97th Congress
2d Session

COMMITTEE PRINT

THE RIGHT TO KEEP AND BEAR ARMS

REPORT

OF THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 1982

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
88-618 O WASHINGTON: 1982

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Enforcement of Federal Firearms Laws From the Perspective of the Second Amendment

Federal involvement in firearms possession and transfer was not significant prior to 1934, when the National Firearms Act was adopted. The National Firearms Act as adopted covered only fully automatic weapons (machine guns and submachine guns) and rifles and shotguns whose barrel length or overall length fell below certain limits. Since the Act was adopted under the revenue power, sale of these firearms was not made subject to a ban or permit system. Instead, each transfer was made subject to a $200 excise tax, which must be paid prior to transfer; the identification of the parties to the transfer indirectly accomplished a registration purpose.

The 1934 Act was followed by the Federal Firearms Act of 1938, which placed some limitations upon sale of ordinary firearms. Persons engaged in the business of selling those firearms in interstate commerce were required to obtain a Federal Firearms License, at an annual cost of $1, and to maintain records of the name and address of persons to whom they sold firearms. Sales to persons convicted of violent felonies were prohibited, as were interstate shipments to persons who lacked the permit required by the law of their state.

Thirty years after adoption of the Federal Firearms Act, the Gun Control Act of 1968 worked a major revision of federal law. The Gun Control Act was actually a composite of two statutes. The first of these, adopted as portions of the Omnibus Crime and Safe Streets Act, imposed limitations upon imported firearms, expanded the requirement of dealer licensing to cover anyone "engaged in the business of dealing" in firearms, whether in interstate or local commerce, and expanded the recordkeeping obligations for dealers. It also imposed a variety of direct limitations upon sales of handguns. No transfers were to be permitted between residents of different states (unless the recipient was a federally licensed dealer), even where the transfer was by gift rather than sale and even where the recipient was subject to no state law which could have been evaded. The category of persons to whom dealers could not sell was expanded to cover persons convicted of any felony (other than certain business-related felonies such as antitrust violations), persons subject to a mental commitment order or finding of mental incompetence, persons who were users of marijuana and other drugs, and a number of other categories. Another title of the Act defined persons who were banned from possessing firearms. Paradoxically, these classes were not identical with the list of classes prohibited from purchasing or receiving firearms.

The Omnibus Crime and Safe Streets Act was passed on June 5, 1968, and set to take effect in December of that year. Barely two weeks after its passage, Senator Robert F. Kennedy was assassinated while campaigning for the presidency. Less than a week after

his death, the second bill which would form part of the Gun Control Act of 1968 was introduced in the House. It was reported out of Judiciary ten days later, out of Rules Committee two weeks after that, and was on the floor barely a month after its introduction. The second bill worked a variety of changes upon the original Gun Control Act. Most significantly, it extended to rifles and shotguns the controls which had been imposed solely on handguns, extended the class of persons prohibited from possessing firearms to include those who were users of marijuana and certain other drugs, expanded judicial review of dealer license revocations by mandating a de novo hearing once an appeal was taken, and permitted interstate sales of rifles and shotguns only where the parties resided in contiguous states, both of which had enacted legislation permitting such sales. Similar legislation was passed by the Senate and a conference of the Houses produced a bill which was essentially a modification of the House statute. This became law before the Omnibus Crime Control and Safe Streets Act, and was therefore set for the same effective date.

Enforcement of the 1968 Act was delegated to the Department of the Treasury, which had been responsible for enforcing the earlier gun legislation. This responsibility was in turn given to the Alcohol and Tobacco Tax Division of the Internal Revenue Service. This division had traditionally devoted itself to the pursuit of illegal producers of alcohol; at the time of enactment of the Gun Control Act, only 8.3 percent of its arrests were for firearms violations. Following enactment of the Gun Control Act the Alcohol and Tobacco Tax Division was retitled the Alcohol, Tobacco and Firearms Division of the IRS. By July, 1972 it had nearly doubled in size and became a complete Treasury bureau under the name of Bureau of Alcohol, Tobacco and Firearms.

