



214 Massachusetts Avenue, NE • Washington DC 20002 • (202) 546-4400 • heritage.org

Legislative Testimony

ATF Struggles to Prove That Its Priority Is Stopping Gun Crime, Not Furthering a Gun Control Agenda

ATF's Assault on the Second Amendment: When Is Enough Enough?
Joint Hearing before the U.S. House Subcommittee on Economic Growth, Energy Policy, and Regulatory
Affairs and Subcommittee on Crime and Federal Government Surveillance
March 23, 2023

Amy E. Swearer
Senior Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies
The Heritage Foundation

Chairmen Fallon and Biggs, Ranking Members Bush and Jackson Lee, and distinguished members of Congress,

My name is Amy Swearer, and I am a Senior Legal Fellow in the Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies.¹ My areas of scholarship and study include, among other things, the Second Amendment, overcriminalization, and the intersection of gun violence and mental health. I was a primary author of Heritage's recent e-booklet, *The Essential Second Amendment*, and run the organization's Defensive Gun Use Database. I have testified numerous on firearms policy at both the state and federal level, including on several occasions before this Committee. Most recently, these testimonies have covered an array of gun control proposals, recent nationwide spikes in violent crime, the economic toll of gun violence, and the impact of high-profile Second Amendment cases on public safety.²

Today, I and my fellow panelists have been asked to comment on recent assaults on the Second Amendment by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), an executive branch agency tasked with enforcing the nation's extensive regulatory framework on the manufacturing, importation, sale, and possession of firearms. Before I do so, I want to make one thing very clear: While some people tend to paint ATF and its agents as the villain in every Second Amendment story—just as others tend to paint Second Amendment advocates as the villain hamstringing ATF efforts to keep Americans safe—I will refrain from taking either overly simplistic approach.

The reality is that ATF is much like the firearms it regulates. In a vacuum, the agency is neither inherently good nor inherently bad. It depends in large part on who controls it and the ends for which its power is exerted. At its best, ATF and its agents play an integral role in combating gun crime and keeping law-abiding Americans safe from dangerous criminals armed with illegally possessed firearms. At its worst, ATF acts as a fifth column for gun control advocacy groups, using its vast and often unchecked regulatory powers to accomplish through agency rulemaking that which elected officials could not accomplish through the democratic process. Unfortunately, in recent years (and at various times throughout its existence), ATF has struggled to prove that, as an agency, its priorities are to catch criminals and not to arbitrarily create criminals out of peaceable citizens.

¹ The title and affiliation are for identification purposes. Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed here are my own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under section 501(c)(3) of the Internal Revenue Code. It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. The Heritage Foundation's books are audited annually by the national accounting firm of RSM US, LLP.

² See Amy E. Swearer, *What Economists Can't Tell You About the Costs of Gun Violence*, testimony before the Joint Economic Committee (July 20, 2022), <https://www.heritage.org/firearms/report/what-economists-cant-tell-you-about-the-costs-gun-violence>; Amy E. Swearer, *We Have Effective Gun Violence Solutions. You Just Won't Listen.*, testimony before the House Committee of Oversight and Reform (June 8, 2022), <https://www.heritage.org/testimony/we-have-effective-gun-violence-solutions-you-just-wont-listen>; Amy E. Swearer, *Bruen Promotes Public Safety Far More Than The Unconstitutional Gun Laws It Threatens*, testimony before the Senate Committee on the Judiciary (March 15, 2023), <https://www.judiciary.senate.gov/imo/media/doc/2023-03-14%20-%20Testimony%20-%20Swearer.pdf>.

To some extent, this is not entirely ATF's fault. The agency only has that power which Congress gives to it, and Congress too often has made a habit of granting ATF vast amounts of regulatory power while simultaneously failing to check the agency when it wields that power for abusive ends. That does not have to be the case. As I explain below, it is true that ATF in recent years has acted to undermine the rights of peaceable gun owners. But it is equally true that Congress can take back the reins from ATF, narrow the scope of its power, and force the agency to focus its energy on what it does best.

I. A Brief History of ATF at Its Best and Worst

The agency known today as ATF has its origins in the Prohibition Era, when it was initially formed as unit within the Treasury Department tasked with taking on illicit moonshine operations, and then later with enforcing alcohol tax laws. Over subsequent decades, the unit's purpose evolved, and eventually it took on responsibility for enforcing federal gun laws, federal tobacco tax laws, and federal laws on explosives and arson, before becoming an independent agency in 1972.³ After the terrorist attacks on September 11, 2001, ATF was moved to its current position as an agency within the Department of Justice.⁴

A. ATF at its Best

ATF, at its best, plays a vital role in enforcing the legitimate federal regulatory framework for firearms and helps ensure that firearms stay within the stream of lawful commerce. It also plays a role in protecting the public from gun crimes, including investigating and prosecuting criminal gun traffickers and violent offenders. By several objective and traditional indicators, ATF agents are often "exceptionally productive" compared to other federal law enforcement agencies when it comes to developing criminal gun cases for federal prosecution.⁵ The agency has several important and unique tools for combating gun trafficking, including the National Integrated Ballistic Information Network (NIBIN) and the National Tracing Center.⁶ Among other things, ATF helps coordinate between local jurisdictions when gun violence investigations have interstate and interagency elements. Local police departments often express that ATF "consistently offer[s] real value and support...in their efforts to combat local crime."⁷

³ *ATF History Timeline*, ATF (last accessed Mar. 20, 2023), <https://www.atf.gov/our-history/atf-history-timeline>.

⁴ *Id.*

⁵ According to one analysis, for example, in 2013 ATF agents averaged 3.4 prosecution referrals per agent for every one prosecution referral per agent by the Federal Bureau of Investigation. Between 2005 and 2013, ATF referred to federal prosecutors over 13,000 cases involving more than 27,000 defendant suspected of gun trafficking. *See* CTR. FOR AM. PROGRESS, *THE BUREAU AND THE BUREAU*, AT 5 (Spring 2015) <https://s3.documentcloud.org/documents/2083802/the-bureau-and-the-bureau.pdf>.

⁶ NIBIN helps investigators perform ballistics evaluations that can tie together seemingly unrelated cases from different jurisdictions using ballistics imaging technology. *See National Integrated Ballistic Information Network (NIBIN)*, ATF (last reviewed Dec. 6, 2021), <https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin>. ATF's National Gun Tracing Center is the only facility of its kind in the nation, and helps state and local investigators track down the origins of firearms suspected of having been used in a crime to link potential suspects and create investigatory leads. *See National Tracing Center*, ATF (last reviewed June 15, 2020), <https://www.atf.gov/firearms/national-tracing-center>.

⁷ *See THE BUREAU AND THE BUREAU*, *supra* note 5.

B. ATF at its Worst

Unfortunately, ATF also has a long history of scandals that point to a deeper problem in how the agency's power can be misused and abused. Even today, ATF is perhaps most widely associated with several high-profile armed confrontations during the early 1990s that ended disastrously. These include the agency's involvement in an infamous botched raid on the Branch Davidian compound in Waco, Texas, that ended with 86 deaths (including 25 children), and a standoff in Ruby Ridge, Idaho, that resulted in the unintentional death of an unarmed woman.⁸ While reasonable people may disagree on the fairness of the criticisms directed at ATF over these events, the reality is that they are far from isolated instances of problematic behavior. In fact, many far more problematic and abusive actions have flown much further under the radar.

