Herschel Smith Comments on ATF Study on the Importability of Certain Shotguns

1. In the Executive Summary the following statement is made: "The Gun Control Act (GCA) of 1968 generally prohibits the importation of firearms into the United States," and this statement is footnoted to reference Chapter 44, Title 18, United States Code (U.S.C.), at 18 U.S.C. 922(1). This is a material false statement and misrepresentation of the germane law. The GCA creates a framework within which imports of weapons may in fact occur[1], excepting certain firearms such as weapons that are not a so-called "security exemplar."

2. Following immediately after the subject statement above is the following: "However, pursuant to 18 U.S.C. 925(d), the GCA creates four narrow categories of firearms that the Attorney General must authorize for importation." This statement continues the misrepresentation begun in the statement that precedes it by implying that the AG must restrict all firearms except the subject categories. The GCA and the germane code do not in fact prohibit or require the AG to prevent importation of firearms generally, and 18 U.S.C. 925(d) is seen as a restriction on the authority of the AG (by stipulating categories over which he has no authority) rather than outlining the only categories of firearms that are allowed for importation (which is the view taken by authors of this study).

3. In the third paragraph of the Executive Summary, the study is framed as a continuation of the importability study conducted for so-called semiautomatic assault weapons. But there was a sunset provision for this ban, and at 0001 hours on September 13, 2004, this ban expired and those particular provisions of the law ceased to apply. Accordingly, in order to prevent the executive branch of our government from pre-empting or circumventing the authority of the U.S. Congress to promulgate law for the United States, action associated with a ban on any shotguns should be abandoned, especially as it relates to features that were prohibited prior to 2004 and which are now legal. Otherwise, inconsistency is knowingly and intentionally created in regulations for rifles and shotguns because the ATF is operating within the framework of repealed law.

4. At the bottom of page iii and going to page iv, the following statements are made: "The working group agreed with the previous studies in that the activity known as "plinking" is "primarily a pastime" and could not be considered a recognized sport for the purposes of importation. Because almost any firearm can be used in that activity, such a broad reading of "sporting purpose" would be contrary to the congressional intent in enacting section 925(d)(3). For these reasons, the working group recommends that plinking not be considered a sporting purpose." In making these statements authors have carefully laid a logical trap and sprung that trap themselves as they clumsily stumbled headlong into it.

   The basic argument for not considering "plinking" a sport is that almost any firearm can be used for that activity. But in fact, almost any firearm can be used for other sporting

[1] See 18 U.S.C. 922 and U.S. Department of Justice, ATF, Federal Firearms Regulations Reference Guide, 2005, URL → http://www.atf.gov/publications/download/p/atf-p-5300-4.pdf. There is detailed regulatory framework set in place in the germane sections of the code within which licensure as a firearms importer can occur.

activities such as hunting. Deer can be hunted with shotguns, rifles or bow and arrow. I have seen feral hogs killed with .22 WMR ammunition fired from a handgun. Similarly, turkey can be hunted with almost any firearm (while some choices of firearm might be more efficient than others). I have seen deer killed with .308 ammunition fired from a bolt action rifle, and from 5.56 mm ammunition fired from (what the ATF would categorize as) an assault style weapon due to the pistol and forend grips and telescoping stock. Authors' rejection of "plinking" as a recognized sport is arbitrary and illogical based on their reasoning that "almost any firearm can be used in that activity." Almost any firearm can be used for most "sporting purposes" as well.

5. In the statement cited above, inferring congressional intent is fraught with difficulties and usually not advisable in deliberative bodies. Rules for debate (and subsequent statutory interpretation) generally forbid inferring intent or state of mind and focus instead on specific wording.[2]

6. In the section entitled "Firearms Features" on page iv, there is a long list of features that are deemed to be "not particularly suitable or readily adaptable for sporting purposes." This list includes things like rail systems, light enhancing devices, telescoping stocks, magazines over five rounds, "forward pistol grips," etc. This list is arbitrary, and furthermore it is a demonstrably material false statement that these features are not readily adaptable for sporting purposes.

   Ask any skeet shooter if s/he enjoys stopping every five shells and the answer makes for easy dismissal of authors' objections to these features on firearms. Another example might be feral hog hunting, which usually occurs at night since these are nocturnal creatures. Feral hogs are destroying the American landscape, causing many farmers in the American South to go out of business, attacking household pets and even humans. According to NFS and game control experts, they are multiplying more quickly than can be accommodated by lethal removal. Not only is feral hog hunting a sport involving guides and businesses specifically for that purpose, it may be necessary for lethal removal to be increased by an order of magnitude to save the American farmer.[3] Nocturnal hunting requires enhanced or tactical lights on Picatinny or Weaver rail systems, and hunting feral hogs might require high capacity magazines. Finally, note that some shooters have medical problems such as arthritis. Pistol and forend grips used for any sport and with any weapon can not only make the weapon less painful to use, it can make the difference between whether the shooter can engage in the sport at all. So with three examples (skeet shooting, feral hog hunting and medical problems) it has been demonstrated that the list of firearms features supplied by authors as not adaptable for sporting make the firearms more adaptable for sporting, and it is the proposed ATF regulations that are **directly contrary to the practice of sporting**. Many more such examples could be supplied.

