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April 30, 2011
By e-mail to shotgunstudy@atf.gov

United States Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives
Firearms and Explosives Industry Division
Washington, D.C.

Re: Gun Owners Foundation Comments:
ATF "Study on the Importability of Certain Shotguns" (January 2011)

Gentlemen:

Our firm represents Gun Owners Foundation ("GOF"). On its behalf, and in response to the Bureau's invitation, we submit the following Comments in response to ATF's January 2011 "Study on the Importability of Certain Shotguns" ("ATF Study").[1]

GOF appreciates this opportunity to be heard on a matter of great interest to its members, of significant import to the application of federal firearms statutes, and of overriding importance to maintaining a robust right to keep and bear arms as secured to the American people by the Second Amendment to the United States Constitution.

I. ATF's STUDY IS BASED ON MISTAKEN ASSUMPTION THAT THE ATTORNEY GENERAL HAS "BROAD" DISCRETION UNDER SECTION 925(d).

A. Section 925(d), As Amended, Restricts Rather Than Authorizes, ATF Discretion.

[1] "ATF Study on the Importability of Certain Shotguns," U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, January 2011, http://www.atf.gov/publications/firearms/012611-study-on-importality-of-certain-shotguns.pdf

The ATF Study seeks "to establish criteria that the [ATF] will use to determine the importability of certain shotguns under the provisions of the Gun Control Act of 1968 (GCA)."[2] *See* ATF Study, pp. ii and 1.

According to the ATF Study, 18 U.S.C. section 925(d) "creates four **narrow exceptions**" to the **general ban** on the importation of firearms into the United States, giving to the Attorney General[3] what ATF calls "'**unusually broad discretion**'" to decide whether a particular firearm is importable. *See* ATF Study, pp. 1-2 (emphasis added). Indeed, relying on GCA legislative history, the ATF Study concludes that the Attorney General is authorized by section 925(d) "to differ with the judgment of sportsmen expressed through consumer preference in the marketplace" and to exclude the importation of firearms that he, in his sole discretion, determines to be nonimportable. *See* ATF Study, p. 2.

Completely overlooked by the ATF Study is that section 925(d)'s grant of **discretion** to the Attorney General was **significantly narrowed** by the Firearm Owners Protection Act of 1986 ("FOPA").[4] While section 925(d) provided that the Attorney General "**may** authorize a firearm … to be imported … into the United States,**"** FOPA amended section 925(d) substituting "**shall authorize**" for "may authorize."[5]

Additionally, while section 925(d) required a person seeking to import a firearm to **"establish[] to the satisfaction" of the Attorney General** that the firearm met the statutory criteria.[6] FOPA struck this phrase from the Act. The current version of section 925(d) requires the Attorney General to find, **in fact**, whether a firearm meets the statutory criteria for importability. *See* Pub. L. Section 105.

Thus, section 925(d), as amended, **requires** the Attorney General to find a firearm importable if it meets the **statutory criteria**, even though that firearm does **not** meet that statutory criteria to the Attorney General's **personal "satisfaction."**

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[2] Pub.L. 90-618, 82 Stat. 1213.

[3] Originally, the Secretary of the Treasury was granted this authority, but ATF was transferred to the U.S. Department of Justice, and these comments refer to the Attorney General rather than the Secretary of the Treasury.

[4] Pub.L. 99-308, 100 Stat. 449

[5] *Compare* Pub. L. 90-618, section 925(d) (82 Stat. 1225) *with* Pub. L. Sec. 105(2) (100 Stat. 459) (emphasis added).

[6] *See* Pub. L. Section 925(d) (emphasis added)

B. The FOPA Amendments Are the Product of a More Liberal Firearm Policy.

Undergirding FOPA's limitation on the Attorney General's discretion were two congressional findings:

> First, Congress found that "the rights of citizens … to keep and bear arms … require additional legislation to **correct existing firearms statutes and enforcement policies."** [*See* Pub. L. 99-308, Section 1(b)(1)(A) (100 STAT. 449) (emphasis added).]
>
> Second, Congress found that "additional legislation is required to reaffirm … that 'it is not the purpose of this title to place any undue or unnecessary Federal restrictions … on law-abiding citizens with respect to the acquisition … of firearms **appropriate to the purpose of** hunting, trap shooting, **target shooting, … or any other lawful activity**." [*See* Pub. L. 99-308, Section 1(b)(2) (emphasis added).]

