The Power to Tax, The Second Amendment, and the Search for Which "'Gangster' Weapons" to Tax

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The Power to Tax, The Second Amendment, and the Search for Which "'Gangster' Weapons" To Tax

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ABSTRACT

Congress does not have the power to ban firearms. The National Firearms Act (NFA) is based on the power of Congress to lay and collect taxes. In 1937, the Supreme Court upheld the NFA as purely a revenue measure. When it banned possession of machineguns in 1986, Congress undercut that constitutional basis. The Supreme Court has held that any ambiguities in the NFA must be read narrowly according to the rule of lenity. The 1934 House hearings barely mentioned the Second Amendment. A federal district judge upheld the NFA under the theory that the Second Amendment does not protect individual rights. In 1939, the Supreme Court declined to take judicial notice that a short-barreled shotgun is "ordinary military ordnance" protected under the Second Amendment. Recently, the Court has adopted the test that the Second Amendment protects arms that are in common use. The initial NFA bill, and the bill as enacted, arbitrarily included some firearms and excluded others. After enactment, the Attorney General went on a failed crusade to require all firearms to be registered. Short-barreled rifles and silencers should be removed from the NFA. Neither was identified in the 1934 hearings as desirable to criminals. Today, registered short-barreled rifles and silencers are in common use and are rarely used in crime. Removing them from the NFA would leave them still regulated under the Gun Control Act.

I. INTRODUCTION

Unlike laws that punish criminals for the misuse of firearms, the NFA penalizes any person who possesses or transacts in selected firearms that are unregistered or untaxed according to its requirements.[1] Originally enacted in 1934,[2] the NFA was reenacted as Title II of the Gun Control Act (GCA) of 1968.[3] The NFA is Chapter 53 of the Internal Revenue Code.[4] This Article reassesses the constitutional issues raised in the NFA by examining how Congress decided the types of firearms to include or

1 26 U.S.C. § 5861 (unlawful acts); *id.* § 5871 (penalties).

2 National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801–72).

3 National Firearms Act Amendments of 1968, Pub. L. No. 90-618, sec. 201, 82 Stat. 1227 (codified as amended in scattered sections of 26 U.S.C.).

4 26 U.S.C. §§ 5801–72.

exclude from its scope. It also argues for the removal of two types of firearms—short-barreled rifles and silencers—from the Act.[5]

Part II concerns the foundations of the NFA, specifically its basis in Congress's taxing power.[6] Part III covers the intersection between the NFA and the Second Amendment.[7] Part IV explores Congress's process of selecting specific firearms for inclusion in the NFA, a process that recalls the aphorism that laws are like sausages—it's best not to see them being made.[8] Part V explains why two types of NFA "firearms"—short-barreled rifles and silencers—should be removed from the Act.[9]

A. The Power to Tax

Key insights on the constitutional basis and purpose of the NFA may be found in the several days of hearings in 1934 in the House Ways and Means Committee.[10] Its severe restrictions, which were modeled on the Harrison Anti-Narcotic Act, were justified under the power of Congress to tax.[11] But it was conceded that Congress could not ban these firearms outright.[12]

In *United States v. Sonzinsky*, the Supreme Court upheld the Act as a valid taxing measure.[13] *Sonzinsky* was reaffirmed as a valid precedent as late as *National Federation of Independent Business v. Sebelius*.[14] But when Congress enacted 18 U.S.C. § 922(o) in 1986, it was read as banning the possession of newly registered machineguns.[15]

While that construction was upheld in a civil challenge, two courts held in criminal cases that the ban pulled the rug out from under the

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5 This Author has previously addressed NFA issues at length as follows: Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-equal Branch on the Individual Right to Keep and Bear Arms*, 62 TENN. L. REV. 597 (1995) [hereinafter Halbrook, *Congress Interprets*]; Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33 (2016); STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE chs. 6–8 (2024–2025 ed. 2024), Westlaw FALDB.

6 *See infra* Part II.

7 *See infra* Part III.

8 *See infra* Part IV.

9 *See infra* Part V.

10 *See National Firearms Act: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. (1934) [hereinafter *NFA Hearings*].

11 *Id.* at 6, 13.

12 *Id.* at 6, 8, 19 (statement of Homer S. Cummings, Att'y Gen. of the United States).

13 Sonzinsky v. United States, 300 U.S. 506 (1937).

14 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012).

15 Farmer v. Higgins, 907 F.2d 1041, 1045 (11th Cir. 1990).

constitutional basis of the NFA's tax and registration requirements.[16] When the government pivoted to prosecuting machinegun cases under § 922(o), defendants argued that its ban on mere possession had no basis in the Commerce Clause.[17] Several judges agreed, but not a majority in any circuit.[18]

But pigeon-holing NFA firearms as "gangster weapons" does not remove the NFA definitions, if ambiguous, from a narrow interpretation according to the rule of lenity, i.e., against the government and in favor of the citizen. The Supreme Court so held in *United States v. Thompson/Center Arms*, which rejected the classification of a combination pistol/rifle design as a short-barreled rifle.[19]

B. The Second Amendment Problem

In the 1934 House hearings, NFA proponents conceded that the Second Amendment prohibits Congress from outright banning firearms, but suggested that taxing and requiring registration of firearms was permissible.[20] In perhaps the first prosecution after the NFA was enacted, the defense argued the law violated the Second Amendment.[21] Based on precedents that said no such thing, a district judge held that the Second Amendment protected nothing more than a "collective" right.[22]

However, the Supreme Court in *United States v. Miller* asked whether the NFA violated the Second Amendment based on whether the affected type of firearm was ordinary military ordnance, implying that, if so, the NFA may violate the Second Amendment.[23] Over a half century later, *District of Columbia v. Heller* extracted the "common use" test from *Miller* and held that the Second Amendment protects firearms in common use.[24] The Court clarified the test further in *New York State Rifle and Pistol Ass'n v.*

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16 United States v. Rock Island Armory, Inc., 773 F. Supp. 117 (C.D. Ill. 1991), *overruled by* United States v. Ross, 9 F.3d 1182 (7th Cir. 1993), *vacated and remanded*, 511 U.S. 1124 (1994); United States v. Dalton, 960 F.2d 121 (10th Cir. 1992).

17 *E.g.*, United States v. Rybar, 103 F.3d 273, 286–87 (3d Cir. 1996) (Alito, J., dissenting).

18 *See*, *e.g.*, United States v. Kirk, 105 F.3d 997 (5th Cir. 1997) (en banc) (per curiam), *aff'd on reh'g*, (demonstrating an even eight to eight split amongst the judges and thereby affirming the panel decision upholding the statue).

19 United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion).

20 *NFA Hearings*, *supra* note 10, at 19 (statement of Homer S. Cummings, Att'y Gen. of the United States).

21 United States v. Adams, 11 F. Supp. 216, 217, 218–19 (S.D. Fla. 1935).

22 *See id.* at 219.

23 United States v. Miller, 307 U.S. 174, 178 (1939).

24 District of Columbia v. Heller*,* 554 U.S. 570, 627–28 (2008) (quoting *Miller*, 307 U.S. at 179).

Bruen, holding that if a weapon is a bearable firearm under the text, the government must show historical tradition justifies a restriction.[25] The Court has not had occasion to apply *Heller* or *Bruen* to any NFA firearm.

C. How Sausage is Made—Picking and Choosing "Gangster Weapons"

In the 1934 hearings, proponents of the NFA bill sought a prohibitive tax on firearms they thought were most commonly associated with "gangsters."[26] First on the list were pistols and revolvers, followed by short-barreled shotguns, "any other" concealable firearm, a silencer "therefor," or a machinegun.[27] Short-barreled rifles were not on the list, but were added to keep hunting rifles from being considered in the concealable category.[28] No one in the hearings claimed that criminals were using silencers.[29]

A spokesman for the National Rifle Association (NRA) successfully pushed for the removal of pistols and revolvers from the NFA bill.[30] Since they were the most easily concealable, it would have been logical to have also deleted "any other" concealable firearms and short-barreled rifles. That did not happen. Also, without explanation, silencers for concealable firearms were expanded to silencers for all firearms.[31] No one claimed that they were "gangster" weapons. After the NFA's passage, the Attorney General sought unsuccessfully to expand the NFA to include *all* firearms.[32]

Today, with the $200 tax no longer what it used to be, registered short-barreled rifles and silencers are widely used to the extent that they meet *Heller*'s "common-use" test for Second Amendment protection.[33] Yet courts have held them to be "dangerous and unusual weapons" that are unprotected because Congress, arbitrarily or by mistake, put them in the

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25 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

26 *NFA Hearings*, *supra* note 10, at 117 (statement of Joseph B. Keenan, Asst. Att'y Gen. of the United States).

27 *Id.* at 1.

28 *Id.* at 13 (statement of Rep. Harold Knutson, Member, H. Comm. on Ways & Means).

29 *See generally NFA Hearings*, *supra* note 10.

30 *See To Regulate Commerce in Firearms: Hearings on S. 885 S. 2258, S. 3680 Before a Subcomm. of the S. Comm. on Commerce*, 73rd Cong. 8, 58 (1934) (statement of Milton A. Reckord, executive vice president of the NRA) [hereinafter *Commerce in Firearms Hearings*].

31 *Id.*

32 *See*, *e.g.*, Homer Cummings, Address before the Annual Convention of the International Association of Chiefs of Police, Baltimore, Maryland: Firearms and the Crime Problem (Oct. 5, 1937), *in* SELECTED PAPERS OF HOMER CUMMINGS: ATTORNEY GENERAL OF THE UNITED STATES 1933–1939, at 88 (Carl Brent Swisher ed., 1939) (stating that "any practical measure for the control of firearms must at least contain provisions for the registration of *all* firearms.").

33 *See* District of Columbia v. Heller, 554 U.S. 570, 624 (2008).

NFA.[34] Congress should remove these two categories from the NFA, leaving them defined as "firearms" in Title I of the GCA subject to the usual background checks and prohibiting their possession by felons.[35]

II. THE NFA'S FOUNDATION IN CONGRESS'S TAXING POWER

A. The Understanding in the 1934 House Hearings that Congress Has the Power to Tax Firearms, But Not to Ban Them

A single committee hearing is the primary source for the reasons given for and against the NFA bill and its specific provisions. On April 16, 1934, Chairman Robert Doughton of North Carolina called the House Committee on Ways and Means to order for a hearing on H.R. 9066, a bill requiring registration and taxation of machineguns and certain other firearms.[36] Initially, the lead spokesman for the bill was Attorney General Homer Cummings, who served in that office from 1933 to 1939.[37] He explained that the primary constitutional basis of the bill was the taxing power, and that the bill followed the language of the Harrison Anti-Narcotic Act to benefit from the judicial opinions thereon.[38]

In *Nigro v. United States*, the Supreme Court upheld the requirement of the Harrison Anti-Narcotic Act that morphine be sold only pursuant to an order on an Internal Revenue form.[39] The Court interpreted the Harrison Act as "a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress[.]"[40] As the Court explained, "Congress, by merely calling an act a taxing act, cannot make it a legitimate exercise of taxing power under section 8 of article 1 of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise."[41]

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34 *See* 26 U.S.C. § 5845(a)(3), (7); United States v. Cox, 906 F.3d 1170, 1185–86 & n.13 (10th Cir. 2018).

35 *See infra* Part V; 18 U.S.C. § 922(g) (felons and other prohibited persons); *id.* § 922(t) (background check requirement).