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[2] See URL → http://sixthformlaw.info/02_cases/mod2/cases_stat_interp.htm#Black-Clawson%20International%20Ltd%20v%20Papierwerke%20Waldhof-Aschaffenberg%20AG%20[1975]%20HL, accessed 4/29/2011.

[3] See Ian Frazier, Hogs Wild, http://www.wesjones.com/hogswild.htm, accessed 4/29/2011.

7. On page 1 it is stated that "Shotguns are traditional hunting firearms and, in the past, have been referred to as bird guns or "fowling" pieces. Such a narrow categorization of the shotgun is arbitrary and clearly incorrect when compared with routine practice in the United States. Shotguns are used extensively for home defense, and ATF doesn't have the authority to regulate the importation of such when the intended use is for home defense. Furthermore, the list of firearms features referred to previously (e.g., tactical lights, forend grips, etc.) are useful and in some cases necessary for employment of a firearm for home defense (**once again demonstrating the arbitrariness of the list and uninformed nature of the study**). It is illogical for a citizen to able to own an assault rifle for home defense with a rail system, tactical light, high capacity magazine and forend grip, as do I, but then be prohibited from owning a shotgun outfitted the same way.[4]

8. At the bottom of page 1 authors again repeat the material false statement that "The GCA generally prohibits the importation of firearms into the United States."

9. On page 3 the following statements are made: "On December 10, 1968, the Alcohol and Tobacco Division of the IRS (predecessor to the ATF) convened a "Firearm Advisory Panel" to assist with defining "sporting purposes" as utilized in the GCA. This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel generally agreed that firearms designed and intended for hunting and organized competitive target shooting would fall into the sporting purpose criteria. It was also the consensus that the activity of "plinking" was primarily a pastime and therefore would not qualify."

   This is clearly an appeal to authority by authors. But it is customary in any study or legal or scholarly work to supply names, biographies, curriculum vita, or other such information for the reader to judge neutrality and qualifications. No such list is given, and thus the appeal to authority fails. Readers are also not able to judge whether these so-called "experts" knew to what end and purpose their work was going to be put or whether they agreed with the results of the subject study.

   Furthermore, the category "competitive shooting" (*authors' category*) is interesting in this context, and once again shows the uninformed and dated nature of the study. Features such as forend grips and collapsible stocks would be prohibited on imported shotguns under this proposed rule, but firearms used for competitive shooting would be allowed because that is a sporting event. It is clear that authors are not current or informed on competitive shooting events, as a quick perusal of such would show that

[4] In order to address the certain objections, an AR style weapon is ideal for home defense. It's tactical light can be intimidating at night, possibly avoiding the necessity to fire, it's forend grip makes for ease of employment, it's high capacity magazine ensures the capability of dealing with multiple intruders, it's collapsible stock creates ease of maneuver from room to room, and it's smaller caliber ammunition (5.56 mm) causes bullet yaw upon impact and thus lethality if a shot does have to occur. The ATF doesn't have the authority under the constitution to prohibit me from having such a weapon for home defense, any more than it has the authority to prohibit me from owning a shotgun outfitted the same way.

events such as the Saiga 12 shotgun competitions employ forend grips and collapsible stocks. Thus authors' entire paragraph is contradictory.

10. At the bottom of page 3 the following statement is made: "In both 1989 and 1998, ATF was concerned that certain semiautomatic assault weapons had been approved for importation even though they did not satisfy the sporting purposes test." It is a material false assertion to say that assault weapons cannot be used for sporting. I have seen large deer killed (with an ethical shot) using an AR style weapon employing Remington .223 pointed soft point (PSP) ammunition, employing a collapsible stock and pistol and forend grips. Authors' knowledge is dated and the categorization is arbitrary.

11. On page 4 the following statements are made: "The 1989 study then examined the scope of "sporting purposes" as used in the statute. The study noted that "[t]he broadest possible interpretation could take in virtually any lawful activity or competition which any person or groups of persons might undertake. Under this interpretation, any rifle could meet the "sporting purposes" test. The 1989 study concluded that a broad interpretation would render the statute useless."

    Wrapped up in this paragraph we have not only an amusing logical blunder but also the real crux of the problem. Authors have presupposed the answer (so-called circular reasoning) at which they must arrive, i.e., *the statute must remain useful*. Thus, all interpretations by ATF are biased to yield that result. It is not the responsibility of the ATF nor is it within the purview of their authority to ensure the continued usefulness of a statute, if in fact it is rendered useless by advances, common practices, evolution in sporting, or lack of wise crafting of the statute (such as the fact that nowhere in this discussion of "sporting purposes" is there any latitude given for personal protection and home defense under the second amendment to the constitution of the United States). This single paragraph renders the study itself as useless as the statute has become.