Whereas GCA's "principal purpose [was] to **strengthen Federal controls**,"[7] FOPA's corrective purpose was to secure "the rights of citizens … **against unconstitutional exercise of authority under the ninth and tenth amendments**." *See* Pub. L. 99-308, Section 1(b)(1)((D) (100 STAT. 449).

Additionally, whereas the 1968 Congress was relying on a "**collective rights**" view of the Second Amendment, the 1986 Congress that passed FOPA correctly recognized that the Amendment protects an "**individual right**."[8]

The Judiciary Committee in 1968 believed it could outlaw military surplus firearms because Americans as individuals had no right to own them, and the National Guard already had military weapons. However, FOPA made it clear that Congress had abandoned its collective rights view, and instead embraced "the rights of citizens." Pub. L. 99-308, Section 1(a). FOPA considerably amended 925(d)(3), and expressed an entirely different intent of

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[7] *See* House Report No. 1577 in U.S. Code Congressional and Administrative News (USC CAN), p. 4411 (1968) (emphasis added).

[8] The 1968 legislative history on which ATF relies is predicated on the Judiciary Committee's erroneous belief that " the second amendment … was not adopted with the individual rights in mind." 1968 U.S.C.C.A.N. 2112, 2169. The Report claims that "it was clear that **no body of citizens** other than the organized State militia, or other military organization provided for by law, **may be said to have a constitutional right to bear arms**." *Id.* (emphasis added).

Congress than had existed in 1968, and thus 925(d)(3) clearly must be read in light of superceding legislation.

C. The Supreme Court's Decision in the Heller Case Reinforces FOPA's More Liberal Second Amendment Policy.

Unquestionably, Congress premised FOPA upon what has now been affirmed by the United States Supreme Court — that the Second Amendment right to keep and bear arms is secured to individual American citizens. *See* District of Columbia v. Heller, 554 U.S. 570, 581, 591 (2008). And the FOPA amendments to section 925(d) were calculated to facilitate that constitutional right — a right that encompasses the use of firearms for lawful purposes — such as **self-defense and armed resistance to tyranny**. *Id.*, at 598-99.

FOPA's firearms policy brings section 925(d) closer to conformity with the Second Amendment, in that FOPA was specifically designed to protect citizen acquisition of firearms for "any … lawful activity." *See* Pub. L. 99-308, Section 2.[9]

II. THE STUDY'S DEFINITION OF "SPORTING PURPOSES" IS OUTDATED AND UNAUTHORIZED BY THE PLAIN LANGUAGE OF SECTION 925(d).

A. ATF Has No Authority to Define "Sporting Purposes," But Rather Must Find What Has Been "Generally Recognized" By the Shooting Public.

The ATF Study claims to "recognize that **sporting purposes may change over time**, and that certain shooting activities may become 'generally recognized' as such." ATF Study, p. 7 (emphasis added). Thus, the ATF Study states that "a more thorough and complete assessment is necessary," and that "[a]ny such study must include rifles, shotguns, and handguns…." ATF Study, p. iii, 8.

But **the ATF Study fails to do what it states must be done**. Instead of updating its definition of "sporting purposes" to conform to changes that have already taken place, the ATF Study applies a flawed and outdated definition to come up with new categories of prohibited shotguns. Indeed, even though the ATF Study recognizes that sporting purposes

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[9] In a letter written to his nephew, Thomas Jefferson wrote that **"[a]s to the species of exercise, I advise the gun**. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind. Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks." Thomas Jefferson, letter to Peter Carr, August 19, 1785 (emphasis added). http://www.familytales.org/dbDisplay.php?id=ltr_thj1435.

may today include **new sports**, such as "practical shooting competitions," (ATF Study, p. ii), the ATF Study resorts to criteria "based on the … **traditional sports** of hunting, trap and skeet target shooting." ATF Study, p. 8.

