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BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (BATFE): REFORMING LICENSING AND ENFORCEMENT AUTHORITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MARCH 28, 2006

Serial No. 109–114

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

26–765 PDF WASHINGTON : 2006

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CONTENTS

MARCH 28, 2006

OPENING STATEMENT

	Page
The Honorable Howard Coble, a Representative in Congress from the State of North Carolina, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security	1
The Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	2

WITNESSES

Ms. Audrey Stucko, Deputy Assistant Director, Enforcement Programs and Services, Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE)	
Oral Testimony	4
Prepared Statement	7
Mr. Richard E. Gardiner, Attorney at Law, Fairfax, Virginia	
Oral Testimony	15
Prepared Statement	17
Lt. Michael James Lara, Tucson Police Department, Tucson, Arizona	
Oral Testimony	20
Prepared Statement	22
Ms. M. Kristen Rand, Legislative Director, Violence Policy Center	
Oral Testimony	30
Prepared Statement	31

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security	53
Prepared Statement of Bruce R. Barany, Co-Owner, The General Store, Spokane, Washington	54
Prepared Statement of James. M. Faircloth, Owner, Jim's Pawn Shop, Inc., Fayetteville, North Carolina	58
Prepared Statement of Stanton Myerson, Owner, Lou's of Upper Darby, Inc., Upper Darby, Pennsylvania	61

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (BATFE): REFORMING LICENSING AND ENFORCEMENT AUTHORITIES

TUESDAY, MARCH 28, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:04 p.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. We are scheduled to have four witnesses on this panel and I see two have been seated—and a third—and a fourth. Very well.

Today, ladies and gentlemen, the Subcommittee on Crime, Terrorism, and Homeland Security will receive testimony from two panels of witnesses. The first panel has been called to assist the Subcommittee's oversight on the civil and criminal enforcement efforts of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, popularly known as ATF. Specifically, this panel will review ATF enforcement authorities and the possibility of civil penalties for minor violations; ATF administrative process and procedures for licensing of Federal firearm licensees, FFLs, to ensure that licensees are provided adequate and expeditious due process; and ATF allocation of enforcement resources.

This review will help Members of this Subcommittee to determine if legislation is in fact needed to assist the ATF in accomplishing its mission and to ensure adequate and timely due process for FFLs. The ATF must be able to regulate FFLs in a fair and expeditious manner. Unfortunately, the ATF authorities limit potential penalties to only revocation or no penalty at all, which leaves little or no middle ground for fair resolution.

This could also drain the ATF's limited enforcement resources, which may be better utilized by focusing on FFLs posing the greatest threat of harm to the public. ATF should not waste valuable resources worrying about ministerial errors committed by licensees; rather, they should focus, it seems to me, on those licensees who willfully violate the laws and regulations and pose a threat of significant harm.

Similarly, when it comes to criminal prosecutions of individuals, ATF and the Department of Justice should focus on those truly bad

actors. Prosecutions that are aimed at only padding case statistics—and I am not suggesting that that is done. But if it is done, it not only wastes Government resources, but could tarnish law-abiding citizens' reputation as well and cause individuals severe financial distress.

We look forward to our witnesses' testimony today and hope that it can shed some light on how Congress can do its part to ensure, one, that individual civil liberties are respected, and two, that the ATF has effective tools at its disposal to fulfill its mission of investigating violations of our Nation's gun laws.

I am pleased to welcome our panelists and I am now equally pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I am pleased to join you in convening this hearing on ATF licensing enforcement authority. We have held two previous hearings on ATF gun law enforcement activities; this hearing focuses primarily on ATF gun licensing, issuing, and regulations, procedures, and practices.

I believe there are several areas in the current licensing regulations that we can all agree need some change. Adding fine and suspension authority to the current revocation-only authority for licensing violations is one such area that I think there will be general agreement.

I believe that in according due process, the appearance of impartiality is an important component. While there is nothing to establish that ATF-appointed employees cannot serve as fair and impartial hearing officers, I believe that the appearance of impartiality is served by having those officers from a different agency or appointed source.

I am open to the suggestion that ATF could benefit from a study of its operations and resource allocations and from general operational guidelines relative to enforcement activities, as with other agencies under the Department of Justice.

Whatever we may do legislatively, Mr. Chairman, I believe that our goal should be to improve the operational effectiveness as well as the fairness of the ATF's gun law enforcement and licensing responsibilities. That Agency has an important function and responsibility with respect to the enforcement of our Federal gun laws, and while we all want to ensure that these functions and responsibilities are applied in a manner that promotes and supports the respective citizens they affect, we don't want to do it at the expense of diligent and effective law enforcement.

So, Mr. Chairman, I know our staffs are working on legislation that will reform some of ATF's current enforcement procedures and options. It is my hope that we will come up with legislation that reflects improvements on what we can agree on a bipartisan basis and also those that both gun control as well as gun rights advocates can support.

I look forward to the testimony by witnesses relative to these issues and look forward to working with you toward the end of bipartisan, generally supported improvements on ATF gun enforcement operations.

Thank you, Mr. Chairman.

Chairman COBLE. I thank the gentleman from Virginia.

Let me at this time recognize our witnesses. We have four distinguished witnesses with us today. Our first witness is Audrey Stucko, Deputy Assistant Director for Enforcement Programs and Services at the Bureau of Alcohol, Tobacco, and Firearms. Ms. Stucko began her career with ATF in 1977, working in a variety of positions in New York City, Philadelphia, Baltimore, and Washington, D.C. Prior to her current position, she worked as Chief of the Firearms and Explosives Services Division and as the Chief of Staff for the Enforcement Programs and Services Directorate.

Our second witness is Mr. Richard Gardiner, attorney at law in Fairfax, Virginia. Mr. Gardiner is a sole practitioner with emphasis on criminal defense in Federal and State courts. He has briefed and argued criminal and civil appeals before multiple circuits of the United States courts of appeals and the United States Supreme Court. Mr. Gardiner has also previously testified before the Congress and the Virginia General Assembly. He earned his bachelor's degree from Union College and was awarded his J.D. degree from George Mason University—as an aside, Mr. Gardiner, an institution unknown to virtually no American today.

Our third witness is Lieutenant Michael Lara, Commander at the Tucson Police Department. Lieutenant Lara started his law enforcement career in 1977 as a State-certified police officer in Crown Point, Indiana, and moved up the ranks to become a detective and ultimately a supervisor. He previously taught criminal justice classes at the Pima Community College. Lieutenant Lara received a bachelor's degree from Indiana University, a master's degree from Norther Arizona University, and is a graduate of the FBI National Academy in Quantico, Virginia.

Our final witness today is Kristen Rand, Legislative Director for the Violence Policy Center. In this capacity, Ms. Rand is responsible for the VPC's policymaker education efforts and directs the organization's research on Federal firearms policy. Previously she worked as counsel to the Washington office of Consumer's Union. Ms. Rand is the author of numerous studies on gun policy, including Gun Shows in America. She earned her undergraduate degree from the University of Southern California and her J.D. was awarded to her from the George Washington University.

Good to have you all with us. It is our custom to swear in all witnesses, so if you all would please stand and raise your right hands.

[Witnesses sworn.]

Chairman COBLE. Let the record show that each of the witnesses answered in the affirmative. You may be seated.

Good to have you all with us. Now, as we have previously advised you, we are not completely inflexible but we do operate under the 5-minute rule. So if you all could confine your statements on or about 5 minutes, we—Mr. Scott and I do not become violent, but if you go too far astray, I may tap the gavel. Your warning sign will be when the amber light appears on the panel before you. That is your indicator that you have a minute remaining.

Ms. Stucko, why don't you start us off.

TESTIMONY OF AUDREY STUCKO, DEPUTY ASSISTANT DIRECTOR, ENFORCEMENT PROGRAMS AND SERVICES, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (BATFE)

Ms. STUCKO. Good afternoon, Chairman Coble, Congressman Scott, and Members of the Subcommittee. Thank you for the opportunity to appear before you to discuss the significant contributions of the Bureau of Alcohol, Tobacco, Firearms, and Explosives relating to our administration of the licensing provisions of the Gun Control Act of 1968.

I appreciate this opportunity to outline for the Subcommittee ATF's regulation of Federal firearms licensees, which I will refer to as FFLs. I will begin with the application and license issuance process and then address voluntary FFL compliance, which is ATF's primary goal.

All applicants for a license submit an application to ATF's licensing center in Atlanta. The applicant and any corporate officers, directors, or managers are subject to National Instant Check System background checks, and assuming none are felons or otherwise fall within a category of prohibited persons, the application is then sent to the ATF field division where the applicant is located.

At that point, an Industry Operations Investigator, an IOI, conducts an interview to verify the identity of the applicant, verify that the applicant has a permanent location that will be available to ATF's statutorily authorized inspections, and to review with the application the laws and regulations governing the operation of the applicant's firearms business. This process benefits applicants by providing them with information to assist them in operating their business in compliance with the law.

Once the field is satisfied that the applicant meets all the statutory criteria for licensing, the licensing center is then directed to issue the license. ATF attempts to complete the license process within 60 days, but the time period can be extended when complications arise in connection with criminal background checks or necessary zoning variances.

ATF continues to educate licensees concerning their obligations under the law through the issuance of open letters that are mailed to FFLs and posted on the ATF Web site, through quarterly FFL newsletters and by attending industry conferences and trade shows to answer questions from licensees. We also provide FFLs with our Federal Firearms Regulations Reference Guide, which includes the laws, regulations, and other information about conducting a firearms business under Federal law.

With certain exceptions, the Gun Control Act limits ATF to one annual compliance inspection of an FFL's firearms records and inventory each year. There are currently over 105,000 Federal firearms licensees, and ATF conducts approximately 4,000 inspections of firearms licensees each year. The purpose of the inspection program is to determine whether an FFL is complying with the law and regulations, and if not, to obtain voluntary compliance. Voluntary compliance is encouraged by educating FFLs about the requirements of the law and regulations and by issuing Notices of Violation that outline the specific violations of the law and regulations that were discovered during the inspection. IOIs go over the

violations outlined in the notice that the FFLs to make sure they understand how their business operations fell short and how to avoid violations in the future.

In the event the violations are willful, the licensee may receive a warning letter from the field division or may be asked to attend a warning conference to discuss the violation and how it may be avoided in the future. If the violations are willful and it is determined that voluntary compliance is unlikely or that continued operation of the FFL poses a threat to public safety, the field division may recommend that the license be revoked.

Under the Gun Control Act, license revocation may be undertaken for any willful violation of the law or regulations. The term "willful" is not defined in the law, but Federal courts have consistently defined it to mean that the FFL knew of the legal requirements at issue and disregarded or was plainly indifferent to these requirements. This interpretation of willfulness is consistent with that applied in administrative proceedings held by a number of other Federal agencies.

ATF has issued guidance to all field divisions outlining the types of violations that are suitable for warning letters, warning conferences, and revocation of licenses. The guidelines were issued to ensure consistency in administering the statute throughout the United States.

A review of Agency data indicates that ATF typically revokes fewer than 100 licenses per year on the basis of willful violations of the law and regulations. This represents 2.5 percent of all licensees inspected annually and about .1 percent of the total FFL population. In the vast majority of these revocations, ATF has already provided the licensee with an opportunity to comply and previously issued Reports of Violation or warning letters or held warning conferences. Moreover, in almost all cases, the Federal district courts have upheld the Government's actions. For example, in the past 5 years, 33 of 36 Federal district courts reviewing ATF's license denial or revocation decisions have upheld those determinations. Further, only one of the three adverse decisions has resulted in an award of fees and costs against the Government.

Again, our goals are voluntary compliance and educating FFLs about their obligations under the law and encouraging business practices that bring about this result. ATF typically resorts to license revocation only when it is clear that voluntary compliance is unlikely and that continued operation of the firearms business is not in the public's interest.

Currently, license revocation hearings are held before ATF hearing officers and the proceedings are informal, where the rules of evidence and other judicial rules do not strictly apply. Because the hearings are informal, FFLs often choose to represent themselves. After the hearing, the Director of Industry Operations, who oversees a Division's regulatory operations, issues a final decision. During the administrative proceedings, the FFL may continue to operate the firearms business. Thereafter, the FFL can proceed to Federal district court for review of the revocation or denial decision.

Because a firearms license revocation is subject to trial *de novo*, a legal term which means the court can allow new testimony and evidence that was not considered at the administrative hearing,

ATF revocation proceedings do not meet the formal adjudication requirements of the Administrative Procedures Act. This makes the proceedings more amenable to unrepresented FFLs who have chosen to proceed without counsel. ATF hearing officers are trained to accommodate the unrepresented licensees.

We hope this information will assist the Committee in its oversight efforts, and I look forward to answering any questions that the Subcommittee may have.

[The prepared statement of Ms. Stucko follows:]

PREPARED STATEMENT OF AUDREY STUCKO

Department of Justice

STATEMENT

OF

AUDREY STUCKO
DEPUTY ASSISTANT DIRECTOR
ENFORCEMENT PROGRAMS AND SERVICES
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

BEFORE THE

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

"OVERSIGHT OF THE BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES:
REFORMING LICENSING AND ENFORCEMENT AUTHORITIES"

PRESENTED ON

MARCH 28, 2006

Good morning Chairman Coble, Congressman Scott and members of the Subcommittee. Thank you for the opportunity to appear before you to discuss the significant contributions of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) relating to our administration of the licensing provisions of the Gun Control Act of 1968.

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law. Once the field is satisfied that the applicant meets all the statutory criteria for licensing, the licensing center is then directed to issue the license. ATF's attempts to complete the licensing process within 60 days, but that time period can be extended when complications arise in connection with criminal background checks or the necessary zoning variances. ATF continues to educate licensees concerning their obligations under the law through the issuance of Open Letters that are mailed to FFLs and posted on the ATF website, through quarterly FFL Newsletters, and by attending industry conferences and trade shows to answer questions from licensees. We also provide FFLs with our Federal Firearms Regulations Reference Guide, which includes the laws, regulations, and other information about conducting a firearms business under Federal law.

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represents 2.5% of all licensees inspected annually and 0.1% of the total FFL population. In the vast majority of these revocations, ATF has already provided the licensee with an opportunity to comply and previously issued Reports of Violation or warning letters, or held warning conferences. Moreover, in almost all cases the Federal district courts have upheld the Government's actions. For example, in the past 5 years, 33 of the 36 Federal district courts reviewing ATF's license denial or revocation decisions have upheld those determinations. Further, only one of the three adverse decisions has resulted in an award of fees and costs against the Government.