12. At the bottom of page 4 there is yet another reference to the import of assault rifles and the concern expressed by certain members of Congress. Once again, the assault weapon ban expired and the provisions of that law no longer apply. As such, all references to it or firearms features outlined in said ban do not apply to shotguns or any other weapon. Authors are again demonstrating the dated nature of their information and perspective.

13. On page 5 the following statement is made: "These features (editorial note: referring to certain features previously found only on rifles) are typically used by military or law enforcement personnel and provide little or no advantage to sportsmen."

    This is a material false statement. I have already supplied three contrary examples (i.e., skeet shooters, feral hog hunters and shooters with medical problems such as arthritis). It only takes a single contrary example to show the statement to be false, and I have supplied three (and could supply many more).

14. On page 6 authors assert that they knew that the definition of sporting activities could evolve over time and that they considered "a broad range of shooting activities." Authors

might have considered such, but only for the purpose of excluding them from said categories.

15. As if to bolster authors' position to exclude certain firearms and certain features, they quote Senator Dodd who said: "Here again I would have to say that if a military weapon is used in a special sporting event, it does not become a sporting weapon. It is a military weapon used in a special sporting event … As I said previously the language says no firearms will be admitted into this country unless they are genuine sporting weapons."

    This odd appeal to the Senator's authority fails because it cites language of a single Senator in deliberation and [possibly] explains his vote. It does not explain the votes of other members of Congress or their intent or state of mind. Senator Dodd isn't the authority to which we must refer. The wording of the law is. We have already discussed parliamentary rules and the inappropriateness of reference to state of mind versus citations of law.

16. On page 7 the problem of circular reasoning appears again. Authors state "Recognition of plinking as a sporting purpose would effectively nullify section 925(d)(3) because it may be argued that any shotgun is particularly suitable for or readily adaptable to this activity." But as we have previously demonstrated (in comment 4), authors are on the horns of a dilemma. They take the position that any weapon may be used for plinking (apparently assuming that any weapon may not be used for other so-called traditional sports), but we have seen that any weapon may also be used for other so-called traditional sports such as hunting and competitive shooting. Authors have fabricated arbitrary categories in order to arrive at pre-determined conclusions, one intent of which is to ensure the continued usefulness of the statute (which is outside the purview of the authority of the ATF).

17. Authors openly demonstrate the incompatibility of this study and proposed rules with the Second Amendment to the constitution of the United States with the following paragraph on page 10:

    > … the working group determined that magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications. The majority of state hunting laws restrict shotguns to no more than 5 rounds. This is justifiable because those engaged in sports shooting events are not engaging in potentially hostile or confrontational situations, and therefore do not require the large amount of immediately available ammunition, as do military service members and police officers.

    This paragraph displays a deplorable lack of knowledge and judgment. First, state laws do not limit the number of shells in shotguns. State laws generally limit the number of shells that a shotgun is capable of holding *while engaged in the activity of hunting*, and this is both a significant and material distinction in the argument. Authors wish to use state hunting laws which only apply during hunting activities to dictate allowable shotgun

design. State hunting laws were crafted for a different reason than authors assert and are not germane. Thus the appeal to state laws fails.

Furthermore, the limit is usually associated with sportsmanlike behavior when hunting, not whether the shooter will be in a confrontational situation. But regarding engaging in potentially hostile or confrontational situation like military service members or police officers, the authors didn't consider self and home defense as was their responsibility and public's constitutional right. Authors should have considered Ramon Castillo from Houston, Texas, in defense of his and his wife's life from multiple intruders. Regarding the need for larger capacity firearms, according to police: "Investigators said so many shots were fired inside the jewelry shop in a two- or three-minute span that they could not estimate the number of rounds. "We've got bullet fragments all over the place, casings all over the place, shotgun slugs all over the place, so it's really hard to determine at this point how many rounds were actually fired – but quite a few."[5]

For authors to ignore the necessity for high capacity ammunition magazines in the role of self defense is cold and callous, and borders on being morally reprehensible. It also clearly demonstrates a willingness to promulgate regulation without reference to constitutional rights. This is illegal and dangerous precedent for a republic.

In general I find that the study [a] appeals to authority without citation of those authorities, [b] engages in circular reasoning in that conclusions are fixed at the outcome of the discussion (i.e., ensuring the continued usefulness of a particular statute), [c] is dated and out of touch with current practice, [d] ignores legitimate uses of certain weapon features for various sporting functions and activities, [e] fabricates arbitrary categories, [f] makes what can be demonstrated to be material false assertions. As such, this study cannot be used for promulgating regulation without damage being done to the constitutional rights of citizens of the United States.

A copy of these comments will be downloadable at http://www.captainsjournal.com/ in a featured article for several weeks and will be within category:

http://www.captainsjournal.com/category/second-amendment/

[5] See URL → http://www.newsnet14.com/2010/12/19/texas-store-owner-fights-back-kills-3-robbers-in-jewelry-store-shootout/, accessed 4/29/2011.