But the test is **not** whether a firearm is "**traditionally recognized**" as sporting. **Rather**, the text requires ATF to determine whether a particular firearm is "**generally recognized**" as sporting. According to the Study, whether a firearm is so recognized changes over time. ATF Study, p. 7. Yet, the Study has failed to bring its earlier sporting purpose assessments up-to-date.

For example, the ATF Study states that ATF "continues to believe that the activity known as **'plinking' is not a** generally recognized **sporting purpose**." ATF Study, p. 7 (emphasis added). But how would ATF know this, given it has not undertaken the "more thorough and complete assessment" it has claimed is necessary prior to such a determination?

B. Any New Understanding of "Sporting Purposes" Cannot Exclude "Plinking" as a Sport.

The ATF Study states that "hunting" and "organized[10] competitive[11] target shooting" are sporting purposes, but that "plinking" is not. However, the Senate Report on the Omnibus Crime Control and Safe Streets Act of 1968 ("OCCSSA") discussed only "target shooting."[12] **ATF has added to that the qualifiers** "organized" and "competitive" in an apparent effort order to further restrict firearms imports. The only reason given in the ATF Study for this distinction is that ATF believes "plinking" is so broad that virtually any shotgun would be

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[10] Organized shooting implies a group activity. It would seem that ATF continues to base its understanding of section 925(d)(3) on the same "collective rights" interpretation of the Second Amendment that was pervasive (*see* 1968 U.S.C.C.A.N. 2112, 2307) during the passage of OCCSSA, but which has been soundly discredited by FOPA, Heller, and McDonald v. Chicago, 130 S.Ct. 3020 (2010).

[11] The Third Circuit has stated that "we find **no authority**, legal or lexicographical, for the [government's] proposition that sport necessarily implies competition." U.S. v. Bossinger, 12 F.3d 28, 29 (3rd Cir. 1993) (emphasis added). This seems to be nothing more than a way to carve out for importation restriction certain weapons that ATF does not like, regardless of how they fit under the statutory text.

[12] 1968 U.S.C.C.A.N. 2112, 2167.

suitable for plinking, rendering 925(d)(3) a nullity.[13] ATF Study, p. 7.[14] Yet it is incomprehensible how "plinking" — which the ATF defines as "**shooting**" at a "**target**"[15] — is nevertheless not "**target shooting**."

Five federal judicial circuits have interpreted the bounds of "**sporting purpose**" as it relates to §2K2.1(b)(2) of the Federal Sentencing Guidelines. In that Guideline, defendants qualify for a sentence reduction if a firearm was possessed "solely for lawful sporting purposes or collection…."[16] Without exception, each of the five circuits that has addressed the issue has determined that "sporting purpose" **includes** both "**plinking**" and "target shooting."[17] Five other circuits have implicitly accepted the same definition.[18]

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[13] If this is true, it is a problem with the statute, and such a problem cannot be made to disappear simply through creative interpretation by the ATF.

[14] *See also* Springfield v. Buckles, 292 F.3d 813, 818-9 (D.C. Cir 2002).

[15] Plinking is defined as "shooting at random targets such as bottles and cans." ATF Study, p. ii.

[16] 2010 Federal Sentencing Guidelines Manual, §2K2.1(b)(2), http://ftp.ussc.gov/2010guid/2k2_1.htm.

[17] The Third Circuit held that "a firearm possessed solely for lawful sporting purposes includes a firearm possessed solely for plinking." U.S. v. Bossinger, 12 F.3d 28, 30 (3rd Cir. 1993). The Fifth Circuit has discussed "sporting or recreational use, such as … target practice…." United States v. Shell, 972 F.2d 548, 552 (5th Cir. 1992), and the Sixth Circuit has discussed "legitimate sporting purposes like hunting and target shooting…." United States v. Allen, 1997 U.S. App. LEXIS 30204 (6th Cir. 1997). The Seventh Circuit has held that "[f]or purposes of §2K2.1(b)(2), target shooting is a 'lawful sporting purpose.'" U.S. v. Lafleur, 38 Fed. Appx. 327, 330 (7th Cir. 2002). The Tenth Circuit has stated that "'[p]linking' … is a form of target shooting, and [w]e and several other circuits have assumed that target shooting, **organized or unorganized**, is a sporting purpose…." U.S. v. Hanson, 534 F.3d 1315, 1317 (10th Cir. 2008) (emphasis added).

