THE FIREARMS OWNERS' PROTECTION ACT: A HISTORICAL AND LEGAL PERSPECTIVE

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[***Ed. note***: this article has been cited as authority in *Staples v. United States*, 62 USLW 4379, 4387 n.4 (U.S. Sup. Ct. 1994) (Stevens, J., dissenting); *U.S. v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988); *U.S. v. Cassidy*, 899 F.2d 543, 546 n.8 (6th Cir. 1990); *United States v. Otiaba*, 862 F.Supp. 251, 253 (D.N.D. 1994) (declining to follow circuit decision "as that court did not have available to it Hardy's analysis of the legislative history"); *Cisewski v. Dep't of Treasury*, 773 F.Supp. 148, 150 (E.D. Wisc. 1991); and *In re Two Seized Firearms*, 127 N.J. 84, 602 A.2d 728, 731 (1992).]

Summary*: The 1986 Amendments to the Gun Control Act were the result of a nearly-unparalleled legislative battle. A thorough understanding of the amendments is critical to a comprehension of Federal firearms laws as they now exist, since they effectively overruled decades of caselaw which construed the 1968 Act. Among the changes were elevations of the intent which must be proven to establish a violation (pp. 646 ff.), a narrowed definition of who must obtain a dealer's license (pp. 628 ff.), restrictions on unreasonable search, seizure, and forfeiture (pp. 653 ff.), and provisions for recovery of attorney's fees in civil and even criminal cases (pp. 662 ff.).*

INTRODUCTION

On May 19, 1986, the Firearms Owners' Protection Act (FOPA) was signed into law.[1] The first comprehensive redraft of the federal firearm laws since 1968,[2] FOPA was predictably lauded

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1 Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) [hereinafter FOPA].

2 *See* The Gun Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 225 (codified as 18 U.S.C. §§ 921-29 (1982)). Minor amendments to the Gun Control Act included the Act of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1923, which relieved licensed dealers of recording requirements on .22 rimfire ammunition, the Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2138, which expanded mandatory sentencing provisions for use of a firearm in a federal crime, and the Act of Oct. 30, 1984, Pub. L. No. 98-573, 98 Stat. 2991-92, which allowed importation of most military surplus arms that qualified as curios and relics.

as "necessary to restore fundamental fairness and clarity to our Nation's firearms laws"[3] and damned as an "almost monstrous idea" and a "national disgrace."[4] The controversy was not limited to the rhetorical. Seven years passed between FOPA's introduction and its Senate vote;[5] the House vote required passage of a discharge petition[6] —only the eighth to succeed in the last twenty-six years.[7]

The controversy surrounding FOPA's genesis is commensurate to the legal impact of its provisions. FOPA effectively overrules six decisions of the United States Supreme Court,[8] (pg.586) moots what would have become a seventh,[9] and negates perhaps one-third of the total caselaw

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[3] *See* 132 CONG. REC. H1665 (daily ed. Apr. 9, 1986) (statement of Rep. Tallon).

[4] *Id.* at H1696 (statement of Rep. Scheuer); 132 CONG. REC. H1751 (daily ed. Apr. 10, 1986) (statement of Rep. Weiss).

[5] FOPA was originally introduced in the Senate as the Federal Firearms Reform Act of 1979. S. 1862, 96th Cong., 1st Sess., 125 CONG. REC. 27,383 (1979).

[6] 132 CONG. REC. H1173-74 (daily ed. Mar. 13, 1986).

[7] Telephone interview with Mary K. Jolly, former General Counsel, Subcommittee on the Constitution of the Senate Judiciary Committee (Mar. 7, 1986).

[8] Clearly negated is United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), which interpreted the Gun Control Act to permit forfeiture actions for alleged violations on which the owner had previously won a criminal acquittal. § 104(d) of FOPA bars forfeiture under these circumstances. The Senate report on the immediate predecessor to FOPA singles out this decision as overruled, S. REP. No. 583, 98th Cong., 2d Sess. 25 n.56 (1984); the report on FOPA's predecessor in the previous Congress endorsed the circuit ruling which the United States Supreme Court later reversed. S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982).

The former report also indicates that FOPA is meant to render inapposite Dickerson v. New Banner Institute, 460 U.S. 103 (1983). *See also* S. REP. No. 583, 98th Cong., 2d Sess. 7 n.16 (1984). *Dickerson* held that a guilty plea constituted a disabling conviction as a matter of federal law, even though entered under a state procedure whereby the court did not make a final judgment of guilt. Section 101(5) of FOPA provides that the determination of whether a court proceeding resulted in a felony conviction shall be determined by reference to state law.

Partially negated is United States v. Biswell, 406 U.S. 311 (1972), which upheld warrantless searches, not based upon cause, of a licensed firearms dealer's premises. Section 103(g) of FOPA requires a reasonable cause and a warrant for such inspections, albeit with broad exceptions.

Section 103(a) of FOPA requires proof of a willful violation for most Gun Control Act prosecutions and proof of a knowing violation for the remainder. It, thus, negates or narrowly limits United States v. Freed, 401 U.S. 601 (1971), which interpreted portions of the Gun Control Act which required registration of, *inter alia*, hand grenades, as requiring no proof of *scienter*. The Court singled out the unusual nature of the weapons involved, *Freed*, 401 U.S. at 609, Brennan's concurrence suggested that proof was required that the defendant knew the items involved were of the type named in the statute, *id.* at 612, and the Court soon stressed that "strict or absolute liability is not imposed." United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560 (1971). Despite all these factors, the lower courts construed *Freed* broadly as requiring no proof of knowledge for any requirements of the Gun Control Act. *See, e.g.*, United States v. Ware, 758 F.2d 557 (11th Cir. 1985) (defendant's belief that he could lawfully receive firearms would be irrelevant and inadmissible); United States v. Pruner, 606 F.2d 871 (9th Cir. 1979) (trial court committed no error in not permitting the jury to consider whether defendant knew it was illegal for him to receive a firearm); United States v. Ruisi, 460 F.2d 153 (2d Cir. 1972) (government need not establish that defendant knew it was illegal for him to receive firearms).

Two additional decisions that were good law prior to the 98th Congress are inapposite today, although not solely by virtue of FOPA. Simpson v. United States, 435 U.S. 6 (1978) and Busic v. United States, 446 U.S. 398 (1980) both held that a defendant charged with an offense which embodied enhanced punishment for use of a weapon could not also be charged under the Gun Control Act with the offense of using a firearm in a federal felony. Both decisions were premised upon the absence of statutory history to the contrary: section 104(2) of FOPA expressly includes enhanced-punishment offenses within the ambit of the Gun Control Act offense, and the Senate reports both indicated that these decisions would no longer be good law. S. REP. No. 583, 98th Cong., 2d Sess. 22; S. REP. No. 476, 97th Cong., 2d Sess. 23. However, between the 1984 committee action and the Senate floor vote, the critical language was separately enacted. *See* Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2138. Section 104(a)(2) of FOPA in turn reincorporates the language of the 1984 enactment.

[9] Galioto v. Department of Treasury, 602 F. Supp. 682 (D.N.J.), *prob. juris. noted*, 106 S. Ct. 307 (1985), *vacated*, 106 S. Ct. 2683 (1986), a challenge to the Gun Control Act's failure to include a mechanism whereby those disabled from gun ownership by a prior mental commitment can obtain a "relief from disability" (the Gun Control Act's relief provisions are, on their face, limited to those disabled by a felony conviction), is mooted by section 105 of FOPA.

construing the Gun Control (pg.587) Act of 1968.[10] FOPA's impact, however, is not limited to the Gun Control Act, nor even to federal statutes. By expressly exempting interstate transportation of firearms from the reach of many state firearm laws,[11] it affects state proceedings as well. A detailed comprehension of FOPA is thus essential to an understanding of both federal and state firearm laws.(pg.588)

Unfortunately, such a comprehension is not easily achieved. FOPA reflects not a simple, single legislative decision, but a complex series of compromises, many of which are only partially reflected in the record.[12] Even where the record is complete, it is rarely clear. 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*.[13] The House bill's predecessor and Senate counterpart, S. 49, was never referred to committee and went instead to the floor with no

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[10] The author's quick count of caselaw listed in the United States Code Service (Lawyers' Co-op, 1979) under "elements of the offense" and "defenses" for 18 U.S.C. 922 indicates the interpretations of the Gun Control Act in about 70 cases would be entirely negated, the interpretations of the Act in about 10 cases would be partially negated, and the interpretations of the Act in about 156 cases would be unaffected. The cases thus legislatively overruled span the breadth of the Gun Control Act. *See*, *e.g.*, United States v. Cody, 702 F.2d 147 (8th Cir. 1983) (expungement of state conviction for firearms-related felony not an absolute defense to federal ban on gun possession by a convicted felon: overruled by section 101 of FOPA, redefining disabling convictions to exclude expunged convictions unless such expungement limits the right to transport or possess firearms); Perri v. Department of Treasury, 637 F.2d 1332 (9th Cir. 1981) (on appeal from administrative revocation of license, court reconsiders administrative record and may avoid taking additional evidence unless dealer raises "substantial doubt" as to record: overruled by section 103(5) of FOPA, which requires de novo hearing); United States v. Scherer, 523 F.2d 371 (7th Cir. 1975) (licensed dealer cannot transfer personally-owned firearms without complying with all requirements for ordinary sale by a dealer: largely overruled by section 103(3) of FOPA, exempting such personal-collection sales so long as firearm was owned more than a year and transaction was not willful evasion of Act), *cert. denied*, 424 U.S. 911 (1976); Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) (gubernatorial pardon for state firearms-related felony conviction does not give exemption from federal ban on gun possession by convicted felon: overruled by section 101 of FOPA, redefining disabling convictions to exclude pardoned offenses unless the pardon itself prohibits the recipient from possessing firearms), *cert. denied*, 420 U.S. 972 (1975); United States v. Jackson, 352 F. Supp. 672 (S.D. Ohio) (dealer cannot obtain license for temporary premises such as a "gun show": overruled by section 103(7) of FOPA, which specifically authorizes licenses for such premises), *aff'd*, 480 F.2d 927 (6th Cir. 1972), *cert. denied*, 424 U.S. 911 (1976).

[11] Section 107 of FOPA adds to the nonpreemption provisions of the Gun Control Act, 18 U.S.C. § 927, a proviso that any person not barred from transporting arms by the act may transport an unloaded, inaccessible firearm in interstate commerce, notwithstanding state law or regulation. It has been estimated that laws of at least 21 states may be affected. 131 CONG. REC. S9117-18 (daily ed. July 9, 1985) (statement of Sen. Metzenbaum). The Attorney General of Massachusetts has already ruled that the Massachusetts firearms law (which, with its mandatory one-year sentence for unlicensed carrying, is one of the nation's strictest) is inapplicable to travellers who comply with FOPA's pass-through provisions. Letter from Francis X. Belloti, Attorney General, to Charles V. Barry, Secretary, Executive Office of Public Safety (Oct. 31, 1986) (copy in possession of CUMBERLAND LAW REVIEW).

FOPA's provision, in section 101(5), that a state expungement or restoration of civil rights following conviction restores federal rights to possess firearms, absent a state provision to the contrary, may also have a secondary effect on state laws. Some states have extremely liberal provisions on restoration of rights. *See generally infra* notes 304-307. Such states may desire to clarify whether there are conditions under which the restoration of rights should be taken to extend to firearm possession.

[12] The most crucial of these compromises were reached in a series of 1983 meetings between representatives of the Treasury Department and representatives of the National Rifle Association, aimed at achieving a bill acceptable both to the enforcing agencies and to the major private group endorsing FOPA. *See generally infra* notes 143-174.

[13] In the House, the majority leadership was numbered among FOPA's opponents. When it became apparent that the discharge petition was approaching success, the House Judiciary Committee reported out a bill, H.R. 4332, which embodied some of FOPA's provisions and was intended to siphon off support from its rival. *See infra* notes 203-218. On the House floor, FOPA was substituted for H.R. 4332. *See* 132 CONG. REC. H1752-53 (daily ed. Apr. 10, 1986). FOPA thus became H.R. 4332, assuming the numbering of its erstwhile rival. FOPA's underlying report is, thus, designated as the H.R. REP. No. 495, 99th Cong., 2d Sess. (1986). In fact, H.R. REP. No. 495 urges that the *original* H.R. 4332 ought to be adopted and argues for the rejection of its rival, FOPA.

report whatsoever.[14] S. 49's ancestors were the subject of two reports[15] which, unfortunately, are in hopeless conflict in certain aspects.[16] To add to its original complexity, FOPA was, prior to its effective date, amended by a second enactment[17] which was in turn modified by a concurrent resolution.[18] The need for a comprehensive review of this (pg.589) controversial and convoluted legislation is thus clear.[19] The statute's core can be found in the real consistencies obscured by seeming chaos.

The purpose of this Article is to examine the Firearms Owners' Protection Act in both historic and legal perspectives. Accordingly, the Article first examines the framework of federal firearm legislation as it evolved prior to FOPA. Then, the seven-year evolution of FOPA itself is analyzed. Finally, this Article evaluates the nature of the more significant changes embodied in this controversial enactment.

I. BACKGROUND TO FOPA: PRE-1986 FEDERAL FIREARMS LAWS

A. Nationalization of Firearm Regulation: The National Firearms Act of 1934 and Federal Firearms Act of 1938

Firearms and weapons control statutes are by no means a legislative novelty. The first American handgun ban was enacted in 1837,[20] restrictions on sale or carrying of handguns were commonplace by the turn of the century,[21] and the National Conference of Commissioners on

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[14] 131 CONG. REC. 523-27 (daily ed. Jan. 3, 1985).

[15] *See* S. REP. No. 476, 97th Cong., 2d Sess. 23 (1983); S. REP. No. 583, 98th Cong., 2d Sess. 25 (1984).

[16] The most significant difference was in the definition of "willful" as used in section 104 of each bill. *See generally infra* notes 345-46.

[17] Act of July 8, 1986, Pub. L. No. 99-360, 100 Stat. 766. This amendment originated when the House-passed version of FOPA was returned to the Senate. The Senate agreed to some further amendments as the price of obtaining a filibuster-preventing time agreement from FOPA's opponents. The amendments could not simply be incorporated in FOPA itself, or the Senate would be required again to return it to the House, where the leadership would likely let it die. The Senate instead passed the House bill, then introduced and passed S. 2414 to amend it. 132 CONG. REC. S5367-68 (daily ed. May 6, 1986).

[18] S. Con. Res. 152, 99th Cong., 2d Sess., 132 CONG. REC. S5367-68 (daily ed. May 6, 1986). This was necessary since some of FOPA's provisions took effect immediately and the remainder six months later. S. 2414 would have amended both types of provisions and had no specified effective date. The resolution indicated that each section of S. 2414 would take effect on the date the section it amended would have.

[19] This need is, unfortunately, hardly obviated by the promulgation of regulations implementing FOPA. *See* FED. REG. 39,612; 39,635 (1986). The regulations were promulgated without notice or opportunity for comment, and they contain no explanation of changes made or their justification under the new statute.

[20] Act of Dec. 25, 1837, DIGEST OF THE STATUTE LAWS OF THE STATE OF GEORGIA IN EFFECT PRIOR TO THE SESSION OF THE GENERAL ASSEMBLY OF 1851, at 818 (1851). "Such pistols as are known and used as horsemen's pistols" were exempted; these were the largest and heaviest then in use. The statute was voided as a violation of the second amendment to the U.S. Constitution in Nunn v. State, 1 Ga. 243 (1846).

[21] *See*, *e.g.*, Act of Mar. 18, 1889, 1889 Ariz. Sess. Laws 16 (prohibiting carrying of pistols within any settlement, town, village or city); Act of Apr. 1, 1881, 1881 Ark. Acts 191 (prohibiting sale of "any pistol except such as are used in the army and navy of the United States"; upheld in Dabbs v. State, 39 Ark. 353 (1883)); Act of Feb. 4, 1889, 1889 Idaho Sess. Laws 23; *Un Acto Prohibiendo el Porte de Armas Mortiferas*, 1868-69 LEYES DEL TERRITORIO DEL NUEVO MEJICO 61; Act of June 11, 1870, ch. 13, 1870 Tenn. Pub. Acts 28 (prohibiting carrying of handguns and certain other weapons in "public assemblies of the people"; partially struck down in Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1872)); Act of Apr. 12, 1871, ch. 34, 1871 Tex. Gen. Laws 25 (upheld in English v. State, 35 Tex. 473 (1872)).

Uniform State Laws spent seven years in the 1920s preparing a uniform state act on the subject.[22] Nonetheless, prior to 1934, the sole federal (pg.590) statute on the subject was a 1927 ban on use of the mails to ship firearms concealable on the person.[23]

The late 1920s and early 1930s brought, however, a growing perception of crime both as a major problem and as a national one.[24] Public officials did much to support the perception; Attorney General Homer Cummings, for instance, publicly estimated that America was being terrorized by half a million armed thugs, a force larger than the contemporary United States Army.[25] The mobility of the automobile enabled criminals, in those pre-police radio days, to move between jurisdictions before police units could generally be alerted; such criminal gangs found the submachinegun (a fully automatic, shoulder-fired weapon utilizing automatic pistol cartridges) and sawed-off shotgun deadly for close-range fighting. The resulting quest for law enforcement solutions approached the incredible. At one 1933 hearing, for instance, a Senate subcommittee heard, with no recorded skepticism, calls for a ban on felons riding in automobiles, universal fingerprinting of all citizens, mandatory "papers" for interstate travel, and enactment of national vagrancy laws authorizing warrantless search and arrest of anyone "reputed" to "habitually violate" the laws (with law enforcement officials to testify as to the arrestee's reputation).[26] On a more practical plane, (pg.591) the Department of Justice proposed what became the National Firearms Act of 1934. The constitutional basis for federal intervention, very much an issue in 1934,[27] was resolved by patterning the firearm

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[22] The Commissioners appointed a special committee to draft such a law at their 1923 meeting; seven years later a third draft at length secured approval. *See*, *e.g.*, THIRD REPORT OF THE COMMITTEE ON A UNIFORM ACT TO REGULATE THE SALE AND POSSESSION OF FIREARMS (1926); Report of the Committee on a Uniform Firearms Act (1930). The Uniform Act, as finally adopted, required licensing of handgun dealers, forbade dealers to sell to certain classes of persons (those with a record of criminality, narcotics addiction, alcoholism, or mental defect), and required a permit to carry a handgun outside the home or business. *See generally* T. Mahl, A History of Individual and Group Action in Promoting National Gun Control Legislation During the Interwar Period, 1919-1941 (unpublished manuscript) (Master's thesis, Kent State Univ., 1972).

[23] The prohibition survives to this day. *See* 18 U.S.C. § 1715 (1982).

[24] Available evidence suggests that crime rates then were not astonishing by modern standards, but were seen as increasing beyond the capacity of existing law enforcement systems to cope. Chicago's increase in homicides, for instance, was enough to cause virtual collapse of the city's criminal processing system; yet, the reported rate was only about one-third that reached in more recent years. Illinois Law Enforcement Comm'n, Statistical Analysis Center, PATTERNS OF CHANGE IN CHICAGO HOMICIDE: THE TWENTIES, THE SIXTIES AND THE SEVENTIES 11, 13 (Apr. 1980) (noting that only about four percent of Chicago homicides were solved in 1926, even where the offender was known; yet, 1926's homicide rate of 10.4 per 100,000 population was far exceeded by its 1974 rate of 29.2).

[25] *National Firearms Act: Hearings on H.R. 9066 before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 9 (1934). Since the U.S. population was then but half its present level, *id.* at 31, the figure does seem a bit high.

[26] *Investigation of So-called "Rackets": Hearings Pursuant to S. Res. 74 before a Subcomm. of the Sen. Commerce Comm.*, 73d Cong., 2d Sess., vol. I pt. 3 at 283, 307-8, 316 (1933). One proponent of a national vagrancy law proposed a constitutional amendment to remove any question as to its constitutionality, explaining:

> "[W]hen our Constitution was framed there is no question but what it was a great work and was framed with the utmost sincerity.... At that time there were no gangsters, however. At that time they did not have these corrupt syndicates and organized rings.... [T]oday the man who takes advantage of personal liberty is the gangster, the gunman, the kidnapper."

Id. at 307.

[27] Indeed, it would remain an issue for several more years. The following year saw Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), which held the interstate commerce clause an insufficient underpinning for requirements of a 40-hour week, a minimum wage and a restriction on child labor; these aspects of manufacture were held to have an insufficiently "direct" effect on interstate commerce. The following year saw United States v. Butler, 297 U.S. 1 (1936), which restricted use of the taxing power to achieve nonrevenue ends. Only in 1937, with the famed "switch in time that saved nine" (West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and its successors N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) and N.L.R.B. v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937)) did the Court initiate the current, expansive view of the interstate commerce power.

legislation after the Narcotic Drug Act of 1914.[28] The Narcotic Drug Act used the taxing power to support distributor licensing, requirements that sales be accompanied by a "written order" preserved by the seller and subject to inspection, and a ban on interstate shipment by unlicensed persons. As the Narcotic Drug Act had survived legal challenge, albeit narrowly,[29] it was consciously employed as a model for the new firearm legislation.[30]

What became the National Firearms Act was introduced as H.R. 9066.[31] H.R. 9066 would have applied to any "firearm," (pg.592) a term defined to mean "a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun."[32] "Machine gun" was in turn defined as any weapon capable of firing twelve or more shots without manual reloading.[33] All persons engaged in the business of selling such "firearms" were to register with the Collector of Internal Revenue; all sales were subject to a special tax and were to be made pursuant to a written order form. Absent payment of the tax, a firearm could not be shipped in interstate commerce; moreover, knowing possession of a firearm transferred in violation of these requirements was itself a crime.

During committee consideration, a substitute bill was prepared by the Justice Department. The substitute sought to fill a major gap in the original bill, which (consistent with its excise theme) would have applied only to firearms sold after its enactment.[34] The substitute required existing "firearm" owners to register their arms within sixty days, except "with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act."[35] This would still be premised on the taxing power: "it is important to be able to identify arms to see which possessors have paid taxes and which firearms have been taxed and which have not."[36] The substitute

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[28] Pub. L. No. 63-223, 38 Stat. 785.

[29] United States v. Doremus, 249 U.S. 86 (1919). Four Justices, including the Chief Justice, dissented on grounds that the statute invaded the reserved police powers of the state. *Id.* at 95.

[30] "[W]e have followed the Harrison Anti-Narcotic Act in language so as to get the benefit of any possible interpretation that the courts may have made of that act." *National Firearms Act: Hearings on H.R. 9066 before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 6 (1934) (testimony of Attorney General Homer Cummings) [hereinafter *Hearings on H.R. 9066*].

[31] 73d Cong., 2d Sess. (1934) (reprinted in *Hearings on H.R. 9066*, *supra* note 30, at 1-3). The bill got a very slow start due to rather gross mishandling by the Justice Department. Since the bill was based on the taxing power, U.S. CONST. art. I, § 7, it should have originated in the House. Yet the Justice Department referred the bill to Senator Henry Ashurst for introduction. Apart from being in the wrong chamber, Ashurst was hardly likely to be enthusiastic—he carried a .45 for self-protection. When Justice realized its constitutional and practical mistakes, it compounded them by asking Rep. Hatton Summers to champion the bill. Summers, an advocate of state's rights and no friend of Homer Cummings, was already sitting on a dozen Administration anticrime bills and had just finished an infuriating verbal clash with President Franklin D. Roosevelt over them. Only the fortuitous arrival of Raymond Moley, an FDR associate whom Summers trusted, calmed him sufficiently to discuss introduction of H.R. 9066 and the other bills. T. Mahl, *supra* note 22, at 127-31.

[32] H.R. 9066, *supra* note 31, at 1.

[33] *Id.*

[34] When the possibility of registering firearms already owned was first raised, Attorney General Cummings replied "I am afraid it would be unconstitutional," apparently due to lack of any connection with revenue or interstate commerce. *Hearings on H.R. 9066*, *supra* note 30, at 13.

[35] *See id.* at 84. While intended to eliminate a double registration requirement for those who registered prior to the expiration of the sixty days, the exemption led to the registration requirement being stricken as a violation of the fifth amendment's self-incrimination clause some 34 years later. *See* Haynes v. United States, 390 U.S. 85 (1968).

[36] *Hearings on H.R. 9066*, *supra* note 30, at 87 (testimony of Ass't Att'y Gen. Joseph Keenan).

also refined the definition of "firearm" to exclude .22 caliber pistols and to include rifles and shotguns alike if their barrels were under eighteen inches.

When ultimately reported out as H.R. 9741, the substitute embodied two additional and significant changes to the definition (pg.593) of "firearm."[37] First, pistols and revolvers were omitted, so that the bill applied to machineguns, sawed-off shotguns and rifles, silencers, and concealable firearms *other than* pistols and revolvers.[38] Second, the definition of "machinegun" was changed to cover firearms that fired more than once for each pull of the trigger, regardless of how many shots they might fire before reloading was necessary. The transfer tax on machineguns was fixed at $200, then about a 100% excise tax.[39] While the Attorney General described the amended bill as little more than "a Federal Machine-gun act,"[40] it had little difficulty securing enactment as the National Firearms Act of 1934.[41]

The National Firearms Act delayed, rather than defused, the drive for federal regulation of ordinary firearms and ammunition. In the Seventy-third Congress, Senator Royal S. Copeland introduced a bill proposing a "Federal Firearms Act."[42] The bill, which had a number of doubtful features,[43] died in committee. Copeland permitted an ad hoc committee of staff, National Rifle Association representatives, and Department of Justice representatives to prepare an improved draft.[44] Early in the Seventy-fourth Congress, Copeland (pg.594) (noting, "I am always amazed when people agree"[45]) introduced the result as S. 3.[46]

S. 3 was based squarely upon the interstate commerce clause.[47] It would have required any "dealer" (defined as "any person engaged in the business of selling firearms" or repairing them) to obtain a one dollar license from the Secretary of Commerce before transporting, shipping, or receiving any firearm in interstate or foreign commerce. The license could be revoked upon criminal conviction for any violation of the bill. Licensed dealers were required to keep records of sales and

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[37] *See* H.R. REP. No. 1780, 73d Cong., 2d Sess. (1934).

[38] The House report notes: "Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms." *Id.* at 1. The amendment deleting pistols and revolvers carried by one vote. T. Mahl, *supra* note 22, at 152. Since the definition of concealable arms other than pistols and revolvers was retained, there remained a requirement to register these obscure items, largely cane-guns, knife-pistols, "palm pistols" and other small firearms not readily classified as a traditional pistol or revolver.

[39] *See Hearings on H.R. 9066*, *supra* note 30, at 12.

[40] Address by Homer Cummings, Firearms and the Crime Problem at 8 (before 1937 annual convention of the International Assn. of Chiefs of Police).

[41] Pub. L. No. 73-474, 48 Stat. 1236.

[42] S. 2258, 73d Cong., 1st Sess., 78 CONG. REC. 459 (1934). *See also To Regulate Commerce in Firearms: Hearings on S. 885, S. 2258 and S. 3680 before a Subcomm. of the Senate Commerce Comm.*, 73d Cong., 2d Sess. 1-3, 8 (1934).

[43] Among other obvious problems, only licensed manufacturers, not dealers, could ship firearms in interstate commerce. Bullets were to be stamped "on the ends" with a district code, in the hopes the stamp would survive impact and that knowledge of the multistate region into which the ammunition had been shipped would aid in the solution of crimes. S. 2258, *supra* note 42, §§ 2(a), (i).

[44] *See* 79 CONG. REC. 11,973 (1935) ("[F]inally the bill was worked out by a committee consisting of the Rifle Association, the Pistol Association, members of the so-called Crime Committee and our own experts."); *To Regulate Commerce of Firearms: Hearings on S. 3 before the Senate Comm. on Commerce*, 74th Cong., 1st Sess. 1 (1935) [hereinafter *To Regulate Commerce of Firearms*].

[45] *To Regulate Commerce of Firearms*, *supra* note 44, at 1.

[46] S. 3, 74th Cong., 1st Sess., 79 CONG. REC. 100 (1935). *See also To Regulate Commerce of Firearms*, *supra* note 44, at 1-3.

[47] *To Regulate Commerce of Firearms*, *supra* note 44, at 27.

were forbidden to ship firearms in interstate commerce to persons under indictment for or convicted of a crime of violence, or who lacked any permit required by the laws of the state of destination. S. 3 would also have repealed the National Firearms Act of 1934, substituting in its stead a general ban on interstate shipment or transportation of machineguns. The Department of Justice objected to this last provision, and it was deleted in committee.[48]

S. 3 passed the Senate, after floor amendments whose primary effect was to require proof of a "knowing" state of mind.[49] It died in the House with the adjournment of the Seventy-fourth Congress. Copeland reintroduced the measure, incorporating the Senate floor amendments, in the Seventy-fifth Congress, once again as S. 3.[50] After assurances that the measure was supported by firearms groups, Copeland secured speedy passage by voice vote.[51] The House passed S. 3 with amendments, primarily changing the administering agency from Commerce to Treasury.[52] The Senate concurred in the House amendments, and the Federal Firearms Act of 1938 became law.[53] The 1934 and 1938 Acts (pg.595) comprised the substance of federal firearms law for the next three decades.

B. Expansion of National Firearms Laws: The Gun Control Act of 1968

The National Firearms Act and Federal Firearms Act formed the backdrop for the next major federal firearms legislation, the two statutes known collectively as the Gun Control Act of 1968.[54] As is often the case, the dry legal history of that Act covers a complex legislative reality. The byzantine origins of the Gun Control Act are foreshadowed by the career of its prime sponsor, Senator Thomas Dodd. A staunch conservative[55] who kept a pistol in his desk and once tried to carry it onto the Senate floor,[56] Dodd came from a state that was the center of the American firearms industry.[57] In later years, this apparent paradox was explained—and another created—by the

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48 *Id.* at 20-21.

49 79 CONG. REC. 11,973-74 (1935).

50 75th Cong., 1st Sess., 81 CONG. REC. 65 (1937).

51 81 CONG. REC. 1527 (1937).

52 83 CONG. REC. 9659 (1938). The record reflects no reason for the change; likely it was a simple economy move, as Treasury was already enforcing the National Firearms Act.

53 Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938).

54 The "Gun Control Act of 1968" is today used to refer to the statutes codified at 18 U.S.C. §§ 921-27, app. §§ 1201-03 (1985). In fact, these reflect two separate enactments, Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, 82 Stat. 225, 236, and the later Gun Control Act, 82 Stat. 1213.

55 A favorite of J. Edgar Hoover, Dodd functioned during the late 1960s as acting Chairman of the Senate Committee on Internal Security. His Nov. 22, 1963 remark—"I'll say of John Kennedy what I said of Pope John the day he died. It will take us fifty years to undo the damage he did to us in three years"—suggests that he could hardly be considered on the 1960s left. J. BOYD, ABOVE THE LAW 9, 55, 106 (1968).

