No. 01-704

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

THOMAS LAMAR BEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, a person who is convicted of a felony is prohibited from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his satisfaction that certain preconditions are established. See 18 U.S.C. 925(c). Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is whether, despite that appropriations provision barring ATF from acting on such applications, a federal district court has authority to grant relief from firearms disabilities to persons convicted of a felony.

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The Solicitor General, on behalf of the United States of America and the Bureau of Alcohol, Tobacco, and Firearms (ATF), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 253 F.3d 234. The opinion of the district court (App., *infra*, 12a-38a) is reported at 89 F. Supp.2d 828.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2001. A petition for rehearing was denied on August 21, 2001 (App., *infra*, 39a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions—Title 18 Section 922(g)(1), Title 18 Section 925(c), and the applicable appropriations statutes—are set forth in the appendix. App., *infra*, 41a-43a.

STATEMENT

1. Under federal law, it is unlawful for any person convicted of a felony to transport, possess, or receive firearms or ammunition. 18 U.S.C. 922(g)(1). A person may apply to the Secretary of the Treasury for relief from the disabilities imposed by that prohibition. 18 U.S.C. 925(c). The Secretary "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *Ibid.* The Secretary has delegated his authority to act on applications for relief to the Director of the Bureau of Alcohol, Tobacco, and Firearms (ATF). 27 C.F.R. 178.144(b) and (d). Whenever the Secretary grants relief to any persons pursuant to this provision, "he shall promptly publish in the Federal Register notice of such action, and the reasons therefor." 18 U.S.C. 925(c).

A person whose application for relief is "denied" by ATF may file a petition with the federal district court for the district in which he resides for "judicial review of such denial." 18 U.S.C. 925(c). The court may admit additional evidence where failure to do so would result in a miscarriage of justice. *Ibid.* The scope of judicial review is governed by the Administrative Procedure Act, 5 U.S.C. 706. See S. Rep. No. 583, 98th Cong., 2d Sess. 26-27 (1984).

In 1992, the annual appropriations law for ATF provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732. In each subsequent year, Congress has permitted the use of appropriated funds to process applications for relief filed by corporations, but it has retained the bar to the use of appropriated funds to process applications for relief filed by individuals.[1]

The Senate Report accompanying the first appropriations laws explained the purposes of the bar:

> After ATF agents spend many hours investigating a particular applicant they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-

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[1] Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 519; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.

> years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime.

S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The House Report accompanying the fourth appropriations law reiterated those concerns:

> For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. * * * [T]hose who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Government's time or taxpayer's money to restore a convicted felon's right to own a firearm.

H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. In March 1998, respondent and three associates attended a gun show in Laredo, Texas. App., *infra*, 12a. After the show, respondent and his associates drove respondent's car to Nuevo Lardo, Mexico. *Id.* at 12a-13a. Mexican officials stopped the car at the port of entry and discovered approximately two hundred rounds of ammunition in the back of the car. *Id.* at 13a. Respondent admitted ownership of the car and the ammunition, but asserted that the ammunition had been inadvertently left in the car. *Ibid.* Respondent was convicted of importing ammunition into Mexico and sentenced to five years' imprisonment. *Ibid.*

After spending four months in a Mexican jail, respondent was transferred to the La Tuna Penitentiary, where he spent another month before being released. App., *infra*, 13a. Respondent was then placed on super-

vised release under the jurisdiction of the United States District Court for the Eastern District of Texas. The district court terminated supervision of respondent approximately ten months later, on August 30, 1999. *Id.* at 14a.

By virtue of his conviction in Mexico, respondent was prohibited from possessing, distributing, or receiving firearms. 27 C.F.R. 178.11 ("crime punishable" definition).[2] Respondent applied to ATF for relief from his firearms disabilities. App., *infra*, 15a. ATF informed respondent that it could not act on his application because ATF's annual appropriations law forbids it from expending any funds to investigate or act upon applications for relief from firearms disabilities. C.A. R.E., Tab 4, Exh. B.