Two more recent scandals are worth highlighting as evidence of ATF at its worst: Operation Fast and Furious and the agency's inability to account for thousands of seized and forfeited firearms.

Operation Fast and Furious

While ATF has rightfully been brought under public scrutiny for its "rogue" and irresponsible operations tactics,⁹ perhaps no operation is as worthy of rebuke as Operation Fast and Furious, in which ATF decided to just, well, not stop gun traffickers, at all. Beginning in November 2009, ATF agents in the agency's Phoenix field office engaged in a concerted effort to intentionally allow thousands of firearms to be straw purchased from local Federal Firearms Licensees (FFLs), knowing that these firearms would ultimately be illegally trafficked into Mexico for use by drug cartels.¹⁰ Rather than intervene to prevent these guns from being used for nefarious purposes, ATF—in tandem with federal prosecutors—allowed these guns to flow across the border for almost two years before acting. Worse, it appears that at least some of these FFLs suspected the prospective buyers of being straw purchasers, but continued to complete the sales against their

⁸ See Dave Davies, *30 Years After the Siege, 'Waco' Examines What Led to the Catastrophe*, NPR (Jan. 25, 2023), <https://www.npr.org/2023/01/25/1151283229/waco-branch-davidian-david-koresh-jeff-guinn>; *Investigation Into The Activities of Federal Law Enforcement Agencies Toward The Branch Dividians*, House Committee on Government Reform and Oversight Report 104-749 (Aug. 6, 1996), <https://www.congress.gov/104/crpt/hrpt749/CRPT-104hrpt749.pdf>; Ruby Ridge: Report of the Senate Subcommittee on Terrorism, Technology and Government, available via HathiTrust at Appendix: Additional Submission <https://babel.hathitrust.org/cgi/pt?id=pst.000031265799&view=1up&seq=1>; Sarah Pruitt, *How Ruby Ridge and Waco Led to the Oklahoma City Bombing*, HISTORY CHANNEL (updated Apr. 2, 2020), <https://www.history.com/news/how-ruby-ridge-and-waco-led-to-the-oklahoma-city-bombing>.

⁹ John Diedrich & Raquel Rutledge, *ATF Uses Rogue Tactics in Storefront Stings Across Nation*, MILWAUKEE J. SENTINEL (Dec. 7, 2013), <https://archive.jsonline.com/watchdog/watchdogreports/atf-uses-rogue-tactics-in-storefront-stings-across-the-nation-b99146765z1-234916641.html/>; John Diedrich & Raquel Rutledge, *ATF's Milwaukee Sting Operation Marred by Failures, Mistakes*, MILWAUKEE J. SENTINEL (Jan. 29, 2013), <https://archive.jsonline.com/watchdog/watchdogreports/atfs-milwaukee-sting-operation-marred-by-mistakes-failures-mu8akpj188952581.html/>; John Diedrich & Raquel Rutledge, *Leads on Gun Stolen from ATF Storefront in Milwaukee Fizzled Out*, MILWAUKEE J. SENTINEL (Apr. 3, 2013), <https://archive.jsonline.com/watchdog/watchdogreports/leads-on-gun-stolen-from-atf-fizzled-out-ih9b3i8-201363991.html/>.

¹⁰ See John Malcolm, *Operation Fast and Furious: How A Botched Justice Department Operation Led to a Standoff over Executive Privilege*, HERITAGE FOUND. LEGAL MEMORANDUM No. 83 (July 25, 2012), <https://www.heritage.org/courts/report/operation-fast-and-furious-how-botched-justice-department-operation-led-standoff-over>; OFFICE OF THE INSPECTOR GENERAL, *A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS* (re-issued Nov. 2012), <https://oig.justice.gov/reports/2012/s1209.pdf>.

better judgement because the ATF itself asked them to do so.¹¹ As a result of its inaction, the agency was able to seize only about 100 of the more than 2,000 firearms purchased during the operation. The rest were trafficked across the border, and in the ensuing years are known to have been used in several serious crimes, including the fatal shooting of a Border Patrol agent and murder of a former Mexican official.

Subsequent investigations strongly indicate that a primary motivation for the operation was political. The agency fully intended to use its facilitation of straw purchases to dangerous people to later justify its own implementation of more gun control measures and to call on Congress to authorize it to exert even greater control over FFLs.¹² In particular, the agency hoped to use the straw purchases as evidence for why licensed gun stores should be required report information to ATF about all gun sales involving the purchase of multiple long guns by a single buyer, a requirement that currently only exists for sales involving the purchase of multiple handguns.¹³

Missing Firearms and Explosives

Since 2015, ATF's National Destruction Branch (NBD) facility in West Virginia has been responsible for disposing of firearms owned or seized by, or forfeited to, ATF, a process normally entailing the firearm's destruction. Between 2016 and 2019, thousands of firearms, firearm parts, and rounds of ammunition were stolen or otherwise went missing from the facility.¹⁴ This was only discovered after a firearm discovered and traced during a traffic stop in Philadelphia was found to have parts of a former ATF duty firearm that supposedly had been, according to records, destroyed at the facility.¹⁵

A September 2022 audit by the Office of the Inspector General found that ATF staff at the disposal center do not "consistently adhere to established operating procedures in place to mitigate risk of firearms being lost or stolen."¹⁶ Among other things, staff stored guns on top of secure vaults instead of inside them, left exterior doors propped open against protocol, did not properly track keys used for unlocking shipping containers filled with firearms, and failed to adhere to protocols regarding signing people in and out of the facility.¹⁷ This internal sloppiness adds an extra layer of twisted irony to ATF's recent implementation of zero-tolerance policy for FFL violations, outlined in detail below.

¹¹ Sharyl Attkisson, *Documents: ATF Used "Fast and Furious" to Make the Case for Gun Regulations*, CBS News (Dec. 7, 2011), <https://www.cbsnews.com/news/documents-atf-used-fast-and-furious-to-make-the-case-for-gun-regulations/>.

¹² *Id.*

¹³ *Id.*; Office of Inspector General, *supra* note 10, at 261–63.

¹⁴ Office of the Inspector General, *AUDIT OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES' FIREARMS DISPOSAL PRACTICES*, Report 22-106 (Sept. 2022), <https://oig.justice.gov/sites/default/files/reports/22-106.pdf>. This is far from the first time ATF's problem of "losing" weapons has been caught the public's attention. See Joe Davidson, *ATF's Problem of 'Lost, Stolen, or Missing' Guns has Gotten Better, But It's Still A Problem*, WASH. POST (Apr. 9, 2018), <https://www.washingtonpost.com/news/powerpost/wp/2018/04/09/afts-problem-of-lost-stolen-or-missing-guns-has-gotten-better-but-its-still-a-worry/>.

¹⁵ Audit of ATF, *supra* note 14, at 1.