[18] All of the remaining circuits (except the Second Circuit) have implicitly accepted these inclusions, determining that while "plinking" or "target shooting" was one of the defendants' possible purposes for having a firearm, there were other more likely purposes that did not fall under the "sporting purposes" reduction. *See* United States v. Denis, 297 F.3d 25, 32-34 (1st Cir. 2002); United States v. Mills, 82 Fed. Appx. 287, 288-289 (4th Cir. 2003); United States v. Bertling, 510 F.3d 804, 811 (8th Cir. 2007); United States v. Cervantes, 1994 U.S. App. LEXIS 37237 (9th Cir. 1994);United States v. Caldwell, 431 F.3d 795, 797 (11th Cir. 2005).

These judicial decisions reflect a **uniform understanding** of the term "sporting purpose" — one which differs from that adopted in the ATF study.[19] For example, the Hanson court defined "**sporting purpose**" as "an intent to engage in **sport**." *Id.*, at 1317 (emphasis added). The Bossinger court held that "'**sport**' connotes **recreation** – something that is a source of **pleasant diversion**." *Id.*, at 29 (emphasis added). Both of these definitions are broad — much broader than ATF's requirement that a sport be an "organized" and "competitive" event.

In fact, the D.C. Circuit is the only federal circuit to have agreed with ATF on this issue.[20] In the only federal case directly on point interpreting section 925(d)(3) as it relates to "target shooting,"[21] that court rejected Springfield's argument that "BATF construed 'sporting purposes' too narrowly, excluding … 'target shooting, plinking, and recreation." *Id.*, at 818. This was because of the court's agreement with ATF that this "would mean that all firearms must be allowed into the country" as suitable for plinking and target shooting which, as discussed above, is Congress' problem, not the D.C. Circuit's or ATF's. *Id.* If ATF finds the text of 925(d)(3) problematic, ATF should request that Congress amend the statutory language, rather than simply "interpreting" the statute to mean something that ATF alone believes makes sense.

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[19] ATF might argue that analysis of "sporting purposes" **under the Sentencing Guidelines** cannot inform an understanding of "sporting purposes" **under 925(d)(3)**, because the latter includes a requirement that the firearm at issue be "**generally recognized**" as suitable for sporting. Thus, as ATF believes, 925(d)(3) requires both that the "sporting purpose" be generally recognized and also that the weapon at issue be generally recognized as being suitable for that purpose. *See* Gilbert v. Higgins, 709 F. Supp. 1071, 1085 (S.D. Ala. 1989). Such a distinction would be illogical. In applying the "sporting purposes" provision in the Sentencing Guidelines, courts clearly must determine what is and is not a sporting purpose, which requires an implicit finding of general acceptance.

[20] One might take the view that the D.C. Circuit is the last Circuit that should be relied on to define the bounds of what is a shooting sport. The Circuit is confined entirely within the bounds of a federal enclave, whose sole jurisdiction is a metropolitan center, and where until only recently it was illegal to even own a firearm. Nor is there any private shooting range in the nation's capital, or for that matter any place at all where civilians can shoot firearms. The District of Columbia has recently lost its only Federal Firearms Licensed Dealer. Thus it is predictable that this Circuit could disagree with all the others as to the characterization of "plinking."

[21] Springfield, Inc. v. Buckles, 292 F.3d 813 (D.C. Cir. 2002).

By continuing to hold that "plinking" is not a sporting purpose, ATF makes it clear that the agency does not care what is "generally recognized," but rather will continue to adopt its own definition of sporting purposes, in line with what best suits its agenda.

C. Most (If Not All) Of the So-Called "Non-Sporting" Criteria ATF Has Identified Have Legitimate "Sporting Purposes."

ATF has developed a laundry list of characteristics that it believes have no sporting purpose, and thus any shotgun with any one or more such characteristics will be deemed nonimportable.

