THE FIREARMS OWNERS' PROTECTION ACT: A HISTORICAL AND LEGAL PERSPECTIVE

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[***Ed. note***: this article has been cited as authority in *Staples v. United States*, 62 USLW 4379, 4387 n.4 (U.S. Sup. Ct. 1994) (Stevens, J., dissenting); *U.S. v. Sherbondy*, 865 F.2d 996, 1002 (9th Cir. 1988); *U.S. v. Cassidy*, 899 F.2d 543, 546 n.8 (6th Cir. 1990); *United States v. Otiaba*, 862 F.Supp. 251, 253 (D.N.D. 1994) (declining to follow circuit decision "as that court did not have available to it Hardy's analysis of the legislative history"); *Cisewski v. Dep't of Treasury*, 773 F.Supp. 148, 150 (E.D. Wisc. 1991); and *In re Two Seized Firearms*, 127 N.J. 84, 602 A.2d 728, 731 (1992).]

Summary: *The 1986 Amendments to the Gun Control Act were the result of a nearly-unparalleled legislative battle. A thorough understanding of the amendments is critical to a comprehension of Federal firearms laws as they now exist, since they effectively overruled decades of caselaw which construed the 1968 Act. Among the changes were elevations of the intent which must be proven to establish a violation (pp. 646 ff.), a narrowed definition of who must obtain a dealer's license (pp. 628 ff.), restrictions on unreasonable search, seizure, and forfeiture (pp. 653 ff.), and provisions for recovery of attorney's fees in civil and even criminal cases (pp. 662 ff.).*

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Introduction

On May 19, 1986, the Firearms Owners' Protection Act (FOPA) was signed into law. [1] The first comprehensive redraft of the federal firearm laws since 1968, [2] FOPA was predictably lauded as "necessary to restore fundamental fairness and clarity to our Nation's firearms laws" [3] and damned as an "almost monstrous idea" and a "national disgrace." [4] The controversy was not limited to the rhetorical. Seven years passed between FOPA's introduction and its Senate

vote; [5] the House vote required passage of a discharge petition [6] --only the eighth to succeed in the last twenty-six years. [7]

The controversy surrounding FOPA's genesis is commensurate to the legal impact of its provisions. FOPA effectively overrules six decisions of the United States Supreme Court, [8] ***586** moots what would have become a seventh, [9] and negates perhaps one-third of the total caselaw construing the Gun Control ***587** Act of 1968. [10] FOPA's impact, however, is not limited to the Gun Control Act, nor even to federal statutes. By expressly exempting interstate transportation of firearms from the reach of many state firearm laws, [11] it affects state proceedings as well. A detailed comprehension of FOPA is thus essential to an understanding of both federal and state firearm laws.

***588** Unfortunately, such a comprehension is not easily achieved. FOPA reflects not a simple, single legislative decision, but a complex series of compromises, many of which are only partially reflected in the record. [12] Even where the record is complete, it is rarely clear. The House bill that ultimately became FOPA is supported by a report, but the report explains not why FOPA should have been adopted, but rather, why it ought to have been *rejected*. [13] The House bill's predecessor and Senate counterpart, S. 49, was never referred to committee and went instead to the floor with no report whatsoever. [14] S. 49's ancestors were the subject of two reports [15] which, unfortunately, are in hopeless conflict in certain aspects. [16] To add to its original complexity, FOPA was, prior to its effective date, amended by a second enactment [17] which was in turn modified by a concurrent resolution. [18] The need for a comprehensive review of this ***589** controversial and convoluted legislation is thus clear. [19] The statute's core can be found in the real consistencies obscured by seeming chaos.

The purpose of this Article is to examine the Firearms Owners' Protection Act in both historic and legal perspectives. Accordingly, the Article first examines the framework of federal firearm legislation as it evolved prior to FOPA. Then, the seven-year evolution of FOPA itself is analyzed. Finally, this Article evaluates the nature of the more significant changes embodied in this controversial enactment.

I. Background to FOPA: Pre-1986 Federal Firearms Laws

A. Nationalization of Firearm Regulation: The National Firearms Act of 1934 and Federal Firearms Act of 1938

Firearms and weapons control statutes are by no means a legislative novelty. The first American handgun ban was enacted in 1837, [20] restrictions on sale or carrying of handguns were commonplace by the turn of the century, [21] and the National Conference of Commissioners on Uniform State Laws spent seven years in the 1920s preparing a uniform state act on the subject. [22] Nonetheless, prior to 1934, the sole federal ***590** statute on the subject was a 1927 ban on use of the mails to ship firearms concealable on the person. [23]

The late 1920s and early 1930s brought, however, a growing perception of crime both as a major problem and as a national one. [24] Public officials did much to support the perception; Attorney General Homer Cummings, for instance, publicly estimated that America was being terrorized by

half a million armed thugs, a force larger than the contemporary United States Army. [25] The mobility of the automobile enabled criminals, in those pre-police radio days, to move between jurisdictions before police units could generally be alerted; such criminal gangs found the submachinegun (a fully automatic, shoulder-fired weapon utilizing automatic pistol cartridges) and sawed-off shotgun deadly for close-range fighting. The resulting quest for law enforcement solutions approached the incredible. At one 1933 hearing, for instance, a Senate subcommittee heard, with no recorded skepticism, calls for a ban on felons riding in automobiles, universal fingerprinting of all citizens, mandatory "papers" for interstate travel, and enactment of national vagrancy laws authorizing warrantless search and arrest of anyone "reputed" to "habitually violate" the laws (with law enforcement officials to testify as to the arrestee's reputation). [26] On a more practical plane, ***591** the Department of Justice proposed what became the National Firearms Act of 1934. The constitutional basis for federal intervention, very much an issue in 1934, [27] was resolved by patterning the firearm legislation after the Narcotic Drug Act of 1914. [28] The Narcotic Drug Act used the taxing power to support distributor licensing, requirements that sales be accompanied by a "written order" preserved by the seller and subject to inspection, and a ban on interstate shipment by unlicensed persons. As the Narcotic Drug Act had survived legal challenge, albeit narrowly, [29] it was consciously employed as a model for the new firearm legislation. [30]

What became the National Firearms Act was introduced as H.R. 9066. [31] H.R. 9066 would have applied to any "firearm," ***592** a term defined 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." [32] "Machine gun" was in turn defined as any weapon capable of firing twelve or more shots without manual reloading. [33] All persons engaged in the business of selling such "firearms" were to register with the Collector of Internal Revenue; all sales were subject to a special tax and were to be made pursuant to a written order form. Absent payment of the tax, a firearm could not be shipped in interstate commerce; moreover, knowing possession of a firearm transferred in violation of these requirements was itself a crime.

During committee consideration, a substitute bill was prepared by the Justice Department. The substitute sought to fill a major gap in the original bill, which (consistent with its excise theme) would have applied only to firearms sold after its enactment. [34] The substitute required existing "firearm" owners to register their arms within sixty days, except "with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act." [35] This would still be premised on the taxing power: "it is important to be able to identify arms to see which possessors have paid taxes and which firearms have been taxed and which have not." [36] The substitute also refined the definition of "firearm" to exclude .22 caliber pistols and to include rifles and shotguns alike if their barrels were under eighteen inches.

When ultimately reported out as H.R. 9741, the substitute embodied two additional and significant changes to the definition ***593** of "firearm." [37] First, pistols and revolvers were omitted, so that the bill applied to machineguns, sawed-off shotguns and rifles, silencers, and concealable firearms *other than* pistols and revolvers. [38] Second, the definition of "machinegun" was changed to cover firearms that fired more than once for each pull of the trigger, regardless of how many shots they might fire before reloading was necessary. The

transfer tax on machineguns was fixed at $200, then about a 100% excise tax. [39] While the Attorney General described the amended bill as little more than "a Federal Machine-gun act," [40] it had little difficulty securing enactment as the National Firearms Act of 1934. [41]

The National Firearms Act delayed, rather than defused, the drive for federal regulation of ordinary firearms and ammunition. In the Seventy-third Congress, Senator Royal S. Copeland introduced a bill proposing a "Federal Firearms Act." [42] The bill, which had a number of doubtful features, [43] died in committee. Copeland permitted an ad hoc committee of staff, National Rifle Association representatives, and Department of Justice representatives to prepare an improved draft. [44] Early in the Seventy-fourth Congress, Copeland ***594** (noting, "I am always amazed when people agree" [45]) introduced the result as S. 3. [46]

S. 3 was based squarely upon the interstate commerce clause. [47] It would have required any "dealer" (defined as "any person engaged in the business of selling firearms" or repairing them) to obtain a one dollar license from the Secretary of Commerce before transporting, shipping, or receiving any firearm in interstate or foreign commerce. The license could be revoked upon criminal conviction for any violation of the bill. Licensed dealers were required to keep records of sales and were forbidden to ship firearms in interstate commerce to persons under indictment for or convicted of a crime of violence, or who lacked any permit required by the laws of the state of destination. S. 3 would also have repealed the National Firearms Act of 1934, substituting in its stead a general ban on interstate shipment or transportation of machineguns. The Department of Justice objected to this last provision, and it was deleted in committee. [48]

S. 3 passed the Senate, after floor amendments whose primary effect was to require proof of a "knowing" state of mind. [49] It died in the House with the adjournment of the Seventy-fourth Congress. Copeland reintroduced the measure, incorporating the Senate floor amendments, in the Seventy-fifth Congress, once again as S. 3. [50] After assurances that the measure was supported by firearms groups, Copeland secured speedy passage by voice vote. [51] The House passed S. 3 with amendments, primarily changing the administering agency from Commerce to Treasury. [52] The Senate concurred in the House amendments, and the Federal Firearms Act of 1938 became law. [53] The 1934 and 1938 Acts ***595** comprised the substance of federal firearms law for the next three decades.

