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COMMENTS OF STEPHEN P. HALBROOK ON ATF 2021R-05, WHICH WOULD REDEFINE "FRAME OR RECEIVER"AND "SERIAL NUMBER"

Summary

The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." The Gun Control Act (GCA) authorizes "only such rules and regulations as are necessary to carry out the provisions of this chapter . . . ." 18 U.S.C. § 926(a). The GCA prohibits "any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms," and "is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." § 101.

ATF's proposed regulations entitled "Definition of 'Frame or Receiver' and Identification of Firearms"[2] go far beyond the statutory authority delegated to ATF by Congress in the GCA. They would redefine "frame or receiver" and "serial number" beyond their ordinary meanings as recognized by over fifty years of ATF's own regulations. They will violate the GCA and the Second Amendment itself by impeding and discouraging the exercise of the right to keep and bear arms by law-abiding citizens. By vastly expanding the meaning of "firearm," they will create new felony crimes by bureaucratic fiat.

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[2]Notice of Proposed Rulemaking, Definition of "Frame or Receiver" & Identification of Firearms, 86 F.R. 27720 (May 21, 2021). https://www.govinfo.gov/content/pkg/FR-2021-05-21/pdf/2021-10058.pdf.

Under the GCA, a firearm has a single frame or receiver and a single serial number. ATF regulations have always recognized that, and have prohibited duplicate serial numbers. The proposed regulations would treat frame or receiver *parts* as multiple frames or receivers, and each *part* would be treated as a firearm and require serialization. Existing designs such as the 1911 and AR-15 would be grandfathered, but all new designs would be subject to the requirements. Moreover, ATF will have formal authority to declare partially-machined raw material as frames or receivers. The current objective definition of frame or receiver will be scrapped and replaced by ATF discretion.

In addition, the term "serial number" will be redefined and expanded to include not just the number, but also the licensee name and location or the license number. It will no longer suffice to place the name and location on the barrel or slide.

In addition to new burdens and uncertainties, the result will be that more receiver parts will be considered firearms subject to serialization and all other requirements. Receiver parts with different serial numbers will inevitably be combined on the same firearm, whether at the points of production and distribution, or by end users doing custom work or replacing parts. The result will be firearms with both duplicate serial numbers and multiple serial numbers, and this confusing array will be recorded in the acquisition and disposition books. This will invariably lead to confusion among law enforcement, ATF's tracing center, licensees responding to trace requests, and law enforcement who follow up on trace information.

Contrary to the GCA and the Second Amendment itself, the proposed regulations will impose undue restrictions on law-abiding citizens with respect to the acquisition, possession, or use of firearms, and will discourage the private ownership or use of firearms by law-abiding citizens. When frame or receiver parts that are not "firearms" suddenly are redefined as "firearms" overnight, a massive array of GCA crimes – punishable as felonies – will apply, such as bans on transfer of a firearm to, or receipt of a firearm from, a resident of another state. Instead of just ordering parts not previously considered "firearms" by mail, citizens will have to purchase them from dealers, undergo background checks, and pay additional costs.

The proposed regulations are contrary to law, would violate constitutional rights, and should be rejected.

I. The Proposed Regulations Would Place Undue Restrictions on the Acquisition of Firearms by Law-abiding Citizens and Would Violate the Second Amendment

The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." In passing the Firearm Owners' Protection Act (FOPA), 100 Stat. 449 (1986), Congress reaffirmed Second Amendment rights and found it necessary "to correct existing firearms statutes and enforcement policies," adding in § 1 that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968," as follows:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.

The proposed rule places undue restrictions on law-abiding citizens regarding the acquisition, possession, and use of firearms, imposes unjustified financial burdens, and discourages private ownership and use of firearms by law-abiding citizens. It goes beyond the limited powers that Congress delegated to ATF and would violate the very rights that Congress sought to protect under the Second Amendment.

To protect Second Amendment rights, Congress strictly limited ATF's regulatory authority as follows: "The Attorney General may prescribe "*only* such rules and regulations as are necessary to carry out the provisions of this chapter" (chapter 44 of title 18). 18 U.S.C. § 926(a). This language was enacted by FOPA, which deleted the prior language that "the Secretary may prescribe such rules and regulations *as he deems reasonably necessary* to carry out the provisions of this chapter." FOPA, § 106.

In debates on FOPA, Senator Mattingly explained that "regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment. The deletion of the term 'reasonably' narrows the boundaries of an agency's discretion, discretion which has been at times exercised in an abusive manner. . . . In addition, the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law." 131 Cong. Rec., 99th Cong., 1st Sess., at S9171 (July 9, 1985).

Congressional intent in the GCA not to impose undue restrictions on the acquisition of firearms by law-abiding citizens and to limit regulations only to those that are necessary must be interpreted consistent with the protection of Second Amendment rights. "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008). Moreover, "the right to keep and bear arms is fundamental to our scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition . . . ." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

The opinion in *Heller* did not "cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. The proposed regulations here are not "laws" and have no basis in the laws passed by Congress. They would impede the manufacture and acquisition of firearms by imposing new, onerous restrictions and costs.