36 *NFA Hearings*, *supra* note 10, at 1.

37 *Id.* at 1, 4; *Attorney General*, *Homer Stillé Cummings*, U.S. DEP'T OF JUST., https://www.justice.gov/ag/bio/cummings-homer-still [https://perma.cc/4GC6-7QAK] (providing an overview of the life and service of Attorney General Homer Stillé Cummings).

38 *See NFA Hearings*, *supra* note 10, at 6.

39 Nigro v. United States, 276 U.S. 332, 337–38, 353–54 (1928). *See also* Alston v. United States, 274 U.S. 289, 294 (1927) (upholding the Act's requirement that narcotics be sold only with a tax stamp).

40 *Nigro*, 276 U.S. at 341–42.

41 *Id.* at 353.

By the same token, nothing in the Constitution directly delegates power to Congress to regulate firearms, and Cummings readily conceded that "we have no inherent police powers to go into certain localities and deal with local crime."[42] But they could act through the power to tax.[43] Lawmakers decided on the $200 transfer tax because it matched the average cost of a machinegun, effectively imposing a 100% tax.[44] In 1934, $200 was equivalent to over $4,741 today.[45] The average annual family income in this period was $1,524.[46]

Early in the hearings, Cummings turned over promotion of the bill to Joseph Keenan, Assistant Attorney General of the Criminal Division, who had led prosecutions against Depression-era gangsters.[47] Keenan expanded on the constitutional justifications of the bill asserted by Cummings. He repeatedly averred that Congress had no power to ban ownership of machineguns.[48] Nor could it prohibit the manufacture or sale of pistols.[49] Representive Fred M. Vinson of Kentucky asked,"[is it] because of that lack of power that you appear in support of the bill to do something indirectly through the taxing power which you cannot do directly under the police power?" Keenan responded that the Supreme Court decisions on the Harrison Anti-Narcotic Act approved this.[50]

A substitute bill, H.B. 9741, would pass out of the Ways and Means Committee, which reported that it was limited to "the taxing of sawed-off guns and machine guns," it being unnecessary "to . . . include pistols and revolvers and sporting arms."[51] The constitutional basis of the NFA was explained as follows:

> In general this bill follows the plan of the Harrison Anti-Narcotic Act and adopts the constitutional principle

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42 *NFA Hearings*, *supra* note 10, at 8 (statement of Homer S. Cummings, Att'y Gen. of the United States).

43 *Id.* (statement of Homer S. Cummings, Att'y Gen. of the United States).

44 *See id.* at 12.

45 U.S. INFLATION CALCULATOR, http://www.usinflationcalculator.com/ [https://perma.cc/W2YB-W4RS].

46 BUREAU OF LAB. STATS., Rep. 991, 100 YEARS OF U.S. CONSUMER SPENDING: DATA FOR THE NATION, NEW YORK CITY, AND BOSTON 15 (2006), https://www.bls.gov/opub/100-years-of-u-s-consumer-spending.pdf [https://perma.cc/HJL5-FXYF].

47 *See Joseph B. Keenan*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal/history/assistant-attorneys-general/joseph-b-keenan [https://perma.cc/FE3G-JFTJ].

48 *NFA Hearings*, *supra* note 10, at 100.

49 *Id.* at 101–02 (statement of Joseph B. Keenan, Assistant Att'y Gen. of the United States).

50 *Id.*

51 H.R. REP. NO. 73-1780, at 1 (1934); *see also* S. REP. NO. 73-1444, at 1 (1934) (repeating the same language).

> supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected. It also employs the interstate and foreign commerce power to regulate interstate shipment of fire-arms and to prohibit and regulate the shipment of fire-arms into the United States.[52]

During brief floor debates on the bill, no mention was made of its constitutional basis other than to characterize it as a tax measure.[53] Congressman Doughton asserted "it does not in any way interfere with the rights of the States."[54] Congress enacted the bill, and President Roosevelt signed it into law on June 26, 1934.[55]

B. In Sonzinsky, the Supreme Court Found the NFA Was Solely a Taxing Measure

Three years after its enactment, the constitutionality of the NFA was raised before the Supreme Court. The case was *Sonzinsky v. United States*, in which the Court upheld the provision of the NFA imposing a $200 annual license tax on firearms dealers.[56] Relying on the Tenth Amendment, the defendant argued "that the present [NFA] levy is not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because [it was] not granted to the national government."[57] The Court found the NFA on its face to be a revenue measure and nothing more, explaining:

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[52] *See* H.R. REP. NO. 73-1780, at 2. The two commerce provisions restricted import and carrying an unregistered firearm in interstate commerce. National Firearms Act of 1934, ch. 757, §§ 10–11, 48 Stat. 1236, 1239.

[53] 78 CONG. REC. 11400 (1934) (statement of Rep. Doughton); *id.* at 12024 (statement of Sen. Harrison).

[54] *Id.* at 11400.

[55] National Firearms Act of 1934 § 18. As enacted, the NFA defined "firearm" and other terms. *Id.* § 1. It also required manufacturers, importers, and dealers to register with the collector of internal revenue and to pay an annual special tax, *id.* § 2, and to keep records of transactions, *id.* § 9. Manufacturers and importers were required to stamp an identification mark on each firearm, *id.* § 8(a), and it was unlawful to obliterate or remove such mark, *id.* § 8(b). A tax of $200 was imposed on the transferor of each firearm transferred. *Id.* § 3. It was unlawful to transfer a firearm except pursuant to a written order from the person seeking the transfer, except on an application form issued by the Commissioner of Internal Revenue. *Id.* § 4. Persons possessing a firearm had sixty days to register it with the collector. *Id.* § 5(a). It was unlawful not to have done so or to carry an unregistered firearm in interstate commerce. *Id.* § 11. It was unlawful to receive or possess a firearm transferred in violation of the Act, *id.* § 6, and any such firearm was subject to forfeiture, § 7(a). Violation of the Act was punishable by a fine of up to $2000 and imprisonment of not more than five years. *Id.* § 14.

[56] Sonzinsky v. United States, 300 U.S. 506 (1937).

[57] *Id.* at 512.

> The case is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations. Nor is the subject of the tax described or treated as criminal by the taxing statute. Here Section 2 contains no regulations other than the mere registration provisions, which are obviously supportable as in aid of a revenue purpose. On its face it is only a taxing measure[.][58]

In other words, the NFA was a revenue measure only and did not purport to exercise any general criminal power not delegated to Congress under the Constitution.[59] Moreover, the Court refused to speculate on any reasons why Congress might have taxed certain firearms:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. Here the annual tax of $200 is productive of some revenue. We are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed. As it is not attended by an offensive regulation, and since it operates as a tax, it is within the national taxing power.[60]

It would seem improper to suggest that including specific firearms as taxable articles in the NFA represented a judgment of Congress that they were somehow without appropriate uses in society. *Sonzinsky* remains an established precedent followed by the Supreme Court in upholding pure revenue measures concerning areas Congress could not otherwise regulate.[61]

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58 *Id.* at 513 (citations omitted).

59 *See id.*

60 *Id.* at 513–14 (footnote omitted) (citations omitted).

61 It did so as late as its decision upholding "Obamacare" as follows: "Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012). *See also id.* at 573–74 (invalidating a tax on illegal drugs and noting that "there comes a time in the extension of the penalizing features of the so-called tax

C. How § 922(o), Enacted in 1986, Removed the Tax Basis of the NFA as Applied to Machineguns

Congress broke the jurisdictional nexus between the taxing power and the NFA when it banned transferring and possessing new machineguns in 1986.[62] The Bureau of Alcohol, Tobacco, Firearms, and Explosives, (commonly referred to as ATF), no longer accepted tax payments for post-1986 machineguns. In response, the Central District of Illinois held that no constitutional basis existed for the registration requirement and dismissed an indictment for unregistered machineguns.[63] The Tenth Circuit agreed.[64] As a result, the United States Justice Manual instructs that "because it is impossible to comply with the registration and taxation provisions in the NFA, prosecutors should charge the unlawful possession or transfer of a machinegun under § 922(o)."[65]

But § 922(o) had its own constitutional problems. It banned mere possession of a machinegun without any reference to interstate or foreign commerce, which is an element of the offense regarding felon possession and other GCA crimes.[66] In *United States v. Lopez*, the Supreme Court invalidated the Gun Free School Zones Act for that very reason.[67] In hearings to modify the GCA, The ATF Director testified that out of approximately 118,000 registered machineguns, there have been fewer than ten cases where they were used in crimes or violent incidents.[68]

Yet majorities in the circuits upheld the ban under the Commerce Clause over strong dissenting opinions.[69] One dissent was by now Justice

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when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.") (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)); *see generally Sonzinsky*, 300 U.S. 506 (1937).

62 *See* 18 U.S.C. § 922(o).

63 *See* United States v. Rock Island Armory, Inc., 773 F. Supp. 117, 126 (C.D. Ill. 1991), *overruled by* United States v. Ross, 9 F.3d 1182 (7th Cir. 1993), *vacated and remanded*, 511 U.S. 1124 (1994).

64 United States v. Dalton, 960 F.2d 121, 124 (10th Cir. 1992).

65 U.S. Dep't of Just., Just. Manual § 9-63.516 (2016).

66 *Compare* 18 U.S.C. § 922(g) (unlawful for felons and other specified persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.") *with* § 922(o)(1) ("[I]t shall be unlawful for any person to transfer or possess a machinegun.").

67 *See* United States v. Lopez, 514 U.S. 549, 561–63 (1995).

68 *Legislation to Modify the 1968 Gun Control Act: Hearings Before the H. Comm. on the Judiciary*, 99th Cong. 1165 (1987) (statement of Stephen E. Higgins, director of the ATF).

69 *See* United States v. Rybar, 103 F.3d 273, 283–85 (3d Cir. 1996) (upholding the ban and citing five other circuits that did so); *see also* United States v. Stewart, 451 F.3d 1071, 1078 (9th Cir. 2006) ("[P]ossession of homemade machineguns could substantially affect interstate commerce in machineguns."), *overruled on another ground by* District of Columbia v. Heller, 554 U.S. 570, 594–95 (2008)).

Alito, who wrote, "The statutory provision challenged in this case, the portion of 18 U.S.C. § 922(o) that generally prohibits the purely intrastate possession of a machine gun, is the closest extant relative of the statute struck down in *Lopez*[.]"[70] No appellate court has stricken the ban.[71] But the issue will explode if Congress bans the hundreds of thousands of bump stocks in civilian hands as "machineguns," which the Supreme Court has held do not fit the NFA's current definition.[72]

D. Application of the Rule of Lenity to Ambiguous NFA Definitions in Thompson/Center Arms

Labelling NFA firearms as "gangster weapons" does not support an overly-broad application of the definition of "firearm." Under the due-process rule of lenity applicable to criminal statutes, any ambiguity must be resolved against classification of a gun as an NFA firearm. The Supreme Court so held in *United States v. Thompson/Center Arms*, which rejected the classification of a combination pistol/rifle design as a short-barreled rifle.[73]

In *Thompson/Center*, the Court addressed the status under the NFA of the Contender single-shot pistol, which had a 10-inch barrel.[74] Its receiver could be removed. A shoulder stock and a 21-inch barrel could then be attached to the receiver to make a rifle.[75] Using the 10-inch barrel, it could also be assembled as a short-barreled rifle.[76] Carved into the shoulder stock was the following: "Warning. Federal Law Prohibits Use with Barrel less than 16 Inches."[77]

Being a single-shot firearm, loading and unloading is a laborious process, requiring that one open the action, insert a cartridge, pull the hammer back, fire, and then re-open the action to remove the spent cartridge case.[78] As the owner's manual states, "the Contender Pistol has no importance as a combat weapon . . . . The only proper application for

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70 *Rybar*, 103 F.3d 273, 286–87 (Alito, J., dissenting) (footnote omitted).

