

# FOIA MARKER

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**Collection/Record Group:** Clinton Presidential Records

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**OA/ID Number:** 12926

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**Folder Title:**

Assault Weapons Ban - Uzi and Galil Firearms Directive [4]

**Stack:**

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**Row:**

**112**

**Section:**

**2**

**Shelf:**

**5**

**Position:**

**1**



U.S. Department of Justice

Washington, D.C. 20530

## CIVIL DIVISION

## FAX TRANSMITTAL COVER SHEET

DATE

10/29

TO

Karen Popp, Esq.



FAX NO.

456 - 5055

FROM

Kathryn Ray

FAX # (202) 616-8460 LOCAL # (202) 369-8460 (FTS)

TOTAL # PAGES (INCLUDING COVER SHEET)

2

This FAX is intended for the above addressee. If this FAX

## Preliminary Research on Inherent Authority to Reverse Previous Decision

### A. Inadvertent Error:

1. Boesche v. Udall, 373 U.S. 472 (1962). Secretary of Interior had authority to cancel lease for mining rights administratively where applicant had failed to comply with regulations in submitting application.

2. American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133 (1958). Agency reopened proceedings in part to determine whether certificates issued should have contained restrictions. After a hearing, the agency found that the certificates had omitted the relevant restrictions. Court stated that "the presence of authority in administrative officers and tribunals to correct such errors has long been recognized -- probably so well recognized that little discussion has ensued." 358 U.S. at 145. Court cautioned that a policy change may not be disguised as an inadvertent error.

3. American Therapeutics v. Sullivan, 755 F. Supp. 1 (D.D.C. 1990): FDA approved manufacturing of drug on same day it received information on applicant developed through FDA investigation. Less than two weeks later, agency voided approval on ground of inadvertent mistake. Agency stated that applicant would be given a subsequent hearing. Court held that agency's action was not ultra vires, therefore, district court would not exercise jurisdiction (since normally review was in the court of appeals). "[A]n agency must be given some leeway to remedy mistakes." 755 F. Supp. at 2 (citing Gun South)

### B. Reconsideration Within a Reasonable Time:

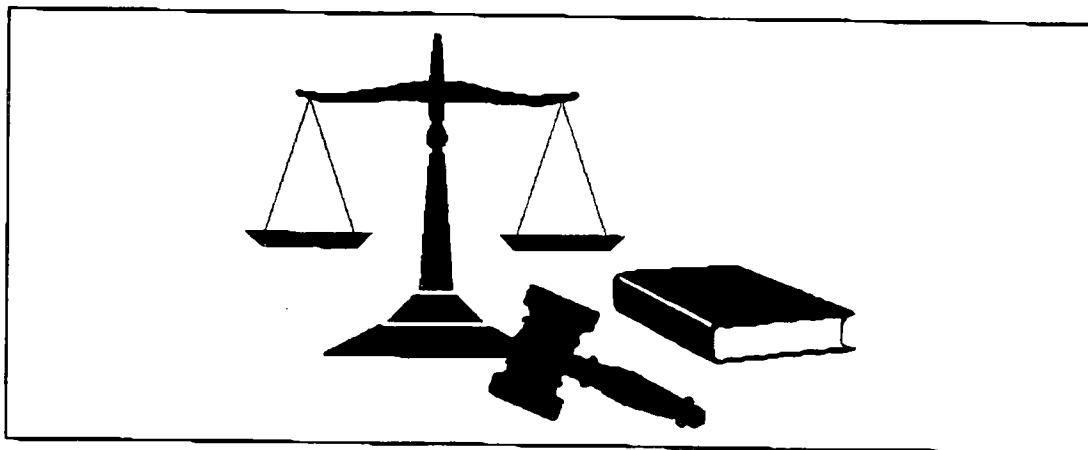
1. Belville Mining Co. v. U.S., 999 F.2d 989, 997 (6th Cir. 1993): Inherent authority to reconsider.

2. Dun & Bradstreet v. U.S. Postal Serv., 946 F.2d 189, 193 (2d Cir. 1991): It is widely accepted that an agency may reconsider even a final decision, but it must be done in a reasonable time and agency must afford claimant proper notice.

But see Cabo Distribution Co., Inc. v. Brady, 821 F. Supp. 601 (N.D.Cal. 1992) (holding that ATF did not have authority to reconsider granting of label several years earlier)

## FAX COVER SHEET FROM:

OFFICE OF CHIEF COUNSEL  
Bureau of Alcohol, Tobacco and Firearms  
Washington, DC 20226  
Phone No. (202) 927-8510  
FAX No. (202) 927-8673



TO: Mark Stern, 514-7964  
Sandra Schraibman, 616-8187  
Rosemary Hart 514-0563  
Karen Popp 456-5055

NUMBER OF PAGES: 7

Re: Sporterized assault rifles

DATE: 10/30/97

COMMENTS: Statistics

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Pending Import Applications and Import Permits  
Approved in October of 1997

Listed Chronologically by Date Received

Approved Permits are indicated by bold type.

| <u>Date<br/>Rcd</u> | <u>Date<br/>Issued</u> | <u>Permit #</u> | <u>Model</u> | <u>Quantity<br/>Requested</u> | <u>Importer</u> |
|---------------------|------------------------|-----------------|--------------|-------------------------------|-----------------|
| 09/9/97             | 10/21/97               | 97-08140        | SR9          | 4                             | H&K             |
| 10/3/97             | 10/7/97                | 97-09091        | BT96         | 5,000                         | D.S. Arms       |
| 10/6/97             |                        | 97-09126        | Uzi Comm.    | 10,000                        | Uzi America     |
| 10/10/97            | 10/21/97               | 97-09510        | WUM-1        | 50,000                        | Century         |
| 10/10/97            | 10/20/97               | 97-09511        | MISR         | 100,000                       | Century         |
| 10/20/97            |                        | 97-09564        | DR-200       | 20,000                        | Kimber          |
|                     |                        |                 | DR-300       | 1,000                         | "               |
| 10/21/97            |                        | 97-09611        | SA-85        | 60,000                        | Eur. Amer.      |
|                     |                        |                 | SA-2000      | 60,000                        | "               |
| 10/21/97            |                        | 97-09597        | SAR-4800     | 10,000                        | Springfield     |
|                     |                        | 97-09596        | SAR-4800     | 10,000                        | "               |
|                     |                        | 97-09600        | SAR-8        | 10,000                        | "               |
|                     |                        | 97-09602        | SAR-8 HB     | 10,000                        | "               |
| 10/23/97            |                        | 97-09617        | SR-9         | 400                           | H&K             |
| 10/23/97            |                        | 97-09721        | RADOM HUNTER | 4,000                         | Armamentos      |
| 10/23/97            |                        | 97-09623        | SAR-8        | 2,000                         | Springfield     |
|                     |                        | 97-09679        | SAR-8 HB     | 2,000                         | Springfield     |
| 10/23/97            |                        | 97-09618        | SR-9         | 600                           | H&K             |
|                     |                        | 97-09619        | SR-9         | 1,400                         | H&K             |

- 2 -

| <u>Date<br/>Rcd</u> | <u>Date<br/>Issued</u> | <u>Permit #</u> | <u>Model</u> | <u>Quantity<br/>Requested</u> | <u>Importer</u> |
|---------------------|------------------------|-----------------|--------------|-------------------------------|-----------------|
| 10/23/97            |                        | 97-09713        | WUM-II       | 25,000                        | Intrac          |
|                     |                        | 97-09714        | WUM-I        | 25,000                        | "               |
|                     |                        | 97-09715        | FPK          | 5,000                         | "               |
|                     |                        | 97-09716        | ARM          | 10,000                        | "               |
|                     |                        | 97-09717        | ARM          | 30,000                        | "               |
| 10/23/97            |                        | 97-09684        | SA-2000      | 20,000                        | K.B.I.          |
| 10/23/97            |                        | 97-09620        | ROMAK-1      | 100,000                       | PW Arms, Inc.   |
|                     |                        |                 | ROMAK-2      | 100,000                       | "               |
| 10/23/97            |                        | 97-09638        | WUM-1        | 100,000                       | "               |
|                     |                        |                 | CUR-2        | 100,000                       | "               |
| 10/23/97            |                        | 97-09639        | SLR-95       | 100,000                       | "               |
|                     |                        |                 | SLR-96       | 100,000                       | "               |
| 10/23/97            |                        | 97-09785        | ROMAK-1      | 30,000                        | Dominion        |
|                     |                        |                 | ROMAK-2      | 10,000                        | "               |
| 10/23/97            |                        | 97-09786        | SLR-95       | 40,000                        | "               |
| 10/24/97            |                        | 97-09727        | WUM-II       | 25,000                        | Intrac          |
|                     |                        | 97-09728        | WUM-I        | 25,000                        | "               |
| 10/24/97            |                        | 97-09723        | SR-9         | 10,000                        | H&K             |

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Total 1,211,404

PENDING PERMIT APPLICATIONS:

| <u>IMPORTER</u> | <u>PERMIT<br/>NUMBER</u> | <u>DATE<br/>RECEIVED</u> | <u>MODEL</u>         | <u>QUANTITY<br/>REQUESTED</u> | <u>IMPORTER<br/>TOTAL</u> |
|-----------------|--------------------------|--------------------------|----------------------|-------------------------------|---------------------------|
| Uzi America     | 97-09126                 | 10/06/97                 | Uzi Comm.<br>Carbine | <u>10,000</u>                 | 10,000                    |
| Kimber          | 97-09564                 | 10/20/97                 | DR-200<br>DR-300     | 20,000<br><u>1,000</u>        | 21,000                    |
| Eur. Amer.      | 97-09611                 | 10/21/97                 | SA-85<br>SA-2000     | 60,000<br><u>60,000</u>       | 120,000                   |
| Springfield     | 97-09597                 | 10/21/97                 | SAR-4800             | 10,000                        |                           |
|                 | 97-09596                 | 10/21/97                 | SAR-4800             | 10,000                        |                           |
|                 | 97-09600                 | 10/21/97                 | SAR-8                | 10,000                        |                           |
|                 | 97-09602                 | 10/21/97                 | SAR-8 HB             | 10,000                        |                           |
|                 | 97-09623                 | 10/23/97                 | SAR-8                | 2,000                         |                           |
|                 | 97-09679                 | 10/23/97                 | SAR-8 HB             | <u>2,000</u>                  | 44,000                    |
| H&K             | 97-09617                 | 10/23/97                 | SR-9                 | 400                           |                           |
|                 | 97-09618                 | 10/23/97                 | SR-9                 | 600                           |                           |
|                 | 97-09619                 | 10/23/97                 | SR-9                 | 1,400                         |                           |
|                 | 97-09723                 | 10/24/97                 | SR-9                 | <u>10,000</u>                 | 12,400                    |
| Intrac          | 97-09713                 | 10/23/97                 | WUM-II               | 25,000                        |                           |
|                 | 97-09714                 | 10/23/97                 | WUM-I                | 25,000                        |                           |
|                 | 97-09715                 | 10/23/97                 | FPK                  | 5,000                         |                           |
|                 | 97-09716                 | 10/23/97                 | ARM                  | 10,000                        |                           |
|                 | 97-09717                 | 10/23/97                 | ARM                  | 30,000                        |                           |
|                 | 97-09727                 | 10/24/97                 | WUM-II               | 25,000                        |                           |
|                 | 97-09728                 | 10/24/97                 | WUM-I                | <u>25,000</u>                 | 145,000                   |
| K.B.I.          | 97-09684                 | 10/23/97                 | SA-2000              | <u>20,000</u>                 | 20,000                    |
| PW Arm's, Inc   | 97-09620                 | 10/23/97                 | ROMAK-1              | 100,000                       |                           |
|                 |                          |                          | ROMAK-2              | 100,000                       |                           |
|                 | 97-09638                 | 10/23/97                 | WUM-1                | 100,000                       |                           |
|                 |                          |                          | CUR-2                | 100,000                       |                           |
|                 | 97-09639                 | 10/23/97                 | SLR-95               | 100,000                       |                           |
|                 |                          |                          | SLR-96               | <u>100,000</u>                | 600,000                   |

PENDING PERMIT APPLICATIONS: (CONT'D)

| <u>IMPORTER</u> | <u>PERMIT<br/>NUMBER</u> | <u>DATE<br/>RECEIVED</u> | <u>MODEL</u>    | <u>QUANTITY<br/>REQUESTED</u> | <u>IMPORTER<br/>TOTAL</u> |
|-----------------|--------------------------|--------------------------|-----------------|-------------------------------|---------------------------|
| Armamentos      | 97-09721                 | 10/23/97                 | RADOM<br>HUNTER | <u>4,000</u>                  | 4,000                     |
| Dominion        | 97-09785                 | 10/23/97                 | ROMAK-1         | 30,000                        |                           |
|                 |                          |                          | ROMAK-2         | 10,000                        |                           |
|                 | 97-09786                 | 10/23/97                 | SLR-95          | <u>40,000</u>                 | <u>80,000</u>             |

TOTAL FIREARMS PENDING:

1,056,400

10/30/97 4:30pm



**IMPORT PERMITS/APPLICATIONS FOR  
MODIFIED SEMIAUTOMATIC RIFLES**

APPROVED PERMITS For NOV. '96 To Oct. '97

| <u>IMPORTER</u> | <u>PERMIT<br/>NUMBER</u> | <u>DATE<br/>ISSUED</u> | <u>MODEL</u> | <u>QUANTITY<br/>APPROVED</u> | <u>IMPORTER<br/>TOTAL</u> |
|-----------------|--------------------------|------------------------|--------------|------------------------------|---------------------------|
| Springfield     | 97-09790                 | 01/07/97               | SAR-8        | 5,000                        |                           |
|                 | 97-00935                 | 02/05/97               | SAR-8        | 1,000                        |                           |
|                 | 97-01792                 | 03/07/97               | SAR-8        | 5,000                        |                           |
|                 | 97-08872                 | 10/01/97               | SAR-4800     | 5,000                        |                           |
|                 | 97-05516                 | 06/17/97               | SAR-4800     | 1,000                        |                           |
|                 | 97-07739                 | 09/23/97               | SAR-8        | 1,158                        |                           |
|                 | 97-06616                 | 07/24/97               | SAR-4800     | <u>5,000</u>                 |                           |
|                 |                          |                        |              |                              | 23,158                    |
| Intrac          | 97-02277                 | 03/25/97               | ARM          | 10,000                       |                           |
|                 | 97-02278                 | 03/25/97               | SA-93        | 25,000                       |                           |
|                 | 97-02282                 | 03/20/97               | WUM-1        | 10,000                       |                           |
|                 | 97-02724                 | 04/04/97               | WUM-1        | 10,000                       |                           |
|                 | 97-01307                 | 02/27/97               | WUM-1        | 10,000                       |                           |
|                 | 97-00943                 | 02/10/97               | ARM          | 30,000                       |                           |
|                 | 97-03226                 | 05/16/97               | WUM-1        | <u>24,000</u>                |                           |
|                 |                          |                        |              |                              | 119,000                   |
| Interordnance   | 97-00775                 | 03/06/97               | SLG-95       | 2,000                        |                           |
|                 | 97-02675                 | 03/24/97               | WUM-1        | 30,000                       |                           |
|                 |                          |                        | SLG-94       | <u>20,000</u>                |                           |
|                 |                          |                        |              |                              | 52,000                    |
| Armamentos      | 97-03587                 | 04/25/97               | WUM          | <u>2,000</u>                 |                           |
|                 |                          |                        |              |                              | 2,000                     |
| ECI             | 97-07322                 | 08/14/97               | BT96         | <u>5,000</u>                 |                           |
|                 |                          |                        |              |                              | 5,000                     |
| PW Arms         | 97-05790                 | 07/14/97               | SLR-95       | 25,000                       |                           |
|                 |                          |                        | SLR-96       | <u>25,000</u>                |                           |
|                 |                          |                        |              |                              | 50,000                    |
| H&K             | 96-10974                 | 01/23/97               | PSG1         | 3                            |                           |
|                 | 97-08140                 | 10/21/97               | SR-9         | <u>4</u>                     |                           |
|                 |                          |                        |              |                              | 7                         |
| D.S. Arms       | 96-11279                 | 12/29/96               | SG550-1      | 500                          |                           |
|                 | 97-09091                 | 10/07/97               | BT96         | <u>5,000</u>                 |                           |
|                 |                          |                        |              |                              | 5,500                     |