56 Interview with Charles Grey (Nov. 18, 1980). The late Mr. Grey, a dedicated and opinionated man whose memory matched his personal library, recalled overhearing Dodd, who was then in the Senate lobby preparing for the reading of his censure, send an aide for the handgun, which he slipped into his pocket. The first aide asked a second whether Dodd might intend to shoot someone else; the second replied, "No, but he might mean to kill himself." The second aide then engaged Dodd in conversation and removed the gun from his pocket; the distraught Dodd made no protest.

57 Dodd was elected from Connecticut, the home ground of Samuel Colt. Then, Connecticut was the headquarters not only of Colt, but also of High Standard, Remington, Mossberg, Winchester-Western, Sturm-Ruger, and Marlin. Connecticut is to firearms what Michigan is to automobiles.

revelation that the early forms of the Gun Control Act were drafted with the assistance and encouragement of firearms manufacturers.[58] (pg.596)

In the postwar years, domestic firearms manufacturers encountered heavy competition from home hobbyists who converted inexpensive imported military arms into hunting and target rifles.[59] "Mail order houses" imported such arms for a pittance and resold them to a national market. Domestic arms manufacturers saw their sporting markets undercut and began pressing for protective measures. Protests to the State and Defense Departments over issuance of surplus import licenses yielded little result.[60] The industry then sought a legislative remedy and in 1958 secured passage in the House of a rider to the Mutual Security Act that would have barred virtually all surplus arms imports.[61] The National Rifle Association took issue with the manufacturers and strongly opposed the amendment.[62] The Senate, citing possible violations of the General Agreement on Trades and Tariffs, limited the restriction to reimportations of American arms,[63] a restriction which prevailed in conference.[64]

After this failure, the firearms manufacturers approached Senator Dodd, with arguments and suitable tribute.[65] (pg.597) Dodd's original effort, S. 1975, was introduced in August 1963 and had extremely limited scope. S. 1975 would have required mail-order purchasers of handguns to provide the seller with notarized affirmations that they met certain age and other requirements. In November and December, Dodd proposed amendments that would have applied to rifles and shotguns as well

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[58] Jack Anderson later charged that "[t]he Big Five—Colt, Olin-Mathieson, Sturm-Ruger, Remington Arms, and Winchester—all have plants in Connecticut. We now learn that Dodd seldom made a move on gun legislation without consulting them." Washington Post, Aug. 9, 1966, at B15, col. 4. During hearings on later drafts of Dodd's bill, the president of the firearm and ammunition manufacturers' trade association testified, "[T]his country has in recent years been flooded with millions of cheap surplus military firearms.... Since 1961 we have cooperated with this Subcommittee in seeking to formulate legislation along these lines." Statement of E.C. Hadley, President of the Sporting Arms and Ammunition Manufacturers' Institute, REMINGTON NEWS LETTER, June 1965, at 3-4 (copy in possession of CUMBERLAND LAW REVIEW).

[59] The conversion was not particularly difficult. The surplus arms were primarily bolt-action rifles outmoded by the adoption of semi- and full-automatic arms during the 1950s and 1960s. Most were based upon the Mauser 1898 action, which is also the starting point for the design of most modern sporting rifles. A simple conversion consisted of no more than trimming the wooden stock to reduce weight; more complex conversions could include restocking, rebarrelling, and fitting of a telescopic sight.

[60] One petition alleged that domestic rifle production had fallen 60% during the 1950s and that with continued sales "the entire small arms industry sales of centerfire rifles could be blanketed up to the end of this century!" Letter from E.C. Hadley, President of Sporting Arms and Ammunition Manufacturers' Institute to Neil McElroy, Secretary of Defense (Sept. 15, 1958) (copy in possession of CUMBERLAND LAW REVIEW).

[61] H.R. REP. No. 1696, 85th Cong., 2d Sess. 45-46 (1958).

[62] NRA BULLETIN, May 1958 (copy in possession of CUMBERLAND LAW REVIEW).

[63] S. REP. No. 1627, 85th Cong., 2d Sess. 22-23 (1958).

[64] *See* Mutual Security Act of 1958, § 205(k), 72 Stat. 267.

[65] Several of Dodd's staff later charged that while Dodd was "drafting, with the collaboration of the arms industry, legislation to control the interstate shipment of firearms and other matters of fundamental interest to that industry, he accepted upwards of $4,000 in political and personal donations from arms industry officials." J. BOYD, *supra* note 55, at 270. During a re-election campaign following passage of the Gun Control Act, Dodd issued a pamphlet stating that the Act "guarantees that legitimate firearms manufacturers in Connecticut will not be forced to lay off employees due to unfair competition from small irresponsible out-of-state garage operations which had glutted the market before the Dodd Act." Dodd Campaign Headquarters, "The Dodd Gun Rights Act" (copy in possession of CUMBERLAND LAW REVIEW).

and would have required certification by the chief law enforcement officer of the purchaser's jurisdiction.[66]

Neither the original bill nor its successors were reported out of committee during the Eighty-ninth Congress. In part, this may have been due to Dodd's dilatory approach to legislation.[67] The Ninetieth Congress was a different story. On the one hand, Dodd was no longer in real control, as censure proceedings steadily undermined his standing.[68] On the other, the Johnson Administration advocated stricter firearms control with increasing vigor.[69] As the session began, Dodd introduced S. 1, which he quickly supplemented with Amendment 90.[70] S. 1-90 would have supplanted the Federal Firearms Act: since S. 1-90 essentially laid the foundations of the Gun Control Act, its major provisions merit examination.

Prohibited Persons

S. 1-90 would have barred firearms receipt by fugitives (pg.598) from justice and persons under indictment for, or convicted of, a crime punishable by imprisonment exceeding one year, a term defined to exclude antitrust, unfair trade, and similar infractions. These provisions were, in the main, borrowed from the Federal Firearms Act, which, however, applied this bar only to sales in interstate commerce.[71] S. 1-90 would have allowed persons convicted of such violations—*other than* violations of the federal firearms laws—to apply for an administrative "relief from disabilities," by which Treasury, upon proof of good character, might restore the right to own or deal in firearms. The latter provision was taken from a 1965 amendment to the Federal Firearms Act,[72] sponsored by Dodd to deal with the problems of a firearms manufacturer.[73] Additionally, under S. 1-90, dealers would have been barred from selling rifles or shotguns to persons under eighteen years of age, or any other firearms to persons under twenty-one years of age, and they would have been generally forbidden

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66 109 CONG. REC. 13,945 (1963). Dodd said the bill "has been thoroughly discussed with the gun industry and the gun clubs, [and] they have approved and endorsed the provisions of our proposal." *Id.* at 13,946-47. He added that NRA had "worked closely with the Committee throughout its investigation and [had] participated willingly in the development of the bill." *Id.* at 13,947.

67 His previous investigations of the insurance, entertainment and drug industries had been characterized by delays while the industry's willingness to back its position with fiscal support was verified. *See* J. BOYD, *supra* note 55, at 187, 195, 264-65.

68 The investigating committee delivered its report in April 1967; the censure vote came in June. *See* SEN. SELECT COMM. ON STANDARDS AND CONDUCT, REP. No. 193, 90th Cong., 1st Sess. (1967). The investigation was heavily publicized through the following year. It was, for instance, the cover story for the Saturday Evening Post, Jan. 13, 1968.

69 For example, the President's State of the Union Address in January 1968 called for Congress "to stop the trade in mail order murder, to stop it this year by adopting a proper gun control law," 1 PUB. PAPERS 25, 30 (1968); five months later, a presidential letter criticized Senate passage of "a watered down version of the Gun Control Law I recommended." 1 PUB. PAPERS 14, 694 (1970). During the Ninetieth Congress, Dodd referred to his amendments as submitted on behalf of the administration, 113 CONG. REC. 3255 (1967); similar statements were made by sponsors of S. 917, the rival to Dodd's measures. *See id.* at 2902.

70 113 CONG. REC. 3257-60 (1967).

71 As originally enacted, the Federal Firearms Act had only banned firearm receipt by those convicted of a "crime of violence." In 1947, this was defined so as to include burglary, house breaking, and many forms of assault. Act of Mar. 10, 1947, 61 Stat. 11. In 1961, the prohibition was extended to anyone convicted of a "crime punishable by imprisonment for a term exceeding one year," thus including nonviolent offenses as well as some violations technically classed as misdemeanors under certain state laws. Act of Oct. 3, 1961, 75 Stat. 757.

72 Act of Sept. 15, 1965, Pub. L. No. 89-184, 79 Stat. 788.

73 The manufacturer, Olin-Mathieson, had pleaded guilty to offenses involving the overseas sale of pharmaceuticals financed by U.S. aid. Under the Federal Firearms Act the firm, as a "person" convicted of a felony, would have been barred from interstate shipment of firearms and, more importantly, ammunition. The court stayed judgment of conviction to give the firm an opportunity to seek legislative change. After a few visits and donations, Dodd sponsored the amendment which allowed the firm to obtain a "relief from the disabilities." Washington Post, Aug. 9, 1966, at B15, col. 4.

to sell any firearm to those whom they knew or should have known "could not lawfully purchase or possess in accord with applicable laws, regulations or ordinances of the State" or locality in which the transferee resided.[74]

Dealer Licensing

S. 1-90 would have required persons "engaged in the business" of firearms dealing to obtain licenses. This was an expansion of the Federal Firearms Act, which required licensing only if the person "engaged in the business" and (pg.599) shipped or received firearms in interstate commerce. While the Federal Firearms Act licenses were issued upon request, and revoked only upon criminal conviction, S. 1-90 provided that the Secretary "may" issue such licenses and *must* deny them if the applicant was "by reason of his business experience, financial standing, or trade connections, not likely to commence business operations." Persons who had willfully violated the Act or who lacked "business premises'" were likewise denied a license. Dealers were obliged to maintain records fixed by regulation, and their premises were open to inspection at will during business hours.

Interstate Sales

The Federal Firearms Act barred interstate sales between nonprohibited persons only when the buyer's state required, and the buyer lacked, a license to purchase. S. 1-90 drew a line between "long arms" (shotguns and rifles) and other firearms (primarily handguns). Persons who were not licensed dealers could purchase handguns only in their state of residence. Residents of different states could sell each other rifles and shotguns so long as the receipt did not violate state or local law at the buyer's place of residence. Dealer "mail order sales" of any firearms were barred by a provision barring a licensee from shipping firearms or ammunition to a nonlicensee in interstate commerce.

National Firearms Act Weapons

The National Firearms Act required licensing of all machineguns, silencers, and short-barrelled rifles and shotguns. S. 1-90 would have imposed similar restrictions on "destructive devices," including bombs, grenades, and firearms with a bore over .50 caliber. Sales of National Firearms Act weapons and destructive devices by a licensed dealer required an affidavit of approval from the chief law enforcement officer of the purchaser's jurisdiction, and interstate transportation of such arms would have required approval by the Secretary.

Importation

S. 1-90 would have barred firearms imports subject to a few exceptions, the most important being rifles, shotguns, (pg.600) and nonmilitary handguns "generally recognized as suitable for or readily adaptable to sporting purposes."

The day before S. 1-90's introduction, Senator McClellan introduced S. 917, "The Safe Streets and Crime Control Act of 1967."[75] In committee, the bill was renamed "The Omnibus Crime Control and Safe Streets Act of 1967" and a new Title IV, dealing with firearms, was added.[76] Title IV tracked S. 1-90 in all but a few details; it did not, for example, prohibit mail order sale of rifles

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74 113 CONG. REC. 3,258 (1967).

75 S. 917, 90th Cong., 1st Sess., 113 CONG. REC. 2902-04 (1967).

76 *See* S. REP. No. 1097, 90th Cong., 2d Sess. 20-27 (1967).

and shotguns, nor place minimum age limits on their purchasers. After lengthy debate, the Senate passed S. 917 with several amendments. One amended the exemption for "antique" firearms, which were not subject to the Act, advancing the cut-off date to 1898 from the committee's 1870 cut-off.[77] A second changed the prohibition on dealer's sales in violation of state or local law or ordinance. Under the amendment, the dealer's obligation was to avoid sales barred by state law or a "published ordinance," the latter being one determined by the Secretary of the Treasury (the Secretary) to be relevant to purposes of the Act and so published in the *Federal Register*.[78]

A third amendment was more significant and, regrettably, less well thought out.[79] It amended S. 917 to add a new title VII, which prohibited certain persons not only from receiving, but also from possessing firearms.[80] The list of prohibited persons did not, however, tally with that in Title IV. To Title IV's list of convicted felons and fugitives from justice, Title VII added persons given a dishonorable discharge[81] by the military, those judicially adjudged "mentally incompetent," (pg.601) those who had renounced U.S. citizenship, those who were aliens unlawfully within the U.S., or those who were acting in the course of employment of any of the other classes. Nor did the discrepancy end there: Title IV had defined a felon as one convicted of a crime punishable by more than one year's imprisonment, excluding certain business-related offenses, while Title VII simply used the term "felony." Title IV excepted from this class a person given "relief from disability"; Title VII excepted a person pardoned and "expressly authorized" to own firearms.[82] The Senate substituted S. 917, with these amendments, for the House-passed version of the bill,[83] and the House accepted the Senate version.[84] Thus did Titles IV and VII become law.[85]

Even before their enactment, however, it become apparent that these would not be the only gun controls enacted in 1968. During the Senate consideration, the United States Supreme Court struck down the machinegun registration provisions of the National Firearms Act, necessitating a

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[77] 114 CONG. REC. 14,793 (1968).

[78] *Id.* at 14,791. The sponsor, Senator Bayh, explained that otherwise the dealer might be held responsible for "knowing every ordinance dealing with firearms in all of the villages and hamlets of the country." Revisions were to be made annually and supplied to all licensed dealers. *Id.*

[79] This floor amendment by Senator Long came with little explanation; the explanation ended with "Several Senators: Vote! Vote!" *Id.* at 14,775.

[80] *See id.* at 14,772-75. Title VII was codified at 18 U.S.C. app. § 1202 (1982). It was repealed by FOPA, which incorporated its categories into the Title IV structure and ended the legislative and logical schism here described.

[81] Technically, Title VII as passed forbade gun possession by any person who had "been discharged from the Armed Forces under other than honorable conditions." Omnibus Crime Control and Safe Streets Act of 1968, § 1201, 82 Stat. 236. After various veteran's groups pointed out that this would encompass certain persons legally classified as "veterans," but discharged for minor misbehavior, this was amended to its present form. *See* 114 CONG. REC. 22,765 (1968).

[82] Even this does not exhaust the list of discrepancies. Title IV barred its prohibited persons from receiving a firearm "which has been shipped" in interstate commerce; Title VII prohibited its classes from receiving or possessing "in commerce or affecting commerce." The punishment for violating Title IV was five years' imprisonment and/or a $5,000 fine; that for violating Title VII was two years and/or $10,000. S. REP. No. 1097, 90th Cong., 2d Sess. 25 (1967).

[83] 114 CONG. REC. 14,798 (1968). The procedure of substituting a bill by way of amendment onto a bill passed by the other house is not meant purely to annoy researchers, although it certainly has that effect. The substitution enables a conference to be called, by ensuring that both houses have passed a bill numbered, in this case, H.R. 5037—even though the H.R. 5037 as passed by the Senate is actually little but the House bill number tacked onto a bill originated and passed by the Senate.

[84] 114 CONG. REC. 16,271; 16,300 (1968).

[85] Pub. L. No. 90-351, §§ 902-07, 1201-02, 82 Stat. 226-33, 236-37 (1968).

redrafting of that statute.[86] In April 1968, while S. 917 was in Senate committee consideration, Rev. Martin Luther King (pg.602) was murdered by a sniper. The day before the House vote, Robert F. Kennedy was killed. The day of the House vote, President Johnson publicly denounced S. 917 as a "half-way measure" that "leaves the deadly commerce in lethal shotguns and rifles without effective control,"[87] and the chairman of the House Judiciary Committee announced plans to introduce a new bill.[88]

The new bill, H.R. 17735, was indeed introduced on June 10, 1968; a move to report it out of Judiciary Committee the following day failed on a tie vote.[89] As originally introduced, the main change worked by the bill would have been to ban sales of rifles and shotguns to nonresidents of the seller's state, to eliminate their sale by mail order and impose a minimum age of eighteen for their purchase from a dealer, to increase controls on handgun ammunition transfers and sales, and to redraft the National Firearms Act to avoid the fifth amendment flaw.[90] Breaking the tie in committee required addition of several amendments. Chief among these were two narrow exemptions from the interstate transfer ban,[91] and a major narrowing of the Secretary's power to deny a dealer's license.[92] Under the latter amendment, the Secretary was *required*, not merely authorized, to license a qualified individual within forty-five days of application; any denial was subject to de novo review in district court; and the applicant was no longer required to demonstrate trade connections proving his entrance into business within the license period.[93] The committee amendments would also have expanded Title IV's list of "prohibited persons" to include any person adjudicated "a mental defective" or judicially committed to a mental institution, and persons unlawfully using or addicted to certain drugs.[94] Unfortunately, no effort was made to coordinate these (pg.603) with the list of Title VII "prohibited persons."[95] On the House floor, the committee amendments were immediately

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[86] Haynes v. United States, 390 U.S. 85 (1968). The Supreme Court found a fifth amendment infraction based upon the unusual drafting of the registration clause. As discussed *supra*, the National Firearms Act had been heavily based on the taxing power, and the registration of machineguns already owned at the date of enactment came in as an afterthought. This was accomplished by a clause requiring registration within 60 days of the effective date. Because some might already have been registered and taxed after the effective date and before expiration of the 60 days, an exception was inserted for firearms which had been lawfully transferred and the tax on which had been paid. Haynes, who had illegally come into possession of the firearm decades after the 60 days had passed, was thus being prosecuted for having failed to register himself essentially as a recipient of a machinegun under illegal conditions.

[87] 1 PUB. PAPERS 1968-69, at 694 (1970). The compilers of the papers note that the letter was also read for radio and television broadcast. *Id.* at 695.

[88] 114 CONG. REC. 16,272 (1968).

[89] R. KUKLA, GUN CONTROL 351 (1973).

[90] H.R. 17,735, 90th Cong., 2d Sess., 114 CONG. REC. 22,223-26 (1968).

[91] The ban on receiving firearms from a nonresident would have been made subject to two exceptions: one for acquisitions by bequest or intestate succession, and the other for purchases of rifles and shotguns in a physically contiguous state, where the law of the recipient's state permitted such acquisitions. H.R. REP. No. 1577, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4411.

[92] *Id.* at 34.

[93] *Id.*

[94] *Id.* at 2-3.

[95] Title VII's prohibitions included several classes (persons with dishonorable discharges, illegal aliens, and those renouncing U.S. citizenship) that would not have been barred under Title IV as amended. The differing definition of a disabling conviction, and the exceptions thereto, not to mention the differing definitions of "firearm" and the necessary connection with commerce, would not have been reconciled. While the amendment would have added mental adjudications to Title IV, Title IV would refer to persons judged a "mental defective" or committed, while Title VII referred to those judged "mentally incompetent." Apart from this, while each Title would recognize ways in which a person disabled by a conviction might remove the disability, by pardon

accepted by voice vote without debate.[96] Over the course of the floor debates, other amendments were adopted: a class of "licensed collectors" was added, with power to purchase curio and relic firearms interstate;[97] importation of all military surplus arms, not just handguns, was banned;[98] an additional penalty (mandatory only upon second offense) for use or illegal carrying of a gun in a federal crime was added;[99] and Title IV's reference to "published ordinances," dropped by the committee in favor of "local law," was restored.[100]

The Senate substituted the text of a similar bill, S. 3633,[101] but the House bill prevailed in conference.[102] The (pg.604) resulting legislation, under the now-familiar name of "The Gun Control Act of 1968," supplanted both the earlier enactment of Titles IV and VII and large portions of the National Firearms Act.[103]

II. ENACTMENT OF THE FIREARMS OWNERS' PROTECTION ACT

One of the last House amendments to the Gun Control Act added section 101, declaring that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to the acquisition, possession, or use of firearms."[104] Enacting FOPA nearly two decades later, the Congress expressly found that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act."[105] Between the two statements lay eighteen years of experience and a seven-year legislative gestation period whose intricacies rivaled those of the Gun Control Act itself.

Enforcement of the Gun Control Act was initially delegated to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which had previously enforced the National Firearms Act

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or administrative relief, neither would recognize a way by which the other classes might remove the disability. *See generally supra* notes 81-82.

96 114 CONG. REC. 22,226-29 (1968). The Committee's reporting of the original bill with a separate list of amendments—rather than actually making the amendments in the reported bill—and the acceptance of the amendments without objection underlines their compromise nature. It might be mentioned that after the report, further compromise (largely the Chairman's agreement to oppose national firearm registration if proposed as an amendment either on the floor or in conference) was necessary to secure a favorable vote in the House Rules Committee. R. KUKLA, *supra* note 89, at 414-15.

97 114 CONG. REC. 22,763; 23,072 (1968).

98 *Id.* at 22,779-80.

99 *Id.* at 23,094.

100 *Id.* at 23,069-70. Unfortunately, the sponsor of this amendment apparently was unaware that Title IV used "published ordinance" as a term of art, *see supra* notes 77-78, explaining that he had in mind "that local ordinances should either be published in newspapers ... or in pamphlet form...." 114 CONG. REC. 23,070 (1968). Fortunately, the conference adopted a portion of the Senate bill, which also restored the definition of "published ordinance." H.R. REP. No. 1956, 90th Cong., 2d Sess. 28 (1968).

101 114 CONG. REC. 27,491 (1968).

102 Technically, the conference drafted a substitute for both bills. Practically, however, the substitute accepted H.R. 17,735, adding on a number of minor Senate amendments—expanding ammunition controls to cover rifle and shotgun ammunition, defining "published ordinance," authorizing the Secretary to define the "curios and relics" that licensed collectors might ship interstate, and including persons administratively, rather than judicially, committed to a mental institution as "prohibited persons." *See generally* H.R. REP. NO. 1956, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 4426.

103 Pub. L. No. 90-616, 82 Stat. 1212 (1968).

104 114 CONG. REC. 22,773 (1968); *see* Gun Control Act of 1968, Pub. L. No. 90-618, § 101, 82 Stat. 1213-14.

105 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986).

and Federal Firearms Act.[106] In 1969, this agency became the Alcohol, Tobacco, and Firearms Division; three years later it achieved full bureau status as the Bureau of Alcohol, Tobacco and Firearms (BATF).[107] To the stresses of growth was added the virtual collapse of BATF's traditional duties of enforcing the alcohol taxes.[108] Almost forty percent of BATF's manpower (pg.605) was directed at a law enforcement problem that had all but vanished.[109] The agency response was a series of heavily publicized projects to demonstrate a potential for firearms operations.[110] Agents and supervisors were implicitly or explicitly assigned quotas and older agents were increasingly replaced with younger, more zealous operatives.[111] Pressure for results, coupled with extremely loose control,[112] led to stringent enforcement of the Gun Control Act's provisions.[113]

This was hardly the first time a statute with broad enforcement powers had been pushed to the limit but BATF's victims were typically appealing citizens[114] and were (pg.606) represented by

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[106] D. HARDY, THE BATF'S WAR ON CIVIL LIBERTIES 7 (1979). As the agency name might suggest, pre-1968 enforcement of the firearms laws was regarded as an agency sideline.

[107] *Id.*

[108] In the early 1970s the retail price of sugar, the main raw material of "moonshine," skyrocketed. Illegal manufacture of alcohol became largely unprofitable. The number of illegal distilleries raided by BATF fell from 2,981 in 1972 to only 361 six years later. It was hard to justify retaining five to six hundred agents to raid barely 300 "stills," many quite small, annually. *See generally id.* at 7-8.

[109] In 1973, for instance, BATF fielded 952 agents for firearms enforcement, and 670 agents for nonfirearms enforcement. Virtually all of the latter were charged with alcohol tax enforcement; enforcement of federal (as opposed to state) tobacco taxes has never been much of a problem. *See id.* at 8.

[110] The crowning project was "Operation Concentrated Urban Enforcement (CUE)," which focused on a 1977 effort to dramatically increase the number of BATF agents assigned to three cities. *See generally* U.S. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CONCENTRATED URBAN ENFORCEMENT (1977). *See also* Hardy, *Firearm Ownership and Regulation: Tackling an Old Problem with Renewed Vigor*, 20 WM & MARY L. REV. 235, 271-83 (1978).

[111] As the head of one agents' association wrote:

> Enormous pressure was placed on agents sent to the CUE cities to "produce statistics." One agent was given an advertisement from an Alexandria, Virginia newspaper offering two guns for sale. Acting undercover he purchased one (a .22 caliber target pistol) and reported that the seller was not a "dealer" and had only one other for sale, a .22 caliber rifle. He was told to return to the citizen, purchase the rifle and charge him with carrying on the business of a firearms dealer without a license.... Approximately 65 agents were transferred from the SE [Southeastern region] to the Washington, D.C. area for CUE. Because of the pressure exerted against them, only two of them are still in that area and only about 10 are still in the federal service. Those that were not eligible for optional retirements sought disability retirements. The Special Agent in Charge who pressured these agents was later commended by the BATF.

Letter from William Pace, Exec. Dir., Nat'l Ass'n of Treasury Agents, to the author (Dec. 8, 1978), *reprinted in Gun Control and Constitutional Rights: Hearings Before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 381 (1980).

[112] At one point, the Bureau indicated that between 1972 and 1979, only seven agents were disciplined for arrest-related misconduct—and this included two oral and four written reprimands. *Oversight Hearings on BATF before the Senate Comm. on Appropriations*, 96th Cong., 1st Sess. 471 (1979) [hereinafter *Oversight Hearings*]. Considering that the agency then had approximately a thousand agents enforcing firearm laws, this indicated either angelic behavior or lack of oversight. As shown *infra*, the former explanation is not warranted by the facts.

[113] *See generally* D. HARDY, *supra* note 106; Hardy, *Gun Laws and Gun Collectors*, 85 CASE & COM. 3 (Jan.-Feb. 1980). *See also infra* note 118.

[114] For example, the lead-off witness at the first oversight hearing was a disabled veteran, set up in the gunsmithing business by the Veterans' Administration. When approached by an informant with an offer to buy guns illegally, he had responded by telephoning BATF with the informant's license plate number and a request for his prosecution. He was nonetheless charged with a technical violation—possession of a semiautomatic firearm with a receiver arguably, and unknown to him, meant for a machinegun. The District Court dismissed charges and apologized on behalf of the United States. *See Oversight Hearings*, *supra* note 112, at 20-26.

relatively well-connected organizations.[115] Even so, the opening skirmish came not over law enforcement, but over the Gun Control Act's creation of a secretarial power to require submission of reports by licensees. BATF's attempt to use this power to require manufacturers, importers, and wholesalers to report firearm transfers for agency data processing[116] led to a credibility-damaging legislative fight and prohibitory riders on Treasury appropriations.[117]

The serious conflict soon followed. Beginning in early 1979, Senate hearings publicized a number of cases of serious abuses of enforcement powers.[118] This documentation (pg.607) was later cited as the empirical foundation of FOPA.[119] Within months of the first hearing, the earliest versions of FOPA were introduced in both House and Senate.[120] These versions proposed extensive amendment of the Gun Control Act. Their main provisions may be summarized as follows:

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[115] The National Rifle Association had at that time (and, for that matter, has today) five full-time federal lobbyists. While this is hardly an army, it is comparable with many national associations.

[116] *See* 43 FED. REG. 11,800 (Mar. 21, 1978).

[117] *See*, *e.g.*, Pub. L. No. 96-74, 93 Stat. 560 (1979); Pub. L. No. 95-429, 92 Stat. 1002 (1978).

[118] Since the data contained in these hearings constitutes the perceived problems at which FOPA was aimed, an outline of the major cases is appropriate:

Oversight Hearings, *supra* note 112: DAVID MOORHEAD: enforcement of strict liability, on technical point, against person with no illicit intent; CURTIS EARL: search, seizure, and unsuccessful request for indictment based on erroneous agency records; R.C. LINDSEY: denial of dealer's license based upon too few (three) sales; hearing officer discovered to have been engaged in prosecution of case; A.W. PHILLIPS: Attempted revocation of dealer's license based on criminal charges earlier dismissed on motion for directed verdict.

Oversight Hearings on BATF, Part 2, before Senate Comm. on Appropriations, 96th Cong., 2d Sess. (1980) [hereinafter *Oversight Hearings, Part 2*]: PAUL & BILLIE HAYES: seizure of entire inventory for six alleged improper sales; attempted license revocation after acquittal; attempted forfeiture of inventory after license issuance; GENE LANE: attempted license revocation after acquittal; informant paid on contingency basis; PATRICK MULCAHEY: prosecution of collector for "engaging in the business" of gun dealing, based upon three sales over two-year period; seizure of 89-gun collection based on that allegation; forfeiture after acquittal.

Gun Control and Constitutional Rights: Hearings before the Subcomm. on the Constitution of the Senate Judiciary Comm., 96th Cong., 2d Sess. (1980) [hereinafter *Gun Control and Constitutional Rights: Hearings*] ROBERT BEST: collector, told by one agent did not need dealer's license, later unsuccessfully prosecuted for alleged dealing without license; ROBERT WAMPLER: same; entire collection, and some firearms stored for brother, seized, and no forfeiture action taken as of three years later.

The Firearms Owner Protection Act: Hearings on S. 1030 before the Senate Judiciary Comm., 97th Cong., 1st & 2d Sess. (1982) [hereinafter *The Firearms Owner Protection Act: Hearings*] RICHARD BOULIN: dealer-collector prosecuted for selling firearms from collection without recording collection in dealer records; prosecution for unintentional violation, where BATF director stated even he thought conduct was legal; seizure of entire collection; unable to obtain relief from disability, since conviction was for Gun Control Act charge; DAVID BERRY: dealer; prosecuted for inadvertent violations; conviction set aside by court; PRESTON BROWN: hunter, arrested while on interstate hunting trip, for failure to have firearm permit while passing through a state requiring it; EDWIN PHILLIPS: collector, prosecuted for inadvertently selling two firearms from collection to resident of another state.

In addition, S. 914 had a more conventional, if less illuminating, hearing, in which heads of interested groups rather than victims testified. *See The Federal Firearms Owner Protection Act: Hearings on S. 914 before Sen. Judiciary Comm.*, 98th Cong., 1st Sess. (1983) [hereinafter *The Federal Firearms Owner Protection Act: Hearings*].

[119] These and subsequent hearings are, for example, described as "the mandate for the addition of civil liberty guarantees to the Gun Control Act" in S. REP. No. 476, 97th Cong., 2d. Sess. 14 (1982). Few bills have seen as heavy a use of hearings in floor debates. *See* 131 CONG. REC. 9101-02 (daily ed. July 5, 1985) (statement by Sen. McClure); *id.* at 9113 (statement by Sen. Laxalt); *id.* at 9123 (statement by Sen. Hatch); *id.* at 9127 (statement by Sen. Sasser); *id.* at 9167 (statement by De Concini; Hatch); *id.* at 9127 (statement by Sen. Sasser); *id.* at 9167 (statement by De Concini); 132 CONG. REC. H1650-52 (daily ed. Apr. 9, 1986) (statement of Rep. Volkmer).