The mid-1970's saw rapid increases in sugar prices, and these in turn drove the bulk of the "moonshiners" out of business. Over 15,000 illegal distilleries had been raided in 1956; but by 1976 this had fallen to a mere 609. The BATF thus began to devote the bulk of its efforts to the area of firearms law enforcement.

Complaints regarding the techniques used by the Bureau in an effort to generate firearm cases led to hearings before the Subcommittee on Treasury, Post Office, and General Appropriations of the Senate Appropriations Committee in July 1979 and April 1980, and before the Subcommittee on the Constitution of the Senate Judiciary Committee in October 1980. At these hearings evidence was received from various citizens who had been charged by BATF, from experts who had studied the BATF, and from officials of the Bureau itself.

Based upon these hearings it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible. Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement. For example the Subcommittee on the Constitution received correspondence from two members of the Illinois Judiciary, dated in 1980, indicating that they had been totally unable to persuade BATF to accept cases against felons who were in possession of

firearms including sawed-off shotguns. The Bureau's own figures demonstrate that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped from 14 percent down to 10 percent of their firearms cases. To be sure, genuine criminals are sometimes prosecuted under other sections of the law. Yet, subsequent to these hearings, BATF stated that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all.

The Subcommittee received evidence that BATF has primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge. Agents anxious to generate an impressive arrest and gun confiscation quota have repeatedly enticed gun collectors into making a small number of sales—often as few as four—from their personal collections. Although each of the sales was completely legal under state and federal law, the agents then charged the collector with having "engaged in the business" of dealing in guns without the required license. Since existing law permits a felony conviction upon these charges even where the individual has no criminal knowledge or intent numerous collectors have been ruined by a felony record carrying a potential sentence of five years in federal prison. Even in cases where the collectors secured acquittal, or grand juries failed to indict, or prosecutors refused to file criminal charges, agents of the Bureau have generally confiscated the entire collection of the potential defendant upon the ground that he intended to use it in that violation of the law. In several cases, the agents have refused to return the collection even after acquittal by jury.

The defendant, under existing law is not entitled to an award of attorney's fees, therefore, should he secure return of his collection, an individual who has already spent thousands of dollars establishing his innocence of the criminal charges is required to spend thousands more to civilly prove his innocence of the same acts, without hope of securing any redress. This, of course, has given the enforcing agency enormous bargaining power in refusing to return confiscated firearms. Evidence received by the Subcommittee on the Constitution demonstrated that Bureau agents have tended to concentrate upon collector's items rather than "criminal street guns". One witness appearing before the Subcommittee related the confiscation of a shotgun valued at $7,000. Even the Bureau's own valuations indicate that the value of firearms confiscated by their agents is over twice the value which the Bureau has claimed is typical of "street guns" used in crime. In recent months, the average value has increased rather than decreased, indicating that the reforms announced by the Bureau have not in fact redirected their agents away from collector's items and toward guns used in crime.

The Subcommittee on the Constitution has also obtained evidence of a variety of other misdirected conduct by agents and supervisors of the Bureau. In several cases, the Bureau has sought conviction for supposed technical violations based upon policies and interpretations of law which the Bureau had not published in the Federal Register, as required by 5 U.S.C. § 552. For instance, beginning in 1975, Bureau officials apparently reached a judgment that

