reform for a certain population of undocumented workers in this country today."[17]

NOVEMBER 13

Napolitano Lays Out Three-Step Immigration Plan, Step 1: Amnesty — DHS Secretary Napolitano describes the Obama administration's vision of immigration reform as a "three-legged stool" in a speech at the pro-amnesty think tank Center for American Progress. The so-called "stool" consists of: (1) a mass amnesty for the approximately 12 million illegal aliens currently living in the U.S.; (2) "improved legal flows for families and workers," which means a dramatic increase in legal immigration; and (3) empty promises of "serious and effective enforcement."[18]

Timeline:2010

Preventing State & Local Enforcement

Department of Justice Becomes Instrument of Intimidation

MARCH 4

DHS Inspector General: Administration Plan to Undermine 287(g) only Partially Complete — A report from DHS's Office of Inspector General (OIG) indicates that the Obama administration has only partially completed its plan to undermine state and local immigration enforcement by dismantling the 287(g) program. The OIG says the operations of 287(g) do not match the administration's new directives and makes numerous recommendations for ICE to fully implement the Obama administration's plan.[19]

MARCH 17

DOJ Threatens Employers Who Use E-Verify with Discrimination Investigations — Assistant U.S. Attorney General Thomas Perez, head of the Civil Rights Division at the Department of Justice (DOJ) and former board member of the open borders group CASA de Maryland, joins officials from USCIS to announce an information-sharing agreement that will increase investigations of employers who use E-Verify for possible discriminatory practices. Mr. Perez states that the new information will better enable DOJ to protect authorized workers from national origin or citizenship-status discrimination. Under the agreement, USCIS will share data from E-Verify queries, including citizenship status, with the DOJ Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) to assist them in identifying violations of the anti-discrimination provisions of the Immigration and Nationality Act (INA).[20]

MAY 19

ICE Director Tells Agents not to Cooperate with Arizona — In an interview with the *Chicago Tribune*, ICE Director John Morton announces that his agency may not process illegal aliens transferred to the agency's custody by Arizona officials. Morton — the official charged with the interior enforcement of U.S. immigration laws — criticizes Arizona's new immigration law, SB 1070, and says "[t]he best way to reduce illegal immigration is through a comprehensive federal approach, not a patchwork of state laws."[21]

MAY 27

ICE Email Reveals Luxury Living in New Detention Facilities — ICE, working with a private prison contractor, makes a number of changes and "upgrades" to nine detention facilities housing illegal aliens. An ICE email reveals that "low-risk" detainees will be able to have visitors stay for an unlimited amount of time during a 12-hour window, be given access to unmonitored phone lines, email, and free internet calling. Illegal alien detainees will also be entertained with movie nights, bingo, arts and crafts, dance and cooking classes, tutoring, and computer training.[22]

JUNE 2

Obama Administration Challenges Arizona E-Verify Law — The Obama administration files an amicus brief on behalf of the U.S. Chamber of Commerce, asking the U.S. Supreme Court to strike down a 2007 Arizona law that punishes employers who knowingly hire illegal aliens. "The Legal Arizona Workers Act," signed by then Arizona Governor Janet Napolitano, requires all Arizona employers to use the federal E-Verify system and allows Arizona to suspend and/or revoke the business licenses of employers who knowingly hire illegal aliens. The Chamber of Commerce filed a lawsuit in 2007 seeking to strike down the Arizona law, arguing that federal law preempts both provisions.[23]

JUNE 17

Clinton Announces DOJ Will Sue Arizona Over S.B. 1070 — News breaks that U.S. Secretary of State Hillary Clinton announced during a recent interview with an Ecuadorian television station that the Administration "will be bringing a lawsuit" against Arizona to block the implementation of SB 1070, the state's immigration enforcement law passed in April 2010. The DOJ confirms this days later, its goal to intimidate other states from following Arizona's lead.[24]

JUNE 25

ICE Union Unanimously Votes No Confidence in Leadership — The National ICE Council, the union that represents more than 7,000 detention and removal agents within ICE, unanimously casts a "Vote of No-Confidence" in ICE Director John Morton and Assistant Director of the ICE Office of Detention and Policy and Planning, Phyllis Coven. According to the union, the vote reflects "the growing dissatisfaction among ICE employees and Union Leaders that Director Morton and Assistant Director Phyllis Coven have abandoned the Agency's core mission of enforcing United States immigration laws and enforcing public safety, and have instead directed their attention to campaigning for programs and policies relating to amnesty…"[25]

JUNE 26

Obama Names Sanctuary City Police Chief as Head of 287(g) Program — President Obama appoints an outspoken critic of local immigration enforcement as the new head of ICE's 287(g) program, which deputizes local law enforcement agents so that they are able to identify illegal aliens by allowing them to investigate a suspect's immigration status after an arrest has been made. Former Houston and Phoenix police chief Harold Hurtt has been highly critical of the very program he has been asked to lead. In 2008, Hurtt went so far as to describe the 287(g) program as a burden on local law enforcement agents who "don't want to be immigration officers." Hurtt also actively supported Houston's sanctuary policies.[26]

JULY 1

Obama Uses University Speech to Resurrect Amnesty Push — Less than two months after Members of Congress from both sides of the aisle declared immigration reform dead in 2010, President Obama tries to resurrect legislation to grant amnesty to the approximately 12 million illegal aliens currently living in the United States. Speaking at American University in Washington, DC, Obama reiterates his support for a "pathway for legal status" for illegal aliens.[27]

JULY 6

DOJ Files Complaint to Enjoin Arizona's S.B. 1070 — After months of speculation, President Obama's Justice Department officially files suit against Arizona to preliminarily enjoin the state's immigration enforcement law, SB 1070, from taking effect. The DOJ claims federal law preempts five sections of the Arizona law: Section 2 (status verification checks during lawful stops); Section 3 (alien registration crimes); Section 4 (smuggling prohibition); Section 5 (unlawful seeking of work); and Section 6 (warrantless arrest of illegal aliens). Disregarding Congressional intent that federal immigration laws be enforced, the complaint states that if SB 1070 were to take effect, it would "conflict with and undermine the federal government's careful balance of immigration enforcement priorities and objectives."[28]

JULY 14

Obama Administration Refuses to Sue Sanctuary Cities — A week after suing Arizona to block its immigration enforcement law, SB 1070, the DOJ says it will not sue sanctuary cities for openly defying federal immigration law. A Justice Department spokeswoman inexplicably argues, "There is a big difference

between a state or locality saying they are not going to use their resources to enforce a federal law, as so-called sanctuary cities have done, and a state passing its own immigration policy that actively interferes with federal law."[29]

JULY 28

Obama Adminstration Wins Federal Injunction Against Arizona — U.S. District Court Judge for the District of Arizona, Susan R. Bolton, issues her injunction of Sections 2, 3, 5, and 6 of SB 1070, handing a victory to the Obama administration in its war against state enforcement legislation. Judge Bolton adopts the DOJ's argument that executive branch priorities, rather than congressional intent, can preempt state law.[30]

JULY 30

Leaked Agency Memo Reveals Intent to Grant Administrative Amnesty — An official USCIS memo reveals the administration's intent to circumvent Congress on immigration policy and grant amnesty administratively. In the memo, entitled "Administrative Alternatives to Comprehensive Immigration Reform," senior officials at USCIS offer Director Alejandro Mayorkas a variety of ways to "reduce the threat of removal for certain individuals present in the United States without authorization" and extend benefits and protections to many individuals and groups until amnesty is granted.[31]

AUGUST

Immigration Officers Stop Detaining Illegal Aliens During Traffic Stops — ICE begins circulating a draft policy that would significantly limit the circumstances under which ICE would take custody of illegal aliens. The memo provides that immigration officers shall issue detainers — or official notification to local law enforcement agencies that ICE intends to assume custody of the alien — only after a law enforcement agency has independently arrested the alien for a criminal violation.[32]

AUGUST 24

Homeland Security Begins Dismissing Deportation Cases — The *Houston Chronicle* reveals that DHS has begun to dismiss deportation proceedings against certain aliens. According to the paper, DHS began systematically reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal aliens without serious criminal records. The local Houston office of ICE is reviewing 2,500 cases and other ICE offices around the country are expected to follow suit. Subsequent reports by the *Chronicle* reveal the policy shift resulted in Texas immigration courts dismissing hundreds of deportation cases, increasing the rate of dismissal of such cases 700 percent between July and August of 2010.[33]

SEPTEMBER 15

Obama Promises Hispanic Caucus He Will Fight for Amnesty — President Obama asserts that due to the failure to pass amnesty legislation "states like Arizona have taken matters into their own hands." He says he is fighting the Arizona law because he feels it was the wrong way to deal with this issue. According to the President, the Arizona law "interferes with federal immigration enforcement. It makes it more difficult for … local law enforcement to do its job. It strains state and local budgets. And if other states follow suit, we'll have an unproductive and unworkable patchwork of laws across the country."[34]

SEPTEMBER 16

Memo: DHS Reveals Administrative Amnesty Plan — A 10-page memo leaked to The *American Spectator*, and dated February 26, 2010, details how DHS has "long envisioned" a two-phase amnesty program to legalize "those who qualify and intend to stay here." The first phase would include registration, screening, and the granting of "interim status that allows illegal aliens to work in the U.S." The second phase would grant legal permanent resident status (i.e. green cards) to those who meet additional requirements.[35]

OCTOBER 8

ICE Presents Misleading Deportation Data — According to ICE's deportation statistics, from October 2009 until September 2010 the agency deported 392,862 illegal aliens. Roughly half of the deportations—more than 195,000—were of *criminal* illegal aliens. However, Napolitano fails to mention that while the deportation of criminal illegal aliens has risen, the change in the total number of *overall* deportations is statistically insignificant. In fact, the number of deportations of non-criminal illegal aliens has decreased.[36]

DECEMBER 6

Public Learns Homeland Security Padded FY 2010 Deportation Numbers — In October, DHS announced it had "removed more illegal aliens than in any other period in the history of our nation" during the 2010 fiscal year. However, interviews and internal communications cited in the *Washington Post* indicate the Department's record number of 392,862 deportations (also called "removals") was padded. First, the article charges that ICE included 19,422 removals in FY 2010 that were really from the previous fiscal year. The *Post* article also describes how ICE extended a Mexican repatriation program beyond its normal operation dates, adding 6,500 to the final removal numbers.[37]

Timeline:2011

Rewriting the Rules
Amnesty by Administrative Action

JANUARY 25

Obama Promotes Failed DREAM Act in State of the Union Address — Less than a month after the Democrat-controlled Senate rejected the DREAM Act, President Obama uses his State of the Union address to renew the call for its passage. There are "hundreds of thousands of students excelling in our schools who are not U.S. citizens," he said. Many of these "live every day with the threat of deportation." Urging Congress to tackle illegal immigration "once and for all", the President says he is "prepared to work with Republicans and Democrats to protect our borders, enforce our laws and address the millions of undocumented workers who are now living in the shadows."[38]

FEBRUARY 15

Less than Half of Southern Border Under Operational Control — As a result of President Obama's failure to enforce U.S. immigration law, House Subcommittee on Border and Maritime Security Chairwoman Candice Miller (R-Mich.) notes that only 69 of roughly 4,000 miles along the northern border are under "operational control," and that only 873 of about 2,000 miles are under "operational control" along the southern border. The 2006 Secure Fence Act mandated that Homeland Security achieve and maintain operational control of the borders and defined "operational control" as "the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband."[39]

MARCH 2

Morton Memo #1: Administration Outlines Enforcement "Priorities"; Limits to Criminal Aliens — In a departmental memo, ICE Director John Morton outlines new enforcement priorities and encourages immigration agents to not enforce the law against illegal aliens who do not meet these priorities. Morton refers to this non-enforcement policy as the use of "prosecutorial discretion." The prioritized categories include: convicted criminals, terrorists, gang members, recent illegal entrants, and fugitive aliens. Additionally, the memo sets out guidelines for limiting detention for certain illegal aliens.[40]

MARCH 30

9/11 Commissioner Warns U.S. Needs Programs Put on Hold by Obama — Chairman of the 9/11 Commission, Tom Kean, testifies before the Senate Homeland Security Committee that "border security remains a top national security priority, because there is an *indisputable nexus* between terrorist operations and terrorist travel." He further explains that, "Foreign-born terrorists have continued to exploit our border vulnerabilities to gain access to the United States," and emphasizes that while the government has made some improvements, troubling vulnerabilities in border security remain. He recommends implementing US-VISIT and REAL ID – two programs the Obama administration refuses to execute.[41]

APRIL 13

Obama Administration Exposed for Suspending Over 34,000 Deportations of Illegal Aliens in 2010 — According to data USCIS sent to Senator Chuck Grassley's (R-Iowa) office, DHS granted deferred action and humanitarian parole to 34,448 illegal aliens residing in the U.S. in fiscal year 2010.[42]

APRIL 19

President's Immigration "Stakeholders" Meeting Stacked with Amnesty Advocates

President Obama hosts a meeting on immigration reform with 70 pro-amnesty guests including former Governor Arnold Schwarzenegger, New York City Mayor Michael Bloomberg, Los Angeles City Council President Eric Garcetti, Rev. Al Sharpton, and former Commerce Secretary Carlos Gutierrez. Although the White House press release on the meeting stated that the President planned to discuss how to "build a bipartisan consensus in Congress" on immigration reform, the White House failed to invite any Members of Congress, border state governors, or law enforcement representatives.[43]

APRIL 27

Border Smuggling So Severe, Feds Decline to Prosecute — Witnesses testify in front of the House Border and Maritime Subcommittee that due to massive illegal activity, federal prosecutors in districts along the Southwest border decline to charge drug smugglers and illegal border crossers unless the amount of narcotics and/or aliens smuggled into the country reaches a certain threshold.[44]

APRIL 28

Obama Hosts Celebrity Amnesty Meeting — On the heels of his pro-amnesty "stakeholders" summit, President Obama holds another immigration meeting at the White House, this time with celebrities from the Hispanic community to discuss "comprehensive immigration reform" and the failed DREAM Act. Notable attendees include actresses Eva Longoria and America Ferrera, television hosts Jose Diaz-Balart of Telemundo (the brother of U.S. Rep. Mario Diaz-Balart (R-Fla.)) and Maria Elena Salinas of Univision, Emilio Estefan (husband of singer Gloria Estefan), and executive director of the pro-amnesty group Voto Latino, Maria Teresa Kumar. After the meeting, Longoria says, "We will be reintroducing [the DREAM Act] next week and hopefully get it to pass."[45]

APRIL 29

Obama Pushes DREAM Act in Commencement Speech — One day after the celebrity meeting, President Obama continues to push for the DREAM Act while delivering the commencement address at Miami Dade College in Florida. He tells the audience, "I know that several young people here have recently identified themselves as undocumented….And I will keep fighting alongside many of you to make the DREAM Act the law of the land." Senate Democrats reintroduce the bill on May 11.[46]

MAY 10

Obama Falsely Declares Border Secure — In a speech at the border in El Paso, Texas, President Obama tells Americans the border is secure. The President quickly follows these remarks by declaring that it is now time for Congress to pass "comprehensive" immigration reform. However, the fence is not complete, checks on both borders have decreased, and violence along the border continues. At the same time, a Rasmussen Report poll reveals that 64 percent of U.S. citizens believe the border is not secure.[47]

JUNE 17

Morton Memo #2: Obama Administration Bypasses Congress, Will Not Prosecute Illegal Aliens Eligible for the DREAM Act — ICE Director John Morton issues a memorandum directing ICE agents to refrain from enforcing U.S. immigration laws against certain segments of the illegal alien population, including those who qualify for the DREAM Act. The memorandum lists 19 different factors agents should consider when deciding whether to take an illegal alien into custody. Criterion include the Agency's enforcement priorities as stated in his March 2 memorandum, the alien's length of presence in the U.S., whether the alien entered the U.S. as a minor, the alien's pursuit of education in the U.S., whether the alien or their spouse is pregnant or nursing, and whether the alien's nationality makes removal unlikely.[48]

Morton Memo #3: Non-Enforcement Against Illegal Aliens Claiming to be Victims
ICE Director John Morton issues a second memorandum that same day, directing ICE agents to refrain from enforcing U.S. immigration laws against crime victims, witnesses to crime, and "individuals pursuing legitimate civil rights complaints;" however, his directive is much broader. In particular, he instructs ICE personnel to consider individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.[49]

JUNE 23

ICE Union Outraged Over Morton DREAM Act Memo — Leaders of the National ICE Council, a union representing roughly 7,000 ICE agents, officers and employees, express outrage over the June 17 administrative amnesty memorandum authored by ICE Director John Morton. The Council says that since the administration was "unable to pass its immigration agenda through legislation, [it] is now implementing it through agency policy." It also accuses ICE officials of working "hand-in-hand" with the open-borders lobby, while excluding its own officers from the policy development process.[50]

JUNE 27

ICE Emails Reveal Cover-up of Administrative Amnesty Policy — Internal memos confirm that once the *Houston Chronicle* (on Aug. 24, 2010) exposed DHS' directive to review and dismiss deportation cases, ICE officials attempted to publicly distance themselves from such lenient policies and deny that they ever existed. The revelations in the emails obtained through the *Chronicle's* FOIA request, however, make clear that such a directive did exist and was even praised by senior ICE officials.[51]

JUNE 29

Obama: No Mandatory E-Verify without Amnesty — When asked at a White House press conference whether he would sign mandatory E-Verify legislation, the President indicates that his priority is amnesty. He adds, "We may not be able to get everything that I would like to see in a package, but we have to have a balanced package."[52]

JULY 6

Adminstration Quietly Signs Agreement to Open U.S. Borders to Mexican Trucks — A provision of NAFTA granting Mexican trucks access to U.S. highways has repeatedly been delayed due to a number of safety and economic concerns. Despite those concerns compounding in recent years — due to the presence of violent drug cartels and human smuggling operations along the border — the Obama administration decides to implement that provision even though the U.S. lacks the capability to inspect more than a small fraction of the trucks that will be crossing the border.[53]

AUGUST 1

DOJ Files Complaint to Enjoin Alabama's HB 56 — The DOJ files a lawsuit to preliminarily and permanently enjoin from taking effect nearly a dozen provisions in Alabama's immigration enforcement law, HB 56. Some of the provisions the DOJ seeks to block include: making it a criminal offense in Alabama to violate federal laws which require aliens to carry their registration cards and register with the federal government; allowing Alabama law enforcement officers to verify an individual's immigration status with the federal government if reasonable suspicion of unlawful presence arises during a lawful stop, detention or arrest; making it a crime to knowingly conceal, harbor or shield an illegal alien from detection; and requiring public elementary and secondary schools to determine the citizenship status of enrolling students for reporting purposes.[54]

AUGUST 18

Secretary Napolitano Announces Review of Pending and Incoming Immigration Cases; Administration to Release Non-Criminal Aliens — In an unprecedented move, Homeland Security Secretary Janet Napolitano announces that DHS is establishing an "interagency working group to execute a case-by-case review" of all pending and incoming deportation cases. According to Napolitano, this review is intended to ensure that proceedings only continue against aliens who fall under the Department's priorities. While the exact composition of the "working group" remains secret to-date, Napolitano states that DHS and DOJ attorneys, in addition to other personnel, will identify "low-priority" deportation cases (currently over 300,000) at every stage of the process that should be considered for an exercise of discretion. It will also issue guidance to prevent "low-priority" cases from even entering the system in the first place. This case-by-case approach, Napolitano writes, "will enhance public safety."[55]

SEPTEMBER 28

President Admits at Hispanic Roundtable that Interior Enforcement is Negligible — In an attempt to deflect criticism from illegal alien advocates, the President argues that new deportation statistics are misleading and acknowledges that he has virtually stopped interior enforcement of our immigration laws. He says, "[T]he statistics are actually a little deceptive because what we've been doing is…apprehending folks at the borders and sending them back. That is counted as a deportation, even though they may have only been held for a day or 48 hours."[56]

OCTOBER 12

ICE Director Admits White House Role in Amnesty Memos — In testimony before the House Immigration Policy and Enforcement Subcommittee, ICE Director John Morton admits that White House officials reviewed his June 17 memorandum directing personnel to refrain from taking action against illegal aliens who would qualify for amnesty under the failed DREAM Act prior to his issuance of it. He also testified that White House Director of Intergovernmental Affairs and former National Council of La Raza employee (now White House Domestic Policy Director), Cecilia Muñoz, assisted in its preparation.[57]

OCTOBER 18

ICE Does Nothing after Santa Clara County Votes to Ignore Immigration Detainers
The Obama administration refuses to act after the Santa Clara County, California, Board of Supervisors votes 3-1 to stop using county funds to honor ICE detainers, except in limited circumstances. The County adopts the policy as retaliation for what it considers forced participation in the Secure Communities program.[58]

DHS Deceives Public with High Deportation Stats — Homeland Security Secretary Janet Napolitano attempts to calm the open borders lobby by explaining that the new level of deportations was reached by deporting a greater number of criminal aliens, not illegal aliens whose "only" infraction is unlawful entry or presence.[59]

OCTOBER 19

ICE Does Nothing after D.C. Mayor Orders Police to Disregard Immigration Laws — The Obama administration refuses to act after District of Columbia (D.C.) Mayor, Vincent C. Gray, issues an executive order to prevent D.C. police from enforcing U.S. immigration law. Among other things, the order prohibits all public safety agencies from inquiring about an individual's immigration status or from contacting ICE if there is no nexus to a criminal investigation.[60]

OCTOBER 25

DHS Orders Reduction in Border Inspections — According to the Associated Press, Homeland Security Secretary Janet Napolitano begins quietly ordering U.S. Customs and Border Protection (CBP) agents to scale back border inspections. Border agents now report that instead of conducting random checks, or checks based on suspicious behavior, they have been ordered to only conduct checks based on actual intelligence indicating a threat.[61]

OCTOBER 31

DOJ Files Complaint to Enjoin South Carolina's S 20 — The DOJ files suit against South Carolina's immigration enforcement law, following the ACLU's suit in October. The DOJ seeks to enjoin enforcement provisions in the law, similar to lawsuits filed against Arizona and Alabama.[62]

NOVEMBER 1

DOJ Demands Data from Alabama Schools — After condemning Alabama for passing its immigration enforcement law, HB 56, the DOJ sends a letter to state superintendents demanding they turnover data collected regarding student absenteeism since the beginning of the 2011-2012 school year. DOJ Civil Rights Division Director, Assistant Attorney General Thomas Perez, requests the information be sent in two weeks and then monthly thereafter to prevent civil rights violations.[63]

NOVEMBER 7

Memo: DHS Consolidates Power Under ICE — USCIS issues a policy memorandum on November 7 to assist ICE in implementing the Obama administration's backdoor amnesty program. The stated goal of the memorandum is to ensure that USCIS' practice of directing people to appear in immigration court, through what are called "notices to appear," or NTAs, complements ICE's goal of administratively closing cases it does not consider a priority. The new guidelines set forth in the memorandum explain when USCIS personnel can unilaterally issue these notices to appear, and when USCIS must refer a case to ICE. The new USCIS memo reflects how the Obama administration is consolidating all decisions regarding immigration enforcement at the highest levels within the Department of Homeland Security.[64]

NOVEMBER 17

Memo: ICE Issues Guidelines for Amnesty Review — ICE's principal legal advisor issues a new policy memorandum and accompanying guidelines that expand upon Secretary Napolitano's Aug. 18 letter establishing a working group to review pending and incoming immigration cases for dismissal. The memorandum instructs agency attorneys to begin reviewing immigration cases and administratively closing those that do not meet the administration's "priorities." The guidelines outline criterion ICE attorneys must follow when reviewing cases and announces pilot programs in Denver and Baltimore that will serve as models for the review of all pending deportation cases.[65]

NOVEMBER 22

DOJ Files Complaint to Enjoin Utah's HB 497 — President Obama's DOJ files suit to enjoin from taking effect three core provisions of Utah's immigration enforcement law, HB 497. These provisions include: Section 3, which would require any law enforcement officer conducting a lawful stop, detention, or arrest, to check the immigration status of any person they arrest for a felony or Class A misdemeanor if that person is unable to provide valid identification; Section 10, which makes it a crime for an individual to harbor, encourage the entry of, or transport an illegal alien into or within the state, for financial gain; and Section 11, which allows law enforcement officers to arrest without a warrant aliens who have a deportation order or who have been charged or convicted in another state with one or more aggravated felonies. The DOJ lawsuit makes Utah the fourth state to be sued

by the federal government over its immigration enforcement law in just over a year. The DOJ elects not to challenge the legality of other Utah immigration laws which openly defy the federal government's authority over immigration policy because those laws work to the benefit of illegal aliens.[66]

ICE Does Nothing after New York City Enacts Ordinance to Prevent Detention of Illegal Aliens — The Obama administration refuses to act after Mayor Michael Bloomberg signs a measure ordering all city jails to ignore certain ICE detainers issued to deport illegal aliens from those jails. As a result, New York City jails will now release many illegal aliens back into the community instead of handing them over to ICE for removal. The Obama administration takes no action against New York City.[67]

DECEMBER 11

Obama Wants to Remove National Guard from Border — The administration insinuates on several occasions that it is considering not renewing the National Guard mission on the Southern border. The 1,200 National Guard troops stationed along the Southern border patrol assist both CBP officers in spotting illegal entries and ICE with criminal intelligence.[68]

DECEMBER 15

DOJ Accuses Maricopa County of Discrimination Against Latinos; Rescinds 287(g) Agreements without Filing Suit — Assistant Attorney General Thomas Perez leads an investigation into Maricopa County Sheriff's Department and determines there was discrimination against Latinos. He goes public with his "findings" without initiating a lawsuit against the County. Without an opportunity to defend itself, and little regard for the maintenance of public safety or the rule of law, DHS rescinds Maricopa County's 287(g) agreement.ICE Director John Morton also tells the Maricopa County Attorney that ICE will no longer respond to calls from the Maricopa County Sheriff's Office (MCSO) involving traffic stops, civil infractions or "other minor offenses." However, it is unclear how ICE can refuse to respond to inquiries from MCSO deputies and not directly violate 8 U.S.C. § 1373(c), which requires the federal government to respond to inquiries by law enforcement agencies to verify immigration status.[69]

DECEMBER 29

ICE Relaxes Detention Policies — In a last minute 2011 move, ICE makes significant changes to its detainer policies, yet passes it off as a mere administrative form change. First, ICE creates a 24/7 hotline for illegal alien detainees to be staffed by the Law Enforcement Support Center (LESC)– the same organization that ICE says is too understaffed to keep up with immigration status check requests from state and local law enforcement. Second, ICE revises its detainer form to include a new provision that allows ICE agents to "Consider this request for a detainer operative only upon the subject's conviction." This shift in policy to a discretionary "post-conviction" model ignores the fact that being in the country illegally is a violation of federal law while simultaneously welcoming criminal aliens back onto the streets.[70]

Timeline:2012

Preparing for Full Scale Amnesty

JANUARY 3

Government Report Exposes USCIS "Get to Yes" Policy — An Office of Inspector General (OIG) report reveals that USCIS officials pressure employees to approve applications for immigration benefits. According to the report, nearly 25 percent of officers surveyed reported that a supervisor has asked them to approve applications that should have been denied, and 90 percent said they felt they didn't have sufficient time to complete interviews of those who seek benefits. The report concludes that the speed at which supervisors require immigration officers to process cases "leaves ample opportunities for critical information to be overlooked." The report comes amid allegations made by agency employees that if they do not approve enough applications, they will be demoted or forced to relocate.[71]

JANUARY 6

DHS Announces Intent to Circumvent 3 and 10-Year Bars to Admissability — DHS proclaims its intent to propose a new rule that would allow certain illegal alien relatives of U.S. citizens to apply for hardship waivers from the 3 and 10-year bars to admissibility from inside the United States. Current law provides that an alien who has been in the U.S. unlawfully for 180 days to one year and leaves (either through removal or voluntary departure) is inadmissible to the U.S. for three years. An alien who has been unlawfully in the U.S. for a year or more and leaves is inadmissible for ten years.[72]

JANUARY 10

Obama Appoints Former Amnesty Lobbyist to Head Domestic Policy Team — President Obama promotes Cecilia Muñoz, the White House's Director of Intergovernmental Affairs, to be the new director of its Domestic Policy Council. Prior to joining the Obama administration, Muñoz served as a Senior Vice President at the National Council of La Raza, one of the most outspoken pro-amnesty organizations in the country. While at La Raza, Muñoz lobbied for comprehensive amnesty and benefits for illegal aliens, causes she continues to push as a high-ranking member of the White House staff.[73]

JANUARY 17

DHS Halts Roll-Out of Secure Communities in Alabama in Retaliation for HB 56 — DHS tells Alabama state officials that the implementation of Secure Communities in the state will be delayed due to "cost constraints." However, in an email sent to members of the Alabama Congressional delegation, DHS admits that the decision to suspend the program was done in retaliation for Alabama's new immigration enforcement law, HB 56. The email from DHS states: "Although the federal courts have enjoined several parts of HB 56, certain provisions were not enjoined and are currently in effect…While these provisions of Alabama's state immigration enforcement law, which conflict with ICE's immigration enforcement policies and programs, remain the subject of litigation, ICE does not believe it is appropriate to expand deployment of Secure Communities…in Alabama."[74]

JANUARY 19

Administration Closes Over 1,600 Deportable Alien Cases as Part of Administrative Amnesty Pilot Review — ICE attorneys in Denver and Baltimore recommend that the agency "administratively close" 1,667 removal cases, which would release illegal aliens already in proceedings back onto the streets without consequence for violating U.S. immigration law. The recommendation is the result of a six-week pilot review of all pending deportation cases in Denver and Baltimore immigration courts, designed to ensure that only aliens meeting the administration's "priorities" are deported.[75]

Executive Order Reduces Screening for Visa Applicants — President Obama issues an executive order that will make it easier for aliens to obtain nonimmigrant visas by waiving screening safeguards, a move that increases the risk for visa overstays and jeopardizes national security. The order directs the Secretaries of State and DHS to come up with a plan that: (1) increases nonimmigrant visa processing in China and Brazil by 40 percent in the coming year; and (2) ensures that 80 percent of nonimmigrant visa applicants are interviewed within three weeks of the government receiving their application. In a release issued the same day as the order, the State Department announces that it will accomplish the order in part by waiving the long-standing statutory requirement that aliens seeking to renew visas undergo in-person interviews with a consular officer. Because the order applies to all "nonimmigrant visas," it will relax the screening process for not only the tens of millions of tourists and business travelers who enter the U.S. each year, but also for hundreds of thousands of guest workers. In addition to relaxing the screening process for issuing visas, President Obama also proposes expanding the Visa Waiver Program, which allows visitors from participating countries with low rates of visa refusals to be admitted to the United States without applying for a U.S. visa.[76]

JANUARY 24

President Asks Congress for Amnesty Plan, Fails to Mention He's Launched it Without Their Approval — In his State of the Union address President Obama asks Congress to give him an amnesty bill he can "sign right away."[77]

FEBRUARY 7

ICE Creates Public Advocate Position to Lobby for Illegal Aliens — ICE announces the creation of a new position within the agency, Public Advocate. The Public Advocate is to serve as a point of contact for aliens in removal proceedings, community and advocacy groups, and others who have concerns, questions, recommendations, or other issues they would like to raise about the administration's executive amnesty efforts. ICE appoints senior advisor for the Agency's Enforcement and Removal Operations (ERO) division, Andrew Lorenz-Strait, to head the new position.[78]