APPROVED PERMITS: (CONT'D)

| <u>IMPORTER</u>               | <u>PERMIT<br/>NUMBER</u> | <u>DATE<br/>ISSUED</u> | <u>MODEL</u>     | <u>QUANTITY<br/>APPROVED</u> | <u>IMPORTER<br/>TOTAL</u> |
|-------------------------------|--------------------------|------------------------|------------------|------------------------------|---------------------------|
| Dominion                      | 96-09424                 | 11/02/96               | SLR-96           | 20,000                       |                           |
|                               | 96-09425                 | 11/02/96               | SLR-95           | 20,000                       |                           |
|                               | 97-06265                 | 07/09/97               | ROMAK-1          | 30,000                       |                           |
|                               |                          |                        | ROMAK-2          | 10,000                       |                           |
|                               | 96-05698                 | 06/19/97               | SLR-97           | 5,000                        |                           |
|                               | 97-04948                 | 06/04/97               | SLR-95           | <u>30,000</u>                |                           |
|                               |                          |                        |                  |                              | 115,000                   |
| Century Arms                  | 96-10234                 | 01/13/97               | MISR             | 36,000                       |                           |
|                               | 97-09510                 | 10/21/97               | WUM-1            | 50,000                       |                           |
|                               | 97-09511                 | 10/20/97               | MISR             | <u>100,000</u>               |                           |
|                               |                          |                        |                  |                              | 186,000                   |
| Uzi America                   | 97-05284                 | 07/02/97               | GALIL<br>SPORTER | <u>2,600</u>                 |                           |
|                               |                          |                        |                  |                              | <u>2,600</u>              |
| Royce Const.                  | 97-01763                 | 03/07/97               | SLR-95           | 10,000                       |                           |
|                               |                          |                        | SLR-96           | <u>10,000</u>                |                           |
|                               |                          |                        |                  |                              | 20,000                    |
| Falcon Trade                  | 97-00627                 | 01/30/97               | SAIGA            | <u>25,000</u>                |                           |
|                               |                          |                        |                  |                              | 25,000                    |
| Ronald Yates                  | 96-08529                 | 11/02/96               | SA-93            | 2,000                        |                           |
|                               | 97-00874                 | 01/29/97               | SLR-95           | <u>12,000</u>                |                           |
|                               |                          |                        |                  |                              | 14,000                    |
| Interport                     | 97-03151                 | 04/11/97               | SAR-8            | <u>10,000</u>                |                           |
|                               |                          |                        |                  |                              | <u>10,000</u>             |
| FOR NOV. '96 to Oct. '97      |                          |                        |                  |                              |                           |
| TOTAL FIREARMS APPROVED 1997: |                          |                        |                  |                              | 629,265                   |

IMPORT PERMITS/APPLICATIONS FOR  
MODIFIED SEMIAUTOMATIC RIFLES

QUESTIONABLE FIREARMS  
RECEIVER ASSEMBLIES WHICH DO NOT HAVE SHOULDER STOCKS

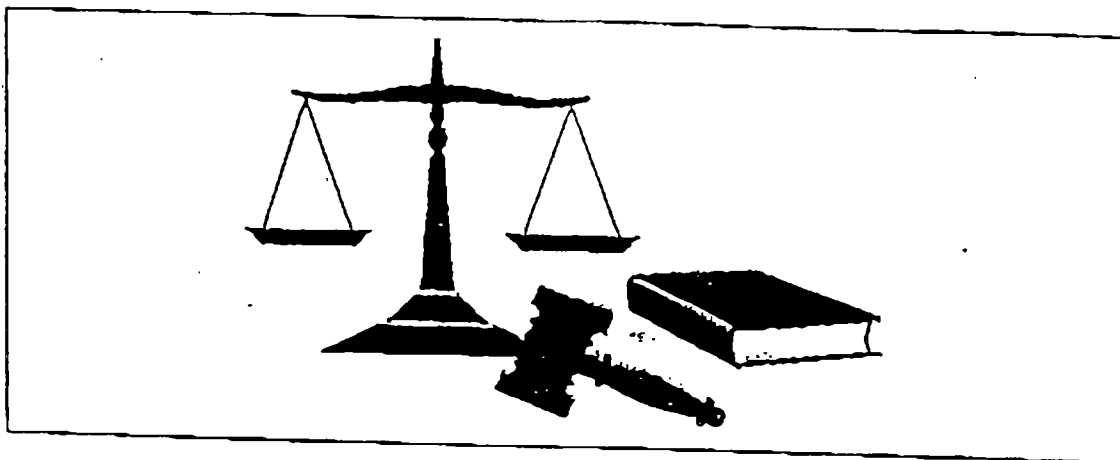
1997 APPROVED PERMITS:

| <u>IMPORTER</u>                   | <u>PERMIT<br/>NUMBER</u> | <u>DATE<br/>ISSUED</u> | <u>MODEL</u> | <u>QUANTITY<br/>APPROVED</u> | <u>IMPORTER<br/>TOTAL</u> |
|-----------------------------------|--------------------------|------------------------|--------------|------------------------------|---------------------------|
| Interport                         | 97-03154                 | 05/01/97               | SAR-8        | 2,000                        |                           |
|                                   | 97-03156                 | 05/01/97               | G3S          | 2,000                        |                           |
|                                   | 97-06392                 | 07/25/97               | AK-TYPE      | 20,000                       |                           |
|                                   | 97-06399                 | 07/18/97               | AK-TYPE      | 20,000                       |                           |
|                                   | 97-06408                 | 07/22/97               | AK-TYPE      | 20,000                       |                           |
|                                   | 97-06415                 | 07/22/97               | AK-TYPE      | <u>20,000</u>                | 84,000                    |
| H&K                               | 97-08140                 | 10/21/97               | SR-9         | <u>2</u>                     | <u>2</u>                  |
| TOTAL QUESTIONABLE FIREARMS 1997: |                          |                        |              |                              | 84,002                    |

OFFICE OF THE CHIEF COUNSEL  
Bureau of Alcohol, Tobacco and Firearms  
Room 6100  
Washington, DC 20226  
FAX # (202) 927-8673

FROM: David Lieberman for Steve McHale \*\*VOICE MAIL: (202) 927- 8172

DATE: 10/30



TO: Karen Popp, Sandra Schraibman, Mark Stern  
FAX # 456-5055 616 8187 514 7964

No. OF PAGES (including cover sheet): 4

FOR YOUR INFORMATION: [ ]

COMMENT: Processing of Import Applications

PROCESSING OF CENTURY ARMS PERMITS

- On Friday, October 10, 1997, Ms. Kirsten Rowe, an attorney with the law offices of Mark Barnes, contacted Specialist Scott Mendoza, requesting and receiving permission to hand deliver a series of 8 import permits. Upon arrival, Ms. Rowe asked that, if possible, ATF expedite 6 of the 8 permits. She provided no reason or basis to support her request. Of the 6 applications, 3 (97-09509, 97-09510, and 97-09511) were for the firearms at issue. The remaining 3 applications, 97-09508, 97-09512 and 97-09513, sought authority to import firearm parts and receivers. Mr. Mendoza gave no assurances to Ms. Rowe that any of the 6 applications would be expedited. No further contact was initiated with Mr. Mendoza by Ms. Rowe, Mr. Barnes, or any Century Arms representatives concerning these applications.
- Mr. Mendoza serves as the liaison for Century officials and their legal counsel, Mark Barnes. In this capacity, Scott is charged with resolving all processing questions or concerns, receiving hand delivered permit applications, and personally processing Century's expedite requests. He was designated to serve in this capacity by Ms. Mary Jo Hughes approximately 1 year ago due to past processing complaints and concerns. Based upon the number of applications submitted, Century is one of the largest importers.
- Mr. Mendoza was busy with a number of tasks between October 10, 1997, and October 21, 1997, including branch projects, the processing of other import applications, and preparing responses to correspondence. Mr. Mendoza was unable to work on the 3 applications in question until October 20, 1997. On that date he compared the model designations on applications 97-09511 and 97-09509 to those in the Century Arms file, concluded that they had been classified by the Firearms Technology Branch as sporting firearms in the past year, and decided that these applications could be approved. On Monday, October 20, 1997, Mr. Mendoza took final action to approve these permits. He also approved applications 97-09508, 97-09512, and 97-09513 on October 20, 1997.
- On October 21, 1997, Mr. Mendoza sent application 97-09510 to the Firearms Technology Branch for evaluation. On the same date, the Chief, Firearms Technology Branch, completed an evaluation form indicating that the firearms sought for importation on this application were sporting firearms that may be approved for importation. The application and the evaluation form were returned to Mr. Mendoza on the same date. On Tuesday, October 21, 1997, Mr. Mendoza, acting under his delegated authority, took final action to approve this application.
- Because Ms. Rowe provided no specific information indicating the urgency for expediting the 6 applications, they were not expedited as requested. Expedite requests are generally processed within one day of receipt.

### IMPORT PERMIT APPLICATION PROCESSING PROCEDURES

- Permit applications are delivered to the branch in bulk by the mail room, received by fax, or in certain instances, hand delivered by the applicant or his agent.
- The branch secretary has the responsibility of sorting and date-stamping incoming mail. However, in her absence, or in the case of faxed or hand delivered applications, this may be performed by an examiner or specialist.
- All incoming permit applications are imprinted with a control number by the person processing the incoming applications, normally the secretary except as noted above, and manually recorded in a log book which reflects the control number, applicant's name, date application was signed, and the date application was received in the branch.
- Routine applications are distributed evenly between 6 examiners for processing. Hand delivered applications may be given to an examiner or a branch specialist. Expedite requests are given to a branch specialist or the supervisory applications examiner for processing.
- Within the past year, specialists have been assigned to oversee the processing of import applications of two specific importers (Century Arms and H & K) that have experienced problems with the processing of their import applications.
- Applications are generally processed in the order in which received. However, this may vary due to an "expedite" request or delays associated with requests for additional information in support of the application.
- Each application is reviewed to determine that: (1) the applicant is properly qualified to import the articles listed; (2) the articles are importable by law; and (3) the articles are importable for the purposes described. Applications are often routed to either Firearms Technology Branch or Explosives Technology Branch for a commodity determination.
- Based on the results of the above review, the application will either be approved, conditionally approved, partially approved, or disapproved. Approval, partial approval or disapproval of an application is indicated by a checkmark in the appropriate box in item 15 on the Form 6. Pertinent restrictions associated with the articles being imported are stamped in red on the face or back of the Form 6.

Disapprovals are also stamped "DISAPPROVED" and "VOID" in red on the face of the application. Letters generated by the processor and signed by the branch chief or a specialist designated to do so will accompany partially approved, disapproved, and conditionally approved applications. The letters will explain the reasons for partial approval, disapproval or the unique conditions governing approval. No letters are issued for applications that are approved unconditionally.

- Most permits are processed within 3 weeks, although expedited permits can be approved in one day and some permit applications can take as long as 80-90 days to be acted upon.

The Branch structure is as follows:

|              |        |   |
|--------------|--------|---|
| Branch chief | (14)   | 1 |
| Specialists  | (13)   | 1 |
|              | (12)   | 4 |
|              | (11)   | 1 |
| Supervisory  |        |   |
| Examiner     | (9/10) | 1 |
| Examiners    | (8)    | 5 |
|              | (7)    | 1 |

Examiners and Specialists have been delegated the authority to take final action on permit applications. Most examiners have a minimum of 3-5 years of experience. The duties of examiners are primarily to receive, process, and act on applications to import firearms and ammunition. They respond to telephone inquiries from industry members concerning import applications and import procedures. Examiners also enter information from import applications into the Firearms and Explosives Import System database.

Most specialists have an average of 8-10 years experience. The duties of specialists do not generally include the processing of routine applications to import firearms and ammunition. Rather, specialists provide assistance to examiners in processing complex applications and assist with "expedite" requests. Specialists also prepare responses to correspondence from the firearms industry, the general public, and Congress. Specialists may also prepare notices of proposed rulemaking, ATF rulings, industry circulars, and private letter rulings.



**U.S. Department of Justice**  
**Civil Division**

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Deputy Assistant Attorney General

Washington, D.C. 20530

OCT 29 1997

**MEMORANDUM**

**TO:** Karen Popp  
Associate Counsel to the President  
Office of the White House Counsel

**FROM:** Stephen W. Preston  
Deputy Assistant Attorney General  
Appellate Staff  
Civil Division

**SUBJECT:** Litigation Risks of Potential Gun-Related Action

Attached is a memorandum prepared by the staff which reflects our thinking to date.

Attachment

cc: Gary G. Grindler  
Deputy Assistant Attorney General





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Washington, D.C. 20530

OCT 29 1997

**MEMORANDUM**

**TO:** Gary G. Grindler  
Deputy Assistant Attorney General  
Federal Programs Branch  
Civil Division

Stephen W. Preston  
Deputy Assistant Attorney General  
Appellate Staff  
Civil Division

**FROM:** Sandra M. Schraibman  
Assistant Director  
Federal Programs Branch  
Civil Division

Mark Stern  
Appellate Litigation Counsel  
Appellate Staff  
Civil Division

**SUBJECT:** Litigation Risks Associated With  
Proposed Suspension Of Permits And  
Application to Import "Sporterized" Rifles

You have asked us to evaluate the litigation risks associated with a proposal to institute a moratorium on pending applications for certain "sporterized" assault rifles and to suspend outstanding permits for such rifles. For the reasons set out below, we believe that defense of a moratorium on pending applications has a high likelihood of success. We believe, however, that defense of a suspension of existing permits has a very low likelihood of success and may involve the government in extensive discovery that could hamper its efforts to undertake a re-evaluation of the criteria for importing assault rifles.

A. The Gun Control Act, 18 U.S.C. § 922(1), prohibits the importation of firearms into the United States except as provided in 18 U.S.C. § 925(d). As relevant, that section provides that the Secretary shall authorize importation of firearms "generally

- 2 -

recognized as particularly suitable for or readily adaptable to sporting purposes \* \* \*."

ATF's present implementation of the "sporting purposes" test traces back to an intensive agency review undertaken in 1989. Until that time, ATF had authorized importation of a broad variety of "assault" rifles. In 1989, evidence suggested that these weapons were increasingly used in violent crimes. On the basis of this evidence, ATF announced a moratorium on pending applications and a temporary suspension of outstanding permits. Its action was immediately enjoined. On appeal, a divided panel of the Eleventh Circuit sustained the agency's action, rejecting a variety of statutory and constitutional arguments. Gun South Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989).

The decision in Gun South established a number of relevant principles. First, an agency decision to declare a moratorium on suspension of permits is reviewed under the standard of the Administrative Procedure Act, which requires that agency action be sustained unless it is "arbitrary, capricious or contrary to law." Second, ATF has authority to suspend outstanding permits when it has a reasonable basis for believing that permits may have <sup>been</sup> issued improperly. Third, ATF could conclude that firearms that once satisfied the sporting purposes test no longer met that standard in light of changing patterns of use.

The court in Gun South did not define the quantum of evidence necessary to justify a suspension. However, it was critical to the court's reasoning that the agency offered evidence indicating that the assault rifles at issue were, in fact, increasingly being used in criminal activity. The court cited four grounds presented in the declaration of the Director of ATF:

(1) law enforcement agencies and officials reported a dramatic proliferation in the use of assault-type rifles in criminal activity; (2) the Bureau's tracings branch showed a 57-percent increase in traces of assault-type rifles recovered from crime scenes; (3) several highly publicized murders in which assault rifles were used indicate their increased use in criminal activity; and (4) the Bureau's statistics revealed the smuggling of substantial numbers of firearms out of this country for use in foreign crime.

Id. at 866.

Following the court's decision, ATF conducted an elaborate study and offered affected importers the opportunity for individual hearings. Ultimately, ATF revoked the majority of the permits at issue. In so doing, it set out the criteria that have guided its subsequent decisionmaking. In essence, firearms will not be

- 3 -

considered to meet the sporting purposes test if they possess certain specified military features.<sup>1</sup> This approach parallels in key respects that later enacted in the statutory ban of assault weapons in 1994. ATF has applied these criteria since 1989.

Because ATF's criteria are well known, manufacturers have "sporterized" some assault rifles by stripping them of their military features. Because the altered firearms thus meet ATF's criteria, ATF has consistently approved their importation.

B. To our knowledge, ATF does not believe that any of the permits now outstanding was issued based on a misapplication of the 1989 criteria. If ATF concluded otherwise, a suspension necessary to correct the agency's mistake would clearly be supportable under the Gun South analysis. However, that does not appear to be the case.