B. Expansion of National Firearms Laws: The Gun Control Act of 1968

The National Firearms Act and Federal Firearms Act formed the backdrop for the next major federal firearms legislation, the two statutes known collectively as the Gun Control Act of 1968. [54] As is often the case, the dry legal history of that Act covers a complex legislative reality. The byzantine origins of the Gun Control Act are foreshadowed by the career of its prime sponsor, Senator Thomas Dodd. A staunch conservative [55] who kept a pistol in his desk and once tried to carry it onto the Senate floor, [56] Dodd came from a state that was the center of the American firearms industry. [57] In later years, this apparent paradox was explained--and another created--by the revelation that the early forms of the Gun Control Act were drafted with the assistance and encouragement of firearms manufacturers. [58]

***596** In the postwar years, domestic firearms manufacturers encountered heavy competition from home hobbyists who converted inexpensive imported military arms into hunting and target rifles. [59] "Mail order houses" imported such arms for a pittance and resold them to a national market. Domestic arms manufacturers saw their sporting markets undercut and began pressing for protective measures. Protests to the State and Defense Departments over issuance of surplus import licenses yielded little result. [60] The industry then sought a legislative remedy and in 1958 secured passage in the House of a rider to the Mutual Security Act that would have barred virtually all surplus arms imports. [61] The National Rifle Association took issue with the manufacturers and strongly opposed the amendment. [62] The Senate, citing possible violations of the General Agreement on Trades and Tariffs, limited the restriction to reimportations of American arms, [63] a restriction which prevailed in conference. [64]

After this failure, the firearms manufacturers approached Senator Dodd, with arguments and suitable tribute. [65] ***597** Dodd's original effort, S. 1975, was introduced in August 1963 and had extremely limited scope. S. 1975 would have required mail-order purchasers of handguns to provide the seller with notarized affirmations that they met certain age and other requirements. In November and December, Dodd proposed amendments that would have applied to rifles and shotguns as well and would have required certification by the chief law enforcement officer of the purchaser's jurisdiction. [66]

Neither the original bill nor its successors were reported out of committee during the Eighty-ninth Congress. In part, this may have been due to Dodd's dilatory approach to legislation. [67] The Ninetieth Congress was a different story. On the one hand, Dodd was no longer in real control, as censure proceedings steadily undermined his standing. [68] On the other, the Johnson Administration advocated stricter firearms control with increasing vigor. [69] As the session began, Dodd introduced S. 1, which he quickly supplemented with Amendment 90. [70] S. 1-90 would have supplanted the Federal Firearms Act: since S. 1-90 essentially laid the foundations of the Gun Control Act, its major provisions merit examination.

Prohibited Persons

S. 1-90 would have barred firearms receipt by fugitives ***598** from justice and persons under indictment for, or convicted of, a crime punishable by imprisonment exceeding one year, a term defined to exclude antitrust, unfair trade, and similar infractions. These provisions were, in the main, borrowed from the Federal Firearms Act, which, however, applied this bar only to sales in interstate commerce. [71] S. 1-90 would have allowed persons convicted of such violations--*other than* violations of the federal firearms laws--to apply for an administrative "relief from disabilities," by which Treasury, upon proof of good character, might restore the right to own or deal in firearms. The latter provision was taken from a 1965 amendment to the Federal Firearms Act, [72] sponsored by Dodd to deal with the problems of a firearms manufacturer. [73] Additionally, under S. 1-90, dealers would have been barred from selling rifles or shotguns to persons under eighteen years of age, or any other firearms to persons under twenty-one years of age, and they would have been generally forbidden to sell any firearm to those whom they knew or should have known "could not lawfully purchase or possess in accord with applicable laws, regulations or ordinances of the State" or locality in which the transferee resided. [74]

Dealer Licensing

S. 1-90 would have required persons "engaged in the business" of firearms dealing to obtain licenses. This was an expansion of the Federal Firearms Act, which required licensing only if the person "engaged in the business" and ***599** shipped or received firearms in interstate commerce. While the Federal Firearms Act licenses were issued upon request, and revoked only upon criminal conviction, S. 1-90 provided that the Secretary "may" issue such licenses and *must* deny them if the applicant was "by reason of his business experience, financial standing, or trade connections, not likely to commence business operations." Persons who had willfully violated the Act or who lacked "business premises"' were likewise denied a license. Dealers were obliged to maintain records fixed by regulation, and their premises were open to inspection at will during business hours.

Interstate Sales

The Federal Firearms Act barred interstate sales between nonprohibited persons only when the buyer's state required, and the buyer lacked, a license to purchase. S. 1-90 drew a line between "long arms" (shotguns and rifles) and other firearms (primarily handguns). Persons who were not licensed dealers could purchase handguns only in their state of residence. Residents of different states could sell each other rifles and shotguns so long as the receipt did not violate state or local law at the buyer's place of residence. Dealer "mail order sales" of any firearms were barred by a provision barring a licensee from shipping firearms or ammunition to a nonlicensee in interstate commerce.

National Firearms Act Weapons

The National Firearms Act required licensing of all machineguns, silencers, and short-barrelled rifles and shotguns. S. 1-90 would have imposed similar restrictions on "destructive devices," including bombs, grenades, and firearms with a bore over .50 caliber. Sales of National Firearms Act weapons and destructive devices by a licensed dealer required an affidavit of approval from the chief law enforcement officer of the purchaser's jurisdiction, and interstate transportation of such arms would have required approval by the Secretary.

Importation

S. 1-90 would have barred firearms imports subject to a few exceptions, the most important being rifles, shotguns, ***600** and nonmilitary handguns "generally recognized as suitable for or readily adaptable to sporting purposes."

The day before S. 1-90's introduction, Senator McClellan introduced S. 917, "The Safe Streets and Crime Control Act of 1967." [75] In committee, the bill was renamed "The Omnibus Crime Control and Safe Streets Act of 1967" and a new Title IV, dealing with firearms, was added. [76] Title IV tracked S. 1-90 in all but a few details; it did not, for example, prohibit mail order sale of rifles and shotguns, nor place minimum age limits on their purchasers. After lengthy debate, the Senate passed S. 917 with several amendments. One amended the exemption for "antique" firearms, which were not subject to the Act, advancing the cut-off date to 1898 from the

committee's 1870 cut-off. [77] A second changed the prohibition on dealer's sales in violation of state or local law or ordinance. Under the amendment, the dealer's obligation was to avoid sales barred by state law or a "published ordinance," the latter being one determined by the Secretary of the Treasury (the Secretary) to be relevant to purposes of the Act and so published in the *Federal Register*. [78]

A third amendment was more significant and, regrettably, less well thought out. [79] It amended S. 917 to add a new title VII, which prohibited certain persons not only from receiving, but also from possessing firearms. [80] The list of prohibited persons did not, however, tally with that in Title IV. To Title IV's list of convicted felons and fugitives from justice, Title VII added persons given a dishonorable discharge [81] by the military, those judicially adjudged "mentally incompetent," those who had renounced U.S. citizenship, those who were aliens unlawfully within the U.S., or those who were acting in the course of employment of any of the other classes. Nor did the discrepancy end there: Title IV had defined a felon as one convicted of a crime punishable by more than one year's imprisonment, excluding certain business-related offenses, while Title VII simply used the term "felony." Title IV excepted from this class a person given "relief from disability"; Title VII excepted a person pardoned and "expressly authorized" to own firearms. [82] The Senate substituted S. 917, with these amendments, for the House-passed version of the bill, [83] and the House accepted the Senate version. [84] Thus did Titles IV and VII become law. [85]

Even before their enactment, however, it become apparent that these would not be the only gun controls enacted in 1968. During the Senate consideration, the United States Supreme Court struck down the machinegun registration provisions of the National Firearms Act, necessitating a redrafting of that statute. [86] In April 1968, while S. 917 was in Senate committee consideration, Rev. Martin Luther King ***602** was murdered by a sniper. The day before the House vote, Robert F. Kennedy was killed. The day of the House vote, President Johnson publicly denounced S. 917 as a "half-way measure" that "leaves the deadly commerce in lethal shotguns and rifles without effective control," [87] and the chairman of the House Judiciary Committee announced plans to introduce a new bill. [88]

The new bill, H.R. 17735, was indeed introduced on June 10, 1968; a move to report it out of Judiciary Committee the following day failed on a tie vote. [89] As originally introduced, the main change worked by the bill would have been to ban sales of rifles and shotguns to nonresidents of the seller's state, to eliminate their sale by mail order and impose a minimum age of eighteen for their purchase from a dealer, to increase controls on handgun ammunition transfers and sales, and to redraft the National Firearms Act to avoid the fifth amendment flaw. [90] Breaking the tie in committee required addition of several amendments. Chief among these were two narrow exemptions from the interstate transfer ban, [91] and a major narrowing of the Secretary's power to deny a dealer's license. [92] Under the latter amendment, the Secretary was *required*, not merely authorized, to license a qualified individual within forty-five days of application; any denial was subject to de novo review in district court; and the applicant was no longer required to demonstrate trade connections proving his entrance into business within the license period. [93] The committee amendments would also have expanded Title IV's list of "prohibited persons" to include any person adjudicated "a mental defective" or judicially committed to a mental institution, and persons unlawfully using or addicted to certain drugs. [94]

Unfortunately, no effort was made to coordinate these ***603** with the list of Title VII "prohibited persons." [95] On the House floor, the committee amendments were immediately accepted by voice vote without debate. [96] Over the course of the floor debates, other amendments were adopted: a class of "licensed collectors" was added, with power to purchase curio and relic firearms interstate; [97] importation of all military surplus arms, not just handguns, was banned; [98] an additional penalty (mandatory only upon second offense) for use or illegal carrying of a gun in a federal crime was added; [99] and Title IV's reference to "published ordinances," dropped by the committee in favor of "local law," was restored. [100]

The Senate substituted the text of a similar bill, S. 3633, [101] but the House bill prevailed in conference. [102] The ***603** resulting legislation, under the now-familiar name of "The Gun Control Act of 1968," supplanted both the earlier enactment of Titles IV and VII and large portions of the National Firearms Act. [103]

II. Enactment of the Firearms Owners' Protection Act

One of the last House amendments to the Gun Control Act added section 101, declaring that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to the acquisition, possession, or use of firearms." [104] Enacting FOPA nearly two decades later, the Congress expressly found that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act." [105] Between the two statements lay eighteen years of experience and a seven-year legislative gestation period whose intricacies rivaled those of the Gun Control Act itself.