FEBRUARY 13

Obama Administration Moves to Defund 287(g) Program; Slashes Immigration Enforcement — President Obama's 2013 budget not only proposes cutting funding for ICE by 4 percent, but specifically proposes a $17 million slash in the 287(g) federal-local law enforcement program, effectively gutting the program, which was enacted by Congress. The budget describes what is essentially a phase-out of the 287(g) program in favor of the expansion of Secure Communities, calling the cut a "realignment and reduction of 287(g)" that will "reduce[] the 287(g) program" as ICE implements Secure Communities nationwide. Obama also proposes cutting the Federal Law Enforcement Training Center (FLETC) by 5 percent, decreasing funds for border security inspections and trade facilitation between points of entry by $6 million, and decreasing funds for border security fencing, infrastructure, and technology by $72.9 million.[79]

FEBRUARY 22

DHS Monitors Social Media for Policy Backlash — A recently released 2011 reference guide for DHS analysts monitoring the media reveals that the Department is employing "Big Brother"-esque tactics to track blowback from opponents of their administrative amnesty policies. According to the guide, DHS is directing its analysts to identify and monitor "media reports that reflect adversely on DHS," and track reports on the administration's "policy changes" in immigration and the term "illegal immigration" in particular.[80]

MARCH 1

DHS Border Crossing Data is Challenged — Chairman of the House Oversight Committee, Darrell Issa (R-Calif.), and Rep. Jason Chaffetz (R-Utah) send a letter to DHS Secretary Napolitano accusing the Department of releasing false and misleading border crossing data. The letter states, "[T]he numbers appear to dramatically underestimate the volume of individuals who cross the border illegally and are neither arrested nor turned back south."[81]

MARCH 8

ICE Director Tells Congress Amnesty Review is Half Complete — ICE Director John Morton testifies before the House Appropriations Homeland Security Subcommittee that the Agency is halfway complete with its review of 300,000 pending deportation cases and will be done with the review by 2013. He states ICE has closed over 1,500 cases thus far. The next day, the ICE Office of Congressional Relations sends an email to Capitol Hill staff clarifying that this figure represents only the number of cases actually closed to-date, and states that it will close or dismiss an additional 11,000 cases pending the results of background checks. The review is part of the administration's backdoor amnesty program announced by Secretary Napolitano in August 2011.[82]

MARCH 29

Obama Administration Announces Rolling Closures of Immigration Courts — The administration announces an expansion of its administrative amnesty program to four major U.S. cities: Detroit, Seattle, New Orleans, and Orlando. The rollout suspends immigration court dockets in the four cities while ICE attorneys review deportation cases of aliens not in custody and administratively close or dismiss those not meeting the administration's enforcement priorities.[83]

MARCH 30

USCIS Proposes Rule to Circumvent Federal Laws on Admission — Nearly three months after making a public announcement, USCIS releases its proposed rule to allow illegal aliens to circumvent federal statutes that govern admission. This latest move by the Obama administration makes it easier for illegal alien family members of U.S. citizens to stay in the country and become citizens themselves. The proposed rule achieves this by creating broad exceptions to the 3 and 10-year bars to admission found in Section 212 of the Immigration and Nationality Act (INA).[84]

APRIL 17

Obama Administration Defends Pulling National Guard Troops from Border — After 19 months of stationing 1,200 National Guard ground troops along the border, the Obama administration cuts the number to a mere 300. Testifying before the House Homeland Security Subcommittee on Border and Maritime Security, Assistant Defense Secretary Paul Stockton claims that aerial surveillance technology will provide a new deterrent to illegal border crossers. Skeptical and concerned members of the Subcommittee argue against withdrawal, noting that the U.S. only has operational control of 873 miles of the 2,000-mile southern border.[85]

APRIL 25

ICE Announces the Number of Illegal Aliens Benefitting from Case-by-Case Amnesty Review Has Increased to 16,500 — ICE officials announce it has offered to close over 16,500 illegal alien deportation cases pending background checks in connection with the administration's review of 300,000 pending immigration cases. The administration also announces that the number of illegal aliens whose cases it has already closed is up to 2,700 from just over 1,500 the previous month.[86]

DHS Delays Biometric Exit System Another Four Years — DHS Secretary Janet Napolitano testifies before the Senate Judiciary Committee regarding the long-awaited biometric exit system that tracks whether aliens leave the country upon the expiration of their visa. In March, DHS Principal Deputy Coordinator of Counterterrorism John Cohen testified before a House Committee that a plan to implement a biometric exit system would be presented within thirty days. However, in her testimony, Secretary Napolitano backtracks on that promise and tells Congress that a biometric system would not be ready for at least four more years, and then only if the plan the Department develops is cost-effective. Instead, Secretary Napolitano testifies that DHS will have an "enhanced biographic" system ready by June and that the Office of Management and Budget was currently reviewing the final plan.[87]

APRIL 27

Obama Administration Weakens Secure Communities — ICE shifts its policy on Secure Communities to stop the enforcement of immigration law against illegal aliens apprehended for "minor traffic offenses." When Secure Communities identifies illegal aliens pursuant to a traffic offense, ICE will no longer ask the local jails to detain the illegal aliens so that ICE may begin deportation proceedings; rather, ICE will only consider detaining an alien if the alien is ultimately convicted of the offense. Moreover, despite claims of limited resources, ICE also announced it plans to take action against jurisdictions with arrest rates the agency deems too high. The new policy is the latest step in the administration's effort to limit state and local involvement in immigration enforcement and ensure that only aliens who have been convicted of violent crimes will be subject to deportation.[88]

MAY 1

DOJ Seeks to Intimidate Alabama School Districts — In its relentless quest to prevent state and local officials from enforcing immigration laws, the DOJ sends another letter of intimidation to the Alabama State Department of Education. In the letter, Civil Rights Division chief Thomas Perez drops a thinly veiled threat of litigation to persuade Alabama officials to back away from its immigration enforcement law, HB 56, specifically the provision that requires schools to collect immigration data on newly enrolled students.[89]

MAY 10

DOJ Sues Maricopa County — The DOJ files an official complaint against Maricopa County and its Sheriff Joe Arpaio for allegedly racially profiling Latinos in violation of federal law. These allegations of misconduct include: 1) a pattern or practice of discriminatory law enforcement actions against Latinos in Maricopa County; 2) discriminatory jail practices against Latino inmates with limited English proficiency (LEP); and (3) a pattern or practice of retaliatory actions against perceived critics. The DOJ's lawsuit follows Sheriff Arpaio's refusal to allow a federal court-appointed "monitor" to oversee his office's activities. Even before filing suit, DHS rescinded the Maricopa County Sheriff's Office 287(g) agreement with ICE and "restricted its use" of the Secure Communities program.[90]

JUNE 5

ICE Releases Latest Backdoor Amnesty Statistics — ICE releases its latest statistics in its case-by-case review of pending deportation cases and states the Agency's attorneys have reviewed over 288,000 cases. Of those reviewed, ICE says it plans to administratively close 20,648; it states over 4,300 of these cases have already been processed and the remaining will be closed pending background checks.[91]

JUNE 11

DOJ Plans to Sue Florida Over Effort to End Illegal Alien Voting — Assistant Attorney General Thomas Perez announces that the DOJ will sue Florida in federal court over the state's removal of ineligible voters, including illegal aliens, from its voter registry. After a news outlet uncovered a number of ineligible voters, the Florida Department of State began an investigation of its voter rolls. To help the state correct its records and remove illegal aliens and other ineligible voters, the Florida Department of State asked DHS to grant it access to the federal Systematic Alien Verification for Entitlement (SAVE) Program. After numerous delays by DHS, DOJ asked Florida to halt its investigation altogether.[92]

JUNE 15

Obama Administration Circumvents Congress

Obama Administration Unilaterally Implements DREAM Act; 1.4 Million Illegal Aliens Set for Removal Reprieve — The Obama administration announces it will circumvent Congress by using prosecutorial discretion to implement unilaterally the DREAM Act. Effective immediately, in a program it calls Deferred Action for Childhood Arrivals (DACA), DHS will grant deferred action and possible work authorization to certain illegal aliens under the age of 30 who claim they arrived in the U.S. before 16 years of age. DHS Secretary Janet Napolitano expects that 800,000 illegal aliens will be granted amnesty through the effort, but other organizations estimate the number of beneficiaries will be 1.4 million or higher.[93]

The President vigorously defends his actions at a White House press briefing despite the fact that in March 2011, he told an audience that he did not have the authority to unilaterally suspend deportations, "*With respect to the notion that I can just suspend deportations through executive order, that's just not the case…Congress passes the law. The executive branch's job is to enforce and implement those laws…There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.*"[94]

Napolitano: Parents of "DREAMers" Won't Face Enforcement Either — In an appearance on CNN to promote the administration's executive amnesty (DACA), DHS Secretary Napolitano quells fears that parents of illegal aliens applying for deferred action may be subject to immigration enforcement. The Secretary says, "We have internally set it up so that the parents are not referred for immigration enforcement if the young person comes in for deferred action." The announcement reveals that the administration is pursuing a broad-based plan. Massively expanding amnesty to illegal alien parents who knowingly entered the country unlawfully dramatically undercuts the President's argument that he simply granted amnesty to "kids" who were brought here through "no fault of their own."[95]

JUNE 22

President Promotes DACA in Speech to Latino Elected Officials — In a speech to the National Association of Latino Elected Officials (NALEO), President Obama defends his administrative amnesty by saying, "what's needed is immigration reform that finally lives up to our heritage as a nation of laws." The President failed to mention that by unilaterally declaring that a massive amnesty is now in place, he usurped Congressional authority and demonstrated a disregard for our nation of laws - laws passed by Congress that is he obligated to enforce.[96]

JUNE 25

DHS Rescinds 287(g) Agreements in Arizona — Immediately following the U.S. Supreme Court's decision in *Arizona v. U.S.* to uphold Section 2(B)—the heart of SB 1070—DHS announces it is rescinding its 287(g) task force agreements with Arizona law enforcement agencies. Section 2(B) requires law

enforcement agents to take reasonable steps to verify the immigration status of those they lawfully stop or detain if they have reasonable suspicion to believe they are in the country illegally. DHS's decision to rescind the 287(g) agreements allowing officers who participate in criminal task forces (such as drug or gang) to proactively respond to, identify, and remove illegal aliens in response to the Supreme Court opinion is perceived as a highly political and retaliatory move.[97]

JULY 6

Border Patrol to Close Nine Stations — Customs and Border Protection (CBP) announces it plans to close nine Border Patrol Stations across the United States. The station closures will take place at the following locations: Lubbock, Amarillo, Dallas, San Angelo, Abilene, and San Antonio, Texas; Billings, Montana; Twin Falls, Idaho; and Riverside, California. According to a CBP spokesman, the move to close these stations—many in strategic locations—is being done "[i]n order to accomplish [the agency's] mission more efficiently and to use its personnel more effectively…." While CBP states that the closures will save the agency $1.3 million per year, it has yet to explain what the trade off will be in terms of illegal alien apprehensions and drugs seized.[98]

JULY 16

Inspector General: IRS Managers Discouraged Employees from Discovering Illegal Alien Tax Fraud — The Inspector General for the Treasury Department issues a report revealing that Internal Revenue Service (IRS) managers discouraged their employees from detecting illegal alien tax fraud.[99] The report states IRS management "has not established adequate internal controls to detect and prevent the assignment of an ITIN to individuals submitting questionable applications," noting that they care more about quickly processing ITIN applications than ensuring the agency grants ITINs to only qualifying individuals. Although illegal aliens are unauthorized to work in the U.S., they are required to comply with federal tax laws. As a result, the IRS grants illegal aliens ITINs to allow them to file tax returns. However, without any safeguards the system is easily manipulated by illegal aliens, who in 2010 alone secured $4.2 billion in refundable tax credits through the Additional Child Tax Credit.

JULY 19

Napolitano: Economy Shouldn't be Balanced on Backs of "DREAMers" — DHS Secretary Janet Napolitano testifies before the House Judiciary Committee. While testifying, she announces that roughly 1,000 illegal aliens have already qualified for a two-year reprieve under the Deferred Action for Childhood Arrivals (DACA) program despite the fact the program is not yet in effect. She also states the administration has virtually no plan in place to process the applications or to prevent fraud in the program.[100]

JULY 24

Internal DHS Docs Show DACA to Cost Hundreds of Millions — The Obama administration's plan to grant deferred action status and work authorization to illegal aliens could cost over $585 million, according to internal Department of Homeland Security (DHS) documents leaked to the Associated Press. The estimate is based on projections that the federal government will need to hire over 1,400 new employees and contractors to process an anticipated 3,000 applications daily. The leaked documents undermine the administration's claims that the amnesty will be fee-driven and not cost U.S. taxpayers.[101]

AUGUST 3

Administration's Guidance Provides Little Insight into Backdoor Amnesty — DHS issues "guidance" on administering the DACA application process, which reveals the administration's intent to ignore the criteria it set forth for the program. Instead, it refers to the original criteria for eligibility as mere "factors" for consideration. Conspicuously absent from the administration's guidance is any direction as to specific forms of documentation an illegal alien must show to receive deferred action and work authorization.[102]

AUGUST 14

USCIS Encourages More Illegal Aliens to Apply for Amnesty — The day before the agency is to begin accepting applications for the administration's backdoor amnesty program, the Director of USCIS, Alejandro Mayorkas, hosts a stakeholder conference call to walk the open borders lobby through the DACA application process. During the call, Mayorkas notes the administration's loose criteria, encouraging even more illegal aliens to qualify for the reprieve. In particular, he states that even those with expunged convictions and orders of removal against them are eligible to apply, as well as those who are only attending literacy and vocational programs rather than attending school.

AUGUST 15

Obama Administration Begins Accepting Backdoor Amnesty Applications — USCIS begins officially accepting DACA applications. The administration has yet to announce which forms of documentation are acceptable nor has it put any safeguards in place to protect against fraudulent applications.

AUGUST 24

Internal ICE Docs Show Administration Cooks Books — The House Judiciary Committee obtains internal ICE documents revealing that DHS is including numbers from the Alien Transfer Exit Program (ATEP) in its year-end removal numbers. ATEP, a joint program between ICE and Customs and Border Protection, transfers illegal aliens apprehended along one point of the U.S.-Mexico border to another point for removal. when ATEP removals are subtracted from ICE's total removal numbers, the number of deportations drops well below pre-Obama administration levels. This manipulation allows the administration to argue it is deporting more illegal aliens than previous administrations while simultaneously claiming border apprehensions have decreased and the border is secure.[103]

SEPTEMBER

DHS Fails to Help States Comply with REAL ID — The Government Accountability Office (GAO) releases a report revealing that the Department of Homeland Security has failed to help states comply with the REAL ID Act. According to the report, "officials in most states [GAO] interviewed expressed a need for additional guidance" from DHS, having been left with a "lack of clarity." In fact, the report reveals that some states that sent questions to DHS regarding compliance never received a response.[104]

SEPTEMBER 13

USCIS Announces First Round of DACA Beneficiaries — In less than a month of taking effect, the administration announces that it has already accepted 82,361 applications for deferred action. Of those, 1,660 are in the final review stage and 29 are complete.[105] The stats show that the agency is moving through the background checks in a matter of days—a process that should take four to six months. In fact, in the first round of processing, fingerprints were taken on a Thursday and the background checks were completed by the following Monday, according to USCIS Director Alejandro Mayorkas.[106]

OCTOBER

Inspector General: Immigration Courts Deporting Too Slowly — The Department of Justice Inspector General releases a report criticizing our nation's immigration courts for delays in processing deportation cases. According to the Inspector General, between FY 2006 and FY 2010 the most significant delays in deportation cases occurred at the first level of adjudication, which occurs in administrative courts housed in the Executive Office of Immigration Review (EOIR) within the Department of Justice (DOJ). The Inspector General highlights requests for continuances — requests to continue the proceedings at a later date — as the primary cause. Altogether, continuances added on average 132 days to the processing time of deportation cases.[107]

OCTOBER 4

ICE Does Nothing after LAPD Chief Announces Plan to Ignore ICE Detainers — The administration refuses to act after Los Angeles Police Department (LAPD) Chief Charlie Beck announces a plan to circumvent federal law by creating a list of offenses for which illegal aliens will be released back onto the streets instead of being transferred to federal custody.[108]

OCTOBER 5

ICE Refuses to Deport Illegal Alien Activist; Defends Inaction — Immigration and Customs Enforcement refuses to deport Mr. Jose Antonio Vargas, an outspoken pro-amnesty journalist who is an openly admitted illegal alien and felon.[109] Remarkably, instead of being embarrassed when asked why the law enforcement agency did not detain and begin removal proceedings on Vargas, ICE showed defiance. "Mr. Vargas was not arrested by ICE, nor did the agency issue a detainer," said an ICE spokeswoman. "ICE is focused on smart, effective immigration enforcement that prioritizes the removal of public safety threats, recent border crossers and egregious immigration law violators, such as those who have been previously removed from the United States."[110]

OCTOBER 12

USCIS Releases Backdoor Amnesty Stats; Number of Beneficiaries Grows Exponentially — Just weeks before the presidential election, the Obama administration released data revealing it has granted deferred action to over 4,500 illegal aliens under the President's DACA program.[111] This number is exponentially higher than the 29 cases the administration claimed to have completed or otherwise approved just one month earlier. Such a drastic increase in approvals in a one-month period suggests the administration is either failing to fully investigate the deferred action applicants, or if the administration is doing so, it is at the expense of immigration enforcement.[112]

OCTOBER 18

Administration Continues Assault on 287(g) Immigration Enforcement Program — Prince William County, Virginia becomes the latest victim of the Obama administration's assault on the 287(g) program when it receives a letter from U.S. Immigration and Customs Enforcement (ICE) officials informing County law enforcement the agency is not renewing its task-force agreement next year. The administration cites budget cuts, yet Congress continues to fund the program at preexisting levels.[113]

OCTOBER 24

President Obama Promises Amnesty if Reelected — In an interview with editors from the *Des Moines Register*, President Obama promises that if reelected, he will grant amnesty to the 11-12 million illegal aliens currently in the United States. The President says he is "confident" Congress will pass amnesty legislation in the first year of his second term because, like Democrats, Republicans will use the issue for no other reason than to court Latino votes. Claiming Republicans have "alienated" Latino voters, he suggests that after Republicans lose the elections, they will change their position and support amnesty. "George Bush and Karl Rove were smart enough to understand the changing nature of America. And so I'm fairly confident that [Republicans are] going to have a deep interest in getting that done," he says.[114]

Over 200,000 Illegal Aliens Apply for President Obama's Backdoor Amnesty Program — Homeland Security Secretary Janet Napolitano announces that over 200,000 illegal aliens have applied for deferred action under the Obama administration's backdoor amnesty program in just over two months. Secretary Napolitano offers these latest DACA statistics while speaking to a panel of educators who serve on the Homeland Security Academic Advisory Council (HSAAC) in Washington, D.C.[115]

OCTOBER 30

ICE Does Nothing after Berkeley City Council Votes to Ignore ICE Detainers — The administration refuses to act after the Berkeley City Council votes unanimously to compel the Berkeley Police Department to ignore all U.S. Immigration and Customs Enforcement (ICE) detainer requests. The newly instated policy simply reads, "The Berkeley Police Department will not honor requests by the United States Immigration and Customs Enforcement (ICE) to detain a Berkeley jail inmate for suspected violations of federal civil immigration law."[116]

OCTOBER 31

Illegal Aliens "Get out the Vote" for President Obama — President Obama's DACA program pays off when thousands of illegal alien minors campaign for President Obama and other pro-amnesty candidates in "swing-states" key to winning the Electoral College.[117]

NOVEMBER 14

Obama uses Press Conference to Push Amnesty — A week after winning reelection, President Obama jumped at the chance to declare his second-term amnesty agenda. "I'm very confident we can get immigration reform done," he told reporters. "[M]y expectation is that we get a bill introduced and we begin the process in Congress very soon after my inauguration."[118]

ICE Expands Access to Illegal Alien Lobbyist — ICE issues a press release announcing it is expanding its "hotline" for illegal alien detainees to make it easier for them to directly contact the ICE "Public Advocate." ICE states it is available for those with questions regarding prosecutorial discretion and questions or concerns about immigration enforcement or detention.[119]

NOVEMBER 16

USCIS Grants Deferred Action to Over 50,000 Illegal Aliens — The administration announces it has approved 53,273 applications for deferred action under the DACA program. This is more than 11 times the number approved (4,591) just one month earlier.[120]

NOVEMBER 18

DHS Website Promotes Welfare Benefits — DHS launches website[121] designed to advertise welfare and entitlement benefits to legal and illegal aliens. Created to remedy "a lack of information about how to access such benefits" and counter "complicated and…misleading information," the website explains how to access federal benefits and promotes such programs to legal and illegal aliens. Federal benefits listed on the website include Medicare, Medicaid, Social Security, food stamps, and Temporary Assistance for Needy Families, among others.[122]

NOVEMBER 19

Mayorkas: USCIS Not in Position to Release Stats on DACA Denials — During a stakeholder conference call, USCIS Director Alejandro Mayorkas states, "Because of the nascent stage" of the DACA program, USCIS is not yet in a position to provide data on the number of applicants who have been denied. Instead, Mayorkas clarifies that before the Agency denies any applications, USCIS is doing one of two things: 1) filing a Request for Evidence (RFE) that asks applicants to submit additional evidence to prove they meet the program's criteria; or 2) issuing applicants a Notice of Intent to Deny the application. If USCIS files an RFE, then the applicant has 84 additional days (12 weeks) to submit proper qualifying evidence. If USCIS issues a Notice of Intent to Deny, the applicant has 30 days to submit evidence before the application is denied.[123]

Administration Releases Additional Tools to Help Illegal Aliens Get Backdoor Amnesty — The same day as Director Mayorkas' conference call, USCIS releases additional tools on its website to aid illegal aliens during the DACA application process. The additional tools consist of a "tip sheet"[124] to walk illegal aliens through a check-list before they submit their application, FAQs in three additional languages, and guidance for employers to make it easier for them to hire DACA beneficiaries who are granted deferred action and work authorization.[125]

DECEMBER

Inspector General: Federal Database Approves Aliens Ordered Deported as Eligible for Public Benefits — The Inspector General for USCIS releases a report revealing that the Systematic Alien Verification for Entitlements (SAVE) program erroneously confirms one in eight of all aliens run through it as eligible for public benefits and work in sensitive areas despite those aliens having deportation orders lodged against them.[126] Federal, state, and local benefit-issuing agencies and licensing bureaus depend on the SAVE program to determine the immigration status of applicants to ensure only those applicants with lawful immigration status are approved. In response, USCIS says it plans to work with other agencies within the Department of Homeland Security to identify whether a final order of removal has been issued to an alien, and that it will initiate a review of other potential data sources.[127]

DECEMBER 4

Inspector General: Illegal Aliens Working in U.S. Capitol — The Inspector General for the Architect of the Capitol issues a report revealing that several illegal aliens had been hired by subcontractors to complete projects on Capitol grounds this last year.[128] Despite federal law requiring the use of E-Verify, a "second-tier" subcontractor failed to use the system, resulting in the hiring of five illegal aliens who used fraudulent documentation to obtain employment. Nonetheless, the Inspector General determined that the subcontractor did not violate any criminal laws because of "his ignorance" of the E-Verify requirement and because the illegal aliens had passed an FBI background check. The subcontractor was not referred to the U.S. Attorney's Office for prosecution.[129]

ICE Does Nothing after California Attorney General Announces ICE Detainers are Optional — The Obama administration refuses to act after California Attorney General Kamala Harris issues an information bulletin[130] stating that local agencies have no obligation to honor detainers issued by U.S. Immigration and Customs Enforcement (ICE). In doing so, Attorney General Harris effectively gives legal cover to sanctuary cities that would rather protect criminal aliens from deportation than ensure the safety of their own communities.[131]

DECEMBER 7

DHS Delays Virtual Fence — Just six months after announcing plans to resume the Virtual Border Fence project, DHS announces it is delaying its implementation for nearly a year. The Department blames an unexpectedly large applicant pool of contractors for the setback, pushing the contractor solicitation date back from January to October 2013.[132]

DECEMBER 13

Number of Illegal Aliens Granted DACA Tops 100,000 — The Obama administration announces it has granted deferred action to 102,965 illegal aliens under the Deferred Action for Childhood Arrivals (DACA) program. This number is nearly double the previous month's number of grantees.[133]

DECEMBER 14

Administration Delays Apprehending Illegal Alien Sex Offender for Political Gain — An Associated Press story reveals that Department of Homeland Security officials delayed the apprehension of an illegal alien sex offender to protect longtime amnesty advocate, U.S. Senator Bob Menendez (D-NJ).[134] The illegal alien sex offender — 18-year-old Luis Abrahan Sanchez Zavaleta, who overstayed his visitor visa from Peru — worked for Sen. Menendez as an unpaid intern and was handling immigration issues in one of his local offices. According to a U.S. official, DHS knew that Sanchez was a danger to the community, but nonetheless refused to act for roughly two months until after the November elections to assure Sen. Menendez was reelected. ICE did not arrest Sanchez until December 6.[135]

Administration Stonewalls DACA Inquiries — The Social Security Administration disregards Rep. Phil Gingrey's (R-GA) request that the agency explain why it issues Social Security Numbers to DACA beneficiaries. The Department of Homeland Security similarly refuses to respond to several letters from Senate Judiciary Ranking Member Chuck Grassley (R-IA) and House Judiciary Chairman Lamar Smith (R-Tex.) seeking information on the DACA program including approval statistics, costs, and fraud prevention.[136]

DECEMBER 20

Administration Delays REAL ID Act Compliance Deadline — The administration quietly announces it is delaying the deadline for states to comply with the REAL ID Act for a fourth time. The deadline—set for January 15, 2013—is "deferred for a minimum of six months" with no set timeframe for compliance. Only thirteen states are currently in compliance with the Act, which Congress passed in 2005.[137]

DECEMBER 21

Memo: ICE Aids Sanctuary Cities through New Detainer Policy — In a memorandum issued the Friday before Christmas, Immigration and Customs Enforcement (ICE) Director John Morton limits the circumstances under which ICE agents can issue detainers and take custody of illegal aliens in the hands of local law enforcement officials.[138] As a result, ICE agents can no longer take an alien into custody if the alien's only violation of the law is being in the country unlawfully—they must now have committed an offense independent of their illegal status. The new detainer policy further illustrates the Obama administration's refusal to enforce immigration law as written by Congress, opting only to enforce the law against aliens deemed a "priority."[139]

Administration Cuts 287(g) Enforcement Program In Half — Buried in the bottom of ICE's press release announcing its year-end removal numbers, the administration declares it will not be renewing any 287(g) task force model agreements in 2013. The release simply states, "ICE has also decided not to renew any of its agreements with state and local law enforcement agencies that operate task forces under the 287(g) program." The administration justifies its decision to end the task force agreements by claiming other programs achieve the same purpose as 287(g) but cost less money.[140]

Adminstration Continues to Peddle Inflated Deportation Stats — ICE releases its year-end removal numbers, announcing it has deported 409,849 individuals. To allay the fears of the pro-amnesty lobby, the administration touts that "some 96 percent of all ICE's removals fell into a priority category, and that they are focusing upon removing criminal aliens and recent border crossers. The new numbers illustrate the administration's continued manipulation of removal data by counting illegal aliens removed under ATEP as ICE removals.[141]

Sealing the Deal

JANUARY 3

Administration Announces Final Rule to Circumvent 3 and 10-Year Bars to Admission — USCIS issues its long-awaited final rule to allow illegal aliens to circumvent federal statutes governing admission. The final USCIS rule does this by allowing illegal aliens to apply for and receive a provisional waiver of the 3 and 10-year bar while in the U.S. so long as they can show that being separated from their U.S. citizen spouse or parent would cause that U.S. citizen relative "extreme hardship." The administration makes clear it plans to consider expanding the rule even further to grant waivers to additional categories of illegal aliens. During a stakeholder phone call discussing the new rule, USCIS Director Alejandro Mayorkas emphasizes the agency will consider granting the same waivers to illegal alien relatives of green card holders, and clarifies that illegal aliens who have been in removal proceedings but whose cases have been administratively closed or terminated will be eligible to apply for the provisional waiver.[140]

Biden: Hispanics the Center of Nation's Future — Seeking to consolidate support from Hispanic lawmakers ahead of an all-out amnesty battle, Vice President Joe Biden refers to Hispanics as "the center of this nation's future." The Vice President makes these remarks in a speech at a Congressional Hispanic Caucus Institute event held to welcome Hispanic Members of the 113th Congress.[141]

JANUARY 14

Secretary Napolitano Here to Stay — The White House confirms that Department of Homeland Security Secretary Janet Napolitano will continue to serve as DHS Secretary into President Obama's second term.[142]

JANUARY 29

Obama Unveils Amnesty Blueprint — A day after the "Senate Gang of Eight" reveals their amnesty proposal, President Obama holds a press conference in Las Vegas to unveil his administration's amnesty blueprint.[143] His four-point plan calls for amnesty for illegal aliens, increasing legal immigration, phased-in worksite enforcement, and securing the border. In doing so, the plan fails to mention enforcing the laws that are already on the books—such as completing the border fence and implementing a biometric entry-exit system—and ignores preexisting programs like E-Verify and 287(g) that would further interior enforcement.[144]

JANUARY 31

White House Holds "Fireside" Amnesty Chat — White House Domestic Policy Advisor and former La Raza vice-president Cecilia Muñoz holds an online "fireside" chat with well-known pro-amnesty advocates. Participants include Mr. Jose Antonio Vargas (a self-admitted illegal alien and felon), actress America Ferrera, and Sojourners CEO Jim Wallis. During the "chat," Muñoz reiterates the President's plan for comprehensive immigration reform and encourages the pro-amnesty lobby to continue pressuring Congress.

Conclusion

This report details the numerous unilateral actions that the Obama administration has taken to dismantle immigration enforcement since taking office in 2009. Some of these actions have been subtle, some deceptive, and others even brazen, but all have been designed to achieve a single purpose: to render enforcement of U.S. immigration laws ineffective.

Despite the Obama administration's efforts to trivialize violations of U.S. immigration law, and to find ways to allow those who are in the country unlawfully to live, work, access benefits, and ultimately gain citizenship, the American public continues to believe that its immigration laws should be enforced. In fact, fewer than 30 percent of voters believe that illegal aliens should be provided a "pathway to citizenship," revealing the American people understand that the purpose of U.S. immigration law is to protect their most vital economic and social interests.[145]

Congress — the body which our Constitution grants plenary power to make immigration laws — must act to reassert its authority over immigration policy and restore the rule of law. If Congress accepts the Executive Branch's usurpation of power, it will not only betray the interests of the people its members were elected to represent, but abdicate the constitutional duties entrusted to them by the founders of our Republic.

Now that President Obama has been reelected, unrestrained use of executive discretion to ignore U.S. immigration law to achieve political ends must be reined-in. The record clearly shows that executive power has been abused at great cost to the integrity of our nation's immigration laws, and the well-being and security of the American people.

Endnotes

1 See Senate Roll Call Vote #235, June 28, 2007. Available online at: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00235.

2 See Executive Order No. 13465 by President George W. Bush, June 6, 2008. Available online at: http://www.gpo.gov/fdsys/pkg/FR-2008-06-11/pdf/08-1348.pdf.

3 "System to Verify Worker Legality is Delayed Again," The Washington Post, Jan. 30, 2009. http://www.washingtonpost.com/wp-dyn/content/article/2009/01/29/AR2009012903729_pf.html.

4 See Transcript of President Obama's Speech at Univision, El Piolin por la Manana, Feb. 18, 2009. http://www.topix.com/forum/news/immigration/TM787HN66V0PT3TMP.

5 See Readout on the President's Meeting with the Congressional Hispanic Caucus, The White House, Mar. 18, 2009. Available online at: http://www.whitehouse.gov/the_press_office/Readout-on-the-Presidents-Meeting-with-the-Congressional-Hispanic-Caucus/.

