



Memorandum

October 19, 2005

SUBJECT: ATF Firearms Testing Procedures**FROM:** William J. Krouse
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This memorandum has been written in response to several congressional inquiries about firearms testing procedures employed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and whether those procedures are outlined in a manual. Regarding this matter, ATF officials have informed the Congressional Research Service that there is no single “firearms testing procedures manual,” given the wide variety of firearms available in both legal and illegal markets. Critics of ATF, who have requested congressional verification as to whether such a manual exists, have questioned the adequacy of ATF firearms testing procedures — particularly in regard to machine guns and other firearms regulated under the National Firearms Act.¹ To address issues raised by ATF critics, in part, Representative Phil Gingrey has introduced the Fairness in Firearm Testing Act (H.R. 1603) that would require ATF to make video recordings of all firearms and ammunition tests.

Background

ATF is the lead federal agency charged with administering and enforcing federal firearms laws. Two major statutes regulate the commerce in, and possession of, firearms: The National Firearms Act (NFA) of 1934² and the Gun Control Act of 1968,³ as amended. Congress passed the NFA to limit the availability of machine guns, short-barreled rifles and shotguns, silencers, and a “catch-all” class of other “concealable” firearms identified as “any other weapon.”⁴ Many of these weapons were considered particularly lethal and often the

¹ Len Savage, “Why the ATF’s Firearm Testing Procedures are Scientifically Invalid,” (Summer 2005), 6 pp. Available at [<http://www.jpfo.org/savage2.htm>].

² 73rd Congress, P.L. 474, June 26, 1934, 48 Stat. 1236. The NFA is codified at 26 USC, Chapter 53, §5801 et seq.

³ P.L. 90-618; 82 Stat. 1213; codified at 18 USC, Chapter 44, §921 et seq.

⁴ The term “any other weapon” was derived from the NFA definition of firearm, which included firearms “capable of being concealed on the person” that were not pistols or revolvers. Such firearms
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weapons of choice of “gangsters” during the prohibition era (1919-1933). As part of the Internal Revenue Code, the NFA levies taxes on all aspects of the manufacture, importation, and distribution of such firearms, and requires that these firearms be registered by their importers, manufacturers, or makers and that transfers of registered firearms be approved in advance by the Attorney General. The NFA requires the Attorney General to maintain a registry of all NFA firearms in the United States that were not under the control of the United States.⁵

Title II of the Gun Control Act (GCA) of 1968 revised and re-codified the NFA to: (1) expand its scope of coverage to include destructive devices (bombs, incendiary devices, and weapons with a bore of greater than one-half inch); (2) include a definition for “any other weapon” to more precisely include certain smooth bore, short-barreled handguns; and (3) redefine the term “firearm” to exclude antique firearms or any device (except machine guns and destructive devices) that were determined to be “collectors’ items” by reason of their date of manufacture, value, design, and other characteristics and would not likely be used as a weapon. Under this provision, the Attorney General is authorized to reclassify certain firearms as “collectors items,” removing them from the NFA. The GCA also increased penalties for violating the NFA. In addition, the GCA included an amnesty provision that addressed a Supreme Court ruling regarding the registration of NFA weapons and the likelihood that individuals holding unregistered NFA firearms would incriminate themselves by registering such weapons.⁶

In 1986, Congress passed the Firearms Owners’ Protection Act (FOPA) and amended the GCA to prohibit the possession of machine guns that were not legally possessed or available for transfer prior to enactment (May 19, 1986).⁷ While FOPA included exceptions for any department or agency of the United States, a state, or political subdivision thereof, it effectively froze the number of machine guns that were legally available to the general public in the United States.

Under current law, it is a felony to receive, possess, or transfer an unregistered NFA firearm. Such offenses are punishable by a fine of up to \$250,000, imprisonment for up to 10 years, and forfeiture of the firearm and any vessel, vehicle, or aircraft used to conceal or

⁴ (...continued)

included gadget-guns that were disguised as pens, walking canes, belt buckles, knives, and flashlights. In 1968, Congress amended the NFA to more precisely define “any other weapon,” and to include certain smooth-bore, short-barreled firearms under that definition.

⁵ Effective Jan. 23, 2003, the responsibility for administering the NFA shifted to the Attorney General, as Congress transferred ATF from Treasury to Justice under the Homeland Security Act. See P.L. 107-296, 116 Stat. 2135.