The basis for the proposed moratorium and suspension would instead be the possibility that the current regulatory criteria no longer effectively implement the statutory sporting purposes test. Based on the draft declarations that we have reviewed, we believe that the government would have a high likelihood of success in defending a challenge to a moratorium on pending applications. However, we believe that there is little likelihood of success in prevailing against a challenge to a suspension of existing permits.

1. We believe that the government would be likely to prevail in litigation regarding pending applications. It is appropriate that ATF periodically reevaluate whether its import criteria continue to effectuate the terms of the statute, and ATF has done so in the past. As the court of appeals recognized in Gun South, firearms that meet the criteria for importability at one point in time, may cease to be importable in light of changing patterns of use. Because applications are pending for over one million assault rifles, a suspension is necessary if ATF's ultimate re-evaluation is to have any practical meaning. Absent a suspension, the import market will be glutted with firearms that ATF may determine are not, under current conditions, importable under the statute. Such a result would be incompatible with ATF's responsibilities and is in no way required by the statute which establishes no deadlines for action on applications.

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No importer challenged the revocation decision so that no judicial guidance exists as to the evidence necessary to justify a revocation as opposed to a suspension of an existing permit. In related litigation, the court of appeals for the Federal Circuit held that importers adversely affected by the revocation of their permits had not demonstrated a compensable taking of property. Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1992).

- 4 -

To defend a moratorium, we do not believe that ATF must have an a priori basis for believing that its current standards require change. It is sufficient that ATF has determined to undertake a periodic review.

2. We believe, however, that it would be extremely difficult to prevail with regard to permits already issued. It might be argued that the same rationale that would sustain a suspension of pending applications should apply as well to permits already granted. In defending such action, ATF could cite the existence of outstanding permits for over 600,000 weapons.<sup>2</sup> The sheer numbers, it might be argued, require a suspension of outstanding permits if the agency's review is to have prospective meaning.

We believe, however, that few courts will be receptive to this argument. Issuance of a permit reflects a final agency determination that an application satisfies the statutory criteria. ATF issues permits in the expectation that they will be relied upon; and, when necessary, it can delay action on applications to permit a general re-evaluation. A court is highly likely to conclude that the agency must adduce some factual basis to support a suspension of an existing permit beyond the desire to re-evaluate its standards. A court is likely to require some showing paralleling that made in Gun South that the firearms at issue do not, in fact, meet the sporting purposes test.

ATF has identified no evidence that a court would likely view as comparable to that presented in Gun South. In particular, the agency has identified no anecdotal or statistical evidence that the firearms at issue are increasingly used not for sporting purposes but in criminal activity.

Tracings of "sporterized" assault rifles have indeed increased. But ATF itself recognizes that this is part of a general increase in requests for tracings that can probably be attributed to ATF's efforts to increase tracing activity. Indeed, ATF points out that the percentage increase in traces for "sporterized" assault rifles is significantly less than the increase in traces of other rifles whose importability under the sporting purposes test is not questioned. Accordingly, the increase in the number of traces does not, as ATF itself apparently

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Most importers seek authorization to import a number of firearms far in excess of the number that they actually import under their permits. According to ATF, a manufacturer typically imports only 10% to 20% of the number of firearms authorized by a permit.

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recognizes, signify that these weapons are being increasingly used in crimes.<sup>3</sup>

That ATF has issued permits for over 600,000 firearms is unlikely to be regarded, without some additional showing, as a basis for suspending permits. The court in Gun South, faced with a comparable number, did not suggest that the magnitude of the potential problem would itself justify a suspension. As noted, the court found it critical that the agency was able to adduce evidence that the permits were, in fact, not properly issued under the statutory standard.

It should also be noted that a court is unlikely to accept an argument premised on the fact that the "sporterized" firearms are virtually identical to the same firearms that were banned when they possessed military features. The agency's implementation of the sporting purposes test, like the assault weapons ban, focuses precisely on the presence or absence of military features. The agency is, of course, free to reconsider this approach. But a court is unlikely at this stage to be impressed by an argument that stresses the similarity of the sporterized firearms to their ancestors with military features.

C. ATF may also consider a suspension of some, but not all, existing permits.

1. A suspension might be limited to importers who had not acted in reliance on their permits. Such a limitation would likely increase the government's likelihood of success at an early stage of litigation, to the extent that it might eliminate the plaintiffs with the most urgent claims for injunctive relief. Such a limitation might thus decrease the likelihood of an early temporary restraining order.

Ultimately, however, such an approach is unlikely to be successful. Regardless of how the limitation is drawn, some plaintiff subject to the suspension will doubtless claim detrimental reliance not covered by the exception. For example, if the suspension excepted firearms already in transit, suit would likely be brought by importers asserting that the suspension jeopardized their contractual arrangements or payment schedules. And, unless ATF has some reason to believe that the permits issued in error, a court is unlikely to sustain the suspension whether or not it is limited.

The increase of tracings in Gun South were not similarly part of an overall increase in the number of tracings.

- 6 -

2. ATF might also limit a suspension to permits issued in recent weeks. The premise for such action would be as follows. At the point at which ATF undertook consideration of a formal moratorium, it declared an internal moratorium on pending applications. Such action was required for reasons similar to those justifying the later, public moratorium. Individual ATF employees, however, erroneously approved applications for 175,000 firearms despite the decision that no applications should be acted on. Suspension now simply effectuates the earlier moratorium and corrects employee error.

As an initial matter, such an argument would require a declaration from a responsible ATF official stating that he made a decision to impose a temporary moratorium while reviewing the possibility of a public, formal moratorium and that he acted to implement it. Even if the factual predicate for the argument exists, the risks of such a strategy may outweigh any possibility of success. Courts generally require agencies to adhere to their public criteria and look askance at attempts to impose nonpublic directives. It is far from certain whether a court would regard an action taken in accordance with published criteria as an "error." Moreover, a controversial suspension premised on a nonpublic moratorium and employee bungling or internal miscommunication does not place the government in the strongest possible litigating posture.

Reliance on a nonpublic moratorium also creates a significant risk of intrusive discovery. Plaintiffs will almost certainly seek to depose decision-makers and to inquire into all the circumstances surrounding the preliminary moratorium decision.

D. While the discovery risks posed by this last course are particularly significant, any suspension is likely to involve government officials in extended discovery at precisely the point at which they are to re-evaluate the criteria for importability.

Finally, an adverse decision with regard to a suspension of existing permits could well cast a cloud over ATF's re-evaluation efforts. While a defeat might be narrow, and fact-based, it is also possible that a court might address the substance of the sporting purposes test in a manner that would significantly circumscribe the agency's range of regulatory options.

In sum, for the reasons set out above, we believe that chances of prevailing with regard to a moratorium on pending applications are extremely high. The government's chances of successfully defending a suspension of existing permits, based on existing information, are very low.



## U.S. Department of Justice

Washington, D.C. 20530

OCT 29 1997

MEMORANDUM

TO: Gary G. Grindler  
Deputy Assistant Attorney General  
Federal Programs Branch  
Civil Division

Stephen W. Preston  
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FROM: Sandra M. Schraibman  
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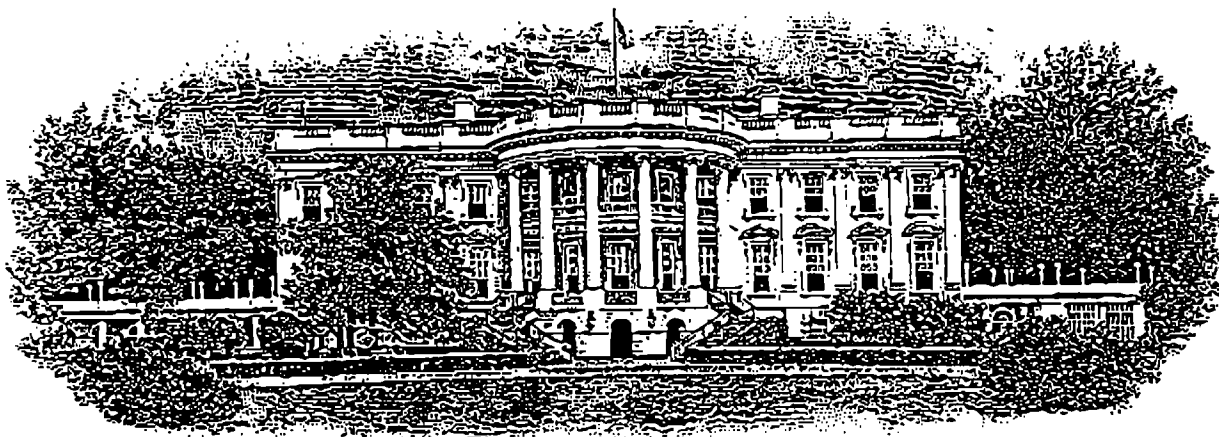
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## The White House

## DOMESTIC POLICY COUNCIL



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American Law Div.



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September 26, 1997

TO : Honorable Dianne Feinstein  
Attention: T.J. Wilkinson Green

FROM : Charles Doyle *C Doyle*  
American Law Division

SUBJECT : Suspension or Revocation of Permits to Import Firearms  
Based Upon an Erroneous "Sporting Purposes" Determination  
in Light of *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir.  
1989)

This is response to your request for an assessment of constitutional limitations imposed upon suspension or revocation of permits to import firearms based upon an erroneous sporting purposes determination (18 U.S.C. 925(d)(3)) in light of *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989).

The Gun Control Act of 1968 imposes a general import ban on firearms, 18 U.S.C. 922(D). It demands, however, that the Secretary of the Treasury allow imports under four circumstances, one of which is that the firearms for which the permit is sought are "generally recognized as particularly suitable for or readily adaptable to sporting purposes," 18 U.S.C. 925(d)(3). The authority has been delegated to the Bureau of Alcohol Tobacco and Firearms (ATF).

*Gun South, Inc.* involved the challenge by a firearms dealer holding import permits for firearms that had been seized by customs officials pursuant to a temporary import ban directed at various semi-automatic military assault weapons in order to reassess their status under the "sporting purposes" exception.

The court declined to enjoin suspension of the import permits on the grounds that suspensions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A), a standard grounded in substantive due process.

*Gun South* contended ATF had acted capriciously by not "adequately consider[ing] sufficient evidence before imposing the temporary suspension." The court responded by pointing to the agency explanation for its action: (1) law enforcement agencies reports of "a dramatic proliferation in the use of assault-type rifles in criminal activity;" (2) tracing branch statistics revealing "a 67-percent increase in traces of assault-type rifles recovered from crime scenes;" (3) several highly publicized murders in which assault rifles were used indicat[ing]

CRS-2

their increased use in criminal activity," and (4) ATF information showing "smuggling of substantial numbers of firearms out of the country for use in foreign crime," 877 F.2d at 866. The court did not suggest that these were the only facts upon which ATF could ever reasonably rely. Gun South alleged the absence of a rational predicate for the agency's action; the court concluded the agency had a rational reason for its action. Other cases suggest the standard is not particularly demanding in light of the judicial deference to agency judgment of what constitute reasonable administrative actions with respect to matters within their jurisdiction, see e.g., *Smiley v. Citibank*, 116 S.Ct. 1790, 1793 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering").

The court also addressed two issues that it expressly characterized as due process challenges. It held that procedural due process did not require pre-seizure notice or opportunity to be heard even in situations like that of Gun South where the dealer had been issued an import permit prior to announcement of the ban. The test applied is that of *Mathews v. Eldridge*, 424 U.S. 319, 885 (1976) and balances: "(1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action including the burdens that any additional procedural requirement would have. The court identified the protection of the public's health and safety as "a paramount government interest" for purposes of the test, 877 F.2d at 867. It mentioned the government's interest in avoiding a contribution "to this country's violence crime epidemic" that the large number of firearms covered by existing applications (not permits) would reflect, but it made no specific reference to the factors considered in its rational basis analysis, *id.*

The Supreme Court has suggested another view of the government's interest under the *Mathews* test, i.e. that the government's interest is "in seizing . . . property before [providing an opportunity to be heard]. The question . . . is whether *ex parte* seizure is justified by a pressing need for prompt action," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 (1993). The Court contrasted the circumstances of *Good* with those where the absence of prompt action might lead to a frustration of legitimate government interests, including the observation that "no pre-seizure hearing is required when customs officials seize an automobile at the border," *id.* at 57.

The nature of the private interest also figures in the second due process issue — Gun South's due process right to compensation for a governmental taking. The court concluded that the government's action did not constitute a taking for due process purposes, 877 F.2d at 869, a view that apparently has continued vitality, see e.g., *B-West Imports, Inc. v. United States*, 75 F.3d 638, 638-33 (Fed.Cir. 1996) (the right to import and sell arms in the United States is "subject at all times to the hazard that their permits [will] be revoked, pursuant to statute and regulation, on foreign policy grounds or for other reasons. The Due Process Clause does not require the government to stand as a surety against the adverse consequences sometimes suffered by persons who knowingly undertake that kind of commercial risk").

877 F.2d 858 printed in FULL format.

GUN SOUTH, INC., Plaintiff-Appellee, v. NICHOLAS BRADY,  
Secretary of the Treasury; STEPHEN E. HIGGINS, Director of  
the Bureau of Alcohol, Tobacco and Firearms; WILLIAM VON  
RABB, Commissioner of the United States Customs Service,  
Defendants-Appellants

No. 89-7339

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

877 F.2d 858; 1989 U.S. App. LEXIS 9449

June 30, 1989

PRIOR HISTORY:

[\*\*1] Appeal from the United States District Court for the Northern District of Alabama; No. CV-89-AR-0551-S; Acker, Judge.

COUNSEL: John R. Bolton, Asst. Attorney General, Civil Division, Washington, District of Columbia, Frank W. Donaldson, U.S. Attorney, George Batcheler, Birmingham, Alabama, John F. Cordeus, Off. of Atty. Gen., Civil Division, Washington, Mark B. Stern, Washington, District of Columbia, for Defendants-Appellants.

James C. Barton, Johnston, Barton, Proctor, Swedlaw & Naff, Robert S. Vance, Jr., Ralph H. Smith, Birmingham, Alabama, for Plaintiff-Appellee.

JUDGES: Fay and Hatchett, Circuit Judges, and Walter E. Hoffman, \* Senior District Judge. Walter E. Hoffman, Senior District Judge, dissenting.

\* Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

OPINIONBY: HATCHETT

OPINION: [\*859] HATCHETT, Circuit Judge

The Secretary of the Treasury, the Director of the Bureau of Alcohol, Tobacco and Firearms, and the Commissioner of the United States Customs Service (collectively "the Government") appeal the district court's grant of an injunction to Gun South, Inc. ("GSI"). The district court ordered the Government to deliver to GSI rifles which had been approved for importation, but held by Customs upon arrival at the Birmingham, Alabama Airport. 711 F. Supp. 1054. For the reasons discussed below, we reverse the district court's decision and vacate the injunction.

FACTS

GSI is a wholesale gun dealer which the Bureau of Alcohol, Tobacco and Firearms ("the Bureau") has licensed to import firearms. In September, 1988, and February, 1989, GSI applied for permits to import Steyr-Mannlicher AUG semi-automatic rifles (AUG-SA rifles) because GSI learned that the Bureau had previously approved the importation of these rifles as firearms with a sporting purpose. Pursuant to its practice of routinely granting permits for previously



imported firearms, the Bureau issued GSI two permits. On October 4, 1988, the Bureau granted GSI a permit to import 1,700 AUG-SA rifles, and on February 22, 1989, the Bureau approved GSI's application to import an additional 3,000 AUG-SA rifles.

On January 23, 1989, GSI ordered 800 AUG-SA rifles and certain accessories under its October 4 permit. GSI obligated itself to pay \$ 700,000 toward a larger total purchase price, and GSI's bank guaranteed these funds.

On March 21, 1989, William Bennett, Director of the Office of National Drug Policy, speaking for the Secretary of the Treasury, announced a temporary suspension [\*\*3] on the importation of five "assault-type" weapons, including the AUG-SA rifle. On March 29, 1989, the Bureau expanded the scope of the suspension to cover all assault-type weapons "indistinguishable in design, appearance and function to the original five." The Government imposed the temporary suspension to allow the Bureau to reassess its approval of several applications to import the suspended rifles. Under an accelerated review, the Bureau will review each permit to determine if it erroneously concluded that the rifles are "generally suitable for a sporting purpose." The Bureau will not revoke the permits before giving the affected importers notice and an opportunity to respond.