6 "Illegal Immigrants Go Free; Some Offered Work Permits," Seattle Times, Apr. 1, 2009. Available online at: http://seattletimes.nwsource.com/html/politics/2008959099_raid01m0.html.

7 "Obama to Push Immigration Bill as One Priority," The New York Times, Apr. 8, 2009. Available online at: http://www.nytimes.com/2009/04/09/us/politics/09immig.html?_r=2.

8 See USCIS Press Release, Apr. 16, 2009. Available online at: http://www.uscis.gov/files/article/UpdateContractor_%20Rule_Extended_16apr09.pdf.

9 "Obama Talks Guns, Immigration in Mexico," The Christian Science Monitor, Apr. 16, 2009. Available online at: http://www.csmonitor.com/USA/Politics/2009/0416/obama-talks-guns-immigration-in-mexico.

10 See DHS Fact Sheet: Transforming the Immigration Enforcement System, June 15, 2012. Available online at: http://www.dhs.gov/ynews/fact-sheets/fact-sheet-transforming-the-immigration-enforcement-system.shtm.

11 See Transcript, Senate Judiciary Committee Oversight Hearing on the Department of Homeland Security, pp. 15-16, May 6, 2009. Available online at: http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56800/pdf/CHRG-111shrg56800.pdf.

12 See USCIS Press Release, June 3, 2009. Available online at: http://www.uscis.gov/files/article/far-delay.pdf.

13 "A Start on Immigration: Movement by Early Next Year Promised," Politico, June 25, 2009. Available online at: http://www.politico.com/blogs/bensmith/0609/A_start_on_immigration.html.

14 See DHS Press Release, July 10, 2009. Available online at: http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

15 "U.S. Police Brass Urge Immigration Reform in Phoenix," The Arizona Republic, July 23, 2009. Available online at: http://www.azcentral.com/community/phoenix/articles/2009/07/23/20090723copforum0723.html.

16 "Obama: Immigration Reform to Start Moving by the End of the Year," ABC News, Aug. 10, 2009. Available online at: http://abcnews.go.com/blogs/politics/2009/08/obama-immigration-reform-to-start-moving-by-the-end-of-the-year-/.

17 See Transcript on Department of State Website, Oct. 21, 2009. Available online at: http://fpc.state.gov/130884.htm.

18 See Remarks and Video of "A Discussion on Immigration Policy with Homeland Security Secretary Janet Napolitano," The Center for American Progress, Nov. 13, 2009. Available online at: http://www.americanprogress.org/events/2009/11/Napolitano.html.

19 See Office of the Inspector General for the Dept. of Homeland Security Report, OIG-10-63, Mar. 2010. Available online at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

20 See USCIS Press Release: DHS Unveils Initiatives to Enhance E-Verify, Mar. 17, 2010. Available online at: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c7ddadd907c67210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

21 See Fox News clip: Sessions Rebukes ICE Head over Immigration Remarks, May 21, 2010. Available online at: http://www.youtube.com/watch?v=Qfy6cTOuVhU.

22 "Coming for some at ICE Jails: bingo and continental breakfast," The Houston Chronicle, June 8, 2010. Available online at: http://www.chron.com/news/article/Coming-for-some-at-ICE-jails-bingo-and-1695443.php.

23 See Brief for the United States as Amicus Curiae, Chamber of Commerce of U.S. v. Candelaria, No. 09-115, May 2010. Available online at: http://www.scotusblog.com/wp-content/uploads/2010/05/US-brief-on-immigration1.pdf.
24 "Hillary Clinton: WH will Sue over Arizona law," Politico, June 17, 2010. Available online at: http://www.politico.com/blogs/bensmith/0610/Hillary_White_House_will_sue_over_Arizona_law.html.
25 See National ICE Council 118 Press Release, June 25, 2010. Available online at: http://iceunion.org/download/259-259-vote-no-confidence.pdf.
26 "Sanctuary city police chief will be head of 287(g) program under Obama," The Examiner, June 26, 2010. Available online at: http://www.examiner.com/article/sanctuary-city-police-chief-will-be-head-of-287g-program-under-obama.
27 See Remarks by the President on Comprehensive Immigration Reform on White House Website, July 1, 2010. Available online at: http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.
28 See DOJ Press Release, July 6, 2010. Available online at: http://www.justice.gov/opa/pr/2010/July/10-opa-776.html; see also DOJ Complaint, U.S. v. Arizona, July 6, 2010. Available online at: http://www.justice.gov/opa/documents/az-complaint.pdf.
29 "Justice: Sanctuary cities safe from law," The Washington Times, July 14, 2010. Available online at: http://www.washingtontimes.com/news/2010/jul/14/justice-sanctuary-cities-are-no-arizona/.
30 See Order No. 2:10-cv-01413 by Judge Susan R. Bolton, July 28, 2010. Available online at: http://www.fairus.org/DocServer/USAvAZ_Injunction7-28-2010.pdf?docID=5021.
31 "Leaked Agency Memo Reveals Intent to Grant Amnesty by Regulation," FAIR Legislative Update, Aug. 2, 2010. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-august-2-2010.
32 See ICE Draft Policy Memo. Available online at: http://ftpcontent.worldnow.com/kgun/KGUN/090610icepolicy.pdf.
33 "Feds moving to dismiss some deportation cases," The Houston Chronicle, Aug. 24, 2010. Available online at: http://www.chron.com/news/article/Feds-moving-to-dismiss-some-deportation-cases-1706119.php.
34 See White House Transcript, "Remarks by the President at the Congressional Hispanic Caucus Institute's 33rd Annual Awards Gala," Sept. 15, 2010. Available online at: http://www.whitehouse.gov/the-press-office/2010/09/15/remarks-president-congressional-hispanic-caucus-institutes-33rd-annual-a.
35 "Bombshell DHS Memo Reveals Plan to Grant Administrative Amnesty to Entire Illegal Alien Population," FAIR Legislative Update, Sept. 20, 2010. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-september-20-2010; see also "Leaked Memo: Department of Homeland Security Contemplates Amnesty by Executive Fiat," The American Spectator, Sept. 16, 2010. Available online at: http://spectator.org/blog/2010/09/16/department-of-homeland-securit.
36 "ICE Presents Misleading Deportation Data," FAIR Legislative Update, Oct. 12, 2010. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-12-2010.
37 "Unusual methods helped ICE break deportation record, emails and interviews show," The Washington Post, Dec. 6, 2010. Available online at: http://www.washingtonpost.com/wp-dyn/content/article/2010/12/05/AR2010120503230.html.
38 See Transcript of President Obama's State of the Union Address, Jan. 25, 2011. Available online at: http://abcnews.go.com/Politics/State_of_the_Union/state-of-the-union-2011-full-transcript/story?id=12759395#.T_2VBZEZtQk.
39 "House Subcommittee: Less than Half of Southern Border Under Operational Control," FAIR Legislative Update, Feb. 22, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-february-22-2011.
40 See ICE Director Morton Memorandum to ICE Employees, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," Mar. 2, 2011. Available online at: http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.
41 "9/11 Commissioner Warns of Terrorists Missed by the Immigration System," FAIR Legislative Update, Apr. 4, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-april-4-2011.
42 "Latinos and Democrats Press Obama to Curb Deportations," The New York Times, Apr. 20, 2011. Available online at: http://www.nytimes.com/2011/04/21/us/politics/21immigration.html?_r=1.

43 See White House Press Release, Apr. 19, 2011. Available online at: http://www.whitehouse.gov/the-press-office/2011/04/19/background-presidents-meeting-senior-administration-officials-and-stakeh.
44 "Smuggling So Severe, Feds Decline to Prosecute," FAIR Legislative Update, May 9, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-may-9-2011.
45 See White House Press Release, Apr. 28, 2011. Available online at: http://www.whitehouse.gov/the-press-office/2011/04/28/background-presidents-meeting-influential-hispanics-across-country-immi.
46 "Obama: Immigration reform now," Politico, Apr. 30, 2011. Available online at: http://www.politico.com/politico44/perm/0411/an_upbeat_challenge_9956cc9a-3745-49fc-bea5-a87faa34d557.html.
47 "President Obama Declares the Border is Secure," FAIR Legislative Update, May 16, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-may-16-2011.
48 ICE Director Morton Memorandum to ICE Field Directors, Special Agents, and Chief Counsel, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" June 17, 2011. Available online at: http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.
49 ICE Director Morton Memorandum to ICE Field Directors, Special Agents, and Chief Counsel, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," June 17, 2011. Available online at: http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.
50 See National ICE Council Press Release, June 23, 2011. Available online at: http://iceunion.org/download/286-287-press-release-pd-memo.pdf.
51 "Report: Feds downplayed ICE case dismissals," The Houston Chronicle, June 27, 2011. Available online at: http://www.chron.com/news/houston-texas/article/Report-Feds-downplayed-ICE-case-dismissals-2080532.php#ixzz1QUEAniIR; see also Results of FOIA request, available online at: http://www.scribd.com/doc/58810530/2011-ICE-Report-FOIA-request.
52 See White House Press Conference Transcript, June 29, 2011. Available online at: http://www.whitehouse.gov/the-press-office/2011/06/29/press-conference-president.
53 See Dept. of Transportation Press Release, July 6, 2011, available online at: http://www.dot.gov/affairs/2011/dot7911a.html; see also Federal Register Notice, July 6, 2011, available online at: http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/notices/US-MX-agreement-FR-notice.pdf.
54 See DOJ Motion for Preliminary Injunction, U.S. v. Alabama, Aug. 1, 2011. Available online at: http://www.justice.gov/opa/documents/motion-preliminary-injunction.pdf.
55 See Letter from Homeland Security Secretary Janet Napolitano to Senate Majority Leader Harry Reid, Aug. 18, 2011. Available online at: http://democrats.senate.gov/uploads/2011/08/11_8949_Reid_Dream_Act_response_08.18.11.pdf.
56 See White House Blog, Sept. 28, 2011. Available online at: http://m.whitehouse.gov/blog/2011/09/28/what-you-missed-president-obamas-open-questions-roundtable.
57 "ICE Director Faces Questions about Administration's Backdoor Amnesty," FAIR Legislative Update, Oct. 17, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-17-2011.
58 See Santa Clara County Policy 3.54 as Amended, Oct. 18, 2011. Available online at: http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2011/October%2018,%202011/203452112/TMPKeyboard203715832.pdf.
59 "U.S. Deportations Hit Historic Levels," CNN, Oct. 18, 2011. Available online at: http://edition.cnn.com/2011/10/18/us/immigrant-deportations/index.html?hpt=us_c2.
60 See Mayor Gray's Order 2011-174, Oct. 19, 2011. Available online at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFEQFjAA&url=http%3A%2F%2Fdcregs.dc.gov%2FNotice%2FDownLoad.aspx%3FNoticeID%3D1784041&ei=sa39T5fgBqnM2gXc27zhCg&usg=AFQjCNHm6efs8drx3ayMU7K2KCCXIAOVMQ.
61 "Homeland Security Orders a Reduction in Border Inspections," FAIR Legislative Update, Oct. 31, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-31-2011.
62 See DOJ Press Release, Oct. 31, 2011, available online at: http://www.justice.gov/opa/pr/2011/October/11-ag-1429.html; see also DOJ Complaint, U.S. v. South Carolina, Oct. 31, 2011, available online at: http://www.justice.gov/opa/documents/us-v-sc-complaint.pdf.

63 See DOJ Blog, Nov. 1, 2011. Available online at: http://blogs.justice.gov/main/archives/1710.
64 See USCIS Policy Memorandum, "Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens," Nov. 7, 2011, available online at: http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf; see also FAIR Legislative Update, Nov. 14, 2011, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-14-2011.
65 See ICE Principal Legal Advisor Peter S. Vincent Memorandum to all ICE Chief Counsel, "Case-by-Case Review of Incoming and Certain Pending Immigration Cases," Nov. 17, 2011; available online at http://www.ice.gov/doclib/foia/dro_policy_memos/case-by-case-review-incoming-certain-pending-cases-memorandum.pdf and attachments I and II; see also "Obama Implements Phase One of Backdoor Amnesty," FAIR Legislative Update, Nov. 21, 2011, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-21-2011.
66 "Obama Administration Sues to Block Utah Immigration Enforcement Law," FAIR Legislative Update, Nov. 28, 2011, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-28-2011; see also DOJ Website, Nov. 22, 2011, available online at: http://www.justice.gov/opa/pr/2011/November/11-ag-1526.html.
67 "New Ordinance Orders NYC Jails to Release Illegal Aliens," FAIR Legislative Update, Dec. 5, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-5-2011.
68 "Obama to Withdraw National Guard Troops at Border," FAIR Legislative Update, Dec. 19, 2011. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-19-2011.
69 "DOJ Formally Accuses Maricopa County of Discrimination Against Latinos; DHS Rescinds 287(g) Agreement"; FAIR Legislative Update, Dec. 19, 2011, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-19-2011; see also DOJ Letter to Maricopa County Attorney, Dec. 15, 2011, available online at: http://content.clearchannel.com/cc-common/mlib/622/12/622_1323968903.pdf.
70 See ICE Press Release, Dec. 29, 2011. Available online at: http://content.govdelivery.com/bulletins/gd/USDHSICE-23b1e1.
71 "USCIS Leaders Improperly Pressured Officers to Approve Visa Applications," FAIR Legislative Update, Jan. 9, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-january-9-2012.
72 "DHS Administratively Skirts Statutory Bars to Admission," FAIR Legislative Update, Jan. 9, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-january-9-2012.
73 See White House Press Release, Jan. 10, 2012. Available online at: http://www.whitehouse.gov/the-press-office/2012/01/10/president-obama-announces-new-white-house-director-domestic-policy-counc.
74 "Rep. Aderholt Says Delay on Federal Immigration Program in Alabama is due to Politics," The Birmingham News, Jan. 18, 2012, available online at: http://blog.al.com/sweethome/2012/01/rep_robert_aderholt_says_delay.html; see also "DHS Retaliates Against Alabama; Suspends Roll-out of Secure Communities," FAIR Legislative Update, Jan. 23, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-january-23-2012.
75 "Obama Administration to Abandon over 1,600 Deportation Cases," FAIR Legislative Update, Jan. 23, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-january-23-2012.
76 See Executive Order, "Establishing Visa and Foreign Visitor Processing Goals and the Task Force on Travel and Competitiveness," Jan. 19, 2012, available online at: http://www.whitehouse.gov/the-press-office/2012/01/19/executive-order-establishing-visa-and-foreign-visitor-processing-goals-a; see also Dept. of State Press Release, Jan. 19, 2012, available online at: http://www.state.gov/r/pa/prs/ps/2012/01/181500.htm.
77 See FAIR Press Release, Jan. 25, 2012. Available online at: http://www.fairus.org/news/president-asks-congress-for-amnesty-plan-but-fails-to-mention-hes-already-launched-it-without-their-.
78 See ICE Press Release, Feb. 7, 2012. Available online at: http://www.ice.gov/news/releases/1202/120207washingtondc.htm.
79 See DHS Budget-in-Brief for Fiscal Year 2013. Available online at: http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.
80 "DHS Uses Social Media to Monitor Amnesty Blowback," FAIR Legislative Update, Feb. 27, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-february-27-2012.

81 "Congress Seeks Answers about Questionable Border Crossing Data," FAIR Legislative Update, Mar. 26, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-march-26-2012#2.

82 "ICE Director Tells Congress Amnesty Review is Half Complete," FAIR Legislative Update, Mar. 12, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-march-12-2012; see also ICE Congressional Relations email to Hill staff, Mar. 9, 2012, available online at: http://www.immigrationpolicy.org/sites/default/files/docs/dhs-email-to-hill-03-09-2012-converted.pdf.

83 "Obama Administration Expands Backdoor Amnesty," FAIR Legislative Update, Apr. 2, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-april-2-2012%231; see also "Deportations Review by Department of Homeland Security Expanding to Additional 4 Cities," The Huffington Post, Mar. 30, 2012, available online at: http://www.huffingtonpost.com/2012/03/30/deportations-review-dhs-more-cities_n_1390998.html?1333120347#s332934&title=DREAM_Act_Students.

84 "USCIS Proposes Rule to Circumvent Federal Rules on Admission," FAIR Legislative Update, Apr. 2, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-april-2-2012%232#2; see also USCIS Website, June 7, 2012, available online at: http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=bc41875decf56310VgnVCM100000082ca60aRCRD&vgnextchannel=bc41875decf56310VgnVCM100000082ca60aRCRD.

85 "Congress Questions Obama's Decision to Cut Border Troops," FAIR Legislative Update, Apr. 23, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-april-23-2012%235#5.

86 "ICE to Suspend over 16,000 Deportations, Immigration Advocates Underwhelmed," Fox News Latino, Apr. 25, 2012, available online at: http://latino.foxnews.com/latino/news/2012/04/25/75-percent-deportations-may-get-shelved-due-to-backlogged-system/#ixzz1t4h1Ipy5; see also "ICE Ignores 16,500 Deportation Cases," FAI R Legislative Update, May 1, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-may-1-2012#2.

87 See Secretary Napolitano Statement for the Record before the Senate Judiciary Committee, Apr. 25, 2012, available online at: http://www.judiciary.senate.gov/pdf/12-4-25NapolitanoTestimony.pdf; see also "DHS Delays Biometric Exit System Another Four Years," FAIR Legislative Update, May 1, 2012, available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-may-1-2012#5.

88 See ICE Response to the Task Force on Secure Communities Findings and Recommendations, Apr. 27, 2012. Available online at: http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf.

89 "Justice Dept. Seeks to Intimidate Alabama School Districts," FAIR Legislative Update, May 7, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-may-7-2012%234#4.

90 See Complaint, US v. Maricopa County, May 10, 2012, available online at: http://www.justice.gov/iso/opa/resources/46420125101544060757.pdf; see also DOJ Press Release, May 10, 2012, available online at: http://www.justice.gov/opa/pr/2012/May/12-crt-602.html.

91 See ICE case-by-case review statistics here, June 8, 2012, available online at: http://s3.documentcloud.org/documents/367098/ice-review-stats.pdf.

92 "Obama Administration Targets Florida over Voter Purge," FAIR Legislative Update, June 19, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-june-19-2012%234#4.

93 See DHS Secretary Napolitano Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," June 15, 2012, available online at: http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf; see also ICE Frequently Asked Questions Regarding Deferred Action Policy, available online at: http://www.ice.gov/doclib/about/offices/ero/pdf/faq-deferred-action-process.pdf.

94 See White House Press Release, "Remarks by the President at Univision Town Hall," Mar. 28, 2011. Available online at: http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall.

95 See CNN Transcript, June 15, 2012. Available online at: http://transcripts.cnn.com/TRANSCRIPTS/1206/15/sitroom.01.html.

96 See Remarks by President at the NALEO Annual Conference, June 22, 2012. Available online at: http://www.whitehouse.gov/the-press-office/2012/06/22/remarks-president-naleo-annual-conference.

97 "President Obama Undermines Supreme Court Ruling by Rescinding Arizona 287(g) Agreements," FAIR Legislative Update, July 3, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-july-3-2012#3.

98 "Border Patrol to Close Local Posts," Lubbock-Avalanche Journal, July 7, 2012, available online at: http://lubbockonline.com/local-news/2012-07-07/border-patrol-close-local-posts#.UAQ0YpEZtQk; see also "Nine Border Patrol Stations to Close; 41 Agents to Move to Posts Closer to Borders," CNN, July 10, 2012, available online at: http://edition.cnn.com/2012/07/09/us/border-patrol-stations/index.html.

99 See Treasury Inspector General for Tax Administration Report, Reference Number 2012-42-081, Jul. 16, 2012. Available online at: http://www.treasury.gov/tigta/auditreports/2012reports/201242081fr.pdf.

100 "Napolitano Offers Congress Few Answers on Deferred Action," FAIR Legislative Update, Jul. 23, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-july-23-2012#1.

101 "AP: Obama Immigrant Program may Cost $585 Million," Arizona Central, Jul. 24, 2012. Available online at: http://www.azcentral.com/news/articles/2012/07/24/20120724obama-immigration-program-cost.html?nclick_check=1.

102 "Administration's Guidance Provides Little Insight into Backdoor Amnesty," FAIR Legislative Update, Aug. 7, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-august-7-2012#1.

103 See House Judiciary Committee Press Release, Aug. 24, 2012 at http://judiciary.house.gov/news/082412_Administration%20Cooks%20the%20Books.html.

104 See GAO Report GAO-12-893, Sept. 2012. Available online at: http://www.gao.gov/assets/650/648689.pdf.

105 See USCIS Deferred Action for Childhood Arrivals September Statistics, Sept. 13, 2012. Available online at: http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DAStats-Sep.pdf.

106 "Quick Start to Program Offering Immigrants Reprieve," New York Times, Sept. 12, 2012. Available online at: http://www.nytimes.com/2012/09/12/us/program-offering-immigrants-reprieve-is-off-to-quick-start.html?_r=3&.

107 See U.S. Department of Justice Office the Inspector General Report, "Management of Immigration Cases and Appeals by the Executive Office for Immigration Review," Oct. 2012. Available online at: http://www.justice.gov/oig/reports/2012/e1301.pdf.

108 "Chief Beck Eases Policy on Illegal Immigrant Deportation," Los Angeles Times, Oct. 4, 2012. Available online at: http://articles.latimes.com/2012/oct/04/local/la-me-lapd-immigration-20121004.

109 "ICE Refuses to Deport Jose Vargas," FAIR Legislative Update, Oct. 15, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-15-2012#2.

110 "ICE Defends itself over Jose Antonio Vargas Case," Politico, Oct. 8, 2012. Available online at: http://www.politico.com/news/stories/1012/82144.html?hp=r5.

111 See USCIS Deferred Action for Childhood Arrivals October Statistics, Oct. 12, 2012. Available online at: http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACAOct2012.pdf.

112 "Number of Backdoor Amnesty Beneficiaries Grows Drastically as Administration Rushes Application Process," FAIR Legislative Update, Oct. 15, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-15-2012#1.

113 "Obama Administration Continues Assault on 287(g) Immigration Enforcement Program," FAIR Legislative Update, Oct. 22, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-22-2012#3.

114 "President Obama Promises Amnesty if Reelected," FAIR Legislative Update, Oct. 31, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-october-31-2012#1.

115 "Napolitano Says 200K Illegal Immigrants have Applied for Deferred Deportation," The Hill, Oct. 24, 2012. Available online at: http://thehill.com/blogs/blog-briefing-room/news/263937-napolitano-says-200k-illegal-immigrants-have-applied-for-deferred-deportation.

116 "Berkeley City Council Votes to Ignore ICE Detainer Requests," FAIR Legislative Update, Nov. 5, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-5-2012#4.

117 "Undocumented Youth Work to Boost Latino Voter Turn Out," Wall Street Journal, Oct. 31, 2012. Available online at: http://online.wsj.com/article/SB10001424052970204789304578089363129186472.html.

118 See Washington Post Transcript, Nov. 14, 2012. Available online at: http://www.washingtonpost.com/politics/president-obamas-news-conference-on-nov-14-2012-running-transcript/2012/11/14/031dfd40-2e7b-11e2-89d4-040c9330702a_story.html.

119 "ICE Expands Access to Illegal Alien Lobbyist," FAIR Legislative Update, Nov. 19, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-19-2012#6.
120 See USCIS Deferred Action for Childhood Arrivals November Statistics, Nov. 16, 2012. Available online at: http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Static_files/2012-1116%20DACA%20Monthly%20Report.pdf.
121 See WelcometoUSA.gov at http://www.welcometousa.gov/Government_benefits/default.htm.
122 "DHS Website Promotes Welfare Benefits to Immigrants," FAIR Legislative Update, Nov. 26, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-26-2012#3.
123 "Administration Sheds Light on Refusal to Deny DACA Applicants," FAIR Legislative Update, Nov. 26, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-november-26-2012#2.
124 See USCIS "What You Need to Know: Filing Tips for Deferred Action for Childhood Arrivals" at http://www.aila.org/content/default.aspx?docid=42151&utm_source=AILA+Mailing&utm_campaign=9fa9497935-AILA8_11_19_12&utm_medium=email.
125 See USCIS "Guidance for Employers" at http://www.aila.org/content/default.aspx?docid=42149&utm_source=AILA+Mailing&utm_campaign=9fa9497935-AILA8_11_19_12&utm_medium=email.
126 See Inspector General Report OIG_13_11 at http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-11_Dec12.pdf.
127 "Inspector General: Federal Database Approves Aliens Ordered Deported as Eligible for Public Benefits," FAIR Legislative Update, Dec. 24, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-24-2012#1.
128 See Architect of the Capitol Inspector General Report at http://www.fairus.org/DocServer/SAR_12-2_Final.pdf.
129 "Inspector General: Illegal Aliens Working in Capitol," FAIR Legislative Update, Dec. 10, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-10-2012#8.
130 See California Attorney General Information Bulletin, Dec. 4, 2012. Available online at: http://www.immigrationpolicy.org/sites/default/files/docs/Kamala-Harris-guidance-on-immigration-detainers.pdf.
131 "California AG: Honoring ICE Detainers Optional," FAIR Legislative Update, Dec. 10, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-10-2012#2.
132 "Virtual Border Fence Contract Postponed Due to Fierce Competition," Nextgov.com, Dec. 7, 2012. Available online at: http://www.nextgov.com/defense/2012/12/virtual-border-fence-contract-postponed-due-fierce-competition/60017/.
133 See USCIS Deferred Action for Childhood Arrivals December Statistics, Dec. 13, 2012. Available online at: http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20MonthlyDEC%20Report%20PDF.pdf.pdf.
134 "AP Exclusive: U.S. Ordered Delay in Intern's Arrest," Associated Press, Jan. 15, 2013. Available online at: http://hosted.ap.org/dynamic/stories/U/US_SENATE_INTERN_ARRESTED?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2012-12-12-14-18-16.
135 "DHS Delays Apprehension of Illegal Alien Sex Offender to Protect Pro-Amnesty Senator," FAIR Legislative Update, Dec. 17, 2012.
136 "Administration Continues to Stonewall DACA Inquiries," FAIR Legislative Update, Dec. 24, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-24-2012#2.
137 See DHS Press Release, Dec. 20, 2012. Available online at: http://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards.
138 See ICE Memorandum by Director John Morton, "Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems," Dec. 21, 2012. Available online at: http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.
139 "Obama Administration Restricts ICE Agents' Ability to take Custody of Illegal Aliens," FAIR Legislative Update, Dec. 31, 2012. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-december-31st-2012.
140 See ICE Press Release, Dec. 21, 2012 at http://www.ice.gov/news/releases/1212/121221washingtondc2.htm.
141 See House Judiciary Committee Press Release, Aug. 24, 2012 at

http://judiciary.house.gov/news/082412_Administration%20Cooks%20the%20Books.html.

142 “Administration Announces Final Rule to Circumvent Federal Admission Laws,” FAIR Legislative Update, Jan. 7, 2013. Available online at: http://www.fairus.org/legislative-updates/fair-legislative-update-january-7-2013#2.

143 “Biden: Latinos ‘the Center of this Nation’s Future,” Politico, Jan. 3, 2013. Available online at: http://www.politico.com/politico44/2013/01/biden-latinos-the-center-of-this-nations-future-153322.html?hp=r1.

144 “Napolitano to Stay,” Politico, Dec. 14, 2012. Available online at: http://www.politico.com/politico44/2013/01/napolitano-to-stay-154090.html.

145 See White House Transcript, Jan. 29, 2013 at http://www.whitehouse.gov/the-press-office/2013/01/29/remarks-president-comprehensive-immigration-reform.

146 See White House Fact Sheet, Jan. 29, 2013 at http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules.

147 “Majority backs Arizona on immigration crackdown law,” The Washington Times, July 10, 2012. Available online at: http://www.washingtontimes.com/news.

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Exhibit 8

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Judicial Review Under 18 U.S.C. § 925(c): Abrogation Through Appropriations?

Gregory J. Pals

JUDICIAL REVIEW UNDER 18 U.S.C. § 925(c): ABROGATION THROUGH APPROPRIATIONS?*

I. INTRODUCTION

Johnny Hunter has a problem.[1]

Johnny became familiar with guns at an early age. He has hunted since he was twelve years old. He also collects guns and attends gun shows whenever possible. Over ninety percent of his firearms collection is commemorative and will never be fired. He is an NRA certified gun instructor.

When he was twenty-one years old, Johnny bought a car motor for $250. Unfortunately, the motor was stolen, and police arrested Johnny. Johnny pleaded guilty to receipt of stolen goods, a felony. The county judge ordered him to pay restitution and placed him on probation for two years. Johnny served his probationary period and has remained out of trouble for over twenty years.

Last year, Johnny went to the Bureau of Alcohol, Tobacco, and Firearms ("BATF") to apply for a gun dealer's license. Unbeknownst to him, however, federal law prohibits a person convicted of any crime carrying a possible sentence of over one year in prison from dealing or possessing firearms.[2] When the BATF Special Agent learned of Johnny's gun collection, he denied Johnny's application for a federal firearm dealer's license. The federal government then charged Johnny with unlawful possession of firearms, a felony. Johnny pleaded guilty before the district court and received a minimal sentence consisting of a $250 fine. After reading 18 U.S.C. § 925(c), Johnny learned that he could petition BATF to have his firearms privileges reinstated.[3] He applied for relief from his federal firearms disabilities only to have BATF refuse even to consider his application. Although the statute says

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* Inspired by the free spirit and loving memory of Shawn R. Carmichael. *Hope the huntin's fine, bro.*

1. The facts of this hypothetical substantially mirror those of *Rice v. United States Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995). *Rice* is discussed *infra* at Part II.C. Some liberties have been taken for literary purposes.

2. See 18 U.S.C. § 922(g)(1) (1994), stating in part:

> It shall be unlawful for any person . . . 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.

Id.

3. For the relevant text of 18 U.S.C. § 925(c), see *infra* note 13.

that he may petition BATF, an agent told him that since 1992, Congress has cut off all funding necessary to act on his application. Therefore the Bureau would not help him.

Johnny did not get discouraged because he learned that the statute explicitly gave him the right to seek judicial review of the denial of his petition. Moreover, the statute empowers the court to hear additional evidence if necessary to prevent a miscarriage of justice. Johnny was optimistic for not only was he well-liked and respected in the community, but recently the Governor of Pennsylvania pardoned his conviction for the twenty-year-old state offense. Surely, Johnny thought, a federal court would give him a hearing. The statute appears at least to give the court the discretion to do so.

So what is Johnny's problem? Johnny's problem is that many courts have decided that because Congress eliminated funding to BATF, the courts likewise lack the power to hear these cases. If Johnny resides in a circuit that sides with the majority, the doors of the federal courthouse are closed. Although Johnny has ample proof of his trustworthiness and the law allows consideration of such evidence, he has nowhere to turn to restore his federal firearms privileges.[4]

This Note examines the right of judicial review under 18 U.S.C. § 925(c). This section allows people whose federal firearms privileges have been revoked to apply to the Secretary of the Treasury for reinstatement.[5] The Secretary delegated this responsibility to BATF.[6] BATF makes an internal determination of the individual's fitness to have these privileges reinstated.[7] However, section 925(c) also allows for judicial review of a denied petition for reinstatement of privileges. The district court may, at its discretion, allow the presentation of additional evidence where failure to do so would result in

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4. While there is legislative history indicating that states were to have the power to remove federal firearms disabilities, the Supreme Court holding in *Beecham v. United States*, 511 U.S. 368 (1994), forecloses this possibility. *See infra* notes 22-23 and accompanying text.

5. *See supra* note 2, *infra* note 13 and accompanying text.