71 *See, e.g.*, United States v. Kirk, 105 F.3d 997 (5th Cir. 1997) (en banc) (per curiam), *aff'd on reh'g* (demonstrating an even eight to eight split amongst the judges and thereby affirming the panel decision upholding the statue).

72 *See* Garland v. Cargill, 602 U.S. 406, 415 (2024).

73 United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion).

74 *Id.* at 508.

75 *Id.*

76 *Id.*

77 *Id.* at 523 (Scalia, J., concurring) (alteration added).

78 *See* THOMPSON/CTR. ARMS CO., IMPORTANT INSTRUCTIONS ON THE USE AND CARE OF THE CONTENDER 5–9 (n.d.), https://archive.org/details/gunmanual_Thompsoncenter_Contender/mode/2up.

a Contender is hunting, target or sport shooting[.]"[79] Even if assembled as a short-barreled rifle, it would thus have no utility for criminal use.

In dicta, the *Thompson/Center* plurality thought it "clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used."[80] That seems to conflict with *Sonzinsky*'s admonition that the Court "will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution."[81]

The Court found the applicable NFA definitions to be ambiguous and recognized that "although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness," and thus found it proper to "apply the rule of lenity and resolve the ambiguity" in favor of Thompson/Center.[82] It therefore concluded that the "pistol and carbine kit when packaged together . . . have not been 'made' into a short-barreled rifle for purposes of the NFA."[83]

Justice Scalia, joined by Justice Thomas, concurred, agreeing with the application of the rule of lenity, adding that the NFA's definition of "rifle" includes the element of being "intended to be fired from the shoulder," a requirement that was not met in the case.[84] Justice White would not have applied the rule of lenity and dissented.[85] Justice Stevens, oblivious to *Sonzinsky*'s admonition, wrote: "The public interest in carrying out the purposes that motivated the enactment of this statute is . . . far more compelling than a mechanical application of the rule of lenity."[86]

The oral argument in *Thompson/Center* was telling as to the lack of criminal utility for short-barreled rifles, at least as applied in the case. Justice White asked whether the record indicated if "anybody [has] ever used this contraption . . . as a short-barreled rifle?"[87] On behalf of the

79 *Id.* at 5.

80 *Thompson/Ctr. Arms Co.*, 504 U.S. at 517.

81 *See* Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

82 *Thompson/Ctr. Arms Co.*, 504 U.S. at 517–18 (plurality opinion).

83 *Id.*

84 *Id.* at 523 (Scalia, J., concurring) (quoting 26 U.S.C. § 5845(c)).

85 *Id.* at 524 (White, J., dissenting).

86 *Id.* at 526 (Stevens, J., dissenting).

87 Transcript of Oral Argument at 8, *Thompson/Ctr. Arms Co.*, 504 U.S. 505 (No. 91-164). For an unpaginated transcript that includes the questions asked and the justices who asked them, see Oral Argument, *Thompson/ Center Arms Co.* (No. 91-164), https://www.oyez.org/cases/1991/91-164 [https://perma.cc/QX5D-B9L4] (choose "Oral Argument – January 13, 1992").

United States, James Feldman responded that the record did not reflect its use as such by any sportsman or criminal.[88] Justice Scalia chimed in, noting that if assembled as a short-barreled rifle, it "would be no more accurate than a pistol, . . . the barrel is not any longer," but it would be "less concealable than a pistol."[89] Feldman agreed that the record did not reflect "whether someone would or would not want to use this for criminal" purposes.[90]

Justice White pressed on, insisting that:

> [Y]ou have no record of anybody ever using this kit to make a short-barreled rifle . . . .[You] would think [if] it was such a dangerous thing . . . even a dumb criminal would have used it . . . for this purpose, but no one in history has ever used it for that purpose.[91]

Laughter erupted in the courtroom. With that, this Author, who argued the case for Thompson/Center, wrongly anticipated that he had Justice White's vote.

Justice Stevens worried that a ruling for Thompson/Center would circumvent the NFA, although he conceded that "apparently this company is not making criminal weapons. Nobody really has that flavor of the case."[92] Counsel Stephen Halbrook responded in part: "The circumvention argument applies to the beautiful shotgun on display downstairs that belonged to Chief Justice Earl Warren that could be sawed off probably in 30 or 40 seconds."[93] This and the above exchanges illustrate that the focus should be on criminal misuse of firearms rather than criminalizing firearms by type.

III. THE SECOND AMENDMENT

A. Bare Mention of the Right to Bear Arms at the 1934 House Hearings

Given that the NFA bill proposed major restrictions on some types of firearms possessed by countless Americans, one would have expected a full discussion of the Second Amendment. But the House hearings barely mentioned the Second Amendment. Representative David J. Lewis of Maryland "never quite understood how the laws of the various States have been reconciled with the provision in our Constitution denying the

88 Transcript of Oral Argument, *supra* note 87, at 8.
89 *See id.* at 9.
90 *Id.*
91 *See id.* at 25.
92 *Id.* at 35.
93 *Id.*

privilege to the legislature to take away the right to carry arms."[94] Attorney General Cummings responded, "a statute absolutely forbidding any human being to have a machine gun" might involve a constitutional question, but taxing machineguns and requiring a license showing tax payment was proper.[95]

B. Judge Ritter's "Collective" Second Amendment

Perhaps the first person prosecuted under the NFA was Joseph H. Adams, a hotel manager in Miami, Florida.[96] In September 1934, a supposed-gangster allegedly gave Adams an unregistered Browning Automatic Rifle with a defaced serial number for safekeeping.[97] Adams transferred it to a friend, who attempted to sell it for $150.[98] Federal agents seized the rifle on January 22, 1935, and charged Adams with transfer of an unregistered machinegun.[99]

In *United States v. Adams*, Judge Halsted L. Ritter of the Southern District of Florida upheld the NFA as a valid revenue measure, despite "a motive to prevent racketeers, bank robbers, and desperadoes from obtaining sawed-off shotguns and machine guns to run wild in crime and to enable the government to trace ownership."[100] He wrote that the Second Amendment "does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers . . . to the collective body and not individual rights."[101]

Judge Ritter was apparently the first federal judge to claim the Second Amendment protected only "collective" rights, but none of the cases he cited in support said any such thing.[102] One U.S. Supreme Court case he cited only noted that, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons,"[103] which presupposed that the right is individual. The other cited Supreme Court opinion is silent on the subject.[104] Nor did the two

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94 *NFA Hearings*, *supra* note 10, at 19.

95 *See id.*

96 Joseph Connor, *How 1930s American Gang Violence Paved the Way for Gun Control*, HISTORYNET (Aug. 23, 2021), https://www.historynet.com/how-1930s-american-gang-violence-paved-the-way-for-gun-control/ [https://perma.cc/E359-8R6F].

97 *Id.*

98 *Id.*

99 *Id.*

100 United States v. Adams, 11 F. Supp. 216, 218 (S.D. Fla. 1935).

101 *Id.* at 219.

102 *See id.*

103 *See* Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897).

104 *See* The Civil Rights Cases, 109 U.S. 3, 30–31 (1883) (discussion of Dred Scott v. Sandford, 60 U.S. (19 How. 393) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV).

state court decisions he cited support that proposition.[105] Soon after rendering the opinion, Judge Ritter was impeached and removed from office.[106]

C. United States v. Miller: Ordinary Military Equipment?

The NFA was back in the Supreme Court in 1939 when it decided *United States v. Miller*—a poorly prepared challenge under the Second Amendment.[107] The indictment alleged that Jack Miller and Frank Layton transported an unregistered shotgun having a barrel less than 18 inches long in interstate commerce.[108] The district court dismissed the indictment as facially violative of the Second Amendment.[109]

The Supreme Court reinstated the indictment based on "the absence of any evidence tending to show that possession or use" of such shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia."[110] Thus "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."[111] In other words, "it is not within judicial notice" that the shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense."[112]

The above implied that the NFA registration and taxation provisions may violate the Second Amendment if the type of firearm is a common military arm.[113] Since the court dismissed the indictment, there was no evidence in the record on the issue about which judicial notice could be

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105 State v. Workman, 14 S.E. 9, 11 (W. Va. 1891) (the "arms" referred to in the Second Amendment referred "to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets,—arms to be used in defending the state and civil liberty"); Hill v. State, 53 Ga. 472, 474–77 (1874) (deciding that the right to bear arms is not infringed by a ban on carrying a pistol in court).

106 When Judge Ritter issued the *Adams* opinion, he was under investigation by the U.S. House of Representatives to determine whether he was guilty of high crimes and misdemeanors. 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 94-661, at 659–60 (2d Sess. 1977). In 1936, the House impeached him on seven counts of corruption and illegal financial dealings. *Id.* at 669–77, 681–86. The Senate convicted him on a single general count of bringing the judiciary into disrepute. *Id.* at 699.

107 Counsel for defendants did not even file a brief or attend oral argument. Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J.L. & LIBERTY 48, 65–68 (2008).

108 United States v. Miller, 307 U.S. 174, 175 (1939).

109 *Id.* at 176.

110 *Id.* at 178.

111 *Id.*

112 *Id.*

113 *See id.*

taken.[114] The Court did not ask whether the defendants were in a militia. However, it noted that the militia originally included "all males physically capable of acting in concert for the common defense," and that they "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[115]

The Court remanded *Miller* for further proceedings.[116] But no evidence was subsequently submitted in the district court showing that the shotgun in question had militia uses or was in common use, which could have made the NFA restrictions a violation of the Second Amendment.[117] That was because Defendant Miller had been killed, and his Co-Defendant Layton pled guilty to the charge.[118]

In 1986, Congress enacted the first federal ban on any type of firearm—the machinegun—but exempted "possession by or under the authority of, the United States or any department or agency thereof."[119] In *Farmer v. Higgins*, the Northern District of Georgia held that this exemption would include possessing a post-1986 machinegun registered under the NFA.[120] That reading would avoid the "possibility of constitutional infirmity" under the Second and Fifth Amendments and the Commerce Clause.[121] The Eleventh Circuit reversed, rejecting this statutory reading and ignoring the constitutional issues.[122]

D. The "In Common Use" Test: Heller, Bruen, and Beyond

While nothing in the NFA was at issue in *Heller*, the Court made several comments thereon in dicta, beginning with this:

> Read in isolation, *Miller*'s phrase 'part of ordinary military equipment' could mean that only those weapons useful in warfare are protected. That would be a startling reading of

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114 *See id.*

115 *Id.* at 179.

116 *Id.* at 183.

117 *See* STEPHEN P. HALBROOK, AMERICA'S RIFLE: THE CASE FOR THE AR-15, at 170–71 (2022) [hereinafter HALBROOK, AMERICA'S RIFLE].

118 Frye, *supra* note 107, at 68–69.

119 *See* 18 U.S.C. § 922(o)(2)(A).