[120] Entitled "The Federal Firearms Law Reform Act," these were introduced in the House by Rep. Volkmer on September 10, 1979 and in the Senate by Sen. McClure on October 5, 1979. H.R. 5225, 96th Cong., 2d Sess., 125 CONG. REC. 23,832 (1979); S. 1862, 96th Cong., 2d Sess., 125 CONG. REC. 27,383; 27,409 (1979).

Dealer Licensing

A dealer's license would be required of anyone "whose time, attention and labor is occupied by dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of an inventory or [sic] firearms."[121] Persons making occasional sales or selling all or part of a "personal collection" were expressly excluded.

Interstate Sales

Sales to nonresidents by dealers and nondealers alike would be allowed unless receipt of the firearm by the purchaser "would be in violation of any published ordinance or law of the state or locality where such person resides."[122]

Prohibited Persons

Inconsistencies between Title VII and Title IV (pg.608) prohibitions would be resolved by repealing Title VII and merging its prohibited person classes with those of Title IV. The result would be a single set of provisions barring possession or receipt by, and sale or transfer (by dealer and nondealer alike) to a list of prohibited classes. The bar on possession by felons would be narrowed to those convicted of certain "disabling crimes" defined as violations of twenty-three chapters of the *United States Code* "or any similar crime." Persons under indictment were not included within the proscription, nor were persons with convictions "set aside or expunged."

Enforcement

Criminal prosecution would require proof of a willful violation. Forfeiture would require conviction; any verdict other than guilty, or failure to prosecute within 120 days of seizure, would require return of the seized property. Only firearms named and "individually identified" as involved in or used in (not "intended" to be used in) a willful violation would be subject to forfeiture. License revocation would be barred if criminal charges were filed and the licensee was not convicted. Attorneys' fees "shall" be allowed to victorious claimants in forfeiture actions and "may" be allowed in other actions in which the court finds charges were without foundation, or brought vexatiously, frivolously or in bad faith.

Records

Warrantless inspection of the premises of a licensee would be allowed only when reasonable grounds existed to believe evidence of a violation of the chapter might be found.

Rulemaking

A minimum of ninety days' public notice would be required; "One-House Veto" provisions were established. No rule could require records to be transferred to a federal or state facility, or establish a system of firearm registration.

Mandatory Sentencing

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[121] S. 1862, 96th Cong., 2d Sess., 125 CONG. REC. 27,380; 27,383 (1979).

[122] *Id.*

The Gun Control Act's additional sentence (technically, an additional offense) for use or unlawful carrying of a firearm (pg.609) in a federal crime would be made mandatory on first offense, rather than on second.

Interstate Transportation

Any state law or regulation prohibiting the transfer of a firearm in interstate commerce through the state "provided that the firearm is unloaded and not readily accessible"[123] would be rendered null and void.

These original forms of FOPA saw no legislative action in the Ninety-sixth Congress. A successor, S. 1030, was introduced in the Ninety-seventh Congress.[124] S. 1030 as introduced contained several significant changes from S. 1862. First, S. 1030 added a prefatory statement of purpose, citing the objective of protecting individual rights under the second, fourth, fifth, ninth and tenth amendments along with rights granted under the Privacy Act, and adding a finding that the purposes of the Gun Control Act had been thwarted by harassment of law-abiding citizens.[125] A second, substantive change completely restructured treatment of "prohibited persons." S. 1862's attempt to define specific "disabling" offenses was dropped, and the Gun Control Act's broad inclusion of nonbusiness felonies was retained, together with its bar on receipt (but not possession) by those under indictment.[126] In exchange, the scope of administrative relief from disability was expanded. Such relief was made available to any "prohibited person," thus making it available to those barred by reasons other than a conviction and to those whose convictions were for Gun Control Act and National Firearms Act violations. The Secretary was to grant such relief, unless his investigation indicated that the person was likely to violate the law or endanger the (pg.610) public safety, and a denial could be reviewed de novo in the district court.[127] A second major change came in the forfeiture section. Criminal conviction would no longer be a prerequisite for forfeiture, but in return forfeitures were limited to willful violations and an acquittal or dismissal of the owner on criminal charges barred forfeiture on those allegations.[128] S. 1030 also added a recognition that a

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[123] *Id.* at 27,382.

[124] S. 1030, 97th Cong., 1st Sess. (1982). *The Firearms Owner Protection Act: Hearings on S. 1030 before the Senate Judiciary Comm.*, 97th Cong., 1st & 2d Sess. 3-22 (1982).

[125] The author's recollection is that this preface was added, not only to aid interpretation, but also in hopes of steering the Senate bill, upon referral to Judiciary Committee, toward the more favorable Subcommittee on the Constitution and away from the less favorable Subcommittee on Criminal Laws. As it turned out, the bill was held at Committee level, which (by avoiding the necessity of subcommittee hearings and markup) had the potential for accelerating action.

[126] S. 1030, 97th Cong., 1st Sess. §§ 101(f), 102(i) (1982). The attempt to define disabling crimes was dropped because of the great difficulty in including every crime which it might be argued should be disabling, and the difficulty in determining which state crimes were "similar" to any set out in entire chapters of the U.S. Code.

[127] *Id.* at § 105(a). The exclusion of persons with conviction that had been expunged or set aside from the definition of "prohibited persons" was expanded by adding persons with a pardon to this list; this had been omitted by oversight in S. 1862. Moreover, a provision that "what constitutes a conviction shall be determined in accordance with the law of the jurisdiction in which the proceedings were held" was added, a response to caselaw culminating in Dickerson v. New Banner Institute, 460 U.S. 103 (1983) (Gun Control Act of 1968 applied to a person who pled guilty and conviction was expunged by Iowa procedure after uneventful probation). S. 1030, *supra* note 126, at § 101(f).

[128] S. 1030, *supra* note 126, at § 104(c). The provision was an attempt to deal with prosecutions such as that encountered by Richard Boulin. *See supra* note 118. The language was, however, very clumsily drafted: BATF itself admitted that a licensee might *maintain* a collection apart from his inventory; the prosecutions arose from transferring a firearm from the collection, not from maintaining the collection. The oversight was remedied in a later draft. *See infra* note 225 and accompanying text.

licensed dealer might maintain a firearm collection separate and apart from his inventory.[129] Interstate sales, on the other hand, were required to conform not only with the laws of buyer's place of residence, but also with those of the seller's.

Many of these changes bear the appearance of a *quid pro quo*. This is not without reason; most grew out of the early stages of negotiation between the National Rifle Association (NRA), the main private supporter of the bill, and Treasury Department (Treasury) officials, and were in fact based upon detailed bargaining and exchanges.[130] These meetings continued over the year that passed between S. 1030's introduction and its committee markup.

The Judiciary Committee, following that markup, reported out an amendment by way of substitute which incorporated several amendments negotiated in these meetings.[131] The more important barred mail-order (pg.611) interstate sales, even if they complied with state law; provided that a dealer making an interstate sale would be presumed to know the laws of the purchaser's jurisdiction; recognized that the dealer's power to "maintain" a private collection also went to "disposing" of it (and in return required that he record sale of any firearm transferred from his inventory into his collection within the preceding year); and allowed license revocation or firearms forfeiture following dismissal of criminal charges (but only if voluntarily dismissed, prior to trial).[132] Other amendments deleted the one-house veto,[133] and removed the de novo aspect of review of a denial of relief from disability, but permitted the court to consider additional evidence if necessary to avoid a miscarriage of justice. A final set of changes allowed certain warrantless inspections of licensee premises, but required not only probable cause but also a magistrate's warrant for the remainder.[134]

S. 1030, as amended, died in the Ninety-seventh Congress.[135] In the Ninety-eighth Congress, the bill was reintroduced as S. 914.[136] Again, the bill was held at full committee; hearings were held

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[129] S. 1030, *supra* note 126, at § 103(c).

[130] Although some meetings occurred as early as the fall of 1981, the most pivotal came in late 1982 and early 1983. *See generally infra* notes 143-157.

[131] The amendment also included a provision that was not negotiated in these meetings—a 14-day waiting period for handgun acquisition. This amendment may have been a *quid pro quo* of its own, an exchange for S. 1030's opponents not attempting a committee filibuster. Senator Kennedy had proposed a 21-day waiting period; a number of committee members had filed proxies with the chairman opposing all of the Kennedy amendments. The chair ruled that since the 14, as opposed to 21, day wait had been suggested by Senator Dole, it was not a Kennedy amendment and the proxies would not be voted. Without them, the amendment passed 8-5. S. REP. No. 476, 97th Cong., 2d Sess. 42 (1982).

[132] *Id.* at 4, 5, 7.

[133] *Id.* at 8. The one-house veto was debated in negotiations until the Supreme Court ruled such action unconstitutional in INS v. Chadha, 462 U.S. 919 (1983).

[134] S. REP. No. 476, 97th Cong., 2d Sess. 8-10 (1982). The amendments also dealt with the situation that might arise when a prosecution against a "prohibited person" or involving a National Firearms Act weapon was dismissed or ended in acquittal. The original S. 1030 would have required return of seized firearms under these conditions, even though the owner might be barred from accepting them. The amended S. 1030 created an exception to the rule of return after acquittal, but in return allowed the owner to appoint a delegate, who must be able to lawfully own the firearms. Thus, the original owner could sell his interest in the firearms, and the agency would return the firearms to the purchaser as his delegate.

[135] The demise was due to fairly practical reasons. The bill had not been reported out until late in the session; the addition of a waiting period, which firearm owners' organizations strongly opposed, complicated the situation and divided support.

[136] S. 914, 98th Cong., 1st Sess. (1983). *See The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 23-44. The only significant difference between the amended S. 1030 and the original S. 914 lay in S. 914's deletion of the waiting period for handgun purchase.

in October 1983.[137] After four markup sessions, the bill was extensively amended and reported out in August 1984.[138] When the majority leader (pg.612) failed to schedule a floor vote, a version of S. 914 was tacked onto a vital appropriations resolution over his objection.[139] Where exhortation failed, extortion succeeded. The amendment was tabled only after a commitment to expedite the bill in the next Congress.[140] The following January a substitute bill, S. 49, was introduced by the new majority leader, Senator Robert Dole, and held at the chair.[141] On July 9, after several amendments and one day of debate, S. 49 passed the Senate by a 79-15 vote.[142]

The official votes and amendments inevitably shed some light on the structured chaos of the legislative process. They fail, however, to illuminate the real process that governed the evolution of the bill. To understand that process requires us to further trace the course of the negotiations between the Treasury Department and the National Rifle Association. These negotiations had, as noted above, affected the composition of S. 1030. They became the crucial determinant of the composition of S. 914 and S. 49.

The most important of these negotiations occurred during January and February of 1983, as Treasury and NRA exchanged drafts and comment.[143] The results of these negotiations formed the basis of the Reagan Administration (pg.613) amendments proposed during the hearings[144] and, thereafter, adopted by the committee.[145] The amendments touched almost every major aspect of the bill:

Dealer Licensing

Treasury had, during the 1981 negotiations, unsuccessfully sought deletion of the word "principal," so that the licensing obligations would extend to anyone who sold firearms with *a*

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137 *See The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118.

138 *See* S. REP. No. 583, 98th Cong., 2d Sess. (1984). The passage of three months between the May 10 unanimous vote to report the bill and the August 8 published report may be due in large part to the committee's habit of voting, not on the precise wording of amendments, but on their general concept, leaving the staff to handle the drafting—sometimes after the vote. On at least one committee amendment to S. 914, the procedure led to a controversy as to what had, in fact, been agreed to. *See* 131 CONG. REC. 9143 (daily ed. July 9, 1985) (statement by Sen. McClure) ("[T]he language of the amendment was not available to the committee at the time it agreed to this compromise. The language, which was not approved by the committee, differed, when it became available, from the committee agreement....").

139 130 CONG. REC. S12,414-18 (daily ed. Sept. 29, 1984). The rebellion against the then-floor leader is underlined by the votes of 63-31 and 77-20. *See* 131 CONG. REC. 523 (daily ed. Jan. 3, 1985) (statement of Sen. McClure).

140 *See* 130 CONG. REC. 12,643 (daily ed. Sept. 29, 1984) (statement of Sen. McClure).

141 S. 49, 99th Cong., 2d Sess., 131 CONG. REC. S23 (daily ed. Jan. 3, 1985). Since S. 49 was held at the chair, it was not referred to a committee and was available for a floor vote.

142 131 CONG. REC. 9175 (daily ed. July 9, 1985).

143 The author's records of these negotiations are reflected in four documents: a handwritten "Summary of Meeting of 12/15/81," prepared by one of the Treasury representatives [hereinafter 12/15/81 Summary]; a draft of proposals prepared by Treasury, dated Jan. 19, 1983, and bearing handwritten modifications added and discussed [hereinafter Jan. 1983 Proposals]; a draft of NRA proposals, with attached explanation that was given to both parties—while undated, its provisions are obviously a response to the Jan. 19 Treasury draft—[hereinafter NRA Proposals]; and a Feb. 8, 1983 Treasury draft of proposals [hereinafter Feb. 1983 Proposals].

144 *The Firearms Owner Protection Act: Hearings*, *supra* note 118, at 11-44.

145 S. REP. No. 98-583, 98th Cong., 2d Sess. 3 (1984).

purpose of profit and livelihood.[146] In 1983, Treasury renewed its quest, arguing that deletion would make "it clear that part-time businesses are included within the definition."[147] In place of this, both parties agreed to accept an added definition of "with the principal objective of livelihood and profit" that made it clear that a preponderant profit motive was necessary, but that firearm dealing need not be the seller's primary source of income.[148] Treasury's (pg.614) parallel proposal to change "livelihood and profit" to "livelihood or profit" met with no success.[149] The additional definition was incorporated into the Reagan Administration amendments[150] and into S. 49.[151]

Interstate Transfers

The complex problem of interstate sales was not resolved at the 1981 negotiations.[152] In the 1983 negotiations, Treasury initially sought to allow interstate sales of only rifles and shotguns and only where the purchaser's state had by legislation allowed such purchase.[153] The NRA's counteroffer would have applied this principle to sales by nonlicensees only and maintained the S. 1030 approach

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[146] The 12/15/81 Summary, *supra* note 143, shows: "engaged in the business defined: do not delete 'principal'. Colloquy and [legislative] history [are to demonstrate] does not mean solely [for profit] or a high percentage of income."

[147] Jan. 1983 Proposals, *supra* note 143.

[148] The author's copy of the Jan. 1983 proposals shows his handwritten deletion of section 101(g) of the committee version of S. 1030 and its replacement with the following:

> "w/the principal object. of live. & profit," when used in this § [,] indicates a requirement that the intent underlying a course of action be predominantly [intended—crossed out] one of obtaining [motivated) by a desire—crossed out] pecuniary livelihood & gain, as opposed to other [motivations—crossed out] intentions such as improving or liquidating [expanding or narrowing—crossed out] a personal collection of firearms. It does not indicate a requirement that the course of action be the principal source of income or be the actor's principal business activity.

The NRA proposals incorporate this and explain:

> Deletion of "principal" poses two risks: (1) courts might read this to mean that *any* objective of profit makes a transaction one with the objective of profit; thus almost any sale constitutes dealing, since no one sells with the objective of a loss, even when following a hobby, *or* [2] they might read this to mean "the" objective must be profit—that this [is] not just the principal objective, but the only one; then almost no one is a dealer.... There would be no way to know which would be the outcome until a test case is brought. A definition seems the surest way to middle ground.

The proposed definition is incorporated, with slight changes, the end of the last sentence becoming "require that the sale or disposition of firearms is, or be intended as, a principal source of income or a principal business activity" in the February 1983 Proposals. Section 101(6) of FOPA as enacted incorporates the core of the original proposed definition—albeit with reference to a definition of "dealing" rather than the original "course of action." Unfortunately, the transition from a general definition of a "course of action" to a specific "sale or disposition of firearms" creates an anomaly. "[W]ith the principal objective of livelihood and profit" is used in FOPA, *supra* note 1, at § 101(6), to define manufacturers and importers, whose status does not key upon disposition, and ammunition manufacturers, whose status has nothing to do with firearms.

[149] The Feb. 1983 Proposals, *supra* note 143, seek to substitute "or" for "and" in this phrase every time it is used. No justification is set out, which may explain why the idea was abandoned. FOPA retains the original "and" language.

[150] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 26.

[151] S. 49 and FOPA as enacted incorporated in section 101(6) the first sentence of the original definition, while deleting the second, which recognized what need *not* be proven. The record does not explain the deletion, which was probably meant to eliminate a redundancy.

[152] The 12/15/81 Summary, *supra* note 143, shows: "Interstate controls:—no resolution—reconsider."

[153] Jan. 1983 Proposals, *supra* note 143: "The existing statute on interstate sales by licensees would be retained except that the contiguous State provision is expanded to permit sales of long guns to residents of any State."

for sales by licensed dealers.[154] Ultimately, the Reagan Administration amendments simply allowed only licensees to sell to nonresidents, so long as the sale complied with the laws of both states.[155]

Prohibited Persons

There was no difference of opinion between the parties on the advisability of consolidating all "prohibited persons" classes into a single provision.[156] Some difference did arise over the exception for persons pardoned or whose convictions (pg.615) had been expunged. This was resolved by adding a proviso that the exception did not apply where the pardon or expungement order provided that the recipient might not own firearms.[157] This provision was incorporated in S. 914 as introduced.[158]

Enforcement

As might be expected, the details of the enforcement powers were extensively discussed during the negotiations. The January 1983 Treasury proposals sought to strike insertion of the word "willfully" in the penalties clause of the bill, noting:

> The requirement that only a willful violation of the Act's provision[s] would be a criminal offense would make knowledge ... of the law an element of the offense. Consequently, this new element would make it difficult, if not impossible, to successfully prosecute any case under the Act. For example, in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act by receiving or possessing a firearm as a felon....[159]

An apparent deadlock was broken by suggestion that some offenses be made to require proof of a "knowing" state of mind, while others would require proof of a "willful" violation.[160] At the January meeting, it was suggested that violations of 18 U.S.C. sections 922(g), (h), (i) or (j) require only (pg.616) "knowing" violation: these barred sales to or receipt by prohibited persons and transportation

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[154] NRA Proposals, *supra* note 143.

[155] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 30.

[156] The author recalls that at one point Treasury indicated they might prefer the omission of some of the more obscure classes, such as persons who had renounced their citizenship, or perhaps those with a dishonorable discharge. NRA indicated that, regardless of the merits of eliminating obscure sections, the deletion might give opponents one more item to focus on.

[157] The 12/15/81 Summary, *supra* note 143, shows:

relief from disabilities line 18 add:

"unless the pardon or expunging order expressly provides that the person may not ship, transport, possess or receive firearms."

Colloquy and [legislative] history [to provide] pardon or expunging [order] does not allow possession, etc. if the person is unqualified for some other reason (prior convictions, mental unfitness, etc.).

The last paragraph appears to relate to situations in which the recipient is under more than one disability.

[158] S. 914, § 101(f) ("unless such pardon, expungement, or restoration of civil rights expressly provided that the person may not ship, transport, possess or receive firearms.").

[159] Jan. 1983 Proposals, *supra* note 143. Although the 12/15/81 Summary is silent on this matter, the author recalls that it had been raised repeatedly before the January 1983 meeting.

[160] *Id.* The author's copy of the Treasury Jan. 1983 Proposals, *supra* note 143, shows handwritten notes crossing out Treasury's deletion of "willfully" and inserting: "knowingly violates subsections 922(g), 922(h), (i)(j) or willfully violates any other provision of this ch."

or receipt of stolen firearms.[161] The NRA's explanation, referring to Treasury's January objections, noted:

> [O]bjection was that this would require proof of knowledge of law for offenses such as receipt of stolen guns, possession by felon, etc. This draft requires only "knowing" violation of those sections, and "willful" for the rest. (Sections relating to transportation with intent to use in a crime and use in a federal crime are not affected by this section, 924(a) in any event, since their intent and punishment is separately set out in 924(b) and (c)).[162]

The knowing-willful dichotomy was adopted in Treasury's February 1983 proposal, albeit with a suggestion that the "knowing" category be expanded,[163] and ended in a compromise[164] embodied in the Reagan Administration amendments.[165] As it turned out, Senator McClure, sponsor of S. 914, was less than happy with the Reagan Administration proposals. Concerned that a "knowing" standard might allow prosecution for negligent violations, McClure demanded and received an amendment in committee that expressly precluded prosecution for "simple negligence."[166]

The issue of license revocation or property forfeiture following criminal proceedings proved less complex. As early (pg.617) as the December 1981 meeting, alternative structures had been explored.[167] These were largely incorporated in S. 914 as introduced, alleviating need for their discussion during the 1983 meetings.[168] S. 914's restriction of forfeiture to firearms "involved in or used in," and exclusion of firearms allegedly "intended to be used in," was more difficult to resolve. At length, it was dealt with by requiring that claims of "intent to be used" be proven by clear and

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[161] *Id.*

[162] NRA Proposals, *supra* note 143.

[163] The Feb. 1983 Proposals, *supra* note 143, suggest:

> In addition, subsections (a)(1), (a)(3), (a)(4), (a)(5), (a)(6), (e), (f), (l) and section 924 should require a knowledge element rather than an element of willfulness. Persons who may violate these sections include nonlicensees. It would be difficult, if not impossible, to establish willful violations of these provisions by nonlicensed persons.

[164] A document entitled "Suggested Additional GCA Provisions for Inclusion of a Knowledge Element, as Opposed to the Element of Willfulness" was, to the author's recollection, presented by Treasury at a meeting shortly before committee mark-up. The author's copy bears handwritten notes indicating reactions. Next to "Section 922(a)(1)—prohibits engaging in a firearms business without a license" is "We can't give on it." Next to other proposals are reactions ranging from "possible" (for §§ 922(a)(4) and (a)(6)) to "OK" (for § 922(f)).

[165] The Reagan Administration amendments would have employed "knowing" for §§ 922(a)(4), (a)(6), (f), (g), (h), (i), (j), or (k), or importation violations under § 922(l), or § 924. *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 39.

[166] S. REP. No. 583, *supra* note 138, at 21. McClure agreed to deletion of this amendment on the floor only after a colloquy giving reassurances that it was redundant. 131 CONG. REC. S. 9132 (daily ed. July 9, 1985) (statement of Sen. Hatch).

[167] The 12/15/81 Summary, *supra* note 143, shows: "basic resolution: give one year statute of limitations, from date that facts have been brought to the attention of the BATF upon which the violation could have been reasonably discovered to bring an administrative hearing; if criminal proceedings brought and defendant acquitted, then no administrative proceeding allowed." On the margin is the author's note: "tried & not convicted: charges dismissed not upon gov't motion. 1 yr."

[168] Whereas S. 1862 had allowed forfeiture only upon a criminal conviction, and barred revocation upon any finding other than guilty, S. 914's bars to forfeiture or revocation became effective if criminal charges ended in acquittal or in dismissal other than upon motion of the government prior to trial. *Id.* at §§ 103(3), 104(c). The author's recollection is that Treasury sought deletion of the bars altogether. The NRA proposed a return of firearms or bar to revocation upon any finding but guilty, but Treasury responded that the government ought to have some power to withdraw from a weak criminal case and pursue revocation or forfeiture instead, and the result was a provision allowing forfeiture or revocation upon a dismissal, but only if on motion of the government and only if pretrial.

convincing evidence.[169] This proposal also became part of the Reagan Administration amendments.[170] Thus, by careful drafting of intermediate positions, it became possible for Treasury and NRA to protect their more vital interests even where those interests appeared most violently at odds.

Records

Resolving the issue of when and on what conditions dealers' records might be inspected without a warrant did not require as much imagination. The NRA's core concern had been to prevent the use of inspections to harass dealers or to drum up technical cases by "fishing expeditions."[171] It was agreed early that inspection without cause might be allowed for inquiries in the course of investigating third (pg.618) parties or as narrowly limited "courtesy inspections," to point out errors without imposition of sanctions.[172] S. 1030, as reported, incorporated these exceptions, with relevant conditions, and added a third. Warrantless inspection would be allowed: (1) in the course of third party investigations; (2) no more than once every twelve months, upon reasonable notice, with no criminal charges to result, except for sale to a prohibited person; and (3) when necessary for tracing a particular firearm in the course of a bona fide criminal investigation.[173] Subsequently, pointing out that a failure to keep records might make it impossible to show whether purchasers were prohibited persons, Treasury sought clearance under the annual inspection exception to prosecute for willful violations of the recordkeeping requirements.[174] This provision was incorporated in S. 914.[175]

Regulations

Resolution of limitations on the power to require submission of licensee records would seem a simple task. The parties could agree on the substance; NRA wanted a secure bar against any

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[169] The author's copy of the Jan. 1983 Proposals, *supra* note 143, bears the handwritten addition "which is est'd by c&c to have been intended": next to this, in the writing of an NRA representative, is "clear and convincing evidence. Where." This was apparently a note to ascertain where to insert the language. The subsequent NRA proposals show: "Clear and convincing evidence has been accepted in caselaw and is a traditional legal term (used for challenges to a written document, estoppel, and some forms of forfeiture): it reflects more than a simple preponderance of evidence but less than proof beyond a reasonable doubt."

[170] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 40.

[171] 131 CONG. REC. S9124 (daily ed. July 9, 1985) (statement by Sen. Hatch).

[172] The 12/15/81 Summary, *supra* note 143, shows:

Licensee records. Line 20, insert:

"Moreover, the Secretary may inspect the inventory and records of a licensee without such cause [except—crossed out] (A) for a reasonable inquiry during the course of a criminal investigation of a person or persons other than the [dealer—crossed out] licensee; or (B) as a courtesy or instruction, no more than once a year [in any 12 calendar months—[interlineated] and upon reasonable notice, but the Secretary shall bring no criminal charges against the licensee, based upon such inspection or any recordkeeping errors found, other than for sales to an illegal purchaser."

[173] These amendments had been agreed upon, in principle, early in the negotiation process. The author recalls in particular that the qualifier "bona fide" was demanded by Neal Knox, then head of NRA's Institute for Legislative Action, to ensure that investigations would not be employed as pretexts for inspections. Since Mr. Knox left ILA in May 1982 and became one of the strongest critics of concessions made during later negotiations, this would fix an early date on this portion of the negotiations.

[174] The Feb. 1983 Proposals, *supra* note 143, show the replacement of S. 1030's "any recordkeeping errors found except for sales to a prohibited person" with "except for willful violations of the recordkeeping requirements of this chapter or sales or other dispositions of firearms to prohibited persons." Treasury's explanation mentioned, "If the licensee has maintained false records or has failed to record firearms transactions, sales to prohibited persons may be impossible to establish. The addition of the word 'willful' will assure that technical and inadvertent recordkeeping violations do not give rise to criminal prosecutions."

[175] S. 914, § 103(f), 98th Cong., 2d Sess. (1984).

renewal of the 1978 attempt to achieve firearm (pg.619) registration through this power, or anything vaguely resembling that attempt, while Treasury wanted to preserve its existing regulations. Those regulations required dealers to submit their records if they went out of business,[176] to report sales if requested by the Secretary,[177] and to report any sale of two or more handguns to a single person in a given week.[178] Treasury was not opposed to a ban on registration or quasi-registration that left these regulations intact; NRA was philosophically opposed to the regulations, but recognized the irrationality of tying the bill up with an attack on them. This coincidence of interests proved singularly difficult to put into practice. The barriers were two-fold. The first, and most easily solved, was that any regulations which required submission of records would likely run afoul of section 106's broad bar on gun registration systems. A simple exception could remedy this, and Treasury's January 1983 draft proposed: "Nothing in subsection (d) shall be deemed to affect the validity of any regulations in effect on the effective date of this Act...."[179] The second problem proved more intractable. The bill would have deleted from 18 U.S.C. 923(g) the general power to require submission of records. With such a repeal, Treasury would lack the rulemaking power to support such regulations, regardless of whether they were barred or not.[180] NRA, conversely, was on record with the argument that the regulations were not (pg.620) authorized by section 923(g), and it could not now agree to any measures that would stipulate that they were. The February 1983 proposal experimented with a novel approach, proposing a change to the effective-date clause to recognize that "[t]he amendments (including repeals) contained in sections 103(f) and 106 shall not affect those regulations now contained in 27 C.F.R. 178.126 and 178.127."[181] The Reagan Administration amendments ultimately combined this with a very limited restoration of the record-submission power, providing that licensees "shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, except as required by regulations in effect" prior to the bill's effective date.[182] This was adopted in S. 914, as reported from committee,

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[176] 27 C.F.R. § 178.127 (1986). This regulation was part of the first set of regulations promulgated to implement the Gun Control Act. *See* 33 FED. REG. 18555 (1968).

[177] 27 C.F.R. § 178.126 (1986). Treasury had previously indicated that reports under this section are requested only in rare cases in which suspicion of improper activities is found. *See* 131 CONG. REC. S9129 (daily ed. July 9, 1985) (statement of Sen. Hatch) (quoting Dec. 1968 Treasury letter: "We contemplate the necessity of using these provisions of the statute when we become aware of violations of the law by an unscrupulous dealer...."); Letter from David Stockman, Director of Office of Management and Budget, to Senator Ted Stevens (June 26, 1984) (copy in possession of author) ("It is required when a licensee is suspected of committing unlawful acts or in cases where there have been a number of unsuccessful tracing efforts. This form is not routinely required, and of the approximately 230,000 licensed gun dealers and collectors, only about 50 are required to submit Form 4483 annually.").

[178] 27 C.F.R. § 178.126a (1986). The most recent and most controversial of these requirements, this regulation dates only to 1975. *See* 40 FED. REG. 19202 (1975).

[179] Jan. 1983 Proposals, *supra* note 143.

[180] Treasury might have fallen back on the general power to promulgate regulations necessary to the purposes of the Act, but section 106 of FOPA considerably narrowed this power. Moreover, since the original regulations were premised upon 18 U.S.C. 923(g) (1982) authority, continuing them under authority of 18 U.S.C. 926 (1982) (as amended by § 106 of FOPA) might well require a new rulemaking. *Cf.* 5 U.S.C. 553(b)(2) (1982) (requirement that rules state statutory authority); *see* National Tour Brokers Ass'n v. United States, 591 F.2d 896, 900 (D.C. Cir. 1978).

[181] Feb. 1983 Proposals, *supra* note 143.

[182] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 36.

but met opposition from Senator McClure. In the end, the text of the disputed regulations was simply written into S. 49 and the exceptions for the regulation deleted.[183]

With the further changes made by these amendments, the bill's movement slowly accelerated. S. 914 was reported from committee, with the Administration amendments, on August 8, 1984.[184] The Senate leadership balked at so controversial a bill and delayed action. In the closing days of the Ninety-eighth Congress, FOPA's sponsors attached it as a rider to a continuing appropriations bill, overriding the majority leader's objections by two-to-one votes.[185] The amendment was ultimately withdrawn in exchange for an agreement that FOPA would receive maximum priority in the following Congress. An updated version of FOPA was accordingly introduced in the Ninety-ninth Congress as S. 49[186] and was brought to the floor on July 9, 1985.