6. *See* 27 C.F.R. § 178.44 (1997). Subsection (a) provides that "[a]ny person may make application for relief from the [sic] disabilities under section 922 (g) and (n) of the Act." *Id.* § 178.44(a). Subsection (b) requires that such application will be filed with the Director of the Bureau of Alcohol, Tobacco and Firearms. *See id.* § 178.44(b). Subsection (c) requires the applicant to submit, among other things, three written references and written consent to obtain and examine personal records, including medical records, employment history, military service, and criminal record. *See id.* § 178.44(c).

7. The regulation directs the Director to consider the same factors found in 18 U.S.C. § 925(c). *See* 27 C.F.R. § 178.144(d). For the text of 18 U.S.C. § 925(c), see *infra* note 13. Additionally, the federal regulations state that the Director will not ordinarily grant relief if the applicant has not been discharged from parole or probation for a period of at least two years. *See* 27 C.F.R. § 178.144(d).

a miscarriage of justice.[8] Despite these statutory guarantees, Congress has continually withdrawn from BATF funding to investigate applications for removal of a disability under section 925(c).[9] Therefore, BATF has suspended processing these applications.

Subsequently, several applicants have sought judicial review under section 925(c). Many district courts have refused to hear these cases. Appeals are largely unsuccessful for varying reasons. The circuits disagree significantly both about the relevance and import of legislative history surrounding the statute and the proper legal analysis of these claims.[10] The Supreme Court has not yet taken an opportunity to resolve the split.[11]

In analyzing these issues, Part II of this Note examines the history behind the relevant appropriations measures and the reasoning and law behind the conflicting decisions of the various circuits. Part III proposes substantive legislation by which Congress should clearly express its intention on the matter. This Note also concludes that, in the interim, the federal courts should review petition denials under the theory that petitioners should be excused from exhausting their administrative remedies.

II. HISTORY

Congress enacted the current version of 18 U.S.C. § 925(c) as part of the Firearm Owners Protection Act of 1986 ("FOPA").[12] FOPA added the judicial review provisions to section 925(c). Section 925(c) grants a right to judicial review of administrative denial for relief and empowers the court to

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8. For the text of 18 U.S.C. § 925(c), see *infra* note 13.

9. This situation began with the appropriations acts for fiscal year 1993. *See infra* note 17 and accompanying text.

10. For example, the Ninth Circuit considered only the text of the statute and determined that BATF had not issued denials, as such. Therefore, the court affirmed the district court's finding of lack of subject matter jurisdiction. *See* Burtch v. United States Dep't of the Treasury, 120 F.3d 1087 (9th Cir. 1997); *see also infra* Part II.A. For the text of 18 U.S.C. § 925(c), see *infra* note 13. The Tenth Circuit also upheld a district court's finding of lack of subject matter jurisdiction, but considered the legislative history underlying the appropriations measures. *See* Owen v. Magaw, 122 F.3d 1350 (10th Cir. 1997); *see also infra* notes 64-70 and accompanying text. The Fifth Circuit ignored the jurisdictional issue. Its analysis of the legislative history of the appropriations bills led it to determine that Congress suspended the relief offered by section 925(c). *See* United States v. McGill, 74 F.3d 64 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 77 (1996); *see also infra* notes 48-63 and accompanying text. Finally, the Third Circuit took yet another approach. It, too, did not analyze the problem in terms of lack of subject matter jurisdiction, but instead in terms of failure to exhaust administrative remedies. The Third Circuit excused exhaustion and allowed an applicant's claim to go forward. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702 (3d Cir. 1995); *see also infra* Part III.C.

11. The Court denied certiorari in one case. *See McGill*, 117 S. Ct. 77. *McGill* is discussed *infra* at notes 48-63 and accompanying text.

12. Pub. L. No. 99-308, 100 Stat. 449, 459 (1986).

consider additional evidence if doing so would avoid a "miscarriage of justice."[13] This change from existing practice was intended to afford individuals not inclined to engage in criminal activity the "essential" opportunity to demonstrate trustworthy character.[14] A right to such review

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13. 18 U.S.C. § 925(c) (1994). The pertinent provision of 18 U.S.C. § 925(c) reads:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

Id.

14. S. REP. NO. 98-583 (1984). The legislative history of FOPA during its seven-year evolution is extremely convoluted. For a thorough chronology of the bills and amendments that eventually became FOPA, see David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986/1987). Between 1982 and the passage of FOPA, Congress issued three committee reports on the subject of amendments to firearms laws. In a nutshell, FOPA was substituted for a rival bill and assumed the numbering of that bill. Thus, the House bill that ultimately became FOPA is supported by a report, but the report explains not why FOPA should have been adopted, but rather, why it ought to have been *rejected.* For the purposes of this Note, all three reports are significant.

Senate Report No. 98-583, quoted in the accompanying text, explains that the power of the Secretary "is intended to provide a 'safety valve' whereby persons whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness" may obtain relief. S. REP. NO. 98-583, at 26 (1984). The Senate Committee on the Judiciary noted that the law in effect at the time restricted relief to a very narrow category of persons convicted of felonies. The Committee worried, "This could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. . . . [M]aking relief available to such persons is essential." *Id.* The Committee explained:

> In a change from existing practice, [the amendment] authorizes the scope of review provided under 5 U.S.C. [§] 706 and empowers the court to consider additional evidence in making its finding where a failure to do so would result in a miscarriage of justice. In such a case, the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination.

Id. at 26-27. Senate Report No. 98-583 accompanied Senate Bill 914, 98th Cong. (1984). However, Senate Bill 914 was not passed. An updated version, Senate Bill 94, 99th Cong. (1985), was brought directly onto the Senate calendar. *See* 131 CONG. REC. 24 (1985). Therefore, there is no Senate Report accompanying Senate Bill 94, the measure that eventually became law. The language of Senate Bill 914, considered in Senate Report No. 98-583, was incorporated verbatim by Senate Bill 49, *see* 131 CONG. REC. 28, and eventually was amended to 18 U.S.C. § 925(c).

Senate Report No. 97-476 accompanied Senate Bill 1030, 97th Cong. (1982), a predecessor to FOPA. As with Senate Bill 914, the judicial review provision of Senate Bill 1030 was the same as that which eventually passed. *See* S. REP. NO. 97-476, at 38 (1982). Senate Report No. 97-476 gives additional insight into the impetus behind the provision for judicial review. After hearings by several committees on the subject of gun control enforcement, "it [became] apparent that the enforcement tactics made possible by [then] current firearms laws [were] constitutionally, legally, and practically reprehensible." *Id.* at 15. In a great many cases, enforcement efforts had been directed toward those

was previously recognized, but on a very narrow basis.[15] As noted in Part I, the Secretary of the Treasury has delegated the authority to the Bureau of Alcohol, Tobacco, and Firearms to administer petitions for the removal of a disability.[16]

Since 1992, however, Congress has eliminated funding for BATF investigations or action on these applications. Typical appropriations measures have provided that "none of the funds appropriated herein shall be

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having committed only unintentional violations, often citizens with no police record whatsoever. *See id.* at 14-17. Thus, the Senate Committee on the Judiciary concluded, "In light of evidence before the Committee that Gun Control Act charges have been abused in the past with resultant convictions of persons not inclined to any criminal activity, making liberal relief available to such persons is essential." *Id.* at 24; *see also infra* note 119.

House Report No. 99-495 accompanied House Bill 4332, 99th Cong. (1986), and was issued during the congressional session in which FOPA was enacted. *See* H.R. REP. NO. 99-495 (1986). As Hardy explains, this report was generated for a rival bill of FOPA and is critical of FOPA. *See* Hardy, *supra*, at 588-89 nn.12-19. Significantly, however, even this report supports the provision for judicial review found in FOPA. Judicial review is mentioned in the report as a "positive feature" of Senate Bill 49. H.R. REP. NO. 99-495, at 15. Even the authors of this report deemed the judicial review provision to be "law enforcement neutral." *Id.*

The reports generated by the Senate Committee on the Judiciary during its consideration of FOPA contrast with the reports of the various congressional appropriations subcommittees. The appropriations committees opine that removal of federal firearms disabilities is a detriment to law enforcement. *See infra* note 20 and accompanying text.

15. *See* Kitchens v. Bureau of Alcohol, Tobacco, and Firearms, 535 F.2d 1197 (9th Cir. 1976). In *Kitchens*, the Ninth Circuit construed the nature of judicial review of petitions for relief under the Gun Control Act of 1968. The court held that under the Act, BATF's decision was subject to judicial review, but the scope of review would be limited to an examination of the reasons upon which BATF made its denial. *See id.* at 1199-200. Senate Report No. 98-583, discussed *supra* at note 14 and accompanying text, indicates that FOPA broadens the *Kitchens* scope of review. *See* S. REP. NO. 98-583, at 26-27 (1984).

16. *See supra* note 6 and accompanying text. During House subcommittee hearings on Treasury appropriations, Representative Steny Hoyer submitted written questions for the record to BATF Director Stephen Higgins. These questions and answers give some idea of the scope of BATF's function regarding petitions for relief:

> Representative Hoyer: Convicted felons are now prohibited from owning firearms. A law from the early 60's [expanded by FOPA, see *supra* notes 14-15 and accompanying text] allows felons to apply to BATF to have their gun rights restored....
>
> Over the past six years, over 2,300 felons have gotten their gun rights restored - including convicted drug dealers and armed robbers.
>
> How many of these permits [sic] were approved from 1960 to 1970, from 1970 to 1980, from 1980 to 1990, and from 1990 to 1992?
>
> Mr. Higgins: From 1960 through 1980, we do not have any statistical information available.
>
> From FY 1981 to FY 1990, a total of 5,005 firearms restorations were granted. From 1990 to February 1992, 675 restorations were granted.
>
> Representative Hoyer: How much does BATF spend on the Gun Relief for Felons Program [sic]? What is the level and staffing required in the 1993 request?
>
> Mr. Higgins: In FY 1992, the Bureau estimates that 38 FTE's and $3,533,000 will be expended on this program. In FY 1993, we estimate the same staffing level and $3,678,000.

Treasury, Postal Service, and Gen. Gov't Appropriations for Fiscal Year 1993, Hearings Before the Subcomm. on the Treasury, Postal Service, and Gen. Gov't Appropriations of the House Comm. on Appropriations, 102d Cong., pt. 1, at 993-94 (1992) [hereinafter *Hearings 1993*].

available for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c)."[17] Subsequently, BATF refuses to process any individual[18] applications for relief.[19] Early reports accompanying these appropriations measures evinced congressional concern for public safety and crime control.[20] Reports from this time also indicate that federal firearms disability determinations were considered coterminous with state decisions about fitness to possess a firearm under 18 U.S.C. § 921(a)(20).[21] For example, one

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17. *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No 103-123, 107 Stat. 1226, 1228 (1993); Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

18. Since 1994 these statutes have provided that "such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c)." *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3019 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993). The additional opportunity for relief for corporations has made for at least one unsuccessful equal protection challenge. *See infra* note 39 and accompanying text.

19. *See infra* note 103 and accompanying text.

20. For example, House Report No. 102-618 states:

> Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms....
>
> [BATF] may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.
>
> Under the relief procedure, [B]ATF officials are required to guess whether a convicted felon or person committed to a mental institution can be entrusted with a firearm. After [B]ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens.
>
> Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by [B]ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

H.R. REP. NO. 102-618, at 13-14 (1992); *see also* S. REP. NO. 103-106, at 20 (1993) (same); S. REP. No. 102-353, at 19-20 (1992) (same).

21. Section 921(a)(20) gives definitions for certain terms used in the chapter. Section 921(a)(20) states in part:

> What constitutes a conviction of [a crime punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been

Senate Report states:

> [T]he [Senate Appropriations] Committee has included language in the [appropriations] bill which prohibits the use of funds for [B]ATF to investigate and act upon applications for relief from *Federal firearms disabilities*. Under current policy, *States have authority to make these determinations* and the Committee believes this is properly where the responsibility ought to rest.[22]

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pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (1994). Thus, by operation of the specified processes, persons culpable for firearms offenses under section 922(g)(1) by virtue of having a predicate conviction may have culpability under the statute removed. For the text of section 922(g)(1), see *supra* note 2. But application of this provision has been limited by the Supreme Court to the jurisdiction of conviction. Thus, it does not operate as to persons convicted of federal crimes. *See* Beecham v. United States, 511 U.S. 368 (1994); *see also infra* note 23 and accompanying text.

Although beyond the scope of this Note, it may be of interest to observe that this approach can produce anomalous results. In *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), the plaintiff was convicted in Vermont state court of larceny, a crime classified as a felony in that state. Under Vermont law, one so convicted who is not sentenced to jail does not forfeit civil rights, nor does Vermont forbid such felons from possessing firearms. Thirty years later, the plaintiff was convicted of possession of an automatic weapon in violation of section 922(g)(1). *See id.* at 1005-06. The plaintiff argued that not suffering the loss of civil rights upon conviction under state law is the functional equivalent of having civil rights "restored" for the purposes of the exemption granted by section 921(a)(20). *See id.* at 1007. The Second Circuit disagreed, defining the word "restore" as meaning "to give back (as something lost or taken away)." *Id.* (internal quotation omitted). The Second Circuit reasoned that restoration of a thing never lost or diminished is a definitional impossibility, and that the plaintiff thus did not come within the terms of the statute. *See id.* Thus, persons convicted of serious crimes who temporarily lose their civil rights are immune from prosecution under the statute, while those convicted of lesser offenses which do not justify stripping them of their civil rights remain subject to prosecution. The Second Circuit noted judicial criticism of this result, but observed that section 925(c) provides a mechanism for relief. *See id.* at 1009.

22. S. REP. NO. 102-353, at 20 (1992) (emphasis added); *see also* S. REP. NO. 103-106, at 20 (1993) (same). These statements suggest Congress considered federal and state firearms disabilities as coterminous. In early hearings on appropriations, the following dialogue took place between Representative Steny Hoyer and the Director of BATF, Stephen Higgins:

> MR. HOYER. Let me ask you a specific question.
>
> As I understand it, you spent $4.5 million to get guns back in the hands of felons, is that correct?
>
> MR. HIGGINS. You are describing the relief from disability programs, which Congress passed, which essentially says----
>
> MR. HOYER. Hold it. Let me make sure that I was accurate. This program is designed for felons *convicted under federal or state statutes* who thereby are precluded from owning guns to get them back.
>
> . . .
>
> MR. HIGGINS. It is only because there is a provision in law which says that if an individual who has been convicted of a felony and is disabled from carrying a gun, if they show after they are out of prison that over time they have been rehabilitated and no longer pose a threat to society, that they can petition our agency for relief. We do a background investigation, and if we come to that decision, their right to possess firearms is restored.

However, the Supreme Court's holding in *Beecham v. United States*[23]

> There is also a provision in the law enacted in 1986, that essentially states that is does not matter whether we think that they are a threat to soxiety [sic]. If a state has a law which restores their rights once they have served their sentence, they automatically have their rights restored. It is being done every day by operation of state law, as well as the process you have described.

Hearings 1993, supra note 16, pt. 1, at 971-72 (emphasis added). During the next year's House hearings on appropriations, Representative George "Buddy" Darden and Higgins had the following discussion:

> MR. DARDEN. Another thing I want to observe as a former State official is, I recall that it is a violation of the criminal code of all 50 States, as well as the laws and statutes of the United States, to be a person convicted of a forcible felony and to possess a firearm. Is that correct, to the best of your recollection?
>
> MR. HIGGINS. It is illegal for a felon to possess firearms unless they have received relief, either by—
>
> MR. DARDEN. A pardon or—
>
> MR. HIGGINS. Yes. There is a process by which they can get it back and I am not familiar with the laws of all 50 States.
>
> MR. DARDEN. But generally speaking, in every single State in the union, it is State law, as well as a violation of the United States Code, to be a convicted felon, unless you file one of these exceptions to possess a firearm, it is not?
>
> MR. HIGGINS. Yes, generally speaking. However, that cannot be said for every State in the Union. Some States impose firearms disabilities only upon conviction of violent felonies. Others impose disabilities only upon persons incarcerated as a result of their convictions. Others impose disabilities only for a prescribed period of time after conviction or incarceration.

Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1994, Hearings Before the Subcomm. on the Treasury, Postal Service, and Gen. Gov't Appropriations of the Comm. on Appropriations, House of Representatives, 103d Cong. pt. 1, at 693 (1993).

Thus, the Senate Reports suggest that if a State determines a person convicted of a crime punishable by imprisonment for over one year is fit to possess firearms, then as a matter of "policy," this determination will apply to federal determinations of fitness as well. Mr. Higgin's reference to "the law enacted in 1986" during the 1992 hearings can only indicate FOPA. This dialogue again suggests that relief from federal disabilities attaches when relief from state disabilities attaches.

23. 511 U.S. 368 (1994). In *Beecham*, the plaintiffs were convicted of violating 18 U.S.C. § 922(g)(1), a federal felony which prevents possession of a firearm by a person with a previous felony conviction. *See id.* at 370. However, 18 U.S.C. § 921(a)(20) defines, for the purposes of section 922(g)(1), what will be considered a previous conviction. The statute states that what constitutes a conviction will be determined by the law of the jurisdiction in which the proceedings were held. Also, it states that a conviction for which civil rights have been restored will not be considered a conviction for the purposes of section 922(g)(1). For the text of section 921(a)(20), see *supra* note 21. The issue in *Beecham* was how the jurisdictional clause and the exemption clause are related. Previously, the Ninth Circuit ruled in *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), that a state's restoration of civil rights to a person eliminates the underlying conviction as a predicate offense for the purposes of the federal firearms statutes, whether the conviction was for a state or federal offense. *See id.* at 1334. The Supreme Court disagreed with this determination, ruling instead that for these purposes, whether something is to be determined a conviction is governed by the law of the convicting jurisdiction. *See Beecham*, 511 U.S. at 371. In doing so, the Court explicitly rejected the Ninth Circuit's reasoning that because no federal procedure exists for restoring civil rights, Congress could not have expected the federal government to perform this function, and therefore the reference to restoration of civil rights in section 921(a)(20) refers to the state procedure. *See id.* at 372-73. The Court noted that some states have no procedure for the restoration of civil rights, then stated, "Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights." *Id.* at 373. Nothing in the Court's opinion gives any indication that it considered or even was aware of the legislative history suggesting that states

eliminated the role of states in providing alternative relief for persons convicted of federal felonies. Nothing in the *Beecham* decision indicates that the Court knew of the legislative intent described above. Therefore, it does not appear that such persons currently have any opportunity for obtaining relief, save 18 U.S.C. § 925(c).

There have been several efforts to dispel the confusion surrounding this issue. One House bill on fiscal year 1997 appropriations for the Treasury Department would have abrogated judicial review for felons convicted of drug-related, firearms or violent offenses.[24] By negative implication, all other petitioners would have had the right to judicial review. Alternate efforts to include language that would completely abrogate judicial review were defeated both in the House Committee on Appropriations[25] and in the House Committee of the Whole House.[26] The House passed the version of the bill containing the provision denying judicial review only to a limited class of persons.[27] However, any mention of judicial review was stricken by the Senate Committee on Appropriations,[28] and the final appropriations measure reflects this fact.[29] Appropriations measures for fiscal year 1998 did not

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were to perform this function regardless of the jurisdiction of conviction. The Court expressed no opinion as to whether a federal felon could have her civil rights restored under federal law, and noted the possible relevance of section 925(c). *See id.* at 373 n.*.

24. The version of House Bill 3756 reported from the House Committee on Appropriations on July 8, 1996, would have provided that "the inability of the Bureau of Alcohol, Tobacco, and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review . . . ." H.R. 3756, 104th Cong., at 15 (1996); *see also* H.R. REP. NO. 104-660, at 26 (1996) (explaining modification). The House of Representatives eventually passed this version of the bill. *See infra* note 27 and accompanying text.

25. On June 26, 1996, Representative Durbin made a motion before the House Committee on Appropriations to amend the provision to a strict prohibition of judicial review. The motion was the subject of a roll call vote and was defeated 24 to 12. *See* H.R. REP. NO. 104-660, at 124 (1996). Representative Durbin, however, was not dissuaded, and he unsuccessfully renewed his efforts in the Committee of the whole House. *See infra* note 26 and accompanying text.

26. Representative Durbin introduced a motion in the Committee of the Whole House to remove the language "for felons convicted of a violent crime, firearms violations, or drug related crimes" from the provision. *See* 142 Cong. Rec. H7678 (daily ed. July 17, 1996). Representative Parker made a point of order against the amendment on the grounds that it changed existing law and constituted legislation in an appropriations bill. *See id.* The Chairman sustained the point of order and the amendment was not subject to vote. *See id.* at H7679.

27. *See* 142 CONG. REC. H7713-14 (daily ed. July 17, 1996) (passage of the bill by a vote of 215 to 207).

28. Research revealed no further information save the historical fact of the amendment. *See* H.R. 3756, 104th Cong. (1996); 142 CONG. REC. S10141 (daily ed. Sept. 10, 1996). The Senate Committee on Appropriations Report contained no mention of the amendment. *See* S. REP. NO. 104-330 (1996). With no relevant exceptions, the Committee amendments were considered and agreed to en bloc, and no floor debate seems to have taken place over this particular change to House Bill 3756. *See* 142 CONG. REC. S10158 (daily ed. Sept. 10, 1996).

29. Treasury Department appropriations were made part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996).

mention judicial review for these petitions.[30]

When individuals aggrieved by BATF's inaction have sought judicial review under 18 U.S.C. § 925(c), the courts of appeal have taken dramatically different approaches to the resolution of these cases. The Ninth Circuit concluded that the federal courts no longer have jurisdiction, based on the plain language of section 925(c). The Fifth Circuit concluded that Congress has suspended any relief available under section 925(c), based on the legislative history of the appropriations statutes. This same legislative history persuaded the Tenth Circuit to conclude that subject-matter jurisdiction is lacking. The Third Circuit, on the other hand, allows these cases to proceed and treats the problem as an exercise of discretion, under the doctrine of denial of administrative remedies.

A. Denial of Jurisdiction as a Matter of Statutory Interpretation

In *Burtch v. United States Department of the Treasury*,[31] the Ninth Circuit heard a case involving a person previously convicted of four felonies.[32] As Burtch had been convicted of a crime "punishable by imprisonment for a term exceeding one year,"[33] he lost his entitlement to possess any firearm or ammunition shipped or transported in interstate or foreign commerce pursuant to 18 U.S.C. § 922(g)(1).[34]

Burtch requested BATF to send him an application for relief from his firearms disabilities.[35] BATF notified him that appropriations measures prohibited it from acting upon or investigating applications for relief from federal firearms disabilities for individuals.[36] BATF recommended that Burtch's attorney "contact our office about obtaining restoration of Federal firearms privileges for your client should Congress act to remove the restriction currently imposed."[37]

Burtch filed a "Verified Petition for Removal of Federal Disabilities" in district court, naming as defendant the United States Department of the

30. *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997) (no mention of judicial review); H.R. REP. NO. 105-240 (1997) (same). Committee prints of appropriations measures for fiscal year 1998 were not available at the time of publication.

31. 120 F.3d 1087 (9th Cir. 1997).

32. *See id.* at 1088.

33. *Id.*; *see* 18 U.S.C. § 922(g)(1) (1994).

34. For the text of 18 U.S.C. § 922(g)(1), see *supra* note 2.

35. *See Burtch*, 120 F.3d at 1089.

36. *See id.*

37. *Id.* (internal quotation omitted).

Treasury.[38] He alleged that his application was denied and requested that the court provide him with relief from his federal firearms disabilities. The plaintiff argued[39] that BATF's funding limitations do not "repeal or affect the validity of 18 U.S.C. § 925(c)."[40] The district court dismissed Burtch's action for lack of subject matter jurisdiction, holding that "[w]here no investigation occurs, there is no denial."[41]

After establishing that it would review the district court's conclusions of law de novo,[42] the Ninth Circuit stated that if the statutory language was unambiguous, it would not resort to legislative history, unless exceptional circumstances dictated otherwise.[43] The *Burtch* court defined the issue as: "Must . . . there first be a denial by [B]ATF for the district court to review, or is the failure to act the functional equivalent of a denial on the merits?"[44] The court concluded "[T]he statute is so clear that we hold it means what it says. Thus, the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected."[45]

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38. Burtch v. United States Dep't of the Treasury, 120 F.3d 1087, 1089 (9th Cir. 1997).

39. Congress originally repealed all funds for investigations under section 925(c), but later reinstated funding for the purpose of investigating corporations. *See supra* notes 17-18 and accompanying text. Thus, the plaintiff also challenged the statutes' distinction between individuals and corporations on equal protection grounds. *See Burtch*, 120 F.3d at 1089. On review, the Ninth Circuit stated, "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 1090 (quoting FCC v. Beach Communications, 508 U.S. 307, 313 (1993)). The court's analysis was limited to the statement that "Congress could rationally have believed that corporations guilty of corporate crime present less danger to the community than do individual felons." *Burtch*, 120 F.3d at 1090.

40. *Burtch*, 120 F.3d at 1090 (internal quotation omitted).

41. *Id.*

42. *See id.* at 1089.

43. *See id.* at 1089-90 (citing Jenkins v. INS, 108 F.3d 195, 200 (9th Cir. 1997); Fernandez v. Brock, 840 F.2d 622, 632 (9th Cir. 1988)).

44. Burtch v. United States Dep't of the Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997).

45. *Id.* In reaching its holding, the court cited *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). It is not entirely clear, however, that *Seattle Audobon* supports the Ninth Circuit's interpretation. In *Seattle Audobon*, various environmental groups challenged changes in timber harvesting policies made by the United States Forest Service and the Bureau of Land Management. *See id.* at 432-33. In response to this ongoing litigation, Congress enacted the Northwest Timber Compromise, which established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain. *See id.* at 433. The Ninth Circuit held that a subsection of the Compromise was unconstitutional, but that it could not effect an implied modification of substantive law because it was embedded in an appropriations measure. *See id.* at 436, 440. The Supreme Court found several errors in this reasoning. It affirmed a standing rule that repeals by implication are especially disfavored in the appropriations context. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) ("The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." (citation omitted)). Nonetheless, the Court noted that Congress may amend substantive law in an appropriations statue, as long as it does so clearly. The *Seattle Audobon* court found that because the questioned section

The Ninth Circuit concluded that the statute did not authorize the district court to build a record "from scratch" or make discretionary policy determinations in the first instance if the Secretary had not done so.[46] It found that in the context of the entire statute, "denial" meant an adverse determination on the merits and did not include a refusal to act. Thus, the court upheld the district court's ruling that it lacked subject matter jurisdiction under section 925(c) without examining the statute's legislative history.[47]

B. Denial of Relief Based on an Examination of Legislative History

In *United States v. McGill*,[48] the Fifth Circuit heard the case of a man who previously pleaded guilty to two felony offenses.[49] As in *Burtch*, the plaintiff wrote BATF requesting information about applying for relief from his section 922(g)(1) disability.[50] BATF informed him that it was no longer accepting applications due to the appropriations measures. The plaintiff filed an application with the district court for the removal of his disabilities. The district court promptly dismissed the application on the ground that it lacked jurisdiction and the plaintiff appealed.[51]

Like the Ninth Circuit, the Fifth Circuit reviews a district court's dismissal for lack of subject matter jurisdiction de novo.[52] But the court stated: "Although we doubt that the district court has original jurisdiction to consider an application to remove the Federal firearm disability, we pretermit the question because it is clear to us that Congress suspended the relief

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provided by its terms that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express. *See Seattle Audobon*, 503 U.S. at 440.

Comparing *Burtch*, it appears that the Ninth Circuit significantly extended the *Seattle Audobon* holding. It is not at all clear in the federal firearms disabilities relief cases that Congress has so much amended substantive law in an appropriations statute as it has suspended substantive law *by way of* an appropriations *measure*. That is, the congressional action in *Seattle Audobon* effected material changes in the substantive provisions of a statute, whereas in *Burtch*, Congress chose to allocate financial resources in a different manner but did not effect material changes to section 925(c). *See Seattle Audobon*, 503 U.S. at 440; *Burtch*, 120 F.3d at 1090.

46. *Burtch*, 120 F.3d at 1090.

47. *See id.* The *Burtch* court distinguished the Fifth Circuit's decision not to examine the legislative history. *See id.* While both courts decided that Congress suspended relief, the Ninth Circuit addressed the issue of subject matter jurisdiction, whereas the Fifth Circuit did not. *See infra* notes 54-55 and accompanying text.

48. 74 F.3d 64 (5th Cir.), *cert. denied*, 117 S. Ct. 77 (1996).

49. *See id.* at 65. McGill was convicted of making a false statement under 18 U.S.C. § 1014 and filing a false tax return under 26 U.S.C. § 7206. He was sentenced to two years probation. *See id.*

50. For the provisions of § 922(g)(1), see *supra* note 2 and accompanying text.

51. *See McGill*, 74 F.3d at 65.

52. *See id.*

provided by § 925(c)."[53] Unlike the Ninth Circuit, the Fifth Circuit explicitly reserved the question of jurisdiction.[54]

The court instead relied on the proposition that Congress has the power to amend, suspend or repeal a statute by an appropriations bill, as long as it does so clearly.[55] To support this proposition, the court cited a 1940 case, *United States v. Dickerson*.[56]

The court first quoted the language of section 925(c) and noted that BATF has the authority to act on these applications. The court then considered the legislative history of some of the applicable appropriations measures[57] in light of the government's argument that relief had been suspended.[58] The court noted that the Appropriations Committee expressed concern over: (1) the use of limited resources for investigating these cases; and (2) the consequences to innocent citizens if BATF makes a mistake in

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53. *Id.* at 65-66.

54. The Fifth Circuit reserved the question of jurisdiction on the basis of *Norton v. Mathews*, 427 U.S. 524 (1976). "In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." *Id.* at 532. Avoiding the question of jurisdiction is known as the *Norton* doctrine. *See generally* John R. Knight, *The Requirement of Subject Matter Jurisdiction on Appeal: A Cardinal Rule with a Twist*, FED. LAW., Jan. 1997, at 16.

The *Norton* doctrine, or something akin to it, has possibly seen use in another section 925(c) case, *Bagdonas v. Department of the Treasury*, 93 F.3d 422 (7th Cir. 1996). Bagdonas was convicted in 1979 for the illegal possession and sale of a registered silencer-fitted gun. *See id.* at 423-24. Upon denial in 1989 of his first application for relief, Bagdonas reapplied in August 1993 by asking for reconsideration of his earlier application. *See id.* at 424-25. Bagdonas' second denial letter, like most considered in this Note, contained language indicating BATF was not processing applications because of the budgetary restrictions. But while the Seventh Circuit was aware of the *McGill* and *Rice* decisions, it merely mentioned in a footnote that neither Bagdonas nor the government argued any jurisdictional bar to the case. *See Bagdonas*, 93 F.3d at 425 n.5. The court only examined whether the Director's determination was arbitrary, capricious or unreasonable. *See id.* at 428. Eight days later, in *Stearnes v. Baur's Opera House*, 3 F.3d 1142 (7th Cir. 1993), the Seventh Circuit stated, "We are required to satisfy ourselves not only of our own jurisdiction, but also the jurisdiction of the district court. It is our duty to raise and consider the issue sua sponte when it appears from the record that jurisdiction is lacking." *Id.* at 1144 (citations omitted).

55. The court based its decision on the rationale of *Seattle Audobon*. For a discussion of *Seattle Audobon*, see *supra* note 45 and accompanying text.