Again, our goals are voluntary compliance and educating FFLs about their obligations under the law and encouraging business practices that bring about this result. ATF typically resorts to license revocation only when it is clear that voluntary compliance is unlikely and that continued operation of the firearms business is not in the public interest.

Currently, license revocation hearings are held before ATF hearing officers, and the proceedings are informal, where the Rules of Evidence and other judicial rules do not strictly apply. Because the hearings are informal, FFLs often choose to represent themselves. After the hearing, the Director of Industry Operations, who oversees a Division's regulatory operations, issues a final decision. During the administrative proceedings, the FFL may continue to operate the firearms

business. Thereafter, the FFL can proceed to Federal District Court for review of the revocation or denial decision. Because a firearms license revocation is subject to trial *de novo*, a legal term which means the court can allow new testimony and evidence that was not considered at the administrative hearing, ATF revocation proceedings need not meet the formal adjudication requirements of the Administrative Procedure Act. Thus, ATF's revocation hearings are not required to be held before an Administrative Law Judge and need not follow formal rules of procedure. This makes the proceedings more amenable to unrepresented FFLs, who often choose to proceed without counsel. ATF hearing officers are trained to accommodate unrepresented licensees and make sure that the proceedings give them a meaningful opportunity to participate in the hearing. ATF's legal staff agree that the informal hearing procedures comply with due process and best serve the interests of licensees and the general public.

ATF has discretion under the regulations on whether to allow a licensee to continue to operate while the appeal process is ongoing in Federal court, which may take several years. The standard for allowing continued operation is whether "justice so requires," and ATF implements this provision to allow an FFL to continue operating unless their business practices pose a threat to public safety. For example, when the violations at issue involve significant numbers of

unaccounted for firearms or FFL participation in straw sales, ATF may decide that the FFL should not operate during the appeal process.

Further, new entities lawfully acquiring a firearms business – including a business from a person whose license was revoked for committing willful violations of the law – start their businesses with a clean compliance history. ATF will verify that the persons acquiring the firearms business are not merely fronting for the predecessor, and, providing that successors otherwise meet the statutory requirements, ATF will issue a license to the successor. In the event the new licensee includes responsible persons or hires employees from the previous business owner who were aware of or participated in prior violations, those violations may be the basis for a determination of willfulness if the successor later commits the same violations. ATF is frequently asked for guidance on such transactions and on how to go about liquidating firearms inventories after revocation.

Our enforcement efforts in inspecting FFLs are a valuable tool in protecting our communities. The commodities in which these businesses are dealing in are not ordinary products—they are firearms that can be used in crime as well as for lawful sporting purposes. If ever there was a business where extraordinary diligence is required, it is a firearms business. This principle has been recognized repeatedly by Federal courts in upholding ATF's revocation of licenses. Again,

our goal is voluntary compliance, and we believe we are using our resources and the available sanctions appropriately to bring about that result.

We hope this information will assist the Subcommittee in its oversight efforts. I look forward to answering any questions the Subcommittee may have.

Mr. COBLE. Thank you, Ms. Stucko.
Mr. Gardiner.

TESTIMONY OF RICHARD GARDINER, ATTORNEY AT LAW, FAIRFAX, VIRGINIA

Mr. GARDINER. Thank you, Mr. Chairman.

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the need to reform the laws under which the ATF operates. There are four major problems with the current process for civil enforcement against Federal licensees which I would like to address.

The first, and most critical, is the fact, as Ms. Stucko mentioned, that there is no legal—there is no definition in the statute of the term "willful." And as I will explain later, the interpretation that the Government pushes for in these cases is quite contrary to what Congress had in mind, if one reviews the legislative history of the Firearms Owners Protection Act of 1986.

Second, the ATF tends to focus, or has a significant focus on trivial, immaterial violations which are unrelated to public safety, and they impose unreasonable standards of perfection which are simply not humanly achievable.

And lastly, the hearing process that Ms. Stucko mentioned is heavily stacked against the licensee and makes those proceedings essentially sham proceedings, which make them essentially worthless.

As I mentioned, first of all, ATF treats virtually all errors in dealers' records, no matter how few or how minor, as willful violations if the dealer—if they can show the dealer had been warned prior to what the law requires. Now, of course, all dealers know what the law is, so that is not very difficult to demonstrate.

Let me give you a couple of examples. One is in a number of cases that I have been involved in, the purchaser of the firearm put on the form where he had to answer Yes or No, he put a Y or an N. ATF used that as a basis for revoking the person's license. Now, that wasn't the sole reason, but it was—it is in a number of occasions a basis for revoking the license, because the customer put down Y or N and not the word Yes or No.

Another example is that ATF, the form requires that in addition to the city and State and Zip Code of the person's place of residence that he also put the county of residence. ATF has revoked licenses or sought revocation of licenses on many instances based on the failure of the licensee to put down the county, even though the residence address was crystal clear from the city, State, and Zip Code which was put down.

As I mentioned, this is clearly not what Congress had in mind when it enacted the "willful" standard in 1986. As the Senate Judiciary Committee report stated, the purpose of adding "willfully" to the license revocation procedure is—and I quote—"to ensure that licenses are not revoked for inadvertent errors or technical mistakes." But that is precisely what ATF is doing. It argues that that standard should not apply. And unfortunately, as Ms. Stucko indicated, a number of courts have agreed with ATF that inadvertent errors and technical mistakes are a basis for revocation and has upheld revocations for exactly that reason.

In one case, in fact, ATF actually argued to the judge that Congress's addition of the word "willfully" to the statute was—and again I quote—"without practical significance." And because several courts have agreed with ATF's interpretation, that definition of "willful" is the one that ATF has continued to apply.

Congress should make clear that "willful" means that the licensee had an intent to violate the law and did so with that intent.

Second of all, ATF revokes licenses for violations which could not possibly create any danger to public safety. For example, in one case in Illinois which was just ruled on by the Seventh Circuit, the individual had not listed on the Form 4473 the type of ID presented. But in each instance the customer's driver's license number, the State firearms identification card number, or both, were recorded on another document which was attached to the Form 4473. Yes, the information should have been transposed over to the Form 4473, but there was nothing there that would have prevented an effective background check, nor would it have prevented in any way the tracing of firearms.

The last point I would make is with regard to the license revocation process which Ms. Stucko mentioned. It is a license process that is stacked against the licensee. In 1986, after passage of the Firearms Owners Protection Act, ATF actually repealed the regulation which required hearings to be held by an administrative law judge, and since then, hearings are held by an ATF employee with no legal training, usually an investigator from another field division or even retired ATF employees. It would be an understatement to say that these hearing officers are deferential to the Agency. They are the Agency.

I would give one example that I think really summarizes that. At one of the hearings that I participated in, I had made a motion to dismiss the proceeding on some procedural grounds. The hearing officer turned to the attorney representing ATF in this hearing and asked, What should I do? The ATF counsel instructed him to deny the motion, and that is what the hearing officer did.

This creates the—along the lines of Representative Scott's comments—at least the impression that these hearings are not being conducted in a fair and neutral manner. We would urge—I would urge that Congress reimpose by statute the requirement that administrative law judges conduct these hearings so that the licensees—so that there is not only the actuality of fairness, but the impression of fairness.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gardiner follows:]

PREPARED STATEMENT OF RICHARD E. GARDINER

TESTIMONY OF RICHARD E. GARDINER
Attorney at Law
Fairfax, Virginia

House Judiciary Committee
Subcommittee on Crime, Terrorism and Homeland Security
March 28, 2006

Mr. Chairman and members of the subcommittee, thank you for the opportunity to testify today on the need to reform the laws under which the Bureau of Alcohol, Tobacco, Firearms & Explosives operates.

I am an attorney in private practice. For over 25 years, I have focused on firearms laws. I have represented individual citizens in firearms related matters and I have represented firearms dealers, manufacturers, and importers throughout the United States in civil and criminal proceedings. Unfortunately, several of those businesses have been the subject of license revocation actions by ATF. That is the area I will focus on today.

There are four major problems with the current process for civil enforcement against federal firearms licensees. Those problems are:

* Undefined legal standards, especially the absence of a definition of "willful";

* A focus on trivial, immaterial violations unrelated to public safety;

* Imposition of unreasonable standards of perfection; and

* A hearing and appeal process that is heavily stacked against the licensee.

First, ATF treats virtually all errors in dealers' records, no matter how few or how minor, as "willful" violations if the dealer knows what he is required to do. As ATF presumes that all dealers know the requirements of the law, this means that any error, no matter how minor, may result in license revocation. For example, one of my clients received a revocation notice that listed "violations" such as not denying a transfer to customers who answered "Y" or "N" instead of writing out "Yes" or "No" on firearms transaction forms. In several other cases, the revocation notice was based in part on the fact that the transaction form did not include, as part of the residence address, the purchaser's county of residence, although the city or town, and state (with zip code), were stated.

ATF also looks far into the past to support the charge of "willfulness," often referring to inspections of the same licensee 10 or even 20 years earlier.

None of this is what the Congress had in mind when it enacted the "willful" standard in 1986; as the Senate Judiciary Committee Report stated, the purpose of adding "willfully" to the license revocation procedure "is to ensure that licenses are not revoked for inadvertent errors or technical mistakes." S.Rep. No. 98-583 at 88. But ATF continues to argue against this

interpretation. In fact, in one case, ATF argued to the court that Congress' addition of the word "willfully" to the license revocation statute was "without practical significance." Because several courts have adopted ATF's interpretation, the term has become meaningless as it applies to civil violations. Congress should make clear, by enacting a definition of "willfully," that "willful" means that the licensee intended to break the law, just as the Supreme Court has said that it does for criminal violations. Congress should also make clear that a reasonable statute of limitations applies to license revocation actions.

Second, ATF treats these supposedly "willful" violations as worthy of revocation proceedings, even when they could not possibly create any danger to public safety. For example, one of my clients in Illinois was accused of "willful" violations for not listing on his transaction records the type of ID the customer presented. In each instance, though, the customer's driver's license number, state firearms identification card number, or both, were recorded and easily identifiable either on the transaction record or on an attached receipt. None of these violations prevented an effective background check on the buyer from being conducted, nor would it have prevented tracing any of the firearms.

Combining this draconian approach with the low standard of "willfulness" leads to enforcement actions against licensees who have made every good faith effort to comply with the law. In the Illinois case I mentioned, ATF revoked my client's license due to 12 supposedly incomplete blocks on the forms, relating to 19 specific items of information. In the time period ATF was inspecting, that dealer and his customers completed 880 transaction forms, with approximately 34,320 blocks to be completed or approximately 51,240 items of information to be provided. Based on those numbers, ATF did not dispute that the records were 99.96% complete and accurate. But when the dealer's appeal was argued in the 7th Circuit, the attorney for the United States stated (and I quote) "No errors are permissible." Justice Kennedy's observation about judges and lawyers applies equally to licensees:

> We all tend toward myopia when looking for our own errors. Every lawyer and every judge can recite examples of documents that they wrote, checked, and doublechecked, but that still contained glaring errors.

Groh v. Ramirez, 540 U.S. 551, 568 (2004)(Kennedy, J., dissenting).

That demand for perfection is an impossible burden for anyone, including federal firearms licensees, to meet. If ATF continues to enforce the law in the current manner, few licensees will remain in business. Congress should make clear that licensees should only face serious penalties for serious, material violations that could result in sales to prohibited persons or that could impede legitimate investigations.

Finally, the appeal process is stacked against licensees. Unlike similar proceedings in many other agencies, a licensee who challenges an ATF revocation does not receive a hearing before an administrative law judge because, in response to Congress' reforms of the Gun Control Act in 1986, ATF actually repealed the regulation requiring hearings to be conducted by an administrative law judge. Instead, the hearing is conducted by an ATF employee with no legal training — usually an investigator from another field division, or even a retired ATF employee, who has been involved the same type of revocations. It would be an understatement to say the

hearing officers are deferential to the agency; indeed, they are the agency. At one hearing, I moved to dismiss the proceedings, and the hearing officer turned to the attorney representing ATF and asked, "What should I do?" ATF counsel instructed the hearing officer to deny my motion, and he did.

This lack of a neutral adjudicator is exacerbated by the fact that the final decision on revocation is made not by the hearing officer but by the local director of industry operations, the very person who initiated the revocation. And, if that was not bad enough, the counsel for the director of industry operations, who advices the director of industry operations on the final decision is the counsel who presented the case to the hearing officer on behalf of the director of industry operations.

In addition to the lack of a neutral adjudicator, licensees do not always get copies of the information ATF intends to use against them unless they request it in advance and the ATF counsel feels like giving it to them.

Congress should require administrative law judges to preside at all these hearings, and ensure that licensees have the opportunity to prepare for the hearing. Congress should also require an automatic stay of an ATF decision until there has been a final, unappealable judicial decision.

I thank the subcommittee for its time, and will be happy to answer any questions.

Mr. COBLE. Thank you, Mr. Gardiner.

Lieutenant Lara.

Mr. LARA. Thank you, Chairman Coble, Representative Scott.

Mr. COBLE. Excuse me just a moment. We have been joined by the distinguished gentleman from Florida, Mr. Feeney. And I thought I saw the Ranking Member for the Full Committee here, Mr. Conyers, from Michigan. Perhaps he will return.

Lieutenant, proceed.

TESTIMONY OF MICHAEL JAMES LARA, TUCSON POLICE DEPARTMENT, TUCSON, ARIZONA

Mr. LARA. Thank you, Chairman Coble, Representative Scott, and Members of the Subcommittee for allowing me to tell you my story. I am Michael Lara from Tucson, Arizona. Currently I am a lieutenant on the Tucson Police Department and have been a law enforcement officer for 28 years.

In 2003, I had prospects of growth and promotion. At that point, I was a patrol commander, when my life was altered after ATF charged me with making a false statement on a firearms purchase form. In 2002, I had purchased a handgun and then gave it to a friend. My friend was a law-abiding citizen and had been authorized by the Arizona State Police to carry a concealed weapon.

On the firearms purchase form, it asked whether or not I was the actual buyer of the firearm. After reading the definition of what an actual buyer was, I answered yes on the form. At one point, ATF had cause to review the purchase of the firearm. The firearm had not been used in any criminal situation, and yet my department conducted an internal investigation and later found me innocent of any wrongdoings.