The Senate debates occupied but a single day. They opened with a series of amendments that were adopted by (pg.621) voice vote. Most were technical, but three had substantive effects. The first changed the bill's proclamation that state laws which had "the effect" of barring interstate travel with an unloaded, "inaccessible firearm" were to be "null and void." The new language would simply recognize the right to transport a firearm, notwithstanding such laws.[187] The second deleted as redundant S. 49's provision that prosecutions were not allowed for simple negligence.[188] The third provided a misdemeanor penalty for a licensee's making of a false statement in, or failure to maintain, records required by the chapter.[189] All remaining amendments were decisively rejected[190] and S. 49 passed the Senate by a 79-15 vote.[191]

S. 49 then passed to the House where its counterpart, Representative Volkmer's H.R. 945, had been languishing in the Judiciary Committee since its introduction.[192] S. 49 was referred to the same committee. That S. 49 would not be reported out was hardly news; but only hubris could have

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[183] S. 49, § 104(g), 99th Cong., 1st Sess. (1985). If it appears irrational to write a regulation into the statute in order to avoid giving it legislative approval, it can only be said that there are limits to the power of explanation. The S. 49 amendment does provide that the records thus submitted will be in the joint custody of the Secretary and the Archivist and will be destroyed after 20 years. *Id.*

[184] S. REP. No. 583, 98th Cong., 2d Sess. (1984).

[185] *See* 131 CONG. REC. S23 (daily ed. Jan. 3, 1985) (statement of Sen. McClure).

[186] S. 49, 99th Cong., 1st Sess., 131 CONG. REC. S24 (Jan. 3, 1985).

[187] 131 CONG. REC. S9114 (daily ed. July 9, 1985). The rationale for the change was that the former language might be read, not merely to allow the transportation, but to void the entirety of a state law. *Id.*

[188] *Id.* at S9131-33.

[189] *Id.*

[190] The amendments rejected were: to limit interstate sales to rifles and shotguns (tabled 69-26), *id.* at S9151; to allow the annual warrantless inspection to be without notice (tabled 76-18), *id.* at S9166; and to impose a waiting period on handgun purchases (tabled 71-23), *id.*

[191] *Id.* at S9175.

[192] H.R. 945, 99th Cong., 1st Sess., 131 CONG. REC. H326 (daily ed. Feb. 6, 1985). During the floor debates, Representative Volkmer and Dingell both discussed the Committee's failure to take action on H.R. 945, 132 CONG. REC. H1651, H1697 (daily ed. Apr. 9, 1986). H.R. 945 was not identical to S. 914 as introduced, but the differences were minor. These differences included the deletion in H.R. 945 of the prohibition of firearms possession by a person working for a prohibited person, a provision allowing an interstate seller to have a firearm shipped to him, provided he made the purchase agreement face-to-face, and deletion of S. 914's elaborate self-defense exception to the mandatory sentence for use of a firearm in a federal crime.

led committee chairman Peter Rodino to immediately and publicly pronounce the bill "dead on arrival."[193] (pg.622)

On October 3, 1985, Representative Volkmer submitted a rule calling for consideration of the bill.[194] The timing was significant; the thirty-day waiting period for filing a motion to discharge the Judiciary Committee from consideration of the bill and the seven-day waiting period for moving to discharge the Rules Committee from considering the rule would expire on the same day.[195] Discharging the rule, which allowed debate of the bill, gave significant tactical advantages over discharging the bill itself.[196] Even so, the petition faced an extremely difficult struggle. A discharge requires signatures of a majority of the entire House—218 members. Names of signers are made public only if and when the petition succeeds.[197] The House leadership is free to examine the list and exert pressure on vulnerable signers. A member who signs is free to withdraw at any time; once the 218 signatures are obtained, the petition must be put to a vote and muster a majority of those present and voting. A failure in the last test bars all similar discharge petitions for the remainder of the session.[198] (pg.623)

The difficulties of these barriers explain why only seven discharge petitions had succeeded in the preceding quarter-century.[199] Nonetheless, on October 22, 1985, Representative Volkmer filed a petition to discharge the Committee on Rules from consideration of the rule allowing floor action

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[193] *See* 131 CONG. REC. H8952 (daily ed. Oct. 22, 1985) (statements of Rep. Volkmer) (citing "Chairman Rodino's first public comment upon passage by the Senate of the legislation was "the bill is dead on arrival in the House." These are hardly the comments of a chairman who will give serious considerations to the merits of the legislation.") The pronouncement was a profound political mistake. The standard response—silence and inaction—would have enabled those later pressured to sign a discharge petition, but unwilling to openly oppose the bill, to invoke the standard justification that they were going to give the committee system a chance. Hughes' overconfident proclamation left these representatives without a safe harbor, and it must have irritated them as much as it angered the bill's not inconsiderable advocates. Complaints about Hughes' statement and inaction were made during the floor debates, often by Members who made clear their ambivalence toward the bill itself. *See* 132 CONG. REC. H1646 (daily ed. Apr. 9, 1986) (statements of Rep. Quillen); *id.* at H1653 (statement of Rep. Robinson); *id.* at H1651 (statement of Rep. Volkmer); *id.* at H1660 (statement of Rep. Kindness); *id.* at H1695 (statement of Rep. Robinson); *id.* at H.1747 (daily ed. Apr. 10, 1986) (statement of Rep. Frenzel).

[194] H.R. Res. 290, 99th Cong., 2d Sess., 131 CONG. REC. H8258 (Oct. 3, 1985). The rule would have provided for consideration of H.R. 945, with two hours of general debate, followed by a maximum of ten hours of debate on amendments, which might include (1) a substitute consisting of a bill earlier introduced by Representative Hughes; (2) a substitute consisting of S. 49 as passed by the Senate; or (3) amendments printed in the Congressional Record at least one day prior to the debate.

[195] *See* RULES OF THE HOUSE OF REP. XXVII(4), 99th Cong. (1985).

[196] If the motion is one to discharge the bill and sufficient signatures are obtained, it may thereafter be called up by any member who has signed, at which time a vote must be taken on the motion; if the House does not vote to immediately consider the bill, it is placed on the calendar as if reported. Discharging a rule allows a more predictable debate, with time agreements, motion rules, and a date certain. *See generally id.* Moreover, by listing both the Senate-passed S. 49 and Rep. Hughes' bill as amendments in order, and allowing other amendments upon notice, the proposed rule made it clear to potential discharge petition signers that they could sign the petition without limiting their alternatives when floor action came.

[197] The petition is kept at the Clerk's desk, so its proponents can memorize names, return to their seats, and write them down. Keeping track of two hundred or so names in this way is nonetheless a formidable task. The proponents of the bill at length resolved this by dividing such memorization among themselves—each member being responsible for memorizing five names.

[198] Rule XXVII(4), *supra* note 195.

[199] Successful discharges occurred in 1960 (federal pay rates), 1965 (District of Columbia home rule), 1970 (Equal Rights Amendment), 1979 (school busing), 1980 (soft drink bottling), 1982 (balanced budget amendment) and 1983 (interest and dividend withholding). Conversation with Mary Jolly (Mar. 1, 1986).

on H.R. 945.[200] The petition moved quickly; less than two months later it had 158 signatures.[201] Then the drive hit a wall; a month later, the count still stood at 158.[202] The apparent standoff may have encouraged overconfidence in the bill's opponents; they made no effort at this stage to employ the traditional counter to a potentially successful petition—the reporting out of a heavily restructured alternative bill. The misjudgment was pivotal. When Congress returned from recess, the count surged ahead; by early March, Volkmer had 203 signatures plus eight commitments to sign.[203] With Volkmer only four votes away from a discharge, his opposition sought aid from the House leadership in pressuring signers off the petition. The quest was in vain: the reply was that they were too late; the landslide had developed without a check. Representative Rodino, Chairman of House Judiciary, was to report forthwith a substitute bill and the leadership would give it prompt floor action.[204] H.R. 4332 was quickly introduced by Representative Hughes, Chairman of the Subcommittee on Crime.[205] This bill would have incorporated some features of S. 49, largely in diluted form,[206] and would have added a number of measures favored by Hughes, most notably a variety of (pg.624) mandatory sentence provisions. Only eight days passed between its March 6 introduction and the full Judiciary Committee's vote to report out a more polished substitute.[207] It was one day too many; on March 13, the discharge petition received its 218th signature and was taken up by the clerk.[208]

In exchange for speedier consideration, Volkmer agreed to a rule allowing his bill as an amendment by way of substitute for H.R. 4332.[209] A number of last minute amendments modified his substitute to parallel closely S. 49, with the major difference being a co-opting of H.R. 4332's

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[200] Discharge Petition No. 4, 99th Cong., 1st Sess. *See* 131 CONG. REC. H8951 (daily ed. Oct. 22, 1985) (statement of Rep. Volkmer).

[201] Memorandum entitled "Signers of the Discharge Petition" (Dec. 18, 1985) (copy in possession of the author).

[202] Report of the Executive Director of the NRA Institute (Jan. 11-12, 1986) (copy in possession of author).

[203] Memorandum entitled "Signers of the Discharge Petition" (Mar. 7, 1986).

[204] Conversation with Wayne LaPierre (Mar. 15, 1986).

[205] H.R. 4332, 99th Cong., 2d Sess., 132 CONG. REC. H932 (daily ed. Mar. 6, 1986).

[206] For example, rather than requiring a "knowing" violation of certain sections and a "willful" violation of the majority, H.R. 4332 would have allowed punishment of anyone who "knowingly engages in conduct that is a violation," which would require little more than consciousness. *Id.* at § 8(2). No protection against revocation or forfeiture after acquittal was given, nor were attorneys' fees recoverable.

[207] H.R. REP. No. 495, 99th Cong., 2d Sess. (1986). The polishing added some improvements to the hastily-drafted H.R. 4332, but added some flaws of its own. As introduced, § 4(a) of H.R. 4332 would have banned possession by persons "disqualified" from gun ownership—a term defined to include those under indictment for, or convicted of, a felony. As a result, any firearm owner indicted on felony charges instantly became guilty of a federal firearm law infraction. The committee dealt with this by inserting an exception in the bar to possession but excepted persons disqualified by indictment *or* conviction, so that the committee-reported bill would have legalized gun possession by convicted felons! Only on the floor, after an embarrassing concession that the committee draft might "be read" to allow possession by convicted felons, was the defect corrected. 131 CONG. REC. H1681 (daily ed. Apr. 9, 1986).

[208] 132 CONG. REC. H1173-74 (daily ed. Mar. 13, 1986).

[209] H.R. Res. 403, 99th Cong., 2nd Sess., 132 CONG. REC. H1644-45 (daily ed. Apr. 9, 1986).

mandatory sentencing.[210] The last minute amendments contributed to subsequent confusion in the debates.[211]

The floor fight was quick and messy. H.R. 4332 and Volkmer's substitute were debated simultaneously.[212] Hughes moved a package of amendments to the substitute which would have, among other things, required proof only of a "knowing" violation, deleted the requirement that an alleged unlicensed dealer be shown to have had a "principal" intent of money profits, and limited the interstate "pass-through" provision to rifles and shotguns, cased *and* (pg.625) inaccessible.[213] The amendments lost 248-173.[214] An attempt to narrow the interstate pass-through also failed, 242-177.[215] A third proposed amendment, limiting dealer sales to nonresidents, passed, 233-184.[216] One final amendment, banning private ownership of any machinegun not already in lawful ownership on the date of enactment, was raised with only minutes left in the time allotted under the rule. It passed on a rather irregular voice vote.[217] The substitute was then accepted in place of H.R. 4332, was passed, and then substituted for the Senate-passed S. 49.[218]

The House version of S. 49 differed in various aspects from the Senate bill. Mandatory sentence provisions had been expanded, and some new ones were added; interstate sales had been limited to rifles and shotguns, and the freeze on machineguns had been attached. Rather than seeking a conference, whose House members would have been appointed by the House leadership, the Senate leadership brought the House bill to a floor vote. The complex saga of FOPA, however, was not quite over. As a price for an antifilibuster time agreement, the House version of FOPA was passed along with a new Senate bill, S. 2414, which would amend three of its provisions.[219] The first amendment altered the interstate transportation provision. As passed, FOPA permitted any nonprohibited person to "transport an unloaded, not readily accessible firearm in interstate commerce" notwithstanding state or local law.[220] S. 2414 would allow such persons to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm ... if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition

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[210] 132 CONG. REC. H1680, 1699 (daily ed. Apr. 9, 1986). Also incorporated was H.R. 4332's inclusion, in the definition of "machinegun," of a "part" as opposed to the then-current "combination of parts" intended to convert an ordinary firearm into a machinegun.

[211] A prime example is one point in which Hughes pressed Volkmer for a definition of "crime of violence" as used in the forfeiture section, only to find it was not used in that section. He then shifted to the section's failure to include firearms "intended to be used" in violation, only to be informed the section then included them. *Id.* at H1680-81.

[212] This did nothing to clarify an already complex debate: "The amendment to the amendment offered as a substitute for the Judiciary Committee amendment in the nature of a substitute was agreed to." *Id.* at H1681.

[213] *Id.* at H1681-82. It would also have allowed two warrantless inspections per year, and deleted the requirement that a machinegun "part" be one designed "and" intended "solely and exclusively" to convert an ordinary firearm into a machinegun.

[214] *Id.* at H1699.

[215] *Id.* at H1701, H1704.

[216] *Id.* at H1745.

[217] The record shows simply that the amendment "was agreed to." *Id.* at H1752. Those watching the debates could note that the chair, upon making this proclamation on the voice vote, refused to hear the Members calling for a recorded vote.

[218] *Id.* at H1752-53.

[219] S. 2414, 99th Cong., 2d Sess., 132 CONG. REC. S5367 (daily ed. May 6, 1986).

[220] FOPA, *supra* note 1, § 107(a), at 460.

being transported is readily accessible or is directly accessible from the passenger compartment...."[221] A second (pg.626) amendment is somewhat more striking. It amended FOPA's definition of "with the principal objective of livelihood and profit" to insert a provision that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism."[222] The amendment, apparently intended to deal with a hypothetical situation involving a supplier of terrorists at cost,[223] was as poorly drafted as it was unusual.[224] The third amendment would require dealers selling from a personal collection to maintain an informal record of the sale.[225] S. 2414 passed both House and Senate on voice votes.[226] Only after passage was it realized that while some of the amended sections of FOPA had an immediate effectiveness,[227] the remainder of that Act was not meant to take effect until six months after passage. S. 2414 was to go into effect immediately, leaving an incongruity (pg.627) whereby an isolated section or sentence would take effect before the remainder of the amended provision. The Senate hurriedly voted out a concurrent resolution linking S. 2414's effective dates to those of the FOPA sections it amended, and the House concurred.[228] At long last, FOPA and its amendments were law. FOPA's seven years of gestation illustrate the legislative application of Holmes' dictum that the life of the law has not been logic, but experience.[229]

III. IMPACT OF THE FIREARMS OWNERS' PROTECTION ACT ON FIREARM STATUTES

The impact of FOPA on existing firearm laws can scarcely be overstated. Every significant aspect of the Gun Control Act of 1968, from purpose clause to penalties, is affected to a greater or lesser degree. FOPA's major alterations fall into four categories: changes in acts prohibited by the

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[221] S. 2414, 132 CONG. REC. S5367 (daily ed. May 6, 1986). The bill went on to clarify that if the vehicle lacked a compartment separate from the passenger compartment, the firearm might be kept in "a locked container other than the glove compartment or console." *Id.*

[222] S. 2414. The bill added a detailed definition of "terrorism," although the previous inclusion of "criminal purposes" would seem to make a definition rather superfluous.

[223] The specter of the benevolent terrorist was raised in a BATF memorandum to files, reproduced in H.R. REP. No. 495, 99th Cong., 2d Sess. 16-21 (1986). One might query whether such a person would have been engaging in the "business of dealing in firearms" under the Gun Control Act prior to amendment. In any event, the hypothetical is likely to remain such: a supplier of terrorists would probably be prosecuted under 18 U.S.C. § 924(b) (1982), which imposes up to ten years imprisonment (twice the normal Gun Control Act maximum) for shipment or receipt of a firearm with knowledge that it will be used to commit a felony.

[224] Apart from the difficulties with the wording, the concept that "proof shall not be required" of an element of a crime—as opposed to deleting the element—seems rather inappropriate. It is not quite so inappropriate, perhaps, as the concept of applying a licensing and recordkeeping requirement specifically to suppliers of terrorists. It would perhaps be too much to hope that terrorism would go the way of all too many regulated industries and stultify for want of competition—but it would not be too much to expect that courts might find a self-incrimination problem in the scheme. To wrap it up, the exception should have been inserted in the definition of "engaged in the business" of dealing, not in that of "with the principal objective of livelihood and profit."

[225] S. 2414. The dealer selling from the collection would not, however, be subject to the other limitations of a dealer, namely, the need to transfer only at his premises and the requirement that the buyer fill out forms.

[226] 132 CONG. REC. S5367-68 (daily ed. May 6, 1986); *id.* at H4104 (daily ed. June 24, 1986).

[227] FOPA, *supra* note 1, § 110, at 460-61. Of the sections amended by S. 2414, only the interstate transportation provisions contained in section 107 would have taken effect upon enactment; the remainder would have become effective only six months later.

[228] S. Con. Res. 152, 132 CONG. REC. S8216, H4102 (daily ed. June 24, 1986).

[229] Less politely, it also gave meaning to the expression (variously attributed to Wayne Morse, Otto von Bismark, and others with relevant experience) that those who care for the law or for sausages should not watch either being made.

Gun Control Act; addition of *scienter* requirements to its penalty clause; alterations of enforcement and administrative powers given by it; and effects on other statutes, such as the National Firearms Act and various state firearm laws. Each of these categories will be examined in turn.

A. Prohibited Acts

The Gun Control Act marked three major expansions of federal control over transactions in ordinary firearms.[230] The first greatly expanded requirements that certain transferors obtain a dealer's license (more formally, a Federal Firearms License, or FFL). The second essentially barred, with narrow exceptions, transfers between nonlicensed persons who were residents of different states. The third expanded, albeit in a chaotic manner,[231] the categories of persons prohibited firearm ownership or acquisition. The (pg.628) enactment of FOPA directed and substantially affects all three categories of proscribed acts.

1. Dealer Licensing Requirements

One of the Gun Control Act's major changes to existing law had been its expansion of licensing requirements. Under the Federal Firearms Act, a dealer's license had been required of anyone who "engaged in the business" of firearm dealing *and* shipped firearms in interstate commerce.[232] Under the Gun Control Act, licensing was required of anyone who "engaged in the business" *or* shipped firearms pursuant to such a business.[233]

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[230] The fourth major expansion was the extension of registration and licensing requirements to "destructive devices." FOPA neither contracted nor expanded these requirements, although its *scienter* requirement and provisions for enforcement and administration would apply.

[231] *See* United States v. Bass, 404 U.S. 336, 344 n.11 (1971), *accord*, United States v. Batchelder, 442 U.S. 114, 120 (1979) ("By contrast, Title VII was a 'last minute' floor amendment, 'hastily passed, with little discussion, no hearings and no report.'"). *See also infra* notes 297-300.

[232] Federal Firearms Act, §§ 1(5), 2(a), 52 Stat. 1250 (1938).

[233] Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1216-17 (1968). *See* Mandina v. United States, 472 F.2d 1110 (8th Cir. 1973), *cert. denied*, 412 U.S. 907 (1974); United States v. Fancher, 323 F. Supp. 1069 (D.S.D. 1971).

The 1968 change greatly increased the scope of the licensing requirement.[234] Two chains of caselaw developed interpreting the licensing requirement. The majority of circuits followed the test laid down in *United States v. Gross*,[235] which held that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is "that (pg.629) which occupies time, attention and labor for the purpose of livelihood or profit."[236] The other test originated in *United States v. Jackson*;[237] it considers persons to be dealers "[i]f they have guns on hand or are ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as they might from time to time conclude to accept as customers."[238] The *Jackson* test, however, found favor only in the Tenth Circuit.[239] Both tests were quite broad, and could easily be applied to exchanges, acquisitions, and dispositions associated with the firearm collecting hobby. Moreover, neither definition offered much certainty to hobbyists who (prior to FOPA) were required to act at their own risk, subject to felony sanctions. Treasury conceded that the standard was incapable of definition, and confessed on more than one occasion that the standard varied from year to year and case to

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[234] Treasury advised, for example, that a personal representative disposing of an estate that included firearms needed to be licensed. Letter from T.P. McFadden, Chief, Industry Control Division, Bureau of Alcohol, Tobacco and Firearms, to Mr. Leo Grizzafi (Nov. 24, 1976) (copy in possession of author). Treasury was not consistent in seeking a broad reading of this provision, however. In one Order, issued at a time when the agency was attempting to restrict license issuance, agents investigating applicants for a dealer's license were advised:

> The term "engaged in the business" is not defined in the law or regulations and is not susceptible to a rigid definition.... If there is a doubt as to whether the applicant intends to actively engage in the business if licensed, the inspector should consider the following techniques and factors: ....
> (4) *Sources of Supply and Financial Status.* Determine whether or how the applicant intends to obtain firearms or ammunition for resale. Although sources of supply and financial status are not requirements for approval of an application, these factors along without other information may indicate that the applicant does not intend to actively engage in the business if licensed. A franchise to distribute firearms or ammunition, or a stock on hand, would be an indication that the applicant intends to engage in business.
> (5) *Advertising.* Determine the extent, if any, that the applicant has or will advertise or promote his business (e.g., business phone, yellow page ads, catalogs, signs, classified ads, etc.).
> (6) *Tools of the Trade.* Determine if the applicant has tools for engaging in the proposed business (e.g., gunsmith tools).

Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Order ATF 0 53003.3 (Jan. 5, 1978).

[235] 451 F.2d 1355 (7th Cir. 1971).

[236] *Id.* at 1357 (emphasis in original). Five other circuits followed *Gross*. *See* United States v. Van Buren, 593 F.2d 125 (9th Cir. 1979); United States v. King, 532 F.2d 505 (5th Cir. 1976); United States v. Huffman, 518 F.2d 80 (4th Cir. 1975); United States v. Williams, 502 F.2d 581 (8th Cir. 1974); United States v. Day, 476 F.2d 562 (6th Cir. 1973).

[237] 352 F. Supp. 672, 674 (S.D. Ohio 1972), *aff'd without opinion*, 480 F.2d 927 (6th Cir. 1973).

[238] *Id.* at 674.

[239] *See* United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975).

case.[240] The resulting (pg.630) prosecutions, sometimes of collectors who had disposed of a small number of firearms,[241] played a major role in bringing about enactment of FOPA.[242]

Thus, it is not surprising that one of FOPA's major purposes was to "substantially narrow" the "broad parameters" of existing caselaw in this area.[243] Under the wording finally enacted, four elements must be proven to establish "engaging in the business" of dealing in firearms:

1. devotion of time, attention and labor to such dealing;
2. as a regular course of trade or business;
3. with the principal objective of livelihood and profit;
4. through the repetitive purchase and resale of firearms.[244] (pg.631)

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[240] *See*, *e.g.*, Letter from Rex Davis, Director of Bureau of Alcohol, Tobacco and Firearms, to Rep. John M. Ashbrook (Apr. 19, 1978) (copy in possession of author):

> [Question by Ashbrook] What is BATF's definition of "engaged in the business? .... Does the standard of 'doing business' change from one year to the next? From one ATF 'program' like Operation CUE to the next? ....
>
> [Davis answer] Unlike most of the terms used in the Gun Control Act of 1968 (18 U.S.C. chapter 44), the term 'engaged in the business' is not susceptible to a rigid definition .... Since the term 'engaged in the business' is not defined in law, and since the courts have determined the term must be decided on a case by case basis, it can not be included in published regulations, as it is a question left to the court.
>
> It also follows that the 'standard' changes, not only from one year to the next, but on a case by case basis.

A year later, the Bureau informed the Senate Committee on Appropriations that "it has been ATF's position that the question whether one has engaged in the firearms business should be determined on a case by case basis." *Oversight Hearings*, *supra* note 112, at 472.

The accuracy of these frank appraisals was documented by one organization, which sent identical requests for advice on a given set of facts to seven agency regional offices. Two replied that no dealer's license was needed, one sent an application for a license, one sent a question-and-answer pamphlet without further explanation, and two never replied. The last office, which was inadvertently sent two requests for the opinion, replied to one with an opinion that no license was needed and to the other with a form to apply for the license! *Gun Control and Constitutional Rights: Hearings*, *supra* note 118, at 449-459.

[241] One former enforcement agent wrote:

> I entered the BATF, after several years of service as a border patrolman, immigrant inspector, and customs inspector, to realize a long time goal of becoming a Treasury agent. It was the biggest disappointment of my life. During those four years, I witnessed entrapment and conspiracy on the part of agents and high ranking supervisors that time and time again resulted in the arrests of honest, law-abiding citizens who had no prior arrests [sic] records. Generally these arrests resulted in [sic] the victim's selling of three firearms to an undercover BATF agent.
>
> In northern Illinois at that time, and probably so now, one had only to sell three firearms to be classified as a dealer in firearms. This gave enormous entrapment powers to an agent who desire [sic] to make a lot of cases to impress his supervisors. Here we had a man who owned some guns. He could go to any store and buy more. It was not illegal to own guns. Who would have thought that by selling three of his guns that he would be committing a Federal felony? Yes, in this manner hundreds of people went to jail.

Letter from Phillip A. Pitton to Sen. John Tower (Apr. 18, 1978) (copy in possession of author).

[242] *See generally supra* note 118. The Senate floor debate opened with a recitation of four cases, illustrative of those at which FOPA was directed. Two of the four concerned collectors charged with "engaging in the business." 131 CONG. REC. S9101-02 (daily ed. July 9, 1985). On the House floor, two of seven cases cited by Rep. Volkmer as the basis of his substitute involved collectors arrested on this charge. 132 CONG. REC. H1651-52 (daily ed. Apr. 9, 1986).

[243] S. REP. No. 476, 97th Cong., 2d Sess. 17-18 (1982) (citing, as the subjects of the narrowing, the definitions from both United States v. Williams, 502 F.2d 581 (8th Cir. 1974) and United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975)); S. REP. No. 583, 98th Cong., 2d Sess. 8 (1984).

[244] FOPA, *supra* note 1, § 101(6), at 450. Additionally, occasional sales and exchanges for advancement of a hobby and sale of all or part of a "personal collection of firearms" are expressly excepted. Since the term has a relatively narrow definition in the first place, these exceptions were apparently included as further assurance against prosecution of collectors and hobbyists who still run afoul of the narrowed definition. They may also have been meant to rule out imaginative interpretations of the definition—*e.g.*, that a collector who sells a firearm to buy another does so for the motive of profit rather than as part of his hobby,

The first element is, of course, taken directly from the majority rule first laid down in *United States v. Gross*.[245] The second, however, narrows the rule by requiring that the devotion of energy be pursuant to a "regular course" of business. Since part-time and secondary businesses were meant to be covered,[246] this element interlinks with the fourth to require a substantial degree of continuity and to rule out those whose sales are intermittent or on an "as needed" basis.[247] The third element marks the main rejection of existing caselaw. That caselaw required that profit be *a* motive, not that it be *the principal* motive, in selling firearms.[248] Use of the narrow term "principal" in FOPA was no accident; deletion of "principal" was debated and rejected during the Treasury-NRA negotiations.[249] The House adopted FOPA's wording over the detailed objections of a hostile report.[250] It is also noteworthy that the (pg.632) intent to be proven is one of deriving livelihood *and* profit. The choice of the conjunctive is, again, no casual matter: the Treasury-NRA negotiations considered the disjunctive as an option,[251] and the hostile House report emphasizes the conjunctive as an "unreasonable" burden.[252] The fourth element joins with the second to emphasize the continuity and repetitious nature of the conduct that must be proven. It also emphasizes that (1) firearms must

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since the intervening step involves obtaining a money price. *See id.* (defining requisite intent as predominantly one of "obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving ... a firearms collection"); *cf.* H.R. REP. No. 495, 99th Cong., 2d Sess. 10 (1986) (arguing against adoption of FOPA since, *inter alia*, "one who maintains that he buys and sells guns to make a little extra money to add to his personal collection of guns" is "for all intentions and purposes, a firearms dealer" and ought to be licensed).

[245] 451 F.2d 1355 (7th Cir. 1971). *See generally supra* notes 235-36.

[246] The Treasury-NRA negotiations, which led to the creation of a new 18 U.S.C. § 921(22) (1982) by FOPA's § 101(6), largely centered upon the need to include part-time businesses and those which brought in only a portion of the seller's total income but were nonetheless motivated primarily by profit. *See supra* notes 144-48. *See also* S. REP. No. 476, 97th Cong., 2d Sess. 18 (1982) ("This provision would not remove the necessity for licensing from part-time businesses, or individuals whose principal income comes from sources other than firearms but whose main objective with regard to firearm transfers is profit rather than hobby. A sporting goods store or pawn shop which derived only a part of its income from firearm sales but handled such sales for the principal objective of business and profit, would still require a license."); S. REP. No. 583, 98th Cong., 2d Sess. 8 (1984) (similar description).

[247] Some caselaw recognized that some repetition or course of action was required. *See* United States v. Huffman, 518 F.2d 80, 81 (4th Cir.) (requiring "a greater degree of activity than occasional sales by a hobbyist"), *cert. denied*, 423 U.S. 864 (1975). A requirement that the activity constitute a regular course of trade or business goes considerably beyond this criterion; much conduct that is more than "occasional" still falls short of being "a regular course of trade or business."

[248] *See supra* notes 235-36 and cases cited therein. Under the minority position, even proof of profit as *a* motivation was not necessary. *See supra* notes 236-37.

[249] *See supra* notes 146-48.

[250] A principal concern of the Committee is that we not permit individuals to buy, sell and distribute firearms on a repetitive, continuing basis without the necessary records.... We believe the "principal objective of livelihood and profit" requirement of the proposed definition has this effect. A requirement of proof of objective or motive, unlike a conduct-motivated standard, calls for proof of subjective matters, and is for this reason of questionable wisdom. In a prosecution for engaging in the business without a license it is unreasonable to require that the prosecution prove that livelihood *and* profit was the *principal* objective of one who maintains that he buys and sells guns to make a little extra money to add to his personal collection of firearms, or because he enjoys learning about all the various firearms that pass through his hands in buying and selling them.

H.R. REP. No. 495, 99th Cong., 2d Sess. 10 (1986). The House of course passed what became FOPA over this objection and substituted it for the alternative recommended by this Report.

[251] *See supra* notes 149-50. This is underlined by the further definition of "with the principal objective of livelihood and profit" as involving a predominant intent of obtaining "livelihood and pecuniary gain." FOPA, *supra* note 1, § 101, at 450 (creating 18 U.S.C. § 921(a)(22)).