¹⁶ *Id.* at 9.

¹⁷ *Id.* 9–12.

II. Present Day Overreach and How Congress Can Control It

Today, the biggest areas of egregious ATF overreach with respect to the rights of peaceable citizens include its “zero-tolerance” policy for FFLs, its two recent major rule changes regarding pistol braces and firearm frames and receivers, and its decades-long abuse of the “sporting purposes” rule to implement a backdoor “assault weapons” ban on imports. But there is also one area of significant underreach—the agency’s complete and prolonged refusal to use its rulemaking authority to better protect the rights of lawful gun owners during interstate travel. Fortunately, for all of these issues, Congress has a variety of means at its disposal to undo the damage and prevent similar abuses in the future.

A. “Zero Tolerance” Policy for Federal Firearms Licensees

One of ATF’s primary roles is to conduct inspections of FFLs to ensure their compliance with the plethora of laws and regulations to which they are subjected. Among other tools at its disposal, Congress gave ATF the discretion to revoke an FFL’s license for “willful” violations of the Gun Control Act and its implementing regulations.¹⁸ The agency may also suspend or revoke a license, or impose a civil fine, for certain violations of the Brady Handgun Violence Prevention Act and the Child Safety Lock Act of 2005.¹⁹

During Congressional hearings in the early 1980s, it became clear that ATF routinely abused its regulatory and enforcement powers to target peaceable citizens in ways that were “constitutionally, legally, and practically reprehensible.”²⁰ Since then, ATF has apparently tried to use a much lighter touch with violations that do not appear willful, and in particular came to view itself as partner with FFLs, working toward the same goal of keeping guns from falling out of the stream of lawful commerce. Rather than revoking permits for technical violations or clerical errors, the agency focused to a great extent on educating licensees when it found violations and working to bring them into compliance.²¹ This was particularly true where violations did not appear to be malicious and where FFLs showed themselves willing to correct their mistakes and keep those mistakes from recurring.

Of course, ATF could (and clearly sometimes did) revoke licenses for noncompliant FFLs that refused to get their act together, and always had the discretion to revoke licenses even for initial violations that were obviously willful and directly led to guns ending up in the hands of dangerous persons. But generally speaking, most violations—especially first-time violations that did not actually result in guns being sold to prohibited persons—were dealt with through an escalating process involving the issuance of warning letters and the initiation of various levels of warning conferences to bring the FFL into compliance. This system of education and correction makes sense when one considers the extensive number of regulations to which FFLs are subjected. The

¹⁸ 18 U.S.C. § 923(e).

¹⁹ 18 U.S.C. §§ 922(t)(5), 924(p).

²⁰ *The Right to Keep and Bear Arms*, Report of the Senate Subcommittee on the Constitution at 20–22 (Feb. 1982).

²¹ See *Federal Firearms Administrative Action Policy and Procedures*, ATF Order 5370.1C (Feb. 21, 2017), [https://www.scribd.com/document/441306108/ATF-O-5370-1C-Internal-ATF-Document-Standards-For-Administrative-Actions; Federal Firearms Administrative Action Policy and Procedures, ATF Order 5370.1D \(Oct. 10, 2019\), https://www.gunowners.org/wp-content/uploads/2019-ATF-O.5370.1D-Federal-Firearms-Administrative-Action-Policy-Procedures.pdf](https://www.scribd.com/document/441306108/ATF-O-5370-1C-Internal-ATF-Document-Standards-For-Administrative-Actions; Federal Firearms Administrative Action Policy and Procedures, ATF Order 5370.1D (Oct. 10, 2019), https://www.gunowners.org/wp-content/uploads/2019-ATF-O.5370.1D-Federal-Firearms-Administrative-Action-Policy-Procedures.pdf).

most recent publicly available “guidebook” from ATF for FFLs is hundreds of pages of long, and even then only covers applicable federal law. Of note, it was also published in 2014 and is already quite outdated.²² There is no question that some FFLs will make mistakes.

In January of 2022, at the direction of President Biden, ATF changed its internal guidelines to take, in its own words, a “zero-tolerance” approach to FFL violations, including initial violations where an FFL had no history of noncompliance.²³ The guidance dictates that, absent extraordinary circumstances, inspectors are required to seek license revocations in many situations that would not have necessarily warranted revocation in the past. The agency also watered down its approach to determining whether a violation was “willful.” Now, when considering whether to revoke a license, inspection agents must even consider factors that are largely not in the FFL’s control. For example, the agent must consider whether the FFL has a particularly high number of crime guns traced to its store, even though this is almost entirely a circumstance of the store’s location near a high-crime area, and not itself an indication that the FFL’s violations were willful or even facilitated the use of guns in crime.²⁴ In other words, an FFL on the outskirts of Chicago will almost certainly be punished more harshly than an FFL in rural Indiana, even if the two FFLs commit the same exact clerical errors. Perversely, the new guidelines actually use an FFL’s history of compliance with a regulation as proof of “willfulness” in any subsequent violation, thereby using that history of perfect compliance against them for even minor one-time mistakes.²⁵

The Problem:

In practice, ATF’s zero-tolerance has had the clear effect of significantly increasing the number of FFLs whose licenses have been revoked. In 2020, ATF revoked a total of 40 licenses and initiated 306 warning conferences, for an average of 3.3 license revocations and 25.5 warning conference initiations per month.²⁶ The agency’s yearly data page does not apparently include information on the number of FFL inspections conducted, and ATF either does not have or has not made publicly available any of its data for January 2021 through September 2021.²⁷ Between October 2021 and June 2022, a time period spanning both just before and just after the policy change, there was a slight but noticeable increase in revocation rates (5.63 per month) and a significant decrease in conference initiations (10.75 per month). During that time period, ATF carried out an average of 520 inspections per month.²⁸

The impact of the new policy did not become clear until the second half of 2022, as ATF revocation data is based on the month in which all appeals in a case are exhausted and a final adjudication occurs, and not in the month in which the violation and initial recommendation occurred.²⁹ In June

²² *Federal Firearms Regulations Reference Guide*, ATF Publication 5300.4 (revised Sept. 2014), <https://www.atf.gov/firearms/docs/guide/federal-firearms-regulations-reference-guide-2014-edition-atf-p-53004/download>.

²³ See *Federal Firearms Administrative Action Policy Procedures*, ATF Order 5370.1E (Jan. 28, 2022), https://www.scribd.com/document/624836022/2022-ATF-O-5370-1E-Federal-Firearms-Administrative-Action-Policy-Procedures?secret_password=bV1r17UtFbF52WMUpuoW.

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ See *Annual Data: Firearms Compliance Inspection Results*, ATF (Last reviewed Mar. 7, 2023), <https://www.atf.gov/firearms/firearms-compliance-inspection-results>.

²⁷ *Id.* at Monthly Data.

²⁸ See Appendix.

²⁹ ATF includes this disclaimer in the monthly Excel datafiles.