Under its commerce power, "Congress may regulate the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate

commerce," and "those activities having a substantial relation to interstate commerce . . . ." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *Lopez* invalidated a ban under the Gun Control Act on possession of a firearm at a school because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id*. at 561. Under the government's arguments in that case, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id*. at 567. The proposed regulations purport to do the same.

Congress exercised its powers under the Commerce Clause in enacting the Protection of Lawful Commerce in Arms Act ("PLCAA"), 119 Stat. 2095, 2096 (2005), in which it found:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

Id. § 2(a)(5).

Although PLCAA is not part of the GCA, it reinforces Congressional intent to promote the lawful manufacture and sale of firearms so that Americans may exercise their constitutional rights. PLCAA's following purpose is relevant to the issues here: "To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." *Id*. § 2(b)(2). It goes without saying that the proposed regulations will also adversely impact the ability of the firearms industry to supply firearms to law enforcement agencies and the Armed Forces.

ATF's arguments for the proposed rule are policy-based contentions about possible solutions to crime. But Congress sets policy, and Congress decided to regulate interstate and foreign commerce in firearms, including frames and receivers – not all frame and receiver *parts* – and to require a serial number on each frame or receiver – not a serial number on *each part* of a frame or receiver. The Gun Control Act is the product of compromises, and it is not ATF's prerogative to impose "solutions" that are not authorized by law.

II. ATF Has No Authority to Create New Crimes by Redefining *Parts* of Frames or Receivers *as* Frames or Receivers and Thus as "Firearms"

Congress defined "firearm" to include "the frame or receiver of any such weapon," § 921(a)(3), not *a part* of a frame or receiver that must be combined with other parts to make an actual frame or receiver. Section 922, entitled "Unlawful Acts," includes numerous crimes involving "firearms" applicable to persons who are licensed under § 923 and persons who are

unlicensed. Section 922 includes subsections (a) through (z), which in turn include numerous subparagraphs that create various crimes related to firearms.

Almost all of these crimes are punishable as felonies involving imprisonment for five years, ten years, or longer. § 924. Besides providing penalties, § 924 creates numerous additional crimes. Moreover, any violations of the GCA may result in revocation of licenses under § 923(e).

Most of the crimes provided in § 922 are victimless, malum prohibitum offenses and involve acts like transfer or receipt of firearms between persons who are not residents of the same state.[3] The commentary shows no awareness that under the GCA, it would be a crime for non-residents to transfer an actual frame or receiver to each other, but not a crime to transfer a mere receiver part. Indeed, it is commonplace for persons to mail order receiver parts, other than the part that ATF designates as the receiver, purchase of which requires going through a licensed dealer.

Yet ATF has no authority essentially to transform items that are not *actual* frames or receivers *into* frames or receivers, and hence into "firearms," thus creating countless new crimes not enacted by Congress. At stake here is not simply an isolated, technical redefinition of "frame or receiver" into "a part of a frame or receiver," but is a massive extension of GCA crimes to conduct that has always been and understood to be lawful. *Brown & Williamson Tobacco*, 529 U.S. at 132, explains about the need to look at the statute as a whole:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ." (Citations omitted).

What Congress had in mind when it defined "firearm" to include a "frame or receiver" thereof is not for ATF to mold like clay into something less than an actual frame or receiver. As the Supreme Court has reiterated, "we have never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014) (also noting that executive branch "views may reflect overly cautious legal advice . . . . Or they may reflect legal error."). *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (Attorney General not entitled to deference in interpretation of criminal law); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

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[3]Crimes with victims are set forth in § 924(c) et seq., but they involve actual use of a complete firearm, not just a frame or receiver, such as in a federal crime of violence.

Abramski v. United States, 573 U.S. 169, 191 (2014), rejected ATF's interpretation of a GCA provision with this explanation:

> The critical point is that criminal laws are for courts, not for the Government, to construe. . . . We think ATF's old position no more relevant than its current one – which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly. . . , a court has an obligation to correct its error.

An analogy exists between the proposal here to redefine a frame or receiver as a mere part thereof and the issue addressed in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 507 (1992), which involved whether, under the National Firearms Act (NFA), certain pistol and rifle parts constitute a rifle with a barrel under sixteen inches, when not assembled as such. Just like "firearm" is a term of art by including its "frame or receiver" here, "[t]he word 'firearm' is used as a term of art in the NFA."[4] *Id*.

The rule of lenity requires that any ambiguity in a criminal statute must be interpreted against the government and in favor of a person to whom the law may apply. *Thompson/Center* held the items in that case not to be a "firearm" because "we are left with an ambiguous statute. . . . It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor." *Id*. at 517-18. By the same token, while no ambiguity should exist that a "frame or receiver" can actually mean just "an incomplete part of a frame or receiver," any ambiguity must be resolved to conclude that it is *not* a frame or receiver.

In sum, the proposed regulations would amount to the creation of an entire array of new crimes created by agency fiat. Only Congress can create new crimes.