[252] *See supra* note 250.

be repetitively *acquired* as well as disposed of—liquidation of collections is not enough—and (2) the broad provisions of the prior minority rule, which required licensing not only of those with guns to sell, but also of those who held themselves out as able to obtain them,[253] are repudiated. Thus, FOPA substitutes a detailed four-element test for the broad and general criterion used under the Gun Control Act. The central thrust of the FOPA definition is toward limiting the term "engaged in the business" to those who treat firearm sales as a business, either of the "storefront" or the "itinerant peddler" variety.

S. 2414 appended an exception to the third element of FOPA's "engaged in the business" definition. The exception was appended, however, not to the definition of "engaged in the business," but to the definition of "with the principal objective of livelihood and profit" contained in the new 18 U.S.C. section 921(a)(22).[254] The wording chosen was equally anomalous: "*Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal (pg.633) purposes or terrorism."[255] The incongruity of requiring the licensing of terrorist supply depots[256] is matched by the incongruity of the wording employed. FOPA nowhere requires "proof of profit": it requires proof of action "with the principal *objective* of livelihood *and* profit."[257] The scope of this exception is likely to remain untested in any event. The rather obvious self-incrimination problem[258] and the parallel due process difficulty[259] are likely to ensure prosecution of suppliers of terrorists or criminals as aiders and abettors[260] or for violation of 18 U.S.C. § 924(b).[261]

2. Interstate Transfers

While FOPA's standard for "engaging in the business" adopts a new and indeed unprecedented definition, its standard for transactions between residents of different states largely

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253 *See supra* notes 237-39.

254 Act of July 8, 1986, Pub. L. No. 99-360, § 1(b), 100 Stat. 766.

255 *Id.*

256 The Secretary is *required* to issue a dealer's license if the applicant is over 21 years of age, is not a prohibited person, has not willfully violated the Act, and has "premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business...." 18 U.S.C. § 923(d)(1) (1982).

257 FOPA, *supra* note 1, § 101, at 450 (emphasis added).

258 Prosecution for failure to secure a license for the "purchase and disposition of firearms for criminal purposes or terrorism" poses a much clearer case than did Haynes v. United States, 390 U.S. 85 (1968) (conviction for possession of sawed-off shotgun which had not been registered and upon which taxes had not been paid).

259 The S. 2414 provision is essentially a conclusive presumption: upon proof of element A, element B need not be proven. Indeed, it states on its fact that "proof" of the other element is not necessary. As such it will likely run afoul of Sandstrom v. Montana, 442 U.S. 510 (1979), which held that an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" improperly lifted from the prosecution either the burden of proof or that of persuasion as to the element of intent. Since Congress could have validly achieved the same effect by making it illegal to sell (1) for a primary motive of profit without a license *or* (2) to terrorists, compare Patterson v. New York, 432 U.S. 197 (1977) (state may define affirmative defenses and place burden of proof on defendant), this may be a triumph of form over substance. It is, however, a triumph indeed, as is readily illustrated by a comparison of *Patterson* with Francis v. Franklin, 471 U.S. 307 (1985) (state cannot define element of crime and put burden of disproving it on defendant). To a greater or lesser extent, of course, all procedural rights involve a triumph of form.

260 *See* 18 U.S.C. § 2 (1982).

261 This section, moreover, imposes a penalty of ten years' imprisonment and a $10,000 fine—twice the penalty allowed for unlicensed dealing.

represents a return to Title IV of the Omnibus Crime Control and Safe Streets Act.[262] That enactment had generally prohibited sales to a nonresident of firearms other than rifles or shotguns; these, in turn, could be sold interstate unless the recipient "could not lawfully purchase or (pg.634) possess in accord with applicable laws, regulations or ordinances' of his state and locality.[263] However, prior to its effective date, Title IV was superseded by the Gun Control Act proper, which barred sales of firearms to nonresident nonlicensees, subject only to narrow exceptions.[264] FOPA, in turn, returns to a modified Title IV standard, permitting a licensee to sell a rifle or shotgun to a nonresident provided (1) they meet in person to accomplish the transfer, and (2) the sale, delivery, and receipt comply with the legal conditions of sale in both states.[265] These provisions in turn raise at least three issues: who is a nonresident; what state laws must be observed; and what state of mind must be proven to establish a violation?

Who is a nonresident?

FOPA does not attempt to define residency. The Gun Control Act has a similar omission, except for military personnel on active duty.[266] The legislative history indicates that (1) a person's residence is not necessarily where he votes or pays taxes—that is, it is not necessarily his legal domicile;[267] (2) a person is a resident of the locale where he is "permanently or for substantial periods of time physically located;"[268] and (3) a person may have dual residency, or rotate between different places of residence on a regular basis.[269] (pg.635)

What laws must be heeded?

The Gun Control Act in several subsections uses the phrase "State laws and published ordinances," or its equivalent.[270] "Published ordinance" is used as a term of art, describing local ordinances found relevant to the Act and published in the *Federal Register*.[271] This represents a

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[262] Pub. L. No. 90-351, 82 Stat. 225 (1968).

[263] *Id.*, 82 Stat. at 229.

[264] Pub. L. No. 90-618, § 102, 82 Stat. 1217-18 (1968).

[265] FOPA, *supra* note 1, § 102(4)(B), at 451.

[266] Such personnel are residents of the state in which their permanent duty stations are located. 18 U.S.C. § 921(b) (1982).

[267] 114 CONG. REC. 22,786 (1968) (opinion of United States Attorney General on legislation).

[268] *Id.*

[269] *Id.*

> Thus, if a Member of Congress lives in the District of Columbia during the legislative session, he could lawfully purchase a firearm there and transport it to his home state when he returns.... This interpretation is also reasonable from the point of view of dealers. When a dealer asks for proof of residence, he may rely on commercially reasonable identification—such as a driver's license or credit cards showing a person's residence address.... If a person has a residence in two states, firearms dealers in both states may lawfully sell to him.

See generally id. at 22,785-89; 23,076-77.

[270] *See*, *e.g.*, 18 U.S.C. §§ 922(b)(2), (3) (1982).

[271] 18 U.S.C. § 921(a)(19) (1982). In recent years, BATF has simply published in the Register a brief statement incorporating by reference its book of such regulations. *See*, *e.g.*, 50 FED. REG. 40,523 (1985); 49 FED. REG. 19,004 (1984). Since the determination of such laws are or are not to be heeded is one of the most clearly "legislative" rulemaking functions under the Gun Control Act, BATF's claim in each year's notice that comment is unnecessary because the incorporation "merely makes procedural changes as authorized by the Office of the Federal Register" is incomprehensible. The result may well render the publication void.

conscious legislative choice against requiring compliance with all "local laws."[272] S. 1030, and S. 914 as introduced, would have imposed a parallel restriction on interstate sales, requiring that they avoid "violation of any published ordinance or law of the State or locality" of the sale and of the buyer's residence.[273] FOPA's contrasting provision originated with the Reagan Administration amendments to S. 914. These limited interstate transfers to licensees, but only required compliance with "the legal conditions of sale in both such States."[274] It is difficult to dismiss the change as accidental; the amendments were given to the Judiciary Committee in a side-by-side comparison with the unamended bill, and they conspicuously omit the former's reference both to "ordinance" and to "locality."[275] Yet the amendment did retain the unamended S. 914's presumption that the dealer in an interstate sale knows "the State laws and published ordinances" of both states.[276] The report on S. 914, while discussing the amendments, fails to mention this particular change;[277] the House report mentions that licensees "would be required to fully comply with the state (pg.636) and local laws applicable,"[278] an explanation that does violence to the distinction, maintained since 1968, between state "law" and local "ordinance."[279]

The floor debates heighten rather than reduce the ambiguity. The most detailed Senate explanation comes from a debate between Senators Hatch and Kennedy, which clearly suggests that the dealer must comply with published, and only published, ordinances.[280] The House debates give virtually no guidance beyond a passing reference to "State laws."[281]

In sum, the use of "the legal conditions of sale in both such States" may refer to: (1) state laws, an interpretation which best reflects the statute's face and its history; (2) all legal requirements imposed either by the state or by its subdivisions, an interpretation supported by the House report but repudiated by the Senate floor debates; or (3) state laws and "published ordinances," an interpretation supported by the most specific exchange of the floor debates but requiring an immense

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See 5 U.S.C. § 553(b)(B) (1982); 5 U.S.C. § 552(a)(1) (1982).

[272] 114 CONG. REC. 23,069-70 (1968) (House amendment to substitute "law or published ordinance" for "local law"); H.R. REP. No. 1956, 90th Cong. 2d Sess. 28 (1968) (conference report accepting Senate definition of "published ordinances").

[273] S. 1030 § 102(d); S. 914 § 102(c). *See* S. REP. No. 476, 97th Cong., 2d Sess. 4-5 (1982); *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 29-30.

[274] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 30.

[275] *Id.*

[276] *Id.*

[277] S. REP. No. 583, 98th Cong., 2d Sess. 10-11 (1984).

[278] H.R. REP. No. 495, 99th Cong., 2d Sess. 8 (1986).

[279] 18 U.S.C. § 921(a)(19) (1982).

[280] Kennedy opened the exchange by quoting the relevant part of the bill, then citing both state laws and local ordinances to show that the dealer's burden would be too great. Hatch agreed that the dealer must comply "with the laws of both the buyer's and the seller's states" but that "[t]hose laws are printed in a Treasury Department manual distributed to all dealers. The dealer will be held accountable for any sales in violation of applicable state or local laws, and it is up to the Treasury Department to update those handbooks on a regular basis." Kennedy asked whether conformance with the laws printed in the manual would be a defense, and pointed out that it was often out of date. Hatch replied that the bill required the updating of the publication, and it was those "[s]tate laws and published ordinances" which the dealer was presumed to know. McClure, sponsor of the bill, then intervened with an explanation, three times mentioning compliance with "state" law, and omitting any mention of local requisites. 131 CONG. REC. S9149-50 (daily ed. July 9, 1985).

[281] One representative mentioned the necessity of compliance "with laws of both buyer's and seller's States." 132 CONG. REC. H1659 (daily ed. Apr. 9, 1986) (statement of Rep. Moore).

revision of the face of the statute. Altogether, the first interpretation seems indicated by the traditional rules of construction.[282] (pg.637)

It is necessary to note one other restriction on the legal standards applicable to interstate sales. Both Senate reports note that FOPA is not intended to give extraterritorial effect to state regulations that were meant only to govern local aspects of transfer.[283] This appears to codify a commonsense distinction. There is little reason to demand that an out-of-state dealer comply with regulations directed at local aesthetics—such as requirements that firearms be wrapped upon sale.[284]

What state of mind need by proven?

As a response to objections that FOPA's requirement of a "willful" state of mind would require the prosecution to assume the burden of proving a dealer's actual knowledge, not only of the law of his own state, but also of the law of the buyer's residence, FOPA added to the interstate sales allowance the provision that the dealer in an interstate sale "shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States."[285] The presumption originates from the Treasury-NRA negotiations.[286] It appears patterned after the classic "Thayer" or "bursting bubble" presumption.[287] Indeed, the language "in the absence of evidence to the contrary" is taken directly from Wigmore's discussion of the Thayer rule.[288] The Thayer rule gives a presumption a very narrow (pg.638) effect. "If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence) the presumption disappears as a rule of law and the case is in the jury's hands free from any rule."[289] To reinforce this understanding, the report on S. 1030, which

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[282] *See*, *e.g.*, Simpson v. United States, 435 U.S. 6, 14-15 (1978) (rule of lenity); Rewis v. United States, 401 U.S. 808, 812 (1971) (same); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (due process requires that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"); Carminetti v. United States, 242 U.S. 470, 485 (1917) (face of statute has priority; if clear on face, no need for further construction); Center for Nat'l Policy on Race and Urban Issues v. Weinberger, 502 F.2d 370, 374 (D.C. Cir. 1974) (exception to face of statute rule where such construction result would be inequitable, unreasonable, or manifestly contrary to purpose of statute).

[283] S. REP. No. 476, 97th Cong., 2d Sess. 19 (1982) ("A law restricting modes of conducting business within a locality, and applicable only to sales within the locality and not to purchases made by its residents elsewhere, is not violated by a resident's purchase of a firearm outside its boundaries. Conversely, a waiting period on delivery of a firearm to a resident, wherever bought in the state ... must be complied with."); S. REP. No. 583, 98th Cong., 2d Sess. 11 (1984).

[284] Recognition of this principle in fact will likely moot the issue of whether local ordinances apply. A dealer is already required to comply with both laws and published ordinances of the place of sale. 18 U.S.C. § 922(b)(2) (1982). If, as the report implies, an ordinance of the buyer's locality, not intended to have extraterritorial effect (for example, a statute requiring registration only of guns *brought into* the locality, or imposing a waiting period on those *sold within* the locality, neither being applicable to purchases elsewhere in the state) is not to be applied to a sale which in fact took place outside the locality, then few ordinances of the buyer's municipality are likely to be applicable in any event.

[285] FOPA, *supra* note 1, § 102(4)(B), at 451 (amending 18 U.S.C. § 922(b)(3)(A)).

[286] The author's files show this language first occurring in the NRA proposals, as a counteroffer to Treasury's proposal to limit interstate sales to licensees.

[287] *See generally* MCCORMICK ON EVIDENCE § 344, at 974-80 (E. Cleary 3d ed. 1984).

[288] 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2491, at 305 (J. CHADBOURN rev. ed. 1981) ("it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent.") (emphasis in original).

[289] *Id. See* Pariso v. Towse, 45 F.2d 962, 964 (2d Cir. 1930) ("the office of a presumption must disappear when the opposite side puts in proof...."); McIver v. Schwartz, 50 R.I. 68, 140 A. 101, 102 (1929) ("The presumption, however, is operative only in the absence of any credible evidence to the contrary for the defendant."); Rocque v. Co-operative Fire Ins. Ass'n, 140 Vt. 321,

introduced the presumption, explains: "The amendment is intended to reverse the initial burden of proof on the issue of knowledge, and not to create an evidentiary presumption."[290]

The treatment of this presumption as a "bursting bubble," which reverses the initial burden of proof and enables the government to survive a directed verdict at the close of its case, may indeed have proven prescient. The United States Supreme Court had, long before FOPA, held that imposition upon the defense of a conclusive presumption would, by circumventing the burden of the government to prove all elements of a crime beyond a reasonable doubt,[291] violate due process.[292] Nearly two years after the critical amendment to S. 1030, the Supreme Court ruled that rebuttable presumptions suffered from a similar defect.[293] FOPA's employment of a "bursting bubble" presumption, which shifts only the burden of going forward, and vanishes at the first introduction of evidence from the defense, may enable it to survive a similar fate.[294] Regardless, it should be apparent from FOPA's face and its history that the defense (pg.639) is only required to produce some proof, at which point the presumption vanishes and the jury is left to assess the facts without instruction on presumptions.[295]

3. Prohibited Persons

Few portions of the Gun Control Act were as garbled as its core, the definition of "prohibited persons" who were forbidden to acquire, possess or transport firearms. Title IV, as amended by the Gun Control Act, prohibited dealers, and only dealers, from selling to its prohibited classes.[296] It barred felons, fugitives from justice, drug users, and persons adjudicated "mental defectives" or committed to an institution from the receipt of guns that had been shipped in interstate commerce.[297] Title VII on the other hand barred felons, persons with a dishonorable discharge, those "adjudged mentally incompetent," those who had renounced American citizenship, and illegal aliens from receiving, possessing or transporting firearms "in commerce or affecting commerce."[298] Even where the classes overlapped, divergence remained. Title IV defined the disabling criminal conviction as one publishable for more than a year, excluding certain business offenses and offenses expressly denominated misdemeanors; Title VII simply referred to "felony." Title IV excluded crimes for which the Secretary had given "relief from disability," but made no provision for pardons; Title VII excepted most pardons, but failed to mention relief from disability. Title IV refers to mental commitment or finding of defect; Title VII only to judicial findings of incompetence. Further

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438 A.2d 383, 386 (1981) ("The effect of such a presumption is to place the burden of going forward with the evidence on the party against whom it operates, but the burden is without any independent probative value. When any evidence is introduced from which facts to the contrary may be found, the presumption disappears and is wholly without effect.").

290 S. REP. No. 476, 97th Cong., 2d Sess. 19 (1982).

291 *In re* Winship, 397 U.S. 358 (1970).

292 Sandstrom v. Montana, 442 U.S. 510 (1979).

293 Francis v. Franklin, 471 U.S. 307 (1985).

294 Some courts have indicated that a presumption affecting only the burden of going forward may survive *Francis v. Franklin* scrutiny. *See* Dean v. Young, 777 F.2d 1239, 1243 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1794 (1986); Davis v. Allsbrooks, 778 F.2d 168, 173-74 (4th Cir. 1985).

295 *See* authorities cited *supra* note 289.

296 Pub. L. No. 90-618, § 102, 82 Stat. 1219-20 (1968) (amending 18 U.S.C. § 922(d)).

297 *Id.*, 82 Stat. 1220-21 (1968) (amending 18 U.S.C. § 922(h)).

298 Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968).

differences are found between the provisions defining the necessary connections to commerce, the penalties (a maximum of two years imprisonment for Title VII, five for Title IV) and even the meaning of the word "firearm"![299] Attempts to reconcile or explain these differences produced a wide-ranging and often conflicting caselaw. The Supreme Court settled early that, when the (pg.640) offense was covered in both Title IV and Title VII, the government could charge either at its option.[300] Other opinions recognized and delineated the commerce connection necessary under each statute.[301] The differing treatment of pardons caused a continuing split among the circuits, some holding that a pardoned citizen is not a prohibited person under either statute, others holding that he was still subject to Title IV's bar even though exempt under Title VII.[302]

The development of alternative procedures in criminal justice posed additional problems for the Gun Control Act's simple criteria of felony convictions and full pardons. States experimented, for example, with procedures for restoration of civil rights or expungement of first-time convictions.[303] Persons who obtained relief under these systems, however, were generally held to still be "prohibited persons" under the Gun Control Act.[304] Other states experimented with "open ended" sentencing schemes under which an offense could be treated as a misdemeanor or a felony in the discretion of the sentencing judge.[305] These were generally treated as felonies under the Gun Control Act, even when (pg.641) the sentence had been as a misdemeanor.[306] Still others experimented with systems by which a guilty plea, followed by probation, could end in a dismissal without a finding of guilt.[307] The Supreme Court soon ruled that such proceedings constituted a conviction for Gun Control Act purposes.[308] The general result was that treatment under any of these systems, largely devised to protect against the effects of a felony record, left the recipient barred from firearm

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[299] Title IV excludes antique arms, those dating from before 1898, from its definition of "firearm," while Title VII includes all guns. *Compare* 18 U.S.C. §§ 921(a)(3), (16) (1982) *with* Pub. L. No. 90-351 § 1202(c)(3), 82 Stat. 237 (1968).

[300] *See* Ball v. United States, 470 U.S. 856 (1985) (both offenses can be charged in same prosecution, although defendant can receive sentence only under one); United States v. Batchelder, 442 U.S. 114 (1979) (Title IV, with its stricter penalties, can be charged; rule of lenity does not compel prosecution under Title VII).

[301] *See* Scarsborough v. United States, 431 U.S. 563 (1977) (under Title VII, nexus between possession and commerce need not be contemporaneous); Barrett v. United States, 423 U.S. 212 (1976) ("We conclude that § 922(h) covers the intrastate receipt ... of a firearm that previously had moved in interstate commerce."); United States v. Bass, 404 U.S. 336 (1971) ("we adopt the narrower reading: the phrase 'in commerce or affecting commerce' is part of all three offenses").

[302] *See* United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978); Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

[303] *See* ARIZ. REV. STAT. ANN. § 13-912 (1978) (automatic restoration of civil rights on first offense); MICH. STAT. ANN. § 28.1274(101) (1986) (conviction set aside if first offense and five years have passed without conviction).

[304] *See* United States v. Andrino, 497 F.2d 1103 (9th Cir.) (expunged conviction still a bar to gun ownership), *cert. denied*, 419 U.S. 1048 (1974); United States v. Ziegenhagen, 420 F. Supp. 72 (E.D. Wis. 1976) (conviction remains bar despite state restoration of civil rights). *But see* Barker v. United States, 579 F.2d 1219 (10th Cir. 1978) (dicta: expungement of conviction might suffice to remove bar on firearms ownership); United States v. Purgason, 565 F.2d 1279 (4th Cir. 1977) (conviction set aside under Youth Correction Act not a bar to firearm ownership).

[305] *See* ARIZ. REV. STAT. ANN. § 13-702(H) (Supp. 1986) (class 6 felony, not involving violence or weapons, can be treated as class 1 misdemeanor); GA. CODE ANN. § 17-10-5 (1982) (felony punishable by ten years or less can be treated as misdemeanor).

[306] *See* United States v. Willis, 505 F.2d 748 (9th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975).

[307] *See* MD. ANN. CODE, art. 27, § 641 (1982).

[308] *See* Dickerson v. New Banner Inst., 460 U.S. 103 (1983).

ownership as a felon. Only a relief from disability was sufficient to lift the bar, and this remedy was unavailable to anyone convicted under the Gun Control Act or National Firearms Act.[309]

FOPA dealt directly with all these anomalies. Title VII was repealed and its prohibited person categories incorporated into Title IV.[310] The jurisdictional bases of both Titles IV and VII were now applied to all categories; it was sufficient for any of them 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."[311] All persons, and not merely licensees, were forbidden to sell or dispose of firearms to those so barred.[312] FOPA's main impact in this area was thus two-fold: uniformity was established between the Title IV and Title VII prohibitions, exceptions, jurisdictional bases and penalties, and caselaw giving a narrow effect to state exercises of clemency was negated.[313] It is perhaps regrettable that (pg.642) FOPA's renovation did not extend further. A redefinition of other "prohibited person" categories is long overdue. FOPA's passage, by re-enacting the categories dealing with mental adjudications, may be taken to accept prior narrow interpretations of these terms,[314] but it sheds little light on the status of convictions in court-martials.[315] (pg.643)

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[309] Individuals so convicted could not have hoped for much relief in any event. Applicants for relief are investigated by the local BATF office. It would be rather surprising if agents recommended to their supervisors that someone they had just spent considerable resources prosecuting should, in light of his honest reputation and conduct, be given relief from the resulting conviction.

[310] FOPA, *supra* note 1, § 102(6), (7), 104(b), at 453-54, 459.

[311] FOPA, *supra* note 1, § 102(6), at 452.

[312] FOPA, *supra* note 1, § 3102(5)(A), at 451-52 (amending 18 U.S.C. § 922(d)).

[313] The more interesting question of FOPA's impact on state restorations of civil rights lost by virtue of a federal conviction is not mentioned in the legislative history. *See* ARIZ. REV. STAT. ANN. § 13-910 (1978). The statute simply excludes from prohibited person status "[a] conviction ... for which a person ... has had civil rights restored," without the express requirement (as found in the definition of what constitutes a "conviction") that it relates to "the jurisdiction in which the proceedings were held." Applying a state proceeding to a federal judgment would seem a bit out of place and would pose the further question of the effect of the state relief should the person involved thereafter move to another state which lacked provision for, or refused to grant him, such relief.

[314] *See* United States v. Hansel, 474 F.2d 1120 (8th Cir. 1973). *Hansel* essentially held that (1) an involuntary hospitalization for examination was not a "commitment" and (2) the administrative finding supporting the order of hospitalization was not a finding of "mental defect," since that term is most often used to describe congenital subnormal intelligence, not mental illness of a previously normal individual. The defendant had been charged solely under Title IV, the former 18 U.S.C. § 922(h), probably because Title VII, the former 18 U.S.C. app. § 1202 requires that a person be judged "mentally incompetent" by "a court."

This narrowing construction reduces but does not obviate the need for a careful redraft of this category. "Mental incompetence," "mental defect" and orders of "commitment" may have little meaning in relation to the Congressional findings that possession of firearms by "mental incompetents" burdens interstate commerce, threatens the life of the President, impedes free speech and practice of religion, and is "a threat to the continued and effective operation of the Government...." Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968). Drafters of a revised criterion should bear in mind that the Supreme Court, while refusing to treat the mentally ill as a "suspect category," appears more than willing to strike down burdens upon them which have no rational basis, and appears unwilling to "stretch the record" to find a rationale. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Future drafters should also note that, while it is permissible to infer a continuing illness from the initial adjudication, compare Jones v. United States, 463 U.S. 354 (1983), many persons may have records of treatment or adjudication that antedate due process guarantees imposed by the Court. *See* Addington v. Texas, 441 U.S. 418 (1979) ("clear and convincing evidence" required for commitment; showing of "idiosyncratic behavior" insufficient). *See generally* Haddad, *Predicting the Supreme Court's Response to Criticism of Psychiatric Predictions of Dangerousness in Civil Commitment Proceedings*, 64 NEB. L. REV. 215 (1985). Unlike a criminal conviction, there is no post-release collateral attack available to clear the record.

[315] A court-martial that ends in a dishonorable discharge clearly puts the defendant within a prohibited category, but what of one that does result, or could have resulted, in incarceration for more than one year? At first glance, the defendant would seem a prohibited person by reason of his conviction "in any court." 18 U.S.C. § 922(d)(1) (1982). Yet a closer look suggests quite strongly that Congress intended the dishonorable discharge, and not conviction of an offense punishable by more than a year's imprisonment, to be the litmus test of arms ownership following a court-martial. First, the full description of the latter prohibition is a person who

FOPA also expanded the "relief from disability" process. The original relief procedures set out in Title IV were limited to persons barred from gun ownership by reason of conviction; all other bars were left unmentioned. Thus, those who were prohibited arms ownership by virtue of a past mental adjudication or dishonorable discharge were denied any possibility of relief. The origin of this limitation was understandable. As enacted, Title IV had limited "prohibited person" status to three categories: fugitives from justice, those indicted for an offense punishable by more than a year's imprisonment, and those convicted of such an offense.[316] The first were hardly likely to apply for relief, and the second would soon either be cleared or convicted. Limiting relief to those disabled by conviction was thus eminently rational. The only questionable measure lay in carrying over the Federal Firearms Act's exclusion from relief of those convicted of a violation of the federal gun laws themselves.[317] The critical legislative mistakes came at two later points: the enactment of Title VII, which added a variety of new prohibited person categories and failed to mention relief mechanisms,[318] and the enactment of the Gun Control Act proper, which added to the Title IV list without a parallel expansion of its relief mechanism.[319] (pg.644)

The actual relief mechanism under FOPA remains largely unaltered from that of the Gun Control Act.[320] Agency regulations require triplicate submission of an application to regional authorities, who thereafter conduct an investigation.[321] FOPA does make express and broad

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is "under indictment for, or has been convicted of" such an offense. "Indictment" is defined to include "information," 18 U.S.C. § 921(a)(14) (1982), but not the pendency of court-martial proceedings. Second, *all* court-martials involve offenses for which a term greater than one year may be imposed—the only statutory limit is that the incarceration "may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856 (1982). Because, at least prior to FOPA, the test was whether a person *could have* received more than one year—even if the court chose a sentencing scheme that ruled that out, *see supra* notes 305-08—all court-martials would qualify. (The President has in fact prescribed maximum terms for most offenses, but these maxima apply only to court-martials of enlisted men. MANUAL FOR COURTS MARTIAL, § 127 (Rev. ed. 1969) cited in 10 U.S.C.S. § 856 note (1982)). Thus, if Congress had understood a court-martial conviction to qualify as a conviction for purposes of this section, it need not have created a separate category for persons sentenced to a dishonorable discharge. It seems more likely that Congress did not intend prohibited person felon status to apply to persons convicted of, *inter alia*, behaving "with disrespect" to a superior, failing to obey a regulation, breach of the peace, use of "reproachful words," or of "disorders and neglects to the prejudice of good order." 18 U.S.C. §§ 889, 892, 917, 934 (1982).

316 Pub. L. No. 90-351, § 902, 82 Stat. 230 (1968).

317 Title IV's relief mechanism was taken from a Federal Firearms Act amendment originally sponsored by Senator Dodd to help a firearms manufacturer facing conviction for a commercial offense. *See supra* notes 72-73. The exclusion of firearm convictions in the earlier act may thus have been due to Dodd's desire to keep the exclusion as narrow as possible while aiding his constituent, or it may have reflected a belief that anyone convicted of a firearms act violation was untrustworthy per se—although reconciling the latter with a provision that did not exclude the possibility of relief for those convicted of murder, rape, assault, robbery or other serious violent crimes is difficult.

318 Pub. L. No. 90-351, §§ 1202-03, 82 Stat. 236-37 (1968).

319 Pub. L. No. 90-618, § 102, 82 Stat. 1220-21 (1968) (amending 18 U.S.C. § 922(d), (g), (h)). The omission of relief provisions for persons subject to a mental adjudication was recently voided on constitutional grounds. *See* Galioto v. Department of Treasury, 602 F. Supp. 682 (D.N.J.), *prob. jurisdiction noted*, 106 S. Ct. 307 (1985), *appeal dismissed as moot*, 106 S. Ct. 307 (1986). At oral argument, the Court raised sua sponte the pendency of FOPA in the House; the parties conceded that enactment of the bill would moot the case. Author's conversation with Robert Dowlut (June 20, 1986).

320 Earlier bills would have profoundly altered these procedures. The first versions of what became FOPA would have limited "prohibited person" status to those convicted of certain, largely violent, crimes. Later bills instead placed reliance on amendments requiring the Secretary to bear the burden of proving an application should be denied and allowing a trial de novo on review. *See supra* note 230.

321 27 C.F.R. § 178.144(a) (186). The regulation, regrettably, fails to set forth what is expected, or may be persuasive, in the eyes of the agency. The author recalls being told informally that letter applications are appropriate, a wait of at least two years following the conviction is considered an appropriate minimum, and that lists of references for the investigators to interview are likewise good form. The criteria followed, if any, are further cloaked by the consistent agency failure to follow the requirement both

provisions for review of an agency denial in the district court.[322] A right to such review had previously been recognized, but on a very narrow basis.[323] FOPA, while retaining review on an "arbitrary and capricious" standard[324] uniquely expanded district court review by allowing the court to admit evidence outside the record if the court deems it necessary to prevent a miscarriage of justice.[325] Since many applicants may file *pro se* and secure counsel only when judicial proceedings become imminent, and counsel not schooled in administrative practice (pg.645) may not appreciate the importance of the initial record to later review, this allowance can significantly aid the court in ensuring that justice is done in actual practice.[326] At the same time, reconciling the "arbitrary and capricious" test with consideration of materials outside the record is not a simple task. An imaginative reconciliation is suggested in the Senate reports: if the court is persuaded that consideration of the evidence is essential to doing justice in the case, it can admit the evidence, after requesting the presence of an agency investigator. It can then stay further proceedings while the agency determines whether the new evidence will change its decision.[327] The court could also, presumably, direct the agency to consider a transcript of the new evidence.[328] The delineation of these unique and practical measures underlines an intent that the review secure actual justice in each case.