2022, for the first time, ATF recorded more violations that resulted in revocation than in the initiation of warning conferences, a trend that has continued for every month since with the exception of August 2022, which nonetheless recorded 12 revocations compared to 2020 monthly average of 3.3. Between July 2022 and February 2023, ATF conducted a monthly average of 647.38 inspections, revoked a monthly average of 14 licenses, and initiated an average of 9.88 warning conferences.³⁰

In other words, while ATF inspections increased by only about 25 percent over the previous nine months, FFL revocations increased by 150 percent and by well over 400 percent compared to 2020 data. The crippling effects of “revoke first, ask questions later” show no signs of abating. February 2023 resulted in the most license revocations in a single month to date, and the average number of revocations over the last four months has been 15.75, compared to the four-month average of 12.25 in October 2022.

What Congress Can Do:

Congress can use its investigatory powers to demand more information from ATF about the sudden, dramatic increase in license revocations. In particular, there are some indications that ATF is using this zero-tolerance approach as a blunt instrument to crush well-intentioned FFLs whose errors were not clearly willful and which did not, in fact, result in any guns being delivered to violent or prohibited persons.³¹

Congress can also use its legislative authority to expressly override ATF’s zero-tolerance approach insofar as it requires revocation of licenses for initial offenses that have not historically warranted such extreme action. It can limit the categories of violations for which revocation can be sought, including specifically for violators with no previous history of non-compliance. It can also concretely define the parameters of what does or does not constitute a “willful” violation and impose a presumption that an FFL’s initial violation was not willful, absent extraordinary circumstances.

B. Pistol Brace Rule

In 1934, Congress passed the National Firearms Act (NFA), which heavily regulates certain types of firearms through an extensive taxing and registration scheme. Among these heavily regulated firearms are “short-barrel rifles,” essentially defined as a semi-automatic rifle with a barrel length of less than 16 inches, or an overall length of less than 26 inches.³² As originally introduced, the purpose of the NFA was to enact a backdoor ban on both machineguns and handguns by imposing a \$200 tax on their possession—a tax that was, at the time, prohibitive for ordinary citizens and

³⁰ See Appendix.

³¹ See, e.g., Caleb Perhne, *ATF ‘Zero Tolerance’ Policy Impacts Local Gun Stores*, WCYB News 5 (Feb. 20, 2023), <https://wcyb.com/news/local/atf-zero-tolerance-policy-impacts-local-gun-stores#:~:text=It's%20under%20a%20new%20%22zero.and%20refusing%20a%20federal%20inspection> (reporting on local FFL who allegedly had his license revoked for clerical errors and other mistakes that did not appear, in fact, to result in guns going to prohibited persons).

³² See 26 U.S.C. § 5845; 27 CFR 479.11. As explained below, the NFA originally regulated all rifles with a barrel shorter than 18 inches, but this was changed in 1968 to accommodate changing realities in gun ownership.

would amount to over \$4,000 if adjusted for inflation today.³³ The addition of short-barrel rifles to the NFA was an attempt to pre-emptively foreclose potential methods of circumventing the regulation on handguns by using other somewhat concealable firearms.³⁴ Ultimately, the provision regulating handguns was removed from the bill prior to its passage, and the act explicitly does not cover “a pistol or revolver having a rifled bore...or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.”³⁵ Despite the fact that handguns are far more concealable than short-barrel rifles (SBRs), and that the stringent regulation of SBRs makes little sense absent a similar regulation on either handguns or similar long-barrel rifles, Congress did not remove the SBR provision.

As a consequence, today, law-abiding citizens may purchase and possess either a semi-automatic rifle with a barrel length of at least 16 inches or a semi-automatic handgun capable of firing the exact same caliber as a long-barrel rifle, just as they would any other firearm. But if the exact same firearm is “designed or redesigned to be fired from the shoulder” and has a barrel length of less than 16 inches (or an overall length of less than 24 inches), then the person is required to go through an extensive process to register the gun with ATF as an SBR and pay \$200 for a special “tax stamp” prior to taking possession. NFA-regulated firearms, unlike other guns, are also subject to a plethora of additional regulations. For example, they may not be “transported interstate” without ATF’s prior written approval. In other words, if owners of NFA-regulated firearms want to move to another state and take their guns with them, they must first get the government’s permission.³⁶ NFA violations constitute serious criminal offenses for which a person will face up to ten years in federal prison and the permanent loss of his or her Second Amendment rights.

In 2012, a man named Alex Bosco invented a stabilizing brace that could attach to large, rifle-caliber pistols, and better enable a shooter to operate these firearms more efficiently and accurately with one hand. His desire was to assist a friend who was a disabled veteran and who, much to his dismay, was no longer able to shoot rifle-caliber firearms at the range because of his inability to control them safely. The stabilizing brace took two different forms. The first essentially attached straps to the pistol’s buffer tube (which extends from the back of many AR-pistols), enabling the shooter to “strap” the buffer tube tightly against the forearm. The second brace acted more as a “fin,” attaching to the buffer tube so that the shooter could brace the fin against his or her inner elbow or upper arm. Mr. Bosco ultimately wanted to put these devices on the market for sale to other disabled shooters, and so he asked the ATF to determine whether these devices turned the firearm into an NFA-regulated short-barrel rifle. In a classification letter dated November 26, 2012, ATF concluded that these devices do not turn a pistol into a short-barrel rifle, because neither the brace nor the fin had the design or intent of enabling the gun to be fired from the shoulder.³⁷

³³ See David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1533–34 (2012); Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597, 601–13 (1995).

³⁴ Halbrook, *supra* note 33.

³⁵ See 26 U.S.C. § 5845(e).

³⁶ See *I Have a NFA Firearm and I’m Moving. What Do I Do?*, ATF (last reviewed Oct. 23, 2020, <https://www.atf.gov/firearms/qa/i-have-nfa-firearm-and-i%E2%80%99m-moving-what-do-i-do#:~:text=A%20registered%20possessor%20of%20an,written%20approval%20of%20ATF%2C%20specifically>

³⁷ Available: <https://vpc.org/wp-content/uploads/2019/08/ATF-Approval-Letter-2012.pdf>.

Over the next several years, others began building on Mr. Bosco’s design, and pistol braces became very popular in the civilian gun market. In 2015, ATF issued an open letter essentially saying that while it had not reversed its initial position, it took umbrage with inquiries “regarding alternate uses” for the braces—namely, that some people figured out that they could use the brace in the same manner as a stock and shoulder the weapon.³⁸ ATF now held that whether the firearm was an SBR depended entirely upon the owner’s intentions—“any person who intends to use a handgun stabilizing brace as a shoulder stock on a pistol” must go through the NFA taxing and registration process, apparently because this subjective intention turned the firearm from an approved handgun with a stabilizing brace into an SBR.