During this internal investigation, I gave one statement, the focus of which was not the purchase form that I had filled out. After the internal investigation, I was left on administrative leave while ATF continued their investigation, which took 7 months. Three months later, ATF indicted me, claiming that I had not purchased a firearm as a gift, but that I had actually bought it for my friend using her money. This type of purchase is often referred to as a straw purchase, and the law prohibits a straw purchase to prevent prohibited possessors from obtaining guns.

After charges were filed, I was fired from the Tucson Police Department. Three weeks later, I had a hearing in a U.S. district court, at which point I was physically arrested and subjected to prisoner processing before being released on my own recognizance. Three months after my arrest, my case went to trial. At the end of the trial, the jury deliberated less than 1 hour before finding me innocent of the charges.

Two more months went by before I was reinstated on my job, but on the first day back to work I was given a 40-hour suspension without pay for criminal activity because I had been indicted.

Throughout this ordeal, I held the belief that once ATF does a proper investigation, the case would go away. This did not happen. ATF based their case on the only statement taken from me by Internal Affairs. ATF failed to interview any of the witnesses to the firearm purchase and transfer.

This was a life-altering event, and it was absolutely devastating. I am the father of four sons and have sole custody of them. So at the time of the prosecution, it had an immediate and direct impact on them as well. It is not hard to imagine how tough it was for them to face their friends and teachers, especially when the newspapers kept running headlines about a cop gone bad.

Financially, I lost over $216,000 in savings and earnings. I had to refinance my home to help pay the bills and the attorney fees. The prosecution also had a direct impact on my retirement. I endured two great fears throughout this entire process. Number one, if I were found guilty, I would lose custody of my sons. Number two, the prospect of prison life is not a good one for an ex-officer.

And finally, my professional career is shot. It has now been 3 years after the event and I am still a patrol lieutenant. It was made clear to me that when I returned to work, I would never see any advancement.

It just makes no sense to me why ATF would try to prosecute someone who had dedicated themselves to serving our community and who clearly did nothing wrong. It was obvious that there was no intent of wrongdoing. And even if their perception of the facts were accurate, at best I would have been guilty of filling out an ambiguous form incorrectly.

This prosecution should not have occurred, and it certainly, as I said, was life-altering.

I would like to thank the Chair. Thank you.

[The prepared statement of Mr. Lara follows:]

PREPARED STATEMENT OF MICHAEL JAMES LARA

House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Legislative and Oversight Hearing March 28, 2006
Written Statement submitted by Michael James Lara

Statement submitted by Michael James Lara March 28, 2006

Short Biography:

I am Michael James Lara (09-09-1944) from Tucson, Arizona. I am 61 years old, and currently work for the Tucson Police Department. I have worked for the Tucson Police Department (TPD) for the last 23 years. While with them, I have held the ranks of; Patrol Officer, Detective, Sergeant, and for the last 12 years I have been a Commander [Lieutenant].

Synopsis:

In 2002 I had purchased a handgun from a licensed dealer, and then gave it to a friend as a gift. When this came to the attention of Alcohol Tobacco and Firearms (ATF), they believed that it did not rise to the gift criteria, thus ATF believed I had violated the law when I filled out the required federal purchase form. I was indicted, arrested and tried for this event.

In 2003, while a Tucson Police Commander, I was put on administrative leave, indicted on federal firearms charges, terminated from the police department, put on trial, found not guilty, and reinstated with a 40-hour suspension for criminal activity.

The felony charges that initiated this chain of events were unfounded and caused my family and I extreme personal and financial hardship.

Time Line of Events:

On November 21, 2002, I had purchased a handgun from a lawfully licensed dealer and gave it to a friend.

On March 25, 2003 the gun and proof of purchase was found in my friend's bedroom after a search warrant was served on the home. The bedroom and the gun were not involved in any criminal activity. However, that evening I was placed on leave from the Tucson Police Department. That leave lasted for three months at which point I was terminated.

On June 11, 2003, after an ATF investigation, I was indicted on a federal weapons charge which stated that I had made a false statement on a firearms purchasing form. According to Harriet Bernick, a spokeswoman for the U.S. Attorney's office in Phoenix, Arizona, in November [2002], I had purchased a firearm, and on the required federal transaction record I had stated that I was the buyer [of the hand gun] when in fact it was acquired for someone else. Ms. Bernick further

told the press that when I had purchased the handgun, I had made a false statement on a form with respect to the information required by federal law. That is, ATF believed I lied when I said I was purchasing the gun for myself.

The charges brought against me carried a maximum penalty of five years in prison and $250, 000 fine.

On June 13, 2003, I was notified that I was terminated from the Tucson Police Department, due to the federal indictment.

On June 26, 2003, I appeared in U.S. District Court [Tucson, Arizona] before magistrate Judge Nancy Fiora. After the hearing, I was physically arrested, subjected to prisoner processing, and then released on my own recognizance.

September 17, 2003, began a three-day trial before U.S. District Judge Cindy K. Jorgenson. Assistant U.S. Attorney Lynnette C. Kimmins was prosecuting. On the third day, the jury deliberated for less than an hour before announcing a not guilty verdict.

Details…

Purchase of the handgun details:
The process of purchasing the handgun really started some months before the physical purchase took place. A friend of mine was an apartment manager in a particularly tough part of town. She had openly been working with law enforcement in an effort to rid the area of criminal activity. Her life had been threatened numerous times because of her efforts. She decided that she needed a handgun for self-protection. She was qualified to legally carry a gun in the State of Arizona. She came to me for advice on what type of handgun would be best for her needs. I turned to a friend of mine who was a Department Armor and discussed it with him. We agreed on a weapon of choice and I gave her some written material on the handgun. In addition, I suggested that she take a Concealed Weapons Course and get certified to carry a concealed weapon. I felt that it would make sure she was safe with the gun and that she would learn the laws concerning its use. In this state, one does not need a permit to carry a weapon, she would need a permit only if she chose to carry it concealed.

My friend did as I suggested. She took the course and was certified through the Arizona State Police to carry a concealed weapon. As she was doing this, she asked me to hold some money for her that she intended to use for the purchase of a handgun. She believed that if she kept the money she would just spend it on her children. It was her intent to give me some money to add to her savings until she had enough to make the purchase. Months went by and she was unable to add anymore money to her savings. After a while, I realized that she was never going be able to make the purchase. I started to put

some money into the "pot", over several paydays, until there was enough money to make the purchase. The total cost of the gun turned out to be $514.

During this "saving period", I spoke with the Department Armor several times and had asked him what the law was concerning the purchase of a weapon. He made it clear to me that I could purchase a gun for myself or for someone else, but only if it were as a gift.

Finally, in November of 2002 I had enough money to buy the gun. It was my intent to simply give her the money and she would then buy the gun. However, after several failed attempts to meet her at the dealers, I decided that I would buy the gun and give it to her as a gift. On November 21, 2002 I purchased a handgun in my name from a licensed dealer and later gave it to her. My 21-year-old son was with me when I made the purchase. About four days later, I met my friend at the dealer's shop and gun range, where I made sure that she knew how to use and clean the gun safely.

I felt responsible for the safe use of the gun. So, when I gave the hand gun to my friend it was with a clear understanding that, at any point, should she decide to not keep the gun, she would give it back to me, and I would give her the $200 she had originally put in. She agreed to this, and in fact, I currently have possession of the gun.

When I went in to buy the gun, I started to fill out the required federal transaction form. I read and reread question (12.a) which asked:

> *Are you the actual buyer of the firearm(s) listed on this form?* ***Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearms(s) to you.*** *(See important Notice 1 for actual buyer definition and examples.)*
>
> **Importante Notice 1: reads in part…**
>
> *...you are the actual buyer if you are purchasing the firearm for yourself...*
> *...You are also the actual buyer if you are acquiring the firearm as a legitimate gift for a third party.*

After reading the Important Notice 1 that was on the backside of this form and answered [YES] in box 12.a.

There was no doubt in my mind that I was the buyer of the gun and that I met the criteria of giving the gun as a gift since I had put the majority of the money in with no understanding or expectation of ever getting my money back.

At the bottom of the form there is a warning narrative that clearly tells the gun buyer that if they answered "yes" to question 12.a and they are not the actual buyer, they are committing a crime that is punishable as a felony.

Handgun confiscated by the Tucson Police:

On March 25, 2003, a Tucson Police Department Officer has occasion to be at my friend's home on a non-criminal matter. The Officer smelled marijuana, and got a search warrant for the home. A search found a large quantity of marijuana in the bedroom of a 19-year-old nephew, who had just recently been allowed to stay there. As it turned out,

the nephew waited for my friend, and her live-in boyfriend to leave for work that day. At which point he brought the marijuana into the home with the intent of packaging and then removing it before they returned.

A search of the home found the handgun and indicia of purchase in my friend's bedroom. The handgun was not involved in anyway with the marijuana cash, other than it was in the home. There was not indication that anyone else living in the home had any involvement in the marijuana stash. The owner of the home was located and charged, as was her son. Both were released and charges dropped after a few days of investigation.

On the day of the marijuana find, I was directed to come to the main station, and to report to Internal Affairs. I was told what had happened, and they took a statement from me with the focus being on any possible knowledge or involvement I may have with the marijuana. Of course, I had none. This was the only statement I made about the marijuana or the gun to any investigator, TPD or ATF.

I was immediately put on administrative leave until further notice, which turned out to be three months, at which point I was terminated and facing a trial.

After a thorough investigation into the marijuana case, I was notified that I was cleared of any involvement, but that I my case had been turned over to ATF for investigation of any wrongdoing related to the handgun purchase. Later, I found out through my Attorney, Michael Piccarreta, that the Tucson Office reviewing my case would not make a decision and that the case was sent to Phoenix for review. After a while, I was told that the Phoenix had decided to press charges against me and they had sent the case back to Tucson, to handle.

Grand Jury Indictment and Termination:
On June 11, 2003 I was indicted on a federal weapons charge.
On June 13, 2003 I was notified that I was terminated from the Tucson Police Department.

Hearing in District Court:
On June 26, 2003, a hearing held in U. S. District Court, Tucson, Arizona.

Trial
Beginning on September 17, 2003, a three-day trial was held. At the conclusion of the trial I was found not guilty.

Reinstatement of Job:
On November 05, 2003 [one and a half months after trial], I was reinstated to my job at the same rank as when I was terminated. The official record was changed from termination to Administrative Leave without pay, to cover the time from indictment to

rehire. However, when I returned to work I was served with a 40-hour of suspension without pay for Criminal Activity.

Concerns about the ATF Investigation:
I am at a loss as to why the ATF decided to prosecute on this case. From the beginning, my attorney assured me that once ATF does a thorough investigation, they would see that this case does not warrant a criminal charge. However, for some reason, there was a very limited investigation at best.

Once I saw that ATF was looking at the purchase of the handgun, I had my attorney, Michael Piccarretta make contact with The Tucson Police and offer to give them or ATF a second interview so that they could ask specific questions about the purchase of the gun. That offer was refused. In addition, I had my attorney let the Tucson Police Department know that I was will to take a polygraph test so that they could see that what I had said was the truth. That offer was also refused. We also contacted my department and reminded them that my adult son was a material witness to the money I had saved toward the purchase of the gun and was present during the actual purchase of the gun. Perhaps they might want to talk to him. That offer was also refused.

ATF Investigators never asked to interview me [which I was more than willing to do]. They never interviewed my friend, who was the receiver of the gun, and they never tried to interview my son in this case. My son was a witness at the trial and they never asked to depose.

The only investigation work done by ATF, that I was aware of, was when they talked to some coworkers of my friend. They based their entire case on the purchase form and the one original statement I gave to Internal Affairs the night the handgun was seized.

Damage Caused by this Attempted Prosecution:
It is difficult to determine the amount of damage done in a case like this. The damage comes from so many directions. For the purpose of this paper, I will concentrate on three areas of concerns; **financial, personal, and professional**.

Financial

$36.000	In Attorney Fees.
$30,910	In Immediate loss of wages .
$30,000	Loss of interested from depleted saving account (projected over 25 years.
$ 2,250	Cash paid to keep medical coverage during termination.
$40, 000	In raises lost by not getting promoted over next eight years.
$15,000	Lost on refinance of house required to pay bills.
$62,500	Min. loss due do not getting promotion over 25 years of retirement.
$216,660	Estimated total loss.

The financial loss was far-reaching. It took part of my retirement money {about $26,000) that I had been saving in a deferred account. This money was used to help pay attorney fees. My retirement will be based on my best three years of earnings. As a public safety retirement goes I would receive about 50% of that figure. So, by not being able to be promoted, this will effect what I would have received during retirement. If we assume that I would live 25 years past retirement and I loss $2,500 per year that would come to $62,500 lost over a lifetime.

Personal

It is almost impossible to explain how an event like this impacts on one's life. I am the father of four sons. I have sole custody of them, and we have a tight bond. When this event started, it became newsworthy. This ordeal last some seven months. This gave me numerous opportunities to have individual and group discussions with my sons about what was going on, and how we, as a family, wanted to stand up to it.

All my son's friends and several teachers had quizzed them about he arrest and the charges facing their father. It was hard for them to go to school and hold their heads up when the newspaper were printing headlines such as " COP faces federal charge in gun buy", and " Officer sacked after weapons charge".

However, there was one positive side to this ordeal. It gave me the opportunity to face one of the most trying times of my life. It also gave me the chance to illustrate to my sons how to face the most adverse events without bitterness and anger. Admittedly, it was a daily struggle to put on a happy face and then reassure them that all be well in the end. It definitely hurts a parent to see their children worrying about whether they will be losing their home or just how this event is going to impact their future.

The personal trauma stressed my emotions to the limits. Seven months is a long time to worry about whether you will be going to jail on a false charge. It is also a long time to be worrying about what is going to happen to your children if you get convicted.

Perhaps one of the elements of this kind of a charge that I had not anticipated was the isolation that comes with being charged. As a police officer, I received instructions from my department that I was to talk to no one about the case. This is standard procedure for our department, and as a result, no one from the department came by to see how I was doing and, not one even called me on the phone. There was no way to get information about the case from Internal Affairs either; so for seven months I had little idea of what was going on.

The humiliation and dread that ones experiences when being arrested and placed into a cell is devastating, especially, when one has spent over 25 years working for the justice system. In addition, there was also the fear that should I be locked

up, what quality of life would I be facing. It is well known that convicted police officers do not fair well behind bars.