Enforcement of the Gun Control Act was initially delegated to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which had previously enforced the National Firearms Act and Federal Firearms Act. [106] In 1969, this agency became the Alcohol, Tobacco, and Firearms Division; three years later it achieved full bureau status as the Bureau of Alcohol, Tobacco and Firearms (BATF). [107] To the stresses of growth was added the virtual collapse of BATF's traditional duties of enforcing the alcohol taxes. [108] Almost forty percent of BATF's manpower ***605** was directed at a law enforcement problem that had all but vanished. [109] The agency response was a series of heavily publicized projects to demonstrate a potential for firearms operations. [110] Agents and supervisors were implicitly or explicitly assigned quotas and older agents were increasingly replaced with younger, more zealous operatives. [111] Pressure for results, coupled with extremely loose control, [112] led to stringent enforcement of the Gun Control Act's provisions. [113]

This was hardly the first time a statute with broad enforcement powers had been pushed to the limit but BATF's victims were typically appealing citizens [114] and were ***606** represented by relatively well-connected organizations. [115] Even so, the opening skirmish came not over law enforcement, but over the Gun Control Act's creation of a secretarial power to require submission of reports by licensees. BATF's attempt to use this power to require manufacturers, importers, and wholesalers to report firearm transfers for agency data processing [116] led to a credibility-damaging legislative fight and prohibitory riders on Treasury appropriations. [117]

The serious conflict soon followed. Beginning in early 1979, Senate hearings publicized a number of cases of serious abuses of enforcement powers. [118] This documentation ***607** was later cited as the empirical foundation of FOPA. [119] Within months of the first hearing, the earliest versions of FOPA were introduced in both House and Senate. [120] These versions proposed extensive amendment of the Gun Control Act. Their main provisions may be summarized as follows:

Dealer Licensing

A dealer's license would be required of anyone "whose time, attention and labor is occupied by dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of an inventory or [sic] firearms." [121] Persons making occasional sales or selling all or part of a "personal collection" were expressly excluded.

Interstate Sales

Sales to nonresidents by dealers and nondealers alike would be allowed unless receipt of the firearm by the purchaser "would be in violation of any published ordinance or law of the state or locality where such person resides." [122]

Prohibited Persons

Inconsistencies between Title VII and Title IV ***608** prohibitions would be resolved by repealing Title VII and merging its prohibited person classes with those of Title IV. The result would be a single set of provisions barring possession or receipt by, and sale or transfer (by dealer and nondealer alike) to a list of prohibited classes. The bar on possession by felons would be narrowed to those convicted of certain "disabling crimes" defined as violations of twenty-three chapters of the *United States Code* "or any similar crime." Persons under indictment were not included within the proscription, nor were persons with convictions "set aside or expunged."

Enforcement

Criminal prosecution would require proof of a willful violation. Forfeiture would require conviction; any verdict other than guilty, or failure to prosecute within 120 days of seizure, would require return of the seized property. Only firearms named and "individually identified" as involved in or used in (not "intended" to be used in) a willful violation would be subject to forfeiture. License revocation would be barred if criminal charges were filed and the licensee was not convicted. Attorneys' fees "shall" be allowed to victorious claimants in forfeiture actions and "may" be allowed in other actions in which the court finds charges were without foundation, or brought vexatiously, frivolously or in bad faith.

Records

Warrantless inspection of the premises of a licensee would be allowed only when reasonable grounds existed to believe evidence of a violation of the chapter might be found.

Rulemaking

A minimum of ninety days' public notice would be required; "One-House Veto" provisions were established. No rule could require records to be transferred to a federal or state facility, or establish a system of firearm registration.

Mandatory Sentencing

The Gun Control Act's additional sentence (technically, an additional offense) for use or unlawful carrying of a firearm ***609** in a federal crime would be made mandatory on first offense, rather than on second.

Interstate Transportation

Any state law or regulation prohibiting the transfer of a firearm in interstate commerce through the state "provided that the firearm is unloaded and not readily accessible" [123] would be rendered null and void.

These original forms of FOPA saw no legislative action in the Ninety-sixth Congress. A successor, S. 1030, was introduced in the Ninety-seventh Congress. [124] S. 1030 as introduced contained several significant changes from S. 1862. First, S. 1030 added a prefatory statement of purpose, citing the objective of protecting individual rights under the second, fourth, fifth, ninth and tenth amendments along with rights granted under the Privacy Act, and adding a finding that the purposes of the Gun Control Act had been thwarted by harassment of law-abiding citizens. [125] A second, substantive change completely restructured treatment of "prohibited persons." S. 1862's attempt to define specific "disabling" offenses was dropped, and the Gun Control Act's broad inclusion of nonbusiness felonies was retained, together with its bar on receipt (but not possession) by those under indictment. [126] In exchange, the scope of administrative relief from disability was expanded. Such relief was made available to any "prohibited person," thus making it available to those barred by reasons other than a conviction and to those whose convictions were for Gun Control Act and National Firearms Act violations. The Secretary was to grant such relief, unless his investigation indicated that the person was likely to violate the law or endanger the ***610** public safety, and a denial could be reviewed de novo in the district court. [127] A second major change came in the forfeiture section. Criminal conviction would no longer be a prerequisite for forfeiture, but in return forfeitures were limited to willful violations and an acquittal or dismissal of the owner on criminal charges barred forfeiture on those allegations. [128] S. 1030 also added a recognition that a licensed dealer might maintain a firearm collection separate and apart from his inventory. [129] Interstate sales, on the other hand, were required to conform not only with the laws of buyer's place of residence, but also with those of the seller's.

Many of these changes bear the appearance of a *quid pro quo*. This is not without reason; most grew out of the early stages of negotiation between the National Rifle Association (NRA), the main private supporter of the bill, and Treasury Department (Treasury) officials, and were in fact based upon detailed bargaining and exchanges. [130] These meetings continued over the year that passed between S. 1030's introduction and its committee markup.

The Judiciary Committee, following that markup, reported out an amendment by way of substitute which incorporated several amendments negotiated in these meetings. [131] The more important barred mail-order ***611** interstate sales, even if they complied with state law; provided that a dealer making an interstate sale would be presumed to know the laws of the purchaser's jurisdiction; recognized that the dealer's power to "maintain" a private collection also went to "disposing" of it (and in return required that he record sale of any firearm transferred from his inventory into his collection within the preceding year); and allowed license revocation or firearms forfeiture following dismissal of criminal charges (but only if voluntarily dismissed, prior to trial). [132] Other amendments deleted the one-house veto, [133] and removed the de novo aspect of review of a denial of relief from disability, but permitted the court to consider additional evidence if necessary to avoid a miscarriage of justice. A final set of changes allowed certain warrantless inspections of licensee premises, but required not only probable cause but also a magistrate's warrant for the remainder. [134]

S. 1030, as amended, died in the Ninety-seventh Congress. [135] In the Ninety-eighth Congress, the bill was reintroduced as S. 914. [136] Again, the bill was held at full committee; hearings were held in October 1983. [137] After four markup sessions, the bill was extensively amended and reported out in August 1984. [138] When the majority leader ***612** failed to schedule a floor vote, a version of S. 914 was tacked onto a vital appropriations resolution over his objection. [139] Where exhortation failed, extortion succeeded. The amendment was tabled only after a commitment to expedite the bill in the next Congress. [140] The following January a substitute bill, S. 49, was introduced by the new majority leader, Senator Robert Dole, and held at the chair. [141] On July 9, after several amendments and one day of debate, S. 49 passed the Senate by a 79-15 vote. [142]

The official votes and amendments inevitably shed some light on the structured chaos of the legislative process. They fail, however, to illuminate the real process that governed the evolution of the bill. To understand that process requires us to further trace the course of the negotiations between the Treasury Department and the National Rifle Association. These negotiations had, as noted above, affected the composition of S. 1030. They became the crucial determinant of the composition of S. 914 and S. 49.