In 2017, under pressure from gun owners and advocates who rightly pointed out that this incredibly subjective test was virtually unenforceable, ATF issued yet another classification letter. This time, it clarified that the addition of a brace does not by itself turn a pistol into an SBR, nor does “incidental, sporadic, or situational use” from a “firing position at or near the shoulder.”³⁹ As ATF acknowledges, during the decade in which it expressly held and told civilians that pistols with arm braces were not NFA-regulated SBRs, millions of these devices (and “AR-15 pistols” with these devices already attached) were sold to law-abiding, peaceable civilians who relied on the agency’s position.⁴⁰

Then, last year, at the direction of President Biden, ATF promulgated final rule 2021R-08F, “Factoring Criteria for Firearms with Attached ‘Stabilizing Braces.’”⁴¹ This rule, which went into effect on January 31, 2023, reversed the agency’s previous position with respect to many of the devices most commonly owned by law-abiding citizens acting in reliance on ATF’s decade-old position. Whereas Congress statutorily defined “rifle” to mean a semi-automatic weapon “designed or redesigned, made or remade, and intended to be fired from the shoulder” with a rifled bore, ATF took it upon itself to unilaterally add to that definition for the specific purpose of making pistol braced firearms more difficult for civilians to possess. Now, according to ATF, a rifle “shall include a weapon that is equipped with an accessory, component, or other rearward attachment that provides surface area that allows the weapon to be fired from the shoulder, provided other factors...indicate that the weapon is designed, made, and intended to be fired from the shoulder.”⁴²

The Problem:

ATF’s irrational abrupt about-face on pistol braces will have virtually no impact on violent crime, while simultaneously imposing significant burdens on perhaps as many as one million peaceable gun owners. ATF barely attempted to justify its position based on an argument that the change is

³⁸ ATF Open Letter on the Redesign of “Stabilizing Braces”, available: <https://www.atf.gov/resource-center/docs/foia/impact-laws-footnote-13-2015-atf-open-letter/download>.

³⁹ Re: Reversal of ATF Open Letter on the Redesign of “Stabilizing Braces”, ATF Letter (Mar. 21, 2017), <https://www.sigsauer.com/pub/media/amasty/blog/atf-letter-march-21-2017.pdf>.

⁴⁰ Importantly, the Congressional Research Service estimated a far higher number of 10 and 40 million stabilizing braces in civilian circulation. *Handguns, Stabilizing Braces, and Related Components*, CRS Report (updated Apr. 19, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11763#:~:text=April%2019%2C%202021-.Handguns%2C%20Stabilizing%20Braces%2C%20and%20Related%20Components.into%20a%20short%20barreled%20rifle>.

⁴¹ <https://www.govinfo.gov/content/pkg/FR-2023-01-31/pdf/2023-01001.pdf>

⁴² *Id.* at 6574, codified at 27 CFR 478.11.

necessary for public safety because pistol-braced firearms are, in fact, commonly used in crime or are extraordinarily dangerous compared to other firearms. The agency cited only two examples in total where the braces had been used in a “mass shooting incident,” and did not explain how or why their use in those crimes or any other crime would significantly increase the criminal’s ability to carry out his or her crime compared to any other commonly available firearm.⁴³ Instead, the agency’s primary argument appeared to be that it is required to implement the NFA, which it understands to be Congress’s way of regulating weapons historically considered “dangerous and unusual.”⁴⁴

The argument for regulating pistol braces in order to decrease violent crime is flawed for many of the same reasons as the argument for regulating (or banning) so-called “assault weapons.”⁴⁵ The reality is that criminals simply do not need pistol braces to carry out their crimes and will just as easily carry them out with a different type of firearm. While pistol braces significantly increase the ability of disabled shooters to accurately and efficiently handle firearms they would not otherwise be able to use, it does not matter at all to a non-disabled shooter whether he shoulders a pistol-braced gun or a long-barrel rifle—it is functionally the same firearm, which he will be able to handle in the exact same way. In fact, given that the shorter barrel length of an SBR or pistol-braced firearm will result in a decrease in muzzle velocity, a victim shot with a standard long-barrel semi-automatic rifle may, if anything, sustain slightly more serious injuries than a victim shot with a pistol-brace weapon chambered in the same caliber.⁴⁶

Worse, ATF’s rule change will almost certainly turn many of those peaceable gun owners into felons. Individuals who possess these firearms—which ATF now considers SBRs under the National Firearms Act—have four options. They can (1) go through the rigorous process of registering their firearms under the NFA, pay the \$200 tax for each firearm, and ask ATF’s permission every time they move; (2) permanently remove the brace and either destroy it or surrender it; (3) destroy the entire firearm or surrender it to ATF, with no reimbursement for their valuable property; or (4) be guilty of committing a serious federal gun crime for they face up to 10 years in prison. At the same time, this rule change creates a bureaucratic nightmare for an agency that constantly complains about being understaffed and underfunded.

What Congress Can Do About It:

Congress can pass a law that explicitly overrides ATF’s expansive recharacterization of federal law to include pistol braces and AR-style pistols as “rifles.” It could, for example, effectively undo ATF’s rule change and clarify that the term “rifle” in 18 U.S.C. § 921(A)(7) does *not* include a

⁴³ *Id.* at 6498, 6499.

⁴⁴ *Id.*

⁴⁵ See Amy Swearer, *Answering Policymakers’ Most Common Questions (And Debunking Their Most Common Misconceptions) About Gun Policy*, Heritage Legal Memorandum No. 325 at 7–9 (March 3, 2023), <https://www.heritage.org/firearms/report/answering-policymakers-most-common-questions-and-debunking-their-most-common>.

⁴⁶ See, e.g., Brandon Louis Clark, *Effect of Barrel Length on the Muzzle Velocity and Report from a Mosin-Nagant 7.62x54R Rifle*, U. S. Fla. Honors Thesis (2011); Richard Mann, *Dispelling Myths: Barrel Length vs. Velocity*, Shooting Illustrated (July 24, 2018), <https://www.shootingillustrated.com/content/dispelling-myths-barrel-length-vs-velocity/>; Bill Marr, *223 Remington/5.56 NATO Barrel Length and Velocity: 26 Inches to 6 Inches*, RifleShooter.com (Dec. 7, 2015), <https://rifleshooter.com/2015/12/223-remington-5-56mm-nato-barrel-length-and-velocity-26-inches-to-6-inches/>.

weapon equipped with an accessory, component, or other rearward attachment that provides surface area allowing the weapon to be fired from the shoulder, regardless of indications that the accessory, component, or attachment may, in fact, enable the firearm to be fired from the shoulder. It could further protect against any future attempts by ATF to redefine those terms by expressly prohibiting ATF from treating as an SBR any pistol brace design approved by (or functionally similarly to any device approved by) the agency prior to its promulgation of 2021R-08F.

But Congress could also pursue an alternative route that both unquestionably prevents ATF from infringing on the rights of peaceable gun owners and indicates to the American people that their elected representatives are capable of acknowledging modern realities. It could remove short-barrel rifles from the categories of weapons so heavily regulated under the National Firearms Act in the first place.

Again, the NFA, as originally intended, would have imposed a prohibitive tax and registration scheme on handguns, and only included SBRs as a means of furthering that initial goal of banning “concealable” firearms. It is clear that had the handgun provision been included in the NFA, it would have been patently unconstitutional. The NFA’s stringent regulation of short-barrel rifles has always been premised on their being more or less as concealable as handguns. Gun control advocates at the time (and even still today) wanted to ban the possession of both handguns and SBRs, and not because these firearms were particularly dangerous or unusual for civilian use (like, for example, the machineguns also regulated by the NFA). Congress could, therefore, consider eliminating an arbitrary and irrational distinction that was rooted in a failed effort by gun control activists to impose a clearly unconstitutional handgun ban.