FOPA thus substantially changes the Gun Control Act's list of prohibited conduct. Each of the 1968 Act's major proscriptions—dealing without a license, sales to nonresidents, and sales or possession by "prohibited persons"—were significantly changed. Yet none of these changes will

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of statute and of regulation that the agency publish not only the names of persons given relief but also the bases therefor. 18 U.S.C. § 925(c) (1982); 27 C.F.R. § 178.144(d) (1986); *see* 50 FED. REG. 1026, 23,374 (1985). Given the costs of Federal Register publication, and the number of reliefs granted, it was perhaps understandable that the agency is reluctant to detail its decision where the only person with a direct interest is, in fact, given what he sought. One might query whether this requirement ought to be considered for legislative elimination, perhaps in favor of a reading file and summary of decisions maintained at headquarters or at regional offices.

[322] FOPA, *supra* note 1, § 105(1), at 459 (amending 18 U.S.C. § 925(c)).

[323] *See* Kitchens v. Bureau of Alcohol, Tobacco and Firearms, 535 F.2d 1197 (9th Cir. 1976). The later Senate report cites this decision, adding, with regard to the reported bill, that "in a change from existing practice, it authorizes the scope of review provided under 5 U.S.C. § 706 and empowers the court to consider additional evidence...." S. REP. No. 583, 98th Cong., 2d Sess. 26-27 (1984).

[324] The Senate version of S. 49 expressly provided that review would be under 5 U.S.C. § 706 (1982), which applies that standard. *See* 131 CONG. REC. S917 (daily ed. July 9, 1985). This language was deleted as redundant in the House version finally passed.

[325] FOPA, *supra* note 1, § 105(1), at 459.

[326] The author's recollection is that this provision was a result of the earliest negotiations between Treasury and NRA; in return for NRA dropping its demand for de novo review of a denial, Treasury agreed to the court's considering the additional evidence if necessary to avert a miscarriage of justice. Unfortunately, how consideration of the evidence could be reconciled with review under an arbitrary and capricious standard was not thought out. The author's suggestion, of a remand of the type discussed in the text, resolved the issue, was acceptable to both parties, and was incorporated in the report.

[327] S. REP. No. 583, 99th Cong., 2d Sess. 27 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 24 (1982). While such a proceeding may seem unusual, courts frequently remand to the agency, at the close of a case, for additional factfinding or explanation of the decision. *See* Rodway v. United States Dep't of Agric., 514 F.2d 809, 824 (D.C. Cir. 1975); Environmental Defense Fund, Inc. v. Ruckleshaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

[328] Agency regulations could establish a procedure for these remands. Since review will be broader than in the past, the need for the agency to adopt regulations setting out its criteria and minimal requirements is evident. The Administrative Procedures Act specifically provides that members of the public cannot be denied relief or punished for failure to conform to an unpublished regulation. *See* Hotch v. United States, 212 F.2d 280 (9th Cir. 1954); 5 U.S.C. § 552(a)(1) (1982).

affect so many cases in so significant a manner as FOPA's key provision: the imposition of *scienter* requirements.

B. Scienter Requirements

The Gun Control Act, as originally enacted, simply provided (pg.646) that "whoever violates any provision of this chapter ... shall be fined not more than $5,000, or imprisoned not more than five years, or both."[329] In *United States v. Freed*,[330] a case involving possession of unregistered "destructive devices," in this case hand grenades, the Supreme Court held that "consciousness of wrongdoing" was not an element of the violation, nor constitutionally required, since "one would hardly be surprised to learn that possession of hand grenades is not an innocent act."[331] *Freed* stressed that the due process test involved a practical judgment as to whether there was "the probability of such knowledge," that is, of the legal duty.[332]

Although *Freed* on its face was limited to possession of hand grenades, and both Brennan's concurrence[333] and later decisions[334] stressed that knowledge of the act prohibited (if not of its illegal nature) *was* required, lower courts read the decision as both a broad authorization applying to all provisions of the Gun Control Act and imposing strict liability.[335] Po

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[329] Pub. L. No. 90-618, § 102, 82 Stat. 1223-24 (1968).

[330] 401 U.S. 601 (1971).

[331] *Id.* at 609.

[332] *Id.* at 608.

[333] *Id.* at 612.

> The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements.

Id. Brennan also stressed that

> the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines.... Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it.

Id. at 616. This concurrence has since been cited by the Court. *See* Liparota v. United States, 471 U.S. 419, 423 n.5 & 425 n.9 (1985), *remanded* 774 F.2d 1166 (7th Cir. 1985); *id.* at 442 n.6 (White, J., dissenting).

[334] Only a few months later, the Court noted: "Here as in *United States v. Freed*, ... strict or absolute liability is not imposed; knowledge of the shipment of the dangerous materials is required." United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560 (1971). *See also* United States v. United States Gypsum Co., 438 U.S. 422, 436-37 (1978); Liparota v. United States, 471 U.S. 419, 423 n.5 (1985) (distinguishing *Freed*).

[335] In United States v. Ruisi, 460 F.2d 153 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972), for instance, the court upheld a conviction for "engaging in the business" where a licensed dealer and an employee sold eleven guns—none of them handguns, and at least some either pre-1898 or inoperable—at a gunshow. The dealer required buyers to fill in the appropriate federal forms, but was not licensed to conduct business in the state of the gunshow. Although the difference between selling hand grenades and selling long arms with appropriate forms would seem rather apparent, the court disposed of argument on the *scienter* requirement with a citation to *Freed*'s statement that one would not be surprised to learn that grenade possession is not an innocent act! *Id.* at 156. Other cases applied true strict liability to ordinary "engaged in the business" cases in reliance on *Freed*, so that knowledge that guns were being sold was adequate for conviction, whether or not the defendant knew that the nature of the sales amounted to "engaging in the business." *See* 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns v. United States, 443 F.2d 463 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971); United States v. Powell, 513 F.2d 1249, 1251 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975); United States v. Huffman, 518 F.2d 80, 81 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975); United States v. Ruisi, 460 F.2d 153 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); United States v. Ten Firearms and Twenty-Four Rounds of Ammunition, 444 F. Supp. 305, 307 (N.D.

st-*Freed* caselaw that struck down strict liability (pg.647) statutes or read intent requirements into them[336] had no visible effect in the field of firearm regulation. No feature of FOPA engendered more legislative approval than its rejection of this caselaw in favor of specific *scienter* requirements.[337]

FOPA's change in this area is hard to overstate. The Gun Control Act was converted from one construed as a strict liability statute to one largely requiring the highest degree of criminal state of mind. The earliest forms of FOPA had proposed to require that all offenses be proven "willful."[338] After negotiations in which Treasury argued that it ought (pg.648) not to be required to prove intent to violate the law for serious offenses such as possession of stolen weapons, felon in possession and illegal importation, a bifurcation was drafted under which these offenses needed proof only of a "knowing" violation, while the remainder still required proof of willfulness.[339] After lengthy negotiation over which offenses belonged in each category, this compromise became the Reagan Administration position[340] and was incorporated into FOPA as enacted.[341] Reasonably accepted definitions attach to both "knowing"[342] and "willful"[343] in criminal statutes, so the matter of *scienter* might have ended here.[344] Indeed, the Senate report on S. 1030, FOPA's predecessor in the Ninety-seventh Congress, explained in quite specific terms that "willfully" was inserted "to require

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Tex. 1977). But in *Freed* the statute prohibited sale of the grenades, and the Court upheld conviction where the defendant knew that grenades were being sold, while this provision did not outlaw sales of firearms, but only such a volume of sales as to amount to engaging in the business of dealing. Accordingly, *Freed*, if applied, would not support conviction when the defendant did not know he was engaging in the business, although it would permit conviction where he had this knowledge but did not appreciate that a license was needed for the dealing. *Cf.* United States v. Renner, 496 F.2d 922, 926 (6th Cir. 1974) (requiring knowledge that a person is under indictment in prosecution for receiving a firearm while under indictment; stressing distinction between ordinary firearms and hand grenades).

336 *See*, *e.g.*, Liparota v. United States, 471 U.S. 419 (1985); United States v. United States Gypsum, 438 U.S. 422 (1978); United States v. International Minerals and Chem. Corp., 402 U.S. 558 (1971). While some such decisions have stressed the stigma and penalty associated with a felony offense, *see* United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985); United States v. Heller, 579 F.2d 990, 994-95 (6th Cir. 1978), others have taken this approach even to misdemeanor charges. *See* Catlett v. United States, 471 U.S. 1074 (1985) (White, J., dissenting from denial of petition for certiorari); United States v. Delahoussaye, 573 F.2d 910, 912 (5th Cir. 1978).

337 *See*, *e.g.*, 131 CONG. REC. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure); *id.* at S9104 (statement of Sen. Symms); *id.* at S9113 (statement of Sen. Hawkins); *id.* at S9124, S9125 (statement of Sen. Hatch).

338 *See* S. 1030, 97th Cong., 1st Sess. § 104(a) (1981); S. 1862, 96th Cong., 2d Sess. § 104(a), 125 CONG. REC. 27,383 (1979); *The Firearms Owner Protection Act: Hearings*, *supra* note 118, at 15.

339 *See supra* notes 159-65.

340 *See supra* notes 163-65.

341 FOPA, *supra* note 1, § 104(a)(1), at 456.

342 *See*, *e.g.*, United States v. International Minerals and Chem. Corp., 402 U.S. 558, 563-64 (1971); Robinson & Grall, *Element Analysis in Defining Criminal Liability:* The Model Penal Code *and Beyond*, 35 STAN. L. REV. 681, 695 (1983).

343 *See*, *e.g.*, United States v. Pomponio, 429 U.S. 10 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Murdock, 290 U.S. 389, 395-96 (1933).

344 To be sure, the question of whether a requirement that a defendant be proven to have "knowingly" violated a provision of the chapter, as opposed to have knowingly done a specified act, might well have reared its head. In the abstract, a colorable argument could probably be made along these lines. *Compare* Liparota v. United States, 471 U.S. 419 (1985) ("knowingly" using a food stamp in a manner not authorized by law or regulation indicates the lack of authorization, as well as use, must be known) *with* United States v. Yermian, 468 U.S. 63 (1984) (in prosecution for having knowingly made a false statement to a federal agency, proof that defendant knew the statement would be submitted to such an agency is not necessary: only the fraud must be known). Given FOPA's bifurcation between knowing and willful requirements, however, any attempts to so convert "knowingly" into "willfully" would likely meet an unfavorable reception.

that penalties be imposed only for willful violations—those intentionally undertaken in violation of a known legal duty."[345]

Unfortunately, this understanding is clouded by the report on S. 914, S. 1030's successor in the Ninety-eighth Congress. That report stated, without explanation or citation, that "the Committee intends 'willful' conduct to cover situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily (pg.649) knowledge of the law."[346] Since the two reports represent the same committee's attempt to analyze the same word in the same section of essentially the same bill, the discrepancy is hard to explain, other than as a possible typographical error in the later report.[347] Neither Senate report technically represents the bill enacted, which was the House version of the still later Senate S. 49.[348] The House report is in clear accord with the first Senate report, arguing that under S. 49,

> violations of this requirement would only be punishable if they were "willful." Willful violations would be more difficult to prove than the usual "knowing" standard.... [I]f the failure was due to a mistake of law or fact or due to negligence on the part of the licensee, the violation of the law most likely would not be punishable.[349]

It also quoted, as the "Views of the Administration," a leaked "memo to files" from Treasury, which specifically noted that interstate "[p]urchasers' violations would be difficult to prove in view of the requirement to prove willfulness on their part, i.e., the purchaser knew that State or local law was violated."[350] Unfortunately, even this report's illumination is clouded by the action of one Representative who quoted the later Senate report on the House floor and attempted to secure the floor manager's agreement that that Senate report explained his bill.[351] (pg.650)

While typographical and analytic errors in reports are not common, they are also not unknown.[352] Here, the report itself is inconsistent, acknowledging, for example, that the willful requirement was necessary to ensure against felony prosecution for a "careless" or "inadvertent"

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345 S. REP. No. 476, 97th Cong., 2d Sess. 22 (1982).

346 S. REP. No. 583, 98th Cong., 2d Sess. 20 (1984).

347 The error would be transposition of "willful" for "knowing." The first report concerned a bill in which "willful" alone was used; the later one concerned the first bill but used both "willful" and "knowing" standards. A definition of "knowing" in the later report would thus be necessary, and a definition of it as requiring cognizance of the elements of the offense though not of the law would be standard. Moreover, the anomalous definition of "willful" in fact comes at the end of a paragraph mainly devoted to explaining the new use of "knowing" in the statute and precedes one listing the sections requiring proof of "knowing" intent. *Id.*

348 As one Representative pointed out: "The Volkmer substitute is allowed under the rule. It is not S. 49 nor is it the original Volkmer bill." 132 CONG. REC. H1657 (daily ed. Apr. 9, 1986) (statement of Rep. Smith).

349 H.R. REP. No. 495, 99th Cong., 2d Sess. 8-9 (1986) (citations omitted).

350 *Id.* at 18.

351 132 CONG. REC. H1679 (daily ed. Apr. 9, 1986) (statements of Reps. McCollum and Volkmer). McCollum's remark was prefaced with the statement that he would like to clarify if it was the intent of Rep. Volkmer, the floor manager, to "imply the same meaning of the term 'willfulness' that the other body intended." He then quoted the later Senate report, mentioning that it dealt with a predecessor of the present bill. Volkmer agreed that the bill's intent was "identical to the Senate meaning," and McCollum replied that by adopting Volkmer's bill, "[t]he House will intend the same interpretation that the other body intends." Since McCollum only a short time later moved an expansion of the "knowing" provisions of the bill, *id.* at H1700 (daily ed. Apr. 10, 1986), it is doubtful that he was genuinely under the belief that "willfully" meant "knowingly."

352 *See*, *e.g.*, Associated Indus. v. United States Dep't of Labor, 487 F.2d 342, 349 (2d Cir. 1973).

violation.[353] This clearly would be chargeable if "willful" connotes knowledge of the facts, but not of their illegality, and, in relation to the parallel use of "willful" in the forfeiture section, explaining that "[t]hus no seizures ... are authorized where a criminal state of mind is absent."[354]

More to the point, accepting this isolated explanation of "willful" would require overlooking the entire and extensive history of a vital component of FOPA. Early versions of FOPA required a willful state of mind for any prosecutions.[355] That this was understood to require knowledge of illegality is apparent from the report on S. 1030. The division between "willful" for some offenses and "knowing" for others originated in the Treasury-NRA negotiations, and was specifically premised upon an understanding that proof of willfulness required proof that the defendant knew of the illegality of his conduct.[356] In discussing the amendment before the Judiciary Committee, Treasury explained that the unamended S. 914

> would require proof of the element of willfulness in establishing any violation of the Act. This new element would make it more difficult to successfully prosecute cases under the Act. For example, in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act....[357]

The House Report, hostile to FOPA, conversely criticized its use of "willful," since "[w]illful violations would be more difficult to prove than the usual 'knowing' standard.... [I]f (pg.651) the failure was due to a mistake of law or fact or due to negligence on the part of the licensee, the violation of the law most likely would not be punishable."[358] This understanding is reflected throughout the floor debates in both houses, where "criminal intentions" or its equivalent recurs as an explanation of "willful."[359] It is also reflected in specific legislative action. The key House vote substituted the core of FOPA, an amendment by Representative Volkmer, for the committee reported H.R. 4332, which was a substantial dilution of FOPA's provisions.[360] The committee-reported H.R. 4332 would have inserted the most modest state-of-mind requirement, allowing conviction of whoever "knowingly engages in conduct that is a violation of" the Act.[361] Representative Hughes thereafter offered an amendment to Volkmer's substitute, which amendment would have changed the substitute's

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353 S. REP. No. 583, 98th Cong., 2d Sess. 20 (1984).

354 *Id.* at 24.

355 *See supra* note 338.

356 *See supra* notes 159-64.

357 *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 48 (statement of Dep't of the Treasury).

358 H.R. REP. No. 495, 99th Cong., 2d Sess. 9 (1986).

359 *See* 131 CONG. REC. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure) ("An element of criminal intention"); *id.* at S9128 (statement of Sen. Sasser) ("Now the government must prove, beyond a reasonable doubt, that the violation was willful.... A technical violation, by one who did not intend to break the law, can no longer form the basis of a life-wrecking felony conviction."); *id.* at S9130 (statement of Sen. Johnson) ("an element of criminal intention"); *id.* at S9174 (statement of Sen. Hatfield) ("require that criminal intent be proved"); 132 CONG. REC. H1668 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes) ("unless the dealer commits a willful violation, that is, knowingly violates a law that he is aware of, the dealer walks...."); *id.* at H1671 (statement of Rep. Boehlert) ("criminal intent"); *id.* at H1670 (statement of Rep. Zschau) (eliminates penalties for "unintentional violations of the Act").

360 132 CONG. REC. H1752 (daily ed. Apr. 10, 1986).

361 H.R. 4332, *supra* note 13, at § 8(2).

knowing-willful dichotomy to a simple "knowingly."[362] Prior to the votes on Volkmer's substitute and on Hughes' amendment to it, the House was repeatedly informed, by both sides of each conflict, that a vote for the Volkmer language was a vote for requiring knowledge of violation of law as a condition to most convictions under the Act.[363] In light of these extensive considerations, (pg.652) it is impossible to avoid the conclusion that Congress was fully aware that its use of "willfully" in FOPA would require proof that the defendant actually knew of the illegality of his acts.

The "knowingly" requirement is less well explained, probably because its meaning is more obvious.[364] Apart from the Senate action, deleting as superfluous a proviso that "knowingly" did not encompass "simple carelessness,"[365] this term received little clarification. This is unfortunate, (pg.653) since the simple use of "knowingly violates" leaves unresolved questions of whether

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[362] 132 CONG. REC. H1682 (daily ed. Apr. 9, 1986). The debate on both the Volkmer substitute and the Hughes amendment to it proceeded concurrently.

[363] Rep. Hughes, floor manager for the opposition to FOPA, stated his case clearly:

> The amendment is directed at the single most damaging of these, the requirement in the Volkmer bill that dealers can be found guilty of violating the law only if they "willfully" break the law. This is more than a mere technicality.... [T]he purpose of creating this privileged class is to make it next to impossible to convict dealers, particularly those who engage in business without acquiring a license, because the prosecution would have to show that the dealer was personally aware of every detail of the law, and that he made a conscious decision to violate the law .... [A] dealer would practically have to sign a statement saying that before committing the crime, he had studied the law, knew what he had in mind was illegal, and did his damnedest to make sure he violated the law.

132 CONG. REC. H1684 (daily ed. Apr. 9, 1986). Somewhat later, Hughes engaged in a dialogue: Rep. Rodino began by asking Hughes, "[a]s one who drafted this legislation, to show the significance of the change you have brought about in the provision whereby under the Volkmer amendment, the gun dealer would be given a privileged status in that there would have to be proof of a willful state of mind." Hughes responded, "The gentleman is absolutely right. There is no other (similar) provision I am aware of.... [W]e are requiring, as I indicated, a dealer to know what the law is, every detail of the law, but that he intended to violate the law.... [I]t would be a prosecutor's nightmare." *Id.* at H1685. Rep. Smith likewise charged that the Volkmer substitute would roll back provisions allowing prosecution of dealers who "had good reason to believe" their purchaser was a felon: "not only do you [need to] have reasonable grounds to believe the person is a convicted felon, but now you must have an additional element of proof ... that they [sic] willfully sold that gun, and that is a very difficult burden of proof, willfulness." *Id.* at 1690. Representative Rodino, chairman of Judiciary, later cited the requirement that "one would have to prove willfulness" as "the difference that exists now between the Volkmer substitute and the Hughes law enforcement package amendment." *Id.* at 1693.

The supporters of the Volkmer amendment did not sidestep. Representative Boehlert explained that:

> The Volkmer legislation requires that ... the Government must prove that his or her actions were "willful"—that the citizen violated the law with some sort of criminal intent.... The judiciary [committee] legislation, on the other hand, discards this provision in favor of a mere "knowing" standard for all violations of the Gun Control Act.... [T]his "knowing" standard which they advocate implies that all errors in bookkeeping are criminal—regardless of how innocent of criminal intent the gun owner may be.... The provisions relating to "willful" intent found in the Volkmer substitute are an integral part of our efforts to reform Federal firearms laws. Without those provisions, our efforts here today are wasted.

Id. at H1671. Volkmer himself had noted, more concisely, that "These are the abuses at which my legislation is aimed. The Hughes bill will do nothing about any of these.... It does not restrict prosecution of inadvertent violations." *Id.* at 1652. In short, it would be difficult for any Member to have missed the message, coming from both sides, that one of the most significant differences between the Hughes and the Volkmer approaches was whether the government would have to prove actual knowledge of illegality or merely knowledge of the underlying action.

[364] *See generally* Robinson & Grall, *supra* note 342, at 695.

[365] 131 CONG. REC. S9132 (daily ed. July 9, 1985) (statement of Sen. Hatch). *See also* S. REP. No. 583, 98th Cong., 2d Sess. 21 (1984) (explaining basis for insertion of "simple carelessness" exclusion). The author's recollection is that the provision was inserted by Judiciary Committee at the express request of Sen. McClure.

knowledge is required of jurisdictional facts (such as movement of the firearm in commerce)[366] or even of the existence of the violation itself,[367] as well as the result of its interaction with violations which themselves contain a different element of knowledge, for example, selling to a person whom the seller knows or *should know* is a felon.[368]

FOPA thus significantly alters the state of mind requirements required by the Gun Control Act. Strict liability, hitherto the rule, is essentially abolished.[369] Certain offenses, distinguished by their more serious natures, are singled out for a requirement only that accused violators know of their actions. The remaining provisions of the Act require stiffer proof that the defendant "willfully" violated the statute.

C. Enforcement and Administration

FOPA's impact on enforcement and administration of the federal firearms laws is wide-ranging. It generally tightens standards for record inspection and disposition, firearm seizures and forfeitures, license revocations and general (pg.654) criminal penalties, while expanding mandatory sentencing for use of firearms in *mala in se* offenses.

1. Inspection and Acquisition of Licensee Records

The Gun Control Act required licensees to maintain records of firearm acquisitions, dispositions, and inventories. Furthermore, it permitted warrantless inspection of these "at all reasonable times," and broadly authorized the Secretary to require submission of reports on the records' content.[370] FOPA establishes significant restrictions on the two latter powers. In general, administrative inspections of licensee records now require a magistrate's warrant, based on a showing of reasonable cause to believe evidence of a violation may be found.[371] Three exceptions, however, nearly swallow this rule. Neither warrant nor reasonable cause is needed for (1) a

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366 *See* United States v. Yermian, 468 U.S. 63 (1984) (in prosecution for making false statements "within the jurisdiction" of a federal agency, knowledge that a written statement would be transmitted to an agency not required; ruling based upon statutory history, with four dissents).

367 On the face of the statute, the defendant must be shown to have knowingly violated the Act, not merely to have knowingly taken action. *See* Liparota v. United States, 471 U.S. 419 (1985) (in prosecution for knowing use of food stamps in unauthorized manner, prosecution must prove knowledge that use was unauthorized). However, the legislative history discussed above is likely to be sufficient to demonstrate that Congress used "willfully" when it meant to require knowledge of the violation itself.

368 The limited statutory history does suggest that, in the last case, the stricter standard of "knowingly" governs. 132 CONG. REC. 1690 (daily ed. Apr. 9, 1986) (statement of Rep. Smith) (on sale to felon by dealer, current law requires knowledge or reasonable cause to know of felon status; Volkmer substitute will add controlling requirement that violation also be willful (actually, knowingly, for that particular violation)).

369 Technically, FOPA amends only the penalty section, 18 U.S.C. § 924(a), leaving intact provisions that make it "unlawful" to do the underlying acts, regardless of intent. However, unlike some state statutory schemes, which provide that offenses for which no penalty is specified become misdemeanors, at the federal level "Congress does not create criminal offenses having no sentencing component." Ball v. United States, 470 U.S. 856, 861 (1985).

370 Pub. L. No. 90-618, § 102, 82 Stat. 1223 (1968) (enacting 18 U.S.C. § 923(g)). The warrantless inspection provision was upheld against a fourth amendment challenge in United States v. Biswell, 406 U.S. 311 (1972).

371 FOPA, *supra* note 1, § 103(7), 100 Stat. at 454.

reasonable inquiry in the course of a criminal investigation of a person other than the licensee;[372] (2) an annual inspection for ensuring compliance with recordkeeping requirements;[373] or (3) tracing a firearm in the course of a bona fide criminal investigation.[374] While (pg.655) these sizably reduce application of the warrant and cause requirement, it remains effective for its primary purpose in any event: to prevent inspections undertaken without immediate law enforcement need, or abused for the purpose of harassment.[375]

FOPA also institutes some measures designed to minimize the harassment potential of an otherwise authorized inspection or search. Only records material to a violation of law may be seized[376] and even as to these, copies must be furnished the licensee within a reasonable time.[377] The unusual appearance of the last protection vanishes upon reflection; because a licensee is legally bound to buy and sell only upon recordation, removal of his records is more than an inconvenience.

The power of the Secretary to acquire licensee records is likewise limited by FOPA. Requirements to (1) submit records upon going out of business, (2) submit a report upon sale of more than one handgun to the same person during the same week and (3) submit reports of sales when ordered to do so by the Secretary,[378] are enacted into law.[379] Conversely, the Secretary is forbidden to require submission of reports "except as expressly required by this section."[380]

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[372] *Id.* The Senate reports explain that in this circumstance, an investigation might be conducted before a particular suspect is singled out, for example, in a situation in which many licensees' records might be inspected in an effort to compose a list of suspects. Under these conditions, requiring a demonstration of cause as to each licensee would hinder, if not prevent, the investigation. S. REP. No. 583, 98th Cong., 2d Sess. 15 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 21 (1982).

[373] The Senate reports stress that these inspections are to be for purposes of instructing and aiding the licensee, and not for the purpose of conducting an investigation per se. S. REP. No. 583, 98th Cong., 2d Sess. 15 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 21 (1982).

[374] The term "bona fide" was added as a qualifier with the specific intent of precluding pretext investigations. *See supra* note 173. With all these exemptions, it will be necessary to analyze the actual purposes of the trace. Treasury frequently traces for other agencies, which frequently request traces for reasons other than genuine criminal investigations—in some cases, apparently, but of simple curiosity. *See* S. BRILL, FIREARM ABUSE: A RESEARCH AND POLICY REPORT 24-25 (1977) (citing two BATF audits of tracing requests: 50 of 195 firearms traced in one case had no criminal investigation nexus, but "were either police officers' firearms turned in for inspection or citizens' firearms turned in for safekeeping"; 103 of 300 traces audited in the other were of firearms not linked to a crime). Since any warrantless inspection of records under this exception that turns out to have no connection to a "bona fide criminal investigation" amounts to search without legal authority and may expose the agency to liability, it may well be advised to document requests for a trace, particularly those made by other agencies. Forms or other records, showing the requestor, the particular investigation, and the relationship of the trace to it, would be a reasonable approach to minimizing exposure and might also enable generation of useful managerial data on tracing utility. When there might be some question as to whether the third-party investigation, compliance inspection or firearm trace was the agency's actual motivation, or when the agency wishes to protect against application of a subjective standard and probing of its investigatory decision making, it would be well advised to follow the safer course and obtain an administrative warrant.

[375] *See* 131 CONG. REC. S9124 (daily ed. July 9, 1985) (statement of Sen. Hatch).

[376] One might hope that only material evidence would be seized in any event. Unfortunately, the temptation to scoop up everything of conceivable interest and winnow out the immaterial at leisure, is too often irresistible. One might query whether under this standard the administrative warrants ought to set out, in greater than normal specificity, what is likely to be material to the charge.

[377] FOPA, *supra* note 1, § 103(7), 100 Stat. at 454.

[378] *See* 27 C.F.R. §§ 178.126, .126a, .127 (1985). *See generally supra* notes 175-178.

[379] FOPA, *supra* note 1, § 103(7), 100 Stat. at 455 (creating 18 U.S.C. § 923(g)(2)-(g)(5)).

[380] FOPA, *supra* note 1, § 103(7), 100 Stat. at 454 (creating 18 U.S.C. § 923(g)(1)(A)). Paralleling this is the requirement that regulations be limited to "only" those "necessary" to carry out the provisions of the Act, rather than the present power of the Secretary to promulgate whatever regulations "he deems reasonably necessary." FOPA, *supra* note 1, § 106(2), (3), 100 Stat. at 459 (amending 18 U.S.C. § 926). Senator Mattingly, in discussing this amendment, made reference to the prior attempt to centralize reports of firearm distribution and explained:

Senate bill 49 provides needed guarantees against similar incidents of regulatory overstepping in the future. It

Paralleling this prohibition is the proviso that no (pg.656) future regulation may require that any records required by the Act "be recorded at or transferred to a facility owned, managed, or controlled by the United States or any state or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established."[381]

2. Firearm Seizure and Forfeiture

Forfeiture proceedings are creatures of statute;[382] the Gun Control Act broadly authorized seizure and forfeiture of arms used in, involved in, or intended to be used in any violation.[383] Customs forfeiture procedures were incorporated by reference,[384] which offered few safeguards to the (pg.657) putative owner.[385] FOPA institutes a number of significant safeguards. First, strict liability

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alters the existing grant of authority.... Under S. 49, regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment.... The practical effect of this clarification is to ensure that regulations are necessary to carry out the terms of the law and are in fact based on the law itself. In addition, the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law.

131 CONG. REC. S9171 (daily ed. July 9, 1985).

[381] FOPA, *supra* note 1, § 106(4), 100 Stat. at 459 (amending 18 U.S.C. § 926). The Administration amendments proposed changing "nor that any system of registration" to "nor that any centralized system of registration" be established. *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 42. This was the only Reagan Administration amendment the Senate Judiciary Committee rejected in its entirety. *See* S. REP. No. 583, 98th Cong., 2d Sess. 57 (1984).

[382] United States v. Farrell, 606 F.2d 1341, 1344 (D.C. Cir. 1979); United States v. Lane Motor Co., 199 F.2d 495, 496-97 (10th Cir. 1952), *aff'd*, 344 U.S. 630 (1953).

[383] Pub. L. No. 90-618, § 102, 82 Stat. 1224 (amending 18 U.S.C. § 924(d)).