56. 310 U.S. 554 (1940). *Dickerson* is perhaps a bit more on point than *Seattle Audobon*. In *Dickerson*, federal law allowed for a bonus to be paid to enlisted veterans who reenlisted. *See id.* at 554-55. The plaintiff did so, but was not paid the bonus because another law provided that no allocation for the year would be available for the payment of such allowances. *See id.* The Court held: "Congress could suspend or repeal the authorization . . . by an amendment to an appropriation bill, or otherwise." *Id.* at 555. *Dickerson*, unlike *Seattle Audobon*, dealt directly with appropriations *qua* appropriations, as opposed to substantive legislation embedded in an appropriations measure. *Dickerson* also dealt with a financial claim, not the abrogation of another right, such as the right of judicial review.

57. For a list of these measures, see *supra* note 17.

58. *See* United States v. McGill, 74 F.3d 64, 67 (5th Cir. 1998).

granting relief to a felon from his firearm disabilities.[59] The court based its decision on the circumstances and the explanation by the Appropriations Committee and stated:

> [I]t is clear . . . that Congress intended to suspend the relief provided by § 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.[60]

Thus, the court concluded that relief from federal firearms disabilities under section 925(c) had been suspended[61] by the appropriations acts.[62] Therefore, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's petition for review.[63]

In *Owen v. Magaw*,[64] the Tenth Circuit also confronted the case of a person who was prohibited under section 922(g)(1) from owning or possessing firearms.[65] The plaintiff agreed that the *McGill* court had not reached an unreasonable result.[66] However, the plaintiff noted that the appropriations statutes were silent as to the role of the judiciary. The plaintiff argued that there had been no clear statement that Congress intended to repeal judicial authority under section 925(c) to review BATF's treatment of applications for relief. The plaintiff thus contended that the appropriations statutes should not be read as having limited the role of the courts.[67] The Tenth Circuit considered the legislative history cited by the Fifth Circuit in

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59. *See id.* These concerns were addressed in S. REP. NO. 102-353, at 19-20 (1992). This report mirrors that of H.R. REP. NO. 102-618, at 13-14 (1992). For the text of H.R. REP. NO. 102-618, see *supra* note 20.

60. *McGill*, 74 F.3d at 67.

61. The plaintiff also argued, alternatively, that if the court found section 925(c) was repealed or suspended, the court should have found that section 922(g)(1) was also suspended. The court did not consider this argument because the plaintiff raised it for the first time on appeal. *See McGill*, 74 F.3d at 68.

62. *See id.* The court also found the history of funding for investigating applications from corporations as evidence of congressional intent to suspend the relief available under section 925(c). It noted that the initial fiscal year 1993 appropriations act barred BATF from using funds to investigate any applications, but that the fiscal year 1994 appropriations act expressly restored funding to BATF to investigate corporations. *See id.* at 67; *see also supra* notes 17-18 and accompanying text. The court opined, "If Congress thought that courts were considering applications for relief under [section] 925(c), this restoration of funds to provide relief for corporations would have been unnecessary." *McGill*, 74 F.3d at 67-68.

63. *See McGill*, 74 F.3d at 68.

64. 122 F.3d 1350 (10th Cir. 1997).

65. *See id.* at 1351.

66. *See id.* at 1353.

67. *See id.*

McGill[68] and upheld the district court's dismissal of the case for lack of subject matter jurisdiction.[69] In rejecting the plaintiff's argument, the Tenth Circuit also explicitly rejected a similar analysis by the Third Circuit.[70]

C. Jurisdiction as a Matter of Exhaustion of Administrative Remedies

The Third Circuit reached a very different conclusion than the other courts of appeal. In *Rice v. United States Department of Alcohol, Tobacco, and Firearms*,[71] the court heard the case of a man who pleaded guilty in 1970 to two related felonies involving stolen automobile parts.[72] Thus, he lost his firearms privileges under 18 U.S.C. § 922(g)(1).[73] Rice applied for relief under section 925(c). BATF informed Rice that it could not continue to process applications for relief from federal firearms disabilities and terminated further action on his application.[74] Rice then filed an action for judicial review. The district court dismissed his request for lack of subject matter jurisdiction.[75]

On appeal, the Third Circuit found that the district court erred in determining that it lacked subject matter jurisdiction. The court stated, "We believe the district court's order is more properly analyzed in terms of a failure to exhaust administrative remedies . . . ."[76] Before continuing, the court noted its independent obligation to determine that the district court had subject matter jurisdiction.[77] It acknowledged the power of Congress both to establish the jurisdiction of inferior federal courts and to appropriate money. It also acknowledged that Congress may use appropriation acts to repeal substantive legislation.[78] Here the Third Circuit, too, considered *Seattle*

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68. 74 F.3d 64, 67 (5th Cir. 1996). *McGill* relied upon Senate Report No. 102-353, at 19-20 (1992), which evinces congressional concern for the use of limited resources for investigating these cases and for the consequences to innocent citizens if BATF makes a mistake in granting relief. This report mirrors that of House Report No. 102-618, at 13-14 (1992). For the text of House Report No. 102-618, see *supra* note 20.

69. *See* Owen v. Magaw, 122 F.3d 1350, 1354 (10th Cir. 1997). However, *McGill* did not decide the question of subject matter jurisdiction. *See supra* notes 53-54 and accompanying text.

70. *See Owen*, 122 F.3d at 1353-54.

71. 68 F.3d 702 (3d Cir. 1995).

72. *See id.* at 704.

73. For the provisions of section 922(g)(1), see *supra* note 2 and accompanying text.

74. *See Rice*, 68 F.3d at 705.

75. *See id.* at 704.

76. *Id.* at 706-07.

77. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702, 707 (3d Cir. 1995); *cf. Bagdonas v. Secretary of the Treasury*, 93 F.3d 422 (7th Cir. 1996) (noting, but not addressing, the issue).

78. *See Rice*, 68 F.3d at 707.

Audobon and *Dickerson*.[79] Yet the court analyzed the situation under the "clear intention" standard of *Seattle Audobon* and came to a different conclusion than that reached by the Ninth Circuit in *Burtch*.[80] The court analyzed the plain language of the relevant appropriations acts[81] and found that none of them seemed to expressly preclude a court from reviewing BATF's refusal to process an application for relief.[82] Thus, the Third Circuit found that Congress did not repeal section 925(c) in its entirety.[83]

In its consideration of the doctrine of exhaustion of administrative remedies, the court paid close attention to the history and rationale behind the doctrine, as developed by the Supreme Court in cases such as *Myers v. Bethlehem Shipbuilding Corp.*,[84] *McKart v. United States*,[85] *Coit*

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79. For a discussion of *Seattle Audobon*, see *supra* note 45. For a discussion of *Dickerson*, see *supra* note 56 and accompanying text.

80. For a discussion of *Burtch*, see *supra* Part II.A.

81. For the text of the appropriations act, see *supra* note 17 and accompanying text.

82. *See Rice*, 68 F.3d at 707.

83. *See id.*

84. 303 U.S. 41 (1938). In *Myers*, the National Labor Relations Board ("NLRB") informed Bethlehem Shipbuilding that it would hold a hearing on a complaint made by a third party and against the corporation. *See id.* at 44-45. Congress granted the NLRB exclusive power to undertake such hearings. *See id.* at 48. Bethlehem filed a bill in equity to enjoin the board from holding such a hearing. *See id.* at 46. Bethlehem argued, among other things, that a hearing would subject it to irreparable damage, and that its constitutional rights would be violated unless the district court had jurisdiction to enjoin the hearing by the NLRB. *See id.* at 50. The Supreme Court held that this contention was "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id* at 50-51.

85. 395 U.S. 185 (1969). In *McKart*, the petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the Armed Forces of the United States. *See id.* at 186-87. McKart defended on the grounds that he was exempt under a certain provision of the Selective Service Act of 1948. *See id.* at 187 & n.2. The district court held that he could not raise that defense because he failed to exhaust the administrative remedies provided by the Selective Service Administration. *See id.* at 187. The Supreme Court first reiterated the *Myers* doctrine. *See id.* at 193. The Court continued:

> Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.
>
> Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

McKart, 395 U.S. at 193-94 (citations omitted). The Court went on to hold application of the doctrine

Independence Joint Venture v. FSLIC[86] and *McCarthy v. Madigan.*[87] The

improper. *See id.* at 197.

86. 489 U.S. 561 (1989). In *Coit*, the petitioner filed suit against a third-party institution which subsequently went into receivership with the FSLIC. *See id.* at 565. The FSLIC removed the case to federal court, where it was dismissed. *See id.* at 565-66. The FSLIC argued on appeal that it had the power to require claimants to exhaust the administrative process leading to allowance, settlement or disallowance before suing on the claims in court. *See id.* at 579. Coit contended that the statutory provisions relied on by the FSLIC did not demonstrate a congressional intent to require exhaustion of administrative remedies by claimants before filing suit in court. *See id.* The Supreme Court first recognized precedent, including *Myers*, holding exhaustion of administrative remedies necessary where required by statute. *See id.* The Court further explained that where a statutory requirement of exhaustion is not explicit, "'courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme.'" *Id.* (quoting Patsy v. Florida Bd. of Regents, 457 U.S. 496, 502 n.4 (1982)). Moreover, a court "'should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.'" *Coit*, 489 U.S. at 580 (quoting *Patsy*, 457 U.S. at 501-02). The Court found that the applicable regulations did not place a "clear and reasonable time limit" on the FSLIC's consideration of whether to pay, settle or disallow claims. *Coit*, 489 U.S. at 586. The Court then stated that administrative remedies that are inadequate need not be exhausted. *See id.* at 587 (citing Greene v. United States, 376 U.S. 149, 163 (1964); Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 591-92 (1926)). The Court here found that the lack of a reasonable time limit in the administrative claims procedure rendered it inadequate. *See Coit*, 489 U.S. at 587.

87. 503 U.S. 140 (1992). In *McCarthy*, a federal prisoner filed a damages action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Tenth Circuit ruled that exhaustion of the internal grievance procedure promulgated by the Federal Bureau of Prisons was required before the plaintiff could initiate a suit. *See McCarthy*, 503 U.S. at 141. The Supreme Court began its analysis by explaining:

> The doctrine of exhaustion of administrative remedies is one among related doctrines——including abstention, finality, and ripeness——that govern the timing of federal-court decisionmaking. Of "paramount importance" to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.

Id. at 144 (citations omitted). The Court explained that exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency:

> As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. . . .
>
> As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.

Id. at 145 (citations omitted). The court then considered the circumstances under which exhaustion will not be required:

> Notwithstanding these substantial institutional interests, federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. . . . Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. . . . Application of this

court began with the proposition that "[e]xhaustion, though often referred to as a question of jurisdiction, does not have the same rigidity as true issues of subject matter jurisdiction. A district court cannot consider a case without subject matter jurisdiction, but failure to exhaust is not always fatal."[88] The doctrine of exhaustion of administrative remedies is thus one which governs the timing of judicial decision making, much like the doctrines of abstention, finality and ripeness.[89]

The Third Circuit recognized the general rule that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[90] The court noted that exhaustion is generally required because it serves the twin purposes of protecting the authority of administrative agencies and promoting judicial efficiency.[91] The court recognized that a significant inquiry in determining the applicability of the exhaustion doctrine is congressional intent and that "[w]here Congress specifically mandates, exhaustion is required."[92]

The Third Circuit noted that when deciding an exhaustion issue, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.[93] The court noted that application of this balancing principle is "intensely practical" because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.[94] Thus, a court may decline to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise.[95] The Third Circuit looked to *McCarthy* for circumstances in which the interests of the individual weigh heavily

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balancing principle is "intensely practical," because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.

This Court's precedents have recognized ... broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. [R]equiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.

Id. at 146-47 (citations omitted).

88. Rice v. United States Department of Alcohol, Tobacco and Firearms, 68 F.3d 702, 708 (1995) (citing *Myers*, 303 U.S. at 50-51; *McCarthy*, 503 U.S. 140); *see also supra* notes 84, 87.

89. *See Rice*, 68 F.3d at 708 (citing McCarthy v. Madigan, 503 U.S. 140, 144 (1992)).

90. *Rice*, 68 F.3d at 708 (citing McKart v. United States, 395 U.S. 185, 193 (1969); *McCarthy*, 503 U.S. at 144-45).

91. *See Rice*, 68 F.3d at 708 (citing *McCarthy*, 503 U.S. at 145).

92. *Rice*, 68 F.3d at 708 (quoting *McCarthy*, 503 U.S. at 144).

93. *See Rice*, 68 F.3d at 708 (citing *McCarthy*, 503 U.S. at 146).

94. Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702, 708 (3d Cir. 1995) (citing *McCarthy*, 503 U.S. at 144) (quotation omitted).

95. *See Rice*, 68 F.3d at 708 (citing McCarthy v. Madigan, 503 U.S. at 140, 144 (1992)).

against requiring administrative exhaustion.[96] One such situation occurs where the requirement of exhaustion may cause undue prejudice to subsequent assertion of a court action.[97] For example, undue prejudice may result due to "an unreasonable or indefinite timeframe for administrative action."[98]

The Third Circuit then discussed *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*[99] to analyze this type of situation.[100] In *Coit*, the Supreme Court reviewed the adequacy of FSLIC proceedings to determine claims against savings and loans associations under FSLIC receivership. The claim in question had been retained for "further review" and held without action for over 13 months.[101] The Court held that "[t]he lack of a reasonable time limit in the current administrative claims procedure render[ed] it inadequate" and "[a]dministrative remedies that are inadequate need not be exhausted."[102]

Next, the Third Circuit applied the balancing test found in *McCarthy* in conjunction with the principles of *Coit* and found that they favored waiver of the exhaustion doctrine in Rice's case. The court decided that although the four-month delay imposed after passage of the appropriation act may have been reasonable, an indefinite delay was unreasonable.[103]

The court found that the case posed a special problem, because the initial determination of Rice's qualification *vel non* for relief involved BATF's discretion and relied on BATF's expertise—two factors that favored strict application of the exhaustion doctrine.[104] The court considered these factors in light of the express authority that section 925(c)[105] gives courts to receive

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96. *See Rice*, 68 F.3d at 708.

97. *See id.* (citing *McCarthy*, 503 U.S. at 146-47). Other circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion are those where there is some doubt about the agency's power to grant effective relief, or where an agency is shown to be biased or has otherwise predetermined the issue before it. *See McCarthy*, 503 U.S. at 147-48.

98. *Rice*, 68 F.3d at 708. (quoting *McCarthy*, 503 U.S. at 147).

99. 489 U.S. 561 (1989). For a discussion of *Coit*, see *supra* note 86.

100. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702, 708-09 (3d Cir. 1995).

101. *Coit*, 489 U.S. at 586.

102. *Id.* at 587.

103. *See Rice*, 68 F.3d at 709. BATF conceded it could not state a date on which it would consider Rice's application, nor could it even state whether it would ever consider his application. In fact, after Congress enacted the appropriation measures, BATF notified Rice that even if Congress removed the restrictions, he "would need to submit an updated application" to restore his federal firearms privileges. BATF also stated that it had concluded its participation in the process and was not preparing any further record that would help the court in resolving the dispute. *See id.*

104. *See id.* (citing McKart v. United States, 395 U.S. 185, 194 (1969); McCarthy v. Madigan, 503 U.S. 140, 145 (1992)).

105. For the text of section 925(c), see *supra* note 13.

independent evidence when necessary to avoid a miscarriage of justice.[106]

The Third Circuit concluded that Congress did not intend to apply rigidly the doctrine of administrative remedies in this context. The court based its decision, in part, on the original grant of jurisdiction and power "[to] create or supplement the administrative record when necessary to avoid a miscarriage of justice."[107] The court noted that the relevant provisions of the appropriations acts did not seem to preclude the agency from presenting its views on the propriety of granting the plaintiff's application in a judicial forum.[108] Thus, the court remanded the case with directions to consider the interests expressed in the statute.[109]

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106. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702, 709 (3d Cir. 1995).

107. *Id.*

108. *See id.*

109. *See id.* at 709-10. The saga of Mr. Rice after the Third Circuit's remand is an interesting one. The United States District Court for the Eastern District of Pennsylvania delayed deciding the case. In *Rice v. United States Dep't of Alcohol, Tobacco and Firearms*, No. 93-6107, 1996 WL 494138 (E.D. Pa. Aug. 21, 1996) ("*Rice II*"), the district court noted that shortly after the decision by the Third Circuit, the Fifth Circuit handed down its contrary opinion in *McGill*. For a discussion of *McGill*, see *supra* notes 48-62 and accompanying text. The district court also noted that McGill had filed a petition for certiorari to the Supreme Court. *See Rice II*, 1996 WL 494138, at *1.

Rice argued that the law of the case doctrine required that he receive an expedited judicial hearing regarding his application for removal of his federal firearms disabilities. He cited *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), for the proposition that when a court "decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Id.* at 816. Rice argued that the Third Circuit's decision was the final adjudication of a plaintiff's right to a hearing and therefore had become the law of the case. *See Rice II*, 1996 WL 494138, at *1.

The district court, however, decided to await the Supreme Court's determination about whether to grant certiorari in *McGill*. *See Rice II*, 1996 WL 494138, at *2. Citing concerns of judicial efficiency and economy, the court speculated that if the Supreme Court affirmed *McGill* because the district court lacked subject matter jurisdiction, it necessarily would have to dismiss Rice's action, as subject matter jurisdiction is exempt from law of the case principles. *See id.* (citing *Christianson*, 486 U.S. at 816). Thus, while the court recognized it normally would be bound by the Third Circuit's decision, it stated that a later relevant decision of the Supreme Court "trumps" the Third Circuit in a case in which a final judgment has not been entered. *Rice II*, 1996 WL 494138, at *2. The court assured the parties that if the Supreme Court were to deny certiorari in *McGill*, it would "proceed expeditiously" to determine whether a failure to admit Rice's evidence would result in a miscarriage of justice. *Id.*

The Supreme Court indeed denied the petition for a writ of certiorari in the *McGill* case, *see supra* note 11 and accompanying text, and *Rice II* resumed. *See* Rice v. United States, No. 93-6107, 1997 WL 48945 (E.D. Pa. Jan. 30, 1997) ("*Rice III*"). The court found in *Rice III* that Rice had been the victim of "an unfortunate set of circumstances and bad timing," stemming from a criminal offense he committed when he was just nineteen years old. *Id.* at *4. The court considered the fact that Rice had obtained expungement of his state criminal record and received a gubernatorial pardon just one year after his federal conviction for unlawful possession of firearms by a convicted felon. *See id.* The court noted that had this pardon been approved one year earlier, Rice could not have been convicted of the federal crime of possession of a firearm by a previously convicted felon, and the case never would have arisen. *See id.*

The court therefore undertook an analysis based on the considerations mentioned in section 925(c). The court noted that Rice was convicted in 1971 of a nonviolent crime, and other than his

III. ANALYSIS AND PROPOSAL

As enacted, 18 U.S.C. § 925(c) expanded the jurisdiction of the federal courts and offered citizens an opportunity to have their federal firearms privileges restored by demonstrating that they pose no threat to society or the public welfare.[110] Congress withdrew funding for the administrative agency involved in this process, BATF, but enacted no legislation regarding the continuing scope of judicial review of these cases.[111] Some courts of appeal have concluded that their part in obtaining relief for these individuals has likewise been abrogated, but the rationale behind these decisions varies significantly.[112] At least one circuit continues to allow individuals to bring relief petitions for judicial review.[113]

Given that the meaning and intent behind the appropriations measures is ambiguous, Congress is in the best position to remedy this problem by enacting clearer legislation. Congress already dictated the role of BATF regarding these applications. The legislative history of the various appropriations bills leaves little doubt that Congress suspended administrative action in processing these applications.[114] Despite the appropriations bills, section 925(c) still grants federal court jurisdiction over these matters and directs the courts to avoid a "miscarriage of justice." Currently, there is no guidance as to how the appropriations bills are intended to affect federal court jurisdiction. Thus, the standard form appropriations measure should be amended as indicated in boldface brackets:

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federal conviction based solely upon this prior state crime, he had had no subsequent entanglement with the law. The state court judge, as well as the federal judge, had imposed the lightest of penalties. The court found, moreover, that Rice was well known in and had significant ties to his community. He submitted 97 affidavits from friends and neighbors which stated that he was a "truthful, law abiding citizen." The court found his reputation and character to be exemplary. *See id.* Therefore, after Rice had lodged three unsuccessful petitions to BATF and a federal lawsuit, the District Court for the Eastern District of Pennsylvania restored Rice's privilege to own and possess firearms. *See id.* at *5.

110. For the text of 18 U.S.C. § 925(c), see *supra* note 13. For its effect on existing law, see *supra* notes 14-15 and accompanying text.

111. For a list of the relevant appropriations measures, see *supra* note 17 and accompanying text.

112. See, for example, *Owen v. Magaw*, 122 F.3d 1350 (10th Cir. 1997), discussed *supra* notes 64-70 and accompanying text, which concludes that the legislative history of the appropriations measures indicates that federal courts are not to take jurisdiction of these petitions; *Burtch v. United States Department of the Treasury*, 120 F.3d 1087 (9th Cir. 1997), discussed *supra* Part II.A, which concludes that in this situation, the plain language of section 925(c) does not grant jurisdiction; and *United States v. McGill*, 74 F.3d 64 (5th Cir. 1996), discussed *supra* notes 48-63 and accompanying text, which concludes without jurisdictional inquiry that Congress intended to suspend relief from federal firearms disabilities.

113. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702 (3d Cir. 1995).

114. *See supra* note 20 and accompanying text.

Treasury, Postal Service, and General Government Appropriations Act, 19**

TITLE I – DEPARTMENT OF THE TREASURY

***

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

SALARIES AND EXPENSES

***

> *Provided further,* That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities. [Nothing herein shall be deemed to preclude the right of an applicant to judicial review of these applications pursuant to 18 U.S.C. § 925(c). In the absence of an offer of evidence by the Bureau of Alcohol, Tobacco and Firearms, the admission of evidence remains at the sound discretion of the court, in the interests of avoiding a miscarriage of justice.]

This provision adequately addresses the concerns of all interested parties. Both the text and the history behind section 925(c) display concern for the distribution of justice and for the "essential" right of a party to demonstrate[115] trustworthiness and good character.[116] Moreover, the legislative history of section 925(c) itself suggests that the judiciary is to have an active role in the oversight of these claims.[117] This provision safeguards these concerns, while preserving the discretion of the court. The legislative history of the appropriations measures evinces congressional concern over fiscal and safety

115. Given the broad statutory mandate to consider the "public interest" and a "miscarriage of justice," 18 U.S.C. § 925(c) (1994), the nature of a petitioner's proof will undoubtedly vary on a case-by-case basis. The statute anticipates a consideration of "the circumstances regarding the disability, and the applicant's record and reputation." *Id.* The *Code of Federal Regulations* requires certain forms of proof by a petitioner, including medical history, employment history, military service and criminal record. *See* 27 C.F.R. § 178.44 (1997); *supra* notes 6-7. In *Rice v. United States*, No. 93-6107, 1997 WL 48945 (E.D. Pa. Jan. 30, 1997), the court considered, among other things, the facts that the plaintiff was sentenced to the minimum allowable penalty for both of his convictions, received a gubernatorial pardon for one of these offenses, had a long history of noninvolvement with law enforcement, submitted 97 affidavits from friends and neighbors which stated that he was a truthful, law-abiding citizen and that the government had no evidence to the contrary. *See also supra* note 109.

116. *See supra* notes 13-14 and accompanying text.

117. *See supra* note 14 and accompanying text.

issues.[118] This proposal adequately protects both concerns. The funding provisions of the appropriations measures remain unchanged. Also, the provision makes clear that courts retain discretion in these matters and that they should exercise their discretion to avoid a miscarriage of justice. Moreover, by including the suggested language in the appropriations measures instead of section 925(c) itself, this proposal will require annual renewal on the part of Congress. The renewal requirement increases legislative flexibility and allows for ongoing analysis of the provision's effectiveness.[119]

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118. *See supra* note 20 and accompanying text.

119. Provisions introduced during the 104th Congress would have amended the appropriations measures with language indicating that "the inability of the Bureau of Alcohol, Tobacco and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review." This provision was not incorporated into the final appropriations measures. *See supra* notes 24, 27-29 and accompanying text.

This Note concludes that such a provision inadequately addresses the concerns underlying the passage of FOPA and its predecessor, particularly the restriction on those convicted of firearms violations. While the appropriations measures have eliminated BATF's authority to *remove* firearms disabilities, BATF's ability to *impose* such disabilities through its primary sphere of enforcement authority remains unchecked. Extensive Senate hearings prior to the passage of FOPA established rampant abuses of enforcement power by BATF. For a list of these hearings and capsule summaries of major transgressions by BATF agents, see Hardy, *supra* note 14, at 606 n.118. Senator DeConcini, who chaired the hearings in the Appropriations Committee, concluded:

> Frankly, I was shocked by yesterday's testimony. The problem appears much greater in scope and more acute in intensity than I had imagined. It is a sobering experience to listen to *average, law-abiding citizens* present evidence of conduct by an official law enforcement agency of the federal government which borders on the criminal. . . . The testimony offered yesterday, together with supporting documentary data, is extremely disquieting. . . . (It) indicates that *BATF has moved against honest citizens and criminals with equal vigor.*

Senate Report No. 97-476 (1982) at 15 (emphasis added) (alteration in original). Thus, the drafters of FOPA found the "safety-valve" measure of judicial review to be "absolutely essential." *See supra* note 14.

The well-publicized tragedies at Ruby Ridge and Waco, both initiated by BATF, foreclose any notion that things have gotten better at the Bureau. Senator Arlen Specter, Chairman of the Terrorism, Technology & Government Information Subcommittee of the Senate Judiciary Committee, concluded after Subcommittee hearings on the Ruby Ridge incident that BATF is "out of control. . . . [BATF] went overboard, went to extremes." Specter noted that BATF lied about Randy Weaver, whose 14 year-old son and wife were killed in the incident:

> [BATF] said [Weaver] had a prior record of convictions . . . . Not true. [BATF] said that [Weaver] was a suspect in a bank robbery case. Not true. . . . And yet when the hearings were on, the director of the [BATF, John Magaw,] came in and made an effort to defend those misrepresentations, and later had to concede at the hearing that the conduct was inexcusable.

Ken Fuson, *An 'Out of Control' ATF Should Be Abolished, Says Senator Specter*, DES MOINES REG., Oct. 24, 1995, at 1. A report on the incident by the Treasury Department, which oversees BATF, found "disturbing evidence of flawed decision-making, inadequate intelligence gathering, miscommunication, supervisory failures, and deliberately misleading post-raid statements about the raid and raid plan by certain [B]ATF supervisors." BATF employees were among the federal agents cited for attending "Good Ol' Boy Roundups" in east Tennessee which included drunkenness and racist behavior. Holly Yeager, *Guns in America/ATF: A Mixed Heritage*, HOUSTON CHRON., Oct. 22, 1997, at 20.

Absent any clear direction from Congress, such as that in the proposed appropriations measure, the Supreme Court should grant review of a section 925(c) case to clarify the rights of applicants[120] and to resolve the split among the circuits.[121] Review is further appropriate because these cases involve weighty issues of subject matter jurisdiction, statutory interpretation, the doctrine of exhaustion of administrative remedies and a statutory mandate to avoid the "miscarriage of justice." Moreover, as the Court recognized, its decision in *Beecham* further complicated the issues surrounding 18 U.S.C. § 925(c).[122] The time has come for a definitive resolution of these matters.

Absent either congressional or Supreme Court resolution of this problem, the lower federal courts should undertake review of these petitions. Both the text of 18 U.S.C. § 925(c) and the history behind the statute demonstrate that Congress expanded the role of the judiciary to extend beyond whatever evidence the Secretary of the Treasury may or may not have to offer in any particular case.[123] Moreover, both the text of the statute and its legislative history reveal a congressional concern for justice and for trustworthy individuals to be afforded the opportunity to vindicate their standing in the eyes of the law.[124]

This Note concludes that narrow reasoning, such as that applied by the Ninth Circuit in *Burtch*, is ill-founded. Even if resolution of these cases were to turn on the narrow issue of statutory construction of the term "denial," the analysis of the Third Circuit regarding the doctrine of administrative exhaustion reveals that the *Burtch* court was making law in a vacuum. Supreme Court precedent dictates that Congress may repeal substantive rights, such as the right to judicial review, through appropriations measures only if it does so "clearly."[125] The appropriations measures at issue here are silent on the issue.[126] The only affirmative attempt by either house of Congress to address the issue would have defined the right, not destroyed it.[127] The fact that this attempt initially succeeded only in the House of Representatives is at best a mixed message, a far cry from the Supreme Court's standard of a "clear" indication of congressional intent. Lower

120. The Supreme Court denied McGill's petition for a writ of certiorari. *See* McGill v. United States, 117 S. Ct. 77 (1996).

121. *Compare* Burtch v. United States Dep't of the Treasury, 120 F.3d 1087, 1089 (9th Cir. 1997), *and* United States v. McGill, 74 F.3d 64 (5th Cir. 1996), *with* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 68 F.3d 702 (3d Cir. 1995).

122. *See* Beecham v. United States, 511 U.S. 368, 373 n.* (1994).

123. *See supra* notes 13-14 and accompanying text.

124. *See supra* notes 13-14 and accompanying text.

125. *See supra* note 45 and accompanying text.

126. *See supra* note 17 and accompanying text.

127. *See supra* notes 24, 27-28 and accompanying text.

federal courts should consider these cases with a view toward effecting the policies expressed by 18 U.S.C. § 925(c). Recognition of these claims reflects both the letter and spirit of the law.

IV. CONCLUSION

Currently, federal law allows a person unable to lawfully possess firearms to apply to BATF for a removal of this disability. Yet Congress tied the hands of BATF by removing all funding for investigations of these applications, although Congress kept section 925(c) right of petition and judicial review on the books. BATF has refused to take any part in the further resolution of these petitions or any ensuing litigation. The courts of appeal, on the other hand, meet petitioners seeking judicial review with conflicting determinations. The Supreme Court has thus far been unwilling to determine the rights of the parties, the jurisdiction of the federal courts or the intent of Congress. Legislative or judicial redress of this situation is sorely needed.

Gregory J. Pals

Exhibit 9

H. R. 3547

One Hundred Thirteenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the third day of January, two thousand and fourteen

An Act

Making consolidated appropriations for the fiscal year ending September 30, 2014, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2014".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

assistance to State and local law enforcement agencies, with or without reimbursement, $1,179,000,000, of which not to exceed $36,000 shall be for official reception and representation expenses, not to exceed $1,000,000 shall be available for the payment of attorneys' fees as provided by section 924(d)(2) of title 18, United States Code, and not to exceed $20,000,000 shall remain available until expended: *Provided*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code: *Provided further*, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code: *Provided further*, That no funds made available by this or any other Act may be used to transfer the functions, missions, or activities of the Bureau of Alcohol, Tobacco, Firearms and Explosives to other agencies or Departments.

FEDERAL PRISON SYSTEM

SALARIES AND EXPENSES

(INCLUDING TRANSFER OF FUNDS)

For necessary expenses of the Federal Prison System for the administration, operation, and maintenance of Federal penal and correctional institutions, and for the provision of technical assistance and advice on corrections related issues to foreign governments, $6,769,000,000: *Provided*, That the Attorney General may transfer to the Health Resources and Services Administration such amounts as may be necessary for direct expenditures by that Administration for medical relief for inmates of Federal penal and correctional institutions: *Provided further*, That the Director of the Federal Prison System, where necessary, may enter into contracts with a fiscal agent or fiscal intermediary claims processor to determine the amounts payable to persons who, on behalf of the Federal Prison System, furnish health services to individuals committed to the custody of the Federal Prison System: *Provided further*, That not to exceed $5,400 shall be available for official reception and representation expenses: *Provided further*, That not to exceed $50,000,000 shall remain available for necessary operations until September 30, 2015: *Provided further*, That, of the amounts provided for contract confinement, not to exceed $20,000,000 shall remain available until expended to make payments in advance for grants, contracts and reimbursable agreements, and other expenses: *Provided further*, That the Director of the Federal Prison System may accept donated property and services relating to the operation of the prison card program from a not-for-profit entity which has operated such program in the past, notwithstanding the fact that such not-for-profit entity furnishes services under contracts to the Federal Prison System relating to the operation of pre-release services, halfway houses, or other custodial facilities.