⁶ *Haynes v. United States*, 88 S.Ct. 722, 390 U.S. 85, 19 L.Ed.2d 923 (1968). To overcome the constitutional defect, the amnesty provision (P.L. 90-618; 82 Stat. 1235, §207(b)) authorizes the Attorney General (previously, the Secretary of the Treasury) to conduct amnesties for no longer than 90 days to allow persons in possession of NFA weapons to register them without penalty. Such an amnesty was conducted officially from Nov. 2 through Dec. 1, 1968.

⁷ P.L. 99-308, §102(9); 100 Stat. 452; codified at 18 USC §922(o)(1).

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convey the firearm.⁸ Consequently, the validity of ATF determinations regarding NFA provisions is a serious concern for many members of the NFA community.⁹

ATF Firearms Technology Branch

ATF's Firearms Technology Branch conducts tests to determine whether firearms are subject to the NFA, among other things. Critics of the ATF maintain that there ought to be written or documented testing procedures or protocols for NFA-related firearms testing and evaluation.¹⁰ ATF officials, meanwhile, have informed the Congressional Research Service that there is no "firearms testing procedures manual."¹¹ Instead, firearms enforcement officers at ATF's Firearms Technology Branch (FTB) follow certain (until recently) unwritten, but basic safety protocols and testing procedures. They also rely on a very large reference library of actual firearms and technical manuals that reflects the wide variety of firearms that are available in legal and illegal markets.

ATF firearms enforcement officers test-fire and disassemble firearms sent to them from various parties for classification. Such firearms are often evidence in criminal cases involving NFA violations, such as the illegal possession of a machine gun.¹² In other cases, firearms samples are sent in by licensed firearm manufactures and others for evaluation.

In regard to machine guns, for example, a firearms enforcement officer would test-fire the firearm at the FTB range. If more than one round was fired with a single pull of the trigger, the firearm would likely be considered a machine gun. In most cases, the firearm would be disassembled to compare it with sample firearms in the FTB gun library to verify whether it had either been modified to fire in a fully automatic mode or had been originally configured to fire that way. In either case, possessing an unregistered machine gun is a violation of the NFA. Following the evaluation, the firearms enforcement officer documents his findings in writing and with photographs.

In criminal cases, the firearms enforcement officer would testify in court as to his classification of the firearm. In the case of a test for a gun manufacturer or other interested party to evaluate a newly produced firearm or firearm part (such as, a receiver or upper), ATF would issue a classification letter that provides background information and the justifications for the officer's determination as to whether the item is subject to the NFA.

⁸ 26 USC §§5861(d) and (j); 26 USC §5872; 49 USC §§781-788.

⁹ For the most comprehensive discussion of NFA legal issues, see Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice*, (2001), pp. 6-1 to 6-72.

¹⁰ Len Savage, "Why the ATF's Firearm Testing Procedures are Scientifically Invalid," (Summer 2005), 6 pp. Available at [<http://www.jpfo.org/savage2.htm>].

¹¹ ATF Legislative Specialist Christine Smith told the author this in July 2005, as did ATF Inspector Liza Jones in September 2005. On October 18, 2005, Inspector Jones reiterated ATF's official position on this matter in a phone call.

¹² The FTB handles what is generally considered technical determinations regarding the NFA. The FTB does not handle firearms forensics questions. ATF has a separate Firearms Forensics Laboratory that handles firearms forensic matters, such as ballistic imaging, serial number restoration, or muzzle-to-target distance determinations.

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Regulations, Rulings, Classifications, and Certifications

It is significant to note that ATF regulations, rulings, and classifications are based upon the agency's best interpretation of current law and reported case law. As such, ATF determinations are subject to the Administrative Procedures Act and can be challenged in federal court, after all other administrative remedies have been exhausted.¹³

ATF has compiled both departmental and agency firearms-related rulings, regulations, and statutes in the *Federal Firearms Regulations Reference Guide* (otherwise known as the "Green Book").¹⁴ More recent rulings are published on ATF's website (www.atf.gov). Upon written request, the FTB also issues classification (determination) letters regarding technical aspects of the NFA and other applicable federal firearms laws. According to ATF, the agency has over 300 cubic feet of classification letters stored in file cabinets.¹⁵

In general, these classification letters, once released to the original requestor, are not available to the public, although they can be obtained by outside interested parties through the Freedom of Information Act (FOIA). More often than not, they are redacted to protect the privacy of individuals and proprietary information. As there is no central index of these letters, however, some observers note that it is not a certainty that an individual who files a FOIA request for previously issued classification letters on a technical aspect of the NFA will receive every relevant letter issued by the ATF. In other words, the ATF is the final arbitrator as to what classification letters are relevant to a particular FOIA request.