120 Farmer v. Higgins, 907 F.2d 1041, 1042 (11th Cir. 1990); Order at 8, *Farmer*, 907 F.2d 1041 (N.D. Ga. Jan. 6, 1989) (No. 1:87-cv-0440-JOF) (denying motion to dismiss) [hereinafter Jan. Order].

121 Jan. Order, supra note 120, at 11 (citing *Miller*'s reference to "ordinary military equipment" protected by the Second Amendment and Fifth Amendment concerns about self-incrimination under the NFA); *see also* Order at 9, *Farmer*, 907 F.2d 1041 (N.D. Ga. Dec. 15, 1989) (No. 1:87-cv-0440-JOF) (an order issued in December directing ATF to reconsider the application or register the firearm).

122 *See Farmer*, 907 F.2d at 1045.

> the opinion, since it would mean that the National Firearms Act's restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939.[123]

The Court "therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[124] *Heller* went on to say that *Miller*'s "common use" test "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[125] It explained further:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But . . . the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.[126]

To the extent a type of NFA firearm is in common use, it is not "dangerous and unusual" and thus meets the *Heller* test. What if it is unusual because of the NFA restrictions? Is it nonetheless protected because it is "typically possessed by law-abiding citizens for lawful purposes," albeit numerically not in common use?

The *Bruen* Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[127] The plain text covers most NFA

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123 *See* District of Columbia v. Heller, 554 U.S. 570, 624 (2008).

124 *Id.* at 625.

125 *Id.* at 627 (internal quotations omitted).

126 *Id.* at 627–28.

127 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 17 (2022).

firearms, excluding certain "destructive devices," such as artillery since they cannot be carried on the person.[128]

Accordingly, to vindicate the NFA's registration, taxation, and other requirements, the burden is on the government to demonstrate that they are consistent with this Nation's historical tradition of firearm regulation. Post-*Bruen* jurisprudence on that issue is a "work-in-progress" to which the lower courts have not substantially responded.

IV. MAKING SAUSAGE: THE SEARCH FOR WHICH FIREARMS TO TAX

A. The Initial Bill: Draconian and Limited

The initial NFA bill, H.R. 9066, would have defined "firearm" to mean "a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor, or a machine gun."[129] A muffler or silencer for a firearm (such as a rifle or shotgun) *not* capable of being concealed on the person was not included, nor was a rifle of any kind, including one with a short barrel.[130]

B. Removing Pistols and Revolvers from the Bill

Beginning his testimony as the first witness in the hearings before the House Committee on Ways and Means, Attorney General Cummings assured members that the bill would not affect "the ordinary shotgun or rifle."[131] But, Cummings testified, revolvers, pistols, sawed-off shotguns, and machineguns must be taken from "roving criminals" like the notorious Depression-era bank robber John Dillinger.[132] During the hearings, more would be said about pistols and revolvers than any other type of firearm.

Criminal misuse of a type of firearm does not negate the rights of law-abiding citizens. Although handguns were used to commit crimes, Representative Claude A. Fuller of Arkansas voiced concern regarding "resentment on behalf of all law-abiding people to be regulated too much, especially about pistols."[133] In response to Fuller's suggestion to remove pistols and revolvers from the bill and make "as strong a law as possible for sawed-off shotguns and machine guns," Attorney General Cummings

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128 *See* 26 U.S.C. § 5845 (listing firearms).

129 *NFA Hearings*, *supra* note 10, at 1.

130 *See id.*

131 *Id.* at 5.

132 *See id.* at 9.

133 *Id.* at 22 (statement of Rep. Claude A. Fuller, Member, H. Comm. on Ways & Means).

warned against any such "half-way measures."[134] Chairman Doughton asked why rifles and shotguns did not suffice for self-defense, and James A. Frear of Wisconsin thought that "the average person who carries a revolver" lived in "places that Dillinger and men of his type are found."[135]

In response to the opposition to including pistols and revolvers in the bill, a draft substitute bill was introduced. This draft would have defined "firearm" as "a pistol or revolver of more than .22 caliber rim fire, a shotgun or rifle having a barrel less than 18 inches in length, or any other firearm capable of being concealed on the person, a firearm muffler or firearm silencer, or a machine gun."[136] This extended coverage from mufflers or silencers for concealable weapons, to all firearm mufflers or silencers.

Assistant Attorney General Keenan explained that they could remove .22 caliber rimfire pistols because people used them for target practice, and they were not as formidable as other firearms.[137] But all other pistols must be restricted. In raids against gangsters "we usually find the machine gun, but we always find a half dozen or 8 or 10 Colt automatics or some easily concealable firearm."[138] The Chairman joked, "the wooden pistol seems to have been used with great effect"[139]—a reference to John Dillinger's escape from jail with a fake pistol a few months earlier.[140]

Major General Milton A. Reckord, Executive Vice President of the NRA, testified in support of bills to punish criminals who possessed or used any kind of firearm, but added that the NRA would not oppose the pending bill if three words were deleted: "pistols and revolvers."[141] On behalf of the Justice Department, Keenan pushed back hard, pointing out that authorities had apprehended criminals with pistols.[142] As that statement reflects, the very premise of the bill was to focus solely on

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134 *Id.*

135 *Id.* at 48 (statement of Rep. James A. Frear, Member, H. Comm. on Ways & Means).

136 *See id.* at 83, 88.

137 *Id.* at 89–90.

138 *Id.* at 100 (statement of Joseph B. Keenan, Asst. Att'y Gen. of the United States).

139 *Id.* at 101 (statement of Rep. Robert L. Doughton, Chairman, H. Comm. on Ways & Means).

140 The hearing date was May 14, 1934, while Dillinger escaped on March 3, 1934. *Dillinger's Wooden Gun Goes For Nearly $20K*, 5 CHICAGO (Dec. 13, 2009), https://www.nbcchicago.com/news/local/john-dillingers-wooden-gun-public-enemies-public-enemy-no-1-gun-sold-at-auction-heritage-auctions-dallas/1891021/ [https://perma.cc/CGG4-U4L2].

141 *NFA Hearings*, *supra* note 10, at 115.

142 *Id.* at 117–18.

criminals, disregarding the countless numbers of law-abiding citizens who possessed pistols.

That explains why Reckord rejoined that "it is going to be another Volstead Act" (the alcohol Prohibition law),[143] as citizens would not register pistols and revolvers and "you are going to legislate 15 million sportsmen into criminals[.]"[144] Charles V. Imlay, a member of the National Conference of Commissioners on Uniform State Laws, warned not to repeat "the same unhappy condition that you had under the Volstead Act, where liquors were contraband, and where any transfer of liquor necessitates either a violation of the law or a very elaborate system of espionage and control."[145]

C. The Accidental Inclusion of Short-Barreled Rifles in the Bill

Before 1934, short-barreled rifles were widely used for sporting purposes. The Winchester Model 92 with a 14-inch barrel cost $18 in 1892. [146] "In running a line of traps for smaller animals these men would not infrequently catch a wolf or a bear, and a Model 92 with a four-teen-inch barrel was effective in dealing with these animals."[147] In 1932, Winchester presented its one-millionth Model 92 rifle to Secretary of War Patrick Hurley.[148]

Others enjoyed the Stevens pocket rifle. There were buggy rifles and bicycle rifles, which were convenient to carry. A great number were boys' rifles, with short shoulder stocks and short barrels. Many such rifles were single shot .22s. Whether designed for adult convenience or children's usage, small rifles were associated purely with hunting and recreation.[149] Despite their common use, all of these firearms were, somewhat accidentally, classified and regulated under the NFA as short-barreled rifles.

In the 1934 hearings, Attorney General Cummings attempted to alleviate concerns by insisting that "this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle."[150] The

143 National Prohibition Act, ch. 85, 41 Stat. 305 (1919), also known as the Volstead Act, enforced the Eighteenth Amendment, which prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

144 *NFA Hearings*, *supra* note 10, at 123.

145 *Id.* at 141 (cleaned up).

146 HAROLD WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 159 (1952).

147 *Id.*

148 *Id.*

149 *See* JAMES J. GRANT, BOYS' SINGLE SHOT RIFLES (1967).

150 *See NFA Hearings*, *supra* note 10, at 5.

interests of "[t]he sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice" were completely protected.[151] By contrast, "[a] sawed-off shotgun is one of the most dangerous and deadly weapons."[152] Apparently, to set a limit on what can be considered a "firearm capable of being concealed on the person," Representative Harold Knutson, a Minnesota Republican, proposed a legal limit to rifle barrels:

> General, would there be any objection . . . after the word "shotgun" to add the words "or rifle" having a barrel less than 18 inches? The reason I ask that is I happen to come from a section of the State where deer hunting is a very popular pastime in the fall of the year and, of course, I would not like to pass any legislation to forbid or make it impossible for our people to keep arms that would permit them to hunt deer.[153]

Cummings seemed taken aback, replying: "Well, as long as it is not mentioned at all, it would not interfere at all."[154] Knutson responded, somewhat confusedly, that "an 18-inch barrel would make this provision stronger than 16 inches, knowing what I do about firearms."[155] To which Cummings replied indifferently: "Well, there is no objection as far as we are concerned to including rifles after the word 'shotguns' if you desire."[156]

Adding rifles with barrels under 18 inches in length, an objective standard, prevented longer-barreled rifles such as those used for deer hunting from being interpreted as "any other firearm capable of being concealed on the person," which was restricted in the bill.[157] This would make sense if, as the bill proposed, pistols and revolvers were restricted.[158] Even so, the Attorney General noted that rifles were "not mentioned at all" under the bill and made no claim that restricting short-barreled rifles had law enforcement value.[159]

After the bill was revised to include short-barreled rifles, .22 caliber pistols and revolvers were excluded. Assistant Attorney General Keenan summarized the amended bill as follows:

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151 *Id.* at 5 (statement of Homer S. Cummings, Att'y Gen. of the United States).
152 *Id.* at 6.
153 *Id.* at 13.
154 *Id.*
155 *Id.*
156 *Id.*
157 *See id* at 1, 13.
158 *See id.* at 1.
159 *See id.* at 13.

> For purposes of this act the definition of the term "firearm" is a pistol or revolver of more than .22 caliber rim fire, a shotgun or rifle having a barrel less than 18 inches in length, or any other firearm capable of being concealed on the person. . . . Therefore, shotguns or rifles with barrels over 18 inches in length are not included.[160]

This addressed Congressman Knutson's concern that hunting rifles not be restricted as concealable weapons.[161] Consistent with that purpose, Congressman Samuel B. Hill asked for verification that "[a] rifle of 18 inches or more would not be a firearm under this definition?"[162] Keenan responded that it would not.[163]

Almost all the debate at the hearings centered on whether to impose restrictions on pistols and revolvers. Congress reached a compromise that excluded pistols and revolvers from the bill. The new bill, H.R. 9741, provided:

> The term 'firearm' means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun[.][164]

As in the House hearings, when the Senate hearings discussed this definition, no one mentioned a short-barreled rifle having any criminal use.[165] The above definition appeared in the bill as passed.[166] Both House and Senate reports on the bill stated, "limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms."[167]

The hearings repeatedly identified machineguns and sawed-off shotguns as crime weapons, but no one mentioned short-barreled rifles as such.[168] Without regulating pistols, it was anomalous to regulate short-barreled rifles, which were far less concealable and no better for criminal

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160 *Id.* at 88.

161 *See id.* at 13.

162 *Id.* at 95 (statement of Rep. Samuel B. Hill, Member, H. Comm. Means & Ways).

163 *Id.* at 96.