One of the reasons ATF gives for its classification is that "the working group determined that shotguns with any one of these features are **most appropriate** for military or law enforcement use." ATF Study, p. iv (emphasis added). ATF then claims because such features are "most" appropriate for other uses, "shotguns containing any of these features are not [sporting]." *Id.* ATF in essence has claimed that "Because A, not B." This is a logical fallacy.

A shotgun may or may not be suitable for "military or law enforcement use." However such usefulness should have no bearing on its usefulness for "sporting." In fact, police and military often use shotguns that are no different than those ATF would classify as sporting, such as the Remington 870, the hallmark of police "cruiser" shotguns. As an indication of current use, Wikipedia currently states that the 870 "is **widely used by the public for sport shooting**, hunting, and self-defense. It is **also commonly used by law enforcement and military** organizations worldwide."[22]

ATF cannot simply exclude a shotgun because it is **appropriate** for the police. Rather, it must show why it is **inappropriate** for sporting.

1. "High Capacity" Magazines.

The ATF Study has claimed that any shotgun with a "magazine[] over 5 rounds" will be considered not sporting and thus non importable. ATF Study, p. iv. And yet ATF recognizes that "traditional shooting sports of trap, skeet, and clays" are clearly sporting purposes, and in fact "based [the] sporting suitability criteria" on those sports. *Id.* It likely would come as quite a surprise to shooters such as Tom Knapp[23] — world renowned for his records at

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[22] http://en.wikipedia.org/wiki/Remington_870 (emphasis added).

[23] http://www.tomknapp.net/

shooting hand-thrown clay targets[24] — who regularly uses Benelli shotguns with "high capacity" magazines up to ten rounds, to learn that his shotguns are not sufficiently "sporting" to be imported.

Knapp and others like him are essentially "at the top of the game" of their recognized shooting sports, and clearly would be in the best position to define the "nature and requirements inherent to that sport." ATF Study, p. 7. And yet ATF would disagree. Clearly, high capacity magazines have legitimate, generally recognized "sporting purposes," even based on ATF's cramped definition of that term.

2. "Light Enhancing Devices."

Additionally, ATF has listed "light enhancing devices" as a prohibited feature. ATF Study, p. iv. Apparently this would include both "night vision" (ATF Study, p. 11) and traditional flashlights (ATF Study, Exhibit 4). First, GOF is unaware of any shotgun that currently is imported with either of these types of devices. It would seem that ATF is simply looking to how Americans modify their weapons once they have been imported (*see* Section IV, below).

ATF bases this determination on its finding that "it is generally illegal to hunt at night." ATF Study, p. 11. That's all well and good, but there's a big difference between "generally" and "always." "Generally illegal" means that it's not always illegal to hunt at night, which is another way of saying "**it is sometimes legal to hunt at night**."

In reality, it is often legal to hunt at night. Many animals are hunted at night, some hunted **exclusively** at night. Racoon are hunted at night. Opossum are hunted at night. Fox, coyotes and other predator animals are hunted at night.[25] The Michigan Department of Natural Resources goes so far to say that "**[f]lashlights**, portable battery-powered spotlights and headlamps, and similar portable lights designed to be carried in the hand or on the person **are legal**. The use of natural light, including **night vision optics** and scopes, **is legal**." *Id.* (emphasis added).

The question then becomes what sorts of devices are "generally recognized as particularly suitable or readily adaptable to" lawful night time hunting. ATF cannot possibly believe that nighttime hunting (which ATF implicitly recognizes as a sporting purpose) can be

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[24] http://www.youtube.com/watch?v=jpv0yZC3iMM

[25] *See, e.g.*, "Nighttime Raccoon and Predator Hunting," Michigan Department of Natural Resources, http://www.michigan.gov/dnr/0,1607,7-153-10363_10880-31621--,00.html.

accomplished without the use of some sort of illumination, yet it rules out both active and passive devices that accomplish this. Hunters do not just shoot wildly off into the dark.