III. Under the GCA, A Firearm Has a Single Frame or Receiver with a Single Serial Number

A. The Gun Control Act Refers to "*The* Frame or Receiver," Which Has "*A* Serial Number"

Under the Gun Control Act of 1968 (GCA), a firearm has only one, complete frame or receiver: "The term 'firearm' means (A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) *the frame or receiver* of any such weapon . . . ." 18 U.S.C. § 921(a)(3). The GCA repealed the definition in the Federal Firearms Act of 1938 of a firearm as also including "any part or parts of such weapon."

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[4]Here, "firearm" includes a weapon that, inter alia, "may readily be converted to expel a projectile," but "frame or receiver" includes no such "readily convertible" language. 18 U.S.C. § 921(a)(3). In the NFA, "rifle" includes "any such weapon which may be readily *restored* to fire," but not which may be "readily *converted*" to fire. 26 U.S.C. § 5845(c).

52 Stat. 1250 (1938), quoted in 86 F.R. at 27720.

The proposed rule would redefine a firearm to include not just *the* frame or receiver as per § 921(a)(3)(B), but also *any part or parts* of such frame or receiver. Yet ATF lacks authority to redefine "firearm" to include not only "*the* frame or receiver of any such weapon," but also "*any part or parts of* the frame or receiver of any such weapon." See *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010) ("The word 'place' is in the singular, not the plural.") "We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014).[5]

Under the GCA, the frame or receiver must be identified by one, not multiple, serial numbers: "Licensed importers and licensed manufacturers shall identify, by means of *a serial number* engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer." § 923(i). The term "a serial number" is in the singular, not the plural. "The Attorney General may prescribe "*only* such rules and regulations as are necessary to carry out the provisions of this chapter . . . ." § 926(a).

"When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021). "Congress's decision to use the indefinite article 'a' thus supplies some evidence that it used the term . . . as a discrete, countable thing." *Id*. at 1481. See *id*. at 1485 (holding that "*a* notice to appear" means "a single" notice).

Elsewhere the GCA makes clear that a firearm has one serial number. It is unlawful to possess or otherwise deal with "any firearm which has had *the* importer's or manufacturer's serial number removed, obliterated, or altered . . . ." § 922(k).

"A serial number" is just that – it is a *number* assigned by the importer or importer. ATF regulations may prescribe "the manner" of its engraving or casting (such as height and depth requirements, see 27 C.F.R. § 478.92(a)), but authority to prescribe such "manner" does not constitute authority to redefine and expand "a number" to include information other than a number or to require multiple serial numbers.

A firearm has a single part called "*the* frame or receiver." "*A* serial number" – not multiple serial numbers – must be engraved or cast on the frame or receiver, "in such manner" as ATF regulations require.

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[5]"Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Texas v. FCC*, 569 U.S. 290, 296 (2013); *id*. at 307 ("Where Congress has established a clear line, the agency cannot go beyond it").

B. ATF Regulations Have Always Recognized the Frame or Receiver as a Unitary Part with a Single Serial Number that Must not be Duplicated

1. ATF's 1968 Definition Correctly Treated a "Frame or Receiver" as the Complete Housing for Certain Components, Not a Subpart

From the time of passage of the GCA in 1968 through today, ATF regulations have provided: "*Firearm frame or receiver.* That part of a firearm which provides housing for the hammer, bolt or breechblock,[6] and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 478.11. Being "that part" that "provides housing" for all of the listed components, which expresses the meaning in ordinary English,[7] is not the same as "one of the subparts" that "provides housing" for only one of the listed components.

ATF's definition adopted in 1968, which defines "frame or receiver" as a complete part, is consistent with the ordinary meaning of the terms. See commentary, 86 F.R. at 27721 n.4, referencing Webster's Third New International Dictionary, pp. 902, 1894 (1971) (a "frame" is "the basic unit of a handgun which serves as a mounting for the barrel and operating parts of the arm"; "receiver" means "the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached").

A district court explained colloquially: "A receiver is similar to the chassis of a car. It houses the operational parts that make a gun fire, much like a chassis houses the engine, transmission and other mechanisms necessary to make an automobile operate." *United States v. 1,100 Machine Gun Receivers*, 73 F. Supp. 2d 1289, 1291 (D. Utah 1999), aff'd, 9 Fed. Appx. 815 (10th Cir. 2001). A piece of a car chassis is no more an actual chassis than a piece of a receiver is an actual receiver.

The regulations have also required importers and manufacturers to place "on the frame or receiver [of each firearm] in a manner not susceptible of being readily obliterated, altered, or removed, an individual serial number not duplicating any serial number placed by the manufacturer or importer on any other firearm . . . ." § 478.92. This recognizes that the statute provides for "*the* frame or receiver" which has "*an* individual serial number," both in the singular. It seems shocking that ATF would propose a rule that would open the floodgates to duplication of serial numbers on a massive scale. That will happen because, even if a single firearm starts out with the same serial number marked on two or more receiver parts, many of

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[6]"*Breechblock*. The locking and cartridge head supporting mechanism of a firearm that does not operate in line with the axis of the bore." *Glossary of the Association of Firearm and Toolmark Examiners* 21 (1985).