164 *See Commerce in Firearms Hearings*, *supra* note 30, at 58 (statement of Sen. Royal S. Copeland, Chairman, S. Subcomm. of the Comm. on Commerce).

165 *See id.*

166 National Firearms Act of 1934, ch. 757, § 1(a), 48 Stat. 1236, 1236.

167 H.R. REP. NO. 73-1780, at 1 (1934); S. REP. NO. 73-1444, at 1 (1934).

168 *See supra* Part IV.B and accompanying text.

use than pistols. But just as Congress added short-barreled rifles to the bill as an afterthought to protect longer rifles, it neglected to remove short-barreled rifles from the bill when it removed pistols. The curious result was that the NFA did not regulate large and small rifled arms, such as long-barreled rifles and pistols, but it did restrict medium sized rifled arms, like short-barreled rifles.

D. The Thoughtless Inclusion of Silencers in the Bill

Contrary to Hollywood, "silencers" are not all that silent, and they are not used much in crime. As explained below, no one in the 1934 House hearings argued otherwise. Bucking the stereotype in today's popular culture that noise suppressors are a social evil, in 2024 a leading American medical academy issued the following position statement:

> Sound suppressors are mechanical devices attached to the barrel of a firearm designed to reduce harmful impulse noise of firearms at its source . . . . The American Academy of Otolaryngology-Head and Neck Surgery endorses the use of firearm suppressors as an effective method of reducing the risk of hearing loss, especially when used in conjunction with conventional hearing protective measures.[169]

Loud noises can be annoying and harmful. One of the early automobile mufflers was patented by Hiram Percy Maxim in 1911.[170] Maxim, who was also the inventor of the first successful firearm noise suppressor, wrote:

> The Maxim Silencer was developed to meet my personal desire to enjoy target practice without creating a disturbance. I have always loved to shoot, but I never thoroughly enjoyed it when I knew that the noise was annoying other people. It occurred to me one day that there was no need for the noise. Why not do away with it and shoot quietly?[171]

In his 1908 patent application, Maxim described a device mounted on "an ordinary sporting rifle" in which "the energy of the powder gases is

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[169] *Suppressors for Hearing*, AM. ACAD. OF OTOLARYNGOLOGY (Nov. 18, 2024), https://www.entnet.org/resource/suppressors-for-hearing-preservation/#:~:text=The%20American%20Academy%20of%20Otolaryngology,with%20conventional%20hearing%20protective%20measure [https://perma.cc/VM99-TERE].

[170] Gas Engine Silencer, U.S. Patent No. 1,015,698 (issued Jan 23, 1912).

[171] HIRAM PERCY MAXIM, EXPERIENCES WITH THE MAXIM SILENCER 2 (1915), http://www.silencerresearch.com/maximletters.pdf [https://perma.cc/L23X-HW2Y].

dissipated in rotary or whirling movement of the gases before they pass into the atmosphere," thereby reducing noise.[172] Maxim called his device a "silencer," although it did not actually silence a gun. "It stops flinching by reducing the recoil over 75%," declared one of his advertisements, adding: "Ask your hardware or sporting goods dealer to show you the Silencer."[173] One could buy a .22 suppressor for $5.[174] "Makes target practice and small gun shooting a fascinating pastime for the whole family," declared another ad.[175]

Maxim published a brochure with the front cover showing two finely-dressed ladies with suppressor-equipped rifles, which consisted of "letters from sportsmen in all parts of the country."[176] A hunter thought the device was "a very good thing from the humane standpoint and also for saving the game," for if the first shot only wounded a deer, the noise would not frighten it away, allowing for a second shot to dispatch the animal.[177]

An avid hunter and gun collector, Theodore Roosevelt had a Maxim suppressor on his 1894 Winchester lever-action rifle for culling varmints at his residence of Sagamore Hill on Long Island.[178] That was not the only one. "In 1909, for his trip to Africa, Roosevelt also ordered a M1903 Springfield [rifle] fitted with a Maxim silencer[.]"[179]

The Maxim device was just one of several types of suppressors that reduced hearing loss and noise pollution caused by modern technology. In a 1932 tribute, *Time* magazine had this to say:

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172 *See* U.S. Patent No. 958,935 col. 2 l. 60, col. 1 ls. 11–14 (issued May 10, 1910).

173 Will Dabbs, *History of the Sound Suppressor*, THE ARMORY LIFE (April 4, 2023), https://www.thearmorylife.com/history-of-the-sound-suppressor/ [https://perma.cc/65N7-Y263] (showing original ad).

174 *A Brief History of the Maxim 1909 .22 Caliber Silencer*, SMALL ARMS REV. (Nov. 9, 2011) https://smallarmsreview.com/a-brief-history-of-the-maxim-1909-22-caliber-silencer/ [https://perma.cc/52KY-3DY6].

175 Maxim Silencer Co., *Women Shoot with Certain Aim*, *in* POPULAR SCI. Apr. 1920, at 128. https://ia902301.us.archive.org/30/items/1920-to-1924-popular-science/1920-04%20Popular%20Science.pdf.

176 EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 171, at 3 (providing further information on cover page).

177 Letter from W.G. to Hiram Percy Maxim, *in* EXPERIENCES WITH THE MAXIM SILENCER, *supra* note 171, at 11.

178 *S*ee Max Slowik, *Teddy Roosevelt's Suppressed 1894 Winchester*, GUNS.COM (May 18, 2012, 8:00 PM), https://www.guns.com/news/2012/05/18/nra-national-firearms-museum-theodore-roosevelt-collection-suppressed-winchester-model-1894 [https://perma.cc/KRC7-CTK4].

179 LEROY THOMPSON, THE M1903 SPRINGFIELD RIFLE 71 (Martin Pegler ed., 2013).

> While mental hygienists, efficiency experts and city officials have been bewailing the maddening effects of city noise, Hiram Percy Maxim has been manufacturing noise mufflers at Hartford, Conn. Last week he announced that his Maxim Silencer Co . . . . will—besides continuing to make silencers for guns, motor exhausts, safety valves, air releases, in fact every kind of pipe which emits a gas—offer a consulting service in noise abatement.[180]

Maxim's noise suppressors thus represented a positive technological advance in various aspects of human endeavors. That would not stop a new breed of Luddites from virtually banning the device without much thought in the sausage-making legislative process.

As noted, the initial NFA bill, H.R. 9066, would have defined "firearm" to mean, in part, "a pistol, revolver, shotgun having a barrel less than sixteen inches in length, or any other firearm capable of being concealed on the person, a muffler or silencer therefor[.]"[181] A muffler or silencer for a firearm *not* capable of being concealed on the person, such as a rifle or shotgun, was not included.

In response to the opposition to including pistols and revolvers in the bill, a draft substitute bill was put in the record that would have defined "firearm" as "a pistol or revolver of more than .22 caliber rim fire, a shotgun or rifle having a barrel less than 18 inches in length, or any other firearm capable of being concealed on the person, a firearm muffler or firearm silencer, or a machine gun."[182] Without any explanation, this extended the bill's coverage from mufflers or silencers for concealable weapons, to any firearm muffler or silencer, including for rifles and shotguns. A whole new category of restricted items was added for no apparent purpose.

Representative Fuller suggested that a man who carried "a sawed-off shotgun or machine gun, or a silencer" would do so "for an unlawful purpose."[183] That was the only vague reference in the entire hearings to possessing a silencer for an unlawful purpose. Leaving aside whether criminals were using silencers on pistols, which no one even suggested, where was the evidence that Depression-era gangsters used a silencer on a rifle?

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180 *Noise's Bogeyman*, TIME, Jan. 4, 1932, at 22, 22.

181 *NFA Hearings*, *supra* note 10, at 1.

182 *Id.* at 83, 88.

183 *Id.* at 111 (statement of Rep. Claude A. Fuller, Member, H. Comm. Ways & Means).

The hearings closed without a single reference to any incident of the criminal misuse of a muffler or silencer, and the only reference to one in a negative light being Representative Fuller's offhand inclusion of them with firearms being carried for an unlawful purpose.[184] The hearing record amounted to 166 pages.[185] The handwriting was on the wall: more was said about criminal misuse of pistols and revolvers than any other weapon, but too many people owned them to impose strict regulation without creating another unworkable Prohibition. Machineguns and "sawed-off" shotguns, repeatedly condemned as criminal tools, along with mufflers and silencers—which were virtually unmentioned and not criticized—could be restricted because they were not in such widespread use as were pistols and revolvers.

In the scant debate on the House floor, one member stated that "the primary purpose of the bill is to stop gangsters from getting hold of machine guns."[186] There was no Senate debate of substance.[187] Again, no one mentioned any need to restrict noise suppressors. As passed, the NFA included the following definition:

> The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machinegun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.[188]

Thus, without any discussion of the need to restrict noise suppressors, Congress expanded the original bill's restrictions from suppressors for concealable firearms to all silencers, including those for rifles and shotguns. Suppressor technology was just getting off the ground when it was virtually banned.[189] Gun owners were destined to continue suffering from hearing loss for generations to come.[190]

E. The Failure of Cummings' Crusade to Expand the NFA to All Firearms

Following enactment of the NFA until he left office, General Cummings waged a crusade to expand the restrictions to all firearms. Joseph Keenan wrote a revealing memorandum to Cummings on the NFA

184 *See id.*
185 *Id.* at 166.
186 78 CONG. REC. 11400 (1934) (statement of Rep. Connery).
187 *See id.* at 12024, 12398–12400.
188 National Firearms Act of 1934, ch. 757, § 1(a), 48 Stat. 1236, 1236.
189 *See* U.S. Patent No. 958,935 (issued May 24, 1910).
190 *Infra* notes 169–81 and accompanying text.

in November 1935.[191] After providing data on NFA registrations,[192] Keenan noted that there had been only "a few prosecutions" under the NFA, but "we have secured (in the Karpis case) a decision from Judge Ritter, of the Southern District of Florida, holding that this act is a constitutional enactment."[193]

The number of prosecutions remained small because Internal Revenue collectors lacked training for the required investigative work. "The Collectors of Internal Revenue are not engaged in making raids, but rather in the clerical work in connection with the collection of taxes[.]"[194]

Some eighty weapons had been seized or surrendered, plus two drums for submachine guns, and six silencers, although the field offices had more weapons not yet sent to the Washington warehouse.[195]

FBI Director J. Edgar Hoover suggested that NFA registrants should submit fingerprints, but Keenan doubted that such "would be sustained by the courts as a proper feature of a tax statute."[196] He feared it would "clearly indicate to any court that the entire statute was not a revenue measure but primarily regulatory in character; and that it would consequently have no hesitancy in declaring the statute unconstitutional."[197]

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191 Memorandum from Assistant Attorney General Joseph B. Keenan to Attorney General Homer Stillé Cummings (Nov. 20, 1935) (on file with author). This source can also likely be found at the University of Virginia Library. For more information, see Univ. of Virg. Lib., *Attorney General Personal File – Firearms and National Firearms Act 1935 Man-1938 September, Box 104*, A *Guide to the Papers of Homer Stille Cummings*, ARCHIVAL RES. OF THE VIRGINIAS, https://ead.lib.virginia.edu/vivaxtf/view?docId=uva-sc/viu01993.xml#subseries860 [https://perma.cc/CBE6-ZZDU].