One attorney who specializes in firearms law has cautioned his readers that ATF classification (determination) letters "may not be consistent over time."¹⁶ Such inconsistencies are not necessarily "arbitrary and capricious," however, as ATF's position on the technical application of the NFA or other firearms-related statutes may shift over time as the result of reasoned analysis or evolving technological standards.¹⁷

As to ATF certifications made in court during criminal proceedings, ATF's findings can be and have been on occasion successfully challenged by outside firearms experts. Indeed, the firearms law specialist, cited above, suggested that attorneys defending individuals charged with NFA-related violations should make sure that they have acquired all ATF rulings and technical records regarding a particular type of alleged firearm during discovery or

¹³ 5 U.S.C. § 702 establishes that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In general, classification letters are not subject to the notice and comment rule making provisions of the Administrative Procedures Act, as they are considered informal adjudications.

¹⁴ U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Federal Firearms Regulations Reference Guide*, ATF P 5300.4 (01-00), (Washington, 2000), 69 pp. Available at [http://www.atf.gov/pub/fire-explo_pub/2000_ref.htm].

¹⁵ This information was given to the author by Sterling Nixon, ATF's FTB Chief on October 12, 2005.

¹⁶ Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice*, (2001), p. 6-72.

¹⁷ For related court case and precedent, see *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983).

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through the FOIA process.¹⁸ He also recommended that the defense attorney consult with firearms experts familiar with ATF positions regarding NFA firearms.¹⁹

Recent Allegations About ATF Testing Procedures

The adequacy of ATF firearm testing procedures was raised in an article written by Len Savage and distributed on the Internet.²⁰ In this article, Mr. Savage asserted that ATF's firearms testing procedures were "scientifically invalid."²¹ He based his assertion on a court case (U.S. v. Glover, No. 3:03-CR-69 (D. N.C.)), in which an individual was charged with violating the NFA for possessing an unregistered machine gun.²² In this case, the government contended that a rifle in the defendant's possession was fully automatic, but according to Mr. Savage, the ATF firearms enforcement officer who testified against the defendant never disassembled the rifle.²³ Upon subsequent examinations during grand jury proceedings, the firearm was found to be a semiautomatic rifle, which was malfunctioning ("slam-firing") in that it fired more than one cartridge per pull of the trigger.²⁴ Consequently, the presiding judge dismissed this case (with prejudice).²⁵ Allegations related to the Glover case, and perhaps other cases, have prompted a Member of Congress to introduce legislation addressing the issue of ATF firearms testing.

Fairness in Firearm Testing Act (H.R. 1603)

In the 109th Congress, Representative Phil Gingrey has introduced the Fairness in Firearm Testing Act (H.R. 1603) on April 13, 2005. This bill would require ATF to make video recordings of the testing and examination of firearms and ammunition, and would prohibit the agency from editing or erasing any such recording. It would also require ATF to make available a copy of the recording on a digital video disc to: (1) a person who requests and claims an ownership interest in such item; and (2) to a defendant in a criminal proceeding involving such item. In regard to criminal proceedings, the bill would provide that a firearm or ammunition shall not be admissible as evidence unless: (1) the ATF has provided the defendant with a digital video recording of the relevant firearms test in question; or (2) defendant has waived in writing his right to the digital video recording of such test.

H.R. 1603 was referred to the Committee on the Judiciary and to the Committee on Ways and Means on April 13, 2005. It was referred to the Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security on May 10, 2005. No further action has been reported on this bill.

¹⁸ Ibid., p. 6-45.

¹⁹ Ibid., p. 6-72.

²⁰ Len Savage, "Why the ATF's Firearm Testing Procedures are Scientifically Invalid," (Summer 2005), 6 pp. Available at [<http://www.jpfo.org/savage2.htm>].

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.