[7]See *Muscarello v. United States*, 524 U.S. 125, 128-37 (1998) (to determine what it means to "carry" a firearm, the Court consulted dictionaries, books, and newspapers, and reviewed the statute's purpose, legislative history, and related statutes).

these parts will be invariably interchanged with parts on different firearms.

An agency's interpretation of a law just after its enactment, such as ATF's 1968 definition of "frame or receiver," carries far more weight than an abrupt shift made years later. *See Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983) ("that early position . . . is surely more indicative of congressional intent in 1953 than a 1971 opinion to the contrary"); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 341 (1999) (bureau took a position in 1980 and a contrary position in 1994; "in light of this history, appellants make no claim to deference"); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference. . . . [W]e find it wholly unpersuasive.").[8]

It is noteworthy that Congress conducted a thorough review of the Gun Control Act of 1968 in the course of passage of the Firearm Owners' Protection Act of 1986 (FOPA), 100 Stat. 449, in which it found it necessary "to correct existing firearms statutes and enforcement policies." § 1. Despite FOPA's comprehensive revision of the GCA, including revisions that overturned ATF interpretations thereof, Congress made no changes to its references to "frame or receiver" or expressed any dissatisfaction with ATF's definition of "frame or receiver."[9] "Once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979).[10]

2. Nothing Has Changed Since 1968 that Has Transformed the Meaning of "Frame or Receiver" Into a Subpart Thereof

The commentary notes that "at the time the current definitions were adopted there were numerous models of firearms that did not contain a part that fully met the regulatory definition of 'frame or receiver,' such as the Colt 1911, FN-FAL, and the AR-15/M-16 . . . ." 86 F.R. at 27721. The Colt 1911 pistol has been in production since, of course, 1911, and the FN-FAL since the early 1950s. ATF's predecessor agency, the Bureau of Alcohol and Tobacco Tax Division, was well aware of the AR-15/M-16 two-part, split receiver, and in a letter dated

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[8] *See National Distributing Co., Inc. v. U.S. Treasury Dept., BATF,* 626 F.2d 997, 1012 (D.C. Cir. 1980) (ruling against "an abrupt and unexplained shift from the position [BATF] followed from at least 1949 until 1974").

[9] Further amendments to the GCA were enacted in 1993, 1994, and 2005 without touching the definition of "firearm" or repudiating ATF's definition of "frame or receiver."

[10] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382 n.66 (1982) (citation omitted).

December 10, 1963, its Director approved the AR-15 Sports Version Rifle as not being a machinegun, i.e., as being a semiautomatic rifle. See copy of letter at end of these Comments.

The commentary cites to a 1971 decision that the "lower portion of the M-16 is the frame or receiver because it comes closest to meeting the definition of frame or receiver in 26 CFR 178.11 (now 27 CFR 478.11) . . . ." 86 F.R. at 27721 & n.9 (citing ATF Internal Revenue Service Memoranda #21208 (Mar. 1, 1971)). The Memoranda stated in more detail (see copy of document at end of these Comments):

> The M-16 receiver is fabricated in two parts, and the Enforcement Division has determined that the lower portion should be considered the receiver . . . . Both parts were necessary to function as a "frame or receiver" in a machine gun. I can see some difficulty in trying to make cases against persons possessing only the lower part of a receiver, but insofar as the licensing, serial numbering, and special occupational tax requirements are concerned, I feel that this is the only practical solution.

ATF thus recognized that it took both the upper and the lower portions to be a receiver in the GCA. It considered the lower portion to be the receiver for serial numbering and certain other purposes. Since then, the industry has been fully cooperative in serializing whatever portion ATF designates as the preferable part to serialize. But the "difficulty in trying to make cases against persons possessing only the lower part of a receiver" existed because the GCA defined firearm to include a frame or receiver, not *a part* of a frame or receiver. That was inherent in the statute as passed by Congress, and ATF recognized that it had no authority to change that.

The above history, along with ATF's consistent adherence to its regulatory definition of "frame or receiver" since 1968, makes clear that ATF has realized for over fifty years that a "frame or receiver" as that term is used in the GCA is an actual frame or receiver, not just one part of a frame or receiver that requires another part to constitute a frame or receiver. ATF has no authority at this late date fundamentally to expand that term to mean something that it just does not mean.