192 Keenan noted the following NFA registrations since it became effective in July 1934: 11,413 machineguns and machine rifles (7,094 in the possession of Auto-Ordnance Corp., the manufacturer of the Thompson submachinegun); 5,606 firearms with shotgun barrels and pistol grips; 9,090 shotguns and rifles having barrels of less than 18 inches in length; and 561 silencers, totaling 26,670 registrations. Keenan, *supra* note 191, at 1. There had been 6,935 transfers of firearms, all but six of which were to governmental entities. *Id.*

193 *Id.* Judge Ritter's decision is discussed above, *supra* notes 100–02 and accompanying text. It is unclear whether Adams, whose conviction Ritter upheld, had any relation to Alvin Karpis of the notorious Barker/Karpis gang. *See Barker/Karpis Gang, Famous Cases & Criminals*, FBI, https://www.fbi.gov/history/famous-cases/barker-karpis-gang [https://perma.cc/7HDC-4NMR].

194 Keenan, *supra* note 191, at 1–2.

195 *Id.* at 2.

196 *Id.* at 4–5.

197 *Id.*

Since "no very satisfactory federal legislation can be framed with the commerce clause as the constitutional basis," they "have consequently resorted to the tax power" in the NFA.[198] But Keenan offered:

> [A]s a constitutional basis the general power of Congress to "provide for the common defense", on the theory that the Government is interested in knowing the number, location, and ownership of all weapons which might conceivably be used in the defense of the country in time of insurrection or invasion.[199]

He cited the Preamble, the Army and Naval Clauses, and the Militia Clause of the Constitution.[200]

Keenan recommended the laws of England, Canada, and France, where "a person cannot buy or possess a firearm without first securing a permit."[201] However, "if we go too far at this time we will have another Prohibition Act on our hands," as "a law which required every person to secure a permit to possess a firearm would be widely violated and virtually unenforceable."[202] In addition to publicizing the laws of other countries, Keenan recommended "a few well placed magazine articles" to "prepare the American people for a more stringent federal law in future years."[203]

Sonzinsky, decided in March 1937, was a big win for the Administration, which aimed to expand the NFA. [204] That October, General Cummings addressed the Annual Convention of International Association of Chiefs of Police. [205] Under the NFA, he explained, "if the criminal did not register his gun and he was arrested with a gun he could be sent to the penitentiary for as many as five years."[206] No need existed "to link such a law violator with" a violent crime.[207] He did not explain why the person would be considered a "criminal" without any evidence of a crime beyond non-registration.[208]

Cummings suggested that the categories of NFA firearms were underinclusive. "The criminal's arsenal is today made up of not only pistols

198 *Id.* at 6.
199 *Id.*
200 *See id.*
201 *Id.*
202 *Id.* at 7–8.
203 *Id.*
204 *See* Sonzinsky v. United States, 300 U.S. 506 (1937).
205 Homer Cummings, *supra* note 32, at 83.
206 *Id.* at 87.
207 *See id.*
208 *See id.*

and revolvers, but of ordinary shotguns and rifles. . . . The high-powered rifle which will kill big game at tremendous distances is, unfortunately, equally effective against human beings."[209] He explained further:

> Are we altogether realistic when we require the registration of a shotgun with a barrel of less than eighteen inches in length and overlook the weapon which measures nineteen inches? Why should we require the registration of the short rifle and exempt the automatic pistol or the newer type revolvers? I am convinced of this—any practical measure for the control of firearms must at least contain provisions for the registration of *all* firearms.[210]

Noting that he had submitted such a bill to Congress, under which registration would be free and a transfer tax would be "nominal," Cummings declared, "Show me the man who does not want his gun registered and I will show you a man who should not have a gun."[211]

Cummings continued his crusade into 1938. In an April radio address, he noted that Representative Robert L. Doughton introduced H.R. 9999 at his request.[212] Cummings believed, "Under this bill no honest citizen will transfer his weapon without complying with the terms of the statute, and in time the underworld supply of guns, except those secured by theft, will be cut off."[213]

Cummings claimed that the only opposition to the bill was "the munition makers" and "certain sportsmen's organizations."[214] Asked who favored the bill, he replied, "In the first place, I would list the press of the country. The editorials which have come to my desk concerning this matter have been almost unanimous in endorsing the bill[.]"[215] Some things seem never to change.

Nothing came of Cummings' agenda to expand the NFA by the time he retired on January 2, 1939. Robert H. Jackson succeeded him and, in early 1941, sent his bill to the Speaker of the House to "require registration

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209 *Id.* at 88.

210 *Id.* (emphasis in original).

211 *Id.* at 88–89.

212 *An Interview by Rex Collier of The Honorable Homer Cummings: Attorney General of the United States* 2 (NBC Radio Broadcast Apr. 25, 1938), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-25-1938.pdf [https://perma.cc/Q2H9-P5MV]. Doughton was Chairman of the House Ways and Means Committee, which held the hearings on the NFA bill in 1934.

213 *Id.* at 5.

214 *Id.* at 4.

215 *Id.* at 6.

of all firearms."[216] Under the guise of national defense, "it would hamper the possible accumulation of firearms on the part of subversive groups."[217]

At that point in history, firearm registration was a tool of authoritarianism and conquest. In Germany, the Nazis seized upon the Weimar Republic's registration decrees to disarm political opponents and the Jews.[218] Before the war, France decreed registration. After its defeat in 1940, its police worked for the German occupation, which imposed the death penalty for possession of a firearm.[219]

Congress took notice. Reporting a bill to allow the President to requisition property, the House Committee on Military Affairs included a provision forbidding the impairment of Second Amendment rights "in view of the fact that certain totalitarian and dictatorial nations are now engaged in the willful and wholesale destruction of personal rights and liberties[.]"[220] The resultant Property Requisition Act of 1941 declared in part:

> Nothing contained in this Act shall be construed—
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms[.][221]

In the Gun Control Act (GCA) of 1968, Congress expanded the narrow types of firearms required to be registered in the NFA. Otherwise, it has repeatedly hammered nails into the coffin of the agenda to require registration of firearms. Lawmakers defeated several bills requiring the registration of all firearms during the 1968 legislative process.[222] The Firearm Owners' Protection Act of 1986 forbade any regulation that would

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216 *A 1940 Proposal: Register Firearms*, N.Y. TIMES, Apr. 11, 1989, at A31 (quoting Letter from Robert H. Jackson, Att'y Gen., to William G. Bankhead, Speaker of the House of Representatives (May 29, 1940)).

217 *Id.*

218 *See* STEPHEN P. HALBROOK, GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND "ENEMIES OF THE STATE" 26, 184 (2013).

219 *See* STEPHEN P. HALBROOK, GUN CONTROL IN NAZI-OCCUPIED FRANCE: TYRANNY AND RESISTANCE (2018).

220 H.R. REP. NO. 77-1120, at 1 (1941).

221 Property Requisition Act of 1941, ch. 445, §1, 55 Stat. 742. For the legislative history, see Halbrook, *Congress Interprets*, *supra* note 5, at 623–30.

222 *See* HALBROOK, AMERICA'S RIFLE, *supra* note 117, at 181–83.

require the registration of firearm owners,[223] as did the Brady Handgun Violence Prevention Act of 1993.[224] Schemes to require registration of all firearms appear to be completely dead.

V. WHY CONGRESS SHOULD REMOVE SHORT-BARRELED RIFLES AND SILENCERS FROM THE NFA

Congress should remove short-barreled rifles and silencers from the NFA. The 1934 NFA hearings did not identify either as particularly useful to criminals. Their inclusion in the Act was thoughtless or a mistake. Should Congress remove them from the NFA, they would remain regulated under Title I of the GCA, which defines "firearm" as a weapon that will expel a projectile by the action of an explosive and a firearm muffler or silencer.[225]

A. Short-Barreled Rifles Are in Common Use and Are Rarely Used in Crime

At the end of World War II, the Treasury Department mounted a drive to register NFA firearms. John M. Schooley, special investigator for the Department, facilitated the registration of hundreds of short-barreled rifles, although he testified at a Congressional hearing on what became the GCA of 1968:

> In my 20 years' experience enforcing the provisions of this act, I have never had the privilege of registering a machinegun, rifle or shotgun, possessed by a person known to operate outside the law. I have, however, registered many saddle guns, many short-barreled caliber .22 rifles and combination .22 and .410 arms and other such firearms for law-abiding citizens.[226]

Congress has singled out short-barreled rifles for more liberal treatment, unlike other NFA firearms. Initially, Congress restricted all rifles with barrels under 18 inches. In 1936, .22 caliber rifles with at least 16 inch barrels were exempted.[227] A committee report explained that it wished to remove a hardship on "two or three manufacturers of .22 and less caliber hunting rifles . . . which are in fact less susceptible of being concealed on

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223 Firearms Owner's Protection Act, Pub. L. No. 99-308, § 106(4), 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. § 926(a)).

224 Brady Handgun Violence Protection Act, Pub. L. No. 103-159, § 103(i), 107 Stat. 1536 (1993) (codified at 34 U.S.C. § 40906).

225 18 U.S.C. § 921(a)(3).

226 *See Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juv. Delinq.*, *S. Comm. on the Judiciary*, 90th Cong. 967–68 (1967) (statement of John M. Schooley, past president of the NRA).

227 *See* Act of Apr. 10, 1936, ch. 169, 49 Stat. 1192.

the person than other types of rifles, of the same caliber, not coming within the technical definition."[228]

In 1960, the NFA was amended to reduce the barrel length of prohibited rifles in all calibers from 18 inches to 16 inches.[229] Noting that many rifles sought by collectors were just under 18 inches, Congressmen Bob Sikes added, "While such rifles could be not be considered concealable, and while they do not enter into the crime picture[,] they still must be classed as a firearm subject to the taxation provisions of the law."[230] The Senate report noted that "a number of popular sporting rifles have a barrel length just slightly under 18 inches . . . . It is not believed that these guns constitute a type of weapon, such as a sawed off rifle or shotgun, which is likely to be used by the criminal element."[231]

The prohibition on possessing a weapon made from a shotgun or rifle with an overall length of less than 26 inches was added in 1960 to "ease administration, since it will no longer be necessary . . . to determine whether they are capable of concealment on the person."[232]

While Title II of the GCA of 1968 provided more stringent categories and definitions of other NFA weapons, Congress did not see fit to increase restrictions on short-barreled rifles. In fact, a thorough review of all the hearings and debates on the Act reveals hardly any mention of short-barreled rifles (though much on machineguns, sawed-off shotguns, and destructive devices).[233] No one in Congress strongly suggested any link between short-barreled rifles and crime during the proceedings leading up to the enactment of the GCA.[234]

The NFA excludes from the definition of "firearm" "any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.)"[235] The ATF has classified thousands of

228 H.R. REP. NO. 74-2000, at 1 (1936).

229 Act of June 1, 1960, Pub. L. No. 86-478, sec. 3, § 5848, 74 Stat. 149, 149–50 (codified at 26 U.S.C. § 5845).

230 *Firearms: Hearings on H.R. 4029 Before the S. Comm. on Fin.*, 86th Cong. 9 (1960).

231 S. REP. NO. 86-1303, at 3 (1960), *reprinted in* 1960 U.S.C.C.A.N. 2111, 2113.

232 *Id.*

233 When asked for statistics concerning the sources of "sawed-off shotguns and sawed-off rifles," IRS Commissioner Sheldon Cohen filed a report stating that "sawed-off shotguns can be made from standard shotguns with relative ease" without providing any statistics. *Anti-Crime Program: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 90th Cong. 559, 568 (1967).