As a teacher of the Justice System at a local community college, I had the opportunity to tell my students about my experience, my charges and my arrest. This is, however, quite difficult.

Professional ... Career Opportunities:
Prior to this case, it was reasonable to assume that I could look forward to some advancement in my career. I had been a police officer with the Tucson Police Department for 20 years. I had two degrees and was a graduate of the FBI National Academy. Before my career was over I had hoped to make the rank of Captain or possibly Assistant Chief. There was the possibility of moving on to another department as a Chief some day. However, with this charge placed against me, and with my personnel record showing that I was suspended for criminal activity while a police officer, there is no future growth for me in law enforcement. It was made very clear to me upon my return to duty that I could look forward to no advancement or even a growth assignment at TPD.

Instead of retiring at 60 or so, I will now be working for another 10 years as a patrol commander in order to make up for the financial loss suffered during my termination. In addition, the time that I was designated as being on leave without pay, [about 1.5 months] is considered as "dead time". In other words, that time was removed from my continuous time toward retirement, and I will have to work that much longer to make the time up.

I remain baffled at the way ATF pursued their case against me. It was clear that there was no violation of the law. I have yet to find an attorney outside of ATF that understands what their intent was. According to ATF's interpretation of 12.a, in order to qualify as a gift purchase the buyer would have to put in 100% of the cost of the gun. This would preclude every father-son [parent-child] team in America from pooling their money to buy that first gun together. Further, it was explained to me that the intent of the law (12.a) is to prevent a person from

buying a gun for another person [also know as a 'straw purchase"] who is a prohibited possessor and cannot lawfully buy a gun for themselves. This clearly was not the situation in my case.

To end on a positive note…I am still working, and as long as my health holds out, I will still be able to take care of my sons and assist them in getting a good start on their own lives. The Tucson Police Department may not have been perfect in how they handled this situation, but in the end, they reinstated me. This will allow me to accomplish the most important mission in my life, and that is to help create four morally sound young men so that they can make a positive contribution to our society.

Mr. COBLE. I thank you, Lieutenant, for being with us.
Ms. Rand.

TESTIMONY OF M. KRISTEN RAND, LEGISLATIVE DIRECTOR, VIOLENCE POLICY CENTER

Ms. RAND. Thank you, Mr. Chairman, Members of the Subcommittee.

I think I would just like to provide a little context here in that the Violence Policy Center has done a lot of research looking at gun dealer licensing over the decades. In 1992 we released a study showing that there were more gun dealers in America than gas stations. There were 245,000 Type I FFL dealers, meaning the basic license to deal in firearms; there were 210,000 gas stations in America at that time.

And not surprisingly, with so many gun dealers out there, they were a primary source for illegally trafficked weapons. They were a primary source for straw purchases. They were virtually unmanageable by ATF. There were simply too many dealers, far too few agents, far too few inspections. And we documented this situation in many research studies and worked with the Clinton administration to impose new administrative rules and to pass new regulations. The regulations at the time were so lax that two dogs were licensed as gun dealers by ATF in 1990. That was a really bad situation.

We have come a long way since then, through the tougher enforcement of existing law, higher license fees, better background checks. The universe of gun dealers, Type I dealers in America today, is around 55,000—far more manageable for ATF. And we think that is going in the right direction.

We would also add that, with respect to administrative procedures, it is really important to understand that the administrative process for persons who are in a revocation proceeding with ATF, it really is skewed toward the defendant in that they have the right to a *de novo* review, meaning a court can look at new evidence. That is not required under the Administrative Procedures Act. We certainly want to see that there is at least an appearance—that the hearing officer is objective. That is important. But the current process does meet the Administrative Procedures Act, and we would want to have this issue studied very carefully before making changes in that regard.

I think the most important thing is we have to remember what it was like when we had more gun dealers than gas stations. I know it was extremely frustrating for law enforcement, extremely frustrating for ATF and other enforcement agencies, and we don't want to take steps backwards.

So that I think some of the things that have been discussed here, the Violence Policy Center would certainly support: civil penalties, as long as they are meaningful, so that they are not just a slap on the wrist and that they are carefully gauged to be adequate for the violation; suspension authority for ATF, we have long supported that. I think that is a great idea, that revocation certainly shouldn't be the only option for the Agency. But again, the Agency really doesn't revoke that many licenses. They never have.

So we think we just need to be very careful here, but I think, from the discussion today, there certainly are measures that we can all agree on to improve the process. But I would caution that we shouldn't legislate based on anecdote. Mr. Lara's situation sounds extremely unpleasant, but we just should be careful not to just legislate based on one anecdote and go back to the days when America had more gun dealers than gas stations.

Thank you.

[The prepared statement of Ms. Rand follows:]

PREPARED STATEMENT OF M. KRISTEN RAND

Good afternoon Mr. Chairman, I am Kristen Rand, legislative director for the Violence Policy Center (VPC). The Violence Policy Center is a non-profit think tank that works to reduce firearm-related death and injury through research, policy development, and advocacy. The VPC is pleased to have the opportunity to address issues related to Federal Firearms License holders (FFLs).

In 1992, the Violence Policy Center released a landmark study of federally licensed firearms dealers. *More Gun Dealers than Gas Stations* detailed the ease with which a Federal Firearms License could be obtained at the time. The basic three-year gun dealer's license could be had for $30.00 and completion of a simple form. Applicants were barely scrutinized by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The result was more than 245,000 Type I gun dealers in America—far more than the 210,000 gas stations then operating in the United States. The system for issuing licenses was so lax that in 1990 ATF approved applications for two dogs, the *Washington Post* revealed.

But the sheer volume of licensees was only the tip of the iceberg. Unlike ordinary citizens, licensees are: able to buy and sell firearms in interstate commerce and receive firearms via common carrier; able to purchase firearms from wholesalers at discount and in unlimited quantities; and, are exempt from waiting periods, background checks, licensing, or registration requirements. In our 1992 study, the VPC documented how FFLs were abusing these privileges to funnel large numbers of guns into the illegal market. One of the most egregious abuses was a Virginia dealer who was supplying guns to criminals in the District of Columbia:

> Donald Percival was an FFL who owned two pawn shops in Virginia: Ted's Coin, Guns, Pawnbrokers, and Ted's Coins, Guns, and Machineguns. In 1988 ATF became aware that Percival and his employees were selling firearms such as MAC-11 assault pistols, 9mm pistols, and inexpensive small-caliber handguns to underage DC residents, including drug dealers. Percival warned buyers that he was required to notify ATF of multiple purchases, something one drug dealer described as "information he needed in his business." The drug dealer said Percival had stated that all he required was a Virginia driver's license or someone with a Virginia driver's license to act as the straw man and "you can come down and get a gun." When a Ted's salesman was asked how to get rid of the serial number on a gun, he replied, "You have to pour acid over the serial number to get it off." Percival also sold numerous guns in straw purchase sales to undercover ATF agents. In 1989, Percival was convicted by a jury of conspiracy and related felony federal firearms violations.

At the time, ATF identified straw purchasing[1] as the preferred method by which weapons were obtained by criminals in the District of Columbia.

This is just one of the myriad examples of dealers abusing the privileges of the license. One infamous example was David Taylor, a Bronx, New York, man who was ultimately indicted by authorities in 1987 in a plot to resell in New York City at least 1,000 handguns he ordered using his FFL and had shipped to his apartment via UPS. The Bronx District Attorney called the case "the most incredible violation of this city's gun laws that I or anyone else has ever heard of." Moreover, because there was no requirement at that time that FFLs comply with state and local licensing laws, Taylor was able to circumvent New York's tough gun laws, prompting the Bronx D.A. to label the federal law "disgraceful."

The Clinton Administration reacted to this "disgraceful" situation by taking a number of steps to crack down on license abuse. They began aggressively enforcing

[1] A straw purchase is a transaction in which persons who can legally purchase guns acquire them for persons prohibited from gun possession by reason of a felony conviction or other disqualifier.

the statutory requirement that dealers be "engaged in the business" of selling firearms.[2] Although federal law had long contained the requirement that dealers meet a certain level of business activity in order to be eligible for a license, this provision had never been enforced. In addition, the thoroughness of the background check was improved with a new requirement that applicants submit fingerprints and photographs, and more applicants were inspected. These administrative changes were augmented by new statutory requirements in 1994, including an increase in the fee for a three-year license from $30.00 to $200.00. Applicants were also required for the first time to certify that their business was not prohibited by state or local law and that the business would comply with all relevant state and local laws within 30 days of license approval.

In addition to these positive changes at the federal level, many localities—including Detroit and New York—began enforcing zoning and other local ordinances prohibiting dealers from operating from residential premises.

The result of these policy changes has been a gradual, yet drastic, reduction in the number of licensees. The Violence Policy Center recently released a study with the most recent numbers. Today there are 54,902 Type I FFLs. Only five states—Alaska, Idaho, Montana, Oregon, and Wyoming—still have more gun dealers than gas stations (a copy of the study, *An Analysis of the Decline in Gun Dealers: 1994 to 2005,* http://www.vpc.org/studies/dealers.pdf, has been submitted for inclusion in the record).

The Government Accountability Office (GOA) analyzed the reasons for the decline and found that the policy changes made during the 1990s resulted in fewer applications being submitted and fewer renewals of existing licenses. The GAO also found that the number of licenses that were abandoned or withdrawn far exceeded the number of licenses denied or revoked.[3] In fact, ATF very seldom revokes a license. The VPC's 1992 study documented 15 years of license revocations, from 1975 through 1990. In 1990, nine licenses were revoked. In 1975, ATF revoked seven licenses. The high during the 15-year period was during the Reagan Administration in 1986 when a total of 27 licenses were revoked. The low revocation numbers continue today. In 2002, ATF revoked 30 licenses and the number of revocations increased to 54 in 2003.

The low revocation numbers may be partially the result of a process that provides every advantage to the licensee. Typically, after ATF finds violations, the dealer is warned and provided with the opportunity to remedy any violations long before revocation proceedings are initiated. Moreover, revocation is the agency's only option to punish recalcitrant dealers. The agency has no general authority to suspend a license or to assess civil penalties.

In addition, licensees are afforded generous appeal rights. Licensees have a statutory right to a hearing and may even request that a license revocation be stayed during the hearing process. Although some licensees have complained that the hearing officer is an ATF employee, this is entirely consistent with the Administrative Procedure Act (APA),[4] the federal statute governing administrative adjudications.

A licensee who does not prevail at the agency hearing has the right to appeal the revocation decision to a United States district court and is entitled to *de novo* review of his claim.[5] The *de novo* standard of review was added to the judicial review provision in 1986 by the National Rifle Association-backed Firearms Owners' Protection Act (FOPA), legislation designed primarily to loosen restrictions on federal firearms licensees. The FOPA also added language that entitles a licensee to submit evidence in court that was not considered at the agency level hearing.

Another FOPA addition provides a huge advantage to a licensee who is the subject of criminal charges where the proceedings are terminated or the defendant is acquitted. This provision prohibits the Attorney General from revoking a license based "in whole or in part on the facts which form the basis of such criminal charges."[6] The Reagan Department of the Treasury opposed this change to the statute pointing out, "Because the burden of proof on the Government is less stringent in civil actions, a civil license denial or revocation proceeding should not depend on

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[2] See 18 U.S.C. § 921 (a)(21) and § 923 ((d)(1)(E).

[3] GAO Report, *Federal Firearms Licensees: Various Factors Have Contributed to the Decline in the Number of Dealers,* (March 1996).

[4] 5 U.S.C. § 556 (b) provides that the agency, one or more members of the body which comprises the agency, or one or more administrative law judges shall preside at the taking of evidence.

[5] *De novo* review ensures that the claim will be considered anew, the same as if it had not been heard before and as if no decision previously had been rendered. *Ness v. Commissioner,* 954 F.2d 1495, 1497 (9th Cir. 1992). Such review is 'independent.' *Premier v. Fuentes,* 880 F.2d 1096, 1102 (9th Cir. 1989).

[6] 18 U.S.C. § 923(f)(4).

the outcome of the criminal case. No constitutional rights are violated by the civil proceeding when the applicant or licensee was previously acquitted of criminal charges."[7]

There are several benefits to the significant decline in the number of FFLs. A smaller universe of dealers makes it easier for ATF to focus its inspections. ATF has also noted that fewer dealers makes it easier to complete firearm trace requests since it reduces the number of dealers who cannot be located because they have changed residences.

The decline in the number of licensed gun dealers coincided with a very significant drop in overall gun death in America. Gun-related deaths peaked in 1993 at 39,595. In 2003, the latest year for which complete figures are available, there were 30,136 gun-related deaths.

But the fact that FFLs are difficult to revoke and licensees' rights are so well protected may help explain why straw purchases continue to contribute significantly to illegal gun trafficking, despite the decline in the number of licensed dealers. In its June 2000 report detailing 1,530 criminal gun trafficking investigations, ATF identified straw purchasing as "the most common channel in trafficking investigations"—with straw purchasing involved in almost half of all trafficking investigations. The report also found that because licensed dealers have access to large numbers of firearms, corrupt FFLs diverted the highest volume of guns into the illegal market. Moreover, where FFLs cooperated with straw purchasers and straw-purchasing rings, the average number of firearms trafficked per investigation was 114.8 compared to 32.8 in cases where there was no FFL involvement.

Recent straw purchasing prosecutions include the following:

- In 2006, seven people were indicted in Philadelphia for using straw purchases to obtain guns, including an AK-47 assault rifle, they used in robberies at banks and fast-food restaurants and to shoot at a police officer.[8]
- In 2005, two FFLs in Fairmont, West Virginia, were indicted for facilitating straw purchases at two pawn shops.[9]
- In 2004, two FFLs in Manassas, Virginia, were arrested for facilitating straw purchases of various types of guns over a two-year period. One of the dealers was recorded telling an informant that he knew that what he was doing was wrong.[10]
- In 2004, a woman pleaded guilty to purchasing two semiautomatic handguns—one of which was used in the slaying of a three-year-old child—for felons from Don's Guns in Indianapolis. The woman was arrested as part of a federal gun trafficking investigation that involved the straw purchase of at least 28 guns from Don's Guns.[11]
- In 2003, the owner of a Pennsylvania gun shop and his father were sentenced to prison terms for supplying guns to a straw purchaser.[12]

The steep decline in licensed gun dealers in America is one of the unsung victories in the effort to prevent firearm-related violence and protect public safety. The gun lobby is desperate to reverse this decline. They have, in fact, succeeded in inserting a provision in ATF's annual spending bills for fiscal years 2005 and 2006 that prohibits ATF from refusing to grant or renew a dealer's license for "lack of business activity." In order to continue in the right direction, ATF needs more resources to monitor dealers' operations and identify the "bad apple" dealers whose licenses should be revoked. The agency needs more flexibility to punish corrupt dealers, such as the authority to suspend licenses and assess civil penalties.