One example of widespread nighttime hunting is that of wild or "feral" hogs in the American south and southwest, which result when Asian boars breed with American wild pigs.[26] The Discovery Channel believed this to be such a prevalent activity in many states, that it has devoted an entire television series to the sport.[27] Such animals are most often hunted at night, when they are most active. Night vision and/or weapon mounted illumination is often used to target these animals. Since these and other predator animals are considered pests, there is no "in season" date restrictions on their being hunted, and there is no limit to the number that can be hunted (*see* Missouri's "Shoot on Sight" policy).[28]

3. Telescoping Stocks.

ATF claims that "folding, telescoping, or collapsible stock[s]" are "predominant[ly used for] military and tactical purposes." ATF Study, p. 9. ATF claims that such stocks are "not therefore found on the traditional sporting shotgun." *Id.*

These claims are false. In fact, the U.S. military predominately uses two shotguns as primary weapon systems — the Mossberg 590,[29] and the Remington 870.[30] On the other hand, shotguns with telescoping stocks generally have not been widely adopted by the military. The Benelli M1014 has been adopted in some capacity by the U.S. Marines, but this is only within the last decade, and its use in no way compares with the others listed above.[31]

Also, the ATF Study claims telescoping or collapsible stocks are designed "main[ly for] portability," and are not used to "improve the overall 'fit' of the shotgun to a particular shooter." ATF Study, p. 9.

This, too, is patently false. A collapsible stock, for example, might improve portability **slightly** by making the weapon at most a few inches shorter. However, that same few inches

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[26] http://www.tpwd.state.tx.us/huntwild/wild/nuisance/feral_hogs/

[27] http://dsc.discovery.com/videos/hogs-gone-wild-videos/

[28] http://mdc.mo.gov/landwater-care/animal-management/invasive-animal-management/feral-hogs/shoot-em-sight

[29] http://en.wikipedia.org/wiki/Mossberg_M590.

[30] http://en.wikipedia.org/wiki/Remington_870#Variants.

[31] http://www.usmcweapons.com/articles/M1014/M1014NF.htm

can make a **significant** improvement in the "overall 'fit'" of the shotgun to shooters of various statures, which is critical to maintain a proper shooting position and eye relief.

III. IF A FIREARM IS A "MILITARY SURPLUS FIREARM," AND IS NOT OTHERWISE-PROHIBITED UNDER 28 U.S.C. 5845, IT IS *PER SE* IMPORTABLE UNDER 925(D)(3), RATHER THAN *PER SE* PROHIBITED AS ATF CLAIMS.

A. The Plain Text of 925(d)(3) Supports The Importability of Surplus Military Firearms that are not Otherwise Prohibited by 26 U.S.C. Section 5845.

Section 925(d) states that the Attorney General "shall" authorize the importation of a firearm if it meets a two part test.

- **First**, the firearm must **not** be an **NFA weapon** under 28 U.S.C. 5845.[32]

- **Second**, the firearm must be "generally recognized as particularly suitable or readily adaptable to **sporting purposes**."

The statute then appears to lay out an **exception** to the second part of the test by the phrase, "**excluding surplus military firearms**." Although 925(d) is not particularly well written, such an exception would mean that, if a firearm is a "surplus military firearm," it is excluded from the sporting purposes test, and importable so long as it is not prohibited by section 5845.

However, ATF's longstanding interpretation of this clause is entirely the opposite, namely, that military surplus firearms are non-importable because they are, by statute, nonimportable *per se*. ATF has argued that the "excluding surplus military firearms" language means that "Congress intended … to allow the importation of … sporting rifles, while excluding military-type rifles [from importation]." 1989 Study, p. 3. ATF's interpretation is

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[32] The firearm must not be a short barrel shotgun or rifle, an "any other weapon," a silencer, or a "destructive device."

based on the GCA's legislative history consisting of a Senate Report[33] and a statement made on the floor of the Senate.[34]

If section 925(d)(3) were actually ambiguous, ATF's reliance on legislative history to interpret it might be justified. However, the statute, while poorly worded, exempts military surplus weapons from the sporting purposes test, allowing such weapons to be imported if they meet the easier 5845 test. It is well accepted that if a statute is clear on its face, legislative history cannot be used to "interpret" it to mean something other than what it says,[35] even if the result is not what its drafters intended. ATF's interpretation might be in line with what those who authored the Senate Report wrote, but it is not in line with what section 925(d)(3) states.