234 The handful of references to "sawed-off rifle" and "short-barreled rifle" typically just state that they are controlled by the NFA. *E.g.*, *id.* at 528, 623.

235 26 U.S.C. § 5845(a).

short-barreled rifles as curios or relics and removed them from the NFA.[236] There is nothing inherently dangerous about rifles with barrels under 16 inches in length. Law-abiding persons commonly possess short-barreled rifles for lawful purposes. As of 2021, there were 532,725 short-barreled rifles registered with the ATF,[237] compared to 74,729 ten years earlier.[238] Justice Alito, concurring in *Caetano v. Massachusetts*, wrote that 200,000 civilians owned stun guns, making them common and thus protected by the Second Amendment.[239]

While most states ban or severely regulate machineguns and short-barreled shotguns, as of 1969, only six of fifty states and the District of Columbia prohibited short-barreled rifles.[240] A 1969 Ninth Circuit opinion lists forty four states and the District of Columbia in which "a firearm similar to the ['sawed off rifle'] made by the defendant could be legally possessed although it would be illegal to carry it concealed without a permit or license"—a restriction that typically applies to any firearm.[241] The court found only six states where "the mere possession of a firearm similar to that made by the defendant could be a crime[.]"[242] Today, five states plus the District of Columbia ban short-barreled rifles.[243] Several states prohibit them unless registered under the NFA.[244]

Criminologists Wright and Rossi found in a 1986 study that many criminals are apt to saw off a shotgun, but those few who use rifles are more apt to leave them unmodified. [245] Research interviews supported by

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236 FIREARMS & AMMUNITION TECH. DIV., ATF, P. 5300.11, CURIOS OR RELICS LIST—JANUARY 1972 THROUGH APRIL 2018, at 23–65 (2022), https://www.atf.gov/file/128116/download [https://perma.cc/JBK9-7ZQP].

237 ATF, *Firearms Commerce in the United States*, 2021 ATF ANN. STAT. UPDATE 1, exhibit 8, https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download [https://perma.cc/V35R-NKPR] [hereinafter 2021 ATF ANN. STAT. UPDATE].

238 ATF, *Firearms Commerce in the United States*, 2011 ATF ANN. STAT. UPDATE 24, exhibit 8, https://www.atf.gov/file/56646/download [hereinafter 2011 ATF ANN. STAT. UPDATE].

239 Caetano v. Massachusetts, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (per curiam).

240 *See* United States v. Benner, 417 F.2d 421, 424–25 n.10 (9th Cir. 1969).

241 *See id.*

242 *See id.*

243 *See What NFA Firearms are Permitted by Each State?*, NAT'L GUN TRS. (Jan. 5, 2024), https://www.nationalguntrusts.com/blogs/nfa-gun-trust-atf-information-database-blog/nfa-items-permitted-by-state [https://perma.cc/QN6F-L7E3] (In California "SBRs . . . may be obtained with a 'Dangerous Weapons Permit' but it is rarely granted. . . . SBRs . . . on the C&R list may be obtained with a C&R FFL[.]").

244 *See id.*

245 *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 95 (Expanded ed. 1986).

the National Institute of Justice with inmates convicted of violent felonies revealed the following preferences for types of firearms:

> 1. What kinds of gun(s) have you *ever used* to commit crimes?
>
> | | |
> |---|---|
> | Handgun | 90 |
> | Sawed-off shotgun | 27 |
> | Regular shotgun | 16 |
> | Sawed-off rifle | 7 |
> | Regular rifle | 10 |
> | Zipgun (homemade) | 3 |
> | All other | 4[246] |
>
> . . .
>
> 4. What kind of [weapon] have you used *most frequently* in committing crimes?
>
> | | |
> |---|---|
> | Handgun | 85 |
> | Sawed-off shotgun | 9 |
> | Regular shotgun | 3 |
> | All other guns | 3[247] |

FBI data for the five-year period of 2000–2024 showed the following types of firearms used in murders: handguns 161,345, rifles 8,666, other firearms 3,286, and shotguns 7,799.[248] Although the data does not distinguish rifles by barrel length, it is evident that all types of rifles were used far less than handguns.[249] Unlike the handgun, which is not an NFA firearm, a short-barreled rifle lacks easy concealability.

In holding that the Second Amendment does not protect short-barreled rifles, the best argument that the Tenth Circuit could muster was that such rifles are "close analogues" to the short-barreled shotguns that *Heller* suggested in dictum were not protected. *Heller* was based on *Miller*'s holding that it could not take judicial notice that such shotguns were

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246 *Id.*

247 *Id.*

248 FBI, *Crime Data Explorer: Expanded Homicide Offense Data in the United States*, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/shr [https://perma.cc/3BT5-US4D] (last visited Feb. 4, 2025).

249 *See* James A. D'Cruz, *Half-Cocked: The Regulatory Framework of Short-Barrel Firearms*, 40 HARV. J.L. & PUB. POL'Y 493, 518 (2017) (citing FBI Crim. Just. Info. Servs. Div., *Expanded Homicide Data Table 8: Murder Victims by Weapon*, 2010–2014, 2014 CRIME IN THE U.S., https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls [https://perma.cc/R4D6-YTHN]).

ordinary military ordnance.[250] Significantly, the court concluded, "We need not opine on whether a sufficient factual record could be developed to distinguish short-barreled rifles from short-barreled shotguns."[251]

Actually, the factual difference is stark—a rifle fires "only a single projectile,"[252] while a shotgun fires "either a number of ball shot or a single projectile."[253] Depending on shell size, 12 gauge buckshot may contain between 8 and 21 pellets, making the shotgun a far more formidable weapon at close range than a rifle which fires only a single projectile.[254]

Congress mistakenly or carelessly included short-barreled rifles in the NFA, even after the Act excluded more concealable rifled arms. These rifles are not associated with significant criminal misuse. Short-barreled rifles are less accurate than long-barreled rifles and less concealable than handguns, offering no clear advantage over other rifled arms. Therefore, Congress should remove short-barreled rifles from the NFA. At the time of this writing, H.R. 173 is pending in the 118th Congress, which would remove short-barreled rifles from the NFA.[255]

B. Suppressors Are in Common Use and Are Rarely Used in Crime

Devices to reduce noise at its source are ubiquitous in modern society. But imagine if you had to register with the government, obtain law enforcement permission, submit fingerprints, and pay a $200 tax to have a muffler on your automobile or lawn mower. You must do exactly that to obtain a device to muffle the noise from your firearm; if you fail to do so, you can face ten years imprisonment.[256]

Legislative reform would promote public health. According to the American Speech-Language-Hearing Association, "exposure to noise greater than 140 dB [decibels] can permanently damage hearing, even from

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250 *See* United States v. Cox, 906 F.3d 1170, 1185 (10th Cir. 2018); United States v. Miller, 307 U.S. 174, 178 (1939) (citing Aymette v. Tennessee, 21 Tenn. (2 Humph.) 152, 154, 158 (Tenn. 1840)) ("it is not within judicial notice" that the subject shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense.").

251 *Cox*, 906 F.3d at 1186.

252 18 U.S.C. § 921(a)(7).

253 *Id.* § 921(a)(5).

254 *See* Anthony Foster, *How Many Pellets in Buckshot?*, ANTHONY ARMS (Aug. 3, 2024), https://anthonyarms.com/gun/how-many-pellets-in-buckshot/ [https://perma.cc/QZ6U-YJZE].

255 Home Defense and Competitive Shooting Act of 2023, H.R. 173, 118th Cong. (2023).

256 *See* 26 U.S.C. §§ 5811–12, -45(a)(7), -71.

a single occurance."[257] Small-caliber firearms may generate noise up to 140 dBP [decibel peak pressure], while higher-caliber rifles may produce noise over 175 dBP.[258] "However, studies have shown that only about half of target shooters wear hearing protection all the time when target practicing, and 70%–80% of hunters never wear hearing protection."[259] It is thus advisable to "us[e] a firearm suppressor in addition to using HPDs [hearing protection devices]."[260]

Dr. Brian J. Fligor of Harvard Medical School writes, "A single shot from a large caliber firearm, experienced at close range, may permanently damage your hearing in an instant."[261] That means most hunters are likely to suffer from such damage. He adds that,"[l]oud explosions (that peak for a few milliseconds at levels greater than 130–140 dB) may cause immediate hearing loss," which is called "acoustic trauma."[262] While recommending hearing protection devices, he also advises to "try to reduce noise at the source."[263] For firearms, reducing noise at the source would mean using sound moderators, otherwise known as silencers or suppressors.

Forty-two states allow the possession of noise suppressors, with forty-one permitting their use for hunting, while eight states have banned them.[264] Despite the onerous NFA restrictions, people registered 2,664,774 silencers with the ATF as of 2021,[265] a slight decrease from the 285,087 registered a decade earlier.[266] The American Suppressor Association sets the figure at 3,613,983 as of January 2024.[267]

Ronald Turk, ATF Associate Deputy Director, wrote in 2017 that "silencers account for the vast majority of NFA applications," however, "[i]n light of the expanding demand and acceptance of silencers . . . that

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257 *Recreational Firearm Noise Exposure*, AM. SPEECH-LANGUAGE-HEARING ASS'N, https://www.asha.org/public/hearing/Recreational-Firearm-Noise-Exposure/ [https://perma.cc/EC23-WGXQ].

258 *Id.*

259 *Id.*

260 *Id.*

261 Brian J. Filgor, *Prevention of Hearing Loss from Noise Exposure*, BETTER HEARING INST. 1 (July 16, 2013), https://www.audiologist.org/_resources/documents/diabetes/Prevention-of-Hearing-Loss-from-Noise-Exposure.pdf [https://perma.cc/C6Y4-Y727].

262 *Id.* at 4.

263 *Id.* at 7.

264 Silencer Data Map, AM. SUPPRESSOR ASS'N., https://americansuppressorassociation.com/wp-content/uploads/2024/02/legislative-handout-generic-1.pdf [https://perma.cc/W8DL-974K].

265 2021 ATF ANN. STAT. UPDATE, *supra* note 237, at 15–16, exhibit 8.

266 2011 ATF ANN. STAT. UPDATE, *supra* note 238, at 24, exhibit 8.

267 Silencer Data Map, *supra* note 264.

volume is unlikely to diminish unless they are removed from the NFA."[268] He added that "the change in public acceptance of silencers arguably indicates that the reason for their inclusion in the NFA is archaic and historical reluctance to removing them from the NFA should be reevaluated."[269] The restrictions also lack law enforcement value:

> ATF's experience with the criminal use of silencers also supports reassessing their inclusion in the NFA. On average in the past 10 years, ATF has only recommended 44 defendants a year for prosecution on silencer-related violations; of those, only approximately 6 of the defendants had prior felony convictions. Moreover, consistent with this low number of prosecution referrals, silencers are very rarely used in criminal shootings. Given the lack of criminality associated with silencers, it is reasonable to conclude that they should not be viewed as a threat to public safety necessitating NFA classification and should be considered for reclassification under the GCA.[270]

A study by Paul A. Clark supports those conclusions. His review of federal and state court data found that "there only appear to be about 30 federal prosecutions involving silencers each year, and it is very unlikely that there are more than 200 state and federal prosecutions per year involving silencers."[271] Clark examined all federal cases using the word "silencer" from 1995 through 2004 in Lexis and Westlaw.[272] He found 136 convictions for possession, 8 enhanced sentences, 2 plea-bargained to lesser charges, 7 where the evidence was suppressed, 7 not resulting in charges, and 7 acquittals.[273] Clark concluded that "more than 80 percent of federal silencer charges are for non-violent, victimless crimes."[274] Over the ten-year period, reports showed only two federal cases where a silencer was used in a murder.[275]

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[268] RONALD TURK, ATF, FEDERAL FIREARMS REGULATIONS: OPTIONS TO REDUCE OR MODIFY FIREARMS REGULATIONS 6 (2017), https://accurateshooter.net/Downloads/atfwhitepaperjan2017.pdf [https://perma.cc/MK6U-CZ82].