The proposed rule appears to have been occasioned by the fact that three district courts ruled in criminal cases that the lower portion of an AR-15 receiver alone does not constitute a frame or receiver. But in one of those cases, the defendant was convicted of engaging in the business of manufacturing firearms without a license.[11] In the other two cases, felons were

[11] *United States v. Joseph Roh*, SACR 14-167-JV, Minute Order p. 8 (C.D. Cal. July 27, 2020).

acquitted of firearm receipt because they only acquired lower portions of receivers.[12] It is noteworthy that the government did not appeal these decisions and, as a West Law search indicates, no other court has cited these decisions in an opinion. For future prosecutions, even if a court may not recognize the receipt of just an incomplete part of a frame or receiver to be an offense, the same persons may be prosecuted for related offenses.[13]

The result in these three district court cases is no reason to overturn over fifty years of ATF regulatory rules and practices. A prosecution may be unsuccessful because unlawfully seized evidence was excluded or for any number of other reasons,[14] but that does not mean the sky will fall. The fact is that almost all prosecutions prove successful. In fiscal 2018, of 6,037 defendants prosecuted in federal court for firearm possession by prohibited persons, a total of 5,667 were convicted.[15]

The commentary essentially makes policy arguments to justify its remake of the statutory term "frame or receiver" into a mere subpart of a frame or receiver. Yet like other agencies, ATF is "a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. . . . Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. E.P.A.,* 268 F.3d 1075, 1081-82 (D.C. Cir. 2001). Further, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 161 (2000).[16]

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[12]*United States v. Rowold*, 429 F. Supp. 3d 469, 475-77 (N.D. Ohio 2019); *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016).

[13]E.g., conspiracy to violate the GCA, 18 U.S.C. § 371; aiding and abetting violation of the GCA, 18 U.S.C. § 2; and accessory after the fact of such violation, 18 U.S.C. § 3.

[14]See *Hill v. Philpott*, 445 F.2d 144, 149-50 (7th Cir. 1971) ("Of course, the Fifth Amendment makes the business of criminal prosecutions more difficult, but this is its clear intent.").

[15]U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense, Table D-4, at 3 (2018). https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf.

[16]*See Synovus Financial Corp. v. Board of Governors*, 952 F.2d 426, 437 (D.C. Cir. 1991) (even if the purpose of a law "would be thwarted" unless the agency could regulate certain activity, "the language of the amendment limits the Board's authority and we cannot remove that congressionally imposed limitation"); *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991) (invalidating ATF regulations which contradicted "the plain language of the statute" and rejecting ATF's policy arguments as a matter for Congress).

The commentary also states that changes in firearms design may render parts of the current definition of "frame or receiver" dated, e.g., "more firearm manufacturers began incorporating a striker-fired mechanism rather than a 'hammer' in the firing design." 86 F.R. at 27721. But the existing definition could be easily amended to accommodate such changes, as by beginning the definition "[t]hat part of a firearm which provides housing for the hammer *or striker* . . . ."

In sum, under the GCA, ATF regulations have always recognized the frame or receiver to be the housing for the functioning parts of a firearm, and have recognized that the frame or receiver must have a single serial number. ATF has no authority to turn this longstanding, statutorily-based rule upside down.

IV. The Proposed Rule That a Firearm May Have Multiple Frames or Receivers Departs from the Statutory, Ordinary Meaning of "*The* Frame or Receiver"

A. General Definition

Unlike the existing definition which entails one frame or receiver and one serial number, the proposed definition would potentially encompass multiple frames or receivers and multiple serial numbers on the same firearm. 27 C.F.R. § 478.11 would state in part:

> *Frame or receiver.* A part of a firearm that, when the complete weapon is assembled, is visible from the exterior and provides housing or a structure designed to hold or integrate one or more fire control components, even if pins or other attachments are required to connect those components to the housing or structure. Any such part identified with a serial number shall be presumed, absent an official determination by the Director or other reliable evidence to the contrary, to be a frame or receiver. For purposes of this definition, the term "fire control component" means a component necessary for the firearm to initiate, complete, or continue the firing sequence, including any of the following: Hammer, bolt, bolt carrier, breechblock, cylinder, trigger mechanism, firing pin, striker, or slide rails.

Under this definition, a firearm may have several frames or receivers, because several parts of a firearm may provide housing or structure to hold one or more fire control components, which in turn include hammers, bolts, firing pins, strikers, slide rails, and other components. Any part with a serial number is presumed to be the frame or receiver, unless the ATF Director has decided otherwise – meaning that ATF's determination is final without regard to objective characteristics. But "an official determination by the Director" is not a definition at all.

While § 923(i) of the GCA states that importers and manufacturers shall identify the frame or receiver with a serial number, the proposed rule authorizes that to be overridden by "an official determination by the Director." That places importers and manufacturers at jeopardy of license revocation if ATF disagrees with what they serialized as being the frame or receiver.

They further will either risk sanctions, including license revocation, if they market a part they believe to be unregulated and ATF later disagrees, or will have to wait months pending a determination by ATF. Either alternative stymies new product design and harms the industry.

The commentary states: "In light of recent court cases, the majority of regulated firearms may not meet the existing definition of firearm frame or receiver." 86 F.R. 27738. That is not accurate. A complete frame or receiver obviously meets the definition of a frame or receiver; two or more parts of a frame or receiver, standing alone, may not. Moreover, almost all firearms that are manufactured are sold as complete weapons, not as frames or receivers or portions thereof.