This would not be the first time Congress has acted to bring the NFA’s regulation of SBRs into alignment with changing realities about lawful civilian gun ownership. The original NFA defined “short-barrel rifle” to include any rifle with a barrel length of less than 18 inches, consistent with its categorization for “short-barrel shotgun.” A few years later, Congress amended the law to allow certain rimfire rifles to have to a minimum length of 16 inches.⁴⁷ Then, beginning in the early 1960s as part of an effort to recoup money for its now-obsolete stock of WWII and Korean War weapons, the U.S. government sold roughly 250,000 M1 carbine rifles to American civilians at incredibly low prices through the Civilian Marksmanship Program.⁴⁸ There was just one problem—the .30-caliber rifle had a barrel length of 17.75 inches, and the government had inadvertently turned a quarter of a million peaceable Americans into felons. Rather than force these peaceable owners of a widely possessed and practicable semi-automatic rifle to register their guns under the NFA, Congress amended the NFA to accommodate a new reality, reducing the minimum barrel length for “short-barrel rifles” to 16 inches.⁴⁹

Six decades later, it is once again clear that the NFA should be changed to accommodate reality. It is not just that the government has once again created a scenario in which significant numbers

⁴⁷ Ian McCollum, *Why Are Short Barreled Rifles Actually Regulated in the U.S.?*, *Forgotten Weapons* (Jan. 15, 2023), <https://www.forgottenweapons.com/why-are-short-barreled-rifles-actually-regulated-in-the-us/>.

⁴⁸ See *The M1 Carbine: American’s ‘Light Rifle’*, *NRA Blog* (Nov. 1, 2016), <https://www.nrablog.com/articles/2016/11/the-m1-carbine-americas-light-rifle>.

⁴⁹ Ian McCollum, *Why Are Short Barreled Rifles Actually Regulated in the U.S.?*, *Forgotten Weapons* (Jan. 15, 2023), <https://www.forgottenweapons.com/why-are-short-barreled-rifles-actually-regulated-in-the-us/>.

of peaceable gun owners are facing a choice between NFA registration and the commission of a felony criminal offense. It is not just that these peaceable gun owners relied on the government’s assurances that they were in lawful possession of their firearms. It is that, if ATF’s new definition is accurate and all of these peaceable gun owners have for ten years owned SBRs without turning the United States into a “warzone,” it destroys the entire premise for heavy regulation in the first place. These are very clearly not “dangerous and unusual” firearms lacking in any lawful civilian function because they are, quite literally, commonly owned by law-abiding citizens for lawful purposes.

C. “Frame and Receiver” Rule

Congress’s first major attempt to broadly regulate interstate firearms commerce occurred in the 1938 Federal Firearms Act (FFA). The FFA created a framework that, among other things, imposed a license requirement on firearms importers, manufacturers, and “any person engaged in the business of selling firearms.”⁵⁰ It defined “firearm” very broadly to include not only the finished weapon itself, but “any part or parts of such weapon.”⁵¹ Thirty years later, during debates on the Gun Control Act of 1968, Congress recognized that this definition was impractical because it gave the government control over each small part of a firearm, in any circumstance.⁵² It amended the definition to its current wording of “any weapon which will or is designed to or may be readily converted to expel a projectile by the action of an explosive,” or “the frame or receiver of any such weapon.”⁵³ In short, federal law no longer claims to regulate the manufacture and sale of every firearm part—just finished firearms, items which may be readily converted into a finished firearm, and the frame or receiver of any firearm.

That same year, the Department of the Treasury (where ATF was then located), published regulations that further defined “firearm frame or receiver” as “that part of a firearm which provides housing for the hammer, bolt or breechlock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel.”⁵⁴ In other words, the frame or receiver is the hunk of drilled-out metal that houses all of the parts of a firearm that, when put together, make the firearm go “boom.” So while a person can buy or sell any other part of a firearm just as easily as he or she could sell a cookie or a bar of soap, frames and receivers are a different story. Any person or entity “engaged in the business” of manufacturing or selling firearms—including frames or receivers—has to obtain a federal firearms license and is subject to all of the rules and regulations that entails. In practice, this also means that frames and receivers cannot be sold to anyone without first having a serial number stamped on them, recorded in mandatory documents, and ensuring that the buyer passes a background check.

That regulatory definition remained unchanged until recently.

⁵⁰ See Pub. Law No. 785 (June 30, 1938), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg1250.pdf>.

⁵¹ *Id.* at (3).

⁵² ATF Overview of Final Rule 2021R-05F, at 6, <https://www.atf.gov/firearms/docs/guide/overview-final-rule-2021r-05f-definition-%E2%80%9Cframe-or-receiver%E2%80%9D-and-identification/download>.

⁵³ See 18 U.S.C. § 921(a)(3), <https://www.law.cornell.edu/uscode/text/18/921>

⁵⁴ ATF Overview of Final Rule 2021R-05F, at 6, <https://www.atf.gov/firearms/docs/guide/overview-final-rule-2021r-05f-definition-%E2%80%9Cframe-or-receiver%E2%80%9D-and-identification/download>.

Americans have a long and proud history of private gunsmithing.⁵⁵ As has been the case throughout history, most home gunsmiths today are more “gunbuilders” than “gunmakers,” assembling a variety of largely premade parts into a custom weapon. Generally, this type of assembly requires some degree of skill, special tools, and time, especially when starting with a “blank” (completely solid) frame or receiver. But with the advent of 3D-printing, online tutorials, and a tremendous growth in the number of manufacturers selling partially finished frames and receivers (known as “80% receivers” because they are about 80 percent completed), homemade gunbuilding has become increasingly easier to do and more accessible for the average American. Additionally, some manufacturers now sell “gun kits” that contain not just partially finished frames or receivers, but all the other components or tools necessary for a relative novice to build a functional firearm in a single afternoon. Under federal law, nothing in these kits technically comprises a firearm—or a frame or receiver—at the time the kit is sold, so federal law does not require the parts to have serial numbers or that buyers undergo background checks.

ATF and others viewed the proliferation of these “gun kits” as problematic because they in theory allowed prohibited persons to purchase these kits and create un-serialized “ghost guns” that could not be tracked back to them.

In ATF Final Rule 2021R-05F, “Definition of ‘Frame or Receiver’ and Identification of Firearms,” which went into effect on August 24, 2022, the agency moved to address this perceived problem by, among other things, unilaterally redefining what is or is not a firearm.⁵⁶ It regulates the sale of unfinished firearm frames and receivers if those unfinished parts are “readily convertible” into finished ones.⁵⁷ This includes unfinished frames and receivers sold in do-it-yourself “ghost-gun kits,” which sometimes come with the tools and additional parts needed to finish the frame or receiver and assemble it into a functional firearm. Under the new rule, these “readily convertible” unfinished frames or receivers (or DIY kits containing them) are regulated just like finished ones, which, in turn, are regulated in the same manner as functional firearms—to be lawfully bought or sold on commercial markets, they must be marked with a serial number, sellers must obtain a federal firearms license and buyers must comply with state and federal gun laws.