Respondent then filed suit in the United States District Court for the Eastern District of Texas. App., *infra*, 12a. Respondent asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order granting relief from his firearms disabilities. C.A. R.E., Tab 4. Respondent attached various affidavits from persons attesting to his fitness to possess firearms. *Ibid.*

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[2] There is a conflict in the circuits on whether a foreign conviction triggers firearms disabilities. Compare *United States* v. *Atkins*, 872 F.2d 94 (4th Cir.), cert. denied, 493 U.S. 836 (1989) (foreign conviction triggers firearms disabilities) and *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986) (same) with *United States* v. *Concha*, 233 F.3d 1249 (10th Cir. 2000) (foreign conviction does not trigger firearms disabilities). In this case, however, respondent conceded (C.A. Br. 18) that his conviction in Mexico triggered firearms disabilities under 18 U.S.C. 922(g)(1), and the court of appeals did not address that issue. App., *infra*, 11a. That question is therefore not presented here.

In reliance on the Fifth Circuit's decision in *United States* v. *McGill*, 74 F.3d 64, cert. denied, 519 U.S. 821 (1996), the government moved to dismiss respondent's complaint. Mot. To Dismiss at 2-3. In *McGill*, the Fifth Circuit held that the appropriations bar prevents ATF from acting on applications for relief from firearms disabilities and that a district court has no authority to consider an application for relief in the first instance. 74 F.3d at 67. The government also argued that the district court lacked authority to rule on respondent's complaint, because a district court only has authority to review the "denial" of an application by ATF, and ATF's failure to act on respondent's application as a consequence of the appropriations bar did not constitute a "denial." Mot. To Dismiss at 3.

The district court denied the government's motion to dismiss. App., *infra*, 12a-38a. The district court concluded that *McGill* had been incorrectly decided and declined to follow it. *Id.* at 18a-29a. Specifically, the court concluded that, while the appropriations law prevents ATF from acting on applications for relief from firearms disabilities, a court retains authority to grant such relief. *Id.* at 24a. The court also concluded that ATF's failure to act on respondent's application constituted an effective denial of his application that was subject to judicial review. *Id.* at 29a-30a. After a hearing, the court determined that respondent was not likely to act in a manner dangerous to public safety and that granting relief from firearms disabilities to him would not be contrary to the public interest. *Id.* at 34a-36a. The court then entered a judgment granting respondent relief from his firearms disabilities. *Id.* at 37a-38a.

3. The court of appeals affirmed. App., *infra*., 1a-11a. The court acknowledged that it had held in *McGill*

that the appropriations laws "reflected an intent to suspend the relief provided to individuals by § 925(c)." *Id.* at 4a. The court reasoned, however, that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." *Id.* at 9a. The court then held that it "must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Ibid.* The court further held that when ATF notified respondent that it would not act on his petition, respondent's "administrative remedies *de facto* were exhausted," and "the trial court had jurisdiction to entertain this appeal." *Ibid.* Finally, the court held that the district court "did not err as a matter of law" in granting respondent relief from his firearms disabilities. *Id.* at 11a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit held in this case that a district court has authority to grant relief from firearms disabilities to persons who have been convicted of a felony. That holding conflicts with decisions of five other circuits. The Fifth Circuit's decision is also incorrect. The annual appropriations laws prevent ATF from acting on applications for such relief, and a district court does not have authority to assume the responsibility that Congress removed from ATF. The Fifth Circuit's decision also threatens to create the very dangers to public safety that Congress sought to avoid through imposition of the statutory bar in each annual appropriations law since 1992. Review by this Court is therefore warranted.

A. The Fifth Circuit's Decision Conflicts With Decisions Of Five Other Circuits

The Fifth Circuit held that, although Congress has prevented ATF from using funds to act on applications for relief from firearms disabilities, a district court has authority to perform that function. App., *infra*, 4a-9a. The Fifth Circuit specifically concluded that "merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.* at 9a. The Fifth Circuit's ruling squarely conflicts with decisions of five other circuits.