GSI requested a clarification of whether the suspension applied to weapons purchased under preexisting permits. In response to this inquiry, the Bureau informed GSI, at least twice, that the ban did not apply to weapons purchased under preexisting permits, but rather, the suspension only prevented the issuance of new permits. Despite these assurances, the Customs Service interdicted GSI's shipment of [\*860] AUG-SA rifles at the Birmingham Airport even though GSI purchased such rifles under a permit issued prior [\*\*4] to the suspension. Although the Government agreed to allow GSI to obtain custody of the AUG-SA rifles if GSI posted a bond guaranteeing that it would not resell or distribute such weapons, GSI declined such offer and brought this action.

#### PROCEDURAL HISTORY

On March 30, 1989, GSI filed this action in the Northern District of Alabama seeking a declaratory judgment, and preliminary and permanent injunctive relief. GSI sought to enjoin the Government from interfering with the delivery of firearms imported under its permits issued prior to the temporary suspension. On April 7, 1989, the district court consolidated GSI's preliminary injunction motion with a final adjudication of the merits of GSI's claims pursuant to Fed.R.Civ.P. 65(a)(2). Both sides provided further evidence and legal briefs.

On April 26, 1989, the district court denied the Government's summary judgment motion and issued a permanent injunction "enjoin[ing] any interference with the routine delivery of any and all weapons ordered by Gun South, Inc. in accordance with the terms and conditions of permits issued by [the Bureau] prior to the promulgation of the notice or notices of suspension purporting to affect the importation [\*\*5] of the [firearm in question]." The district court found that the Government failed to present any evidence that the AUG-SA is not "generally recognized as particularly suitable or readily adaptable to sporting purposes." The court also found that the evidence demonstrated that the AUG-SA has the design of a sporting weapon. Based on these findings, the district court held that section 925(d)(3) of the Gun Control Act precluded the temporary suspension. See 18 U.S.C.A. @ 923(d)(3) (West 1976) (compels the Secretary of

the Treasury to authorize the importation of firearms "generally recognized as particularly suitable for or readily adaptable to sporting purposes."). After the district court concluded that GSI lacked an adequate legal remedy to redress any harm incurred from the suspension, the court ordered the Customs Service to release GSI's weapons for immediate delivery. Because the district court found the suspension unlawful, the court did not address GSI's constitutional challenges to the Government's actions.

On April 28, 1989, the district court denied the Government's motion for a stay pending appeal. On the same day, this court granted a temporary emergency stay pending [\*\*6] the court's further action. On May 3, we extended the stay pending appeal and expedited the Government's appeal.

#### CONTENTIONS

The Government contends that the district court erred by concluding that the Bureau did not lawfully suspend the importation of the AUG-SA rifle for ninety days. The Government contends that section 925(d)(3) does not preclude it from temporarily suspending the importation of firearms while it conducts an accelerated reassessment of the importability of such firearms. In addition, the Government maintains that it did not act arbitrarily or capriciously because the suspension is rationally related to fulfilling its mandate of precluding the importation of unauthorized firearms.

The Government further contends that even if GSI has a vested property interest in the permits, the temporary suspension does not violate GSI's constitutional rights. According to the Government, the temporary import suspension does not violate GSI's due process rights because the strong public interest in immediate action outweighs the limited impact on GSI's alleged property interest. Moreover, the Government contends that GSI cannot establish a valid taking claim because: (1) this [\*\*7] court lacks jurisdiction over GSI's equitable claim to enjoin the alleged taking; and (2) the Government's temporary deprivation of the rifles does not constitute a compensable taking.

GSI contends that the district court properly concluded that section 925(d)(3) prevents the Government from suspending the [\*861] importation of the AUG-SA rifle because the Bureau previously classified this rifle as a sporting firearm, and the Government has failed to present any evidence to demonstrate that this classification is erroneous. Beyond the Gun Control Act, GSI contends that the Act's implementing regulations also preclude the suspension.

Even if the Government has the authority to suspend the importation of the AUG-SA rifles, GSI alternatively contends that the Government arbitrarily and capriciously imposed the suspension by making an uninformed decision without any supporting evidence. Finally, GSI contends that the Bureau's imposition of the suspension violates its fifth amendment procedural due process rights and constitutes an unconstitutional taking.

#### ISSUES

The sole issue which the Government raises on appeal is whether the district court improperly enjoined the Government from temporarily [\*\*8] suspending the importation of GSI's AUG-SA rifles purchased under permits which the Bureau approved prior to the Government's announcement of the import suspension.

## DISCUSSION

We begin our analysis by emphasizing the deferential standard of review that we must apply when examining an agency's action. We may set aside the Bureau's temporary import suspension of AUG-SA rifles only if we find that such action: (1) exceeds the Bureau's statutory authority, (2) violates a constitutional right, or (3) constitutes an "arbitrary" or "capricious action," or "an abuse of discretion" or an action "otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C.A. @ 706(2)(A), (B), and (C) (West 1977). Under this deferential standard, we cannot substitute our judgment for the Bureau's judgment, but rather, we must presume the import suspension's validity. *Manasota-88, Inc. v. Thomas*, 799 F.2d 687, 691 (11th Cir. 1986). With this standard in mind, we address GSI's multipronged attack of the temporary import suspension.

## I. Lawfulness of the Temporary Suspension

The district court enjoined the Government's actions because it concluded that the Gun Control Act and its implementing [\*\*9] regulations prohibit the Bureau from temporarily suspending the importation of the AUG-SA rifles. GSI contends that the district court properly interpreted the Gun Control Act and its regulations. In contrast, the Government contends that its temporary import suspension does not exceed the Gun Control Act or its implementing regulations and that the evidence illustrates the reasonableness of such action.

## A. The Authority for the Temporary Suspension

The Gun Control Act gives the Secretary of the Treasury the power to enforce its provisions. n1 The Act generally forbids the Secretary from authorizing the importation of firearms into the United States. 18 U.S.C.A. @ 922(1) (West 1976). The Act, however, creates four narrow categories of firearms which the Secretary must authorize for importation. 18 U.S.C.A. @ 925(d) (West 1976 and Supp. 1989). Under the only exception relevant to this controversy, the Secretary of the Treasury must authorize the importation of firearms

of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable [\*\*10] to sporting purposes, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled.

18 U.S.C.A. @ 925(d)(3) (West 1976 and Supp. 1989) (emphasis added).

- - - - -Footnotes- - - - -

n1 The Secretary of Treasury has delegated this authority to the Bureau. See 27 C.F.R. @ 178.12 (1988) (no importation of firearms without authorization from the Bureau).

- - - - -End Footnotes- - - - -

[\*862] We must first determine whether the Act or its regulations authorize or prohibit the suspension. Contrary to the district court's conclusion, we believe that no provision precludes the suspension but rather, the Act impliedly authorizes such action.

GSI correctly notes that neither the Act nor its regulations explicitly authorizes the suspension. Despite this absence of express authority, we conclude that the Bureau must necessarily retain the power to correct the erroneous approval of firearms import applications. As discussed above, the Act strictly limits the importation of firearms to those which satisfy one of the four exceptions. 18 U.S.C.A. [\*11] @ 922(1) (West 1977). To accomplish this task, the Bureau inherently must possess the corollary power to temporarily suspend the importation of firearms under permits which the Bureau may have erroneously granted. Otherwise, gun companies could legally inundate the country with rifles which Congress intended to forbid from entering our borders. We decline to interpret the Act in a way which produces such a nonsensical result.

Beyond this common sense rationale, we find support for this implied authority in the legislative history. Several portions of the legislative history emphasize Congress's intent to ban the importation of firearms, and the Secretary's discretion in complying with this mandate. The Senate report to the Gun Control Act of 1968 provides that "the existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the states to effectively cope with firearms traffic within their own borders. . . ." Sen.R. 1097, 90th Cong., 2d. Sess. 80, reprinted in 1968 U.S.Code Cong. & Admin.News 2112, 2167. In addition, the Senate report explains that Congress intended section 925(d)(3) to "curb the flow of surplus military weapons [\*12] and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting" to prevent such weapons being used for criminal means. S.Rep. No. 1097, 90th Cong., 2d Sess. 80, reprinted in 1968 U.S.Code Cong. & Admin.News 2112, 2167. Furthermore, the sponsor of the legislation, Senator Dodd, stated:

Title IV prohibits importation of arms which the Secretary determines are not suitable for research, sport, or as museum pieces. . . . The entire intent of the importation section is to get those kinds of weapons that are used by criminals and that have no sporting purpose.

114 Cong.Rec. S 5556 column 3, S 5582 column 1, S 5585, column 2 (May 14, 1968). These remarks illustrate Congress's intent absolutely to bar the importation of firearms outside of the narrow statutory exceptions. Given this purpose, we believe that Congress intended the Secretary to retain the necessary authority to comply with this mandate, including the power to temporarily suspend imports under potentially erroneous permits.

As further support for our conclusion, we note that the Supreme Court and other courts have recognized an implied authority in other [\*13] agencies to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration. For example, in concluding that the Interstate Commerce Commission ("ICC") could order a refund to correct a prior error, the Supreme Court stated that "agency, like a court, can undo what is wrongfully done by virtue of its order." United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229, 86 S. Ct. 360, , 15 L. Ed. 2d 284, 289 (1965); see also American Trucking Assoc. v. Frisco Trans. Co., 358 U.S. 133,

145, 79 S. Ct. 170, , 3 L. Ed. 2d 172, 180-81 (1958) ("the presence of authority in administrative offices and tribunals to correct [inadvertent ministerial] errors has long been recognized -- probably so well that little discussion has ensued in the reported cases."). Other courts have similarly recognized this implied authority. See *Iowa Power and Light Co. v. United States*, 712 F.2d 1292, 1294-97 (8th Cir. 1983) (ICC could retroactively impose higher tariff to correct legal error), cert. denied, 466 U.S. 949, 80 L. Ed. 2d 536, 104 S. Ct. 2150 (1984); *Bookman v. United States*, 197 Ct. Cl. 108, 453 F.2d 1263, 1265 (1972) (allowing agency to [\*\*14] reconsider decisions in [\*\*863] absence of statutory or regulatory authorization after noting general rule that "every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriate to modify its judgment, decree, or order.") (quoting 2 K. Davis, *Administrative Law Treatise*, @ 18.09 (1958)). Finally, some courts have specifically relied on this implied authority to allow an agency to revoke a license. *Kudla v. Modde*, 537 F. Supp. 87, 89 (E.D.Mich. 1982), "(the power of the state to require a license implies the power to revoke a license which has been improperly issued.)", aff'd without opinion, 711 F.2d 1057 (6th Cir. 1983); *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002, 1016-17 (D.Vt. 1971), ("We are aware of no licenses which once granted, can never be taken away.") aff'd, 449 F.2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065, 92 S. Ct. 1494, 31 L. Ed. 2d 794 (1972).

The district court and GSI, however, refuse to imply such authority because they interpret section 925(d)(3) as expressly prohibiting the suspension. We do not interpret section 925(a)(3) so broadly.

Section 925(d)(3) requires the Secretary to authorize the importation of a firearm [\*\*15] which is generally recognized as particularly suitable for sporting purposes. We agree with the district court that this section unambiguously requires the Secretary to authorize the importation of sporting firearms. But we decline to adopt the district court's broader interpretation of this section as precluding a temporary suspension until the Bureau proves that the rifles are not sporting firearms. First, we believe that such an interpretation "places the cart before the horse"; the Bureau must decide whether a firearm is generally suitable for a sporting purpose before the Act requires the Secretary to authorize such a rifle's importation.

Second, the Bureau and the Secretary of Treasury do not interpret this section as prohibiting a temporary ban. Because we do not believe the language of section 925(a)(3) compels a different interpretation, we should defer to their interpretation. See *Callaway v. Block*, 763 F.2d 1283, 1287 (11th Cir. 1985) ("construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong").

Third, the legislative history supports our interpretation. The Senate Report notes that the [\*\*16] Act gives the Secretary of the Treasury unusually broad discretion in applying section 925(d)(3):

The difficulty of defining weapons characteristics to meet this target [of eliminating the importation of weapons used in crime], without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition. . . .

S.Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968). In fact, such broad discretion was a major concern of the opponents of the bill:

The proposed restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. . . .

S.Rep. No. 1097, 90th Cong., 2d Sess. 255 (April 29, 1968), reprinted in 1968 U.S.Code Cong. & Admin.News at 2306 ("individual views of Messrs. Dirksen, Hruska, Thurmond and Burdick on Title IV"). Because the Bureau has significant discretion in administering the Gun Control Act, we do not believe that Congress intended section 925(d)(3) to prevent the [\*\*17] Bureau from temporarily suspending imports which may be unlawful under the Act.

The district court and GSI cite the 1986 amendment to the Gun Control Act as support for their interpretation of section 925(d)(3). We, however, agree with the Bureau that the 1986 amendment does not compel us to adopt the district court's interpretation. The 1986 amendment substituted the word "shall" for "may" in section 925(d), and therefore, mandated the Secretary to authorize the importation of firearms falling within one of the four excepted categories. Firearm Owners Protection [\*\*864] Act, P.L. 99-308, 100 Stat. 459 (1986) (codified as amended at 18 U.S.C.A. @ 925(d) (West 1988); H.Rep. No. 495, 99th Cong., 2d Sess. at 14 (1986), reprinted in 1986 U.S.Code Cong. & Admin.News 1327, 1340 (the 1986 amendment "opens up the importation of firearms by mandating the Secretary to authorize importation of a firearm if there is a sporting purpose and eliminat[es] the requirement that the importer has the burden of satisfying the Secretary of the sporting purpose. . . ."). As discussed above, while we acknowledge this mandatory language, we do not believe that such language prohibits the Bureau from temporarily [\*\*18] suspending the importation of certain firearms while reassessing whether such firearms have a sporting purpose. As the senate report notes, "it is anticipated that in the vast majority of cases, [the substitution of 'shall' for 'may' in the authorization section] will not result in any change in current practices." S. Rep. No. 98-583, 98th Cong., 1st Sess. 27 (1984). Thus, we conclude that section 925(d)(3) does not expressly preclude the temporary suspension.

Turning to the implementing regulations, GSI contends that the regulations also prohibit the Government's actions. We disagree.

The Secretary promulgated regulations which prescribe procedures for importing firearms. Under the regulations, gun companies must apply for a permit to import firearms. 27 C.F.R. @ 178.112 (1988). If the Bureau approves the permit, the licensed importer may import the quantity of firearms specified in the application for the period of time stated in the application. 27 C.F.R. @ 178.112 (1988).

According to GSI, the following regulation unambiguously prohibits the temporary import suspension:

If the Director [of the Bureau] approves the application, such approved application shall serve as the permit [\*\*19] to import the firearm, firearm barrel, or ammunition described therein, and importation of such firearms, firearm barrels, or ammunition may continue to be made by the licensed

importer under the approved application (permit) during the period specified thereon. [Emphasis added.]

27 C.F.R. @ 178.112. This regulation does not unambiguously proscribe the Bureau from temporarily suspending firearms imports. Rather than expressly precluding such action, the regulation merely explains the consequences of the Bureau's proper approval of a firearm import application.

Even if the regulation does not unambiguously preclude the suspension, GSI argues that the regulation's failure to explicitly authorize the Bureau to suspend a valid permit demonstrates that the Bureau does not have the authority to temporarily suspend GSI's permits. According to GSI, where the Bureau has retained authority to suspend or revoke such permits, it has implemented explicit regulations which recognize such authority. See 27 C.F.R. @ 47.44 (1988) (explicitly granting the Bureau the right to deny, revoke, suspend or revise permits found to be inconsistent with or violating the Arms Export Control Act [\*\*20] of 1976); 27 C.F.R. @@ 178.71-178.78 (1988) (regulations establishing a procedure for suspending or revoking a license in accordance with 18 U.S.C. @ 923). The Secretary's creation of express procedures for revoking or suspending permits under a different statute does not compellingly indicate that the Bureau did not intend to establish such a right to temporarily suspend permits under the Act. Similarly, the Secretary's imposition of procedures for revoking a license does not convince us that its failure to expressly authorize the Bureau to suspend a permit indicates its intent to preclude such action.

More importantly, the Secretary urges this court not to interpret this regulation as precluding the temporary suspension. We must defer to the Bureau's interpretation of the Gun Control Act and its regulations absent plain error in the Bureau's interpretation. See *Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965) (court should follow agency's interpretation unless "there are compelling indications that it is wrong"); *Veterans Administration Medical Center v. FLRA*, [\*865] 675 F.2d 260 (11th Cir. 1982); *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945) [\*\*21] (administrative interpretation is the ultimate criterion for interpreting an administrative regulation and such interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"). Because we do not find the Secretary's interpretation plainly erroneous, but rather we find it more valid than GSI's interpretation, we reject GSI's contention that the Bureau's regulations preclude the temporary suspension.