The most important of these negotiations occurred during January and February of 1983, as Treasury and NRA exchanged drafts and comment. [143] The results of these negotiations formed the basis of the Reagan Administration ***613** amendments proposed during the hearings [144] and, thereafter, adopted by the committee. [145] The amendments touched almost every major aspect of the bill:

Dealer Licensing

Treasury had, during the 1981 negotiations, unsuccessfully sought deletion of the word "principal," so that the licensing obligations would extend to anyone who sold firearms with *a purpose* of profit and livelihood. [146] In 1983, Treasury renewed its quest, arguing that deletion would make "it clear that part-time businesses are included within the definition." [147] In place of this, both parties agreed to accept an added definition of "with the principal objective of livelihood and profit" that made it clear that a preponderant profit motive was necessary, but that

firearm dealing need not be the seller's primary source of income. [148] Treasury's ***614** parallel proposal to change "livelihood and profit" to "livelihood or profit" met with no success. [149] The additional definition was incorporated into the Reagan Administration amendments [150] and into S. 49. [151]

Interstate Transfers

The complex problem of interstate sales was not resolved at the 1981 negotiations. [152] In the 1983 negotiations, Treasury initially sought to allow interstate sales of only rifles and shotguns and only where the purchaser's state had by legislation allowed such purchase. [153] The NRA's counteroffer would have applied this principle to sales by nonlicensees only and maintained the S. 1030 approach for sales by licensed dealers. [154] Ultimately, the Reagan Administration amendments simply allowed only licensees to sell to nonresidents, so long as the sale complied with the laws of both states. [155]

Prohibited Persons

There was no difference of opinion between the parties on the advisability of consolidating all "prohibited persons" classes into a single provision. [156] Some difference did arise over the exception for persons pardoned or whose convictions ***615** had been expunged. This was resolved by adding a proviso that the exception did not apply where the pardon or expungement order provided that the recipient might not own firearms. [157] This provision was incorporated in S. 914 as introduced. [158]

Enforcement

As might be expected, the details of the enforcement powers were extensively discussed during the negotiations. The January 1983 Treasury proposals sought to strike insertion of the word "willfully" in the penalties clause of the bill, noting:

> The requirement that only a willful violation of the Act's provision[s] would be a criminal offense would make knowledge ... of the law an element of the offense. Consequently, this new element would make it difficult, if not impossible, to successfully prosecute any case under the Act. For example, in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act by receiving or possessing a firearm as a felon.... [159]

An apparent deadlock was broken by suggestion that some offenses be made to require proof of a "knowing" state of mind, while others would require proof of a "willful" violation. [160] At the January meeting, it was suggested that violations of 18 U.S.C. sections 922(g), (h), (i) or (j) require only ***615** "knowing" violation: these barred sales to or receipt by prohibited persons and transportation or receipt of stolen firearms. [161] The NRA's explanation, referring to Treasury's January objections, noted:

> [O]bjection was that this would require proof of knowledge of law for offenses such as receipt of stolen guns, possession by felon, etc. This draft requires only "knowing" violation of those sections, and "willful" for the rest. (Sections relating to transportation with intent to use in a crime and use in a federal crime are not affected by this section, 924(a) in any event, since their intent and punishment is separately set out in 924(b) and (c)). [162]

The knowing-willful dichotomy was adopted in Treasury's February 1983 proposal, albeit with a suggestion that the "knowing" category be expanded, [163] and ended in a compromise [164] embodied in the Reagan Administration amendments. [165] As it turned out, Senator McClure, sponsor of S. 914, was less than happy with the Reagan Administration proposals. Concerned that a "knowing" standard might allow prosecution for negligent violations, McClure demanded and received an amendment in committee that expressly precluded prosecution for "simple negligence." [166]

The issue of license revocation or property forfeiture following criminal proceedings proved less complex. As early as the December 1981 meeting, alternative structures had been explored. [167] These were largely incorporated in S. 914 as introduced, alleviating need for their discussion during the 1983 meetings. [168] S. 914's restriction of forfeiture to firearms "involved in or used in," and exclusion of firearms allegedly "intended to be used in," was more difficult to resolve. At length, it was dealt with by requiring that claims of "intent to be used" be proven by clear and convincing evidence. [169] This proposal also became part of the Reagan Administration amendments. [170] Thus, by careful drafting of intermediate positions, it became possible for Treasury and NRA to protect their more vital interests even where those interests appeared most violently at odds.

Records

Resolving the issue of when and on what conditions dealers' records might be inspected without a warrant did not require as much imagination. The NRA's core concern had been to prevent the use of inspections to harass dealers or to drum up technical cases by "fishing expeditions." [171] It was agreed early that inspection without cause might be allowed for inquiries in the course of investigating third ***618** parties or as narrowly limited "courtesy inspections," to point out errors without imposition of sanctions. [172] S. 1030, as reported, incorporated these exceptions, with relevant conditions, and added a third. Warrantless inspection would be allowed: (1) in the course of third party investigations; (2) no more than once every twelve months, upon reasonable notice, with no criminal charges to result, except for sale to a prohibited person; and (3) when necessary for tracing a particular firearm in the course of a bona fide criminal investigation. [173] Subsequently, pointing out that a failure to keep records might make it impossible to show whether purchasers were prohibited persons, Treasury sought clearance under the annual inspection exception to prosecute for willful violations of the recordkeeping requirements. [174] This provision was incorporated in S. 914. [175]

Regulations

Resolution of limitations on the power to require submission of licensee records would seem a simple task. The parties could agree on the substance; NRA wanted a secure bar against any renewal of the 1978 attempt to achieve firearm ***619** registration through this power, or anything vaguely resembling that attempt, while Treasury wanted to preserve its existing regulations. Those regulations required dealers to submit their records if they went out of business, [176] to report sales if requested by the Secretary, [177] and to report any sale of two or more handguns to a single person in a given week. [178] Treasury was not opposed to a ban on registration or quasi-registration that left these regulations intact; NRA was philosophically opposed to the regulations, but recognized the irrationality of tying the bill up with an attack on them. This coincidence of interests proved singularly difficult to put into practice. The barriers were two-fold. The first, and most easily solved, was that any regulations which required submission of records would likely run afoul of section 106's broad bar on gun registration systems. A simple exception could remedy this, and Treasury's January 1983 draft proposed: "Nothing in subsection (d) shall be deemed to affect the validity of any regulations in effect on the effective date of this Act...." [179] The second problem proved more intractable. The bill would have deleted from 18 U.S.C. 923(g) the general power to require submission of records. With such a repeal, Treasury would lack the rulemaking power to support such regulations, regardless of whether they were barred or not. [180] NRA, conversely, was on record with the argument that the regulations were not ***620** authorized by section 923(g), and it could not now agree to any measures that would stipulate that they were. The February 1983 proposal experimented with a novel approach, proposing a change to the effective-date clause to recognize that "[t]he amendments (including repeals) contained in sections 103(f) and 106 shall not affect those regulations now contained in 27 C.F.R. 178.126 and 178.127." [181] The Reagan Administration amendments ultimately combined this with a very limited restoration of the record-submission power, providing that licensees "shall not be required to submit to the Secretary reports and information with respect to such records and the contents thereof, except as required by regulations in effect" prior to the bill's effective date. [182] This was adopted in S. 914, as reported from committee, but met opposition from Senator McClure. In the end, the text of the disputed regulations was simply written into S. 49 and the exceptions for the regulation deleted. [183]

With the further changes made by these amendments, the bill's movement slowly accelerated. S. 914 was reported from committee, with the Administration amendments, on August 8, 1984. [184] The Senate leadership balked at so controversial a bill and delayed action. In the closing days of the Ninety-eighth Congress, FOPA's sponsors attached it as a rider to a continuing appropriations bill, overriding the majority leader's objections by two-to-one votes. [185] The amendment was ultimately withdrawn in exchange for an agreement that FOPA would receive maximum priority in the following Congress. An updated version of FOPA was accordingly introduced in the Ninety-ninth Congress as S. 49 [186] and was brought to the floor on July 9, 1985.

The Senate debates occupied but a single day. They opened with a series of amendments that were adopted by ***621** voice vote. Most were technical, but three had substantive effects. The first changed the bill's proclamation that state laws which had "the effect" of barring interstate travel with an unloaded, "inaccessible firearm" were to be "null and void." The new language would simply recognize the right to transport a firearm, notwithstanding such laws. [187] The second deleted as redundant S. 49's provision that prosecutions were not allowed for simple

negligence. [188] The third provided a misdemeanor penalty for a licensee's making of a false statement in, or failure to maintain, records required by the chapter. [189] All remaining amendments were decisively rejected [190] and S. 49 passed the Senate by a 79-15 vote. [191]

S. 49 then passed to the House where its counterpart, Representative Volkmer's H.R. 945, had been languishing in the Judiciary Committee since its introduction. [192] S. 49 was referred to the same committee. That S. 49 would not be reported out was hardly news; but only hubris could have led committee chairman Peter Rodino to immediately and publicly pronounce the bill "dead on arrival." [193]

***622** On October 3, 1985, Representative Volkmer submitted a rule calling for consideration of the bill. [194] The timing was significant; the thirty-day waiting period for filing a motion to discharge the Judiciary Committee from consideration of the bill and the seven-day waiting period for moving to discharge the Rules Committee from considering the rule would expire on the same day. [195] Discharging the rule, which allowed debate of the bill, gave significant tactical advantages over discharging the bill itself. [196] Even so, the petition faced an extremely difficult struggle. A discharge requires signatures of a majority of the entire House--218 members. Names of signers are made public only if and when the petition succeeds. [197] The House leadership is free to examine the list and exert pressure on vulnerable signers. A member who signs is free to withdraw at any time; once the 218 signatures are obtained, the petition must be put to a vote and muster a majority of those present and voting. A failure in the last test bars all similar discharge petitions for the remainder of the session. [198]