B. Single Frame or Receiver

The definition goes on to give examples, with illustrations, of the above general definition. Examples 1 through 4 are firearms with a single frame or receiver: Hinged or single framed revolver; Bolt action rifle; Break action, lever action, or pump action rifle or shotgun; and Semiautomatic firearm or machinegun with a single receiver housing all fire control components (e.g., AK-type firearms).

C. Split or Modular Frame or Receiver

The definition would classify firearms with two or more parts that hold fire control components as having multiple frames or receivers, unless ATF classifies or has previously classified a single part of such firearms as the frame or receiver:

> *Split or modular frame or receiver*. (1) In the case of a firearm with more than one part that provides housing or a structure designed to hold or integrate one or more fire control or essential internal components (e.g., a split frame with upper assembly and lower assembly as in many semiautomatic rifles, upper slide assembly and lower grip module as in many semiautomatic handguns, or multiple silencer modular pieces), the Director may determine whether a specific part or parts of a weapon is the frame or receiver, which may include an internal frame or chassis at least partially exposed to the exterior to allow identification. In making this determination, the Director will consider the following factors, with no single factor being controlling:
>
> (i) Which component the manufacturer intended to be the frame or receiver;
>
> (ii) Which component the firearms industry commonly considers to be the frame or receiver with respect to the same or similar firearms;
>
> (iii) How the component fits within the overall design of the firearm when assembled;
>
> (iv) The design and function of the fire control components to be housed or integrated;

(v) Whether the component may permanently, conspicuously, and legibly be identified with a serial number and other markings in a manner not susceptible of being readily obliterated, altered, or removed;

(vi) Whether classifying the particular component is consistent with the legislative intent of the Act and this part; and

(vii) Whether classifying the component as the frame or receiver is consistent with ATF's prior classifications.[17]

Thus, a firearm with a split or modular frame or receiver is defined to have two or more frames or receivers unless ATF decides, or previously decided, that a single part is the frame or receiver. Again, this bases the classification on ATF's discretion rather than objective characteristics. In deciding whether an internal frame or chassis is the frame or receiver, ATF will consider whether it is sufficiently exposed to show the required markings (which will include not just the serial number, but also the licensee's name and city or state, or license number). Finally, frames or receivers of different firearms combined into one firearm will remain separate frames or receivers.

By treating each part of a frame or receiver as a separate frame or receiver, each one becomes a firearm subject to all of the ATF regulations. The adverse impact on the firearms industry cannot be overstated. Licensed importers and manufacturers will have to serialize each firearm not just in one place but in several places and will have to keep records on parts that were never considered frames or receivers before. Hundreds of thousands of importers, manufacturers, and sellers of previously-unregulated parts will become subject to federal licensing requirements. Millions of consumers will no longer be able freely to buy non-regulated parts to customize or reconfigure their firearms, and instead will have to undergo NICS background checks (§ 922(t)) and complete paperwork (Form 4473) for parts that were never previously considered frames or receivers at all.

The requirement that multiple frame or receiver parts be serialized will result in (a) the duplication of serial numbers and (b) the marking of multiple serial numbers on the same firearm. That is because receiver parts are interchangeable and will be interchanged at the manufacture, distribution, and consumer levels. Frame or receiver parts with the same serial number on a firearm will be switched with identical parts on another firearm, resulting in two firearms with two of the same, duplicate serial numbers.

This is a recipe for disaster for inventory control, recordkeeping, and tracing. If a single firearm may have more than one serial number, how is a licensee to conduct an inventory? Whether looking at each firearm or scanning bar codes on packaging, having multiple serial

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[17] 27 C.F.R. § 478.11(b)(1) ("frame or receiver") (proposed). It adds: "(2) Frames or receivers of different weapons that are combined to create a similar weapon each retain their respective classifications as frames or receivers provided they retain their original design and configuration." § 478.11(b)(2).

numbers means more time consumed and greater chance of errors. Acquisition and disposition records in which a single firearm has multiple serial numbers will play havoc with electronic systems designed to *reject* more than one serial number for each firearm. Instead of just trying to trace a firearm with one serial number, licensees, ATF, and law enforcement will have to try and trace multiple serial numbers, which may end up on different firearms.

D. Previous ATF Classifications

The regulation lists previous ATF determinations of specific models as being the frame or receiver. While this adds certainty to manufacturers as to existing models, it leaves open the classification of future models under the general definition as having more than one frame or receiver and allows ATF to have too much discretion in making future classifications.

However, the commentary states that "if there is a present or future split or modular design for a firearm that is not comparable to an existing classification, then the definition of 'frame or receiver' would advise that more than one part is the frame or receiver subject to marking and other requirements, unless a specific classification or marking variance is obtained from ATF, as described above." 86 F.R. at 27729. What is "comparable" may be in the eye of the beholder, with negative consequences for a misjudgment. For the future, many firearms will have multiple frames or receivers under the general definition, unless ATF in its discretion decides that a single part is the frame or receiver.