#### B. Reasonableness of the Temporary Suspension

Having established that the Secretary has the authority to temporarily suspend the importation of semi-automatic assault rifles, we must determine the reasonableness of such action. In making this determination, we will defer to the Bureau's suspension unless we find it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. @ 706 (2)(A) (1977).

##### 1. Accordance with Law

By arguing that the imposition of the temporary suspension without conducting a hearing violates the Gun Control Act's and the Administrative Procedure

Act's ("APA") procedural rules, GSI essentially argues that the temporary suspension is "otherwise not in accordance with law." The [\*\*22] Government responds to this attack by arguing that the procedural provisions on which GSI relies do not apply to the temporary suspension. We find the Government's argument persuasive.

First, GSI argues that the imposition of the suspension without a hearing violates section 926(b) of the Act. Section 926(b) requires the Secretary to give notice and an opportunity to be heard prior to promulgating regulations. See 18 U.S.C.A. @ 926(b) (West Supp. 1989). This section only applies when the Secretary engages in rulemaking.

The Bureau has not engaged in rulemaking, but has merely suspended certain firearms from importation while it individually reassesses several permit determinations. These activities which involve applying the law to the facts of an individual case, do not approach the function of rulemaking. See *York v. Secretary of Treasury*, 774 F.2d 417, 420 (10th Cir. 1985) ("classification" of firearm as machine gun is "not a rulemaking of any stripe."). Such a determination is more analogous to making a licensing decision which the APA classifies as an "order" rather than a "rule." See 5 U.S.C. @@ 551(6), (7) & (9) (defining "licensing" as "agency process respecting [\*\*23] the grant, renewal, denial, revocation, suspension, amendment, withdrawal, limitation, amendment . . . of a license."). Thus, because these actions do not constitute rulemaking, the Bureau did not violate section 926(b).

Second, we reject GSI's argument that the Government violated the APA by imposing the suspension without a hearing. Under the APA, an agency must provide notice and an opportunity to respond before revoking a license. 5 U.S.C.A. @ 558 (1977). As discussed above, the Bureau has not revoked GSI's license or its permits; import suspension does not constitute rulemaking; therefore, the suspension does not violate the APA's procedural requirements.

## 2. Arbitrary, Capricious or Abuse of Discretion

Even if the Bureau's suspension does not specifically conflict with the Act or any other laws, GSI argues that the district court properly enjoined the Government's actions because the Bureau arbitrarily and capriciously imposed the suspension. GSI relies on two alternative grounds for reaching this conclusion: (1) the AUG-SA rifle has not physically changed and (2) the Bureau lacks any evidence to support its "drastic" actions. Neither prong of this argument has any [\*\*24] merit.

Initially, we reject GSI's argument that the Bureau acted arbitrarily and capriciously by imposing the suspension because the [\*866] AUG-SA rifle has not physically changed. This argument places too much emphasis on the rifle's structure for determining whether a firearm falls within the sporting purpose exception. While the Bureau must consider the rifle's physical structure, the Act requires the Bureau to equally consider the rifle's use. The term "generally recognized" in section 925(d)(3) suggests a community standard which may change over time even though the firearm remains the same. Thus, a changing pattern of use may significantly affect whether a firearm is generally recognized as particularly suitable for or readily adaptable to a sporting purpose.

In addition, the Bureau has interpreted section 925(d)(3) as requiring an inquiry of the firearms' actual use in addition to its physical



characteristics. See *Gilbert Equip. Co. v. Higgins*, 709 F. Supp. 1071, slip op. at 10-11 (S.D. Ala. 1989) (upholding Bureau's denial of permit despite its granting permits for similar firearms because Bureau changed its view of scope of sporting purposes). Because we find this [\*\*25] interpretation reasonable, we defer to it. See *Callaway*, 763 F.2d at 1287 (requiring adherence to agency's construction of statute absent compelling indication of error). Thus, the temporary suspension is not arbitrary and capricious simply because the rifle has not changed.

We similarly find no merit in GSI's contention that the Bureau imposed the suspension in such a manner and so totally without evidence that we should not defer to the Government's action. See *SEC v. Sloan*, 436 U.S. 103, 117-18, 56 L. Ed. 2d 148, 160-61, 98 S. Ct. 1702 (1978) ("one factor to be considered in giving weight to an administrative ruling is the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in power to control."). According to GSI, the following circumstances demonstrate that the Bureau made a hurried and uninformed decision: (1) the Bureau did not evaluate or deliberate the situation; (2) the Bureau did not have any data showing that imported semi-automatic rifles or the AUG-SA rifle contribute to crime; (3) the Bureau did not consult its experts who routinely identify sporting [\*\*26] firearms; and (4) the Bureau made its decision without considering its legal obligations under the Act and its implementing regulations.

Contrary to this assertion, we believe that the Bureau adequately considered sufficient evidence before imposing the temporary suspension. In Director Higgins's declaration, he explains: (1) law enforcement agencies and officials reported a dramatic proliferation in the use of assault-type rifles in criminal activity; (2) the Bureau's tracings branch showed a 57-percent increase in traces of assault-type rifles recovered from crime scenes; (3) several highly publicized murders in which assault rifles were used indicate their increased use in criminal activity; and (4) the Bureau's statistics revealed the smuggling of substantial numbers of firearms out of this country for use in foreign crime. This evidence sufficiently supported the Bureau's reassessment of certain permits; therefore, the district court clearly erred in finding that the Government did not present any evidence indicating that the AUG-SA rifles may not have a generally recognized sporting purpose.

Because the Bureau issued permits to allow the importation of 640,000 rifles and had [\*\*27] 136,000 applications pending for additional rifles, the Bureau could reasonably conclude that it needed to impose a temporary suspension to avoid a saturation of potentially illegal assault-type rifles. We emphasize that we are not reviewing the Bureau's revocation of the permits, but only its ninety-day suspension. Thus, the Government did not act arbitrarily and capriciously by imposing the temporary suspension while it conducts an accelerated review of its grant of several permits; rather, the Government acted reasonably to comply with its duty of prohibiting the importation of firearms under the Gun Control Act.

## II. Constitutional Claims

Beyond the above claims, GSI attacks the suspension by arguing that it violates its [\*\*867] due process rights and constitutes a taking of property without the payment of just compensation. In response, the Government argues

that its temporary import suspension does not infringe upon any of GSI's constitutional rights. We agree.

#### A. Procedural Due Process Claim

According to GSI, the Government's failure to give it notice of the suspension and an opportunity to respond prior to imposing the suspension deprived GSI of its due process rights. n2 GSI [\*\*28] reaches this conclusion by arguing that the Government may not deprive an individual of property without giving such individual an opportunity to be heard. Although GSI correctly argues the general rule, GSI fails to recognize that the Constitution does not always require such predeprivation procedural protection. *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 300, 101 S. Ct. 2352, 69 L. Ed. 2d 1, 31 (1981) ("summary administrative action may be justified in emergency situations."). See *Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (pending prompt judicial or administrative hearing to determine issue, state's board could properly temporarily suspend horse trainer's license prior to hearing); *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594, 70 S. Ct. 870, 94 L. Ed. 1088 (1950) (allowing seizure of misbranded articles by enforcement agency prior to hearing).

- - - - -Footnotes- - - - -

n2 The parties dispute whether the right to import firearms under a permit constitutes a property interest. Because GSI has more than the mere "right to import," we assume a property interest for the purpose of deciding this expedited case.

- - - - -End Footnotes- - - - -

Rather than setting [\*\*29] categories of mandatory procedural protections in all cases, the Supreme Court decides the nature and timing of the requisite process in an individual case by accommodating the relevant competing interests. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982) (quoting *Goss v. Lopez*, 419 U.S. 565, 579, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975)).

The Supreme Court's balancing test essentially requires us to weigh three factors: (1) the nature of the private interest; (2) the risk of an erroneous deprivation of such interest; and (3) the government's interest in taking its action, including the burdens that any additional procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18, 33 (1976). Balancing these considerations, we conclude that the Bureau's summary action did not violate GSI's due process rights.

The Bureau imposed the temporary suspension to protect the public by ensuring that nearly three-quarters of a million rifles do not improperly enter the country. The protection of the public's health and safety is a paramount government interest which justifies summary administrative action:

Protection of the health and safety of the public is a [\*\*30] paramount governmental interest which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is 'one of the oldest examples' of permissible summary action.

Hodel, 452 U.S. at 300 (quoting Ewing, 339 U.S. at 599) (safety concerns justified summary seizure of vitamin product). The public interest in avoiding the importation of possible illegal assault rifles which could contribute significantly to this country's violent crime epidemic is clearly substantial, especially given the large number of rifles approved for importation under the current outstanding permits. The Government could not protect the public interest without imposing the temporary suspension.

On the other side of the balancing equation, we consider the nature of the private interest, including the deprivation's length and finality. See Logan, 455 U.S. at 434, 71 L. Ed. 2d at 277. GSI has not suffered a permanent loss because the Government has not revoked GSI's license or its permits. The Government has merely deprived GSI of the ability to import the AUG-SA rifle for ninety days. [\*868] The Government has further reassured the court that it will not revoke [\*\*31] GSI's permits without giving GSI the right to participate in a hearing.

In addition to being a non-final, temporary deprivation, the ninety-day suspension does not affect a significant portion of GSI's imports. The rifles which GSI seeks to import during this ninety-day period are only a small percent of the number of firearms it plans to import under its permits this year, and the importation of the Steyr rifles constituted only 20-percent of GSI's import inventory in 1988.

Considering the final factor, we do not find that the Government's summary action presents a significant risk of an erroneous deprivation of GSI's right to import the rifles. First, GSI only loses its right to import the rifles for ninety days. Second, as discussed above, the Bureau considered ample evidence before imposing the temporary suspension, and therefore, it minimized the risk that its actions would erroneously deprive GSI of its right to import the AUG-SA rifles.

Balancing GSI's temporary non-final loss of its right to import one type of rifle against the Government's interest in preventing the unlawful importation of firearms, we conclude that the Government did not err by suspending the importation [\*\*32] of the AUG-SA rifle prior to giving GSI an opportunity to respond. The strong public interest in the immediate action outweighs the temporary and limited impact on GSI's alleged property interest. We find support for this decision in other cases which have subordinated more substantial property interests to the Government interest in protecting the public. See Mackey v. Montrym, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (although license to operate motor vehicle is substantial property interest, the substantial nature of such interest is diminished measurably by maximum duration of suspension being ninety days and availability of immediate post-suspension hearing). Furthermore, the availability of a hearing at the end of this temporary suspension provides adequate procedural protection. See Hodel, 452 U.S. at 303, 69 L. Ed. 2d at 33 (summary administrative action justified where adequate post-deprivation hearings providing opportunity for judicial review exist). Thus, the summary imposition of the import suspension does not violate GSI's due process rights.

#### B. Taking Claim

GSI finally contends that the temporary suspension constitutes a taking of property without just compensation. [\*\*33] The Government argues that GSI cannot pursue this claim in this court but must assert this claim in a damages suit in the Claims Court. In the alternative, the Government contends that the temporary suspension does not constitute a taking. We conclude that GSI must bring this claim in the Claims Court.

GSI concedes that it cannot maintain an action for injunctive relief if it may subsequently bring an action for damages against the Government under the Tucker Act. GSI contends, however, that it lacks a post-deprivation damages remedy under the Tucker Act because neither the Constitution or any statute authorizes the Government's actions. See *Regional Rail Reorganization Cases*, 419 U.S. 102, 127 n. 16, 95 S. Ct. 335, 350 n. 16, 42 L. Ed. 2d 320, n. 16 (1974) (injunctive relief available where owner proves that government officials lack lawful authority to take property). This contention has no merit. As the above discussion demonstrates, the Government has the authority to temporarily suspend the importation of GSI's firearms under the Gun Control Act. Moreover, Congress has not expressed an intention to preclude Tucker Act jurisdiction over a claim for compensation under the [\*\*34] Gun Control Act; therefore, GSI can seek damages under the Tucker Act. *Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1017, 104 S. Ct. 2862, , 81 L. Ed. 2d 815, 841 (1984) (Tucker Act remedy available unless "Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the Court of Claims. . . ."). Because GSI can bring a claim under the Tucker Act, it cannot seek an injunction to prevent a taking in this court. *Ruckelshaus*, 467 U.S. at [\*\*35] 1019, 104 S. Ct. at , 81 L. Ed. 2d at 843 (suit for equitable relief to enjoin alleged taking not ripe where the taking claim is remedial under the Tucker Act).

Even if we had jurisdiction to consider this claim, we note that the temporary suspension does not constitute a taking. In deciding whether a taking exists, we consider: "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations." *Ruckelshaus*, 467 U.S. at 1004 (quoting *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, , 64 L. Ed. 2d 741, 753 (1980)). First, the Government has acted in a purely regulatory capacity and does not profit from its actions. [\*\*35] Second, the Government has neither permanently nor totally deprived GSI of any property because the Government has only temporarily suspended the importation of such rifles. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922) (regulation of property is a taking only when regulation goes too far). Finally, even though GSI may have had a reasonable investment-backed expectation, GSI does not demonstrate that the suspension will unreasonably impair the value of the rifles. See *Pruneyard Shopping Center*, 447 U.S. at 83, 64 L. Ed. 2d at 753 (no taking where regulation will not unreasonably impair value of regulated property). Thus, no compensable taking has occurred. We therefore reject GSI's constitutional attacks on the temporary suspension.

#### CONCLUSION

Because we conclude that the suspension does not exceed the Bureau's statutory authority, does not constitute an arbitrary or capricious action, and does not violate GSI's constitutional rights, we reverse the district court's decision and vacate its injunction enjoining the Government from temporarily suspending the importation of the AUG-SA rifles.

REVERSED and REMANDED.

DISSENTBY: HOFFMAN

DISSENT: WALTER E. HOFFMAN, [\*\*36] Senior District Judge, dissenting:

With regret I feel compelled to dissent, only because I am obliged to yield to the Congress even though I may personally feel to the contrary.

Section 925(d)(3) of the Gun Control Act, 18 U.S.C. @ 925, prior to the amendment of 1986, provided that "the Secretary may authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the person importing or bringing in the firearm or ammunition establishes to the satisfaction of the Secretary that the firearm or ammunition . . . (3) is of a type that . . . is generally recognized as particularly suitable for or readily adaptable to sporting purposes. . . ." The permits approved for the guns in controversy were dated October 4, 1988 and February 21, 1989. The life of each import permit is six months; one having expired on April 4, 1989; the other due to expire the latter part of August, 1989.

On May 19, 1986, the Congress enacted P.L. 99-308, the Firearms Owners' Protection Act of 1986. This Act amended @ 925(d)(3) of the Gun Control Act by substituting the word "shall" for "may," and removing from importers the burden of proving that firearms are suitable [\*\*37] for sporting purposes. Indeed, if the Secretary has any question as to whether the firearm may be imported into the United States, 18 U.S.C. @ 925(d) further provides:

The Secretary shall permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

Thus, before approving a permit Congress has said that the Secretary may conditionally import a firearm to conduct the appropriate testing, etc. More importantly, however, Congress has made it mandatory for the Secretary to authorize firearms to be imported when the permits are approved. In this case, all parties are in [\*\*870] agreement that the permits were regularly and properly approved prior to the announcement of the ban on March 13, 1989. The issue in my mind is whether the Secretary, as the head of an agency, may take steps by way of a temporary suspension of permits, already approved, which action, if successful, will render nugatory the express intention of the Congress to authorize the importation. While I hold no brief for some [\*\*38] legislation enacted by the Congress, and am fully aware of the special interest pressure which obviously existed when the 1986 amendment was enacted, I have always felt that it was my duty to adhere to the will of Congress wherever the Congress clearly had the jurisdiction and power to act, as it did in this situation.

The majority expresses the view that, despite the 1986 amendment, a temporary suspension for the purpose of reassessing whether the firearms have a sporting purpose is not prohibited. The legislative history does not, in my opinion, justify the foregoing conclusion even though the majority cites a Senate Report, S.Rep. No. 88-583, 98th Cong., 1st Sess. 27 (1984), stating that in the vast majority of cases the use of the mandatory word "shall" will not result in a

change of practice. That statement of the majority is correct until we meet, as we now do, a conflict with the circumvention by an agency of what Congress has heretofore provided. A Senate Judiciary Committee reported, 98th Cong., 2d Sess., at 27 (1984), that

the Committee amendment requires the Secretary to authorize the importation of firearms in the listed categories.