Importantly, the ATF went out of its way to specify that un-serialized, privately made firearms (PMF) are lawful for unlicensed individuals to create, possess and even to sell under some circumstances. The new regulations apply only to commercial sales by those “engaged in the business” of selling firearms (or, in this case, unfinished frames and receivers). The agency also revised its final rule to clarify which portions of “split receiver” guns must contain serial numbers, and to reduce scenarios in which a single privately made firearm might end up with multiple serial numbers. While private citizens may make and possess un-serialized firearms, any FFL that takes such a gun “into its inventory” must mark it with an identifying number and record information about the transfer just as it would for any commercially manufactured gun, including the identity of the person from whom it was received or to whom it is transferred. Moreover, the new rule piles

⁵⁵ See Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary’s L. J. 35 (2023).

⁵⁶ See Final Rule: Definition of “Frame or Receiver” and Identification of Firearms, ATF (Apr. 26, 2022), <https://www.federalregister.gov/documents/2022/04/26/2022-08026/definition-of-frame-or-receiver-and-identification-of-firearms>

⁵⁷ See Summary of Final Rule 2021R-05F, ATF (last visited Mar. 20, 2023), <https://www.atf.gov/rules-and-regulations/definition-frame-or-receiver/summary>.

onto this additional burden by increasing the length of time for which FFLs must retain not just these new records, but all records related to background checks and gun sales.

The Problem:

(1) Frames and Receivers

ATF may certainly clarify its regulatory definitions, but it may not unilaterally grant itself the authority to regulate firearm components that Congress itself has not sought to regulate. The relevant statute is clear—ATF may regulate (1) finished firearms that will or are designed to expel a projectile via explosive force, (2) anything that may be “readily converted” into a finished firearm, and (3) the frame or receiver of a firearm. Now, ATF says it can regulate not just frames and receivers, but anything that is readily convertible into a frame or receiver (and therefore may be readily convertible into a part that is readily convertible into a firearm). ATF simply does not have this authority. ATF’s willingness to exceed the bounds of that power which Congress has granted to it is just one more example of the agency’s longstanding history of thumbing its nose at the constitutional separation of powers.

Moreover, ATF’s new test for distinguishing “readily convertible” unfinished frames and receivers from “non-readily convertible” ones is incredibly vague and offers FFLs anything but a clear line. An unfinished frame or receiver is deemed to be “readily convertible” based on an imprecisely weighted combination of nearly a dozen factors, and the ATF refers to a series of cases indicating that the line might be somewhere between needing eight hours in a machine shop to finish the part and needing a master gunsmith with tens of thousands of dollars of specialized equipment to finish the part.⁵⁸

(2) Privately Made Firearms

Another serious concern with the rule is its regulation of Privately Made Firearms, and its attempts to bring as many PMFs as possible into its regulatory purview. While private citizens may make and possess un-serialized firearms, any FFL that takes such a gun “into its inventory” must mark it with an identifying number and record information about the transfer just as it would for any commercially manufactured gun, including the identity of the person from whom it was received or to whom it is transferred. This effectively increases the paperwork burden on FFLs and also increases fears that ATF will use these records of PMFs to build de facto gun owner registries.

(3) FFL Records Retention

Not only has ATF increased the number and complexity of records FFLs must maintain, but it now requires FFLs to maintain those records indefinitely. Under previous rules laws, FFLs needed to keep these physical records for at least 20 years, so that the FBI and ATF could access them during investigations. Now, FFLs have to retain these physical paper records until the company goes out of business or ends its licensure, at which time the records must be sent to ATF. This could mean keeping decades of records, requiring even smaller licensees to rent expensive off-site secure storage facilities due to ever-increasing storage needs through several generations of owners. It

⁵⁸ See, e.g., Final Rule at 24662, n. 44, <https://www.govinfo.gov/content/pkg/FR-2022-04-26/pdf/2022-08026.pdf>.

also reeks of an end run around Congressional prohibitions on ATF's ability to create and maintain a federal database of firearms or firearm owners.

ATF claimed that the change was necessary to help it conduct traces on crime guns. According to the agency, it cannot successfully trace roughly 1,000 firearms a year because the records were more than 20 years old and subsequently tossed out or destroyed by an FFL no longer required to maintain them under the previous rules.⁵⁹ However, in 2021, ATF conducted almost 450,000 gun traces.⁶⁰ This means that its ability to trace guns was impacted by the 20-year limit in only 0.002 percent of cases, and it is not at all clear whether any of those traces would have meaningfully furthered the criminal investigation. For this mere potential of a lead in a fraction of a percent of all gun traces, however, ATF believes itself justified in imposing significant burdens on FFLs (and, apparently, revoking their licenses for so much as misplacing decades-old paperwork).

What Congress Can Do About It:

Congress can explicitly override the more concerning aspects of the rule, while leaving in place those changes that were, in fact, necessary clarifications. It can clarify that unfinished frames and unfinished receivers are not firearms, or it can better specify at which point those unfinished frames and unfinished receivers are subject to regulation, so that it does not impose an undue burden on lawful private gunbuilding. It can explicitly override ATF's record retention requirements, both with respect to PMFs taken "into inventory" and the imposition of a duty to maintain all records past 20 years.

D. "Sporting Purposes" Rule

The Gun Control Act of 1968 broadly prohibits, at 18 U.S.C. § 922(i), the importation of firearms and ammunition into the United States. An exception is provided in § 925(d)(3), which provides that the Attorney General shall authorize the importation of firearms and ammunition that are "generally recognized as particularly suitable for or readily adaptable for sporting purposes," except for "surplus military firearms" or firearms regulated by the NFA (e.g., machineguns and short-barrel rifles or shotguns). Since 1988, however, ATF has used its authority to determine that any firearm with characteristics of so-called "semi-automatic assault rifles" were not "suitable for sporting purposes."⁶¹ While an effort by the Obama Administration to use the "sporting purposes" test to ban the importation of the nation's most commonly used caliber of rifle ammunition was abandoned after receiving significant blowback from advocates and policymakers alike, it certainly shows the extent to which an anti-gun Administration might be willing to stretch (and abuse) the test in the future.⁶²

⁵⁹ See, e.g., Fact Sheet: Privately Made Firearms (PMFs), aka 'Ghost Guns,' 'Buy-Build-Shoot' Kits, and the 'Frame or Receiver' Final Rule, DOJ Bureau of Public Affairs, <https://www.justice.gov/opa/press-release/file/1493431/download>.

⁶⁰ See *Firearms Trace Data – 2021*, ATF (last reviewed Sept. 16, 2022), <https://www.atf.gov/resource-center/firearms-trace-data-2021>.

⁶¹ See *Study of the Importability of Certain Shotguns*, ATF (Jan. 2011), <https://www.atf.gov/resource-center/docs/january-2011-importability-certain-shotgunspdf/download>; Kopel, *supra* note 33.