[384] This simplifies a complex legal trail. All provisions of the Internal Revenue Code pertaining to seizure and forfeiture of firearms (i.e., National Firearms Act weapons) would be applicable to Gun Control Act seizures and forfeitures. 18 U.S.C. § 924(d). *See also* FOPA, *supra* note 1, at § 104(3) (modifying 18 U.S.C. § 924(d)). The National Firearms Act, in turn, incorporates all provisions of the internal revenue laws relating to seizure and forfeiture of unstamped article. 26 U.S.C. § 5872(a). The statutes relating to those seizures and forfeitures in turn allow issuance of an administrative notice of forfeiture for property valued at $10,000 or less. The agency publishes notice of the proposed forfeiture, and serves notice upon the person from whom the property was taken. If no claimant comes forward, the agency may forfeit the property without necessity of taking judicial action. If a claimant comes forward, he or she must file a claim and post a $250 bond, whereupon the agency must transmit the matter to the United States Attorney General and institute a judicial forfeiture action. 26 U.S.C. § 7325; 16 U.S.C. §§ 1608-10 (1982). If the appraised value is above $10,000, the agency must initiate the judicial forfeiture action without requirement of a claim or bond. 16 U.S.C. § 1610 (1982). *See generally* Epps v. Bureau of Alcohol, Tobacco & Firearms, 375 F. Supp. 345 (E.D. Tenn. 1973), *aff'd*, 495 F.2d 1373 (6th Cir. 1974); 27 C.F.R. §§ 72.11-.25 (1985). The claimant may also submit a petition for remission of the seized item, essentially seeking return, upon equitable grounds, in the discretion of the agency. *See* 26 U.S.C. § 7327 (1982) (customs remission procedures apply to Nat'l Firearms Act); 19 U.S.C. § 1618 (1982) (customs: remission allowed if violation was without intent or willful negligence, or other mitigating circumstances appear); 27 C.F.R. § 72.31-.39 (1985). Since remission is committed to the discretion of the Secretary, no meaningful review is available. *See also* United States v. VonNeumann, 471 U.S. 1064 (1985), *rev'd*, 474 U.S. 272 (1986). Enactment of FOPA, which largely bars forfeiture when the owner was not willfully or knowingly in violation, may wipe out what was traditionally the main ground for successful petitions for remission—status as an innocent third-party owner or secured party. *Cf.* 28 C.F.R. § 8.5(c) (1985) (Dep't of Justice remission provisions).

[385] In a forfeiture action, the government can establish its prima facie case merely by proving probable cause, United States v. One 1975 Mercedes, 590 F.2d 196 (6th Cir. 1978); Bramble v. Richardson, 498 F.2d 968 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974); United States v. Fourteen Handguns, 524 F. Supp. 395, 397 (S.D. Tex. 1981); and carry its burden of persuasion by a preponderance of the evidence. United States v. Eighty-Six Firearms & Twenty-Two Rounds of Ammunition, 623 F.2d 643, 644 (10th Cir. 1980). Conversely, the claimant can demand safeguards of jury trial, C.J. Hendy Co. v. Moore, 318 U.S. 133, 163, *reh'g denied*, 318 U.S. 801 (1943); Four Hundred and Forty-Three Cans of Egg Product v. United States, 226 U.S. 172, 183 (1912); and civil discovery procedures, United States v. Eight Thousand Eight Hundred Fifty Dollars, 461 U.S. 555, 567 (1983) (civil forfeiture action allows wider discovery under FED. R. CIV. P. 26 than would be available in a criminal action).

is no longer the rule.[386] The property whose forfeiture is sought must be linked to a knowing or willful violation.[387] A second safeguard, aimed at preventing seizures of an entire collection or inventory, requires that the seized firearms or quantities of ammunition be "particularly named and individually identified" as used in, involved in, or intended to be used in the violation.[388] A third safeguard overrules *United States v. 89 Firearms*[389] (pg.658) and forbids forfeitures when the claimant has been charged criminally and the charges end in dismissal or acquittal, except a voluntary dismissal prior to trial.[390] A fourth set of safeguards restricts firearms seizures that are specifically based upon intent to use in an offense. The Gun Control Act traditionally permitted forfeiture based upon use, involvement, or intent to use in a violation of the Act or other federal criminal law.[391] In reaction to complaints that "intended to be used" had served to justify seizing entire firearm collections or dealers' inventories when only isolated violations were alleged,[392] the earlier versions of FOPA sought to delete "intended to be used."[393] The Reagan Administration amendments to S. 914 would have restored this, but with the proviso that intent must be shown by "clear and convincing evidence."[394] The Senate Judiciary Committee adopted this compromise, but added the further restriction that the alleged intent must be to commit certain specified offenses.[395] Both safeguards carried over into S. 49 and thus into FOPA.[396]

The restrictions have significance beyond the forfeiture hearing itself. Proof that the firearm's owner or possessor had the requisite mental state and, if intent to use in a violation is alleged, met

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386 A number of cases had upheld strict liability applied to forfeitures based on "used or involved in" grounds. *See* United States v. 16,179 Molso Italian Caliber .22 Winlee Derringer Convertible Starter Guns, 443 F.2d 463 (2d Cir. 1971), *cert. denied*, 404 U.S. 983 (1972); United States v. 57 Miscellaneous Firearms, 422 F. Supp. 1066 (W.D. Mo. 1976). One case did hold that forfeiture on "intended to be used" bases required *scienter* in accord with its terms. *See* United States v. One Lot Eighteen Firearms, 325 F. Supp. 1326 (D.N.H. 1971). *See generally* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234 (1972) (in Customs forfeiture, "the government bears no burden with respect to intent.").

387 FOPA, *supra* note 1, § 104(3), 100 Stat. at 457. The divisions between knowing and willful violations track those employed for determining criminal liability. The revolutionary nature of even this one safeguard is underlined by a comparison to the remainder of the United States Codes. The only obvious analogies are weak comparisons to 49 U.S.C. § 782 (1982) (allowing forfeiture if owner or person in charge of a vehicle is "a consenting party or privy" to the violation) and the Lacey Act, 16 U.S.C. § 3375 (1982) (allowing forfeiture on similar grounds if felony violation was involved).

388 FOPA, *supra* note 1, at § 104(3), 100 Stat. at 458 (creating 18 U.S.C. § 924(d)(2)(C)). A few pre-FOPA courts had required some evidentiary links between the violation and the particular firearms involved. *See* United States v. One Assortment of Seven Firearms, 632 F.2d 1276 (5th Cir. 1980); United States v. 1,992 Assorted Firearms, 330 F. Supp. 635 (E.D. Mo. 1971). The latter case is cited with approval in one Senate report. *See* S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982).

389 465 U.S. 354 (1984). Both Senate reports make it clear this case is no longer good law. The later report calls for its overruling; the earlier one cites with approval the Fourth Circuit decision which the Supreme Court reversed. S. REP. No. 583, 98th Cong., 2d Sess. 25 n.56 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982).

390 FOPA, *supra* note 1, § 104(3), 100 Stat. at 457 (creating 18 U.S.C. § 924(d)(1)).

391 Pub. L. No. 90-618, § 102, 82 Stat. 1224 (1968) (amending 18 U.S.C. § 924(d)).

392 See *Gun Control and Constitutional Rights: Hearings*, *supra* note 118, at 289-90, 568; *Oversight Hearings, Part 2*, *supra* note 118, at 21-29, 44-48. *See generally infra* note 414.

393 *See* S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982).

394 *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 40.

395 The Committee refers to these as "nonregulatory" offenses. S. REP. No. 583, 98th Cong., 2d Sess. 24 (1984). The enumerated groups of offenses are: (1) certain defined crimes of violence; (2) certain drug offenses; (3) certain Gun Control Act offenses, chiefly transfers to prohibited persons, (4) other prohibited transfers if they involve a "pattern of activities," illegal exportation of firearms, or receipt of stolen firearms.

396 FOPA, *supra* note 1, § 104(a)(2), 100 Stat. at 458 (creating 18 U.S.C. § 924(d)(3)). *See* 131 CONG. REC. S9167 (daily ed. July 9, 1985).

the "intended to be used" qualifications, is a precondition to the firearm's being "subject to *seizure* (pg.659) and forfeiture."[397] Likewise, only firearms "particularly named and individually identified" as meeting those criteria are "subject to *seizure*, forfeiture, and disposition."[398] This cannot easily be dismissed as an unconscious slip of the draftsman's pen. The floor debates show repeated references to overly-broad seizures.[399] More to the point, the House report noted quite specifically that under FOPA:

> A potentially significant problem is that the authority to seize and forfiet [sic] is limited only to firearms or quantities of ammunition "particularly named and individually identified as involved in or used in" specified violations of law. This is narrower than interpretations of the Fourth Amendment requirement that a warrant "particularly" described the place to be searched and the persons or things to be seized, and the exceptions involving objects in "plain view" and "inadvertent discovery." It would appear that contraband firearms could not be seized if they had not been specifically identified in the search warrant as being used in a specific violation of the law.[400]

The Senate reports are not so explicit, but acknowledge that the individual identification requirement "is intended both to prevent the issuance of general warrants, leaving it to the executing agents to decide which firearms meet the general criteria ... and also to prevent wholesale forfeiture...."[401] Requiring the issuing magistrate to find, in some cases by clear and convincing evidence, that the person against whom a search warrant is directed had the requisite state of mind and that the property to be seized can be individually linked to the violation, will involve fairly substantial changes in practice. The same will result from requirements (pg.660) of warrants to seize what would normally be in "plain view."[402] At the same time, the face of the statute and its history alike suggest that this is the only fair reading of the legislative intent.

The last safeguard imposed by FOPA on seizures and forfeitures is that of time. Traditionally, seizure actions have been subject to a five-year statute of limitations[403] and to only the most general due process restrictions on excessive delay.[404] Delays of many months between seizures

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397 *See* authorities cited *supra* note 396.

398 *See supra* note 388 (emphasis added). Even the requirement for "clear and convincing evidence" is carried over as an element of seizure as well as forfeiture. *Id.*

399 *See* 131 CONG. REC. S9101 (statement of Sen. McClure), S9104 (exhibit inserted by Sen. Wallop) (daily ed. July 9, 1985).

400 H.R. REP. No. 495, 99th Cong., 2d Sess. 11 (1986) (citations omitted); the report also notes that the requirements go beyond those of FED. R. CRIM. P. 41. The House report, prepared at the behest of the 35-Representative Judiciary Committee, did not merely describe a bill; it essentially defined the battlelines between two bills in what was one of the most heated and controversial conflicts of the 99th Congress. The probability that members read the report and this passage is probably much higher than the usual probability that a given report would be read.

401 S. REP. No. 583, 98th Cong., 2d Sess. 26 (1984); *see also* S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982).

402 The fact that these measures would be novel is not to say that they would be undesirable, of course. The notion of Congress respecting rights against search and seizure beyond the bare minimum required by the fourth amendment is a pleasant, if not too probable, one. Perhaps a successful experiment in the area of firearms may lay the basis for an argument to extend these protections to other areas.

403 19 U.S.C. § 1621; 28 U.S.C. § 2462 (1982).

404 United States v. Eight Thousand Eight Hundred Fifty Dollars, 461 U.S. 555 (1983).

and initiation of forfeiture are frequently upheld under these standards.[405] FOPA works a dramatic change here. "Any action or proceeding" for forfeiture must be commenced within 120 days of the seizure.[406] The Senate reports make it clear the time limit is jurisdictional.[407] In a judicial forfeiture, application of the time limit should be simple: a civil action is commenced by the filing of the complaint.[408] In an administrative forfeiture, in which publication and service of the notice must precede recourse to the court,[409] the issue is more difficult. The question becomes whether the limitation period stops with the filing of the administrative notice or only with the filing of the judicial action. The sole indication to be found in the statutory history is the remark of FOPA's House sponsor, in arguing the comparative inadequacies of H.R. 4332, that that bill would "not require an agency to bring judicial actions within 120 days, or any other limit...."[410] FOPA's language and purposes support his reading. (pg.661) "Action" or "proceeding" generally refer to judicial actions,[411] and the latter term is used in the statutes authorizing *judicial* forfeiture at the close of the administrative process.[412] Merely requiring initiation of administrative forfeiture within the time allowed would not achieve much of the statutory objective: the administrative proceedings serve little purpose beyond allowing entry of default forfeitures without recourse to the courts. The claimant receives his day in court only when judicial proceedings have begun, so allowing the administrative notice to stop the running of the limitation period would not prevent the agency from delaying indefinitely the claimant's opportunity to present his case. A mandate that the judicial action be commenced within 120 days will, to be sure, place certain time pressures upon the enforcing agency,[413] but Congress appears to have shown far more concern for the claimant's deprivation than for the agency's convenience.[414]

3. Licensee Penalties and Revocations

FOPA also has an impact on penalties available against licensees. In addition to imposing the general *scienter* requirements discussed above, FOPA also downgrades to a misdemeanor a

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405 *See*, *e.g.*, Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978) (18 months); United States v. One 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (9 months), *reh'g denied*, 505 F.2d 734 (5th Cir. 1974).

406 FOPA, *supra* note 1, § 104(a)(3), 100 Stat. at 457.

407 S. REP. No. 583, 98th Cong., 2d Sess. 25 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 23 (1982). Both state: "Beyond this point the statutory power to forfeit is lost." Presumably, the claimant could file a motion for return under FED. R. CRIM. P. 41(e), or file a civil action to order the return. United States v. Eight Thousand Eight Hundred Fifty Dollars, 461 U.S. 555, 568-69.

408 FED. R. CIV. P. 3.

409 *See supra* note 384.

410 132 CONG. REC. H1652 (daily ed. Apr. 9, 1986) (statement of Rep. Volkmer).

411 BLACK'S LAW DICTIONARY 49, 368 (Rev. 4th ed. 1968).

412 *See*, *e.g.*, 19 U.S.C. § 1618 (1982) (United States Attorney shall "proceed" to forfeiture).

413 The agency would have to appraise the property, prepare the notice of forfeiture, publish and serve it. The claimant would then have a maximum of 30 days in which to post claim and bond. *See* 27 C.F.R. § 72.22(a)(3) (1985). The agency would then have to transmit the case to the appropriate U.S. Attorney, who would have to review and assign it and file the complaint. Of the 120 days, all but the 30 days allowed for the claimant to post claim and bond is within sole control of the agency or the U.S. Attorney.

414 *See* 131 CONG. REC. S9101-02 (daily ed. July 9, 1985) (statement of Sen. McClure) (cases of agency holding seized collections for 2-3 years without filing action, or holding after acquittal); *id.* at S9167 (statement of Sen. DeConcini) (citing "a consistent pattern of harassment of legitimate gun dealers by BATF"); 132 CONG. REC. 1651-52 (daily ed. Apr. 9, 1986) (statement of Rep. Volkmer).

licensee's recordkeeping violations, whether involving a failure to keep records or an entry of a false record.[415] In the words of a sponsor, this Senate floor amendment (pg.662) was intended to ensure that the dealer would not be "subjected to harsh felony penalties for technical violations of the rigid recordkeeping standards" of the Act.[416] Its adoption was also part of a *quid pro quo* for dropping of the Committee's exclusion of the "simple carelessness" defense.[417] Two limitations are immediately apparent. First, these misdemeanor provisions relate only to a licensee; a purchaser who provides false information can still be charged with a felony. Second, they relate only to the recordkeeping aspect of a transaction. A sale illegal per se can still be the basis of felony charges for the firearm transfer itself.[418]

On the civil side, FOPA makes two noteworthy amendments relating to license revocation proceedings. First, it expressly provides that a licensee is allowed a de novo review on an appeal to the district court. This is a response both to reports of extreme irregularities in the administrative process,[419] such as appointing as hearing officer a prosecuting official with previous involvement, and to caselaw which summarily upheld such administrative findings unless the licensee managed to raise substantial doubt as to their outcome.[420] (pg.663) FOPA expressly provides that the review will be de novo and that the court may consider evidence not considered at the administrative hearing.[421] The Senate reports make it clear that the caselaw allowing a constricted review is no longer good law.[422] Accordingly, it would appear that future reviews of license revocations will require a full hearing de novo.[423]

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[415] FOPA, *supra* note 1, § 104(a)(1), 100 Stat. at 456 (creating 18 U.S.C. § 924(a)(2)). It might be suggested that the government could still bring felony charges under 18 U.S.C. § 1001. The drafting of this section of FOPA, its origin as a *quid pro quo*, and the explanation of the sponsor all suggest that it was Congress' intent that dealers be prosecuted under this misdemeanor section only, where applicable. While implicit repeal of an earlier statute is not favored, it is not unknown. West India v. Domenech, 311 U.S. 20 (1949). Failure to recognize it here would thwart the legislative purpose and deprive the bill's proponents of a bargained-for exchange.

Courts have generally held that enactment of a specific penalty for misrepresentation of a given form does not preclude prosecution in the alternative for a violation of 18 U.S.C. § 1001 (1982). *See* United States v. Fern, 696 F.2d 1269 (11th Cir. 1983); United States v. Burnett, 505 F.2d 815 (9th Cir. 1974), *cert. denied*, 420 U.S. 966 (1975). These decisions were, however, based upon the traditional presumption against implicit repeal of prior legislation. Where, as here, the legislative history indicates an intent to compromise competing legislative views, a compromise that cannot be given effect unless the earlier statute is understood to be inapplicable, the result may be different. *Cf.* Kniess v. United States, 413 F.2d 752 (9th Cir. 1969); United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974). *But cf.* United States v. Weatherspoon, 581 F.2d 595 (7th Cir. 1978).

If 18 U.S.C. § 1001 (1982) is held applicable to actions that are reduced to misdemeanors by FOPA, the question remains of whether the court ought to instruct on the FOPA violation as a lesser included offense. *See generally* United States v. Thompson, 493 F.2d 305 (9th Cir. 1974).

[416] 131 CONG. REC. S9132 (daily ed. July 9, 1985) (statement of Sen. Hatch).

[417] *Id.* at S9132 (statement of Sen. Hatch); *id.* at S9133 (statement of Sen. McClure).

[418] In the case of a dealer, this provision also gives a basis for plea bargaining. The author recalls at least one case that was temporarily stalemated by the Gun Control Act's lack of any sections not carrying felony stigma to which a plea might be made.

[419] *See* 132 CONG. REC. H1651-52 (daily ed., Apr. 9, 1986) (statement of Rep. Volkmer).

[420] *See* Cucchiara v. Secretary of Treasury, 652 F.2d 28 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); Perri v. Department of Treasury, 637 F.2d 1332 (9th Cir. 1981). While this would not be unusual in most cases of review of administrative decision-making, *see* Newell v. Baldridge, 548 F. Supp. 39, 44 (W.D. Wash. 1982), 18 U.S.C. § 923(f)(3) allowed the court to consider any evidence submitted by parties to the hearing.

[421] FOPA, *supra* note 1, § 103(6), 100 Stat. at 453 (amending 18 U.S.C. § 923(f)).

[422] *See* S. REP. No. 583, 98th Cong., 2d Sess. 14 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 20 (1982).

[423] Some prior caselaw had relied upon provisions allowing consideration of "any" evidence submitted, *see supra* note 420, to conduct a de novo review without a new hearing, unless the court's review of the record uncovered a material fact requiring additional evidence or raised some substantial question as to the outcome. *See* Cucchiara v. Secretary of Treasury, 652 F.2d 28 (9th

FOPA's second significant amendment to this section involves the insertion of a proviso that revocation is barred where the same grounds have been alleged in a criminal action against the licensee, and the criminal action has ended in his acquittal or a dismissal, other than a voluntary dismissal prior to trial.[424] The bar extends to any revocation based "in whole or in part" on the facts forming the basis of the criminal charges, which suggests that an agency considering revocation may need to exercise great care in the drafting of the revocation notice and in the conduct of the administrative hearing.[425]

4. Awards of Attorneys' Fees against the United States

The traditional "American rule" denying recovery of attorneys' (pg.664) fees to a successful litigant[426] has been extensively eroded by recent legislation.[427] From the standpoint of federal agency action, the Equal Access to Justice Act clearly marks the greatest incursion.[428] The retention of attorneys' fees provisions in FOPA and its predecessor bills despite passage of the Equal Access to Justice Act might suggest that FOPA establishes a still broader standard. The suggestion would be accurate. While the Equal Access to Justice Act allows awards only if the agency act was "unsupported by substantial evidence" or "not substantially justified,"[429] it is surpassed by a bifurcated standard of impressive scope: a prevailing claimant in a forfeiture action *shall* be allowed a reasonable attorney's fee; a successful citizen in "any other action or proceeding under the provisions of this chapter" may receive such an award if he establishes that such action "was without foundation, or initiated vexatiously, frivolously, or in bad faith."[430] The former, mandatory provisions are relatively straightforward;[431] the latter, discretionary provisions, are in contrast, likely to generate considerable controversy as to their scope, grounds, and procedure.

Scope

Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); Perri v. Department of Treasury, 637 F.2d 1332 (9th Cir. 1981); Shyda v. Director, BATF, 448 F. Supp. 409 (M.D. Pa. 1977). The last case merely indicates that the court may consider the record as evidence in determining whether the agency can demonstrate undisputed fact issues (i.e., the record serves the purpose of an affidavit and places the burden of going forward on the resisting party). The first two cases are expressly singled out in the Senate reports as being overruled by FOPA. *See* S. REP. No. 583, 98th Cong., 2d Sess. 14 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 20 (1982).

[424] FOPA, *supra* note 1, § 103(6)(B), 100 Stat. at 453 (creating 18 U.S.C. § 923(f)(4)).

[425] Amendments to the agency regulations governing revocation proceedings, 27 C.F.R. §§ 178.71 to 178.82 (1985), may also be in order.

[426] *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[427] *See*, *e.g.*, 5 U.S.C. § 552(a)(4)(E) (1982) (Freedom of Information Act); 16 U.S.C. § 1540(g)(4) (1982) (Endangered Species Act); 42 U.S.C. § 1988 (1982) (Civil Rights Act). The 1980 Equal Access to Justice Act, 28 U.S.C. § 2412 (1982), virtually made the American Rule an exception rather than a rule, with regard to regulatory challenges to federal agency action.

[428] Pub. L. No. 96-481, 94 Stat. 2325, *amended by* Act of Aug. 5, 1985, Pub. L. No. 99-80, 99 Stat. 183. The most critical portion of the act is codified at 5 U.S.C. § 504 (Supp. 1985) and 28 U.S.C. § 2412 (Supp. 1985).

[429] 5 U.S.C. § 504(c)(2) (Supp. 1985); 28 U.S.C. § 2412(d)(1) (Supp. 1985).

[430] FOPA, *supra* note 1, § 104(a)(3), 100 Stat. at 458 (amending 18 U.S.C. § 924(d)(2)(A), (B)).

[431] This is not to say that a petition for attorneys' fees in the wake of a motion for return of property under FED. R. CRIM. P. 41 may not seem a bit of a novelty. Section 104(a)(3) on its face applies to "any action or proceeding for the return of firearms or ammunition" seized under the Gun Control Act.

The award of attorneys' fees at the close of trial to a successful criminal defendant would seem a radical innovation in criminal procedure. Yet, there can be no doubt that FOPA accomplishes exactly that. FOPA's general attorneys' fees provision applies to "any other action or proceeding (pg.665) under the provisions of this chapter"; in other words, the Gun Control Act.[432] It might be suspected that this was merely the product of legislative oversight, a failure to realize that criminal cases are "actions or proceedings," too. But the legislative history makes it inescapably clear that Congress knew and intended that criminal actions be covered. The first Senate report states unequivocally:

> If an individual has in fact been deprived of his property unjustly, and establishes such in court, these [sic] is little reason to put the burden of costs upon the just claimant rather than those who have unjustly taken his possessions. Such an award is likewise to be made in any other action, *civil or criminal*, under this chapter, where the court finds it was undertaken without foundation or from specified bad motives.[433]

The later Senate report grouped both categories into a single sentence:

> If an individual has in fact been deprived of his property unjustly or has been unfairly forced to defend himself, and established such in court, there is little reason to put the burden of costs upon the just claimant rather than those who have unjustly taken his possessions or forced him to defend himself in an unreasonable action.[434]

On the House floor, Representative Hughes argued with even greater specificity that, if enacted, FOPA "would have us paying attorneys' fees for persons charged with illegally possessing weapons who successfully defend themselves, something we do not do for others that in fact avoid conviction in criminal offenses."[435] Accordingly, the extension of FOPA's general attorney's fees provisions to "all" proceedings under the Gun Control Act must be read to cover, and to have been intended to cover, criminal proceedings as well as civil.

Grounds

FOPA's general provision for attorneys' fees mandates (with the use of the word "shall") their award when the (pg.666) court finds that the action "was without foundation, or was initiated vexatiously, frivolously, or in bad faith."[436] Although the legislative history is remarkably silent on the background of this test, its genesis appears to lie in *Christiansburg Garment Co. v. EEOC*,[437] in which the United States Supreme Court authorized awards of attorneys' fees to successful civil defendants in EEOC litigation. The Court approved of the tests employed in two circuits, one allowing fees upon a finding that the government's action was "unfounded, meritless, frivolous or vexatiously brought," the other "where the action brought is found to be unreasonable, frivolous,

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[432] FOPA, *supra* note 1, § 104(3), 100 Stat. at 458 (creating 18 U.S.C. § 924(d)(2)(B)).

[433] S. REP. No. 476, 97th Cong., 2d Sess. 24 (1982) (emphasis added).

[434] S. REP. No. 583, 98th Cong., 2d Sess. 25 (1984).

[435] 132 CONG. REC. H1647 (daily ed. Apr. 9, 1986).

[436] FOPA, *supra* note 1, § 104(3), 100 Stat. at 458 (creating 18 U.S.C. § 924(d)(2)(B)).

[437] 434 U.S. 412 (1978).

meritless or vexatious."[438] The Court made it clear that either subjective bad faith *or* pursuit of an objectively groundless claim would suffice for an award.[439] Tracking this dictum, FOPA draws a demarcation between the objective "without foundation" and the subjective "vexatiously, frivolously, or in bad faith" bases for an award. A wide variety of conduct may meet these criteria, ranging from pleading factually unfounded or legally barred claims[440] to failure to make reasonable inquiry into the law or use of harassing, though not technically illegal, tactics[441] to outright perjury based on personal spite.[442] The availability of awards for defense against an unfounded *part* of an action[443] may militate against "overcharging" a defendant.[444] (pg.667)

Procedure

The courts have generally held that due process requires a hearing prior to assessment of fees against an unsuccessful civil plaintiff.[445] In a claim *against* the government, due process for the defending party is not a direct requirement. Moreover, where an objective standard ("without foundation") is the basis for the claim, the court will often be in a position to rule upon the existence or lack of a foundation at the close of the underlying action.[446] As a practical matter, handling of the claim (particularly when based upon the subjective grounds) will require some manner of hearing in most cases.

Collection

FOPA requires, as a precondition of governmental liability for attorneys' fees, that such be "provided in advance by appropriations Act."[447] This language was inserted at the request of House Budget Committee members, who maintained that otherwise the bill might have led to commitment

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438 *Christiansburg Garment Co.*, 434 U.S. at 421. The decision applied to the EEOC, but the doctrine has been repeatedly recognized in other contexts. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.4 (1968).

439 *Christiansburg Garment Co.*, 434 U.S. at 421 (award justifiable where action "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith"); *id.* at 422 ("if plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred....") (emphasis in original).

440 *See*, *e.g.*, *Newman*, 390 U.S. at 402 nn.5 & 6.

441 *See*, *e.g.*, McLaughlin v. Western Caualty & Sur. Co., 603 F. Supp. 978 (S.D. Ala. 1985).

442 *See*, *e.g.*, Carrion v. Yeshiva Univ., 397 F. Supp. 852 (S.D.N.Y. 1975), *aff'd*, 535 F.2d 722 (2d Cir. 1976); *accord*, *Christiansburg Garment Co.*, 434 U.S. at 421.

443 Robinson v. Ritchie, 646 F.2d 147 (4th Cir.), *remanded*, 516 F. Supp. 437 (E.D. Va. 1981).

444 One particularly aggravated case of overcharging was discussed at length during the Senate floor debates. It apparently involved a personal grudge on the part of a U.S. Attorney who, on his own, pressed a case Treasury had refused to take and charged the defendant with 88 felony counts, all dealing with recordkeeping. The jury took two hours to acquit on all charges. It was also pointed out that the defendant's attorney's fees totalled $100,000. 131 CONG. REC. S9112 (daily ed. July 3, 1985) (statement of Sen. Abdnor).

445 *See* Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387 (7th Cir. 1983); Miranda v. Southern Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983). *But see* Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

446 *See* Coyne-Delany Co. v. Capital Dev. Bd., 717 F.2d 385 (7th Cir. 1983).

447 FOPA, *supra* note 1, § 104(a)(3), 100 Stat. at 458 (creating 18 U.S.C. § 924(d)(2)(D)).

of unappropriated funds and thus require referral to their Committee.[448] The practical significance is not too great. In 28 U.S.C. section 2414, payment of final judgments and compromises is authorized, upon settlement, by the General Accounting Office. These are payable out of the "Judgment Fund," a continuing appropriation created by 31 U.S.C. section 1304. The sole significance of FOPA's qualifier will likely lie in restrictions on awards toward the end of a given fiscal year, when the Judgment Fund may be low or exhausted. In such an event, the motion may have to be carried over until the arrival of a new fiscal year.[449] (pg.668)

FOPA's enforcement and administration provisions thus comprise a wide spectrum of innovations. Administrative inspections, seizures, forfeitures, revocations and penalties are all sharply limited; attorneys' fees are, in contrast, liberally provided.

D. Effect on Statutes Other Than the Gun Control Act

While FOPA's main thrust was directed at the Gun Control Act, it also affects other firearms laws as well. Its main impact here is to expand the scope and restrictions of the National Firearms Act, while curtailing the application of certain state weapons laws.

1. National Firearms Act

The National Firearms Act essentially requires Treasury permits for manufacturing, transferring, possessing, or transporting interstate any "firearm," a term of art limited to machineguns, silencers, "sawed off shotguns" and rifles, and similar guns.[450] FOPA alters the provisions of the National Firearms Act in two respects. First, the definition of "machinegun" is expanded to include "any part designed and intended solely and exclusively ... for use in converting a weapon into a machinegun."[451] Already included, within such definition, was "any combination of parts designed and intended" for converting regular firearms into machineguns.[452] This was primarily aimed at "M-2 conversion kits," sold as military surplus and widely available prior to 1968, which could convert an ordinary surplus M-1 carbine into a full automatic M-2 version.[453] By the 1980s, however, some manufacturers began to market a single part—usually a modified trigger or interrupter—which, when installed in a designated semiautomatic rifle, converted it to fully automatic fire.[454] As each kit involved only a "part," not a "combination of parts," it was not covered within the statutory (pg.669) language. FOPA adds a single part to the definition, albeit with the stricter standard of "designed and intended solely" for such conversion. The legislative history indicates that this constriction was intended to exclude parts intended as supplements or repair parts for arms, whether semiautomatic or fully automatic, and parts that might be used either for conversion or for

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448 Conversation with Rep. Harold Volkmer (Apr. 7, 1986).

449 How the court will be informed of the availability of such funding is another matter.

450 26 U.S.C. §§ 5801-72 (1982); *see generally supra* notes 32, 38-39.

451 FOPA, *supra* note 1, § 109(a), 100 Stat. at 460 (amending 26 U.S.C. § 5845(b)).

452 26 U.S.C. § 5845(b) (1982).