Speaking to the same subject, [\*\*39] the House Judiciary Committee, House Rec. No. 495, 99th Cong., 2d Sess., at 14 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 1327, 1340, recognized the "problem" and said that the liberalization of the importation of firearms:

Opens up the importation of firearms by mandating the Secretary to authorize importation of a firearm if there is a sporting purpose and eliminating the requirement that the importer has the burden of satisfying the Secretary of the sporting purpose. . . .

When the later permit expires in the latter part of August, the Secretary would have essentially accomplished what he contemplated doing when he issued the ban on March 13, 1989. True, there may have been a taking-- an issue not now decided -- but the firearms need no longer be received for importation. I do not disagree with the majority in their expression of the strong public interest in immediate action, but this action is not limited to the firearms purchased under two permits regularly issued and approved, but not yet delivered to the owner because of the temporary suspension, said to be 90 days but vague as to its commencement date and with no assurance that anything will be done at any definite [\*\*40] time.

Believing that the statutory authority was exceeded in this case, I would affirm the district court.

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SEN DIANNE FEINSTEIN

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EMBASSY OF ISRAEL

AMBASSADOR OF ISRAEL  
WASHINGTON, D.C.



שגרירות ישראל  
בבית הלבן

October 28, 1997

The Honorable Dianne Feinstein  
The United States Senate

Dear Senator Feinstein:

Further to the previous exchange on the sale of Uzi and Galil weapons to the American Market, I wish to convey to you that the Government of Israel is aware of your concerns on this issue and is sensitive to them. We are prepared to work with you to resolve the matter.

We assume that you would not advocate anything that would unfairly single out Israel. You have our assurances that Israel has not done nor will Israel do anything which in any manner violates United States law. Furthermore, in light of the misperception generated through the media coverage of this matter, we wish to stress that no Israeli weapons of this kind have been sold in the United States since the relevant legislation was passed in 1994.

I wish to assure you that no sales will take place for a period of three months. If during that time the other parties decide to suspend their sales or such restraint is imposed either through United States legislation or an executive directive, the Israeli exporter will act accordingly.

Sincerely,

E. Ben Elissar

Elihu Ben-Elissar  
Ambassador

514 INTERNATIONAL DRIVE N.W. • WASHINGTON, D.C. 20008 • TEL: (202) 361-5500 • FAX: (202) 361-5501

10-28-97 08:07PM P002 #37

6784

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WALTER CAPPS  
22D DISTRICT, CALIFORNIA

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WASHINGTON, DC 20515-0522  
(202) 225-3601

COMMITTEE ON  
INTERNATIONAL RELATIONS

COMMITTEE ON SCIENCE



**Congress of the United States**  
**House of Representatives**

September 30, 1997

President William J. Clinton  
The White House  
Washington, D.C. 20500

OCT 2 PM 2:05

Dear Mr. President:

I am writing to bring to your personal attention the enclosed letter to Israeli Prime Minister Binyamin Netanyahu signed by 34 Members of the House of Representatives.

This letter represents our strong opposition to the pending sale between Israel Military Industries Ltd. and the U.S. gun maker O.F. Mossberg & Sons, Inc. As you know, the sale would put tens of thousands of Uzi and Galil guns on American streets. These weapons have been modified to avoid the ban instituted in the 1994 Assault Weapons legislation. I know that you believe, as I do, that we cannot continue to expose our citizens to the deadly dangers posed by assault weapons.

I respectfully urge you to intervene in this sale and to do all that you can to heighten the Bureau of Tobacco, Alcohol, and Firearms' role and responsibility in transactions such as this. While we cannot stop the worldwide marketing of these guns, we certainly can make efforts to stop their importation.

I thank you for your attention to this matter and I look forward to your response.

Sincerely,

WALTER CAPPS  
Member of Congress

WHC:ej



**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

September 30, 1997

His Excellency Binyamin Netanyahu  
Prime Minister  
Jerusalem, Israel

Dear Mr. Prime Minister:

~~We are writing to respectfully ask for your intervention in a pending gun sale between a~~  
state-owned company, Israel Military Industries Ltd. and the United States gun maker O.F.  
Mossberg & Sons, Inc. This sale has been approved by the U.S. Bureau of Alcohol, Tobacco,  
and Firearms because importing these weapons does not technically violate United States law.  
However, we firmly believe that the commercial sale of powerful assault weapons in the United  
States must be restricted.

We understand how critical the Uzi and Galil weapons have been to the Israel Defense  
Forces in the IDF's efforts to maintain the security of the nation. However, these weapons have  
no place on American streets. As you know, the illegal use of semiautomatic assault weapons  
continues to rise in our country. Military-style weapons are the guns of choice of criminals from  
our urban streets to our rural communities.

In the spirit of U.S. - Israel friendship, we urge you to stop this sale and to do all that you  
can to prevent future sales. Thank you for your attention to this important matter.

Sincerely,

Walter Capps

Tom Lantos

Garn Jefferies

Edith L. Enyel

Robert Waple

Concyn Mc Carthy

Don Barrett

Carol B. Malin

Eddie Bernice Johnson

Shirley Jackson

David Shoo

Elizabeth Durr

Zee Lippin

Jim McGovern

Ami V. Antierney

Gerold Radler

Lucille Bayal-allard

Lan Eun

Jim McDermott

Barney Frank

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Edward J. Mackey

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Sam Fan

Neil Abernethy

John Sprat

George L. Brown

Tom Campbell

Sandra Levin

Martin D. Pabo

Lonnie Moulton

James H. Miller - Mr. J. H. Miller

Darlene Hooley

Patry T. Thirk

JOHN D. DINGELL  
16TH DISTRICT, MICHIGAN  
  
RANKING MEMBER  
COMMITTEE ON COMMERCE  
  
CO-CHAIR  
HOUSE GREAT LAKES  
TASK FORCE  
  
MEMBER  
MIGRATORY BIRD  
CONSERVATION COMMISSION

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-2216**

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(313) 243-1849

October 24, 1997

The President  
The White House  
Washington, D.C. 20500

Dear Mr. President:

Several news organizations have reported that you intend to issue a directive suspending the importation of several dozen models of assault weapons which are believed to have been modified for the purpose of meeting the requirements of the Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Bill) and the 1968 Gun Control Act. It is also thought that you intend to reconvene a working group to again review the "sporting purposes" test under current law.

As you may recall, I voted reluctantly in favor of the 1994 Crime Bill. This followed assurances between us that modifications could be made to alleviate some of the most objectionable concerns expressed by myself and other Democrats, including Congressman Jack Brooks, then the Chairman of the Judiciary Committee. Despite the improvements ultimately agreed to, I remained opposed to the assault weapons provisions because I knew then that they would have very little practical impact in reducing crime.

Our agreement was quickly threatened. Immediately after you signed the Crime Bill, the Bureau of Alcohol, Tobacco and Firearms (ATF) implemented a freeze on the import of magazines which clearly were eligible to enter the country under the new law. It took almost two years of fighting with ATF before it decided to honor our agreement by lifting this freeze, which clearly could not have withstood a challenge in Federal Court.

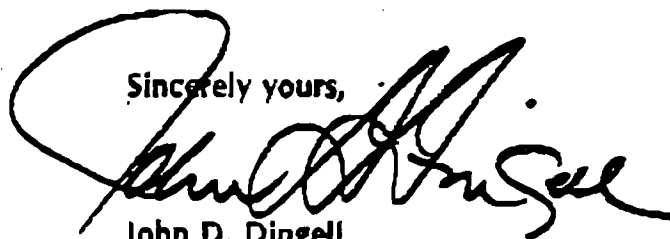
As you consider whether to issue a new directive, I wish to remind you of the report which was ordered under Sec. 110104 of the 1994 Crime Bill. Under this provision, the Attorney General was required to study the effect of the ban and its impact on violent and drug trafficking crime. The Justice Department awarded a grant to the Urban Institute to meet this requirement. The final report, issued on March 13, 1997, found that, "At best, the assault weapons ban can have only a limited effect on total gun murders, because the banned weapons and magazines were never involved in more than a modest fraction of all gun murders." The report continued, "We were unable to detect any reduction to date in two types of gun murders that are thought to be closely associated with assault weapons."

The President  
October 24, 1997  
Page 2

I respectfully submit that, given the results of the Urban Institute's study, and its recommendation for future research, any additional review should be conducted before ATF is again directed to implement action outside of the law and the clear intent of Congress. I appreciate your consideration of my views, and hope that you will act in a manner that respects the rights of all law abiding citizens.

With every good wish,

Sincerely yours,

A large, stylized handwritten signature in black ink, which appears to read "John D. Dingell". The signature is written over the typed name and title.

John D. Dingell  
Member of Congress

cc: Hon. Robert Rubin

DIANNE FEINSTEIN  
CALIFORNIA**United States Senate**  
WASHINGTON, DC 20510-0504

Jose / EK / CR

September 17, 1997

Honorable William J. Clinton  
President of the United States  
The White House  
1600 Pennsylvania Avenue  
Washington, DC 20500

Dear Mr. President:

Thank you for meeting with me on Monday to discuss the issues of assault weapons, the continued circulation of high-capacity ammunition clips, and the ability of the Bureau of Alcohol, Tobacco and Firearms to enforce our nation's Federal firearms laws. In addition, I appreciate your willingness to try to look into the issue of California and other states facing the possible loss of billions of dollars in Federal funds due to a delay in development of a child support enforcement system as required under the 1988 Family Support Act and Welfare Reform.

As a follow up to our meeting, let me reiterate what it is I am hoping we can each do to further our common goals.

**Legislative on high-capacity ammunition magazines (HCMs) or imported HCMs.**

I intend to introduce legislation that replaces the grandfather clause on high-capacity ammunition magazines in the 1994 Crime Bill with a prohibition on the commercial sale of HCMs manufactured prior to the ban. If passed by Congress, this will have the added effect of prohibiting the importation of high capacity clips as well. I am asking that you and your Administration support this effort and commit to use the power of your office to help bring this issue to the American people, in addition to helping me weigh in with key legislators for passage of this amendment. The legislation was drafted by Wilke Green of my staff, and he is prepared to brief your staff on the details of the legislation and the strategy for introduction.

**Administrative Action on Imported HCMs**

As we move forward on legislation addressing the issue of pre-ban large-capacity clips, I believe there is action you can take to suspend the importation pre-ban clips. I urge you to issue a directive to the BATF to determine the manufacture date of imported clips prior to approval of any applications for import permits. If BATF is unable to determine with certainty the date of manufacture, the import permit should be denied.

7

President William J. Clinton  
September 17, 1997  
Page Two

Understanding that this directive will likely be challenged in court, I will help build the case in the Senate that the continued importation of these large-capacity clips violates both the spirit of the law and the intent of Congress, and will encourage my counterparts in the House of Representatives to do the same as I work toward passage of legislation to address this issue permanently.

#### **Bureau of Alcohol, Tobacco and Firearms - Enforcement and Staffing**

It is clear to me that however committed the BATF is to carry out our nation's gun laws, their enforcement ability has been hampered by inadequate staffing, statutory limits on their inspection authority, and internal policies that discourage inspections not relative to an on-going criminal investigation.

I am asking you to consider, in your FY 1999 Budget to Congress, an increase in funding for the BATF for the purpose of adding additional field inspectors. I am also requesting that you issue a directive to the BATF to change current internal policies prohibiting field inspectors from attending gun shows without their attendance being relative to a criminal investigation. Further, in your order, direct the BATF to proactively send field inspectors to gun shows for the purpose of enforcing Federal firearms laws and to serve as a deterrent to those who would violate the law. I pledge to work in the Senate to build support for your efforts to address both of these issues.

yes

#### **Importation of Israeli Galils and Uzis**

As we discussed, I sent a letter to Prime Minister Binyamin Netanyahu urging him to intervene in the planned export to the United States tens of thousands of modified Uzis and Galils by a government-owned munitions manufacturer, Israel Military Industries, Ltd. I am asking that you issue a directive to the Department of Treasury to suspend pending permits of these weapons until such time as a clarification can be made as to the suitability of these weapons for sporting purposes. This order would be modeled after a similar directive issued by the Treasury Department and supported by President Bush in 1989. In that order, President Bush suspended the pending import permits of 24 types of assault weapons in order to determine whether or not the weapons were suitable for sporting purposes under 18 USC 925(d)3. I believe you have an opportunity to take the same action in this case.

?

Further, I am requesting that you use diplomatic channels to persuade Israel, in the interest of public safety, not to export these weapons to the United States.

President William J. Clinton  
September 17, 1997  
Page Three

### Child Support Enforcement System Automation

Finally, as we discussed, I am heartened by your willingness to do what you can to prevent California and other states from losing billions of dollars in federal funds, which include all of the states' Temporary Assistance for Needy Families (TANF) funds and the Child Support Enforcement System funds because these states will not meet the October 1, 1997 deadline as required under welfare reform.

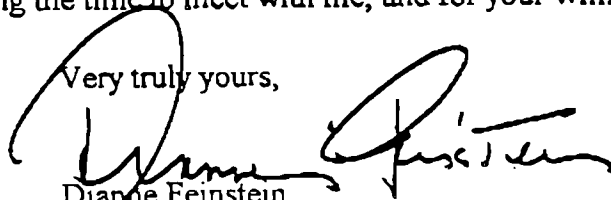
Without your intervention, California could lose \$3.7 billion in TANF funds and \$300 million in child support system funding. I am asking you to impose a temporary 6 month moratorium on the penalties for failure to meet the October 1st deadline in order to give California and other States the ability to implement their TANF programs and to improve their child support systems. California's state and local officials are making every effort to comply with the law as expeditiously as possible.

Mr. President, I know these issues are as important to you as they are to me. I understand the difficulty in addressing some of these firearms issues in a Republican Congress, but I am willing to do everything in my power to try, and I hope you will do the same.

I stand ready to assist you in every way, and I look forward to working with you, the Vice President, and others in your Administration to get the job done. The public stands behind you on this issue; of that I have no doubt. The rest is up to us.

If you would like to discuss this further, or if there are any questions you have, please do not hesitate to call me or have your staff contact Wilke Green of my staff at (202) 224-1227. Thank you again for taking the time to meet with me, and for your willingness to help.

Very truly yours,



Dianne Feinstein  
United States Senator

cc: Vice President Al Gore  
Thomas F. "Mack" McLarty, Counselor to the President  
Erskine Bowles, White House Chief of Staff  
Bruce Reed, Assistant to the President for Policy Development  
Kay Casstevens, Office of the Vice President  
Tracey Thornton, Special Assistant to the President for Legislative Affairs



SEP 27/1997 09:53 202-232-5529

6-5581

DIANNE FEINSTEIN  
CALIFORNIA**United States Senate**  
WASHINGTON, DC 20510-0604

September 17, 1997

The Honorable William J. Clinton  
President of the United States  
1600 Pennsylvania Avenue  
Washington, DC 20500

Dear Mr. President:

We the Members of the U.S. Senate urge you to use your executive authority to declare a temporary suspension of the importation of semi-automatic assault weapons that are now coming into this country.

We have learned that the state-owned Israel Military Industries, Ltd., has been granted permission to export to the United States for commercial sale tens of thousands of military-style assault weapons. They have taken the Uzi and Galil used by the military and made physical modifications to them, which do not affect their rapid-fire use. These weapons violate the 1968 Gun Control Act, in that they are not "suitable for, or readily adaptable to sporting purposes" [18 USC 925(d)3]. The Bureau of Alcohol, Tobacco and Firearms approved the importation permit because they did not believe that the modified weapons were in technical violation of the 1994 assault weapons law. However, that law applied generally to the transfer of these weapons, and was enacted independently of, and did not override, the 1968 Gun Control Act, which is addressed specifically to imports. The ATF has been requested to provide a list of all importation permits granted over the past two years, and that they indicate whether the weapons are manufactured by a private or government-owned company. According to ATF, this information will not be available for one month.