[269] *Id.*

[270] *Id.* at 6–7.

[271] Paul A. Clark, *Criminal Use of Firearm Silencers*, (8)(2) W. CRIMINOLOGY REV. 44, 47–48 (2007).

[272] *Id.* at 50.

[273] *See id.*

[274] *Id.* at 51.

[275] *Id.* at 52.

Using the same methodology but limiting the study to 2000–2004, Clark found only 18 silencer cases in California state courts out of 25,000 criminal cases.[276] Only four or five defendants used a silencer in a crime, and nine of the eighteen were possessory offenses.[277] Three or four silencers were used in homicides out of the 1,700 reported prosecutions for homicide for the five-year period.[278] Clark concludes, "The data indicates that use of silenced firearms in crime is a rare occurrence, and is a minor problem."[279]

A sampling of some of the judicial decisions is instructive. A Tenth Circuit case involved two suppressors made from "[o]ld toilet paper tubes and stuffing from some old stuffed animals."[280] While no evidence existed of any intent to use the tubes for any unlawful purpose, the court found it improper to sentence the defendant to probation instead of the Sentencing Guidelines range of 27 to 33 months imprisonment.[281]

A First Circuit case involved "a device designed to muffle the sound of an airgun," which is not a firearm silencer, but which an ATF agent added an adapter to attach it to a firearm.[282] The court overturned the defendant's conviction for lack of evidence that he intended to use the silencer on a firearm,[283] but not before he served 1,259 days in prison for an unjust conviction.[284] A district court in a civil case held that the ATF acted arbitrarily, capriciously, and contrary to law in classifying an item claimed to be a muzzle brake as a silencer.[285]

It would be instructive to examine the gun laws of some European countries, often suggested as superior models for the United States, regarding what they call "noise moderators." In some European nations, suppressors are far more readily available than the laws in the United States would allow.

The United Kingdom has no equivalent of the Second Amendment.[286] As the Home Office states, "Gun ownership is a privilege, not a right.

276 *Id.* at 53.

277 *Id.*

278 *Id.*

279 *Id.* (abstract).

280 United States v. Webb, 49 F.3d 636, 639 (10th Cir. 1995), *overruled in part by* United States v. Booker, 543 U.S. 220 (2005).

281 *See id.* at 640.

282 United States v. Crooker, 608 F.3d 94, 95–96 (1st Cir. 2010) (per curiam).

283 *Id.* at 97.

284 *See* Crooker v. United States, 119 Fed. Cl. 641, 658 (2014), *rev'd*, 828 F.3d 1357 (Fed. Cir. 2016).

285 *See* Innovator Enters. v. Jones, 28 F. Supp. 3d 14, 26 (D.D.C. 2014).

286 *See* David B. Kopel & Vincent Harinam, *Britain's Failed Weapons-*

Firearms control in the United Kingdom is among the toughest in the world[.]"[287] To acquire a firearm, individuals must obtain a firearm certificate from local police, which they may issue for "good reason," such as work, sport, or leisure.[288] But once a person is qualified to have a firearm, it is a cinch to obtain a suppressor:

> Sound moderators are subject to certificate control as an accessory "designed or adapted to diminish the noise or flash caused by firing" of a firearm. Sound moderators are often used for shooting game, deer, or vermin. In the case of the latter, they might facilitate more effective pest control. They are appropriate for reducing hearing damage to the shooter, or to reduce noise nuisance, for example, for deer control in urban parks, or close to residential properties, or to reduce recoil of the rifle. "Good reason" to possess a rifle for shooting game, vermin or deer should normally imply "good reason" to possess a sound moderator.[289]

Moreover, "an integral sound moderator, that is one that is part of the firearm, does not require separate authorisation."[290] The Home Office added, "Some target shooting events where fire and movement is conducted on field firing ranges may require the use of sound moderators, for example, where hearing protection may impede the shooter and where voice commands need to be heard or given by the shooter for safety and continuity."[291]

Widely advertised on the internet for sale in the United Kingdom, a .22 suppressor sells for between £40 and £150.[292] One vendor states, "This item requires [an] owner to be the holder of and [to] present[293] (upon collecting this item) an original copy of a Firearms (Section 1) Licence

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Control Laws Show Why the Second Amendment Matters, CATO INST. (Aug. 28, 2018), https://www.cato.org/commentary/britains-failed-weapons-control-laws-show-why-second-amendment-matters [https://perma.cc/U3QU-YRMN].

287 HOME OFF., GUIDE ON FIREARMS LICENSING LAW 3 (2022), https://assets.publishing.service.gov.uk/media/67b73deb9ae06ef4a71cf385/Firearms_Guide_-_November_2022.pdf [https://perma.cc/LUU8-ZSK3] (UK).

288 *Id.* at 3–4.

289 *Id.* at 111 (citation omitted).

290 *Id.* (citing Broom v. Walter [1989] QB 725 (Eng.)).

291 *Id.*

292 *See* Bruce Potts, *Five .22 Rimfire Sound Moderators Reviewed*, SHOOTINGUK (Oct. 25, 2020), https://www.shootinguk.co.uk/guns/test-five-22-sound-moderators-90613/ [https://perma.cc/A2V2-KJAW].

293 In other words, the owner must be the holder of a license and must present it to the dealer.

(with the necessary unused variation) to purchase this item."[294] No long approval process or expensive tax is required.

Silencers may be sold and possessed, without registration or special taxes, in other European countries by any person who is eligible to possess a firearm. For instance, Finnish law provides, "The following activities are not subject to authorisation: . . . (3) acquisition, possession and transfer of a silencer if the person has a licence to possess a firearm."[295]

In France, what are called "sound reducers/moderators" are not "considered as accessories or weapon components subject to authorization or registration. Thus they are free to possess and are also authorized for hunting."[296] For purchase, one need only exhibit a national identity card (CNI), French Shooting Federation (FFTir) License, or a hunting license.[297] As the European experience illustrates, the acquisition and use of sound moderators on firearms need not be subject to draconian restrictions.

Finally, the issue arises of whether noise suppressors are "arms" protected by the Second Amendment? *Heller* interpreted the term "arms" to mean the same now as in 18th century dictionaries, to include "weapons of offence, or armour of defence," specifically mentioning "bows and arrows," the quintessential quiet weapon of the day.[298] The Second Amendment "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[299] Notably, manufacturers were producing air rifles, which are far quieter than firearms, as early as the 18th century. Meriwether Lewis carried a Girandoni repeating air rifle in the Lewis and Clark expedition of 1804–1806.[300]

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294 *Anschutz Rimfire Sound Moderator .22LR – ½" X20*, DOUBLE DEUCE FIRING RANGE, https://www.double-deuce.co.uk/product/anschutz-rimfire-sound-moderator-22lr-1-2x20-unf/ [https://perma.cc/54NP-QM2C].

295 Ministry of the Interior, Finland, *Firearms Act (1/1998; Amendments up to 1249/2020 included)*, https://finlex.fi/en/laki/kaannokset/1998/en19980001.pdf [https://perma.cc/3W46-KWZN].

296 *See Législation et Règlementation*, MODERATEURS DE SON https://www.moderateur-de-son-carcassonne.com/l%C3%A9gislation-et-r%C3%A8glementation [https://perma.cc/65YD-42LC] (Fr.) (translation by author).

297 "L'achat d'un modérateur . . . , est simplement soumis à présentation d'une pièce d'identité CNI [carte nationale d'identité] recto-verso, d'une licence FFTir [Fédération française de tir] ou d'un permis de chasser." *Id.*

298 District of Columbia v. Heller, 554 U.S. 570, 581 (2008).

299 *Id.* at 582.

300 Mike Markowitz, *The Girandoni Air Rifle*, DEFENSE MEDIA NETWORK (May 14, 2013), http://www.defensemedianetwork.com/stories/the-girandoni-air-

The common-use test presents a quandary for noise suppressors, in that passage of the NFA in 1934 inhibited Americans' common use of the product on Depression-era budgets. However, *Heller* does not imply that mere listing in the NFA in itself would cause an arm to lose Second Amendment protection. Instead, it says that the common-use test "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."[301] But a suppressor is not dangerous or unusual, as the ATF registration data shows.

In a Tenth Circuit case, defendants argued that silencers are in common use, rarely used in crime, protect hearing, improve accuracy, and are valuable for home defense.[302] The court did not address these arguments and held simply that "[a] silencer is a firearm accessory; it's not a weapon in itself," and thus, "can't be a 'bearable arm' protected by the Second Amendment."[303] A concurring opinion added that the court had no occasion to consider "whether items that are not themselves bearable arms but are necessary to the operation of a firearm (think ammunition) are also protected."[304] Does that mean that sights, scopes, recoil pads, and other accessories that make firearms more accurate, less painful to fire, or otherwise improve efficient use are not protected?

It could be that Congress may take action. In 2017, the U.S. House of Representatives held hearings on a bill to remove noise suppressors from the NFA.[305] At the time of this writing, bills are pending in the 118th Congress that would remove silencers from the NFA.[306]

VI. CONCLUSION

In the nearly one century since the NFA's enactment, Congress has rarely expanded or removed the firearms subject to its scope. Attorney General Homer Cummings' dream of expanding the NFA to include all firearms was futile.[307] Despite the onerous registration requirements,

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rifle/ [https://perma.cc/R5BK-BDSY] ("The weapon's advantages included a high rate of fire, no smoke, relatively low recoil, and less noise than a musket."); *see also* Robert D. Beeman, *New Evidence on the Lewis and Clark Air Rifle*, http://www.beemans.net/lewis-assault-rifle.htm [https://perma.cc/SG92-B74V] (providing further support that Meriwether Lewis carried a Girandoni repeating air rifle).

301 *See Heller*, 554 U.S. at 627 (internal quotations omitted).

302 United States v. Cox, 906 F.3d 1170, 1186 (10th Cir. 2018).

303 *Id.*

304 *Id.* at 1196 (Hartz, J., concurring).

305 *See Sportsmen's Heritage & Recreational Enhancement (SHARE) Act of 2017: Hearing on H.R. 3668 Before the H. Subcomm. on Federal Lands*, 115th Cong. 1 (2017) (testimony of Stephen P. Halbrook).

306 They include S. 401, 118th Cong. (2023) and H.R. 152, 118th Cong. (2023).

307 *Infra* Part IV.E.

registered silencers and short-barreled rifles are in common use.[308] And overall, they figure low in crime data.[309] Their insertion into the NFA appears virtually irrational and almost a mistake.[310] Whether Congress removes silencers from the NFA or the Supreme Court rules short-barreled rifles are protected by the Second Amendment remains to be seen, but their initial inclusion in the NFA should not prevent reconsideration today.

308 *See infra* Part V.A–B.
309 *See infra* Part V.A–B.
310 *See infra* Part IV.C–D.