E. Forgings, Castings, and Partially Complete Frames or Receivers

The GCA provides: "The term 'firearm' means (A) any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) *the frame or receiver* of any such weapon . . . ." 18 U.S.C. § 921(a)(3). The language "is designed to or may readily be converted to" refers to a weapon that expels a projectile, but does not modify a frame or receiver, which must be defined in its ordinary meaning as actual housing, not raw material.

The ATF regulation, adopted in 1968, defines frame or receiver as "that part of a firearm which *provides housing* for the hammer, bolt or breechblock, and firing mechanism," not a forging or casting that does not "provide" such housing in the present tense. However, the new regulation will define frame or receiver to include raw material that is not finished into a frame or receiver:

> *Partially complete, disassembled, or inoperable frame or receiver.* The term "frame or receiver" shall include, in the case of a frame or receiver that is partially complete, disassembled, or inoperable, a frame or receiver that has reached a stage in manufacture where it may readily be completed, assembled, converted, or restored to a functional state. In determining whether a partially complete, disassembled, or inoperable frame or receiver may readily be

> assembled, completed, converted, or restored to a functional state, the Director may consider any available instructions, guides, templates, jigs, equipment, tools, or marketing materials. For purposes of this definition, the term "partially complete," as it modifies "frame or receiver," means a forging, casting, printing, extrusion, machined body or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.[18]

The above types of raw material simply do not constitute a frame or receiver. Manufacturers obtain such raw material in order to manufacture firearms, and individual citizens who wish to make their own firearms do the same. Plumbing pipe, nails, and other common items found in any hardware store may be used to make a firearm more "readily" than such unfinished material. ATF simply lacks authority to proclaim raw material as a frame or receiver and thus a "firearm."

F. Discretionary ATF Classifications

As currently, ATF may classify firearms, although it is and would continue to be discretionary, meaning that ATF would not be legally required to respond to a request. Proposed § 478.92(c) provides:

> The Director may issue a determination to a person whether an item is a firearm or armor piercing ammunition as defined in this part upon receipt of a written request or form prescribed by the Director. Each such voluntary request or form submitted shall be executed under the penalties of perjury with a complete and accurate description of the item, the name and address of the manufacturer or importer thereof, and a sample of such item for examination along with any instructions, guides, templates, jigs, equipment, tools, or marketing materials that are made available to the purchaser or recipient of the item. The Director shall not issue a determination regarding a firearm accessory or attachment unless it is installed on the firearm(s) in the configuration for which it is designed and intended to be used.

Currently, as is generally known in the industry, ATF may take up to a year to render a classification. If adopted, this rule should require that a determination should be rendered, and should be done so within three months or some other expedient time limit. To retain flexibility, the provision should be deleted that no determination about an accessory or attachment will be rendered unless it is installed on a firearm. Finally, it should be clarified that an ATF determination is an opinion and does not have the force of law.

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[18] 27 C.F.R. § 478.11(c) ("frame or receiver") (proposed).

V. "Serial Number" May Not be Redefined and Expanded to Include Information Unrelated to the Serial Number

The GCA requires importers and manufacturers to identify each firearm "by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe . . . ." § 923(i). The serial number has always been considered the number (or number and letters) assigned by the licensee; ATF has prescribed the manner in which it is engraved or cast by requiring that it be conspicuous, not readily removable, and having a certain depth and height.

The proposed regulation would expand the meaning of a serial number as follows: "*Importer's or manufacturer's serial number*. The identification number, licensee name, licensee city or state, or license number placed by a licensee on a firearm frame or receiver in accordance with this part. The term shall include any such identification on a privately made firearm, or an ATF issued serial number." This is wholly unnecessary. Ever since the 1968 regulations were adopted, all markings other than the serial number could be on the barrel or pistol slide. Under the proposed regulation, only the model, caliber or gauge, and (where applicable) the name and country of a foreign manufacturer may be marked on the barrel or slide. § 478.92(a)(1)(ii).

Including all of this new information on a frame or receiver, or worse yet on multiple parts of a frame or receiver, may be impossible. There will be insufficient space on the typical metal insert on polymer grip housings and on the surfaces of various parts of the newly-defined firearms with multi-frames or receivers. Expensive retooling will be required for all firearms, and some designs will be precluded from production if it is impossible to engrave all of the information on each part.

More detail is provided in the proposed revision to § 478.92(a)(1)(i), which concerns the identification of firearms:

> Except as provided in paragraph (a)(4)(v) of this section [see below], each frame or receiver thereof must also be marked with either: Their name (or recognized abbreviation), and city and State (or recognized abbreviation) where they maintain their place of business; or their name (or recognized abbreviation) and abbreviated Federal firearms license number as a prefix, which is the first three and last five digits, followed by a hyphen, and then followed by a number as a suffix, e.g., "12345678-[number]" . . . .

No valid reason is given to require that all of this information be marked on the frame(s) or receiver(s) of a firearm. This will greatly disrupt manufacturing practices that have been in place since 1968 and will make compliance difficult for all manufacturers and importers. Some models may have to be taken off the market for lack of space to mark the expanded serial numbers.