B. Recent Statutes and Supreme Court Precedents Support This Reading.

There are additional reasons why ATF's reading of section 925(d)(3) is erroneous.

1. Firearm Owners Protection Act of 1986.

See discussion of FOPA in Section I.B., *supra*.

2. United States Supreme Court Precedent.

Additionally, Heller and McDonald undermined the collective rights interpretation of the Second Amendment, recognizing significant legitimate, non-sporting uses for firearms. Thus, to continue to rely on the collective rights doctrine to interpret section 925(d)(3) is analogous to relying on the reasoning of Plessy v. Ferguson to interpret the Civil Rights Act. *See* Section 1.

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[33] As authority for its position, ATF cites to a report from the Senate Judiciary Committee (S. Rep. 90-1097, 1968 U.S.C.C.A.N. 2112). That report claims that military surplus weapons "have no sporting use and their continued importation and domestic availability to virtually anyone cannot be justified." 1968 U.S.C.C.A.N. 2165.

[34] ATF has also relied on an exchange between two Senators during Senate debate, as support for its interpretation. Senator Hansen asked for confirmation that simply because a "military weapon" used in a "sporting event," that fact did not make the weapon a "sporting rifle." This may be true. However a "military weapon" need not be considered a "sporting rifle" to be imported if "surplus military firearms" are exempted from the sporting purposes test by the language of 925(d)(3).

[35] *See, e.g.*, Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992), United States v. Gonzales, 520 U. S. 1, 6 (1997).

3. National Defense Authorization Act of 1996.

The **1968** legislative history on which ATF relies justified the purported restriction on "surplus military firearms" because of the fact that "the United States no longer sells domestic military surplus to the public." Senate Report, 1968 U.S.C.C.A.N. 2112, 2165. That claim is no longer true, and neither is the sentiment that underlies it.

In **1996**, a **majority** of Congress clearly intended military surplus firearms to be available to Americans when, as part of the National Defense Authorization Act ("NDAA") for Fiscal Year 1996, Congress instructed the U.S. Army **to transfer surplus firearms** to the Civilian Marksmanship Program ("CMP"), and in turn **instructed the CMP to sell those firearms to the public**. 36 U.S.C. 40728.

The CMP's stated purpose is to "instruct citizens of the United States in marksmanship" and "promote practice and safety in the use of firearms." 36 U.S.C. section 40722. To further this purpose, the CMP was instructed to "sell firearms" to the American public, including "caliber .30 surplus rifles [and] ammunition." To date, the CMP has sold countless thousands of M-1 Garands, M-1 Carbines, and other U.S. surplus military firearms.

If, as ATF believes, Congress still wanted to keep "military surplus firearms" out of the hands of Americans, why would Congress charter an organization devoted entirely to ensuring that "military surplus firearms" made their way into the hands of the American public, and order the U.S. Army to provide that organization with firearms?

In recent months, ATF has gone so far as to interpose itself in the State Department's affairs, and rescind importation from South Korea of potentially millions of U.S. made M-1 Garands and M-1 Carbines because, as the ATF has claimed, they are "particularly dangerous" and "pose[] a threat to public safety in the U.S."[36]

The irony is palpable. Claiming to be acting pursuant to the supposed intent of Congress, ATF has acted to deny importation of the very American-made firearms that Congress has unambiguously expressed its intent for Americans to possess.

When interpreting 925(d)(3), ATF should use the most recent mandate of Congress as expressed in FOPA and the NDAA — that military surplus weapons should be readily available to the American public. Without relying on the outdated legislative history of 1968, both the text of 925(d)(3), and Congress' intent become clear.

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[36] http://www.nytimes.com/2002/11/16/national/16GUNS.html?tntemail1
http://www.scribd.com/full/39176770?access_key=key-k0k126h4dxkbhjq0z4r

IV. ATF INEXPLICABLY RELIES ON DOMESTIC PARTS, DOMESTIC MODIFICATIONS, AND EVEN DOMESTIC FIREARMS IN ORDER TO JUSTIFY OUTLAWING FOREIGN FIREARMS.