453 *See generally* H.R. REP. No. 1956, 90th Cong., 2d Sess. 34 (1968).

454 *See generally* 132 CONG. REC. H1647 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes). Design of such parts was not so difficult as it might sound. An automatic arm, like an internal-combustion engine, is naturally designed to continue its cycle. It is generally necessary in the design to *add* a part or system—often called the interrupter—to inhibit this and limit it to one shot per trigger squeeze.

other purposes.[455] Implementation of this amendment will require overcoming both practical and legal barriers. The practical one is simply stated: a machinegun, like any other National Firearms Act weapon, must be identified by serial number,[456] and many of the one-part conversion kits involve parts measuring perhaps an eighth of an inch by a half inch. The passing of this camel through the eye of a needle is more simply overcome than some of the legal problems, however. First, such a part was not a machinegun and thus not a National Firearms Act weapon prior to the passage of FOPA. It, therefore, could not have been registered as such. Yet, immediately upon enactment of FOPA, it was transformed from an unregisterable part to a "firearm," and its unregistered possession became punishable by ten years' imprisonment. It was thus impossible for an owner of such a part to avoid violation of the new statute. This flaw can be remedied by Treasury's exercise of its general power to declare an amnesty for registration.[457]

The second provision of FOPA relative to machineguns is more difficult to dispose of. An amendment to FOPA, added on the House floor, supplemented the Gun Control Act with the following:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
> (2) This subsection does not apply with respect to—
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection (pg.670) takes effect.[458]

The primary difficulty here is not one of application but one of interpretation. The prohibition is perfectly clear, but determining the intended effect of the first exemption calls to mind the centuries-old plaint, "an Act of Parliament can do no wrong, though it may do several things that look pretty odd."[459] By exempting transfers and possession "under authority" of a federal department or agency, Congress could easily have intended either of two inconsistent exemptions:

1. Only machineguns owned by federal agencies and meant for use in the course of official duties are possessed under authority of an agency; or

2. Machineguns possessed under National Firearms Act permits issued by the Secretary of the Treasury, presently or in the future, are possessed under authority of an agency.

Unfortunately, the legislative history is singularly unhelpful. The amendment came up on the House floor, time expired before it could be debated, and it passed on a voice vote of questionable propriety.[460] As a result, the House vote has no legislative history, aside from the frantic pleas of one Representative, moving for additional time and implying that it "banned" machineguns,

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[455] 132 CONG. REC. S5363 (daily ed. May 6, 1986) (statement of Sen. Hatch).

[456] 26 U.S.C. § 5842(b) (1982).

[457] Pub. L. No. 90-618, § 207(d), 82 Stat. 1236 (1968). FOPA's restriction on amnesty, discussed *supra*, would not bar an amnesty for registering a machinegun "part," since such were legally possessed on the date of enactment.

[458] FOPA, *supra* note 1, § 102(9), 100 Stat. at 452 (creating 18 U.S.C. § 922(o)).

[459] City of London v. Wood, 88 Eng. Rep. 1592, 1602 (1701).

[460] *See supra* note 217.

which it clearly does not.[461] On return of the amended bill to the Senate, two Senators conducted a colloquy relating primarily to the exemption for presently possessed machineguns and devoted to listing actions which were *not* meant to be covered by the House-proposed ban. Even the limited light this sheds on the issue is blocked by a twofold barrier: the pair of Senators involved in the colloquy appear mainly concerned with demonstrating that the House amendment is not meant to bar (pg.671) what it clearly does bar,[462] and another Senator objected to the colloquy as not reflecting his or other Senators' understandings.[463] Denied any clear history, we are left both with the recognition that repeals by implication are not favored[464] and the inevitable deduction that Congress must have meant to rule out *something* previously allowed.[465] The application of the normal rules of construction to this amendment will, perforce, yield a result which can best be (pg.672) characterized, not as a choice of the better interpretation, but as a choice of the "less worse" one.

Applying this approach to the first possible interpretation which views "under the authority of" the United States to exclude permits issued under the National Firearms Act and to include only actual ownership by the United States or an employee acting in the scope of his duties, a number of deficiencies become apparent.

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[461] 132 CONG. REC. H1750 (daily ed. Apr. 10, 1986) (statement of Rep. Hughes). To add further complications, the author is informed that the C-Span videotapes of the debate do not reflect this statement, which may have been inserted into the record after the vote. Conversation with Stephen P. Halbrook (June 29, 1987). *Quaere* the role of such videotapes in future statutory construction. Even the first interpretation of the amendment would allow future possession and sale of all presently registered machineguns, which presently number well over 100,000. It is, thus, hardly a "ban"; the best that can be said of the utility of this language is that, while inaccurate under either interpretation, it is somewhat less inaccurate under the first interpretation than under the second.

[462] *See* 132 CONG. REC. S5358-61 (daily ed. May 6, 1986) (statements of Sens. Hatch and Dole). This Senate colloquy explains that it is sufficient for a manufacturer to have postmarked an envelope containing an application to manufacture prior to the effective date, although the amendment refers to firearms legally possessed before that date, and manufacture is forbidden until after Treasury *approval* is received; that manufacturers may possess firearms for sale to police or the United States since such possession is "with the intent to transfer" to such, although the statute allows possession only under the second ("under authority of") exemption, and even the first exemption only relates to transfers to the United States or a state, not possession in contemplation of such. More extraordinarily, the colloquy states that "private researchers such as Carbine Williams, Gerrand [sic] and Stoner" would be allowed to design and possess machineguns since "the intent of this possession would be for military or law enforcement purposes"—a conclusion neither justified by the statute nor by the facts. The Hatch-Dole colloquy also concludes that a future amnesty for presently owned and unregistered machineguns is not barred by the amendment, without giving much in the way of explanation.

[463] 132 CONG. REC. S5361 (daily ed. May 6, 1986) (statement of Sen. Metzenbaum):

> I want to make it very clear that this is a colloquy between two of the proponents, and I do not believe that it should be interpreted as speaking for the rest of us in the Senate since the rest of the Senate has not had a chance to hear it.... I just want to make clear in the Record that that colloquy is not to serve any purpose as to changing the intent or the purpose or any aspect whatsoever of the legislation.

Metzenbaum and Kennedy then engaged in a colloquy designed to demonstrate, *inter alia*, that an amnesty is not permissible; "There is nothing in the bill that gives such an authority." *Id.* at 5362 (statement of Sen. Kennedy). In short, the aid that this colloquy between two Senators gives to interpreting the House amendment, or the decisions of both houses upon it, is minuscule and unreliable.

[464] West India Oil Co. v. Domenech, 311 U.S. 20, 29, *reh'g denied*, 311 U.S. 729 (1940); United States v. Borden Co., 308 U.S. 188, 189 (1939).

[465] The very brevity of statutory history and consequent appearance of lack of controversy would normally suggest that Congress did not mean to rule out too much. Controversial measures rarely proceed by voice vote without debate or dissent. Even this guide, general as it is, fails under these circumstances. We cannot know what the debate would have been if the time agreement had not been, in its final seconds, and there *was* in fact a call for a recorded vote, which would have brought in the entire House rather than the forty to fifty who sat through the debates and participated in the voice votes. The chair, however, refused to acknowledge the call for the recorded vote. *See generally supra* note 217. The chair's selective deafness to calls for a such a vote undermines that guarantee against abuse, which guarantee was quite necessary—the chair had called every single voice vote in favor of amending or rejecting FOPA, and lost all but two when the actual count was made, either of those present or of the entire body.

First, we are required to assume under this interpretation that Congress for some reason overlooked the fact that such an exemption was completely unnecessary. The amendment adds a prohibition to the Gun Control Act, and the Gun Control Act already exempts arms "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."[466] If a narrower exemption was desired, the logical choice would have been the National Firearms Act's exclusion, from tax requirements, of arms transferred "to the United States" or made "on behalf of the United States."[467] There was no need to employ a broader standard of "under the authority of" unless, in fact, the House desired to employ a broader exemption than that which would ordinarily apply.[468]

Second, this first possible interpretation would raise a number of constitutional questions. A fifth amendment challenge to prosecutions for failure to register newly made firearms is obvious; as to these, the registration requirement would impose a duty to confess possession of an item whose possession is illicit.[469] To be sure, this would not rule out prosecution because charges could be brought under the amendment itself, for illicit possession. But the amendment is to the Gun Control Act, not the National Firearms Act, and it thus bears a five-year rather than a ten-year penalty.[470] It is rather doubtful that a House concerned with illicit (pg.673) machinegun use would have intended a halving of the effective penalties. Another, more subtle constitutional problem surfaces when the constitutional bases of the amendment are evaluated. The amendment reaches possession, which in most cases will be an intrastate activity. To be sure, a case of "affecting commerce" could be argued but Congress did not argue it. The preamble to FOPA reflects only findings that sundry constitutional rights need to be *protected against* enforcement policies, and that the Congressional intent to avoid placing undue restrictions upon possession of firearms useful for any lawful purpose would be implemented by this legislation.[471] If the purpose of the amendment was to outlaw future acquisition and intrastate activities with a class of firearms, an appropriate finding of "affecting commerce" should have been made, perhaps patterned after the elaborate finding,[472] supported by debate,[473] used with Title VII's ban on possession of firearms by prohibited persons. No such finding was made in FOPA, and the only references to machineguns *under permit*, which is what the amendment would restrict under this interpretation, are Senate statements that those with such firearms "have complied with the most rigorous firearms law imaginable" and that "it is my understanding that there is not a single instance on record of a legally possessed machinegun having

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466 18 U.S.C. § 925(a)(1) (1982).

467 26 U.S.C. § 5852(a), (b) (1982).

468 Additionally, even in the absence of an express exception, a prohibition applicable to any "person" would not be construed to apply to the sovereign in the absence of clear intent to the contrary. *See* United States v. United Mine Workers, 330 U.S. 258, 272-73 (1947); United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941); Davis v. Pringle, 268 U.S. 315, 318 (1925).

469 *See generally* Haynes v. United States, 390 U.S. 85 (1968); United States v. Five Gambling Devices, 346 U.S. 441, 452 n.* (1953) (Black, J., concurring).

470 *Compare* 18 U.S.C. § 924(a)(1) (1982) *with* 26 U.S.C. § 5871 (1982).

471 FOPA, *supra* note 1, § 1(b), 100 Stat. at 449.

472 *See* Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968) (finding that possession by felons and other prohibited persons burdens commerce, threatens security of the President, impedes exercise of free speech, and threatens continued and effective operation of the government).

473 *See* 114 CONG. REC. 14,773-74 (1968) (acknowledging commerce issues with regard to bars on possession, but discussing how assassinations committed by "prohibited persons" had caused rioting, thereby disrupting commerce).

been used in a predatory street crime."[474] These statements were made by a legislator who had announced his intent to vote for the bill as amended by the House;[475] they went unchallenged by any other legislator. An appropriate finding, keyed to this amendment, of "affecting interstate commerce" might thus (pg.674) have been difficult to draft and support. Absent such a finding, application to simple possession must, at the least, raise constitutional questions.[476]

Yet another difficulty raised by the first proposed interpretation is a practical one. If "under authority of" the United States does not include National Firearms Acts permits, manufacturers who supply the United States must fall back on the amendment's other exceptions. These exempt transfers "to or by" the United States, and possession "by" it.[477] Neither provision exempts possession by a manufacturer who intends later to sell his item to the United States. Nor would they exempt transfers to that manufacturer of components (i.e., receivers, which are themselves "machineguns" even before assembly)[478] by subcontractors. Reading "under authority of" to exclude these manufacturers' National Firearms Act permits would thus likely cripple military procurement,[479] which is unlikely to have been an object of Congress. Development and research, in which non-governmental entities have played a major role,[480] (pg.675) would be even more clearly affected, since individual specimens of their prototypes are rarely sold to the United States. Export of fully automatic arms would likewise be impaired, since these are hardly being sold to the United States. These practical consequences of reading "under authority of" to exclude National Firearms Act permits argue strongly against the hypothesis that Congress intended such a meaning.

The alternative interpretation would avoid these difficulties. It would also comport with the commonsense reading of the terms employed: it is hard to say that a person who receives or transfers

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474 132 CONG. REC. S5363 (daily ed. May 6, 1986) (statement of Sen. Hatch). The Bureau of Alcohol, Tobacco and Firearms had earlier informed the House Subcommittee on Crime that "Registered machineguns which are involved in crimes are so minimal [sic] so as not to be considered a law enforcement problem." Letter from Stephen Higgins, Director, Bureau of Alcohol, Tobacco and Firearms, to William J. Hughes, Chairman, House Subcomm. on Crime (May 22, 1984) (Copy in possession of CUMBERLAND LAW REVIEW).

475 132 CONG. REC. S5362 (daily ed. May 6, 1986) (statement of Sen. Hatch).

476 *See* United States v. Five Gambling Devices, 346 U.S. 441, 450 (1953); *cf. id.* at 462-63 (Clark, J., dissenting) (statute at issue only seeks registration of gambling equipment possessed; if statute had sought to regulate possession, case would be less clear). *Compare* Perez v. United States, 402 U.S. 146 (1971) (upholding federal ban on local "loansharking," based on findings, documented in floor debates, that such activity as a class employs interstate commerce, affects such commerce, and supports organized crime.)

477 The manufacturer might also invoke the Gun Control Act's general exemption for arms "sold or shipped to" the United States. 18 U.S.C. § 925(a)(1) (1982). But this merely brings us back to the question of why the drafters would have inserted an exemption in the amendment, unless the purpose was to apply a broad reading to its novel "under the authority of" language, which is not mirrored in the § 925(a) exemption.

478 26 U.S.C. § 5845(b) (1982) ("The term 'machinegun' ... shall also include the frame or receiver of any such weapon"). *Cf.* United States v. Leavell, 386 F.2d 776 (4th Cir. 1967).

479 All machineguns now in use by the military are manufactured by private contractors. The M-60 medium machinegun is manufactured by Bridge Tool & Mfg Co. and by General Motors, the M-16 fully automatic rifle by Colt Industries, the M-14 (not now being purchased) by Cadillac Gage Co., Harrington & Richardson Arms Co., and Winchester-Western. J. OWEN, BRASSEY'S INFANTRY WEAPONS OF THE WORLD 75-76, 111 (1975).

480 Such private contractors are at the core of American military firearm development.

> A number of versions of the SPIW—Special Purpose Individual Weapon—a weapon which will have an area fire as well as a point fire capability, are currently under development. Springfield Armory and a number of contractors submitted designs for the SPIW development. Only one of these designs, that submitted by the AAIW Corp., has lasted.... There has also been some activity in the area of rifles that are extremely cheap and easy to manufacture and rifles that are easy to maintain. TRW among others submitted prototypes.

J. SMITH & W.H.B. SMITH, SMALL ARMS OF THE WORLD 628 (10th ed. 1973).

a firearm after "the Secretary [of the Treasury] has approved the transfer"[481] does not possess and transfer "under authority of the United States, a department or agency thereof."[482] Indeed, the chief sponsor of the amendment at issue used "authorized" in exactly this sense during the floor debates.[483] This is consistent with prior enactments; where "under authority of the United States" has previously been employed in Title 18, it has been used to broadly describe acts of private individuals or groups acting under color of a federal license or permission.[484] This interpretation is subject to the objection that it makes the amendment meaningless; if only arms possessed without permits are banned, the ban is useless, since those arms are already illegal. However, there remains the possibility that the amendment will bar future exercise of the amnesty (pg.676) power given the Secretary by the Gun Control Act. Under this provision, the Secretary retained continuing and broad authority to call an amnesty for registration of presently illegal machineguns.[485] The subject of these powers had earlier been raised on the Senate side, where the majority leader had suggested their expansion, and the enforcing agency had strongly opposed the suggestion.[486] That ruling out such an amnesty was meant to be an effect of the amendment is suggested by a Senate colloquy specifically singling out that effect.[487]

In sum, the second interpretation appears preferable as the "less worse" approach to what, if anything, Congress likely intended by this amendment. The chief objection to such a reading is that it seems a miniscule result for such an effort—at least on the Senate side, where there actually was a floor discussion, if not a genuine debate—but this objection is less compelling than those to the opposing reading of the statute. [*Author's note: since publication of this article, yet another legal question has come to light. Since exercise of the taxing power is the constitutional underpinning of the National Firearms Act, and 18 U.S.C. section 922(o) forbids Treasury to receive taxes on post-1986 machineguns, has the latter statute removed the constitutional basis for the NFA? If so, charges might still be brought under 922(o)—but its penalty is half that assessed for a violation of the NFA*].

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[481] 26 U.S.C. § 5812 (1982).

[482] *Cf.* Greene v. Athletic Council of Iowa State Univ., 251 N.W.2d 559 (Iowa 1977) (council on athletic scholarships is one "authorized by the laws of this state" within meaning of open meetings law, since it exercises powers given it by statute).

[483] 132 CONG. REC. H1684 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes) (responding to question as to whether he knew "what you have to go through to get a registration for a silencer" under the National Firearms Act: "indeed we on this Subcommittee on Crime ... know the silencer provisions as have been authorized by law, and that they have to go through fingerprinting and there is a records check....")

[484] *See*, *e.g.*, 18 U.S.C. § 953 (1982) (prohibiting citizens from carrying on diplomatic correspondence "without authority of the United States"); *id.* at §§ 1853, 1855, 1856 (1982) (proscribing destruction of trees, leaving of unextinguished fires, and burning of timber on lands either owned by the United States or "occupied by any tribe of Indians under authority of the United States"). *See also* 33 U.S.C. § 1902 (1982) (controlling discharge of pollutants by any ship "operating under the authority of the United States," while expressly excluding Navy vessels).

[485] Pub. L. No. 90-618, § 207(d), 82 Stat. 1236 (1968).

[486] *The Federal Firearms Owner Protection Act: Hearings*, *supra* note 118, at 62-63.

[487]
> [Mr. Metzenbaum].... Another question has been over granting amnesty to people who now possess machineguns outside the law. As the Senator knows, this was one of the proposals offered this afternoon as part of this compromise package, but it was rejected by us, and strongly by the law enforcement agencies.
>
> Do you believe that an amnesty period can be administratively declared by the Secretary of the Treasury by the enactment of this bill?
>
> [Mr. Kennedy] Yes, I am aware of the discussions earlier today on the question of amnesty, and I joined the Senator in rejecting any such proposal. There is nothing in this bill that gives such an authority...."

132 CONG. REC. S5362 (daily ed. May 6, 1986).

2. Interstate Transportation of Firearms

In response to reports of hunters being arrested for firearms law violations while passing through a state with tight controls,[488] FOPA's drafters inserted provisions to offer protection for such travel. S. 49 as introduced provided that any provision of state or local law "which prohibits or has the effect of prohibiting the transportation of a firearm or ammunition in interstate commerce through such state, when such firearm is unloaded and not readily accessible, (pg.677) shall be null and void."[489] On the Senate floor, an amendment was accepted which changed this in two respects: (1) the protection was extended only to persons not prohibited by the Gun Control Act from transporting, shipping or receiving a firearm; and (2) the provision that an infringing law was to be null and void was dropped in favor of a simpler declaration that the transportation was allowed notwithstanding any such law.[490] The rationale for the former change should be apparent. The rationale for the latter was a concern that, if the provisions that "have the effect" of inhibiting interstate transport were declared "null and void," entire sections of state law might be challenged and voided as to all purposes.[491] In this form the provisions passed the Senate,[492] and an identical provision was inserted in the bill that passed the House.[493]

Upon transmittal of the House bill to the Senate, the Senate passed both it and an amendatory bill, S. 2414, which greatly affected this section. S. 2414 narrowed the right of travel by providing that it was a right "to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearms"; moreover, both firearm and ammunition must not only be not "readily accessible" but also not "directly accessible from the passenger compartment."[494] The restriction to transport to and from areas where the arms might be lawfully possessed was apparently a counter to criticisms that the bill might otherwise bar arrest of the owner in his own state, under that state's laws, if he argued he was beginning a permitted transportation.[495] The second change was intended to rule out carrying in a glove compartment,[496] which the Senate (pg.678) reports had indicated would qualify as

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488 *See The Firearms Owner Protection Act: Hearings*, *supra* note 118, at 66-67 (statement of Preston Brown); 132 CONG. REC. H1657 (daily ed. Apr. 9, 1986) (statement of Rep. Marlenee); *id.* at H1693 (statement of Rep. Dingell).

489 S. 49, 99th Cong., 1st Sess. § 107 (1985), 131 CONG. REC. S27 (daily ed. Jan. 3, 1985).

490 *Id.* at S9115-17 (daily ed. July 9, 1985).

491 *Id.* (statements of Sens. Symms, Hatch and Metzenbaum).

492 *Id.* at S9179.

493 132 CONG. REC. H1757 (daily ed. Apr. 10, 1986).

494 S. 2414, 99th Cong., 2d Sess., 132 CONG. REC. S5367 (daily ed. May 6, 1986).

495 *See* 132 CONG. REC. H1702 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes) ("Unlike the Judiciary Committee bill, the Volkmer bill would preempt even the laws of the home state and locality of such a person. It could also make it legal to carry a gun from a state where it is illegal into another state where it is illegal.").

496 132 CONG. REC. S5367 (daily ed. May 6, 1986) (statement of Sen. Kennedy) ("That means it cannot be in the glove compartment, under the seat, or otherwise within reach."). S. 2414 did contain an exception for vehicles lacking a trunk—such as pickup trucks or motorcycles. For these, the firearm must "be contained in a locked container other than the glove compartment or console." *Id.* It is noteworthy that the provisions for inaccessibility do not otherwise require that the container or compartment be locked. The Senate reports had, incidentally, suggested a similar resolution for the problems of vehicles lacking trunks. *See* S. REP. No. 583, 98th Cong., 2d Sess. 28 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 25 (1982) ("It is anticipated that the firearms being transported will be made inaccessible in a way consistent with the mode of transportation—in a trunk or locked glove compartment in vehicles which have such containers, or in a case or similar receptacle in vehicles which do not.").

"not readily accessible" under FOPA.[497] On the other hand, S. 2414 seemingly widened the allowable transportation by requiring, not that it be "interstate commerce," but that it simply be "from any place" of lawful possession "to any place" of the same.[498] The House passed the Senate bill without amendment.[499]

Enactment of S. 2414 does leave some questions unanswered. Fortunately, its late origin has given us a legislative history adequate to address most issues.

Accessibility

The first question is obvious: what is "not readily accessible"? We can easily discard the horrible hypotheticals raised during the House debates on FOPA, that a briefcase behind the seat would meet this test,[500] or that "inaccessible in most cases probably means concealed."[501] In practical terms, the requirement of inaccessibility is essentially subsumed in S. 2414's requirement that the firearm be stored outside the passenger compartment. If storage in a locked glove compartment was sufficient to meet the accessibility test, as the legislative history clearly indicates,[502] the (pg.679) required storage outside the passenger compartment should clearly suffice.

Purposes

A second question is likewise obvious. For what purposes may the transportation be undertaken? FOPA itself had no requirements relative to the underlying purpose.[503] Opponents of FOPA criticized this lack,[504] but did not carry the day; a House amendment that would essentially have required that the transportation be for defined sporting purposes was decisively defeated.[505] S. 2414 does insert a purpose requirement, but one far broader than that proposed unsuccessfully in the House; the transportation may be for "any lawful purpose."[506] The omission of "sporting" or its

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497 *See supra* note 496.

498 This raises two questions. The first is practical: can a stopover be so long that it is no longer part of the original transportation? The legislative history unfortunately gives no guidance. The second is legal: what is the constitutional justification for reaching an intrastate trip? *Cf. supra* note 476. Here, at least, a rationale may be obtained from the preamble's findings that sundry constitutional rights, including the right to bear arms and to be free from unreasonable searches, require additional protection. One representative did mention second amendment rights in connection with (at that point) interstate trips (132 CONG. REC. H1695 (daily ed. Apr. 9, 1986) (statement of Rep. Robinson)) but this is far from a formal Congressional finding. *See also* THE RIGHT TO KEEP AND BEAR ARMS: A REPORT OF THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE JUDICIARY COMM., 97th Cong., 2d Sess. (Comm. print 1982).

499 Act of July 8, 1986, Pub. L. No. 99-360, 100 Stat. 766.

500 132 CONG. REC. H1683 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes).

501 *Id.* at H1703 (statement of Rep. Lungren).

502 *See*, *e.g.*, S. REP. No. 583, 98th Cong., 2d Sess. 28 (1984); S. REP. No. 476, 97th Cong., 2d Sess. 25 (1982); 132 CONG. REC. H1702 (daily ed. Apr. 9, 1986) (statement of Rep. Fish).

503 Pub. L. No. 99-308, § 107, 100 Stat. at 460 (1986).

504 *See* 132 CONG. REC. H1687 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes) (FOPA would allow a person to carry "for any reason he chooses"); *id.* at H1691 ("for any reason"); *id.* at H1702 (allowed transportation is "not limited to hunting or sporting purposes"); *id.* at H1659 (statement of Rep. Moore) (self-defense).

505 *Id.* at H1701, H1704.

506 Act of July 8, 1986, Pub. L. No. 99-360, 100 Stat. 766.

equivalent is apparent and would suggest that the transporting party may intend any lawful purpose, including self-defense, at his or her destination.

Lawful Carrying at Origin and Destination

S. 2414 would require that the transportation be from an area where the person may possess "and carry" the arm to a place where he may do the same.[507] This raises the question of what manner of carrying is being addressed. Carrying restrictions can vary; in some states concealed carrying is banned, while open carrying is subject to no regulation.[508] Others require a permit to carry on or about the person, regardless of purpose,[509] while others only restrict carrying for non-sporting purposes.[510] The legislative history reflects an intention of a simple and pragmatic test: the transporter must be entitled to carry in the way he carries during the transportation; he must be legally qualified to carry an (pg.680) unloaded, inaccessible firearm outside a vehicle's passenger compartment both where he begins and where he ends his journey.[511]

Nature of the Transportation

The shift from transportation "in interstate commerce" to transportation from one "place" to another[512] raises an initial question of whether intrastate trips through a locality with restrictive firearms laws might be covered. There is no explanation of the deletion of "in interstate commerce" in S. 2414's legislative history. On the more general question of whether it was intended to reach intrastate trips, the legislative history implies, but not unequivocally, that interstate trips remain the target. One Representative, for instance, mentioned that both FOPA and S. 2414 cover trips "in interstate commerce,"[513] but received a response that travelers are protected "after they leave the boundaries of their state or local jurisdiction."[514] The responding Representative then, only a few moments later, described S. 2414 as a protection "for interstate travelers."[515] Conversely, even with its restriction to travels in interstate commerce, it had been suggested that FOPA *would* reach travel within a state.[516] The better reading would probably be to restrict the coverage of this section to interstate commerce, particularly in light of the preamble's failure to make findings that protection of intrastate trips was necessary to a valid federal objective.[517]

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507 *Id.*

508 *See* ARIZ. REV. STAT. ANN. § 13-3102(A)(1) (Supp. 1985-86).

509 *See* MASS. ANN. LAW ch. 269, § 10 (West 1981).

510 *See* MD. ANN. CODE art. 27, § 36 (Supp. 1985).

511 132 CONG. REC. H4103 (daily ed. June 24, 1986) (statements of Reps. Marlenee and McCollum, letter from Acting Director, Bureau of Alcohol, Tobacco and Firearms).

512 *See supra* note 498 and accompanying text.

513 132 CONG. REC. H4103 (daily ed. June 24, 1986) (statement of Rep. Marlenee).

514 *Id.* at H4102 (statement of Rep. McCollum).

515 *Id.*

516 132 CONG. REC. H1702 (daily ed. Apr. 9, 1986) (statement of Rep. Hughes) ("it is not even limited to crossing state lines").

517 *See supra* notes 471-76 and accompanying text. On the other hand, the preamble did mention protection of various constitutional rights, including the second amendment right to keep and bear arms and the fourth amendment right to security against unreasonable searches. FOPA, *supra* note 1, § 1, 100 Stat. at 449. It does not, however, tie these to intrastate travel.

CONCLUSION

FOPA's amendment of the Gun Control Act is both deep (pg.681) and wide-ranging. Congress clearly accepted that the alterations would be dramatic.[518] Its deliberations extensively reflect judgments that repudiated either the Gun Control Act in toto or its administration as a traditional regulatory system.[519]

FOPA will require greatly increased sensitivity, efficiency and coordination on the part of the administering agency. Delays may run afoul of FOPA's various limitation periods; unjustified administrative inspections may clash with its restrictions on searches; a failure to coordinate with litigation teams may result in criminal adjudications that bar the agency from undertaking forfeiture or revocation; and unfounded actions, civil or criminal, may risk liability for the citizen's attorneys' fees.

Conversely, FOPA confers both substantive and procedural rights upon citizens accused of Gun Control Act violations. Scienter requirements limit application of most of the Act's sanctions to willful violators; a citizen who wins a criminal acquittal need not face civil sanctions based on the same allegation; the length of time seized property may be held without hearing is strictly limited; and the unprecedented availability of attorneys' fees awards ensures that the financial risks of a meritorious defense may well be shifted to the prosecuting agency.

FOPA's safeguards are entirely innovative, and largely (pg.682) unique. If they prove able to withstand the passage of time and experience, they may well merit extension to proceedings under other criminal and civil penalty systems.

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[518] The degree of change brought about was no legislative secret. On the Senate floor, one speaker estimated that 75% of BATF cases were against persons lacking the criminal intent required by FOPA: the speaker was supporting, not opposing, the bill. 131 CONG. REC. S9104 (daily ed. July 9, 1985) (statements of Sen. Symms). Many others bluntly expressed the belief that the Gun Control Act was not affecting crimes in any event, so that narrowing amendments in their eyes had no real social cost. *See*, *e.g.*, *id.* at S9173 (Sen. Sasser) (an "ill-conceived law"); *id.* at S9173 (Sen. Biden); *id.* at S9172 (Sen. Domenici); *id.* at S9161 (Sen. Hatch); 132 CONG. REC. H1653, 1654 (daily ed. Apr. 9, 1986) (statements of Rep. Robinson); *id.* at H1670 (Rep. Hendon) ("The present law has not done anything to the crooks....").

[519] Many FOPA supporters who did not attack the Gun Control Act wholesale argued that its implementation should be completely reoriented away from a traditional regulatory approach and toward a criminal enforcement effort directed at *malum in se* offense. *See*, *e.g.*, 131 CONG. REC. S9173 (daily ed. July 9, 1986) (remarks of Sen. Sasser) (Act "does not deal with or even purport to deal with misuse of firearms. It is purely and simply a regulatory statute...."); *id.* at S9165 (Sen. Stevens) ("pervasive regulation is not the answer to the growing incidence of violent crime"); *id.* at H1651 (Rep. Volkmer) (FOPA will direct "enforcement toward those who illegally traffic in firearms, toward those who criminally use firearms, and away from regulation of the law-abiding citizen"). This position would also assume that most of FOPA's impediments had no real social cost; enforcement actions that would run afoul of its provisions should not have been undertaken in the first place.