***623** The difficulties of these barriers explain why only seven discharge petitions had succeeded in the preceding quarter-century. [199] Nonetheless, on October 22, 1985, Representative Volkmer filed a petition to discharge the Committee on Rules from consideration of the rule allowing floor action on H.R. 945. [200] The petition moved quickly; less than two months later it had 158 signatures. [201] Then the drive hit a wall; a month later, the count still stood at 158. [202] The apparent standoff may have encouraged overconfidence in the bill's opponents; they made no effort at this stage to employ the traditional counter to a potentially successful petition--the reporting out of a heavily restructured alternative bill. The misjudgment was pivotal. When Congress returned from recess, the count surged ahead; by early March, Volkmer had 203 signatures plus eight commitments to sign. [203] With Volkmer only four votes away from a discharge, his opposition sought aid from the House leadership in pressuring signers off the petition. The quest was in vain: the reply was that they were too late; the landslide had developed without a check. Representative Rodino, Chairman of House Judiciary, was to report forthwith a substitute bill and the leadership would give it prompt floor action. [204] H.R. 4332 was quickly introduced by Representative Hughes, Chairman of the Subcommittee on Crime. [205] This bill would have incorporated some features of S. 49, largely in diluted form, [206] and would have added a number of measures favored by Hughes, most notably a variety of ***624** mandatory sentence provisions. Only eight days passed between its March 6 introduction and the full Judiciary Committee's vote to report out a more polished substitute. [207] It was one day too many; on March 13, the discharge petition received its 218th signature and was taken up by the clerk. [208]

In exchange for speedier consideration, Volkmer agreed to a rule allowing his bill as an amendment by way of substitute for H.R. 4332. [209] A number of last minute amendments modified his substitute to parallel closely S. 49, with the major difference being a co-opting of H.R. 4332's mandatory sentencing. [210] The last minute amendments contributed to subsequent confusion in the debates. [211]

The floor fight was quick and messy. H.R. 4332 and Volkmer's substitute were debated simultaneously. [212] Hughes moved a package of amendments to the substitute which would have, among other things, required proof only of a "knowing" violation, deleted the requirement that an alleged unlicensed dealer be shown to have had a "principal" intent of money profits, and limited the interstate "pass-through" provision to rifles and shotguns, cased *and* ***625** inaccessible. [213] The amendments lost 248-173. [214] An attempt to narrow the interstate pass-through also failed, 242-177. [215] A third proposed amendment, limiting dealer sales to nonresidents, passed, 233-184. [216] One final amendment, banning private ownership of any machinegun not already in lawful ownership on the date of enactment, was raised with only minutes left in the time allotted under the rule. It passed on a rather irregular voice vote. [217] The substitute was then accepted in place of H.R. 4332, was passed, and then substituted for the Senate-passed S. 49. [218]

The House version of S. 49 differed in various aspects from the Senate bill. Mandatory sentence provisions had been expanded, and some new ones were added; interstate sales had been limited to rifles and shotguns, and the freeze on machineguns had been attached. Rather than seeking a conference, whose House members would have been appointed by the House leadership, the Senate leadership brought the House bill to a floor vote. The complex saga of FOPA, however, was not quite over. As a price for an antifilibuster time agreement, the House version of FOPA was passed along with a new Senate bill, S. 2414, which would amend three of its provisions. [219] The first amendment altered the interstate transportation provision. As passed, FOPA permitted any nonprohibited person to "transport an unloaded, not readily accessible firearm in interstate commerce" notwithstanding state or local law. [220] S. 2414 would allow such persons to "transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm ... if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment...." [221] A second ***626** amendment is somewhat more striking. It amended FOPA's definition of "with the principal objective of livelihood and profit" to insert a provision that "proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." [222] The amendment, apparently intended to deal with a hypothetical situation involving a supplier of terrorists at cost, [223] was as poorly drafted as it was unusual. [224] The third amendment would require dealers selling from a personal collection to maintain an informal record of the sale. [225] S. 2414 passed both House and Senate on voice votes. [226] Only after passage was it realized that while some of the amended sections of FOPA had an immediate effectiveness, [227] the remainder of that Act was not meant to take effect until six months after passage. S. 2414 was to go into effect immediately, leaving an incongruity ***627** whereby an isolated section or sentence would take effect before the remainder of the amended provision. The Senate hurriedly voted out a concurrent resolution linking S. 2414's effective dates to those of the FOPA sections it amended, and the House concurred. [228] At long last, FOPA and its amendments

were law. FOPA's seven years of gestation illustrate the legislative application of Holmes' dictum that the life of the law has not been logic, but experience. [229]

III. Impact of the Firearms Owners' Protection Act on Firearm Statutes

The impact of FOPA on existing firearm laws can scarcely be overstated. Every significant aspect of the Gun Control Act of 1968, from purpose clause to penalties, is affected to a greater or lesser degree. FOPA's major alterations fall into four categories: changes in acts prohibited by the Gun Control Act; addition of *scienter* requirements to its penalty clause; alterations of enforcement and administrative powers given by it; and effects on other statutes, such as the National Firearms Act and various state firearm laws. Each of these categories will be examined in turn.

A. Prohibited Acts

The Gun Control Act marked three major expansions of federal control over transactions in ordinary firearms. [230] The first greatly expanded requirements that certain transferors obtain a dealer's license (more formally, a Federal Firearms License, or FFL). The second essentially barred, with narrow exceptions, transfers between nonlicensed persons who were residents of different states. The third expanded, albeit in a chaotic manner, [231] the categories of persons prohibited firearm ownership or acquisition. The ***628** enactment of FOPA directed and substantially affects all three categories of proscribed acts.

1. Dealer Licensing Requirements

One of the Gun Control Act's major changes to existing law had been its expansion of licensing requirements. Under the Federal Firearms Act, a dealer's license had been required of anyone who "engaged in the business" of firearm dealing *and* shipped firearms in interstate commerce. [232] Under the Gun Control Act, licensing was required of anyone who "engaged in the business" *or* shipped firearms pursuant to such a business. [233]

The 1968 change greatly increased the scope of the licensing requirement. [234] Two chains of caselaw developed interpreting the licensing requirement. The majority of circuits followed the test laid down in *United States v. Gross*, [235] which held that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is "that ***629** which occupies time, attention and labor for the purpose of livelihood or profit." [236] The other test originated in *United States v. Jackson*; [237] it considers persons to be dealers "[i]f they have guns on hand or are ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as they might from time to time conclude to accept as customers." [238] The *Jackson* test, however, found favor only in the Tenth Circuit. [239] Both tests were quite broad, and could easily be applied to exchanges, acquisitions, and dispositions associated with the firearm collecting hobby. Moreover, neither definition offered much certainty to hobbyists who (prior to FOPA) were required to act at their own risk, subject to felony sanctions. Treasury conceded that the standard was incapable of definition, and confessed on more than one occasion

that the standard varied from year to year and case to case. [240] The resulting ***630** prosecutions, sometimes of collectors who had disposed of a small number of firearms, [241] played a major role in bringing about enactment of FOPA. [242]

Thus, it is not surprising that one of FOPA's major purposes was to "substantially narrow" the "broad parameters" of existing caselaw in this area. [243] Under the wording finally enacted, four elements must be proven to establish "engaging in the business" of dealing in firearms:

1. devotion of time, attention and labor to such dealing;
2. as a regular course of trade or business;
3. with the principal objective of livelihood and profit;
4. through the repetitive purchase and resale of firearms. [244]

***631** The first element is, of course, taken directly from the majority rule first laid down in *United States v. Gross*. [245] The second, however, narrows the rule by requiring that the devotion of energy be pursuant to a "regular course" of business. Since part-time and secondary businesses were meant to be covered, [246] this element interlinks with the fourth to require a substantial degree of continuity and to rule out those whose sales are intermittent or on an "as needed" basis. [247] The third element marks the main rejection of existing caselaw. That caselaw required that profit be *a* motive, not that it be *the principal* motive, in selling firearms. [248] Use of the narrow term "principal" in FOPA was no accident; deletion of "principal" was debated and rejected during the Treasury-NRA negotiations. [249] The House adopted FOPA's wording over the detailed objections of a hostile report. [250] It is also noteworthy that the ***632** intent to be proven is one of deriving livelihood *and* profit. The choice of the conjunctive is, again, no casual matter: the Treasury-NRA negotiations considered the disjunctive as an option, [251] and the hostile House report emphasizes the conjunctive as an "unreasonable" burden. [252] The fourth element joins with the second to emphasize the continuity and repetitious nature of the conduct that must be proven. It also emphasizes that (1) firearms must be repetitively *acquired* as well as disposed of--liquidation of collections is not enough--and (2) the broad provisions of the prior minority rule, which required licensing not only of those with guns to sell, but also of those who held themselves out as able to obtain them, [253] are repudiated. Thus, FOPA substitutes a detailed four-element test for the broad and general criterion used under the Gun Control Act. The central thrust of the FOPA definition is toward limiting the term "engaged in the business" to those who treat firearm sales as a business, either of the "storefront" or the "itinerant peddler" variety.