As Members of the Senate, we wish to state clearly that the intent of the Federal assault weapons legislation was to keep weapons such as these off the streets of America. The weapons planned for export to the United States by a government-owned Israeli gun manufacturer are functionally no different than the military-style weapons Congress intentionally banned and those weapons prohibited from import by the Presidential Directive of 1989: they are capable of firing bullets as fast as the operator can pull the trigger, the pistol grip is designed to allow the weapon to be fired from the hip as opposed to target shooting, with slight alterations they are able to be made fully-automatic, and they are capable of accepting magazines that hold 30, 50 or even 100 bullets. In short, these weapons have the same capacity as those that many Americans are trying to keep off our streets and out of the hands of criminals.

202-232-5529

KENNEDY

President William J. Clinton  
September 17, 1997  
Page Two

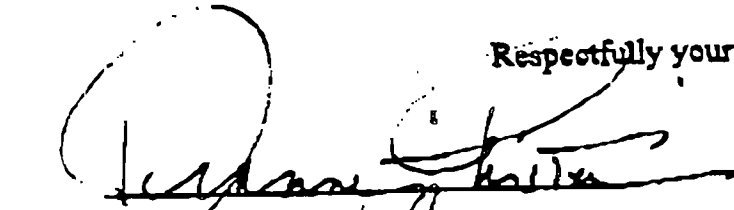
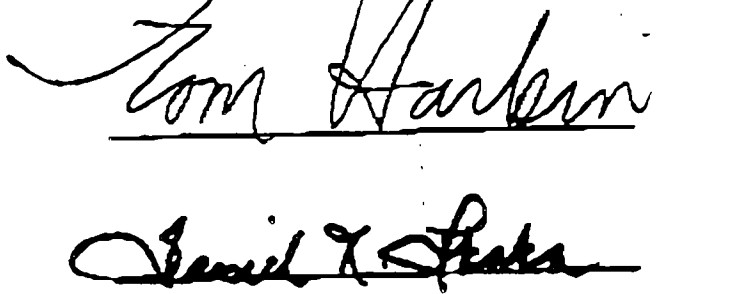
These weapons are not designed for hunting. Rather, they have become the weapon of choice for grievance killers, gangs, and those who use them against police. They are designed to kill large numbers in close combat, and as such have no place on the streets of a civilized society.

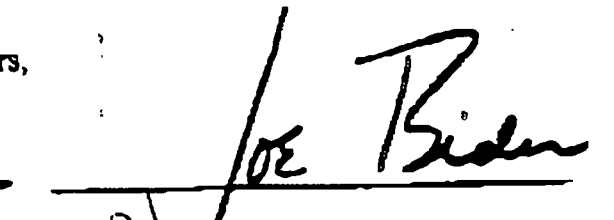
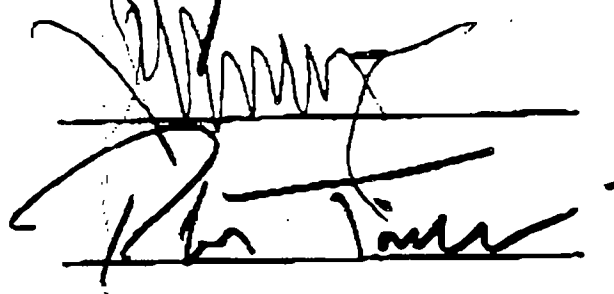
Mr. President, the 1994 Crime Bill included legislation that banned 19 specific types of semi-automatic assault weapons, including the Uzi and Galil. The Department of Justice reported that, from January, 1992 through May, 1995, 20 police officers were murdered with assault weapons. After implementation of the Crime Bill, since May of 1995, there has been only one killing of a police officer with an assault weapon, and the number of banned weapons traced to crimes has dropped precipitously.

Practically every other day there is another news report of incidents involving assault weapons used in bank robberies, drive-by shootings and revenge killings. A police officer in Tacoma, Washington was killed by an assault weapon just last month. We all saw on the CBS program *48 Hours* last week, the chilling footage of two bank robbers in Los Angeles who, dressed in full body armor and carrying assault weapons with thousands of rounds of ammunition, fearlessly took on more than 100 Los Angeles police officers. Outgunned officers were forced to borrow weapons from a nearby gun store to protect themselves.

Mr. President, we do not need more assault weapons on the streets of America. We urge you to use your executive authority as President to prevent this transfer of arms to American streets on behalf of public safety.

Respectfully yours,

  
Tom Harbo  
  
Daniel J. Flaherty

  
Joe Biden  
  
Rick Warren



## United States Senate

WASHINGTON, DC 20510-0504

(202) 224-3841

October 17, 1997

Mr. Rahm Emanuel  
White House  
1600 Pennsylvania Avenue  
Washington, D.C. 20500

Dear Rahm:

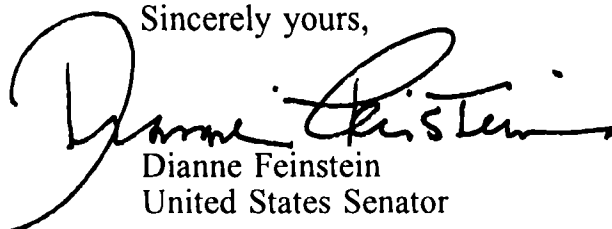
I am sending you a copy of the letter I sent to Secretary Rubin today regarding using executive authority to temporarily suspend the importation of semiautomatic assault weapons. I believe that the administration can and should review these weapons based on the intent of Congress established in the 1968 Gun Control Act.

I ask that you take a personal look at the material I am sending you which includes a September 26 report from the Congressional Research Service. I believe you will find this report persuasive and evidence that action is possible and appropriate.

Please let me know your thoughts.

With warmest personal regards.

Sincerely yours,



Dianne Feinstein  
United States Senator

DF:msm



# United States Senate

WASHINGTON, DC 20510-0504

October 17, 1997

The Honorable Robert Rubin  
Department of Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Dear Mr. Secretary:

As you know, thirty Members of the Senate have sent a letter to President Clinton, a copy of which is attached, asking that he utilize his executive authority to temporarily suspend the importation of semiautomatic assault weapons pending a review of the suitability of those weapons under the 1968 Gun Control Act. The Act specifically grants broad discretion to the Secretary of the Treasury to decide whether a type of firearm is generally recognized as particularly suitable for or readily adaptable to sporting purposes.

Information from the Bureau of Alcohol, Tobacco and Firearms indicates that tens of thousands of semiautomatic assault weapons from more than a dozen foreign nations have either been imported in the last two years, or are pending importation. These weapons are not suitable for nor readily adaptable to sporting purposes as required by the 1968 Gun Control Act and therefore should not be granted permits for importation to this country.

Additionally, hundreds of thousands of foreign-made high capacity ammunition feeding devices, able to hold more than 10 bullets, are continuing to come into the country under a grandfather clause in the 1994 Assault Weapons legislation which bans the manufacture, sale, transfer and possession of these clips. Over two and a half years have passed since enactment of this law, more than enough time for any inventory already purchased and awaiting shipment at the time of passage to have been sent.

I am attaching what I believe to be a definitive report by the Congressional Research Service dated September 26 that states that the President of the United States and Secretary of the Treasury have clear authority to suspend the importation of firearms, ammunition or accessories.

Military-style semiautomatic assault weapons present a substantial threat to law enforcement officers and the public. A police officer was killed in Alabama just last Friday by an assailant with an AK-47 and a 100-round magazine. Two other law enforcement officers were killed last month in North Carolina during a midday traffic

Honorable Robert Rubin  
October 16, 1997  
Page Two

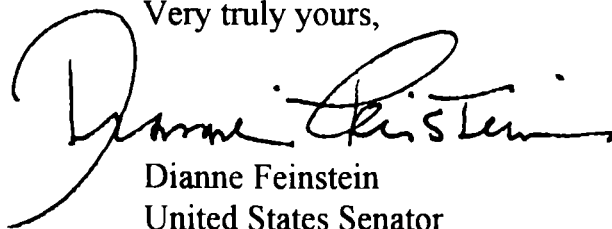
stop by two teenagers with an AK-47. A police officer in Washington State was killed in August by an assailant with an SKS semiautomatic assault rifle. Also that month, suspected gang members sprayed dozens of bullets from an AK-47 at a crowd of 20 people standing outside a home in Santa Ana, California, killing one person and injuring 4 others. Incidents of police killings, drive-by shootings and grievance killings with semiautomatic assault weapons are too numerous to list and well known to all. These weapons are not designed for sport and, as such, present a threat to the security and well being of the American people.

The executive order issued by the Secretary of the Treasury in 1989 and approved by President George Bush clearly sets a precedent for suspending importation of assault weapons. Two weapons recently approved for importation are of the same types suspended by the Treasury Department in 1989, the Uzi-type and Galil-type semiautomatic assault rifle. These weapons are manufactured by the State-owned munitions company, Israel Military Industries, Ltd. I have written a letter to Prime Minister Binyamin Netanyahu urging that the Israeli government discontinue the exportation of these weapons to the United States. That request is being considered at the highest levels.

This Administration has taken a strong position against assault weapons. I believe that unless the Administration is prepared to extend this same stance against assault weapons being imported to the United States, it makes a mockery of all that we have tried to do to make our streets safer, prevent police from being assassinated and to remove from the reach of criminals, military weapons of significant destructive potential.

I urge your serious consideration of and immediate action on this issue.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dianne Feinstein", with a large, stylized initial "D".

Dianne Feinstein  
United States Senator

Attachments:

Congressional Research Service Report 9/26/97  
Senators letter to President Clinton  
Senator Feinstein letter to Prime Minister Netanyahu



Congressional Research Service • The Library of Congress • Washington, D.C. 20540-7000

September 26, 1997

TO : Honorable Dianne Feinstein  
Attention: Wilkie Green  
Susan Kennedy

FROM : American Law Division

SUBJECT : (1) Standards Used to Determine Whether a Firearm Is  
"Particularly Suitable for or Readily Adaptable to Sporting  
Purposes" in Order to Permit the Issuance of an Import  
License  
(2) Authority of the President or Other Executive Officer to  
Ban Importation of Particular Firearms, Ammunition and/or  
Related Accessories Without Reference to Their Country of  
Origin

This is in response to your request for information as to (1) what standards have been, are or might be used to determine whether a particular firearm, type of ammunition, or firearm accessory (e.g. an ammunition clip) is "particularly suitable for or readily adaptable to sporting purposes" in order to permit the issuance of an import license under 18 U.S.C. 925(d)(3); and (2) what authority the President enjoys to ban the importation of such firearms, ammunition, or accessories without reference to the country in which they were manufactured, have been assembled or from which they are to be shipped.

#### *Summary*

The first "suitability" standard used by the Bureau of Alcohol, Tobacco and Firearms (ATF) was based upon a presumption that only handguns were likely to be found unsuitable and that those least likely to survive scrutiny were those that most closely resembled "Saturday Night Specials." Under this standard, quality and price weighed heavily, and simple amusement was stripped from the concept of "sporting purpose" (if it ever resided there) with the determination that "plinking" or target practice on randomly selected bottles and cans was a pastime and not a "sport."

Next, ATF abandoned the "only-handguns" presumption with respect to two varieties of shotgun whose features rendered them particularly suitable for nonsporting purposes, e.g., military or law enforcement purposes, but were "generally recognized" as not suitable for purposes of hunting or competitive shooting.

Finally, ATF moved to a process under which it determined the class of a firearm for which an import license was being sought, e.g., semiautomatic assault rifle, according to the type of firearm involved; its principle purpose or use; which of its features made it particularly suitable for its principle use and which made particularly unsuitable for sporting purposes; and whether, among those particularly conversant with hunting and competitive shooting, the firearm was generally recognized as suitable or adaptable for use in their sport.

The President and the Secretary of the Treasury enjoy extensive authority to impose an import ban upon a particular type of firearm, ammunition or accessory. The Gun Control Act of 1968 as enacted vested virtually unbridled discretion in the Secretary. The amendments to the Act which support the contention that the Secretary is compelled to permit importation when faced with the applications qualifying for exceptions under section 925(d) have thus far been interpreted generously.

The President has either explicit or apparent authority to impose a import ban covering various firearms, ammunition or accessories under a number of other statutes. The International Emergency Economic Powers Act, 50 U.S.C. 1701 et seq., gives him general authority to regulate foreign commercial transactions when he considers it necessary to deal with an "unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States."

He has already invoked this authority to revive provisions of the Export Administration Act of 1979 and the Arms Export Control Act, E.O. 12924, 59 *Fed.Reg.* 43437 (Aug. 10, 1994), 50 U.S.C. 1701 note. The reach of the Arms Export Control Act is particularly pertinent since it declares that "in furtherance of world peace and the security and foreign policy of the United States the President is authorized to control imports . . . of defense articles and services," 22 U.S.C. 2778(a)(1). The Export Administration Act empowers to President to regulate military exports including the authority to restrict the transfer of goods within the United States, 50 U.S.C.App. 2404(a). ATF's reference in *Gun South, Inc.* to the smuggling of foreign semiautomatic assault rifles out of this country suggests the kind of predicate that might bolster a claim that the Export Administration Act under appropriate circumstances authorizes an import ban on various types of firearms, ammunition or accessories.

These statutory powers supplement and carry into execution broad powers the Constitution vests in the President to conduct foreign affairs, act as commander-in-chief, and to see to the faithful execution of the law, U.S.Const. Art.II §§2, 3. Judicial descriptions of these powers and of plenary authority to control the flow goods and persons across our borders document the breadth of discretion they convey.

#### *Evolution of the Search for a Standard*

The 1968 Gun Control Act prohibits importing firearms or ammunition except as authorized by the Act, 18 U.S.C. 922(l). The Act authorizes the

Secretary of the Treasury to license imports, *inter alia*, if the firearm or ammunition in question "is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is *generally recognized as particularly suitable for or readily adaptable to sporting purposes*, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled," 18 U.S.C. 925(d)(3)(emphasis added).<sup>1</sup>

Shortly after passage of the 1968 Act, the Secretary of Treasury appointed a Firearms Evaluation Panel "to provide guidelines for implementation of the 'sporting purposes' test of section 925(d)(3)," Bureau of Alcohol, Tobacco and Firearms, *Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (Report)* 3 (1989). At the time, the most often cited example of firearm abuse involved "Saturday Night Specials," inexpensive and usually poor quality handguns, and the Panel's considerations apparently dealt almost exclusively the development of guidelines to determine whether a particular handgun should be considered a Saturday Night Special and consequently be subject to an import bar, *Report* at 3. The Panel "did not propose criteria for evaluating rifles and shotguns under section 925(d)(3)," *Report* at 3.<sup>2</sup> And for many years thereafter, the question of what type of firearm other than a handgun might fail the "sporting purposes" test never arose, *Report* at 4. As the statute then required, applicants for licenses were simply asked to indicate how a particular firearm qualified under the "sporting purposes" test, see e.g., §3(b)(4)(interim regulations), 33 *Fed. Reg.* 15733 (Oct. 24, 1968). But it does seem to have been agreed early on that "plinking" -- shooting a bottles and cans randomly -- should be considered more of a pastime than a sport -- and that otherwise virtually every firearm might thought suitable for "sporting purposes," *Report*, Attachment 3 at 2.

Apparently, the first instance of a failure to meet the "sporting purposes" test occurred with a 1984 attempt to import South African shotguns designed for riot control. "When the import was asked to provide evidence of sporting purposes for the weapon, ATF was provided information that the weapon was

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<sup>1</sup> The full text of section 925(d) and of 26 U.S.C. 5845 cited above are appended.

<sup>2</sup> See also Hurst, "Debate Rages on Imported Guns: Just What Is a Sporting Weapon?" *Los Angeles Times* 27-8 (Feb. 26, 1989). The Bureau of Alcohol, Tobacco and Firearms (ATF) did use the panel recommendations to develop criteria and an evaluation sheet (ATF Form 4590) to determine whether import licenses should be issued for a particular type of handgun that favored larger, heavier, higher caliber, multi-featured handguns (i.e., handguns that were more likely to be well made, more expensive, and less easily concealed; not Saturday night specials), see ATF Form 4590 in *Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles* at Attachment 2.



suitable for police/combat style competitions," *Report* at 4. The license was denied.