⁶² See, e.g., Taylor Wofford, *Obama's Proposed Ban on 'Green Tip' Bullets Misfires*, Newsweek (Mar. 13, 2015), <https://www.newsweek.com/obamas-proposed-ban-green-tip-bullets-misfires-313453>.

The Problem:

For decades, ATF has abused the definition of “sporting purposes” to impose a backdoor ban on commonly owned semi-automatic firearms deemed “assault weapons” by gun control advocates, at least for purposes of their importation into the United States. Even though Congress allowed the federal ban on assault weapon sales to sunset in 2004, and even though it is perfectly lawful for peaceable citizens to own these firearms in a majority of states, and even though these firearms are almost certainly protected by the Second Amendment, ATF has continued this arbitrary and nonsensical prohibition on their importation.

American gun owners collectively and lawfully possess as many as 44 million AR-15 or similarly styled rifles, and they do so for a variety of lawful reasons that prove these rifles have legitimate “sporting purposes.” Nearly one-third of gun owners with firearms considered “non-sporting” by ATF say that they use these firearms for competitive shooting sports, while 50 percent use them for hunting, and a significant majority (66 percent) find them useful for recreational target shooting.⁶³

It is equally absurd to consider “large magazine capacity” as a factor in whether a gun has a legitimate sporting purpose. An estimated 39 million peaceable Americans own magazines with a capacity of 11 or more rounds.⁶⁴ More than one-in-four of these gun owners say that they use these magazines for competitive shooting sports, while roughly half say that they own them for hunting and nearly two-thirds own them for recreational target shooting.⁶⁵

What Congress Can Do About It:

Congress can explicitly define “sporting purposes” to encompass all semi-automatic rifles chambered in common calibers, including but not limited to those with pistol grips, foregrips, collapsing or folding stocks, barrel shrouds, or the ability to accept standard capacity magazines. If Congress really wants to emphasize the true purpose of the Second Amendment, however, it should amend the test to include not just those firearms suitable for sporting purposes, but commonly possessed by law-abiding citizens for any lawful purpose, including self-defense. Moreover, it should explicitly indicate that semi-automatic rifles with common features such as pistol grips, foregrips, barrel shrouds, collapsing or folding stocks, and the ability to accept standard capacity magazines are, indeed, suitable for a variety of lawful purposes, including self-defense.

III. Recent Actions by Other Executive Agencies that Undermine the Second Amendment

Unfortunately, ATF is not the only federal agency threatening to undermine the Second Amendment rights of peaceable citizens. Here are just a few examples of non-ATF overreach that Congress should consider:

⁶³ William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, GEORGETOWN MCDONOUGH SCHOOL OF BUSINESS RESEARCH PAPER NO. 4109494 (last revised Sept. 28, 2022).

⁶⁴ *Id.*

⁶⁵ *Id.*

- In June of 2022, the U.S. Fish and Wildlife Service released proposed regulations that would phase out the use of lead ammunition while hunting on lands controlled by the Service.⁶⁶
- In the summer of 2022, the Centers for Disease Control and Prevention, at the behest of gun control groups and for the explicit purpose of removing a perceived barrier to the implementation of preferred gun control policies, removed its own language on defensive gun uses from its website.⁶⁷
- The Department of Defense recently issued report (paid for with over \$2 million of taxpayer money) recommending a that series of gun control measures be implemented on DoD property that would significantly undermine the Second Amendment rights of military members and their families.⁶⁸

Additionally, Congress should closely watch how federal agencies, including ATF, try to implement President Biden’s recent Executive Order regarding, among other things, background checks, the interstate transportation of firearms by FFLs, the acquisition of firearms by the Department of Defense, and the advertising of firearms to the public.⁶⁹

IV. Conclusion

When it comes to firearms, we often say that the problem is not the gun itself, but who is using it and for what purposes. A gun in the hand of a would-be criminal is bad, and we want to prevent that—but we do not want to prevent it in such a way that we also prevent law-abiding citizens from having ready access to lawfully possessed guns for armed self-defense. The same is true of ATF or any other law enforcement agency. We should not be trying to undermine their legitimate efforts to stop violent criminals. But at the same time, we should absolutely ensure that this is, in fact, where ATF’s efforts are focused.

⁶⁶ 2022-2023 Station-Specific Hunting and Sport Fishing Regulations, U.S. Fish & Wildlife Servs. (June 9, 2022), <https://www.federalregister.gov/documents/2022/06/09/2022-12463/2022-2023-station-specific-hunting-and-sport-fishing-regulations>.

⁶⁷ Stephen Gutowski, *Emails Show CDC Removed Defensive Gun Use State After Gun Control Advocates Pressured Officials In Private Meeting*, THE RELOAD (Dec. 15, 2022), <https://thereload.com/emails-cdc-removed-defensive-gun-use-stats-after-gun-control-advocates-pressured-officials-in-private-meeting/>.

⁶⁸ Preventing Suicide in the U.S. Military: Recommendations from the Suicide Prevention and Response Independent Review Committee, Dept. of Defense (2022) <https://media.defense.gov/2023/Feb/24/2003167430/-1/-1/0/SPRIRC-FINAL-REPORT.PDF> (recommending, among other things, raising the minimum age for purchasing firearms and ammunition on DoD property to 25, implementing a 7-day waiting period for any firearm and 4-day waiting period for any ammunition purchased on DoD property, repealing regulations prohibiting DoD from collecting information related to the lawful acquisition of privately owned firearms by military personnel and civilian employees, requiring the registration of all privately owned firearms for anyone living in military housing, and prohibiting the possession of privately owned firearms on DoD property by anyone not living on DoD property).

⁶⁹ Press Release: Executive Order on Reducing Gun Violence and Making Our Communities Safer, White House Briefing Room (Mar. 14, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/14/executive-order-on-reducing-gun-violence-and-making-our-communities-safer/>.

It is not at all clear that ATF has its priorities in order. And it is high time for Congress to step in with aggressive efforts to ensure that the agency can longer prioritize turning peaceable citizens into criminals, rather than protecting them from truly violent offenders.

Appendix A

ATF Violation Actions Before and After Implementation of “Zero-Tolerance” Policy⁷⁰

Month	Inspections	Warning Conferences	Revocations	Revocation 4-Month Rolling Average
Oct. 2021	436	11	4	n/a
Nov. 2021	454	11	6	n/a
Dec. 2021	378	8	4	n/a
Jan. 2022	470	10	3	4.25
Feb. 2022	526	13	3	4
Mar. 2022	660	7	6	4
Apr. 2022	520	10	11	5.75
May 2022	645	16	8	7
June 2022	609	11	6	7.75
July 2022	671	15	16	10.25
Aug. 2022	767	15	12	10.5
Sept. 2022	916	9	13	11.75
Oct. 2022	485	4	8	12.25
Nov. 2022	534	5	17	12.5
Dec. 2022	429	6	10	12
Jan. 2023	678	10	17	13
Feb. 2023	699	10	19	15.75

⁷⁰ Data taken from *Firearms Compliance Inspection Results*, ATF (last accessed Mar. 20, 2023), <https://www.atf.gov/firearms/firearms-compliance-inspection-results>.