BUILDINGS AND FACILITIES

For planning, acquisition of sites and construction of new facilities; purchase and acquisition of facilities and remodeling, and equipping of such facilities for penal and correctional use, including

Exhibit 10

Prince Law Offices, P.C.

BY JOSHUA PRINCE, ESQ. | MAY 26, 2011 · 2:42 PM | EDIT

Can you Fund your Own Federal Relief Determination if You are a Prohibited Person?

Quite often, individuals call me because they are prohibited under Federal Law, usually 18 U.S.C. 922(g)(1), but not specifically under the laws of the Commonwealth of Pennsylvania. However, since they are prohibited at the federal level, that individual is a prohibited person that cannot use or possess any firearm or ammunition, including black powder.

Pursuant to 18 U.S.C. 925©, there is the ability to apply for federal firearms relief; however, since 1992, the Congress has placed in the Bureau of Alcohol, Tobacco, Firearms and Explosives' (BATFE) annual appropriations bill that it may not use any of the appropriated money for firearms relief determinations. What the appropriations bills does NOT say is that the ATF cannot conduct firearms relief determinations which have been privately funded. Accordingly, I submitted a request, on behalf of a client, for the cost to perform a firearms relief determination, which would be funded by my client.

Previously, in the U.S. Supreme Court case of *U.S. v. Bean*, 537 U.S. 71 (2002), the Court held that the refusal by the BATFE to perform a firearms relief determination, because of the Congressional appropriations bill, was not a defacto denial that provided for access to the federal courts.

The BATFE just respond and you can see its determination here. TheBATFE asserts three positions, which it argues prevents it from conducting privately funded firearms relief determinations.

Argument 1: The ATF **interprets** the Congressional language in the appropriations bill, Consolidated Appropriations Act, 2010, Public Law 111-117, December 16, 2010, as "a clear indication that Congress does not want the ATF to act on such applications [firearms relief determinations]." If the Congress wants to prevent the ATF from being able to conduct firearms relief determinations, then why hasn't the Congress amended the 18 U.S.C. 925©, such that firearms relief determinations are no longer provided for? It is that Congress doesn't want ANY relief determinations to be made; or, is it that the Congress doesn't want to provide for publicly funded relief determinations? Given the language of the appropriations bill and the absence of Congressional action to eradicate 18 U.S.C. 925©, it seems clear that the Congress is only speaking to the use of public money.

Argument 2: Title 31 of the United States Code, Section 1341 "prohibits any officer or employee of the United States Government from 'making an expenditure exceeding an amount available in an appropriation…" But, who is asking for an expenditure? Black's Law Dictionary, Third Pocket Edition, defines an expenditure as "1. The act or proceed of paying out; disbursement. 2. A sum paid out." The request is to privately fund a relief determination, not for the BATFEto pay out any money. While the result may be the the ATF would utilize the privately funded relief

determination money to pay its employees for their time, Section 1341 only prohibits them from expending more than which is allocated. Hence, if the relief determination cost was estimated to be $1000, the individual paid the $1000, and the cost for the determination was going to exceed $1000, the ATF would be prohibited from using any additional funds over the $1000 mark. However, if the individual paid the additional required funds, there should not be an issue with Section 1341.

Argument 3: Title 31 of the United States Code, Section 3302 provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim" and, as a result, any funds received would have to be placed into a Government's general account and not an account of the ATF. It should be noted that Section 3302 only requires that the money be deposited with the Treasury and there is nothing within Section 3302 that precludes the keeping of separate accounts or disbursement of those accounts to Departments of the U.S. Government. Moreover, Section 3302©(1) requires the Secretary to issue receipts reflecting the deposit. Accordingly, there should be no problem with tracking or accounting for the money.

The question now arises whether the refusal by the BATFE to provide for privately funded firearms relief determinations is a basis that permits the federal courts to consider relief determinations. Unfortunately, the cost is likely to be substantial as the case almost definitely will go to the US Supreme Court. Hopefully the NRA or another pro-2nd Amendment organization will consider funding such a case.

Share this:

As a prohibited person in PA, can you possess antique firearms?
In "Firearms Law"

As an FFL, Should You Conduct a Background Check and 4473 on a Law

Enforcement Officer with a Department Letter for a Duty Gun?
In "ATF"

At What Age Can Someone Establish a NFA Gun Trust?
In "ATF"

Exhibit 11

MAY 24 2011

Josh

25460
CE

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Washington, DC 20226

www.atf.gov

MAY 11 2011

Mr. Joshua Prince, Esq.
Prince Law Offices, P.C.
646 Lenape Road
Bechtelsville, Pennsylvania 19505

Dear Mr. Prince:

This is in response to your letters dated March 22 and 31, 2011, to the Attorney General and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in which you ask ATF to provide you with an estimate of the cost of investigating a petition for relief from Federal firearms disabilities pursuant to 18 U.S.C. § 925(c). We understand that you made this request based on the understanding that your clients could privately fund ATF's investigation into their petitions for relief. As explained below, ATF is barred from using private funds for that purpose.

As you correctly stated in your letters, since 1992, Congress in every annual bill appropriating funds for ATF has prohibited ATF from expending any funds to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c) submitted by individuals. *See e.g.* Consolidated Appropriations Act, 2010, Public Law 111-117, December 16, 2009. The United States Supreme Court discussed the appropriation restriction at length when it considered whether the Federal courts had the power to review ATF's inaction on a petition for relief from disabilities in *United States v. Bean*, 537 U.S. 71 (2002). The Court held that ATF's inaction on an application for relief did not amount to an appealable denial of relief.

We understand Congress' explicit restriction on ATF's use of funds to investigate or act upon applications for relief from Federal firearms disabilities from individuals as a clear indication that Congress does not want ATF to act on such applications. If ATF were to investigate and act upon these applications with private funds, ATF's actions would circumvent Congressional intent. Moreover, ATF is prohibited by Federal law from using funds that have not been appropriated to ATF by Congress. Title 31, United States Code, Section 1341, prohibits any officer or employee of the United States Government from "making an expenditure exceeding an amount available in an appropriation..." Since Congress has not appropriated any money for the purpose of investigating and acting on relief petitions, any expenditure of funds for this purpose would violate the law.

Finally, if private individuals were to provide ATF with funds for the purpose of investigating and acting on relief petitions, ATF could not deposit the money into any ATF account. Title 31, United States Code, Section 3302, provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." Thus, any funds so received would have to be deposited into the Government's general fund, which is separate and distinct from ATF's budgetary funds.

We hope this information proves helpful to your clients. Please let me know if we can be of further assistance.

Sincerely yours,

Ernest E. Hickson
Chief of Staff
Public and Governmental Affairs

Exhibit 12

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
U.S. CUSTOM HOUSE, ROOM 607
2ND & CHESTNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

SEP 4 1998

CC:PH-21,705
JKW:emk

Jon Pushinsky, Esquire
1808 Law & Finance Bldg.
429 Fourth Avenue
Pittsburgh, Pennsylvania 15219

Dear Mr. Pushinsky:

You asked if a person who had been involuntarily detained for an emergency mental health examination pursuant to 50 PA. CONS. STAT. § 7302 would be prohibited from possessing firearms under 18 U.S.C. § 922(g)(4). You stated that you believe such a person would not be prohibited. We agree.

Title 18 U.S.C. § 922(g)(4) makes it unlawful for a person who has been committed to a mental institution to possess a firearm. The term "committed to a mental institution" is defined in 27 C.F.R. § 178.11 as follows:

> A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes a commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 178.11, Federal Register, Vol. 62, No. 124, p. 34639. (Emphasis supplied).

Jon Pushinsky, Esquire

A involuntary detention under 50 PA. CONS. STAT. § 7302 does not constitute a commitment to a mental institution within the meaning of 27 C.F.R. § 178.11. Section 7302 provides for temporary emergency measures and as such falls short of the "formal commitment" described in section 178.11. Although section 7302 provides for the immediate medical treatment of person deemed by a physician to require it, the apparent broader purpose of the statute is to enable the authorities to observe the subject and determine their options within a 120 hour period.[1] One option is to make an application to the Court of Common Pleas for extended involuntary emergency treatment pursuant to 50 PA. CONS. STAT. § 7303.

Unlike a person detained pursuant to section 7302, a person facing extended involuntary treatment (up to 20 days) pursuant to section 7303 is afforded a variety of due process rights including counsel, notice, and hearing. Pennsylvania also provides for longer periods of commitment pursuant to 50 PA. CONS. STAT. §§ 7304 and 7305. These sections likewise provide a panoply of due process rights for persons who might be subject to them. In the context of these provisions for formal commitments, the distinction between a detention under section 7302 and a commitment, which would meet the definition in 27 C.F.R. § 178.11, is clearer still.

Given the lack of due process provisions afforded by 50 PA. CONS. STAT. § 7302, the limited duration of a detention pursuant to it, the fact that its apparent primary purpose is to provide mental health officials time to observe a detainee and make an assessment, and the existence of more formal commitment procedures under Pennsylvania law, we conclude that a detention under 50 PA. CONS. STAT. § 7302 does not constitute a commitment for purposes of 18 U.S.C. § 922(g)(4).

---

[1] We note that section 178.11 specifically states that a person in a mental institution for observation has not been committed.

Jon Pushinsky, Esquire

If you have additional questions concerning this matter, please do not hesitate to call ATF Attorney Kevin White at (215) 597-7183.

Sincerely yours,

Lawrence L. Duchnowski
Special Agent in Charge

Exhibit 13

Opening Pandora's Box: The Practical and Legal Dangers of Involuntary Outpatient Commitment

Michael Allen, J.D.
Vicki Fox Smith

Policy makers have recently begun to reconsider involuntary outpatient commitment as a means of enhancing public safety and providing mental health services to people deemed to be noncompliant with treatment. The authors review the therapeutic claims for outpatient commitment and take the position that there is insufficient evidence that it is effective. They offer arguments that outpatient commitment may not improve public safety and may not be more effective than voluntary services. The authors further point out that outpatient commitment may undermine the delivery of voluntary services and may drive consumers away from the mental health system. The authors conclude that outpatient commitment programs are vulnerable to legal challenge because they may depart from established constitutional standards for involuntary treatment. (*Psychiatric Services* 52:342–346, 2001)

A handful of highly publicized violent incidents involving people with mental illnesses has rekindled the debate on involuntary outpatient commitment. Many mental health advocates are seeking new approaches to treating hard-to-serve populations. However, advocates for involuntary treatment have focused on public fears about mental illness and violence (1), which likely increases the stigma felt by people who have been diagnosed as having mental illnesses. Advocates of involuntary treatment have attempted to shift public attention toward mandated treatment strategies and away from voluntary therapeutic models.

We believe there are at least five significant reasons to question the wisdom of outpatient commitment as public policy. First, in our view, there is arguably insufficient evidence that outpatient commitment is effective in improving public safety or treatment compliance or in reducing rehospitalization rates. Second, we believe that these worthy goals could be achieved by providing enhanced and coordinated services and supports, without the potential expense, trauma, and violation of legal rights occasioned by outpatient commitment. Third, unless treatment resources are consistently provided along with outpatient commitment, orders for involuntary treatment may hurt the people most in need of voluntary mental health services and supports by diverting limited resources from proven and successful programs. Fourth, the coercive character of outpatient commitment may actually undermine public safety by alienating people who have mental illnesses from the mental health system. Finally, the ways in which outpatient commitment has been implemented in most states may violate the constitutional right to control one's own treatment decisions.

In this paper we describe current involuntary outpatient commitment practices and outline reasons why outpatient commitment will not achieve its objectives. We also review its legal validity.

Definitions and descriptions

Outpatient commitment is a mechanism used to compel a person with mental illness to comply with psychotropic drug and treatment orders as a condition of living in the community. If prescribed in a treatment plan, outpatient commitment may require that a person participate in full-day treatment programs, undergo urine and blood tests, frequently attend meetings of addiction self-help groups, enter psychotherapy with a particular therapist, or reside in a supervised living situation (2). In many states, orders may be extended for prolonged periods, without clear criteria for ending the order (3).

Outpatient commitment is not typically used for people who are currently dangerous; such individuals are generally held in inpatient settings. Nor does it seek to protect those who are currently incompetent to make treatment decisions (4,5). Rather, it seeks to override the expressed wishes of a legally competent person who is thought to have some potential to become dangerous or gravely disabled in the future.

***Mr. Allen** is senior staff attorney at the Bazelon Center for Mental Health Law, 1101 15th Street, N.W., Suite 1212, Washington, D.C. 20005-5002 (e-mail, michaela@bazelon.org). **Ms. Smith** is affiliated with MadNation, an organization of people working together for social justice and human rights in mental health. This paper is part of a special section on outpatient commitment.*

Proponents suggest that outpatient commitment is a kinder and gentler alternative to inpatient commitment, homelessness, and jail or prison (6). They claim that outpatient commitment may decrease threats to autonomy occasioned by involuntary hospitalization and point to evidence that those who may most benefit from its targeted use are subpopulations of individuals with mental illness (7). However, at its core, outpatient commitment requires a person, on pain of entering police custody and undergoing rehospitalization, to comply with the treatment decisions of another person, undermining the fundamental right of a competent, nondangerous person to determine the course of his or her treatment (8). It also appears to violate the constitutional rights to travel, to privacy, to personal dignity, to freedom from restraint and bodily integrity, to freedom of association, and to the free communication of ideas (9).

The first formal outpatient commitment laws were enacted in the early 1980s, and about 40 states now have such laws on their books (3,10). More than half the states invoke the law infrequently (11), in large part because of the reluctance of service providers to participate in coercive treatment and because of a lack of community-based services (12).

Will outpatient commitment achieve its objectives?

It may not improve public safety

The root causes of violence in our society are complex, and many have little to do with mental illness. The public is justified in expecting the criminal justice system to protect it against people who commit violent crimes, whether or not they are mentally ill, and the law has long recognized the legitimacy of removing actively dangerous people from the community and confining them in prisons and jails.

For the small number of people whose mental illness makes them dangerous to themselves or others but who have not committed criminal acts, the law permits state authorities to seek involuntary hospitalization, at least on an emergency basis. So long as a person continues to meet this dangerousness standard, hospital discharge, even with an outpatient commitment order, appears to be clinically and legally irresponsible. It serves neither public safety nor individual rights to have currently dangerous people released into the community.

However, there is limited evidence that outpatient commitment will make either the public or people diagnosed with mental illness any safer. Compared head-to-head with a program of enhanced and coordinated services, outpatient commitment is no more effective in preventing subsequent acts of violence and arrest (13).

Compared head-to-head with a program of enhanced and coordinated services, outpatient commitment is no more effective in preventing subsequent acts of violence and arrest.

In fact, the people whose conduct helped revive the debate about forced treatment would not likely have been candidates for outpatient commitment in many states. They include Andrew Goldstein, who pushed a woman in front of a New York City subway train, and Russell Weston, who shot and killed two guards at the U.S. Capitol. Each was actively seeking treatment and services, and each was repeatedly turned away. Medication nonadherence was alleged to have been a problem in both cases. However, innovative treatment approaches such as peer outreach or intensified outreach efforts are more likely than court orders to successfully engage people alienated from the mental health system. In the cases of Goldstein and Weston, there was little evidence that coerced treatment was needed; in fact, their greatest need was for appropriate services, which have been dramatically underfunded for more than 40 years (14).

The mental health system on its own is ill equipped to enforce compliance with outpatient commitment orders. Building in enforcement, such as police and court resources, may increase the costs of administering already underfunded treatment programs (15). It may also make people with a history of hospitalization wary of contact with the mental health system or frightened to disagree with their doctors or family members, because doctors and family members are empowered under the outpatient commitment laws in many states to secure forced treatment orders against them (2).

It may not be more effective than voluntary services

Policy makers should review the research literature, which shows that outpatient commitment confers no apparent benefit beyond that available through access to effective community services. Researchers in the Bellevue outpatient commitment study, the only controlled study that explicitly provided enhanced community services, concluded that individuals provided with voluntary enhanced community services did just as well as those under commitment orders who had access to the same services (13). The study compared persons subjected to outpatient commitment with those who were offered access to the same intensive services. Researchers found no additional improvement in patient compliance with treatment, no additional increase in continuation of treatment, and no differences in hospitalization rates, lengths of hospital stay, arrest rates, or rates of violent acts.

More recent research by Swartz and colleagues (7,16) in North Carolina found that outpatient commitment had no clear benefit unless it was sustained for at least six months and accompanied by high-intensity community services and supports. The North Carolina investigators also found that

outpatient commitment benefited only a small portion of the population potentially subject to such commitment. Given the differing results of the Bellevue and North Carolina studies, caution should suggest that outpatient commitment be avoided until more definitive studies are available.

A number of other studies frequently cited in support of outpatient commitment have either lacked appropriate control groups (17,18) or have focused on small and poorly described groups of subjects (19). Although numerous other studies have been undertaken, none has documented a clear link between outpatient commitment and positive therapeutic outcomes (20,21).

It may undermine service delivery

Research has shown that enhanced and coordinated mental health services are an effective means of improving outcomes for consumers and for the public. The U.S. Surgeon General (22) recently noted that "the need for coercion should be reduced significantly when adequate services are readily accessible. . . . Randomized clinical trials have shown that psychosocial rehabilitation recipients experience fewer and shorter hospitalizations than comparison groups in traditional outpatient treatment."

Psychosocial rehabilitation programs have demonstrated long-term improvements in the lives of participants. At the end of one ten-year program, 62 to 68 percent of the participants showed no signs of mental illness (23). Other voluntary programs, such as California's Village Integrated Service Agency, have been shown to reduce rehospitalization rates, increase employment income, and reduce stress on family members (24). Greater reliance on peer counseling and self-help groups has led to a dramatic decrease in the number and duration of hospitalizations and to improvement in self-esteem for participants (25,26).

Governmental support for mental health systems is declining in real terms (14). When such systems are required to make services available to people for whom a court has ordered treatment, others may be deprived of effective voluntary services. Every dollar prioritized for coerced treatment is a dollar that is not available to pay for effective voluntary services, such as peer support, outreach, adequate housing, jobs programs, and rehabilitation.

It may drive consumers away

Although informal coercion by family members, case managers, and others may overcome some consumers' reticence about getting treatment (27), legal coercion in the form of court orders for outpatient commitment may have the unintended consequence of driving many consumers away from the mental health system. Seeking to avoid both coercive practices and the stigma attached to mental illnesses, many consumers may not seek basic services and supports until emergency circumstances arise and hospitalization becomes necessary.

We have the technology to provide essential services and supports, even to the hardest-to-reach people, but we have failed to fund the effort to do so.

The literature suggests that effective mental health treatment is based on a therapeutic alliance between the professional and the consumer (28–31) and that the right to refuse unwanted treatment bolsters this alliance by assuring patients that they have input into their treatment (32, 33). The right to refuse unwanted treatment can be critical for people who have previously been stripped of significant autonomy through the involuntary commitment process (34) —people who, by virtue of their past hospitalizations, may now be subject to outpatient commitment. By its very nature, outpatient commitment may undermine the treatment alliance and increase consumers' aversion to voluntary involvement with services (35).

Involuntary mental health treatment of any kind can also undermine the ultimate long-term goal of patient independence. Research has shown that many mentally ill homeless individuals have opted out of the mental health system after being forcibly medicated. Some of these individuals choose life in the streets rather than institutionalization, partly to avoid compulsory administration of psychotropic medications (36).

Coerced treatment may ensure compliance while the individual is under a court order. However, it may also prevent the formation of patterns of behavior that will lead the individual to voluntarily seek out and actively participate in treatment once the order has expired. One study in New York found that patients who exercised their right to refuse certain treatments and to participate assertively in their own treatment were more likely to succeed outside the hospital environment as independent members of the community (37).

Questionable legal validity

Beyond their practical limitations, outpatient commitment statutes such as "Kendra's Law" in New York (2) may violate long-established constitutional protections against forced treatment. However, a recent challenge to the constitutionality of outpatient commitment was rejected by a King's County, New York, trial court (38). Since the U.S. Supreme Court established requirements for involuntary treatment nearly a quarter century ago (39), courts and legislatures have established stringent standards for commitment, requiring proof of a mental disability that poses a substantial threat of serious harm to oneself or others (40). According to some commentators, involuntary commitment is a "massive curtailment of liberty" (41), should be limited to emergency circumstances (28), and cannot be justified on an indefinite basis (42).

The law recognizes a strong presumption of competence to make treatment decisions and has established a person's right to make his or her own medical decisions as one that is fundamental and should not be interfered with absent a compelling state interest (8). Although restraining a currently dangerous person may be permissible, a mere desire to prevent future deterioration absent dangerousness has generally not been found to be a compelling interest (43). When a person is not dangerous and when no court has made a formal finding of incompetence, the government cannot substitute its judgment about mental health treatment (4). Risk assessment tools have improved dramatically in the past 15 years (44,45); however, they still lack the level of precision required to abridge the fundamental right of a person to control his or her treatment.

Most people with mental illnesses are never involved in violent acts (46) and are capable of weighing treatment options and making rational and valuable contributions to their own treatment (47). Despite alterations in thinking and mood, people with psychiatric disorders are not automatically less capable than others of making health care decisions (48–51).

Most courts have made it clear that states have no legal basis to force a competent person to take psychotropic or other drugs against his or her will absent an emergency (52,53). This doctrine would appear to extend to outpatient commitment and would preclude court enforcement of an order requiring medication adherence as a condition for remaining in the community.

Advocates for legally mandated treatment have sought to avoid this legal conundrum by suggesting that nearly half of the persons with schizophrenia or manic depression, although legally competent to make treatment decisions, lack the insight necessary to recognize their need for treatment (6). However, the construct of insight lacks specificity and legal meaning. Its use beclouds accepted legal norms, which limit the use of involuntary treatment for competent individuals.

Conclusions

Even if outpatient commitment were found to "work" for a small population, the question remains of whether it is the most effective means of engaging that population and providing essential services and supports in the community. We have the technology to provide essential services and supports, even to the hardest-to-reach people, but we have failed to fund the effort to do so. Outpatient commitment appears to be a short-sighted solution that may over time also undermine long-term treatment alliances. We believe efforts are far better directed toward fundamentally improving our public mental health system. ♦

References

1. Torrey EF, Zdanowicz M: A right to mental illness? New York Post, May 28, 1999
2. Kendra's Law, New York Mental Hygiene Law, sect 9.60, 1999
3. Bazelon Center for Mental Health Law, Summary of Statutes on Involuntary Outpatient Commitment (1999). Available at www.bazelon.org/iocchart.html
4. Schwartz SJ, Costanzo CE: Compelling treatment in the community: distorted doctrines and violated values. Loyola of Los Angeles Law Review 20:1329–1429, 1987
5. Stefan S: Preventive commitment: the concept and its pitfalls. Mental and Physical Disability Law Reporter 11:288–302, 1989
6. Treatment Advocacy Center, General Resources Index Page: Fact Sheets (2000). Available at www.psychlaws.org/general resources/index.htm
7. Swartz MS, Swanson JW, Hiday VA, et al: A randomized controlled trial of outpatient commitment in North Carolina. Psychiatric Services 52:325–329, 2001
8. Rivers v Katz, 67 NY 2d 485, 1986
9. Bee v Greaves, 744 F 2d 1387, 10th Cir 1984
10. Torrey EF, Kaplan RJ: A national survey of the use of outpatient commitment. Psychiatric Services 46:778–784, 1995
11. National Association of State Mental Health Program Directors Research Institute: SMHA Profiling System, FY 1996. Available at http://www.nasmhpd.org/nri/invol_2a.htm
12. Starrett D, Miller RD, Bloom J, et al: Task Force Report on Involuntary Outpatient Treatment. Washington, DC, American Psychiatric Association, 1987
13. Steadman HJ, Gounis K, Dennis D, et al: Assessing the New York City involuntary outpatient commitment pilot program. Psychiatric Services 52:330–336, 2001
14. Bazelon Center for Mental Health Law: Under Court Order: What the Community Integration Mandate Means for People With Mental Illnesses, 1999. Available at www.bazelon.org/lcruling.html
15. Hiday VA: Involuntary commitment as a psychiatric technology. International Journal of Technology Assessment in Health Care 12:585–598, 1996
16. Swartz MS, Swanson JW, Wagner HR, et al: Can involuntary outpatient commitment reduce hospital recidivism? Findings from a randomized trial with severely mentally ill individuals. American Journal of Psychiatry 156:1968–1975, 1999
17. Munetz MR, Grande T, Kleist J, et al: The effectiveness of outpatient civil commitment. Psychiatric Services 47:1251–1253, 1996
18. Fernandez GA, Nygard S: Impact of involuntary outpatient commitment on revolving-door syndrome in North Carolina. Hospital and Community Psychiatry 41:1001–1004, 1990
19. Zanni G, deVeau L: Inpatient stays before and after outpatient commitment. Hospital and Community Psychiatry 37: 941–942, 1986
20. Maloy KA: Critiquing the Empirical Evidence: Does Involuntary Outpatient Commitment Work? Washington, DC, Mental Health Policy Resource Center, 1992
21. Bazelon Center for Mental Health Law: Studies of Outpatient Commitment Are Misused (2000). Available at www.bazelon.org/opcstud.html
22. Mental Health: A Report of the Surgeon General. Washington, DC, Department of Health and Human Services, 2000
23. Harding CM, Brooks GW, Ashikaga T, et al: The Vermont longitudinal study of persons with severe mental illness: I. methodology, study sample, and overall status 32 years later. American Journal of Psychiatry 144: 718–726, 1987
24. Village Integrated Service Agency: Outcome Studies, 1999. Available at www.village-isa.org/outcomes/outcome_studies.htm
25. Galanter M: Zealous self-help groups as adjuncts to psychiatric treatment: a study of Recovery, Inc. American Journal of Psychiatry 145:1248–1253, 1988
26. Kurtz LF: Mutual aid for effective disorders: the manic depressive and depressive association. American Journal of Orthopsychiatry 581:152–155, 1988
27. Lovell AM: Coercion and social control: a framework for research on aggressive strategies in community mental health, in Coercion and Aggressive Community Treatment: A New Frontier in Mental Health Law. Edited by Dennis DL, Monahan J. New York, Plenum, 1996
28. Winick BJ: Mandatory treatment: an examination of therapeutic jurisprudence. New Directions for Mental Health Services, no 75:27–34, 1997
29. Gutheil TG, Shapiro R, St Clair RL: Legal guardianship in drug refusal: an illusory so-

lution. American Journal of Psychiatry 137: 347–352, 1980

30. Safran JD, Muran JC: The therapeutic alliance: introduction. Journal of Clinical Psychology 56(suppl 2):159–161, 2000
31. Aquila R, Weiden PJ, Emanuel M: Compliance and the rehabilitation alliance. Journal of Clinical Psychiatry 60(suppl 19):23–27, 1999
32. Appelbaum PS, Gutheil TG: Clinical aspects of treatment refusal. Comprehensive Psychiatry 23:560–566, 1982
33. Melamed Y, Szor H: The therapist and the patient: coping with noncompliance. Comprehensive Psychiatry 40:392–400, 1999
34. Eisenberg GC, Barnes BM, Gutheil TG: Involuntary commitment and the treatment process: a clinical perspective. Bulletin of the American Academy of Psychiatry and the Law 8:44–51, 1980
35. Campbell J, Schraiber R: In Pursuit of Wellness: The Well-Being Project. Sacramento, California Department of Mental Health, 1989
36. Fischer PJ, Breakey WR: Homelessness and mental health: an overview. International Journal of Mental Health 14:6–31, 1985–1986
37. Hassenfeld IN, Grumet B: A study of the right to refuse treatment. Bulletin of the American Academy of Psychiatry and the Law 12:72–79, 1984
38. In re Urcuyo, 2000 NY Misc LEXIS 417 (NY Sup Ct Sept 20, 2000)
39. O'Connor v Donaldson, 422 US 563 (1975)
40. Lessard v Schmidt, 349 F Supp 1078 (ED Wis 1972)
41. Humphrey v Cady, 405 US 504, 509 (1972)
42. Rubenstein LS: APA's model law: hurting the people it seeks to help. Hospital and Community Psychiatry 36:257, 1985
43. Addington v Texas, 441 US 418 (1979)
44. Monahan J: Clinical and actuarial predictions of violence, in Modern Scientific Evidence: The Law and Science of Expert Testimony. Edited by Faigman D, Kaye D, Saks M. New York, West, 1997
45. Ennis B, Litwack T: Psychiatry and the presumption of expertise: flipping coins in the courtroom. California Law Review 62:693–734, 1974
46. Steadman HJ, Mulvey EP, Monahan J, et al: Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods. Archives of General Psychiatry 55:393–401, 1998
47. Grisso T, Appelbaum PS: Assessing Competence to Consent to Treatment: A Guide for Physicians and Other Health Professionals. New York, Oxford University Press, 1998
48. McKinnon K, Cournos F, Stanley B: Rivers in practice: clinicians' assessments of patients' decision-making capacity. Hospital and Community Psychiatry 40:1159–1162, 1989
49. Grisso T, Appelbaum PS, Hill-Fotouhi C: The MacCAT-T: a clinical tool to assess patients' capacities to make treatment decisions. Psychiatric Services 48:1415–1419, 1997
50. Appelbaum PS, Grisso T: The MacArthur treatment competence study: I. mental illness and competence to consent to treatment. Law and Human Behavior 19:105–109, 1995
51. American Psychiatric Association Practice Guideline for the Treatment of Patients With Schizophrenia. American Journal of Psychiatry 154(Apr suppl):1–63, 1997
52. Lappe v Losffelholz, 815 F 2d 1173 (8th Cir 1987)
53. Slobogin C: Involuntary community treatment of people who are violent and mentally ill: a legal analysis. Hospital and Community Psychiatry 45:685–689, 1994

Exhibit 14

Developments in Mental Health Law

The Institute of Law, Psychiatry & Public Policy — The University of Virginia

Volume 21, Number 1 (December 2001)

Mandated Community Treatment: Beyond Outpatient Commitment

John Monahan, Ph.D., Richard J. Bonnie, LL.B., Paul S. Appelbaum, M.D., Pamela S. Hyde, J.D., Henry J. Steadman, Ph.D., and Marvin S. Swartz, M.D.*

Mandating adherence to mental health treatment in the community through outpatient commitment is among the most contested issues in mental health law. Outpatient commitment refers to a court order that directs a person who has a serious mental disorder to adhere to a prescribed community treatment plan and to be hospitalized for failure to do so if the criteria for involuntary hospitalization are met. Although 39 U.S. jurisdictions have statutes that nominally authorize outpatient commitment, until recently few states made substantial use of these laws. With the 1999 enactment in New York State of "Kendra's Law," nationwide interest in -- and controversy over—outpatient commitment has soared.

Also in this issue:

* Dr. Monahan and Mr. Bonnie are affiliated with the University of Virginia School of Law, 580 Massie Road, Charlottesville, Virginia. Dr. Appelbaum is with the department of psychiatry of the University of Massachusetts Medical School in Worcester. Ms. Hyde is with the Technical Assistance Collaborative in Boston. Dr. Steadman is with Policy Research Associates in Delmar, New York. Dr. Swartz is with the department of psychiatry at Duke University Medical Center in Durham, North Carolina.