In *McHugh* v. *Rubin*, 220 F.3d 53 (2000), the Second Circuit held that "Congress could not have stated more clearly that the ATF is prohibited from acting on applications submitted by individuals pursuant to § 925(c)," *id.* at 58, and that "[t]he federal district courts are no more empowered than is the ATF to review individuals' applications for relief from federal firearms disabilities," *id.* at 59. Similarly, in *Mullis* v. *United States*, 230 F.3d 215, 221 (2000), the Sixth Circuit held that "Congress, through its appropriations act, has chosen to at least temporarily suspend the operation of § 925(c) in its entirety, thereby removing subject matter jurisdiction from the district court." The Fourth, Ninth, and Tenth Circuits have reached the same conclusion. *Saccacio* v. *ATF*, 211 F.3d 102, 104 (4th Cir. 2000) ("because section 925(c) authorizes judicial review of only the denial of an application for relief, and the ATF's failure to process Saccacio's application * * * is not the denial of an application, the district court correctly concluded that it was without subject-matter jurisdiction to adjudicate Saccacio's petition for review"); *Burtch* v. *United States Dep't of the Treasury*,

120 F.3d 1087, 1090 (9th Cir. 1997) ("the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected," and "the statute does not authorize the district court to build a record from scratch or make discretionary policy determinations in the first instance if the Secretary does not."); *Owen* v. *Magaw*, 122 F.3d 1350, 1353-1354 (10th Cir. 1997) ("We believe that this is an instance where Congress has chosen to suspend the operation of the [statute] through the appropriations acts[,]" and "in light of the absence of a denial by the [ATF] of an application by Owen for relief pursuant to 18 U.S.C. § 925(c), the district court lacked subject-matter jurisdiction and properly dismissed.").[3]

Thus, the Fifth Circuit has held that a district court has authority to grant relief from firearms disabilities to persons who have been convicted of a felony, while five other circuits have held that a district court lacks such authority. Review is warranted to resolve that square conflict in the circuits.

B. The Court Of Appeals' Decision Is Incorrect

1. The Fifth Circuit erred in holding that a district court has authority to grant relief from firearms disabilities to persons convicted of a felony. This Court has repeatedly held that Congress has authority under the Constitution to suspend or repeal substantive law through the enactment of an appropriations law. *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 440

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[3] In *Rice* v. *United States*, 68 F.3d 702 (3d Cir. 1995), a panel of the Third Circuit held that a district court has authority to grant relief from firearms disabilities. The Third Circuit has recently granted rehearing en banc in another case to consider whether *Rice* was correctly decided. See *Pontarelli* v. *ATF*, No. 00-1268 (3d Cir.).

(1992); *United States* v. *Will*, 449 U.S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940); *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883). As the Court explained most recently in *Robertson*, 503 U.S. at 440, "although repeals by implication are especially disfavored in the appropriations context, * * * Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."

Congress could not have more clearly expressed its intent to prohibit ATF from acting on applications to grant relief from firearms disabilities. In every ATF appropriations statute passed since 1992, Congress has provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 106 Stat. 1732; 107 Stat. 1228; 108 Stat. 2385; 109 Stat. 471; 110 Stat. 3009-319; 111 Stat. 1277; 112 Stat. 2681-485; 113 Stat. 434; 114 Stat. 2763A-129; 115 Stat. 519. Congress enacted that prohibition because it concluded that determining whether to grant relief "is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made," and because it believed that the government's scarce resources "would be better utilized" on more pressing matters, such as "crack[ing] down on violent crime." S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, *supra*, at 19-20. The bar in each annual appropriations law reflects Congress's considered judgment that "those who commit felonies should not be allowed to have their right to own a firearm restored." H.R. Rep. No. 183, *supra*, at 15.

Thus, while 18 U.S.C. 925(c) has not been repealed, Congress has deliberately and unequivocally suspended its operation. Until such time as Congress removes the

statutory restriction, ATF is legally prohibited from processing applications for relief from firearms disabilities.