In listing the various criteria ATF has determined to be non-sporting, ATF has included Exhibits, with pictures depicting examples of these non-sporting features. However, there are several fundamental problems with ATF's exhibits. First, some Exhibits picture shotguns that not in their imported configuration, but rather in aftermarket configurations. Second, the Exhibits show pictures of U.S. made parts, such as magazines, that can be used on shotguns once they are imported. Yet neither of these issues is at all relevant to whether a shotgun is in a sporting configuration at the time it is imported.

The subject is **imported** shotguns. Yet the subject matter ATF depicts in its Exhibits is **domestic** foregrips, **domestic** flashlights, **domestic** magazines, **domestic** conversions, and even **domestic** shotguns. Nearly every one of ATF's exhibits suffers from this flaw. Was ATF unable to come up with any example of an actual shotgun that is nonimportable? If not, what then is the purpose of the ATF Study?

So long as a shotgun meets other requirements of domestic firearms, including the parts-count requirement under 18 U.S.C. 922(r), **it is not within ATF's jurisdiction** to evaluate what some U.S. owners might choose to do with their imported shotguns. ATF's authority under 925(d)(3) is limited to examining the shotgun and determining if it is importable. ATF has no authority to deny importation based on a configuration it might be given after importation.

For example, in ATF's **Exhibit 1**, the bottom picture on the page depicts a Saiga shotgun, seemingly the Saiga-410. This picture is not a picture of the Saiga in its imported configuration, but rather in a converted state (something that was done in the United States). The pictured Saiga has a pistol grip, which was added after importation. Additionally, the trigger assembly on the pictured Saiga has been moved forward several inches, residing next to the magazine release, which is completely different to the way that shotgun is imported.[37]

Next, ATF's **Exhibit 3** depicts a MD Arms model MD-20 drum magazine for the Saiga 12. The picture was taken directly from MD Arms' website.[38] Yet this drum magazine has nothing to do with the importability of the Saiga 12. This is a U.S.-made, aftermarket magazine. No Saiga-12 is imported with a drum magazine such as this. On the contrary,

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[37] For an example of a Saiga shotgun the way it is **actually** imported, see http://www.raacfirearms.com/images/saiag12_adjsight.jpg.

[38] https://www.mdarms.com/index.php?main_page=product_info&cPath=13_1&products_id=3

Saiga shotguns are imported with 5 round box magazines, which even the ATF does not deem to be "high capacity."[39] Thus it is incomprehensible why ATF would refer to this magazine or this shotgun in determining certain shotguns to be nonimportable.

Next, in ATF's **Exhibit 4**, the picture in the middle of the page depicts a Remington 870 as an example of a "sporting" type of rail system. Although ATF has determined this type of rail to be "sporting," it is still unclear why ATF is using American-made firearms at all in its Study.

Finally, in **Exhibit 6**, ATF depicts a shotgun with a vertical foregrip as another non-sporting feature. However, the foregrip that ATF depicts appears to be a Tango Down vertical foregrip, which again is manufactured by an American company.[40] The foregrip shown in the bottom picture is of a TDI Arms "Front Arm Ergonomic Vertical Grip AVG," the picture again taken from TDI's website.[41]

No shotgun is known to be imported with either of these foregrips. Rather, they are added only by post-import users. As discussed, ATF has no jurisdiction under 925(d)(3) over what an American chooses to do with his shotgun once it has been imported, so long as he complies with other relevant federal laws. Whether the U.S. owner wants to add an aftermarket vertical foregrip to his shotgun is just as irrelevant for purposes of 925(d)(3) as whether he wants to paint it with polkadots.

The ATF Study is badly flawed, and should be withdrawn and revised in accordance with a proper understanding of these firearms and applicable law, as discussed in these comments.

Sincerely yours,

/s/

William J. Olson

WJO:gw

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[39] In fact, the Saiga shotguns currently imported have **none** of the "evil" features that ATF has identified. Why, then, would pictures of Saiga shotguns and parts appear in ATF's exhibits as examples of **prohibited** shotguns?

[40] http://tangodown.com/shop/product_info.php?cPath=26&products_id=65

[41] http://tdi-arms.biz/index.php?productID=678