Two years later a second shotgun application was denied when the Bureau concluded that due "the weight, size, bulk, designed magazine capacity, configuration, and other factors" the shotgun (a "USAS-12") was not generally recognized as "particularly suitable for or readily adaptable to a sporting purpose," *Gilbert Equipment Co., Inc. v. Higgins*, 709 F.Supp. 1071, 1074 (S.D.Ala. 1989). At least then, the ATF was of the view that "the 'generally recognized' component requires both that the firearm itself or the 'type' of firearm to which the subject firearm is being compared, has attained general recognition as being particularly suitable for or readily adaptable to sporting purposes, and that a particular use of a firearm has attained general recognition as having a 'sporting purpose,' or that an event has attained general recognition as being a 'sport' before those uses and/or events can be 'sporting purposes' or 'sports' under §925(d)(3)," *Gilbert Equipment Co., Inc. v. Higgins*, 709 F.Supp. at 1075. "The bureau determined that the USAS-12 weighed 12.4 pounds unloaded, and this weight makes the gun extremely awkward to carry for extended periods, as used in hunting, and cumbersome to lift repeatedly to fire at multiple small moving targets as used in skeet and trap shooting. The bureau also determined that the USAS-12 contains detachable magazines which permit more rapid reloading. A large magazine capacity and rapid reloading are military features, according to the bureau. The bureau also opined that the overall appearance of the weapon was radically different from traditional sporting shotguns, and strikingly similar to shotguns designed specifically for or modified for combat/law enforcement/anti-personnel use. Further, the bureau determined that the activities that the USAS-12 was designed for, various police combat competitions, have not attained "general recognition" as shotgun sports," *Gilbert Equipment Co., Inc. v. Higgins*, 709 F.Supp. at 1075.

During the same year, Congress amended section 925(d)(3) and removed the provision that compelled import permit applicants to demonstrate that the firearm they sought to import was generally recognized as suitable or adaptable for sporting purposes. Congress also added a provision for conditional import approval and rephrased the statute so that where it had once declared that the Secretary "may" issue import licenses, it now states that the Secretary "shall" issues such licenses, *compare*, 18 U.S.C. 925(d)(3)(1982 ed.), *with*, 18 U.S.C. 925(d)(3)(1988 ed.).

Soon thereafter, President Bush was asked about the prospect of increasing gun control measures during a series of question-and-answer sessions with the press. There were references to the killing of school children with a Chinese AK-47 and the President indicated he felt there were sufficient laws on the books to cover importation and criminal use firearms, *25 Weekly Compilation of Presidential Documents*, 209-10, 222 (Feb. 16, 21, 1989). The President later noted that he had asked William Bennett, the newly named "Drug Czar," to look into the extent to which the availability of automatic and semi-automatic weapons contributed to drug-related violence and whether adjustments in the understanding of "suitable for sporting purposes" could be made consistent with

the interests of law abiding firearm owners, 25 *Weekly Compilation of Presidential Documents*, 294, 370 (Mar. 7, 17, 1989).

Within days, Mr. Bennett and ATF announced a temporary suspension of import licenses for an array of "assault type weapons," in order to allow ATF "to reassess its approval of several applications to import the suspended rifles. Under an accelerated review, the Bureau [reviewed] each permit to determine if it erroneously concluded that the rifles are 'generally suitable for a sporting purpose,'" *Gun South, Inc. v. Brady*, 877 F.2d 858, 859 (11th Cir. 1989). The ban applied to licenses for AK47 type, Galil type, Uzi carbine, Beretta AK70 type, M16/22 type and Galil/22 type rifles, among others, *Report, Attachment 1*.

A licensed dealer with an import license held under suspension challenged ATF's authority to suspend existing licenses. The Court of Appeals found the temporary suspension within the implicit authority of ATF under section 925(d)(3) and reasonable in light of the fact that "(1) law enforcement agencies and officials reported a dramatic proliferation in the use of assault-type rifles in criminal activity; (2) the Bureau's tracings branch showed a 57-percent increase in races of assault-type rifles recovered from crime scenes; (3) several highly publicized murders in which assault rifles were used indicate their increased use in criminal activity; and (4) the Bureau's statistics revealed the smuggling of substantial numbers of firearms out of this country for use in foreign crime," *Gun South, Inc. v. Brady*, 877 F.2d at 866.

The Court quoted from the section's original legislative history in support of the proposition that Congress intended to prohibit the importation of firearms subject to narrow exceptions and looked to Secretary of the Treasury to effectuate their intent, *Gun South, Inc. v. Brady*, 877 F.2d at 862-63:

Several portions of the legislative history emphasize Congress's intent to ban the importation of firearms, and the Secretary's discretion in complying with this mandate. The Senate report to the Gun Control Act of 1968 provides that "[t]he existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the states to effectively cope with firearms traffic within our borders." S.Rep.No. 1097, 90th Cong., 2d Sess. 80. In addition, the Senate report explains that Congress intended section 925(d)(3) to "curb the flow of surplus military weapons and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting" to prevent such weapons being used for criminal means. S.Rep.No. 1097 at 80. Furthermore, the sponsor of the legislation, Senator Dodd, stated, Title IV prohibits importation of arms which the Secretary determines are not suitable for research, sport, or as museum pieces . . . . The entire intent of the importation section is to get those kinds of weapons that are used by criminals and that have no sporting purpose. 114 *Cong.Rec.* S5556, S5582, S5585 (daily ed. May 14, 1968).

To accomplish its purpose, the Court felt Congress had given the Secretary fairly broad discretion to do its bidding, *Gun South, Inc. v. Brady*, 877 F.2d at 863:

The Senate Report notes that the Act gives the Secretary of the Treasury unusually broad discretion in applying section 925(d)(3): "The difficulty of defining weapons characteristics to meet this target [of eliminating the importation of weapons used in crime], without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition. . . ." S.Rep.No. 1501, 90th Cong., 2d Sess. 38 (1968). In fact, such broad discretion was a major concern of the opponents of the bill: "The proposed restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adoptable to, sporting purposes. . . ." S.Rep.No. 1097, 90th Cong., 2d Sess. 255 (1968)(Individual Views of Sens. Dirksen, Hruska, Thurmond and Burdick on Title IV).

The Court did acknowledge, however -- and the dissent emphasized -- that Congress, by its amendment, had "mandated the Secretary to authorize the importation of firearms falling within one of the four excepted categories," *Gun South, Inc. v. Brady*, 877 F.2d at 863.

The review, conducted during the temporary suspension of the licenses under attack in *Gun South, Inc.*, began by identifying the type of firearm under consideration, i. e., "assault-type rifles . . . which generally met the following criteria: a. military appearance[,] b. large magazine capacity[, and] c. semiautomatic version of a machinegun," *Report* at 1. It felt compelled to do so because of its reading of the legislative history of section 925(d)(3): "[S]ection 925(d)(3) expressly provides that the Secretary shall authorize the importation of a firearm that is of a type that is generally recognized as particularly suitable for sporting purposes. . . . [I]n its explanation of section 925(d)(3), the Senate Report on the Gun Control Act stated: This subsection gives the Secretary authority to permit the importation of ammunition and certain types of firearms. . . . S.Rep.No. 1501, 90th Cong., 2d Sess. 38 (1968)," *Report* at 5-6.

They concluded that the weapons under review represented a "distinctive type of rifle distinguished by certain general characteristics which are common to the modern military assault rifle" and that "the modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguishes it from traditional sporting rifles."<sup>3</sup>

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<sup>3</sup> "These features and characteristics are as follows: 1. Military Configuration. a. Ability to accept a [large capacity] detachable magazine. . . . b. Folding/telescoping stocks. . . . c. Pistol grips [that protrude conspicuously beneath the action of the weapon]. . . . d. Ability to accept a bayonet. . . . e. Flash suppressor. . . . f. Bipods [as an integral part of the firearm, either attached or as an easily accommodated feature]. . . . g. Grenade launcher. . . . h.

Whether these types of rifles were suitable or could be adapted for sporting purposes depends in part on the meaning of "sporting purposes." The report again cited legislative history.

Section 925(d)(3) had originally been enacted as part of Omnibus Crime Control and Safe Streets Act where its purpose had been described as an attempt to "curb the flow of surplus military weapons and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting. The provisions concerning the importation of firearms would not interfere with the bringing in of currently produced firearms, such as rifles, shotguns, pistols, or revolvers of recognized quality which are used for hunting and for recreational purpose, or personal protection," S.Rep.No. 1097, 90th Cong., 2d Sess. 80 (1968). The AFT report points to other segments of the legislative history the firearms used for "sporting purposes" are distinguished from those used for military purposes including references in Senate committee report on the Gun Control Act that noted an intent to permit importation of "quality made, sporting firearms, including . . . rifles such as those manufactured and imported by Browning and other such manufacturers and importers of firearms," S.Rep. No. 1501, 90th Cong., 2d Sess. 38 (1968). This at a time when "the rifles being imported by Browning . . . were semiautomatic and manually operated traditional sporting rifles of high quality," *Report* at 2. More telling is the colloquy where one of the Senate sponsors of the legislation confirms a colleague's assessment "that despite the fact that a military weapon may be used in a sporting event, it [does] not, by that action become a sporting rifle," 114 *Cong.Rec.* 27461-462 (1968)(remarks of Senators Hansen and Dodd).

This history -- coupled with the language and structure of the Gun Control Act and interpretation of earlier evaluation (rejecting random target practice on bottles and cans as a "sport") -- led to the AFT report's conclusion that "sporting purpose" should be narrowly limited to "the traditional sports of hunting and organized marksmanship competition", *Report* at 10.

The ATF report decided whether the firearms subject to the temporary import suspension were suitable or adaptable for these traditional sporting purposes by using their own observations and by consulting with those associated with traditional sporting uses. So in addition to determining whether a rifle in question was marked by features more in keeping with military than sporting purposes or how it was described by technical writers, in advertising and by importers, AFT solicited the views of state game commissioners, hunting guides, hunting and shooting sports journalists, and the organizers of shooting competitions as to whether they considered the rifles in question suitable or readily adaptable for sporting purposes, *Report*, Attachment 10.

The ATF report recommended that the temporary import ban be made permanent for most of the rifles under consideration; for a few, like the Valmet

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Night sights . . . . 2. [S]emiautomatic version of a machinegun, [and] 3. [T]he rifle is chambered to accept a centerfire cartridge case having a length of 2.25 inches or less [in combination with other military features], *Report* at 6-9.

Hunter and Galil/22 type, it recommended the ban be lifted, *Report* at 15, Attachments 7, 8. The impact of its recommendation was muted in 1994 when the Violent Crime Control and Law Enforcement Act outlawed until September 13, 2004 semiautomatic assault weapons manufactured after September 13, 1994 and large capacity ammunition feeding devices, 18 U.S.C. 922(v), (w).

The ATF report identifies the most recent process used to develop the standards by which to assess suitability or adaptability for sporting purposes. It does not suggest that this is the only process that it might be employ in the future. In this context, it might be worth noting that the current process does not explicitly require consideration of the extent of criminal use or the suitability for criminal purposes of a particular type of firearm, notwithstanding the importance of those considerations in the history of section 925(d)(3) and its subsequent interpretation.

### *Executive Authority*

The Executive Branch has considerable authority under existing law to impose an import ban on various firearm, ammunition or accessories. First, the Gun Control Act makes it unlawful to import any firearms or ammunition without the approval of the Secretary of the Treasury: "Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition. . . ." 18 U.S.C. 922(l). The provisions of section 925(d) were amended in 1986, so where it had been previously said that the Secretary "may" authorize imports under various conditions, it now provides that the Secretary "shall" authorize them under those circumstances.

*Gun South, Inc.* concluded that Congress intended in the Gun Control Act to ban firearm importation subject to the exceptions found in section 925(d) and meant to afford the Secretary of the Treasury, through ATF, with fairly broad discretion to flesh out those exceptions, *Gun South, Inc. v. Brady*, 877 F.2d at 861-65.

This authority unquestionably includes the power to proscribe importation of firearms, ammunition or accessories that may not be lawfully be possessed. It seems beyond contention for example, that the Secretary may bar the importation of those semiautomatic assault weapons and large capacity ammunition feeding devices whose possession Congress made unlawful under the 1994 Violent Crime Control and Law Enforcement Act, 18 U.S.C. 922(v), (w).<sup>4</sup>

The Secretary also appears to enjoy broad authority to define the standards for determining suitability or adaptability to sporting purposes and to promulgate the regulations governing the application of those standards. As a

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<sup>4</sup> See e.g., 27 C.F.R. 178.119 (application requirements for those seeking to import ammunition feeding devices).

general principle of administrative law, the courts will give great deference to the construction of a statute by the agency responsible for its administration. They will in fact accept the agency's reading where it is at all creditable, *Auer v. Robbins*, 117 S.Ct. 905, 909 (1997).

The history of Treasury Department interpretation of its prerogatives under the statute reveals a general inclination to allow firearms to be imported unless it becomes apparent that a particular type of firearm no longer fits comfortably beneath the cloak of a sporting purpose. Thus, it concluded that cheap, poorly made handguns seemed more likely to be devoted to robbing convenience stores than to being used for hunting or marksmanship contests. And it similarly deduced that shotguns designed for South African riot control during the days of apartheid could not reasonably be called sporting. Finally, it announced that semiautomatic assault rifles whose characteristics made them particular well suited for military purposes but especially ill suited for hunting or competitive shooting did not qualify for the sporting purposes exception.

There is nothing in any of these decisions to suggest that these examples exhaust the universe of all possible nonconforming types of firearms or of standards by which to assess them. In fact, ATF's analysis described in *Gilbert Equipment* and its report on semiautomatic assault rifles seem to verify that the list of firearms now under an import ban is not necessarily complete and that any number of other types of firearms, ammunition or accessories under the proper circumstances might be found unsuitable for sporting purposes and thus ineligible for importation under a standard developed by using the process described in the ATF report or under some other standard. ATF enjoys considerable discretion to formulate future standards for the sporting purposes exception under the Gun Control Act as long as they appear to have some reasonable foundation.

But there seem to be other authorities upon which the Executive might call upon to regulate or outlaw the importation of various types of firearms, ammunition or accessories.

The International Emergency Economic Powers Act (IEEPA) empowers the President to partially or completely bar various international commercial transactions when he considers it necessary to deal with an "unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States," 50 U.S.C. 1701, 1702.

The President has used this authority to revive portions the Export Administration Act and Arms Export Control Act. The Arms Export Control Act, 22 U.S.C. 2778, expressly authorized the President to regulate trade in firearms and other defense articles and services "in furtherance of world peace and the security and foreign policy of the United States." The regulations implementing this authority for purposes of importing firearms, ammunition and accessories, 27 C.F.R. pt.47 (esp. §47.2), adopt the regulations that implement the authority under section 925(d), 27 C.F.R. pt. 178, but this

distinct authority appears sufficient to support a different treatment if the President thought it appropriate.

Somewhat more tangentially, the Export Administration Act of 1979, as its name suggests, addressed exports primarily with an eye, in part, to the use of export controls "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States" or "where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations," 50 U.S.C.App. 2402(2)(A),(B). To this end, the President may under some circumstances "curtail the transfer of goods or technology within this country," 50 U.S.C.App. 2404(a)(1).

These statutory authorities carry into execution powers the Constitution grants the President. The power of the President as commander in chief of the armed forces; his power over foreign relations, and his responsibility to see that the laws are faithfully executed have been called upon in the past to fill in gaps in statutory authority. With statutory adornment, they are exceptionally broad. "When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it,'" *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (Jackson, J. concurring).

In the case of imports, "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority . . . to prevent the introduction of contraband into this country," *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). When, as will often occur, the regulation of imports coincides with the overall conduct of nation's relation with other nations, then we are "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress. . . ." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

It does not seem unlikely that any number of circumstances might exist that would justify a President to exercise the powers of his office in the form of an import ban on a particular type of firearm, or a particular kind of ammunition or accessory. In fact, the trade sanctions imposed against Iran, Iraq, Libya, and Cuba already do this and more, see 50 U.S.C. 1701 note; 31 C.F.R. pt. 515, 535, 550, 560, 575.

  
Charles Doyle  
Senior Specialist  
7-6006

**18 U.S.C. 925(d)**

(d) The Secretary shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition--

(1) is being imported or brought in for scientific or research purposes, or is for use in connection with competition or training pursuant to chapter 401 of title 10;

(2) is an unserviceable firearm, other than a machinegun as defined in section 5845(b) of the Internal Revenue Code of 1954 (not readily restorable to firing condition), imported or brought in as a curio or museum piece;

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily adaptable to sporting purposes, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled; or

(4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

The Secretary shall permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection.

**26 U.S.C. 5845**

For the purpose of this chapter--

(a) Firearm.--The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun.--The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any



combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.--The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun.--The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon.--The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) Destructive device.--The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) Antique firearm.--The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also

any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) Unserviceable firearm.--The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) Make.--The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) Transfer.--The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) Dealer.--The term "dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

(l) Importer.--The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) Manufacturer.--The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.