2. Congress did not suspend ATF's authority to grant relief from firearms disabilities only to have district courts assume that role. Prior to its suspension, Section 925(c) assigned broad discretion to the Secretary to determine whether an application for relief should be granted: Under Section 925(c), relief may be granted only if "it is established to the Secretary's satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Section 925(c) has never assigned any comparable authority to district courts to decide whether the conditions for relief are satisfied. Furthermore, even where the Secretary is satisfied that the prerequisites for relief are met, Section 925(c) provides only that the Secretary "may" grant relief, not that he must do so, and it "imposes no limitations on the factors that [he] may consider in determining who, among the class of eligible [applicants] should be granted relief." Compare *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996). The courts are not well-positioned to exercise the sort of policy discretion that the statute vests in an official of the Executive Branch.

Instead, courts play a far more limited role under Section 925(c): a person "whose application for relief from disabilities is *denied* by the Secretary may file a petition with the United States district court for the district in which he resides for a *judicial review* of such *denial*." 18 U.S.C. 925(c) (emphasis added). "By its

terms, § 925(c), gives the applicant the right to seek review in the district court only after the Secretary has denied [his] application." *McGill*, 74 F.3d at 66; see also, *e.g.*, *Saccacio*, 211 F.3d at 104; *McHugh*, 220 F.3d at 59; *Mullis*, 230 F.3d at 219.

In the context of Section 925(c), the plain meaning of a "denial" is "an adverse determination on the merits." *Burtch*, 120 F.3d at 1090; *Saccacio*, 211 F.3d at 104; see also *Webster's Third International Dictionary*, at 602 (1993) ("denial" means a "refusal to grant, assent to, or sanction: rejection of something requested, claimed, or felt to be due"). Because of the appropriations law, ATF no longer has authority to "deny" applications for relief under Section 925(c). The appropriations law forbids ATF from taking *any action* on applications for relief: it may neither grant nor deny them.

The appropriations law therefore not only suspends ATF's authority to act on applications for relief, it simultaneously removes the essential predicate for judicial review—an ATF "denial" of an application. Without an ATF denial, there is no role under Section 925(c) for the judiciary to play. As a result, "[t]he federal district courts are no more empowered than is the ATF to review individuals' applications for relief from federal firearms disabilities." *McHugh*, 220 F.3d at 59; see also *Burtch*, 120 F.3d at 1088-1090; *Owen*, 122 F.3d at 1351-1354; *Saccacio*, 211 F.3d at 103-105; *Mullis*, 230 F.3d at 217-221.

3. Even if ATF's failure to act on an application triggered judicial review, that would not give a court authority to issue an order granting relief from firearms disabilities. The scope of judicial review under Section 925(c) is governed by the Administrative Procedure Act, 5 U.S.C. 706. See S. Rep. No. 583, *supra*, at 26-27. With exceptions not relevant here, a

reviewing court has limited authority under the APA: A court may only "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or "hold unlawful" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A).

ATF's decision to comply with the statutory directive to refrain from processing applications for relief does not violate those APA standards. "Given Congress's explicit instruction that the ATF should not spend any appropriated funds to process applications for the removal of firearm disabilities, [an applicant] could hardly argue that the ATF has acted unlawfully or unreasonably in failing to process his application." *Mullis*, 230 F.3d at 219. Similarly, "[t]he ATF's decision to comply with a congressional directive cannot be said to [be] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *McHugh*, 220 F.3d at 61. Thus, if a court had authority to review ATF's refusal to act on an application for relief from firearms disabilities, it would simply lead to an affirmance of ATF's refusal to act on the ground that such a refusal is required by the applicable appropriations law. A court could not condemn ATF's refusal to act as unlawful, much less make its own determination that firearms privileges should be restored.

4. A court's assumption of authority to grant relief from firearms disabilities would also be inconsistent with Congress's stated reasons for suspending ATF's authority. Congress disabled ATF from granting such relief because it believed that ATF could easily make mistakes that could have terrible consequences for innocent citizens. See pp. 3-4, *supra*. That risk is not diminished by shifting responsibility for decisions from ATF to federal district courts. In fact, such a shift in

responsibility only increases the dangers that Congress sought to forestall.