Note that the above additional information must be on "each frame or receiver." However, there is a grandfather clause (referred to above as paragraph (a)(4)(v)) which states: "Licensed manufacturers and licensed importers may continue to identify firearms (other than PMFs) of the same design and configuration as they existed before [EFFECTIVE DATE OF THE FINAL RULE] with the information required to be marked by paragraphs (a)(1)(i) and (ii) of this section that were in effect prior to that date, and any rules necessary to ensure such identification shall remain effective for that purpose." This raises uncertainties about what will be considered "the same design and configuration" and will impose new burdens regarding future designs and configurations.

VI. ATF Has No Authority to Require Licensees, Other than Importers and Manufacturers, to Place Serial Numbers on Firearms

Proposed § 478.92(a)(2) would provide that licensees identify privately made firearms (PMFs) with serial numbers. Nothing in the GCA authorizes ATF to require this. Marking is required only for two other license categories: "Licensed importers and licensed manufacturers shall identify, by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer." 18 U.S.C. § 923(i). Other than importers and manufacturers, no other licensees are required to place serial numbers on firearms.

ATF's regulatory authority is limited: "The Attorney General may prescribe *only* such rules and regulations as are necessary to carry out the provisions of this chapter . . . ." § 926(a). None of "the provisions of this chapter" (chapter 44 of Title 18) require licensees who are not importers or manufacturers to place serial numbers on firearms. The commentary makes policy arguments in support of the perceived need for PMFs to be serialized, 86 F.R. at 27722-25, but cites no statutory authority for imposing the requirement, for there is none.

VII. An Unlicensed Person May Make and Sell Privately Made Firearms as Long as it Does Not Amount to Engaging in the Business of Manufacture

The commentary twice states that a person may make firearms "for personal use (not for sale or distribution)." 86 F.R. 27725, 27732. That requires clarification. Americans have had a right to make their own firearms since the country began, and it is perfectly lawful to do so today.

Nothing in the GCA prohibits a person from making and selling firearms without a license, unless *engaged in the business* of doing so. "It shall be unlawful – (1) for any person – (A) except a . . . licensed manufacturer . . . to engage in the business of . . . manufacturing . . . firearms . . . ." § 922(a)(1)(A). "The term 'manufacturer' means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term 'licensed manufacturer' means any such person licensed under the provisions of this chapter." § 921(a)(10).

"The term 'engaged in the business' means – (A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured . . . ." § 921(a)(21). "The term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: Provided, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." § 921(a)(22).

Accordingly, a person who makes firearms and occasionally sells them is not required to be a licensed manufacturer unless the above statutory requirements are met. That should be made clear in any commentary to the final regulations.

VIII. The Rule Will Impose Immense Costs

In the purported "Total Cost of the Proposed Rule," 86 F.R. 27737-38, no estimated costs are given regarding consumers who will no longer be able to buy, either online or in stores, unregulated parts that are not currently considered frames or receivers. Currently, such parts are acquired to customize, repair, upgrade, and change calibers on firearms. Since each such part will be redefined as a firearm, they will have to be purchased from licensed dealers with required recordkeeping, filling out Forms 4473, and NICS background checks. Sellers of currently unrestricted parts will go out of business and consumers will pay higher prices. These financial impositions will be similar to the unconstitutional poll taxes of a bygone era.

The proposed regulations would force the people who choose to exercise Second Amendment rights into the Hobson's choice of either complying with all provisions of the Gun Control Act but not ATF's unlawful rules (about which they may be completely unaware), thus risking prosecution and incarceration, or complying with the unlawful rules as well and thereby paying the costs of loss of liberty and financial impositions.

"ATF estimates that this proposed rule could potentially affect 132,023 entities, including all FFLs and non-FFL manufacturers and retailers of firearm parts kits with incomplete firearm frames or receivers . . . ." 86 F.R. at 27728. But that does not include manufacturers and retailers of just parts of frame or receivers (not firearm parts kits) that are currently unregulated. It adds: "The second largest impact would be $12,828 if a manufacturer had to retool their existing production equipment, but ATF anticipates this is unlikely because this proposed rule encompasses the majority of existing technology." *Id*.

"Existing technology"? What about the future? And as to retooling existing production equipment, the figure of $12,828 must be grossly underestimated. Serial numbering is conducted with advanced, electronically-controlled CNC machinery that will have to be redesigned to mark more information on more surfaces. Just consider what it could cost to enlarge metal plates and

to inscribe all the new "serial number" information and to place it in polymer grip housings, which would require alteration to embed the metal plates.

The proposed rules would institute such a radical break from past regulations and practices that it is impossible to estimate costs, both short- and long-term. What will be the costs of new electronic recordkeeping systems that will entail multiple serial numbers for a single firearm? How about the costs of trying to conduct inventories – both by industry personnel and by ATF inspectors – in such a disarrayed environment? The costs of needless traces and of unsuccessful trace by industry, ATF, and law enforcement?

ATF has simply not thought through the full scope and implications of the proposed regulations, which should be wholly rejected.