S. 2414 appended an exception to the third element of FOPA's "engaged in the business" definition. The exception was appended, however, not to the definition of "engaged in the business," but to the definition of "with the principal objective of livelihood and profit" contained in the new 18 U.S.C. section 921(a)(22). [254] The wording chosen was equally anomalous: "*Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal ***633** purposes or terrorism." [255] The incongruity of requiring the licensing of terrorist supply depots [256] is matched by the incongruity of the wording employed. FOPA nowhere requires "proof of profit": it requires proof of action "with the principal *objective* of livelihood *and* profit." [257] The scope of this exception is likely to remain untested in any event. The rather obvious self-incrimination

problem [258] and the parallel due process difficulty [259] are likely to ensure prosecution of suppliers of terrorists or criminals as aiders and abettors [260] or for violation of 18 U.S.C. § 924(b). [261]

2. Interstate Transfers

While FOPA's standard for "engaging in the business" adopts a new and indeed unprecedented definition, its standard for transactions between residents of different states largely represents a return to Title IV of the Omnibus Crime Control and Safe Streets Act. [262] That enactment had generally prohibited sales to a nonresident of firearms other than rifles or shotguns; these, in turn, could be sold interstate unless the recipient "could not lawfully purchase or ***634** possess in accord with applicable laws, regulations or ordinances' of his state and locality. [263] However, prior to its effective date, Title IV was superseded by the Gun Control Act proper, which barred sales of firearms to nonresident nonlicensees, subject only to narrow exceptions. [264] FOPA, in turn, returns to a modified Title IV standard, permitting a licensee to sell a rifle or shotgun to a nonresident provided (1) they meet in person to accomplish the transfer, and (2) the sale, delivery, and receipt comply with the legal conditions of sale in both states. [265] These provisions in turn raise at least three issues: who is a nonresident; what state laws must be observed; and what state of mind must be proven to establish a violation?

Who is a nonresident?

FOPA does not attempt to define residency. The Gun Control Act has a similar omission, except for military personnel on active duty. [266] The legislative history indicates that (1) a person's residence is not necessarily where he votes or pays taxes--that is, it is not necessarily his legal domicile; [267] (2) a person is a resident of the locale where he is "permanently or for substantial periods of time physically located;" [268] and (3) a person may have dual residency, or rotate between different places of residence on a regular basis. [269]

***635** *What laws must be heeded?*

The Gun Control Act in several subsections uses the phrase "State laws and published ordinances," or its equivalent. [270] "Published ordinance" is used as a term of art, describing local ordinances found relevant to the Act and published in the *Federal Register*. [271] This represents a conscious legislative choice against requiring compliance with all "local laws." [272] S. 1030, and S. 914 as introduced, would have imposed a parallel restriction on interstate sales, requiring that they avoid "violation of any published ordinance or law of the State or locality" of the sale and of the buyer's residence. [273] FOPA's contrasting provision originated with the Reagan Administration amendments to S. 914. These limited interstate transfers to licensees, but only required compliance with "the legal conditions of sale in both such States." [274] It is difficult to dismiss the change as accidental; the amendments were given to the Judiciary Committee in a side-by-side comparison with the unamended bill, and they conspicuously omit the former's reference both to "ordinance" and to "locality." [275] Yet the amendment did retain the unamended S. 914's presumption that the dealer in an interstate sale knows "the State laws and published ordinances" of both states. [276] The report on S. 914, while discussing the amendments, fails to mention this particular change; [277] the House report mentions that licensees "would be required to fully comply with the state ***636** and local laws

applicable," [278] an explanation that does violence to the distinction, maintained since 1968, between state "law" and local "ordinance." [279]

The floor debates heighten rather than reduce the ambiguity. The most detailed Senate explanation comes from a debate between Senators Hatch and Kennedy, which clearly suggests that the dealer must comply with published, and only published, ordinances. [280] The House debates give virtually no guidance beyond a passing reference to "State laws." [281]

In sum, the use of "the legal conditions of sale in both such States" may refer to: (1) state laws, an interpretation which best reflects the statute's face and its history; (2) all legal requirements imposed either by the state or by its subdivisions, an interpretation supported by the House report but repudiated by the Senate floor debates; or (3) state laws and "published ordinances," an interpretation supported by the most specific exchange of the floor debates but requiring an immense revision of the face of the statute. Altogether, the first interpretation seems indicated by the traditional rules of construction. [282]

***637** It is necessary to note one other restriction on the legal standards applicable to interstate sales. Both Senate reports note that FOPA is not intended to give extraterritorial effect to state regulations that were meant only to govern local aspects of transfer. [283] This appears to codify a commonsense distinction. There is little reason to demand that an out-of-state dealer comply with regulations directed at local aesthetics--such as requirements that firearms be wrapped upon sale. [284]

What state of mind need by proven?

As a response to objections that FOPA's requirement of a "willful" state of mind would require the prosecution to assume the burden of proving a dealer's actual knowledge, not only of the law of his own state, but also of the law of the buyer's residence, FOPA added to the interstate sales allowance the provision that the dealer in an interstate sale "shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States." [285] The presumption originates from the Treasury-NRA negotiations. [286] It appears patterned after the classic "Thayer" or "bursting bubble" presumption. [287] Indeed, the language "in the absence of evidence to the contrary" is taken directly from Wigmore's discussion of the Thayer rule. [288] The Thayer rule gives a presumption a very narrow ***638** effect. "If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence) the presumption disappears as a rule of law and the case is in the jury's hands free from any rule." [289] To reinforce this understanding, the report on S. 1030, which introduced the presumption, explains: "The amendment is intended to reverse the initial burden of proof on the issue of knowledge, and not to create an evidentiary presumption." [290]

The treatment of this presumption as a "bursting bubble," which reverses the initial burden of proof and enables the government to survive a directed verdict at the close of its case, may indeed have proven prescient. The United States Supreme Court had, long before FOPA, held that imposition upon the defense of a conclusive presumption would, by circumventing the burden of the government to prove all elements of a crime beyond a reasonable doubt, [291] violate due process. [292] Nearly two years after the critical amendment to S. 1030, the Supreme

Court ruled that rebuttable presumptions suffered from a similar defect. [293] FOPA's employment of a "bursting bubble" presumption, which shifts only the burden of going forward, and vanishes at the first introduction of evidence from the defense, may enable it to survive a similar fate. [294] Regardless, it should be apparent from FOPA's face and its history that the defense ***639** is only required to produce some proof, at which point the presumption vanishes and the jury is left to assess the facts without instruction on presumptions. [295]

3. Prohibited Persons

Few portions of the Gun Control Act were as garbled as its core, the definition of "prohibited persons" who were forbidden to acquire, possess or transport firearms. Title IV, as amended by the Gun Control Act, prohibited dealers, and only dealers, from selling to its prohibited classes. [296] It barred felons, fugitives from justice, drug users, and persons adjudicated "mental defectives" or committed to an institution from the receipt of guns that had been shipped in interstate commerce. [297] Title VII on the other hand barred felons, persons with a dishonorable discharge, those "adjudged mentally incompetent," those who had renounced American citizenship, and illegal aliens from receiving, possessing or transporting firearms "in commerce or affecting commerce." [298] Even where the classes overlapped, divergence remained. Title IV defined the disabling criminal conviction as one publishable for more than a year, excluding certain business offenses and offenses expressly denominated misdemeanors; Title VII simply referred to "felony." Title IV excluded crimes for which the Secretary had given "relief from disability," but made no provision for pardons; Title VII excepted most pardons, but failed to mention relief from disability. Title IV refers to mental commitment or finding of defect; Title VII only to judicial findings of incompetence. Further differences are found between the provisions defining the necessary connections to commerce, the penalties (a maximum of two years imprisonment for Title VII, five for Title IV) and even the meaning of the word "firearm"! [299] Attempts to reconcile or explain these differences produced a wide-ranging and often conflicting caselaw. The Supreme Court settled early that, when the ***640** offense was covered in both Title IV and Title VII, the government could charge either at its option. [300] Other opinions recognized and delineated the commerce connection necessary under each statute. [301] The differing treatment of pardons caused a continuing split among the circuits, some holding that a pardoned citizen is not a prohibited person under either statute, others holding that he was still subject to Title IV's bar even though exempt under Title VII. [302]

The development of alternative procedures in criminal justice posed additional problems for the Gun Control Act's simple criteria of felony convictions and full pardons. States experimented, for example, with procedures for restoration of civil rights or expungement of first-time convictions. [303] Persons who obtained relief under these systems, however, were generally held to still be "prohibited persons" under the Gun Control Act. [304] Other states experimented with "open ended" sentencing schemes under which an offense could be treated as a misdemeanor or a felony in the discretion of the sentencing judge. [305] These were generally treated as felonies under the Gun Control Act, even when ***641** the sentence had been as a misdemeanor. [306] Still others experimented with systems by which a guilty plea, followed by probation, could end in a dismissal without a finding of guilt. [307] The Supreme Court soon ruled that such proceedings constituted a conviction for Gun Control Act purposes. [308] The general result was that treatment under any of these systems, largely devised to protect against

the effects of a felony record, left the recipient barred from firearm ownership as a felon. Only a relief from disability was sufficient to lift the bar, and this remedy was unavailable to anyone convicted under the Gun Control Act or National Firearms Act. [309]

FOPA dealt directly with all these anomalies. Title VII was repealed and its prohibited person categories incorporated into Title IV. [310] The jurisdictional bases of both Titles IV and VII were now applied to all categories; it was sufficient for any of them 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." [311] All persons, and not merely licensees, were forbidden to sell or dispose of firearms to those so barred. [312] FOPA's main impact in this area was thus two-fold: uniformity was established between the Title IV and Title VII prohibitions, exceptions, jurisdictional bases and penalties, and caselaw giving a narrow effect to state exercises of clemency was negated. [313] It is perhaps regrettable that ***642** FOPA's renovation did not extend further. A redefinition of other "prohibited person" categories is long overdue. FOPA's passage, by re-enacting the categories dealing with mental adjudications, may be taken to accept prior narrow interpretations of these terms, [314] but it sheds little light on the status of convictions in court-martials. [315]