Let's not go back to the days when America had more gun dealers than gas stations.

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[7] 132 Cong. Rec. H507 (1986) (statement of Rep. Hughes).

[8] Vernon Clark, "Seven charged in gun-buying, robbery spree: Weapons obtained illegally through 'straw buyers,' were used to rob banks, local and U.S. officials said," *The Philadelphia Inquirer,* February 9, 2006, p. B03.

[9] *Associated Press,* "Five charged in illegal gun sales," March 2, 2005, State and Regional.

[10] Josh White and Jerry Markon, "2 Manassas Gun Dealers Charged; Weapons Sold to Felons and for Use in Crimes, ATF Says," *Washington Post,* March 18, 2004, Prince William Extra, T02.

[11] Fred Kelly, "Woman admits buying 2 pistols on behalf of felons," *The Indianapolis Star,* March 11, 2004, p. 3B.

[12] *Associated Press,* "News in brief from western Pennsylvania," March 22, 2003, State and Regional.

ATTACHMENT

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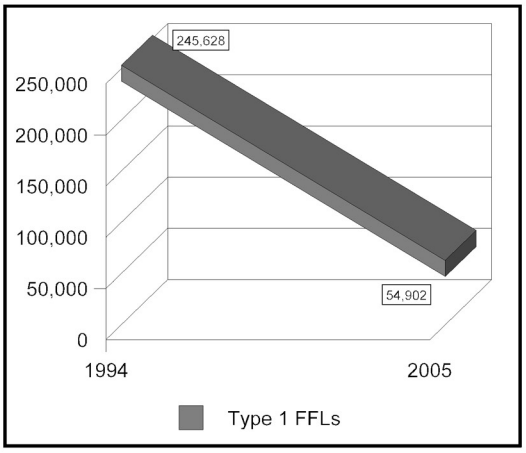
An Analysis of the Decline in Gun Dealers: 1994 to 2005

America once had more gun dealers than gas stations, now only five states do.



The Violence Policy Center (VPC) is a national non-profit educational organization that conducts research and public education on violence in America and provides information and analysis to policymakers, journalists, advocates, and the general public. This report was funded in part with the support of The Herb Block Foundation, The David Bohnett Foundation, The Joyce Foundation, and, The John D. and Catherine T. MacArthur Foundation. Past studies released by the VPC include:

- *When Men Murder Women: An Analysis of 2003 Homicide Data* (September 2005)
- *Clear and Present Danger: National Security Experts Warn About the Danger of Unrestricted Sales of 50 Caliber Anti-Armor Sniper Rifles to Civilians* (July 2005)
- *Safe At Home: How D.C.'s Gun Laws Save Children's Lives* (July 2005)
- *When Men Murder Women: An Analysis of 2002 Homicide Data* (September 2004)
- *The Threat Posed to Helicopters by 50 Caliber Anti-Armor Sniper Rifles* (August 2004)
- *United States of Assault Weapons: Gunmakers Evading the Federal Assault Weapons Ban* (July 2004)
- *Vest Buster: The .500 Smith & Wesson Magnum—The Gun Industry's Latest Challenge to Law Enforcement Body Armor* (June 2004)
- *A Further Examination of Data Contained in the Study "On Target" Regarding Effects of the 1994 Federal Assault Weapons Ban* (April 2004)
- *Really Big Guns: Even Bigger Lies* (March 2004)
- *Illinois: Land of Post-Ban Assault Weapons* (March 2004)
- *Bullet Hoses—Semiautomatic Assault Weapons: What Are They? What's So Bad About Them?* (May 2003)
- *"Officer Down"—Assault Weapons and the War on Law Enforcement* (May 2003)
- *Firearms Production in America 2002 Edition—A Listing of Firearm Manufacturers in America with Production Histories Broken Out by Firearm Type and Caliber* (March 2003)
- *"Just Like Bird Hunting"—The Threat to Civil Aviation from 50 Caliber Sniper Rifles* (January 2003)
- *Sitting Ducks—The Threat to the Chemical and Refinery Industry from 50 Caliber Sniper Rifles* (August 2002)
- *License to Kill IV: More Guns, More Crime* (June 2002)
- *American Roulette: The Untold Story of Murder-Suicide in the United States* (April 2002)
- *The U.S. Gun Industry and Others Unknown—Evidence Debunking the Gun Industry's Claim that Osama bin Laden Got His 50 Caliber Sniper Rifles from the U.S. Afghan-Aid Program* (February 2002)
- *"A .22 for Christmas"—How the Gun Industry Designs and Markets Firearms for Children and Youth* (December 2001)
- *Kids in the Line of Fire: Children, Handguns, and Homicide* (November 2001)
- *Unintended Consequences: Pro-Handgun Experts Prove That Handguns Are a Dangerous Choice For Self-Defense* (November 2001)
- *Voting from the Rooftops: How the Gun Industry Armed Osama bin Laden, Other Foreign and Domestic Terrorists, and Common Criminals with 50 Caliber Sniper Rifles* (October 2001)
- *Shot Full of Holes: Deconstructing John Ashcroft's Second Amendment* (July 2001)
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- *Where'd They Get Their Guns?—An Analysis of the Firearms Used in High-Profile Shootings, 1963 to 2001* (April 2001)
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- *Handgun Licensing and Registration: What it Can and Cannot Do* (September 2000)
- *Pocket Rockets: The Gun Industry's Sale of Increased Killing Power* (July 2000)
- *Guns For Felons: How the NRA Works to Rearm Criminals* (March 2000)
- *One Shot, One Kill: Civilian Sales of Military Sniper Rifles* (May 1999)
- *Cease Fire: A Comprehensive Strategy to Reduce Firearms Violence* (Revised, October 1997)

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Introduction

The number of federally licensed gun dealers in the United States has dropped dramatically as a result of licensing reforms implemented during the Clinton Administration, combined with changes to the law made by the 1993 Brady Handgun Violence Prevention Act (the "Brady Law") and the 1994 Violent Crime Control and Law Enforcement Act. From 1994 to 2005, the number of Type 1 Federal Firearms License (FFL) holders has fallen 78 percent as a result of the enforcement of little-known provisions of these laws.

This report examines the causes and importance of the drop in gun dealers, reveals new efforts by the gun lobby to reverse the decline, and offers recommendations to build on the successful efforts of the last decade to keep the number of gun dealers at a manageable level.

1992: When There Were More Gun Dealers Than Gas Stations

In 1992 the Violence Policy Center (VPC) released *More Gun Dealers Than Gas Stations*, a study which focused national attention on abuses of the law by FFL holders as well as lack of enforcement by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The study revealed that, at the time of its release, the number of Americans who possessed a Type 1 FFL—the basic federal license required to sell guns in America—outnumbered gas stations 245,000 to 210,000.[1]

The Gun Control Act of 1968 (GCA) established the current federal licensing system for manufacturers, importers, wholesalers, and dealers of firearms. Under the GCA, any person "engaged in the business" of making or selling firearms must be licensed by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives.[a]

From 1968 to 1993, almost anyone who was not prohibited from owning firearms and had a location from which they intended to conduct business—including their own home or office—could obtain an FFL. For $30 an applicant could receive the three-year license, allowing him to ship, transport, and receive firearms in interstate commerce and engage in retail sales. License holders are exempt from many of the restrictions on the sale and transfer of firearms that private citizens are subject to under the GCA. Unlike ordinary citizens, licensees are:

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[a] "Engaged in the business" is generally defined as devoting "time, attention, and labor to 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 firearms...." 18 USC §921(a)(21). Until recent Congressional action, a person desiring a license had to conduct this level of activity to be eligible to maintain and renew a license.

- able to buy and sell firearms in interstate commerce and receive firearms via common carrier;
- able to purchase firearms from wholesalers at discount and in unlimited quantities; and,
- exempt from waiting periods, background checks, licensing, or registration requirements.

In 1986, Congress passed the National Rifle Association-backed Firearms Owners' Protection Act, which further eased regulation of licensees and placed restrictions on ATF's ability to weed out illegitimate gun dealers.[b]

FFLs are a key source of guns for illegal gun traffickers and a reduction in ATF's ability to monitor FFLs would certainly result in an increase in illicit firearm availability.

"Kitchen-Table" Dealers

As a result of the lax requirements for becoming a firearms dealer, the number of Type 1 FFLs ballooned from 146,429 in 1975 to 245,000 in 1992. The vast majority of these license holders were what is known as "kitchen-table" dealers—individuals who conduct business out of their homes and offices and do not operate actual gun or sporting goods stores. And while many "kitchen-table" dealers obtained the license merely to enjoy lower prices and evade the perceived "red tape" associated with gun purchase laws, others recognized it as a dramatic loophole in federal law that could be easily exploited to facilitate high-volume criminal gun trafficking.

Licensing Reforms

In response to the widespread abuse of FFLs and at the urging of the Violence Policy Center, the Clinton administration began strictly enforcing the requirement that license holders be "engaged in the business" of selling firearms as required by the statute. In addition, the Brady Law implemented many of the recommendations the VPC laid out in its 1992 study, including: increasing the dealer licensing fee from $10 per year to $200 for the first three years and $90 for each additional three-year

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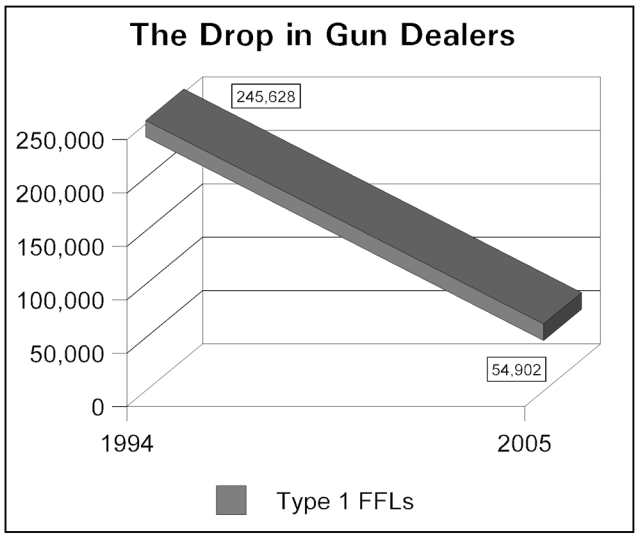
[b] The Firearms Owners' Protection Act curtailed ATF enforcement activity by: limiting ATF to one unannounced dealer inspection per year; reducing recordkeeping requirements for dealers selling guns from their "personal" collections; and, lessening criminal penalties for dealer violations.

period; and, requiring applicants to certify that they have notified the Chief Law Enforcement Officer (CLEO) of their locality of their intent to apply for a license. In 1994, the Violent Crime Control and Law Enforcement Act codified a requirement first implemented by the Clinton Administration requiring applicants to submit photographs and fingerprints, as well as a requirement that they certify that their businesses complied with all state and local laws.[2]

In the three years following these administrative and statutory changes, the eligibility of existing FFL holders was reviewed as licensees applied for renewal of their licenses. FFL holders were required to submit new application packages with photographs and fingerprints, and ATF worked with state and local authorities to verify that licensees were in compliance with local laws and had notified their local CLEO.[3]

The Drop in Gun Dealers

As a result of the new licensing requirements and ATF's increased scrutiny of licensees, the number of Type 1 FFLs in the United States has dropped 78 percent—from 245,628 in 1994 to 54,902 in 2005. California leads the nation with a 17,710 reduction in dealers, declining from 20,148 to 2,438—a decrease of 88 percent.[4]



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Number and Percent Decrease of Type 1 FFLs, 1994 to 2005

State	Total of Type 1 Federal Firearms License (FFL) Holders, 1994	Total of Type 1 Federal Firearms License (FFL) Holders, 2003	Total of Type 1 Federal Firearms License (FFL) Holders, 2005	Number Decrease From 1994 to 2005	Percent Decrease From 1994 to 2005
Alabama	3,235	832	776	2,459	76%
Alaska	3,137	905	844	2,293	73%
Arizona	4,178	1,098	1,127	3,051	73%
Arkansas	3,096	775	771	2,325	75%
California	20,148	2,842	2,438	17,710	88%
Colorado	4,248	1,189	1,158	3,090	73%
Connecticut	3,334	546	508	2,826	85%
Delaware	507	114	116	391	77%
Florida	9,970	1,721	1,451	8,519	85%
Georgia	5,589	1,272	1,158	4,431	79%
Hawaii	820	110	101	719	88%
Idaho	2,295	708	682	1,613	70%
Illinois	8,959	2,120	1,948	7,011	78%
Indiana	5,872	1,546	1,379	4,493	77%
Iowa	3,877	1,247	1,206	2,671	69%
Kansas	3,653	995	942	2,711	74%
Kentucky	4,679	1,111	1,060	3,619	77%
Louisiana	4,864	1,058	988	3,876	80%
Maine	2,189	516	499	1,690	77%
Maryland	3,232	579	543	2,689	83%
Massachusetts	3,851	621	556	3,295	86%
Michigan	12,076	2,713	2,597	9,479	78%
Minnesota	5,741	1,713	1,601	4,140	72%
Mississippi	3,080	848	760	2,320	75%

State	Total of Type 1 Federal Firearms License (FFL) Holders, 1994	Total of Type 1 Federal Firearms License (FFL) Holders, 2003	Total of Type 1 Federal Firearms License (FFL) Holders, 2005	Number Decrease From 1994 to 2005	Percent Decrease From 1994 to 2005
Missouri	7,624	2,050	1,981	5,643	74%
Montana	3,058	1,073	1,017	2,041	67%
Nebraska	2,688	710	665	2,023	75%
Nevada	1,952	451	458	1,494	77%
New Hampshire	1,565	490	471	1,094	70%
New Jersey	1,645	378	337	1,308	80%
New Mexico	1,909	590	565	1,344	70%
New York	9,726	2,231	2,037	7,689	79%
North Carolina	6,466	1,505	1,400	5,066	78%
North Dakota	1,619	460	439	1,180	73%
Ohio	9,464	2,544	2,371	7,093	75%
Oklahoma	4,024	1,030	1,009	3,015	75%
Oregon	4,995	1,563	1,479	3,516	70%
Pennsylvania	11,799	3,004	2,765	9,034	77%
Rhode Island	567	109	105	462	81%
South Carolina	2,332	580	550	1,782	76%
South Dakota	1,537	448	431	1,106	72%
Tennessee	4,736	1,221	1,136	3,600	76%
Texas	18,041	4,321	4,261	13,780	76%
Utah	2,113	575	572	1,541	73%
Vermont	1,556	382	367	1,189	76%
Virginia	6,942	1,564	1,458	5,484	79%
Washington	5,724	1,007	904	4,820	84%
West Virginia	3,234	839	797	2,437	75%
Wisconsin	5,953	1,642	1,568	4,385	74%
Wyoming	1,729	574	550	1,179	68%
Total	**245,628**	**58,520**	**54,902**	**190,726**	**78%**

As the number of dealers in the United States has dropped, the percentage of "kitchen-table" dealers has also fallen. In 1998, 56 percent of Type 1 FFLs operated out of residential premises, down from 74 percent in 1992.[5] Despite these dramatic declines, five states still have more gun dealers than gas stations (Alaska, Idaho, Montana, Oregon, and Wyoming). In some cases, substantially more. For example, Alaska has more than three times as many gun dealers as gas stations.