a dealer who sells to a legitimate purchaser may nonetheless be subject to prosecution or license revocation if he knows that that individual intends to transfer the firearm to a nonresident or other unqualified purchaser. This position was never published in the Federal Register and is indeed contrary to indications which Bureau officials had given Congress, that such sales were not in violation of existing law. Moreover, BATF had informed dealers that an adult purchaser could legally buy for a minor, barred by his age from purchasing a gun on his own. BATF made no effort to suggest that this was applicable only where the barrier was one of age. Rather than informing the dealers of this distinction, Bureau agents set out to produce mass arrests upon these "straw man" sale charges, sending out undercover agents to entice dealers into transfers of this type. The first major use of these charges, in South Carolina in 1975, led to 37 dealers being driven from business, many convicted on felony charges. When one of the judges informed Bureau officials that he felt dealers had not been fairly treated and given information of the policies they were expected to follow, and refused to permit further prosecutions until they were informed, Bureau officials were careful to inform only the dealers in that one state and even then complained in internal memoranda that this was interfering with the creation of the cases. When BATF was later requested to place a warning to dealers on the front of the Form 4473, which each dealer executes when a sale is made, it instead chose to place the warning in fine print upon the back of the form, thus further concealing it from the dealer's sight.

The Constitution Subcommittee also received evidence that the Bureau has formulated a requirement, of which dealers were not informed that requires a dealer to keep official records of sales even from his private collection. BATF has gone farther than merely failing to publish this requirement. At one point, even as it was prosecuting a dealer on this charge (admitting that he had no criminal intent), the Director of the Bureau wrote Senator S. I. Hayakawa to indicate that there was no such legal requirement and it was completely lawful for a dealer to sell from his collection without recording it. Since that date, the Director of the Bureau has stated that that is not the Bureau's position and that such sales are completely illegal; after making that statement, however, he was quoted in an interview for a magazine read primarily by licensed firearms dealers as stating that such sales were in fact legal and permitted by the Bureau. In these and similar areas, the Bureau has violated not only the dictates of common sense, but of 5 U.S.C. § 552, which was intended to prevent "secret lawmaking" by administrative bodies.

These practices, amply documented in hearings before this Subcommittee, leave little doubt that the Bureau has disregarded rights guaranteed by the constitution and laws of the United States.

It has trampled upon the second amendment by chilling exercise of the right to keep and bear arms by law-abiding citizens.

It has offended the fourth amendment by unreasonably searching and seizing private property.

It has ignored the Fifth Amendment by taking private property without just compensation and by entrapping honest citizens without regard for their right to due process of law.

The rebuttal presented to the Subcommittee by the Bureau was utterly unconvincing. Richard Davis, speaking on behalf of the Treasury Department, asserted vaguely that the Bureau's priorities were aimed at prosecuting willful violators, particularly felons illegally in possession, and at confiscating only guns actually likely to be used in crime. He also asserted that the Bureau has recently made great strides toward achieving these priorities. No documentation was offered for either of these assertions. In hearings before BATF's Appropriations Subcommittee, however, expert evidence was submitted establishing that approximately 75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations. (In one case, in fact, the individual was being prosecuted for an act which the Bureau's acting director had stated was perfectly lawful.) In those hearings, moreover, BATF conceded that in fact (1) only 9.8 percent of their firearm arrests were brought on felons in illicit possession charges; (2) the average value of guns seized was $116, whereas BATF had claimed that "crime guns" were priced at less than half that figure; (3) in the months following the announcement of their new "priorities", the percentage of gun prosecutions aimed at felons had in fact fallen by a third, and the value of confiscated guns had risen. All this indicates that the Bureau's vague claims, both of focus upon gun-using criminals and of recent reforms, are empty words.

In light of this evidence, reform of federal firearm laws is necessary to protect the most vital rights of American citizens. Such legislation is embodied in S. 1030. That legislation would require proof of a willful violation as an element of a federal gun prosecution, forcing enforcing agencies to ignore the easier technical cases and aim solely at the intentional breaches. It would restrict confiscation of firearms to those actually used in an offense, and require their return should the owner be acquitted of the charges. By providing for award of attorney's fees in confiscation cases, or in other cases if the judge finds charges were brought without just basis or from improper motives, this proposal would be largely self-enforcing. S. 1030 would enhance vital protection of constitutional and civil liberties of those Americans who choose to exercise their Second Amendment right to keep and bear arms.