***643** FOPA also expanded the "relief from disability" process. The original relief procedures set out in Title IV were limited to persons barred from gun ownership by reason of conviction; all other bars were left unmentioned. Thus, those who were prohibited arms ownership by virtue of a past mental adjudication or dishonorable discharge were denied any possibility of relief. The origin of this limitation was understandable. As enacted, Title IV had limited "prohibited person" status to three categories: fugitives from justice, those indicted for an offense punishable by more than a year's imprisonment, and those convicted of such an offense. [316] The first were hardly likely to apply for relief, and the second would soon either be cleared or convicted. Limiting relief to those disabled by conviction was thus eminently rational. The only questionable measure lay in carrying over the Federal Firearms Act's exclusion from relief of those convicted of a violation of the federal gun laws themselves. [317] The critical legislative mistakes came at two later points: the enactment of Title VII, which added a variety of new prohibited person categories and failed to mention relief mechanisms, [318] and the enactment of the Gun Control Act proper, which added to the Title IV list without a parallel expansion of its relief mechanism. [319]

***644** The actual relief mechanism under FOPA remains largely unaltered from that of the Gun Control Act. [320] Agency regulations require triplicate submission of an application to regional authorities, who thereafter conduct an investigation. [321] FOPA does make express and broad provisions for review of an agency denial in the district court. [322] A right to such review had previously been recognized, but on a very narrow basis. [323] FOPA, while retaining review on an "arbitrary and capricious" standard [324] uniquely expanded district court review by allowing the court to admit evidence outside the record if the court deems it necessary to prevent a miscarriage of justice. [325] Since many applicants may file *pro se* and secure counsel only when judicial proceedings become imminent, and counsel not schooled in administrative practice ***645** may not appreciate the importance of the initial record to later review, this allowance can significantly aid the court in ensuring that justice is done in actual practice. [326] At the same

time, reconciling the "arbitrary and capricious" test with consideration of materials outside the record is not a simple task. An imaginative reconciliation is suggested in the Senate reports: if the court is persuaded that consideration of the evidence is essential to doing justice in the case, it can admit the evidence, after requesting the presence of an agency investigator. It can then stay further proceedings while the agency determines whether the new evidence will change its decision. [327] The court could also, presumably, direct the agency to consider a transcript of the new evidence. [328] The delineation of these unique and practical measures underlines an intent that the review secure actual justice in each case.

FOPA thus substantially changes the Gun Control Act's list of prohibited conduct. Each of the 1968 Act's major proscriptions--dealing without a license, sales to nonresidents, and sales or possession by "prohibited persons"--were significantly changed. Yet none of these changes will affect so many cases in so significant a manner as FOPA's key provision: the imposition of *scienter* requirements.

B. Scienter Requirements

The Gun Control Act, as originally enacted, simply provided ***646** that "whoever violates any provision of this chapter ... shall be fined not more than $5,000, or imprisoned not more than five years, or both." [329] In *United States v. Freed*, [330] a case involving possession of unregistered "destructive devices," in this case hand grenades, the Supreme Court held that "consciousness of wrongdoing" was not an element of the violation, nor constitutionally required, since "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." [331] *Freed* stressed that the due process test involved a practical judgment as to whether there was "the probability of such knowledge," that is, of the legal duty. [332]

Although *Freed* on its face was limited to possession of hand grenades, and both Brennan's concurrence [333] and later decisions [334] stressed that knowledge of the act prohibited (if not of its illegal nature) *was* required, lower courts read the decision as both a broad authorization applying to all provisions of the Gun Control Act and imposing strict liability. [335] Post-*Freed* caselaw that struck down strict liability ***647** statutes or read intent requirements into them [336] had no visible effect in the field of firearm regulation. No feature of FOPA engendered more legislative approval than its rejection of this caselaw in favor of specific *scienter* requirements. [337]

FOPA's change in this area is hard to overstate. The Gun Control Act was converted from one construed as a strict liability statute to one largely requiring the highest degree of criminal state of mind. The earliest forms of FOPA had proposed to require that all offenses be proven "willful." [338] After negotiations in which Treasury argued that it ought ***648** not to be required to prove intent to violate the law for serious offenses such as possession of stolen weapons, felon in possession and illegal importation, a bifurcation was drafted under which these offenses needed proof only of a "knowing" violation, while the remainder still required proof of willfulness. [339] After lengthy negotiation over which offenses belonged in each category, this compromise became the Reagan Administration position [340] and was incorporated into FOPA as enacted. [341] Reasonably accepted definitions attach to both "knowing" [342] and "willful" [343] in criminal statutes, so the matter of *scienter* might have ended here. [344] Indeed, the

Senate report on S. 1030, FOPA's predecessor in the Ninety-seventh Congress, explained in quite specific terms that "willfully" was inserted "to require that penalties be imposed only for willful violations--those intentionally undertaken in violation of a known legal duty." [345]

Unfortunately, this understanding is clouded by the report on S. 914, S. 1030's successor in the Ninety-eighth Congress. That report stated, without explanation or citation, that "the Committee intends 'willful' conduct to cover situations where the offender has actual cognizance of all facts necessary to constitute the offense, but not necessarily ***649** knowledge of the law." [346] Since the two reports represent the same committee's attempt to analyze the same word in the same section of essentially the same bill, the discrepancy is hard to explain, other than as a possible typographical error in the later report. [347] Neither Senate report technically represents the bill enacted, which was the House version of the still later Senate S. 49. [348] The House report is in clear accord with the first Senate report, arguing that under S. 49,

> violations of this requirement would only be punishable if they were "willful." Willful violations would be more difficult to prove than the usual "knowing" standard.... [I]f the failure was due to a mistake of law or fact or due to negligence on the part of the licensee, the violation of the law most likely would not be punishable. [349]

It also quoted, as the "Views of the Administration," a leaked "memo to files" from Treasury, which specifically noted that interstate "[p]urchasers' violations would be difficult to prove in view of the requirement to prove willfulness on their part, i.e., the purchaser knew that State or local law was violated." [350] Unfortunately, even this report's illumination is clouded by the action of one Representative who quoted the later Senate report on the House floor and attempted to secure the floor manager's agreement that that Senate report explained his bill. [351]

***650** While typographical and analytic errors in reports are not common, they are also not unknown. [352] Here, the report itself is inconsistent, acknowledging, for example, that the willful requirement was necessary to ensure against felony prosecution for a "careless" or "inadvertent" violation. [353] This clearly would be chargeable if "willful" connotes knowledge of the facts, but not of their illegality, and, in relation to the parallel use of "willful" in the forfeiture section, explaining that "[t]hus no seizures ... are authorized where a criminal state of mind is absent." [354]

More to the point, accepting this isolated explanation of "willful" would require overlooking the entire and extensive history of a vital component of FOPA. Early versions of FOPA required a willful state of mind for any prosecutions. [355] That this was understood to require knowledge of illegality is apparent from the report on S. 1030. The division between "willful" for some offenses and "knowing" for others originated in the Treasury-NRA negotiations, and was specifically premised upon an understanding that proof of willfulness required proof that the defendant knew of the illegality of his conduct. [356] In discussing the amendment before the Judiciary Committee, Treasury explained that the unamended S. 914

> would require proof of the element of willfulness in establishing any violation of the Act. This new element would make it more difficult to successfully prosecute

> cases under the Act. For example, in the absence of evidence that the defendant had specific knowledge that his conduct violated Federal law, he would not violate the Act.... [357]

The House Report, hostile to FOPA, conversely criticized its use of "willful," since "[w]illful violations would be more difficult to prove than the usual 'knowing' standard.... [I]f ***651** the failure was due to a mistake of law or fact or due to negligence on the part of the licensee, the violation of the law most likely would not be punishable." [358] This understanding is reflected throughout the floor debates in both houses, where "criminal intentions" or its equivalent recurs as an explanation of "willful." [359] It is also reflected in specific legislative action. The key House vote substituted the core of FOPA, an amendment by Representative Volkmer, for the committee reported H.R. 4332, which was a substantial dilution of FOPA's provisions. [360] The committee-reported H.R. 4332 would have inserted the most modest state-of-mind requirement, allowing conviction of whoever "knowingly engages in conduct that is a violation of" the Act. [361] Representative Hughes thereafter offered an amendment to Volkmer's substitute, which amendment would have changed the substitute's knowing-willful dichotomy to a simple "knowingly." [362] Prior to the votes on Volkmer's substitute and on Hughes' amendment to it, the House was repeatedly informed, by both sides of each conflict, that a vote for the Volkmer language was a vote for requiring knowledge of violation of law as a condition to most convictions under the Act. [363] In light of these extensive considerations, ***652** it is impossible to avoid the conclusion that Congress was fully aware that its use of "willfully" in FOPA would require proof that the defendant actually knew of the illegality of his acts.

The "knowingly" requirement is less well explained, probably because its meaning is more obvious. [364] Apart from the Senate action, deleting as superfluous a proviso that "knowingly" did not encompass "simple carelessness," [365] this term received little clarification. This is unfortunate, ***653** since the simple use of "knowingly violates" leaves unresolved questions of whether knowledge is required of jurisdictional facts (such as movement of the firearm in commerce) [366] or even of the existence of the violation itself, [367] as well as the result of its interaction with violations which themselves contain a different element of knowledge, for example, selling to a person whom the seller knows or *should know* is a felon. [368]

FOPA thus significantly alters the state of mind requirements required by the Gun Control Act. Strict liability, hitherto the rule, is essentially abolished. [369] Certain offenses, distinguished by their more serious natures, are singled out for a requirement only that accused violators know of their actions. The remaining provisions of the Act require stiffer proof that the defendant "willfully" violated the statute.

C. Enforcement and Administration

FOPA's impact on enforcement and administration of the federal firearms laws is wide-ranging. It generally tightens standards for record inspection and disposition, firearm seizures and forfeitures, license revocations and general ***654** criminal penalties, while expanding mandatory sentencing for use of firearms in *mala in se* offenses.