Five States Still Have More Gun Dealers Than Gas Stations

State	Number of Gun Dealers	Number of Gas Stations
Alabama	776	2,978
Alaska	844	229
Arizona	1,127	1,866
Arkansas	771	1,695
California	2,438	8,250
Colorado	1,158	1,726
Connecticut	508	1,219
Delaware	116	312
Florida	1,451	6,544
Georgia	1,158	4,695
Hawaii	101	324
Idaho	682	663
Illinois	1,948	4,153
Indiana	1,379	2,904
Iowa	1,206	1,997
Kansas	942	1,464
Kentucky	1,060	2,443
Louisiana	988	2,545
Maine	499	893
Maryland	543	1,735
Massachusetts	556	2,333
Michigan	2,597	4,201
Minnesota	1,601	2,605

State	Number of Gun Dealers	Number of Gas Stations
Mississippi	760	2,009
Missouri	1,981	3,136
Montana	1,017	597
Nebraska	665	1,116
Nevada	458	671
New Hampshire	471	624
New Jersey	337	2,749
New Mexico	565	958
New York	2,037	5,447
North Carolina	1,400	4,818
North Dakota	439	496
Ohio	2,371	4,460
Oklahoma	1,009	2,020
Oregon	1,479	1,146
Pennsylvania	2,765	4,476
Rhode Island	105	393
South Carolina	550	2,476
South Dakota	431	678
Tennessee	1,136	3,339
Texas	4,261	10,610
Utah	572	884
Vermont	367	479
Virginia	1,458	3,623
Washington	904	2,104
West Virginia	797	1,212
Wisconsin	1,568	2,667
Wyoming	550	401
U.S. Total	54,902	121,363

Source: *2002 Economic Census, Geographic Area Series, Retail Trade*, U.S. Census Bureau, August 18, 2005. Includes gas stations and gas stations with convenience stores.

Conclusion: What Next?

Even with a national drop of 78 percent in the number of gun dealers, FFLs—both "kitchen-table" and stocking dealers—are still a key supplier of guns to criminals. As noted earlier, up to 56 percent of FFLs *still* operate out of residential premises. Thirty-one percent of FFLs had not sold a single firearm in the previous year, a disturbingly high percentage for a class of people who purport to be "engaged in the business" of selling firearms.[6] Exacerbating this problem, in the most recent appropriations bills, Congress prohibited ATF from denying the renewal of an applicant's license because of "a lack of business activity."[c]

While at first glance it may seem that an FFL holder who sells few if any firearms is not a threat to public safety, it must be remembered that this reflects only sales reported to ATF. Many sales by "kitchen-table" and corrupt stocking dealers take place "off the books" without the licensee logging the guns into their firearms acquisition book or confirming the identity of the purchaser as required by law.

In the June 2000 report on illegal gun trafficking *Following the Gun*, ATF noted:

> Although FFL traffickers were involved in the smallest proportion of ATF trafficking investigations, under 10 percent, cases involving FFL traffickers were associated with the largest total number of illegally diverted firearms, over 40,000, as compared to the other trafficking channels.[7]

"Kitchen-table" dealers remain a source for criminal gun traffickers. In *Following the Gun*, ATF analyzed a random sample of their FFL trafficking investigations and found that nearly a quarter (23 percent) of these investigations involved "kitchen-table" dealers.[8]

The Violence Policy Center recommends the following actions:

- All federally licensed firearms dealers should be required to operate from a storefront business, not a residence. Licenses should be limited to businesses devoted primarily to the sale of firearms. Gun shops should be conspicuously identified to the public as such. This will reduce the number of dealers ATF must monitor.

- ATF should have the authority to suspend a dealer's license or assess civil penalties—in addition to revocation authority—when a dealer violates the law.

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[c] Public Law 108-447 (HR) 4818; Public Law 109-108 (HR) 2862.

- ATF's ability to inspect a licensee's premises to ensure compliance with recordkeeping and other requirements should be expanded from once a year to at least four times per year.

- The loophole which allows dealers to divert firearms from their business inventory to their "personal collections" and then sell those guns without performing the Brady background check should be eliminated.

- Dealers should be required to safely and securely store their inventories of firearms.

- Local law enforcement agencies and regulators should closely monitor dealers in their areas to ensure that they are in compliance with all applicable local laws including business licensing, zoning, and any pertinent local firearm restrictions such as bans on assault weapons and armor-piercing ammunition.

- Congress should rescind the provision included in ATF's fiscal year 2005 and 2006 spending authorizations prohibiting the agency from denying licenses to persons who do not meet the "engaged in the business" test for business activity.

Endnotes

1. Josh Sugarmann, *More Gun Dealers Than Gas Stations: A Study of Federally Licensed Firearms Dealers in America* (Washington, DC: Violence Policy Center, 1992): 1.

2. *Commerce in Firearms in the United States* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, February 2000): 13.

3. *Commerce in Firearms in the United States* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, February 2000): 13.

4. Bureau of Alcohol, Tobacco, Firearms and Explosives data compiled April 30, 2005.

5. *Commerce in Firearms in the United States* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, February 2000): 16-17.

6. *Commerce in Firearms in the United States* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, February 2000): 17.

7. *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, June 2000): 41.

8. *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (Washington, DC: Bureau of Alcohol, Tobacco and Firearms, June 2000): 16.

Mr. COBLE. Thank you, Ms. Rand.

Now, we impose the 5-minute rule upon ourselves as well, so if you all could tersely respond to our questions, we would appreciate that.

Ms. Stucko, would the creation of civil penalties, including the suspension of an FFL license—is that a concept that ATF would support?

Ms. STUCKO. I think we would need time to analyze any specific situation, but we would certainly be open to considering and working with the Committee on any possibilities.

Mr. COBLE. Ms. Rand, your organization—strike that.

Does your organization support the idea of establishing a graduated civil penalties structure for FFLs that violate the law?

Ms. RAND. Yes, we would support meaningful civil penalties, and also urge that the issue of indexing them for inflation be looked at as well, so that once they are on the books for 10 or 20 years, that they are still relevant. That would be another issue we would recommend that you look at.

Mr. COBLE. Would that include the implementation of the option to suspend an FFL license?

Ms. RAND. Yes. We are very supportive of the idea of suspension authority.

Mr. COBLE. Lieutenant Lara, I empathize with you. That was a very compelling testimony that you gave. And just as an aside, I note that you were acquitted after a 3-day trial. How long was the jury out?

Mr. LARA. The jury was out less than 1 hour.

Mr. COBLE. I would have thought that would—less than 1 hour?

Mr. LARA. Less than 1 hour.

Mr. COBLE. Were you interviewed, lieutenant, by any representative representing ATF or the Department of Justice prior to your having been charged?

Mr. LARA. No, I wasn't.

Mr. COBLE. Mr. Gardiner, you touched on this. Well, strike that. Let me go back to Ms. Rand a minute.

Ms. Rand, does your organization support a complete ban on civilian sale of firearms in the United States?

Ms. RAND. No, Mr. Chairman. We support a ban on sales of handguns, assault weapons, .50 caliber sniper rifles. But we do not support a ban on sporting rifles and shotguns.

Mr. COBLE. Mr. Gardiner, you touched on this, but I am going to give you a chance to extend in a little more detail regarding the different interpretations of the term "willful" in criminal and civil cases. Elaborate a little on that, if you will.

Mr. GARDINER. Yes, in 1986, Congress put the word "willful" into both the license revocation provision and the criminal provisions in 924. Since then, the U.S. Supreme Court has interpreted the word "willfully" in the criminal provision that Congress enacted and said, in a case called *United States v. Bryan,* and said that "willful" means that the person had to act knowing that he was acting unlawfully and acting with a bad purpose. That is classic criminal intent.

In the civil context, interpreting the same word, the same word "willfully" that Congress put into the same act at the same time,

the ATF has taken the position that that word does not mean what it means in the criminal context, despite the fact that it is the same word, but that it means that if a dealer was aware what his legal obligations were and he commits that violation, even if he only does it on a very, very few occasions, that that is a willful violation.

The example I would give is this case that was decided by the Seventh Circuit. There were 880 forms involved. There were 12 forms which had one or two errors on them—and 880 forms would be 34,320 blocks of information of which 19 had errors. And the errors were, for example, that the driver's license number was not transposed from another document. That is a 99.96 percent perfect completion record, yet ATF took the position that because the dealer was aware, based on the fact that he had completed 99.96 percent of the forms accurately, that he committed a willful violation with regard to the other .04 percent, because he knew what his legal obligations were.

Essentially, what the ATF position is, that human beings can make no mistakes. And indeed, in the oral argument in that case, one of the judges asked the U.S. Attorney what the ATF's position was, and he said "zero tolerance."

Mr. COBLE. Thank you, Mr. Gardiner.

Ms. Rand, you indicated that fewer dealers is a move in the right direction. I realize hypothetical questions are sometimes difficult to answer, but let me throw one at you. How many gun dealers do you think there should be? Or do you have an idea for that?

Ms. RAND. Well, the problem primarily is with dealers who aren't operating under storefront businesses. Historically the real problem has been so-called kitchen table dealers, who get the licenses and operate out of their homes or offices, and that they tend not to, you know, really engage in the business of selling firearms. So our position has been if you clean out all these so-called kitchen table dealers and limit the licenses to stocking dealers, that would probably—I mean, I don't actually know how many that would be, but I think it is estimated that about 40 percent now are still kitchen table dealers.

Mr. COBLE. Now, let me beat that red light before Mr. Scott comes after me.

Mr. Gardiner, you heard the lieutenant's testimony. Does that portray cases in which you have been involved?

Mr. GARDINER. Yes.

Mr. COBLE. That severe?

Mr. GARDINER. That severe. I have had similar cases. I had one case in West Virginia where there were 206 counts. The gentleman was acquitted of 201 of them.

Mr. COBLE. Thank you, sir.

The gentleman from Virginia.

Mr. SCOTT. Thank you.

Mr. Gardiner, following up——

Mr. COBLE. Mr. Scott, if you would, we have been joined by the distinguished gentleman from New York, Mr. Weiner. Good to have you with us.

Mr. Scott.

Mr. SCOTT. Thank you.

Mr. Gardiner, let me follow up on that. What was the sanction imposed in that case? Is that a revocation case?

Mr. GARDINER. Which, the one in the Seventh Circuit are you talking about?

Mr. SCOTT. Well, either the 201 out of 206, or the didn't transpose the——

Mr. GARDINER. The 201 out of 206 was a criminal prosecution, and the other one——

Mr. SCOTT. What sanction was imposed?

Mr. GARDINER. Well, he was convicted. I mean, he was acquitted of 201 counts, so no sanction, and the sanction that was imposed for the remaining five counts, which are pending under appeal, was a 24-month jail sentence. And on the other one, the sanction was revocation because, as has been pointed out by several witnesses, the only sanction that ATF has available by statute is revocation.

Mr. SCOTT. So you would agree that fines and possible suspension, kind of intermediate sanctions, would be a good idea?

Mr. GARDINER. Yes.

Mr. SCOTT. You are a lawyer. Do you represent generally the gun dealers as clients?

Mr. GARDINER. I have represented gun dealers. I have also represented individuals who are not gun dealers, although I didn't represent Mr. Lara, but cases similar to his.

Mr. SCOTT. On the term "willful," could you give some other examples of how that new interpretation gets us in trouble?

Mr. GARDINER. Well, what it means is that any dealer who ATF has told in one of these warning conferences that he has mistakes on his 4473 Forms or his acquisition disposition log, if he makes those mistakes again, even if he does it in .04 percent of the time, in ATF's view that is a willful violation. They give no room for human error.

Mr. SCOTT. And then you are looking at revocation or nothing, or a criminal offense?

Mr. GARDINER. Correct.

Mr. SCOTT. Now, in reference to the hearing officer, presently how do they pick the hearing officer?

Mr. GARDINER. The hearing officer is selected—there is a person called a Director of Industry Operations, and I don't know exactly where he is in the hierarchy, but he is a field person, and he selects the hearing officer. And the person he selects is usually someone from outside the region, so he doesn't—but he is an ATF inspector. He is brought in from outside the region, so I guess he doesn't know, theoretically doesn't know any of the players.

Mr. SCOTT. And if we change that to the normal administrative process act, who would be the hearing officer?

Mr. GARDINER. It could be—I believe that the statute should require that it be an administrative law judge. Under the current Administrative Procedures Act, agency employees can conduct certain types of hearings. I think in a situation like this, it would be much wiser for Congress to just simply require by statute that it be an administrative law judge. Because we do have legal issues here which are of significance, and you need someone who has legal training to be able to interpret them and be able to interpret and apply, at least to the degree they apply, the rules of evidence.

Mr. SCOTT. Okay. Ms. Stucko, you indicated that you won 33 out of 36 cases in court.

Ms. STUCKO. That is correct.

Mr. SCOTT. And those are on revocations?

Ms. STUCKO. Those are on revocations, correct.

Mr. SCOTT. Now, how many people did—I assume everybody you revoked didn't go to court?