In many states a take-no-prisoners battle is under way between advocates of outpatient commitment -- who call this approach assisted outpatient treatment -- and its opponents -- who use the term "leash laws." Much of the strident policy debate on outpatient commitment treats this approach as if it were simply an extension of inpatient commitment, and places outpatient commitment within the same conceptual framework that has historically been used to analyze commitment to a mental hospital. In fact, however, outpatient commitment is only one of a growing array of legal tools that is being used to mandate treatment adherence in the community. Only in relation to these other forms of mandated treatment in the open community, rather than to the body of law and policy developed for confinement in an inpatient facility, can outpatient commitment be adequately understood.

The purpose of this article is to inductively elaborate a new and broader conceptual framework for the various forms of mandated community treatment. First, we review what is known about the variety of influences that are brought to bear on a patient's choice of whether to accept mental health services in the community. Second, we discuss what needs to be known about these various forms of mandated treatment so that their potential role in mental health law and policy can be properly assessed.

People who have severe and chronic mental disorders often interact with the social welfare system and with the judicial system. In both of these contexts, such individuals face loss of liberty, property, or other valued interests if they fail to adhere to prescribed

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Edward Strickler, Jr., M.A.

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treatment. The "leverage"[1] that is applied by these systems is typically accompanied by assertive community treatment, a mode of service delivery that itself blurs the distinction between voluntary and coerced treatment.[2] Facing such pervasive constraints, patients may attempt to maximize their own control.

MANDATED TREATMENT INVOLVING THE SOCIAL WELFARE SYSTEM

People with mental disabilities may qualify under federal or state laws to receive monetary payments and subsidized housing. It appears that both of these benefits are being used as leverage to ensure that beneficiaries adhere to mental health treatment in the community.

Money as leverage

A recent survey found that 70% of the U.S. population believes that people with diagnoses of schizophrenia are "not very able" or "not able at all" to manage their money[3]. Such beliefs underlie the inclusion of people who have mental disorders in programs that regulate the disbursement of social welfare benefits. For example, recipients of Supplemental Security Income or Social Security Disability Insurance may have a representative payee appointed to receive their checks. Representative payees can ensure that the individual's basic needs are met by directly paying for rent and food. Of the 1.2 million people who receive disability benefits for a mental disorder, 45% have a representative payee.[4]

Representative payees are usually appointed for people who have schizophrenia, people with a co-occurring substance use disorder, those with a history of mishandling money, or homeless persons.[5] The representative payees are usually family members, but organizations often serve this function.[6]

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[1] E. Susser, *"Coercion" and leverage in clinical outreach,* COERCION AND AGGRESSIVE COMMUNITY TREATMENT. Edited by D. Dennis, John Monahan. New York, Plenum. (1996).

[2] M. Neale, and R. Rosenheck, *Therapeutic limit setting in an assertive community treatment program,* PSYCHIATRIC SERVICES, *51:499*–505, (2000).

[3] B. Pescosolido, J. Monahan, B. Link B, *et al., The public's view of the competence, dangerousness, and need for legal coercion among persons with mental illness,* AMERICAN JOURNAL OF PUBLIC HEALTH, *89:1339*–1345 (1999).

[4] Personal communication to L. Kennedy, (2000).

[5] K.J. Conrad, M.D. Matters, P. Hanrahan, et al. ,*Representative payee for individuals with severe mental illness at community counseling centers of Chicago,* ALCOHOLISM TREATMENT QUARTERLY, *17:169*–186 (1999); M.I. Rosen, and R. Rosenheck, *Substance use and assignment of representative payees*, PSYCHIATRIC SERVICES, *50:95*–98 (1999).

[6] S.H. Cogswell, ENTITLEMENTS, PAYEES, AND COERCION, IN COERCION AND AGGRESSIVE COMMUNITY TREATMENT.

Representative payee programs have been found to reduce the number of hospital days,[7] to increase adherence to outpatient treatment,[8] and to decrease homelessness.[9] Patient satisfaction with these programs tends to be high.[10]

A study that surveyed representative payee programs of mental health centers in Illinois found that disbursement was at least "moderately" contingent on avoidance of substance abuse in 71% of the programs — and was "tightly" linked in 31% of programs — whereas receipt of benefits was at least moderately contingent on adherence to mental health treatment in 55% of the programs and tightly linked in 17% of the programs.[11] Similar results were found in Washington State.[12]

Thus disbursement of social welfare benefits to people who have a mental disorder through a representative payee is used frequently and appears to be associated with a variety of positive outcomes. In a majority of representative payee programs, some relationship exists between treatment adherence and receipt of funds; in a substantial minority of programs this relationship approaches a *quid pro quo* status.

Housing as leverage

A recent survey found that a person with a mental disorder who is living solely on disability benefits would not be able to afford the fair market rent for a "modest" efficiency apartment in any area of the United States.[13] To avoid homelessness in this population, the

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Edited by D. Dennis, and J. Monahan. New York, Plenum (1996).

[7] D.J. Luchins, P. Hanrahan, K.J. Conrad KJ, *et al. An agency-based representative payee program and improved community tenure of persons with mental illness,* PSYCHIATRIC SERVICES, *49:1218*–1222 (1998).

[8] R.K. Ries, and K.A. Comtois, *Managing disability benefits as part of treatment for persons with severe mental illness and comorbid drug/alcohol disorders: a comparative study of payee and non-payee participants.* AMERICAN JOURNAL OF ADDICTIONS *6:330*–338 (1997).

[9] R. Rosenheck, J. Lam, and F. Randolph, *Impact of representative payees on substance use by homeless persons with serious mental illness.* PSYCHIATRIC SERVICES, *48:800*–806 (1997).

[10] L. Dixon , J. Turner, N. Krauss, *et al., Case managers' and clients' perspectives on a representative payee program.* PSYCHIATRIC SERVICES *50:781*–786 (1999).

[11] P. Hanrahan, D.J. Luchins, C. Savage, *et al.,* REPRESENTATIVE PAYEE PROGRAMS FOR MENTALLY ILL PERSONS IN ILLINOIS: CENSUS SURVEY. Presented at the Institute on Psychiatric Services, New Orleans, Oct 29 to Nov 2, 1999.

[12] R.K. Ries, and D.G. Dyck. *Representative payee practices of community mental health centers in Washington State.* PSYCHIATRIC SERVICES *48:811*–814 (1997).

[13] E. Edgar, A. O'Hara, B. Smith, *et al.,* PRICED OUT IN 1998: CRISIS FOR PEOPLE WITH DISABILITIES. Boston, Technical Assistance Collaborative (1999).

government provides several housing options in the community for people with mental disorders that are not available to other citizens [implies must be a citizen to receive these benefits]. Some of these programs are tenant based and provide vouchers for the difference between the market rate for housing and what the individual can afford to pay. Other programs are landlord based and offer incentives for landlords to rent to people with mental disorders at below-market rates.

No one questions whether landlords should be able to impose generally applicable requirements—such as not disturbing neighbors—on these tenants. The issue is whether landlords legally can, and whether they in fact do impose additional requirements on tenants who have mental disorders and whether such requirements may pertain to treatment.

Many agencies that manage housing programs for people with mental disorders appear to consider the programs primarily as residential treatment and only incidentally as lodging.[14] It is clear that landlords sometimes try to use housing as leverage. For example, the standard lease used by one provider of supported housing reads, "Refusing to continue with mental health treatment means that I do not believe I need mental health services. . . . I understand that since I am no longer a consumer of mental health services, it is expected that I will find alternative housing. I understand that if I do not, I may face eviction".[15]

Importantly, some statutes may prohibit the use of housing as leverage to ensure treatment adherence, others do not. For example, the federal statute authorizing the Shelter Plus Care program explicitly states, "In addition to standard lease provisions, the occupancy agreement may also include a provision requiring the participant to take part in the supportive services provided through the program as a condition of continued occupancy".[16] The statute defines supportive services as including mental health treatment, alcohol, and other substance abuse services.

Although some patient advocates decry the linking of housing and services,[17] a study of 118 people with mental disorders who were living in public shelters in Boston reported that 92% of these individuals wanted to move out of the shelter and into permanent housing, "even if they were required to continue taking psychotropic medication" as a

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[14] H. Korman, D. Engster, and B. Milstein. HOUSING AS A TOOL OF COERCION, IN COERCION AND AGGRESSIVE COMMUNITY TREATMENT. Edited by D. Dennis, and J. Monahan, New York, Plenum (1996).

[15] M. Allen. *Separate and unequal: the struggle of tenants with mental illness to maintain housing.* CLEARINGHOUSE REVIEW, *30:720*–739, (1996).

[16] 24 C.F.R. 582.315(b).

[17] NATIONAL COUNCIL ON DISABILITIES: FROM PRIVILEGES TO RIGHTS: PEOPLE LABELED WITH PSYCHIATRIC DISABILITIES SPEAK FOR THEMSELVES (2000). Available at http://www.ncd.gov/newsroom/publications/privileges.html.

condition of securing the housing.[18]

Thus, housing is sometimes used formally as leverage to ensure adherence to mental health treatment in the community and, much more often, may be used informally to the same end. Many people who have mental disorders appear to be prepared to accept services if such a trade-off is required in order for them to obtain the housing they want.

MANDATED TREATMENT INVOLVING THE JUDICIAL SYSTEM

People who have severe mental illness are sometimes ordered to comply with treatment by judges or other decision makers in the legal system, such as probation officers. Even in the absence of a judicial order, people may agree to adhere to treatment requirements to avoid an unfavorable judicial order, such as incarceration or civil commitment to an inpatient facility. In these contexts, judicial authority to impose sanctions and curtail freedom provides the leverage for inducing treatment adherence in the community.

Avoidance of jail as leverage

Although informal procedures have long existed for dealing with mentally ill defendants who are charged with minor crimes,[19] the important role that judges play in this area is now acknowledged with much less hesitation than it was in the past. In fact, a new type of criminal court -- called, appropriately, a mental health court -- has been developed that makes explicit the link between sanctioning and treatment in the community.

Adapted from the drug court model and often explicitly premised on notions of "therapeutic jurisprudence",[20] mental health courts give prominence to the role of the judge, who "plays a hands-on, therapeutically oriented, and directive role at the center of the treatment process".[21] In a mental health court, cases are heard on their own calendar, separate from other cases, and are handled by a specialized team of legal and mental health professionals. Emphasis is placed on implementing new working relationships among the criminal justice, mental health, and social welfare systems, particularly in supervising the defendant in the community.

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[18] R.K. Schutt, and S.M. Goldfinger. *Housing preferences and perceptions of health and functioning among homeless mentally ill persons.* PSYCHIATRIC SERVICES, *47:381*–386 (1996).

[19] A. Matthews, MENTAL DISABILITY AND THE CRIMINAL LAW. Chicago, American Bar Foundation (1970).

[20] D.B. Wexler and B.J. Winick. LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE. Durham, NC, Carolina Academic Press (1996); A. Watson, P. Hanrahan, D. Luchins, *et al., Mental health courts and the complex issue of mentally ill offenders.* PSYCHIATRIC SERVICES *52:477*–481, 2001

[21] J. Goldkamp, C. Irons-Guynn. *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernadino, and Anchorage. Philadelphia,* CRIME AND JUSTICE RESEARCH INSTITUTE (2000).

About a dozen courts now refer to themselves as mental health courts.[22] A bill to create 100 demonstration mental health courts across the country by 2004 (S.B. 1865) was signed into federal law in November 2000, although a spending appropriation has not been enacted. There appears to be no lack of demand for these new courts. Of defendants who are given the choice of having their case heard by a mental health court or by a regular criminal court, 95% choose the mental health court.[23]

Goldkamp and Irons-Guynn[24] found many differences among the four pioneering courts that they studied, so much so that it is clear that there is no single model for what constitutes a mental health court.[25] These authors also addressed the extent to which the avoidance of jail is used as leverage:

> Some observers see special courts as vehicles for 'coerced treatment,' a term with favorable and unfavorable connotations. The favorable use of the term suggests that the judicial role and application of sanctions and rewards contribute valuable tools for keeping participants in treatment and increasing the chances for successful outcomes. The unfavorable reference alludes to the problems associated with forcing treatment upon individuals who have not voluntarily consented, from a due process perspective and from the perspective that treatment cannot be effective unless it is wanted.[26]

Mental health courts, in one of several forms, are likely to be established in an increasing number of communities. Where they exist, they seem to attract a large caseload of misdemeanor defendants with mental disorders who, when given the choice, prefer to receive mental health treatment in the community rather than to be incarcerated.

Avoidance of hospitalization as leverage

There are three types of outpatient commitment.[27] The first is a variant of conditional release from a hospital: a patient is discharged on the condition that he or she continues treatment in the

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[22] J. Petrila, N. Poythress, A, McGaha, *et al., Preliminary observations from an evaluation of the Broward County Florida Mental Health Court.* COURT REVIEW, *37(4):*14–22 (2001).

[23] *Id.*

[24] *Id.* at n.21.

[25] H.J. Steadman, S. Davidson, and C. Brown, *Mental health courts: their promise and unanswered questions.* PSYCHIATRIC SERVICES 52:457–458, 2001; A. Watson, D. Luchins, P. Hanrahan, *et al., Mental health courts: promises and limitations.* JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, *28:476–*482 (2000).

[26] *Id.* at 24.

[27] J.D. Gerbasi, R.B. Bonnie, and R.L. Binder, *Resource document on mandatory outpatient treatment.* JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW *28:127–*144 (2000).

community. The second type is an alternative to hospitalization for people who meet the legal criteria for inpatient treatment: they are essentially given the choice between receiving treatment in the community and receiving treatment in the hospital. The third type of outpatient commitment is preventive: people who do not currently meet the legal criteria for inpatient hospitalization but who are believed to be at risk of decompensation to the point that they will qualify for hospitalization if left untreated are ordered to accept treatment in the community.

Two randomized controlled trials of outpatient commitment were recently published. The first -- the Duke mental health study[28] -- followed patients who had been involuntarily hospitalized and given a court order for mandatory community treatment after discharge. Patients who were randomly assigned to the control group were released from the court order. For patients who were randomly assigned to the experimental group, the outpatient commitment order remained in effect for various periods, depending on whether a psychiatrist and the court believed that the patient continued to meet the legal criteria for outpatient commitment.

In bivariate analyses, the control and outpatient commitment groups did not differ significantly in hospital outcomes, although repeated-measures multivariate analyses showed that the likelihood of readmission was lower for the outpatient commitment group.[29] However, when the data from the experimental group were disaggregated according to whether the patients had been subject to outpatient commitment for at least six months or for less than six months, strong differences emerged. The patients who had been under outpatient commitment for a sustained period had significantly fewer hospital readmissions and hospital days than control subjects.

Additional analyses showed that sustained outpatient commitment was associated with fewer hospital readmissions only when it was combined with a higher intensity of outpatient services—averaging approximately seven service events per month. The prevalence of violence toward other persons during the year after discharge was also significantly lower among the patients who had been subject to outpatient commitment for at least six months than among the control subjects and those who had received less than six months of outpatient commitment.[30] Extended outpatient commitment was also associated with a lower rate of criminal victimization and arrest.[31]

The second randomized controlled

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[28] M.S. Swartz, J.W. Swanson, R.R. Wagner, *et al., Can involuntary outpatient commitment reduce hospital recidivism? Findings from a randomized trial in severely mentally ill individuals.* AMERICAN JOURNAL OF PSYCHIATRY *156:1968*–1975 (1999).

[29] *Id.*

[30] J.W. Swanson, M.S. Swartz, R. Borum, *et al., Involuntary outpatient commitment and reduction of violent behavior in persons with severe mental illness.* BRITISH JOURNAL OF PSYCHIATRY *176:324*–331 (2000).

trial -- the Bellevue study[32] -- also followed-up patients who had been hospitalized and given a court order for mandatory community treatment after discharge. A court-ordered outpatient commitment group was compared with a control group over a one-year follow-up period. Both groups received a package of enhanced services that included intensive community treatment.

No significant differences in number of hospitalizations, arrests or in other outcome measures were found between the control and experimental groups. A significantly smaller proportion of each group was hospitalized during the follow-up year than had been hospitalized during the previous year. The researchers concluded that enhanced services made a positive difference in the post-discharge experiences of both groups but that "the court order itself had no discernible added value in producing better outcomes."

Thus it appears that the results of the only two randomized controlled trials of outpatient commitment agree that improving the availability and quality of mental health services leads to positive outcomes, but there is conflict about the value added by legally mandating patients' participation in those services. Both of these studies had methodologic limitations that make it difficult to resolve this conflict.[33]

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[32] *Id.* at 25.

[33] P. Appelbaum. *Thinking carefully about outpatient commitment.* PSYCHIATRIC SERVICES *52:347*–350 (2001); S. Ridgley, R. Borum, and J. Petrila, THE EFFECTIVENESS OF INVOLUNTARY OUTPATIENT TREATMENT: EMPIRICAL EVIDENCE AND THE EXPERIENCE OF EIGHT STATES. Santa Monica, Calif, Rand (2001).

ADVANCE DIRECTIVES

Faced with the possibility of undergoing mandated treatment if their condition deteriorates, patients may choose to specify their treatment preferences before a disabling crisis actually occurs.[34] Some patient advocates see the use of an advance directive as an antidote to mandatory treatment orders. Others have touted the value of an advance directive as a means of binding oneself to future treatment -- "self-mandated treatment" -- by authorizing caretakers to override anticipated objections on the part of the patient. As one commentator stated, "The advent of advance directives for psychiatric care offers an unprecedented opportunity to reconcile, or at least accommodate, the opposing values represented by proponents of involuntary interventions, on the one hand, and by civil libertarians, on the other".[35]

Under the Patient Self-Determination Act of 1991, any hospital that receives federal funds must notify admitted patients of their right to create

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[34] D.S. Srebnik, and J.Q. La Fond, *Advance directives for mental health treatment.* PSYCHIATRIC SERVICES *50:919*–925 (1999).

[35] E. Gallagher, *Advance directives for psychiatric care: a theoretical and practical overview for legal professionals.* PSYCHOLOGY, PUBLIC POLICY, AND LAW *4:746*–787 (1998).

an advance directive. Usually advance directives pertain to medical care at the end of life. However, the 1991 act has given impetus to the creation of advance directives to promote self-determination during periods in which an individual is rendered incapacitated as a result of a mental disorder. Mental health advance directives, first proposed two decades ago as "psychiatric wills",[36] are permitted in all states, and thirteen states have enacted specific statutes that authorize them.[37]

Medical and mental health advance directives differ in an important experiential respect: because end-of-life care typically occurs only once, the individual is likely to have had little direct experience with being unable to make treatment choices. In contrast, because of the episodic nature of mental illness, most individuals who have a severe mental disorder can be expected to accumulate experience on how best to manage the symptoms that impair their decision-making abilities.[38]

Mental health advance directives take two basic forms. An instructional directive tells treatment providers what to do about treatment in the event that the individual becomes incapacitated -- for example, which treatments the individual wants to receive or which facilities the individual wants to avoid.[39] On the other hand, a proxy directive gives treatment providers the name of an individual whom the patient has designated to make treatment decisions in the event that he or she becomes unable to do so. Both types of directive can be combined in the same instrument.[40]

Surveys conducted in the mid-1990s found that only a small percentage of patients with a mental disorder had completed a mental health advance directive.[41] However, with concerted educational efforts, this situation could change radically. One study surveyed people with severe mental disorders who were receiving treatment in public mental health programs and informed them of their right to prepare a mental health

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[36] P. Appelbaum, *Michigan's sensible "living will" [letter].* NEW ENGLAND JOURNAL OF MEDICINE *301:788* (1979).

[37] R. Fleischner, *Advance directives for mental health care: an analysis of state statutes.* PSYCHOLOGY, PUBLIC POLICY, AND LAW *4:788*–804 (1998).

[38] P. Appelbaum, *Advance directives for psychiatric treatment.* HOSPITAL AND COMMUNITY PSYCHIATRY *42:983*–984 (1991); P.F. Stavis, *The Nexum: a modest proposal for self-guardianship by contract.* JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY *16:1*–95 (1999).

[39] J.W. Swanson, M. Tepper, P. Backlar, *et al., Psychiatric advance directives: an alternative to coercive treatment?* PSYCHIATRY *63:160*–172 (2000).

[40] B.J. Winick, *Advance directive instruments for those with mental illness.* UNIVERSITY OF MIAMI LAW REVIEW *51:57*–95 (1996).

[41] P. Backlar, and B.H. McFarland, *A survey on use of advance directives for mental health treatment in Oregon.* PSYCHIATRIC SERVICES *47:1387*–1389 (1996).

advance directive.[42] Thirty of the forty patients who were surveyed chose to prepare a directive; twenty-two of these chose to designate a proxy decision maker, usually a family member.

None of the patients used the directive to refuse all treatment, although many used the directive to refuse some treatments -- for example, electroconvulsive therapy. Almost all patients were satisfied with their advance directive. As one respondent stated, "It is a document that is my voice when I am not able to be." However, seventeen of twenty-one treatment providers surveyed expressed concern about how the directive would be implemented. They had little confidence that the advance directive would be accessible to clinicians in the event of a crisis.

Mental health advance directives might have a much broader application if they were more aggressively "marketed" to consumers, families, and providers. Technology may play a large role in making advance directives accessible. The recent development of a CD-ROM titled AD-Maker[43] and the online psychiatric advance directives now available from the Bazelon Center for Mental Health Law and from the Advance Directive Training Project may facilitate the use of these instruments. In this regard, New York State has embarked on a one million dollar educational campaign that has distributed 20,000 copies of educational materials on how to complete mental health advance directives.[44]

WHAT WE NEED TO KNOW ABOUT MANDATED COMMUNITY TREATMENT

To evaluate the role that mandated treatment may play in mental health law, we need to know how frequently leverage is used, how the process of applying leverage operates, and the outcomes of leveraged treatment. We also need a sharper understanding of the profound legal, ethical, and political issues that are raised when leverage is used to secure treatment adherence.

Prevalence

Basic descriptive information is lacking for many forms of mandated community treatment. Virtually everything known about a given use of leverage comes from the experience of only one or two states. Part of the reason for this lack of even rudimentary data is that many forms of mandated community treatment have been implemented only recently. However, this state of affairs may also be a reflection of the *sub rosa* quality of many of these arrangements. The use of housing or social welfare benefits as leverage is clearly controversial and subject to legal challenge, and advocates of these practices may consider it

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[42] P. Backlar, B.H. McFarland, J. Swanson, *et al., Opinions about psychiatric advance directives in Oregon. Administration and Policy in Mental Health* (in press).

[43] P. Sherman. *Computer-assisted creation of psychiatric advance directives.* COMMUNITY MENTAL HEALTH JOURNAL *34:351*–362 (1998).

[44] Personal communication from M. Shaw (2001).

imprudent to bring empirical attention to such leverage.

Descriptive information is needed not only about the different types of mandated treatment but also about the joint use of two or more forms of leverage. Data on the overlap among the various forms of mandated community treatment described are essential for determining the prevalence of the use of some form of leverage to induce people to adhere to mental health treatment recommendations. An analogy may be the treatment of alcoholism, for which it has been stated that treatment adherence is governed by at least one of the "four Ls": liver, lover, livelihood, and the law[45].

Alternatively, rather than a single form of leverage being applied to an individual who is reluctant to adhere to treatment, it may be that several forms of leverage are applied. If one form of leverage appears not to be producing treatment adherence, then another is tried, and then another, until adherence is achieved. To the extent that this leverage substitution occurs, eliminating one form of leverage will only increase reliance on other forms.

Process

The central finding from a series of studies of inpatient hospitalization undertaken as part of the MacArthur coercion study was that

> the amount of coercion experienced is strongly related to a patient's belief about the justice of the process by which he or she was admitted. That is, a patient's beliefs that others acted out of genuine concern, treated the patient respectfully and in good faith, and afforded the patient the chance to tell his or her side of the story, are associated with low levels of experienced coercion.[46]

The authors referred to this process variable as procedural justice. In theory, one might expect that leveraged community treatment would be characterized by much more procedural justice than involuntary inpatient hospitalization, and thus that the people to whom it was applied should experience it as much less "coercive" than hospitalization. For example, financial management by representative payees is designed to be negotiated in order that the patient be involved as much as possible in decisions about how money is to be allocated.

Perhaps the best illustration of active participation by the mentally ill individual is the drafting of a mental health advance directive. Indeed, the very purpose of an advance directive is to memorialize the patient's "voice" while he or she is competent to exercise that

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[45] R. Room, TREATMENT-SEEKING POPULATIONS AND LARGER REALITIES, IN ALCOHOLISM TREATMENT IN TRANSITION. Edited by G. Edwards, and M. Grant. Baltimore, University Park Press (1990).

[46] J. Monahan, C.W. Lidz, S.K. Hoge, *et al., Coercion in the provision of mental health services: the MacArthur studies,* in "Research in Community and Mental Health," vol. 10: COERCION IN MENTAL HEALTH SERVICES: INTERNATIONAL PERSPECTIVES. Edited by J. Morrissey, J. Monahan, Stamford, Conn, JAI (1999).

voice.[47] If the results of the MacArthur coercion study are generalizable to the community, such practices should greatly reduce the individual's experience of coercion. Whether they actually do so is yet to be determined.

OUTCOMES

Outcomes For People Who Have Mental Disorders.

The proponents of mandated treatment believe that without leverage, many individuals would not adhere to mental health treatment[48] and thus would not achieve positive therapeutic outcomes. However, it is not yet clear that services that are effective when received voluntarily produce the same outcomes when they are received under duress.

Even if mandated treatment were shown to be effective, it is still not clear whether other, nonmandated treatment options could be equally effective. What proportion of people with serious mental disorders would, but for the use of leverage, consistently refuse to avail themselves of clinically and culturally appropriate mental health services assertively provided in the community? The answer to this crucially important question is unknown.

The reason often given by family advocates for the claim that, without leverage, many people with serious mental disorders would not adhere to treatment is that mental illness negates the ability to make rational treatment decisions. There is no question that mental disorders can impair the competence of some of the people who suffer from them. In the MacArthur treatment competence study,[49] of the patients who were hospitalized with a diagnosis of schizophrenia, approximately half had a significant impairment in at least one of the abilities necessary for making a competent decision about treatment. However, the number of these individuals who would continually refuse the offer of high-quality mental health treatment is currently unknown.

Patient advocates not only question the positive outcomes claimed for outpatient commitment but also claim that leveraged treatment will have a perverse effect on the use of services: people who might otherwise want to avail themselves of mental health services will avoid such services for fear of being forced to continue with them indefinitely or face inpatient hospitalization.[50]

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[47] E. Howe, *Lessons from advance directives for PADs.* PSYCHIATRY *63:173*–177 (2000).

[48] E.F. Torrey, and M. Zdanowicz, *Outpatient commitment: what, why, and for whom.* PSYCHIATRIC SERVICES *52:337*–341(2001).

[49] T. Grisso, P.S. Appelbaum, *The MacArthur treatment competence study: III. abilities of patients to consent to psychiatric and medical treatment.* LAW AND HUMAN BEHAVIOR *19:149*–174 (1995).

[50] M. Allen, and V.F. Smith, *Opening Pandora's box: the practical and legal dangers of involuntary outpatient commitment.* PSYCHIATRIC SERVICES *52:342*–346 (2001).

Campbell and Schraiber[51] reported that 47% of all discharged patients surveyed in California answered yes to the question, "Has the fear of being involuntarily committed ever caused you to avoid treatment for psychological or emotional problems?" However, a disproportionate number of the former patients who were sampled in that study were members of the "survivor" movement. A similar outpatient-commitment survey, administered to a more representative sample of mental health consumers, would be valuable.

One putative outcome of mandated treatment is its effect on reducing violence in the community. Advocates of outpatient commitment have explicitly "sold" the approach largely by playing on public fears of violence committed by people who have mental disorders.[52] As stated by Jaffe,[53] "Laws change for a single reason, in reaction to highly publicized incidents of violence. People care about public safety. I am not saying it is right, I am saying this is the reality. . . So if you're changing your laws in your state, you have to understand that. . . . [i]t means that you have to take the debate out of the mental health arena and put it in the criminal justice/public safety arena."

Although playing the violence card may succeed in getting legislation enacted, the actual effect of outpatient commitment on reducing community violence is unclear. Any benefits that accrue as a result of tapping into public fear must be subtracted from the costs of greater stigma toward people with mental disorders that may result from sensationalizing a real -- but modest -- relationship between mental illness and violence.[54]

OUTCOMES FOR THE MENTAL HEALTH SYSTEM

It is also important to determine the outcomes of mandated treatment on the availability of mental health services in the community. It is often said that the use of leverage commits the system to the patient as much as it commits the patient to the system. However, it is not clear how true this bromide is. Are resources merely being shifted from

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[51] J. Campbell, and R. Schraiber, IN PURSUIT OF WELLNESS: THE WELL-BEING PROJECT. Sacramento, California, Department of Mental Health (1989).

[52] K.J. Conrad, M.D. Matters, P. Hanrahan, *et al., Representative payee for individuals with severe mental illness at community counseling centers of Chicago.* ALCOHOLISM TREATMENT QUARTERLY *17:169*–186 (1999).

[53] D.J. Jaffe, *Remarks on assisted outpatient treatment.* Presented at the annual conference of the NATIONAL ALLIANCE FOR THE MENTALLY ILL, Chicago, June 30, 1999.

[54] H. Steadman, E. Mulvey, J. Monahan, *et al., Violence by people discharged from acute psychiatric inpatient facilities and by others in the same neighborhoods.* ARCHIVES OF GENERAL PSYCHIATRY *55:393*–401 (1998); J. Monahan, H, Steadman, E. Silver, *et al.,* RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE. New York, Oxford University Press (2001).

voluntary cases to leveraged cases? If so, the apparent irony is that people who want services are denied them so that people who do not want services can receive them. Proponents claim that resources are in fact being appropriately prioritized toward patients with the greatest needs.

Alternatively, it may be that leveraged treatment actually leads to an overall increase in the resources allocated to mental health services. The extent to which any augmented funds are earmarked by the legislature for specific types of services -- for example, inpatient beds -- and the relative desirability of such services compared with other treatment needs are additional factors to be considered.

Outside the context of a legislative infusion of new moneys into the public mental health system, there is no apparent reason for a service that was previously unavailable to an individual who needed it to suddenly become available because the name of the service is written on a piece of paper as a mental health advance directive. Nor is "My landlord says I need this" likely to be a winning argument with intake workers in many overburdened treatment agencies. In the era of managed care, "Show me the money" may be the response of service providers.

However, the situation may be different in the case of outpatient commitment and mental health courts. Judges may play a critical role in forcing actors in the mental health, substance abuse, and criminal justice systems to work together in a more effective, less turf-protecting manner. When a judge calls a meeting, people tend to show up -- and on time. Judges' use of their bully pulpit may also get the attention of legislators in a way that traditional lobbying by special-interest mental health activists does not.

Legal, ethical, and political questions

Whatever its outcomes, is leverage legal? There is no shortage of people who assert that some of the forms of mandated treatment described here violate existing statutes. For example, Allen[55] claims that "bundling" housing and services violates the Americans With Disabilities Act, the Fair Housing Act, and the Rehabilitation Act as well as numerous state landlord-tenant laws. Concerns about tort liability are also pervasive. For example, is a mental health professional likely to be sued if he or she provides the type of treatment specified in a patient's advance directive under circumstances in which professional standards indicate that a different treatment is more effective?