1. Inspection and Acquisition of Licensee Records

The Gun Control Act required licensees to maintain records of firearm acquisitions, dispositions, and inventories. Furthermore, it permitted warrantless inspection of these "at all reasonable times," and broadly authorized the Secretary to require submission of reports on the records' content. [370] FOPA establishes significant restrictions on the two latter powers. In general, administrative inspections of licensee records now require a magistrate's warrant, based on a showing of reasonable cause to believe evidence of a violation may be found. [371] Three exceptions, however, nearly swallow this rule. Neither warrant nor reasonable cause is needed for (1) a reasonable inquiry in the course of a criminal investigation of a person other than the licensee; [372] (2) an annual inspection for ensuring compliance with recordkeeping requirements; [373] or (3) tracing a firearm in the course of a bona fide criminal investigation. [374] While ***655** these sizably reduce application of the warrant and cause requirement, it remains effective for its primary purpose in any event: to prevent inspections undertaken without immediate law enforcement need, or abused for the purpose of harassment. [375]

FOPA also institutes some measures designed to minimize the harassment potential of an otherwise authorized inspection or search. Only records material to a violation of law may be seized [376] and even as to these, copies must be furnished the licensee within a reasonable time. [377] The unusual appearance of the last protection vanishes upon reflection; because a licensee is legally bound to buy and sell only upon recordation, removal of his records is more than an inconvenience.

The power of the Secretary to acquire licensee records is likewise limited by FOPA. Requirements to (1) submit records upon going out of business, (2) submit a report upon sale of more than one handgun to the same person during the same week and (3) submit reports of sales when ordered to do so by the Secretary, [378] are enacted into law. [379] Conversely, the Secretary is forbidden to require submission of reports "except as expressly required by this section." [380] Paralleling this prohibition is the proviso that no future regulation may require that any records required by the Act "be recorded at or transferred to a facility owned, managed, or controlled by the United States or any state or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." [381]

2. Firearm Seizure and Forfeiture

Forfeiture proceedings are creatures of statute; [382] the Gun Control Act broadly authorized seizure and forfeiture of arms used in, involved in, or intended to be used in any violation. [383] Customs forfeiture procedures were incorporated by reference, [384] which offered few safeguards to the ***657** putative owner. [385] FOPA institutes a number of significant safeguards. First, strict liability is no longer the rule. [386] The property whose forfeiture is sought must be linked to a knowing or willful violation. [387] A second safeguard, aimed at preventing seizures of an entire collection or inventory, requires that the seized firearms or quantities of ammunition be "particularly named and individually identified" as used in, involved in, or intended to be used in the violation. [388] A third safeguard overrules *United States v. 89 Firearms* [389] ***658** and forbids forfeitures when the claimant has been charged criminally and the charges end in dismissal or acquittal, except a voluntary dismissal prior to trial. [390] A fourth set of safeguards restricts firearms seizures that are specifically based upon intent to use in an offense. The Gun

Control Act traditionally permitted forfeiture based upon use, involvement, or intent to use in a violation of the Act or other federal criminal law. [391] In reaction to complaints that "intended to be used" had served to justify seizing entire firearm collections or dealers' inventories when only isolated violations were alleged, [392] the earlier versions of FOPA sought to delete "intended to be used." [393] The Reagan Administration amendments to S. 914 would have restored this, but with the proviso that intent must be shown by "clear and convincing evidence." [394] The Senate Judiciary Committee adopted this compromise, but added the further restriction that the alleged intent must be to commit certain specified offenses. [395] Both safeguards carried over into S. 49 and thus into FOPA. [396]

The restrictions have significance beyond the forfeiture hearing itself. Proof that the firearm's owner or possessor had the requisite mental state and, if intent to use in a violation is alleged, met the "intended to be used" qualifications, is a precondition to the firearm's being "subject to *seizure* ***659** and forfeiture." [397] Likewise, only firearms "particularly named and individually identified" as meeting those criteria are "subject to *seizure*, forfeiture, and disposition." [398] This cannot easily be dismissed as an unconscious slip of the draftsman's pen. The floor debates show repeated references to overly-broad seizures. [399] More to the point, the House report noted quite specifically that under FOPA:

> A potentially significant problem is that the authority to seize and forfiet [sic] is limited only to firearms or quantities of ammunition "particularly named and individually identified as involved in or used in" specified violations of law. This is narrower than interpretations of the Fourth Amendment requirement that a warrant "particularly" described the place to be searched and the persons or things to be seized, and the exceptions involving objects in "plain view" and "inadvertent discovery." It would appear that contraband firearms could not be seized if they had not been specifically identified in the search warrant as being used in a specific violation of the law. [400]

The Senate reports are not so explicit, but acknowledge that the individual identification requirement "is intended both to prevent the issuance of general warrants, leaving it to the executing agents to decide which firearms meet the general criteria ... and also to prevent wholesale forfeiture...." [401] Requiring the issuing magistrate to find, in some cases by clear and convincing evidence, that the person against whom a search warrant is directed had the requisite state of mind and that the property to be seized can be individually linked to the violation, will involve fairly substantial changes in practice. The same will result from requirements ***660** of warrants to seize what would normally be in "plain view." [402] At the same time, the face of the statute and its history alike suggest that this is the only fair reading of the legislative intent.

The last safeguard imposed by FOPA on seizures and forfeitures is that of time. Traditionally, seizure actions have been subject to a five-year statute of limitations [403] and to only the most general due process restrictions on excessive delay. [404] Delays of many months between seizures and initiation of forfeiture are frequently upheld under these standards. [405] FOPA works a dramatic change here. "Any action or proceeding" for forfeiture must be commenced within 120 days of the seizure. [406] The Senate reports make it clear the time limit is

jurisdictional. [407] In a judicial forfeiture, application of the time limit should be simple: a civil action is commenced by the filing of the complaint. [408] In an administrative forfeiture, in which publication and service of the notice must precede recourse to the court, [409] the issue is more difficult. The question becomes whether the limitation period stops with the filing of the administrative notice or only with the filing of the judicial action. The sole indication to be found in the statutory history is the remark of FOPA's House sponsor, in arguing the comparative inadequacies of H.R. 4332, that that bill would "not require an agency to bring judicial actions within 120 days, or any other limit...." [410] FOPA's language and purposes support his reading. ***661** "Action" or "proceeding" generally refer to judicial actions, [411] and the latter term is used in the statutes authorizing *judicial* forfeiture at the close of the administrative process. [412] Merely requiring initiation of administrative forfeiture within the time allowed would not achieve much of the statutory objective: the administrative proceedings serve little purpose beyond allowing entry of default forfeitures without recourse to the courts. The claimant receives his day in court only when judicial proceedings have begun, so allowing the administrative notice to stop the running of the limitation period would not prevent the agency from delaying indefinitely the claimant's opportunity to present his case. A mandate that the judicial action be commenced within 120 days will, to be sure, place certain time pressures upon the enforcing agency, [413] but Congress appears to have shown far more concern for the claimant's deprivation than for the agency's convenience. [414]

3. Licensee Penalties and Revocations

FOPA also has an impact on penalties available against licensees. In addition to imposing the general *scienter* requirements discussed above, FOPA also downgrades to a misdemeanor a licensee's recordkeeping violations, whether involving a failure to keep records or an entry of a false record. [415] In the words of a sponsor, this Senate floor amendment ***662** was intended to ensure that the dealer would not be "subjected to harsh felony penalties for technical violations of the rigid recordkeeping standards" of the Act. [416] Its adoption was also part of a *quid pro quo* for dropping of the Committee's exclusion of the "simple carelessness" defense. [417] Two limitations are immediately apparent. First, these misdemeanor provisions relate only to a licensee; a purchaser who provides false information can still be charged with a felony. Second, they relate only to the recordkeeping aspect of a transaction. A sale illegal per se can still be the basis of felony charges for the firearm transfer itself. [418]

On the civil side, FOPA makes two noteworthy amendments relating to license revocation proceedings. First, it expressly provides that a licensee is allowed a de novo review on an appeal to the district court. This is a response both to reports of extreme irregularities in the administrative process, [419] such as appointing as hearing officer a prosecuting official with previous involvement, and to caselaw which summarily upheld such administrative findings unless the licensee managed to raise substantial doubt as to their outcome. [420] ***663** FOPA expressly provides that the review will be de novo and that the court may consider evidence not considered at the administrative hearing. [421] The Senate reports make it clear that the caselaw allowing a constricted review is no longer good law. [422] Accordingly, it would appear that future reviews of license revocations will require a full hearing de novo. [423]

FOPA's second significant amendment to this section involves the insertion of a proviso that revocation is barred where the same grounds have been alleged in a criminal action against the licensee, and the criminal action has ended in his acquittal or a dismissal, other than a voluntary dismissal prior to trial. [424] The bar extends to any revocation based "in whole or in part" on the facts forming the basis of the criminal charges, which suggests that an agency considering revocation may need to exercise great care in the drafting of the revocation notice and in the conduct of the administrative hearing. [425]

4. Awards of Attorneys' Fees against the United States

The traditional "American rule" denying recovery of attorneys' ***664** fees to a successful litigant [426] has been extensively eroded by recent legislation. [427] From the standpoint of federal agency action, the Equal Access to Justice Act clearly marks the greatest incursion. [428] The retention of attorneys' fees provisions in FOPA and its predecessor bills despite passage of the Equal Access to Justice Act might suggest that FOPA establishes a still broader standard. The suggestion would be accurate. While the Equal Access to Justice Act allows awards only if the agency act was "unsupported by substantial evidence" or "not substantially justified," [429] it is surpas