Ms. STUCKO. No, those are the cases that did go to court.

Mr. SCOTT. Do you know how many you revoked altogether?

Ms. STUCKO. Approximately 100 each year. And that is about one-tenth of 1 percent of the total population of FFLs.

Mr. SCOTT. Okay. And 100 a year, and over what time was the 33 out of 36?

Ms. STUCKO. That was over a 5-year period.

Mr. SCOTT. So out of 500, you lost 3 cases.

Do you support the intermediate sanctions, the fines and suspensions, as opposed to revocation or nothing?

Ms. STUCKO. We are open to taking a look at intermediary measures.

Mr. SCOTT. Mrs. Rand, how would we establish a standard that would reduce the number of licensees? If someone is well qualified and wants to be a licensee, what should be the process?

Ms. RAND. Well, I mean, there are many jurisdictions, and I think the District of Columbia is one that has a process in place in its interaction between ATF and local law enforcement. If you apply for a dealer's license in the District, you get a visit from an ATF inspector and from—and you have to notify the local law enforcement and you have to meet all zoning requirements, you have to be in compliance with all business license laws, et cetera, et cetera. And the combination of those two things have worked in D.C. and other jurisdictions——

Mr. SCOTT. So you would limit the license to someone who was actually in the business, not just trading frequently?

Ms. RAND. Correct. We would limit it to preferably people who are running stocking gun stores.

Mr. SCOTT. Mr. Gardiner, do you have a problem with that as a limitation on licensees?

Mr. GARDINER. That is already the law. As Ms. Rand pointed out, that changed during the Clinton administration in 1994 to require the compliance with zoning laws. And that is what I think has led to the significant decline in the number of dealers, from about 250,000 to about 55,000.

So, no, I don't have a problem with it because it is already the law.

Mr. SCOTT. Okay. Thank you.

Mr. COBLE. The distinguished gentleman from Florida, Mr. Feeney.

Mr. FEENEY. Thank you, Mr. Chairman.

You know, Ms. Rand, you have already acknowledged that with the exception of some sporting rifles, your organization would be in favor of pretty much an outright ban on sales of handguns and assault weapons and a variety of other weapons. It seems to me that the—you said it three or four times, and of course we have your written testimony which is in more detail and has some facts, but

it seems to me that your major premise is how horrible the notion is that there are more gun dealers than gas stations in the United States as of 1992.

It occurs to me that when we won the Revolutionary War and World War I and probably World War II we had more gun dealers in the United States than we did gas stations. And somehow we wobbled along as a Nation and protected some of our liberties.

I think it is somewhat of a *nonsequitur* to say that because you have more gun dealers than gas stations, that somehow you have a society on the brink of collapse. And yet you repeated that several times in your 5-minute testimony.

Ms. RAND. Well, actually, I mean, we did a new research study looking at the decline in dealers in the States that still do have more gun dealers than gas stations, one of which is Alaska, which has three times more gun dealers than gas stations, and in fact regularly ranks at the top of the list of States with the highest overall firearm-related gun death rates. So——

Mr. FEENEY. How many gun dealers are there in Washington, D.C. that are licensed?

Ms. RAND. I don't—I would guess probably 11 or 12. I guess that would be——

Mr. FEENEY. How many, given the population?

Ms. RAND. But see, the problem in D.C. is that the guns used in homicides here invariably come from out-of-State. Ninety-seven percent of the guns causing harm in the District——

Mr. FEENEY. Well, with all due respect——

Ms. RAND.—come from outside of the District——

Mr. FEENEY. One of the rational arguments here is that to the extent that you license more people that are dealing in guns—because not everybody who is dealing in guns, as you just pointed out, is licensed—so to the extent that you have a higher percentage of the people that are dealing licensed, it gives the ATF the ability to regulate everybody that is transferring weapons.

Ms. Stucko, you just responded to my colleague that you didn't necessarily have a problem with looking at some intermediary effort to enforce licensed gun dealers so that we are not focusing on the minor paperwork problems, but rather getting after people that are willfully or deliberately or in a gross negligent way not complying with the intent and the meaning of the law. Would you support a look at a graduated set of penalties so that we don't throw everybody who has made one or two paperwork errors out of 205 things that they are charged with, don't throw everybody in the same bus with a dealer that literally is going out of his or her way to violate the law and transfer weapons?

Ms. STUCKO. I think we are definitely open to looking at a graduated tier.

I would like to clarify that willfulness doesn't necessarily result in a revocation. Willfulness just establishes that a violation has taken place. And while some violations may be defined by others as being minor, I mean they are violations, but what we do is we take in—we take the overall picture. We look at the FFL as a whole. And depending on what the circumstances are would warrant whether or not revocation is needed.

Mr. FEENEY. Well, we have at least one prosecutor who is on record telling a Federal judge that "no errors" are permissible. I wondered what would happen if we would hold FEMA or, say, the National Immigration Service to the standard that no errors are impermissible. It seems to me a pretty high standard. You may not do that on every basis, but——

Ms. Rand, you indicated that the appellate process is, I think you put it, quite liberal for ATF licensees that are charged with some of these minor offenses. Actually, you put it "generous appeals rights." But in fact, the testimony of Mr. Gardiner is that the appeals process goes to the prosecutor. It is basically the ATF's agent that you get to appeal to. Do I understand—how do you reconcile your testimony with his—I have to go to the prosecutor?

Ms. RAND. You start at ATF, where there is a fact-finding hearing. And then if you lose at that stage, you have the right to appeal to the district court and present your case there. And——

Mr. FEENEY. Mr. Gardiner, do they have to take that appeal to the district court level?

Mr. GARDINER. After the so-called administrative hearing, then you have a right to go into court. That is correct.

Mr. FEENEY. What is your problem with the appellate process as a matter of due process and fairness?

Mr. GARDINER. Well, the problem with the appellate process as it now exists is that this administrative hearing, where presumably most of these cases should end, is a sham proceeding because you have this ATF employee, an investigator from just outside the region, who is conducting the hearing. And what I didn't get to mention earlier but I will mention now is that when he then goes back to review his decision, he consults the very counsel at ATF and the director of industry operations who made the decision in the first place. So it really is not a hearing process as is commonly understood administratively.

And the problem with the judicial review, though it is certainly a good thing, is that most of the judges take the position, based on ATF's argument, that they are simply looking at what the hearing officer did. So you don't really now have any meaningful review.

Mr. FEENEY. Well, Mr. Chairman, if there is no objection, I want to get to this. Because Ms. Rand makes a point that you are entitled to a *de novo* hearing, you say that it is quite deferential. Are you saying that the practice is different than the de jure procedure?

Mr. GARDINER. That is what I am saying, is that—that is exactly what I am saying, that ATF has taken the position that the *de novo* review is limited to a *de novo* review of the administrative process; that is, the judge can look at the administrative process himself but he doesn't do anything beyond that. And that is the problem, is that then you depend on having a fair administrative process, but you don't have a fair administrative process, so the *de novo* judicial review essentially becomes meaningless.

Mr. COBLE. I thank the gentleman.

I commend the Members of the Subcommittee and the witnesses for staying pretty well within the time frame. You all have contributed very significantly, I believe. And I thank you for your testimony. The Subcommittee very much appreciates the contribution.

In order to ensure a full record and adequate consideration of this important issue, the record will be left open for additional submissions for 7 days. Also, any written questions a Member wants to submit should be submitted within the same 7-day period.

This concludes the oversight hearing on the Bureau of Alcohol, Tobacco, Firearms, and Explosives: Reforming Licensing and Enforcement Authorities.

We will now proceed with the legislative hearing on H.R. 5005, the "Firearms Corrections and Improvement Act."

We stand adjourned as far as the first panel is concerned.

[Whereupon, at 2:53 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND RANKING MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Thank you, Mr. Chairman. I am Pleased to join in convening this hearing on ATF licensing and enforcement authorities. We have held two previous hearings on ATF gun law enforcement activities. This hearing focuses primarily on ATF gun licensing issuance and regulations procedures and practices.

I believe there are several areas under current licensing regulations that we can all agree warrant some change. Adding fine and suspension authority to the current revocation only authority for licensing violations is one such area of general agreement. I believe that in according due process, the appearance of impartiality is an important component. While there is nothing to establish that ATF appointed employees cannot serve as fair and impartial hearing officials, I believe that the appearance of impartiality is served by having those officers from a agency and appointment source. And I am open to the suggestion that the ATF could benefit from a study of its operations and resource allocations and from general operational guidelines relative its enforcement activities, as with other agencies under the department of Justice.

Whatever we may do legislatively, Mr. Chairman, I believe that our goal should be to improve the operational effectiveness as well as the fairness of the ATF's gun law enforcement and licensing responsibilities. The ATF has an important function and responsibility with respect to the enforcement of our federal gun laws. While we want to ensure that these functions and responsibilities are applied in manner that promotes the support and respect of the citizens they affect, we don't want to do so at the expense of diligent and effective enforcement.

Mr. Chairman I know that our staff's are working on legislation that will reform some of the ATF's current enforcement procedures and options. It is my hope that the legislation will reflect improvements that we can agree with on a bi-partisan basis, and that gun control, as well gun rights, advocates can support. I look forward to the testimony of our witnesses relative to these issues, and I look forward to working with you towards the ends of bi-partisan, generally supported improvements in ATF gun enforcement operations. Thank you.

PREPARED STATEMENT OF BRUCE R. BARANY, CO-OWNER, THE GENERAL STORE, SPOKANE, WASHINGTON

THE GENERAL STORE
"Wholesalers To The Inland Empire"
PO Box 5348
Spokane, Wa 99205
(509) 444-8006 Fax (509) 328-2171

Statement of Bruce R. Barany

To: The Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
207 Cannon House Office Building
Washington D.C. 20515

March 31, 2006

My name is Bruce Barany and with my brother Bill we own and have operated the General Store in Spokane, WA for the last 35 years. The store is celebrating its 60th anniversary this August. Our father William Barany Sr. established the store shortly after WWII. The General Store has been growing with Spokane's population and has completed its third addition to meet the needs of our growing community. From humble beginnings of a small "General Surplus" store in the late 1940's with six employees including Dad. We've grown to nearly 50,000 square feet of retail sales space and 100 employees.

As the name of our store implies we have everything in "General"; Hardware, House wares, Clothing, Shoes, Automotive, Sporting Goods, Firearms, and Ammunition. Over the years all of these departments have expanded, especially so in the Sports department.

The State of Washington offers many outdoor recreational activities such as, camping, hiking, fishing, hunting, boating and more. Hunting in particular has always been popular in Eastern Washington, where Spokane is located. Being 25 miles from Idaho and near western Montana, the General Store has been a great draw to hunting enthusiasts in all three states. In addition, Fairchild Air Force Base is located in Spokane and military personnel have been a large part of our competitive firearms sales such as, trap and skeet shotguns and target shooting rifles. These combined factors have made our Sports/Firearms department a destination point for gun enthusiasts from all around our area.

With the success of promoting and growing the firearms segment of our business comes the responsibility and requirement of accurately tracking and recording all sales.

In the days after WWII in the "General Surplus Store" military rifles of all countries and calibers were sold over the counter with little or no federal paperwork requirements. It was not until the 1968 Gun Control Act that logging, inventorying, and paperwork requirements came into law.

In the period from 1980 to 2000 The General Store gun sales records reflected sales of nearly 43,000 firearms. I'll be the first to tell you that's a heap of paperwork to keep track of. To give you some idea of the volume we're talking about here, imagine a stack of notebook sized sheets of paper 125' high. That's what we are managing and keeping track of for the Federal Government.

This year alone there have been over 55 requests from the FBI's National Tracing Center for firearm background searches. This number does not reflect the additional requests from the state and local police agencies. I'm happy to say we have been able to fulfill these requests with 100% accuracy this year and in all previous years. The BATF's own testimony at our License revocation hearing last year supports the fact of 100% accuracy. This 100% accuracy in being able to provide buyer information to the National Tracing Center is a great statistical test of our record keeping abilities.

Now the BATF is doggedly pursuing us to revoke our Federal Firearms License (FFL). The same BATF, who in the period of 1980 to January 3, 2000 made a total of fifteen inspections that lasted anywhere form 15 min. to an hour. During inspection the agent would pull a dozen #4473 Federal Firearm transfer forms and check them against our A&D log book, finish his coffee and leave satisfied his job was done.

All of this ended in January 2000 when one Jerry Christianson, a head BATF inspector for our area, and three other agents entered our firearms department and camped out for two weeks armed with laptops. In the course of the two weeks of inspecting 43,000 transactions a number of clerical and reporting errors surfaced. Included there were 72 forms out of the 43,000 forms that couldn't be located. Percentage wise that's not a huge number, but the BATF expects and demands 100% accuracy. Even if one piece of paper is missing or not filled out completely that's grounds for revocation. In addition we had not reported on the proper form a gun loss we incurred in a break in theft in 1994. While we did itemize and the report the theft complete with serial number's and a description to the state and local authorities, that information was not shared resulting in another charge against us by the BATF to support revocation.

Furthermore we failed to log into our books customers guns we had kept overnight for inspections, evaluations, or riflescope mounting. This resulted in an additional revocation charge by the BATF. We received a warning conference with the agent in charge, Jerry Christianson, in 2001 to work out these deficiencies. We dutifully started the process of change and were on the road to 100% compliance, when in 2003 a new agent in charge came in and had four new BATF inspectors with him. Head agent Spalding and company camped out in our offices for three weeks armed with laptops. The adversarial and aggressive nature of his squad of inspectors demonstrated the zero tolerance attitude of this inspection. Agent Spalding made it clear as he shook the rulebook under our noses at the exit interview that his interpretation of the green BATF rulebook was law and even though the previous inspector, Jerry Christianson, had viewed any number of rules and regulations in a different light, it didn't matter.

The regulation bar had been raised for us on this inspection. Agent Spalding was there to see any and all infractions were to be addressed as "willful" by nature and therefore grounds for license revocation. Agent Spalding cited The General Store for violations that the previous inspector had never mentioned. Example being our repair log for firearms taken in by customers was on an incorrect format. We had shown it to the first inspector and all was OK but not for the second inspector. Another "willful violation" and grounds for license revocation.

Our inventory logbook didn't reflect the address or FFL number of each of our wholesalers and distributors from whom we purchased the firearm from. Though a copy of their FFL was on file in the book we merely put their name in the inventory listing. A simple formatting problem with the needed information contained in the back of the inventory book. While the first inspector took no exception to this practice, inspector Spalding noted it as another "willful violation" and reason for license revocation.