Over and above the question of whether any given form of mandated treatment violates a specific statute, it has been claimed that mandated treatment is unconstitutional. The first case that challenged New York's outpatient statute asserted that the statute violated due process and equal protection rights because it permitted treatment to be ordered "without a showing by clear and convincing evidence that the person to whom the order applies lacks the capacity to make a reasoned treatment decision." However,

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[55] M. Allen. *Separate and unequal: the struggle of tenants with mental illness to maintain housing.* CLEARINGHOUSE REVIEW *30:720–739* (1996).

the court held otherwise: "Clearly, the state has a compelling interest in taking measures to prevent these patients who pose such a high risk from becoming a danger to the community and themselves. Kendra's Law provides the means by which society does not have to sit idly by and watch the cycle of decompensation, dangerousness, and hospitalization continually repeat itself".[56]

Therefore, contrary to the claims of advocates on either side of the debate, it is fair to say that the legal status of many forms of mandated treatment is currently uncertain. It will take a number of years before it is clear from the courts which forms of leverage -- and the manner in which they are operationalized -- violate a state or federal statute or constitution. It is not at all unlikely that some state courts, relying on their statutes and constitution, will approve the same type of mandated treatment that other state courts, relying on their own sources of legal authority, will prohibit. As Berg and Bonnie[57] state, "The law in this area is far from settled. Community treatment providers should be aware of the relevant issues and should begin to shape their own guidelines, rather than wait for litigation and thereby surrender responsibility to the courts." When courts finally do address these issues, empirical research on the prevalence, process, and outcomes of given forms of leveraged treatment may play an important and perhaps decisive role.

Beyond questions of the legality of leverage remains the question of whether using jail, housing, hospitalization, or money to leverage treatment adherence -- or insisting that a treatment decision made by an earlier "competent self" trump a treatment decision made by a later "incompetent self" -- can be morally justified.

From one viewpoint, the operative moral concept in mandated treatment is a threat: "Adhere to mental health treatment in the community, or else you will be jailed or will become homeless." From another point of view, the operative moral concept is an offer: "Before, you were facing the certain prospect of jail, or homelessness. Now, we are offering you a way to avoid that by adhering to mental health treatment in the community. Your choice."

The clearest articulation of the distinction being made here is that of Wertheimer:[58]

> The standard view of coercive proposals is that threats coerce but offers do not. And the crux of the distinction between threats and offers is that A makes a threat when B will be worse off than in some relevant baseline position if B does not accept A's proposal, but that A makes an offer when B will be no worse off than in some

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[56] *Re Urcuyo,* 714 N.Y.S.2d 862 (2000).

[57] J. Berg, and R. Bonnie, WHEN PUSH COMES TO SHOVE: AGGRESSIVE COMMUNITY TREATMENT AND THE LAW, IN COERCION AND AGGRESSIVE COMMUNITY TREATMENT. Edited by D. Dennis, and J. Monahan. New York, Plenum (1996).

[58] A. Wertheimer, *A philosophical examination of coercion for mental health issues.* BEHAVIORAL SCIENCES AND THE LAW *11:239*–258 (1993).

> relevant baseline position if B does not accept A's proposal. On this view . . . the key to understanding what counts as a coercive proposal is to properly fix B's baseline or present situation.

However, with mandated community treatment, fixing the individual's baseline is fraught with contention. The individual may see the funds that are sometimes used by representative payees as leverage for securing adherence to community treatment as "my money"—money that he or she is legally "entitled" to receive. Others may see such funds as "taxpayer's money" to be used as the government chooses to use it.[59] According to this view, if a law currently prohibits the government from using disability benefits as leverage, that law can and should be changed, much as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) -- passed by a Republican Congress and signed by a Democratic President -- ended sixty years of federal benefits to eligible mothers and children in the pursuit of "ending welfare as we know it." What once was an entitlement no longer is.

People who have an expansive view of "welfare rights" or "housing rights" are likely to believe that the baseline against which mandated treatment is to be judged should be much higher than people who believe that the government's obligations in the areas of welfare and housing are more circumscribed. The former group is likely to point out that only for people who are both mentally ill and poor can money or housing effectively function as leverage. The latter group is likely to advocate that the government use limited public resources to promote the public good and that getting treatment to people who need it falls squarely into this category.

Viewed in such a light, the resolution of some -- although hardly all -- of the controversies surrounding mandated community treatment may lie in the trade-offs inherent in the political process. What percentage of people who have mental disorders would adhere to treatment in the community if various forms of leverage were made sufficiently attractive? What percentage of the public would support increases in the resources available for mental health services in the community if they believed that leverage would be applied to ensure that the people most in need of services actually received them? The debate on mandated treatment would be enriched if answers to such questions were available.

CONCLUSIONS

Commitment to treatment in the open community in the early 21st century bears little resemblance to commitment to an inpatient facility in the late 20th century. Commitment can be understood only in the context of a broad movement to apply whatever leverage is available to induce engagement with mental health treatment in the community, a movement that includes the use of representative payees, subsidized housing, mental health courts, outpatient commitment, and mental health advance directives.

Other forms of leverage may exist as well -- for example, continued employment used as leverage under the

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[59] *Id.* at n. 56.

Americans with Disabilities Act.[60] Little hard evidence exists on the pervasiveness of the various forms of mandated treatment for people with mental illness, how leverage is imposed, the actual effects of using leverage for different types of patients with various types and severities of illness, or for various mental health systems.

The many vexing legal, ethical, and political questions surrounding mandated treatment have not been thoroughly aired. Yet there are a number of indications that mandated treatment is expanding at a rapid pace, not just in the United States but throughout the world.[61] If mental health law and policy are to incorporate -- or repudiate -- some or all of these types of leverage, an evidence-based approach must rapidly come to replace the ideologic posturing that currently characterizes the field.

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[60] *Bowers v. Multimedia Television,* WL 856074 (D. Kan. 1998).

[61] A. Halpern, and G. Szmukler, *Psychiatric advance directives: reconciling autonomy and non-consensual treatment.* PSYCHIATRIC BULLETIN *21:323–327* (1997).

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Edited by Lynda E. Frost and Richard J. Bonnie

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Exhibit 15

Civil Mental Health Law: Its History and Its Future

Paul S. Appelbaum, M.D.

Dr. Appelbaum is the A.F. Zelenik Professor of Psychiatry and Chair, Department of Psychiatry, University of Massachusetts Medical School. He is currently a fellow at the Center for Advanced Study in Behavioral Sciences, Stanford, CA. From 1982-1987, he was Chair of the Editorial Advisory Board of the Mental and Physical Disability Law Reporter *and a member of the ABA's Commission on the Mentally Disabled.*

As the *Mental Disability Law Reporter* was coming to life 20 years ago, mental health law was in the midst of unprecedented ferment. From a sleepy discipline that rehearsed endless arguments over the insanity defense and paid little attention to persons subject to civil confinement, mental health law had moved to the cutting edge of constitutional argumentation, benefitting from the civil rights revolution of the 1950s and 1960s and, in turn, helping to propel the next wave of change. Approaches unquestioned for a century-and-a-half—particularly those related to involuntary hospitalization and treatment—were suddenly called into question. A new legal order was created, one that largely survives to this day.

To capture the turbulence of the 1970s and early 1980s and to trace the—sometimes surprising—impact of the legal changes that were wrought is a substantial task, well beyond what is possible in this brief review.[1] But it may be feasible to offer some highlights of the era and its aftermath, and to speculate on where mental health law may be headed from here. In particular, I will focus on civil commitment and the right to refuse treatment, two of the major touchstones of the era, and on the question of affirmative rights to mental health treatment, which may be the future nexus of mental health and law.

Civil Commitment of Individuals with Mental Illness

The history of civil commitment law until the late 1960s can be sketched simply.[2] From colonial times, legal provisions existed for involuntary detention of persons who, due to mental illness, threatened public order and safety. Since few hospitals of any sort existed before the early 19th century, detention often was accomplished in local jails. Persons who posed no danger to civil order or sensibilities, but whose illnesses impaired their abilities to feed, clothe, or shelter themselves, were absorbed—not always voluntarily—by the system of almshouses set up in almost every town or county to sustain the poor. If hospital care was available, as it was in a handful of major cities, families and physicians generally decided whether patients should be admitted and when they might be discharged. These procedures rarely were challenged and, when they were, the courts were inclined to be supportive.[3]

In the second quarter of the 19th century, with innovations in the care of those with mental illness—often encapsulated by the term "moral treatment"—bringing a new sense of optimism about the possibility of cure, the foundations of a public mental health treatment system were laid.[4] As state-operated asylums began to spring up in settled areas of the country, the need arose for some statutory structure to govern hospital operations. The early statutes generally codified the existing informal system that gave priority to the wishes of families and the opinions of attending physicians. When conditions in the asylums deteriorated after the Civil War, and as allegations of improper confinement attracted public attention, procedural safeguards were instituted in most states, ranging from examinations by independent physicians to guarantees of the right to communicate with an attorney, to trial by jury.[5]

The following century saw pendular swings between periods in which the procedural reforms were widely embraced as essential to the preservation of individual liberty, and times when they were severely constricted as impediments to the rapid treatment of those with mental illness. Not surprisingly, eras of therapeutic optimism tended to correspond with relaxed procedures, while more fatalistic periods witnessed a rise in procedural protections.[6] At no point, however, was the fundamental assumption of the system seriously challenged: persons with mental illness who might benefit from treatment, along with those who endangered their own safety or that of the public, were viewed as legitimate objects of therapeutic coercion.

It took the 1960s to change this historic approach. A complex web of factors, including profound skepticism about claims of governmental beneficence (based in part on exposés of abysmal conditions in many public institutions[7]), a new community-based ideology of psychiatric care,[8] and soaring budgets for state mental health departments,[9] led to the rejection of broad-based civil commitment standards rooted in patients' presumed need for treatment. Initially, this change was legislative, with passage of the Ervin Act in Washington, D.C. in 1964[10] and the Lanterman-Petris-Short Act in California in 1967.[11] But what lawmakers saw as desirable, the courts soon came to view as mandatory. Basing their positions on findings that need-for-treatment statutes were unconstitutionally overbroad and vague, state and federal courts, led by the landmark decision in *Lessard v. Schmidt,*[12] struck down many existing statutes.[13]

In place of treatment need as the basis for commitment, the courts—soon to be followed by legislatures out to preempt litigation—substituted the requirement that

committees be dangerous to others or themselves. The latter often went beyond overt suicidal tendencies to include an inability to meet basic needs so profound that physical harm was likely to ensue. At the same time, procedural safeguards were expanded, with many provisions adopted from the criminal justice system. Thus, rights to notice, subpoena of witnesses, assistance of an attorney, testimonial silence, exclusion of hearsay evidence, and proof beyond a reasonable doubt, among others, now became common.[14] If involuntary commitment, though ostensibly a civil proceeding, were to result in deprivations of liberty analogous to those in the criminal system, the substantive criteria would have to be rigorous and the procedures comparable. By the conclusion of the 1970s, every state in the nation had essentially realigned its commitment practices in this direction.

As much as advocates looked to the U.S. Supreme Court to ratify these changes, the Court's decisions on civil commitment law were few, and its conclusions sometimes oblique. In *O'Connor v. Donaldson*, a case originally framed as addressing the question of a right to treatment, the Court held that a person capable of surviving safely outside the hospital could not be involuntarily confined "without more."[15] Whether this implied that only dangerousness to self or others was a legitimate basis for commitment or that nondangerous persons could still be committed as long as treatment was provided has been the focus of argument to this day. More clear cut was the Court's rejection in *Addington v. Texas* of a constitutionally required standard of proof beyond a reasonable doubt.[16] "Clear and convincing" evidence, a less rigorous standard, seemed to the Court better to fit the vagaries associated with the evaluation of persons with mental illness.

If the 1970s marked the triumph of civil libertarian approaches to civil commitment, as the decade was ending, the first signs of reaction appeared. Washington state, responding to concerns that dangerousness-based criteria alone excluded from hospitalization too many people genuinely in need of care, expanded its criteria to include persons whose deterioration to a state of danger to self or others might be predicted.[17] In the years since, other states have moved in similar directions, for example, allowing commitment of persons with mental illness who lack the capacity to make reasonable decisions about their care, or those who face rejection by their families, when that will lead to an inability to meet their basic needs.[18] Dangerousness is still the predominant basis for civil commitment (although by far the majority of patients are committed because of danger to themselves, not to others), but a fair number of states have chipped away at the hegemony of the dangerousness standard.

The other major development in commitment law relates to the expansion of provisions for outpatient commitment. In an earlier guise, as "parole" or "conditional discharge" from inpatient hospitalization, the idea that conditions might be placed on patients with mental illness in the community was once widespread. Newer approaches expand this notion to include persons not yet hospitalized, who might be diverted to mandatory outpatient care. Although most states have statutory provisions that appear to permit some form of outpatient commitment, the extent to which they are used varies, and often is dependent on whether adequate resources exist in the mental health system for the purpose.[19] Among states that have adopted statutes recently, there is a split as to whether criteria for outpatient commitment should be the same as or less strict than those for inpatient commitment, and how—if at all—the terms of the commitment are to be enforced.[20] The first two controlled studies designed to assess the efficacy of outpatient commitment are currently underway. [*Author's Note:* One study, examining North Carolina's outpatient commitment law, is being conducted by a multi-disciplinary team led by Marvin Swartz, M.D. at Duke University. The second study is looking at New York's limited experiment with outpatient commitment at Bellevue Hospital, under the direction of Henry Steadman, Ph.D. of Policy Research Associates in Delmar, N.Y.]

At its peak in the 1970s, reform of commmitment law generated a huge body of case law, commentary, and empirical research. On paper, the changes in the law were profound, and for the most part, they endure. As is so often the case, however, the correlation of law on the books to practice on the streets is less clear. Empirical studies of the reforms of the 1970s suggest that the populations of committed persons look much the same before and after the reforms, perhaps reflecting some intuitive sense on the part of decision makers about who is "sick enough" to warrant hospitalization.[21] Adherence to procedural norms, although probably more complete, also has been reported to be quite variable. Without gainsaying the impact of commitment law reform in its entirety, it seems clear that deinstitutionalization, with its marked shrinkage of available inpatient beds, probably has played a greater role in determining the size and composition of committed populations.

Where are we headed with the law of civil commitment? For the most part, the area has been quiescent since the early 1980s, with those changes that have occurred tending to mute the impact of the previous decade of reform. The U.S. Supreme Court's sole excursion into hospitalization of persons with mental illness in the 1990s came in *Zinermon v. Burch*, a decision that appeared to suggest new criteria of competence for patients who wished to admit themselves voluntarily.[22] The majority opinion poorly reflected the realities of the settings in which decisions about acute hospitalization occur, which may account for the minimal impact it has had on actual practice.

The safest prediction for the immediate future is for more of the same. We are unlikely to witness a wholesale rejection of dangerousness-based commitment criteria, but will see efforts to widen their scope. Much of the pressure that might have urged broader changes in substantive criteria has been dissipated by a system that

makes hospitalization easier than a reading of statutes alone would suggest. Most procedural protections have been fairly well internalized by all participants in the process; dramatic changes here are quite unlikely. Indeed, as discussed below, the action in mental health law in the coming years probably will occur in a very different realm.

Patients' Right to Refuse Psychiatric Treatment

As the battles over civil commitment law were winding down, the late 1970s saw a new mental health law controversy rise to prominence: Did mental patients, even after they had been involuntarily hospitalized, retain the same rights as other people to reject treatment proposed to them by their physicians? No question created greater acrimony between mental health professionals and the activist mental health law bar.

In many respects, the "right to refuse treatment," as it came to be called, was the next logical step in a series of challenges to traditional mental health law. Nonconsensual treatment of involuntary psychiatric patients—which had existed as long as there had been mental hospitals—was based on two premises: (1) that all persons with mental illness, certainly all those ill enough to be hospitalized, were globally incompetent; and (2) that the state had a unique interest in the treatment of committed patients, even without their consent.[23]

The first of these presumptions began to be called into question in the 1950s, and was thoroughly discredited by the mid-1970s. Mental illness, not a homogeneous category to begin with, was recognized as selectively affecting patients capacities, rather than uniformly impairing their competence.[24] The second premise appeared to crumble along with commitment laws based on patients need for treatment. Once the purpose of commitment was redefined as the prevention of dangerous behavior, advocates questioned whether the state's interest might not be satisfied by confinement alone. If so, the basis for the state's power to medicate patients against their will seemed dubious.[25]

The question had added impact when the array of patients' interests that might be implicated by involuntary treatment was considered. Rights to bodily integrity, whether based on a right to privacy or substantive due process, led the list, which also included equal protection claims (hospitalized medical patients, after all, could still refuse treatment, as long as they were competent to do so), freedom of speech issues, and others. Moreover, general suspicions about the quality of care in public facilities and concern about the potential long-term side effects of antipsychotic medications led the courts to give even greater credence to patients' claims.[26]

Beginning with the first two cases to make their way through the federal courts, a split could be discerned as to how the courts would address the issue. The federal district court in *Rogers v. Okin*, a Massachusetts case, found that patients had a right not to be medicated over their objections unless determined to be incompetent to make their own treatment decisions.[27] After a tortuous procedural history, including an inconclusive review by the U.S. Supreme Court,[28] the issue was ultimately decided similarly by the Massachusetts courts on state law grounds.[29] In essence, committed psychiatric patients were afforded the same rights to decline treatment as other citizens.

However, the New Jersey federal court that decided *Rennie v. Klein* took a different approach.[30] Though it too recognized that patients had a liberty interest in not being medicated against their will, it viewed that interest as centered on avoiding improper or unnecessary treatment. Thus, the court held that patients' interests could be vindicated by an independent medical review of the appropriateness of their care. *Rennie*, too, reached the U.S. Supreme Court, which again declined to issue a definitive ruling.[31] Instead, it remanded the case for reconsideration in light of its then recent ruling in *Youngberg v. Romeo*.[32] *Youngberg*, which addressed the rights of an institutionalized man with mental retardation, held that patients' rights could be limited when, in the professional judgment of the staff, doing so was necessary to benefit the patient or others in the facility. The Supreme Court appeared to be suggesting general support for the *Rennie* court's approach, which is how the Third Circuit interpreted the decision on remand.[33]

As cases challenging states' procedures for dealing with treatment refusal proliferated, courts tended to follow either *Rogers'* rights-driven model or *Rennie*'s treatment-driven approach.[34] In general, state courts have been more sympathetic to common law or state constitutional claims that psychiatric patients should not be treated differently than other persons, while federal courts have tended to endorse a right to have one's treatment independently reviewed, but not to reject it altogether. This latter approach was reinforced by the U.S. Supreme Court's decision in *Washington v. Harper*,[35] in which Washington's administrative procedures for review of objections by prisoners with mental illness to involuntary treatment were found to be constitutionally sufficient. A determination of competence was not required and treatment deemed to be appropriate (as long as the prisoner met the state's commitment criteria) could be administered. Since *Harper* was a prison case, and the precedents cited by the Court relied heavily on the discretion ordinarily accorded penal facilities, it is unclear whether the Court would rule identically were it again to review a case involving a civil hospital.

To this day, rules vary considerably from state to state. The impact of a more expansive right to refuse treatment, where one has been adopted, remains controversial. Refusal is neither rare, nor endemic, averaging about 10 percent of patients.[36] The majority of cases are resolved by patients reaccepting treatment, although a significant percentage—perhaps 20 percent to 25 percent—remain untreated. Interestingly, the majority of cases that reach formal review result in authorization of treatment. Rates of overriding patients' objections are generally greatest

where courts, rather than administrators or clinicians, review the cases, perhaps because judges are left in the position of having to rely on experts judgments.[37]

Although some litigation continues, and the question of the extent to which federal constitutional rights are implicated by involuntary treatment has not been fully resolved, the right to refuse treatment is no longer the flashpoint it was throughout most of the 1980s. All states now have some structure governing review of patients' refusal of treatment and, though change is possible in some jurisdictions, the diversity of opinion regarding the nature and extent of patients' interests and how best to protect them makes it unlikely that we will see uniformity across states in the foreseeable future.

Affirmative Rights to Mental Health Care

Civil commitment and the right to refuse treatment are just two of many areas of litigation and legislative change that have characterized the last 20 years of civil mental health law. Others include changes in rules governing incompetence and guardianship, confidentiality, patients' rights in institutions, and the like.[38] What these diverse areas all have in common is their characterization as "negative rights." That is, they affirm patients' rights to be free of governmental interference in their lives. Another set of rights received much less attention during the "go-go years" of mental health law: affirmative rights to receive mental health services. Yet, they were not neglected altogether, and I suspect they will become a more prominent focus of mental health law in coming years.

Any effort to define affirmative rights in the United States runs immediately into our society's deeply entrenched aversion to recognizing entitlements as a matter of constitutional law, and our reluctance to embody such rights in federal or state legislation. The recently enacted reforms in federal welfare law suggest that this disposition thrives even today. For a time, however, in the 1970s, it looked as though breakthroughs might be possible with regard to services for persons with mental disorders.

Drawing on earlier suggestions that involuntarily confined persons have a constitutional right, as a matter of fairness, to receive adequate treatment when deprived of liberty,[39] the mental health law bar looked to the courts to establish an entitlement—at least for committed patients—to appropriate services. Initial success was achieved in 1971 in the landmark *Wyatt v. Stickney* litigation in Alabama, where a federal district court, later upheld by the Fifth Circuit, found that the state's failure to provide adequate treatment in its institutions deprived patients of fourteenth amendment rights to due process and equal protection.[40]

Although the U.S. Supreme Court avoided ruling on the issue of a right to treatment in *O'Connor v. Donaldson*,[41] which had come to the Court on that issue, the apparent success of *Wyatt* spawned similar litigation across the country. The courts difficulty in compelling legislatures to provide sufficient funds to improve institutions, along with the reluctance of states to become enmeshed in costly and embarrassing litigation, led to frequent use of consent decrees to resolve the cases. As a result, states pumped millions of dollars of new money into many of their institutions.[42]

When the right to treatment was finally addressed directly by the U.S. Supreme Court in *Youngberg v. Romeo*, the Court took a decidedly conservative view of its scope. It held that involuntary patients were entitled only to that quantum of treatment required to protect their liberty interests by assuring freedom from unnecessary restraint and preventable assault.[43] Nonetheless, lower courts continued to interpret patients' rights broadly, holding that many of the same changes that might have been required under *Wyatt*'s approach also were required by *Youngberg*. The adoption of the Civil Rights of Institutionalized Persons Act in 1980 (see table, p. 631) allowed the U.S. Department of Justice (DOJ) to investigate conditions in state institutions and initiate suits if patients' federal rights were violated. Since both the DOJ and the courts have interpreted patients' rights broadly, this has been an effective tool in improving conditions in many states.[44]

It is, of course, a constricted view of entitlements to mental health services that requires that one be institutionalized, preferably involuntarily, before services will be made available. Although some jurisdictions have been willing to negotiate consent decrees to expand community-based services, by and large, efforts to compel them to do so have failed. Thus, as budgetary pressures hit the states, even those like California, which had created reasonably good systems of community care, have seen them fall victim to reductions in spending. But the recent shift in many states in the mechanisms for providing psychiatric services—in both public and private sectors—may point to new opportunities to ensure availability of services, as well as a new role for mental health law.

In looking for cost savings in this area, private insurance plans that cover mental disorders have moved toward tight prospective management of benefits, either in-house or under contract to another entity. This "managed care" approach to overseeing delivery of services appears successful in reducing overall costs, especially by restricting use of expensive inpatient hospitalizations. Public systems, envious of the cost savings in the private sector, have been looking aggressively for ways to take advantage of similar mechanisms. Many states now contract out to managed care entities their mental health services provided under Medicaid for the poor and disabled.[45] Massachusetts has gone a step further, adding all acute emergency and inpatient public mental health services (many previously provided in state-run facilities) to its Medicaid contract, and awarding responsibility for the entire package to a single managed care company. Actual treatment is provided by a mixture of general

hospitals, specialty psychiatric facilities, community clinics, and private practices.

There is a promise and a danger in this approach. The promise is the end of more than a century-and-a-half of dual standards of care for persons with mental illness—one for those who can afford to pay for care in private facilities (or, since the middle of this century, who have adequate insurance coverage for such care) and one for indigent persons who are compelled to turn to underfunded state facilities. Now, with indigent and disabled persons often being integrated into the same systems that provide care for insured populations, the potential exists for the development of a single standard of care for all persons.

The danger, of course, is that neither population will receive the care they need. As critics in professional and lay media are fond of pointing out, managed care companies have every incentive to deny payment for services, particularly if the costs of such neglect can be shifted elsewhere (e.g., into the residual public system for chronic care). Simultaneously, the companies may put pressure on mental health professionals to restrict use of services, lest they be dropped from the contracting networks and lose access to significant patient populations. When providers directly assume the financial risk for mental health care, as is already occurring under "capitation" plans in many parts of the country, an additional incentive exists for them to deny access to care.

Here is where substantial opportunities exist for a reorientation of mental health law in coming years. So long concerned with protecting persons with mental illness from unwanted interventions, the field is challenged by these new developments to devise mechanisms for insuring access to services for those persons who want and need them.[46] Legislation is already being framed in many states to regulate the practices of managed care companies in performing utilization review, constituting provider networks, and restricting provider-patient communications. These statutes, as they begin to be adopted, will create a platform from which litigative efforts can be launched.

The new world of mental health care will afford other opportunities for the development of new legal theories and approaches. For example, in seeking to avoid expensive hospitalization, managed care entities often utilize diversionary facilities, such as respite beds in community residences or day treatment programs. Patients' rights in such facilities are often unclear, since current rules evolved with traditional inpatient settings in mind. The extent to which restrictions on movement, including physical restraint, or involuntary medication can be utilized, to cite just two examples, are simply unknown in most jurisdictions.

The bread-and-butter issues in civil mental health law, generally focused on negative rights, are certainly not in danger of disappearing from the legal stage. It is unlikely that we will ever definitively resolve such issues as the proper scope of civil commitment, given the difficult balancing of interests that is involved. But the challenge for the next 20 years, one that undoubtedly will be reflected in the pages of the *Mental and Physical Disability Law Reporter*, is to broaden the scope of mental health law to include a new set of issues focused on access to care.

Endnotes

1. I address some of these issues at greater length in my book, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE. New York, Oxford University Press, 1994.

2. GROB GN, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875. New York, Free Press, 1973.

3. *Matter of Josiah Oakes*, 8 Law Reporter 122 (Mass. 1845); *Hinchman v. Richie*, Brightly 143 (C.P. Phila. 1849).

4. DAIN N, CONCEPTS OF INSANITY IN THE UNITED STATES, 1789-1865. New Brunswick NJ, Rutgers University Press, 1964.

5. Appelbaum PS, Kemp KN, *The Evolution of Commitment Law in the Nineteenth Century*. LAW AND HUMAN BEHAVIOR 6:343-354, 1982.

6. DEUTSCH A, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES, 2d ed. New York, Columbia University Press, 1949.

7. DEUTSCH A, THE SHAME OF THE STATES. New York, Harcourt Brace, 1948; Gorman M, Every Other Bed. Cleveland, World Publishing, 1956.

8. Ewalt JR, Ewalt PL, *History of the Community Psychiatry Movement*. AMERICAN JOURNAL OF PSYCHIATRY 126: 41-52, 1969.

9. GROB G, FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA. Princeton, NJ, Princeton University Press, 1991.

10. D.C. Code §§21-501 to 21-591 (Supp. V. 1966), reprinted in ALLEN RC, FERTSER EZ, RUBIN JG, READINGS IN LAW AND PSYCHIATRY. Baltimore, MD, Johns Hopkins University Press, 1975, pp. 277-284.

11. Cal. Welf. & Inst. Code §5150ff.

12. 349 F. Supp. 1078 (E.D. Wis. 1972).

13. PERLIN M, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, vol. 1. Charlottesville, VA, Michie, 1989.

14. BRAKEL SJ, INVOLUNTARY INSTITUTIONALIZATION, BRAKEL SJ, PARRY J, WEINER B: THE MENTALLY DISABLED AND THE LAW, 3d ed., Chicago, American Bar Foundation, 1985.

15. *O'Connor v. Donaldson*, 422 U.S. 563, at 576 (1975).

16. *Addington v. Texas*, 441 U.S. 418 (1979), 3 MDLR 164.

17. Wash. Rev. Code Ann. §71.05.020(1).

18. *E.g.*, Kansas Stat. Ann. art. 29, §§59-2902 (repealed), 1996 Kan. Sess. Laws ch. 167 §2(F)(1); Colo. Rev. Stat. §27-10-101.

19. AMERICAN PSYCHIATRIC ASSOCIATION, INVOLUNTARY COMMITMENT TO OUTPATIENT TREATMENT. Washington, D.C., APA, 1987.

20. Mulvey EP, Geller JL, Roth LH, *The Promise and Peril of Involuntary Outpatient Commitment.* AMERICAN PSYCHOLOGIST 42:571-584, 1987.

21. See my review of the empirical data in Appelbaum, *supra* note 1.

22. *Zinermon v. Burch*, 494 U.S. 113 (1990), 14 MPDLR 116.

23. APPELBAUM, *supra* note 1.

24. SALES BD, POWELL DM, VAN DUIZEND R, ET AL., DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES. New York, Plenum Press, 1982.

25. Rhoden NK, *The Right to Refuse Psychotropic Drugs.* HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 15:363-413, 1980.

26. *See generally,* DOUDERA AE, SWAZEY JP (EDS.), REFUSING TREATMENT IN MENTAL HEALTH INSTITUTIONS—VALUES IN CONFLICT. Ann Arbor, MI, AUPHA Press, 1982.

27. *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), 4 MDLR 11.

28. *Mills v. Rogers*, 457 U.S. 291 (1982), 6 MDLR 221.

29. *Rogers v. Commissioner, Department of Mental Health*, 458 N.E.2d 308 (Mass. Sup. Jud. Ct. 1983), 8 MPDLR 103.

30. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), 3 MDLR 95.

31. *Rennie v. Klein*, 458 U.S. 1119 (1982).

32. 457 U.S. 307 (1982), 5 MDLR 223.

33. *Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983), 8 MPDLR 18.

34. Appelbaum PS, *the Right to Refuse Treatment with Antipsychotic Medication: Retrospect and Prospect.* AMERICAN JOURNAL OF PSYCHIATRY 145: 413-419, 1988.

35. 494 U.S. 210 (1990), 14 MPDLR 124.

36. Hoge SK, Appelbaum PS, Lawlor T, Beck JC, Litman R, Greer A, Gutheil TG, Kaplan E, *A Prospective, Multi-center Study of Patients' Refusal of Antipsychotic Medication.* ARCHIVES OF GENERAL PSYCHIATRY 47: 949-956, 1990.

37. APPELBAUM, *supra* note 1.

38. Useful reviews are provided by PERLIN, *supra* note 13, and by BRAKEL, PARRY, AND WEINER, *supra* note 14.

39. Birnbaum M, *The Right to Treatment.* AMERICAN BAR ASSOCIATION JOURNAL 46:499-505, 1960.

40. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *upheld sub nom Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

41. *Supra* note 15.

42. Mills MJ, *The Right to Treatment: Little Law, But Much Impact,* in Grinspoon L (ed.), Psychiatry 1982: THE AMERICAN PSYCHIATRIC ASSOCIATION ANNUAL REVIEW. Washington, D.C., American Psychiatric Press, 1982.

43. *Youngberg v. Romeo, supra* note 32.

44. Appelbaum PS, *Resurrecting the Right to Treatment.* HOSPITAL AND COMMUNITY PSYCHIATRY 38:703-704, 1987.

45. DORWART RA, EPSTEIN SS, PRIVATIZATION AND MENTAL HEALTH CARE: A FRAGILE BALANCE. Westport, CT, Auburn House, 1993.

46. Appelbaum PS, *Managed Care and the Next Generation of Mental Health Law:* PSYCHIATRIC SERVICES 47:27-28, 34, 1996.