Additionally it was a chargeable and "willful violation" that our firearms paperwork was faxed to our local police department for background evaluation, which they faithfully performed, instead of to the buyers actual county or municipality of residence. The first inspector made no comment on this procedure, whereas inspector Spalding charged us with violating it.

In all these assorted violations make note that not one transaction was made to a criminal. The BATF investigated the 72 serial numbers of the missing firearms and found none were involved in criminal activity. There have been no allegations by the BATF that any firearms have been transferred or sold to prohibited persons. Our records are clean and conscious clear that we have up held the intent of the law to prevent any firearms sold by ourselves to any

criminal. The records support our determination. We are a major operator in our area and the sheer volume of paperwork that needs to be processed is daunting.

What the BATF is really enforcing here is backdoor gun control. Their focus is entirely on nitpicking details that can entrap any dealer in a rulebook violation that is subject to the whims of whatever inspector you may have that day. The dealer is required to know every detail contained in the green code book and any deviation from this can be construed as a "willful violation" and therefore subject to license revocation.

Respectfully Yours,

Bruce R. Barany
Secretary/Treasurer
The General Store

PREPARED STATEMENT OF JAMES. M. FAIRCLOTH, OWNER, JIM'S PAWN SHOP, INC., FAYETTEVILLE, NORTH CAROLINA

TESTIMONY OF JAMES M. FAIRCLOTH
324 Summertime Road
Fayetteville, N.C. 28303

House Judiciary Committee
Subcommittee on Crime, Terrorism and Homeland Security
March 28, 2006

I am the owner of Jim's Pawn Shop, Inc. (d/b/a Jim's Gun Jobbery), JPS of Wilmington, Inc., JLGG of Southern Pines, Inc. and Jim's Indoor Range, Inc. Since the early 1960s, I have held a total of seven Federal firearms licenses. I still currently hold four of those licenses, one for each of my three store locations, as well as an importer license. I relinquished the other three licenses as a result of changes in the status of my businesses.

I have been an avid gun collector my entire life, and it was my interest in firearms that led me to purchase Friendly Pawn Shop in 1977, which is now Jim's Pawn Shop, Inc. In 1986, my wife, Sylvia, and I opened another store in Wilmington, N.C., known as JPS of Wilmington. In 1990, we added an 18 lane shooting range, Jim's Indoor Range, Inc., to our Fayetteville location, and in 1991 we opened JLGG of Southern Pines, Inc.

During the 29 years we have been in the firearms business, approximately 211,000 firearms have been transferred in the three stores, with approximately 140,000 of those transfers taking place at our Fayetteville location, 54,000 at our Wilmington location, and 17,000 at our Southern Pines locations. Over the course of my 29 years as a gun dealer, I have been audited by the BATFE a total of 14 times. Jim's Pawn Shop, Inc. had inspections in 1979, 1980, 1996, 2000, 2001 and 2004. JPS of Wilmington, Inc. had inspections in 1992, 1997, 2000, 2001 and 2004. JLGG of Southern Pines, Inc. had inspections in 1993, 1996 and 2005.

Prior to the inspection that began on January 27, 2004 at Jim's Pawn Shop, I had always maintained a close and cooperative working relationship with the BATFE. I attended any seminars that were offered to licensees and worked closely with inspectors in order to resolve any discrepancies in our records. In November of 1996, Darlene Brown came to our Fayetteville location to conduct an inspection, which was the first inspection that had been conducted in that store in over 16 years, and we worked closely with her to resolve any problems she had encountered. After attending a warning conference in 1997, one of our key employees, Colonel Wayne Shugart, was put in charge of the firearms records, and another person was hired solely to maintain those records. Mr. Shugart wrote a manual of policies and procedures for the acquisition and disposition of firearms, and those policies were implemented; however, the 1996 audit was not actually concluded until February 2000.

In July 2000, Darlene Brown conducted another inspection. Then again in September 2001, John Franklin conducted an inspection, at which time we were issued a Warning Letter by the BATFE that stated, among other things, "it appears that you have made a concerted effort to comply with the laws and regulations governing Firearm Transactions." We had worked diligently to improve our day to day operations and recordkeeping and thought after receiving that comment, those efforts were being recognized.

Prior to 2004, all of the inspections were conducted by simply counting the number of firearms in our inventory and comparing that number to the number of open entries in our Firearms Acquisition and Disposition Records, as well as looking at Forms 4473 for any errors. The 2001 inspection conducted by John Franklin used this method, and no firearms were found to be missing. That was the standard set by the BATFE, and it was the standard we had used to conduct our own in audits through the years. However, when we conducted a more thorough audit after Tim Mabe's arrival in January 2004, we came to the realization that the prior methods used by both us and the BATFE were insufficient and only masked problems.

When Tim Mabe arrived to conduct a compliance inspection in 2004, we actually closed the store and did our own, more thorough, audit of the inventory, comparing serial numbers and stock numbers of firearms in our inventory to those with no disposition in our Acquisition and Disposition records. Upon completion of that audit, we presented the discrepancies we had discovered to Tim Mabe, and he used our findings to issue the report of violations that eventually led to the Notice of Revocation. Within the first two weeks of his inspection in 2004, Tim Mabe stated, "nothing is done until it's done, but we are headed for a revocation." While our relationship with the BATFE had always been cordial and cooperative in the past, Tim Mabe's approach to us was confrontational from the very beginning.

All of the violations that we have been cited for were the result of human error, not illegal or criminal activity, and none of my employees would ever knowingly or willfully break the law. We have made a concerted effort at all of our stores to strive for perfection; however, the BATFE allows for zero margin of error on the part of licensees. For example, during our last inspection in 2004, my daughter, Jan, asked Tim Mabe how she should correct a mistake should she make one when entering the acquisition or disposition of a firearm in our records, and his response was that she could not make a mistake. While we have always done as good a job as we believe is humanly possible, mistakes can and do sometimes occur. Clearly, the bar has been raised by the BATFE, and it in fact needed to be, but we have been denied the opportunity to get in line with it.

While conducting our audit in 2004, we became aware that the ever changing and complex nature of our business had led to the need for the implementation of even more stringent policies. A new Acquisition and Disposition Manual was written as a result of that need, and it was presented to the BATFE at our revocation hearing in February 2005, and the sole responsibility of handling the firearms records was assigned to my daughters, Jo and Jan.

Since opening Jim's Pawn Shop in 1977, I have trained approximately 250 different employees on the proper way to conduct firearms sales and the importance of properly completing any paperwork associated with those sales, and I trained various employees on the proper procedures for recording the acquisition and disposition of firearms in our records. Given the tremendous volume of business we have conducted during the tenure of our business, and the complexity of the transactions associated with conducting that business, I feel that our performance has been outstanding and above reproach.

As for JPS of Wilmington, Inc., which has also been issued a Notice of Revocation, I feel much of the same that I have stated above to be true. The first significant interaction with the BATFE in that store came with the inspection conducted by Darlene Brown in June 1997. That

inspection resulted in a report of violations and a subsequent Warning Letter. In June 2000, John B. Franklin conducted another inspection of JPS of Wilmington. As a result of that inspection, a letter was written to me by Carlton Bowers, the Area Supervisor, requesting a meeting to discuss the violations we were cited for, but on July 25, 2000, I spoke with John Guilford who said that the meeting had been cancelled, and I confirmed that with Darlene Brown on the same day. She too stated that the meeting "was not necessary" and had been cancelled.

In November 2001, John Guilford conducted an inspection of JPS of Wilmington, Inc., and we were only cited with one violation upon completion of that inspection. In late August 2004, Steve Rapps arrived at the Wilmington store to conduct our last audit. Upon completion of that audit, he issued a report of violations but also stated that the Forms 4473 from that store were the best that he had ever seen. Nonetheless, we were issued a Notice of Revocation for that store as well.

In February 2005, I attended a hearing with the BATFE to appeal the Notices of Revocation that had been issued to both Jim's Pawn Shop, Inc. and JPS of Wilmington, Inc., but the revocations were upheld by the BATFE hearing officer. As a result of what I feel to be an unfair and unjust decision, I appealed the revocation of my licenses.

I have always believed in hard work and conducting my life with honesty and integrity. My entire life's endeavor has been to build a business and reputation based on those notions, and that is why I would never knowingly or willfully break the law and jeopardize those things that I have worked so hard to achieve. The revocation of my federal firearms licenses would all but erode everything that I have worked my entire life to accomplish.

PREPARED STATEMENT OF STANTON MYERSON, OWNER, LOU'S OF UPPER DARBY, INC., UPPER DARBY, PENNSYLVANIA

LOU'S Jewelry & Pawn

Lou's of Upper Darby Inc
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STATEMENT OF STANTON MYERSON

March 23, 2006

I am the owner of Lou's of Upper Darby, Inc, a licensed firearms dealer in good standing since 1984. During that period and prior, I owned Lou's of Chester, Inc. and Lou's of Wilmington, Inc., both licensed firearms dealers in good standing since 1968 and 1990 respectively. My father, Louis Myerson, opened our first store in Chester, Pennsylvania on October 27, 1921 and, although there was no BATF licensing, we did sell firearms legally to the public. My father understood his legal and moral responsibilities in selling weapons to the public and he instilled those values in me, first as a boy and then through my years as a young man. That firm foundation of integrity and sense of obligation to the community has carried through all of my business and personal life. I am very proud of this solid upbringing, as it has served me well.

BATF starting licensing dealers in the late 1960s and we were among the first to be licensed. Since that time, many changes have occurred, in procedures, paperwork, and record keeping. It was an ongoing learning process and we were on the frontline. We always attempted to do our utmost to comply fully and completely with any changes to the system and have kept meticulous records from 1968 to the present. Further, on various occasions we had the opportunity to work in conjunction with the BATF and other law enforcement agencies to aid in an effort to combat criminal activity within our region.

To illustrate our ongoing cooperation with the BATF and other local law enforcement agencies, I might cite two examples.

1. In the early 1990s, the first policewoman in Philadelphia

history was murdered in a shoot out in an attempt to thwart a bank holdup. Her name was Officer Vaird. Upon seeing the news account on television, I immediately contacted the Philadelphia Police Department to offer our assistance in tracing the firearm used in the commission of the crime. Lou's of Upper Darby traced the serial number through our internal database and named the buyer of the weapon within minutes and transmitted the information on to the Philadelphia PD. They were able to pick up the suspect within days.

2. During the mid 1990s, Philadelphia was plagued with a crime wave concentrated within the Jamaican community in West Philadelphia. Jamaican immigrants were purchasing multiple firearms from Lou's of Upper Darby and other firearm dealers in large numbers. The BATF was concerned and enlisted our help. We agreed to come to their aid. The BATF asked that we have their agents work in our store as salesman to effect the sale and subsequent transfer of multiple weapons to persons either unable to own them or to persons acting on behalf of another (*i.e.*, a straw purchaser). This cooperative effort lasted for many weeks and was very successful helping to stamping out the illegal firearm activity within the Jamaican community.

We are proud of our involvement in the war against crime and we continue to be of service to the BATF and any law enforcement agency that needs and wants our assistance.

However, of late, the BATF has become more adversarial and aggressive toward the dealers it regulates. Lou's of Upper Darby, Inc. has fallen victim to these actions. It was customary for BATF to send out inspectors to licensees for spot compliance audits. Compliance audits sometimes happened yearly and in some cases every two years or longer. In any case, Lou's was always ready for an inspection.

At our last inspection, in June 2005, BATF inspectors arrived at our location and stated they wanted to audit our books for the last 6 months. At that time, they said that unless we wanted our counter space total covered with records during the inspection, they preferred to take the records off premise. In an effort to comply, we agreed. The records were now out of our custody and control for about a week or more. They were not taken to a BATF office but rather a public library somewhere in New Jersey.

Upon the return of our records, the BATF inspectors claimed that there were missing documents and we were in violation of the regulations that governed firearm dealers' record keeping. In particular, it was alleged that in 5 instances multiple sales

reports were not completed, when in fact it was and evidenced by a log from the PA State Police and a fax log to the BATF. I submit that once my records were taken off premise, anything could have happened to them. Fortunately, the PA State Police was helpful in providing us with copies of the forms in question.

Further, allegations of willful violations involving selling weapons to "straw purchasers" were made. These allegations were supported by documents provided by the BATF where one of the buyers stated that she lied to employees of Lou's of Upper Darby in order to have the weapon transferred in her name. The absurdity of such alleged violations is incomprehensible. How can dealers know that a purchase is a "straw buy" when the buyer lies on the Federal form, lies to the salesman that she is the actual buyer and then passes the NICS background check? How can dealers effectively protect themselves? I submit that they can never totally protect themselves and, as long as the dealer follows the law, he cannot and should not be held responsible for the actions of another person perpetrating an illegal act.

It was also alleged that Lou's did not properly complete Forms 4473 because we did not include both the county and city of residence of the buyer, when in fact the regulation requires that the Form 4473 state the "county or similar political subdivision" as part of the buyer's "residence address." It was alleged that on (196) occasions we knowingly and willfully violated this regulation. **We did not** and, in fact, Lou's more than fully complied with the Federal Firearms Act by inserted the county as a "belt and suspenders measure" approach to full compliance.

Other unsubstantiated allegations of violations were made including, but not limited to, claims of different hand writing on the Federal form and unlawful alterations to those forms.

Now clearly we are not without error. Like all people, we have made mistakes, but ***none*** that would have allowed a prohibited person to buy a firearm and ***none*** that could not be remedied once brought to our attention. In fact, when the BATF inspectors brought errors to our attention, they were immediately addressed and corrected.

It is my belief that the BATF is placing unreasonable pressure on high volume dealers, such as Lou's of Upper Darby, in an effort to put them out of business and curtail or at least impede the sale of firearms to the public- "a new spin on gun control". ATF should instead be working more closely with legitimate gun dealers such as Lou's through better communication rather than intimidation, help rather than harassment, so that both dealers and ATF can consolidate

their collective efforts to fight illegal gun trafficking and other crimes of violence.

Lou's of Upper Darby has been successful in the firearms business for many years by obeying the law, serving the public with integrity, and understanding our moral and legal responsibilities. We plan to continue our work for years to come, hopefully with a spirit of cooperation and mutual respect between the BATF and us.

Respectfully submitted,

Stanton Myerson

STANTON MYERSON