To grant relief from firearms disabilities, a finding must be made that the applicant's record and reputation are such that the applicant "will not be likely to act in a manner dangerous to public safety." 18 U.S.C. 925(c). In order to make that determination, ATF had a practice of conducting extensive field investigations. It interviewed the applicant, his references, probation officer, employers, neighbors, and friends. Indeed, before Congress enacted the funding restriction in 1992, ATF spent 40 man-years annually to investigate and act upon investigations conducted pursuant to Section 925(c). S. Rep. No. 353, *supra*, at 19-20.

The judiciary generally lacks the institutional capacity to conduct the kind of investigations that ATF is now forbidden from undertaking. As the Sixth Circuit explained in *Mullis*, "[w]hile district courts are well equipped to make credibility judgments and factual determinations, they are without the tools necessary to conduct a systematic inquiry into an applicant's background." 230 F.3d at 219. Rather than conducting a thorough background investigation, a district court must necessarily rely largely on the information that the parties furnish. The applicant will typically supply the district court "only with contacts who will supply positive information concerning the applicant's record and reputation." *Ibid.* At the same time, the appropriations law prevents ATF from conducting an investigation that could counter the evidence that the applicant presents. As a consequence, "the court would only be able to conduct a very one sided inquiry, relying largely on letters of recommendation and testimony from individuals hand selected by an applicant." *Id.* at 219-220. That process is particularly ill-suited to

protecting the public from the dangers that Congress sought to avert.

At the very least, district courts are no more able than ATF to protect the public from the risks associated with granting relief from firearms disabilities to persons who have been convicted of a felony. A court's assumption of such authority therefore cannot be reconciled with Congress's decision to suspend ATF's authority to grant such relief. "To infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements." *Owen*, 122 F.3d at 1354.

5. In *McGill*, the Fifth Circuit initially held that "Congress intended to suspend the relief provided by § 925(c)." 74 F.3d at 67. Indeed, it could not "conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications." *Ibid.*

The Fifth Circuit in this case departed from *McGill* on the ground that "we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights." App., *infra*, 9a. For that reason, the court held that "[w]e must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Ibid.* That analysis is seriously flawed.

First, under this Court's controlling precedents, the question whether Congress intends to suspend the operation of substantive law by passage of an appropriations law is one of legislative intent. See pp. 9-10,

supra. Here, it is abundantly clear that Congress intended through each annual appropriations law to suspend the operation of Section 925(c). The passage of time does nothing to detract from that inference. There is no reason that the most recently enacted appropriation statute should be interpreted any differently from its identically worded predecessors. Indeed, the accumulation of the appropriations provisions only makes congressional intent to suspend the operation of Section 925(c) more emphatic. That is particularly true because all appellate court decisions since *McGill* have interpreted that succession of appropriation laws to suspend Section 925(c).

Second, under Section 925(c), convicted felons have never had a "right" to have their firearms privileges restored. Instead, prior to its suspension, Section 925(c) granted to the Secretary a discretionary power to lift the firearms bar, and to do so only if if it was established, to the *Secretary's* satisfaction, that an applicant would not be likely to act contrary to public safety and that granting relief would not be contrary to the public interest. There is every reason to give full effect to an explicit statutory restriction on the exercise of such a discretionary authority by an Executive Branch official. The court of appeals erred in failing to honor the plain intent of that restriction.

C. The Court Of Appeals' Decision May Cause Serious Adverse Consequences

The court of appeals' decision has the potential to create serious adverse consequences. In 1999, 80,000 persons were convicted of felonies in Texas alone. Criminal Justice Policy Council, *Total Adult Convictions and Deferred Adjudications for All Felony Offenses, Fiscal Years 1988-1999*, at 1 (updated Jan. 5,

2001) <http://www.cjpc.state.tx.us/StatTabs/CourtConvictions/00Courtconvictions.pdf>. Under the court of appeals' decision, all convicted felons would have the right to apply to a court for relief from their firearms disabilities, and to have a determination made by the court in the first instance based on a record that is constructed largely by the applicant himself. There is therefore a significant risk that persons who pose a real danger to public safety might be rearmed. Even if most applications are ultimately denied, substantial resources would have to be devoted to litigating those requests in court.

Congress enacted the appropriations bar precisely because it feared that felons who have the prohibition on their possession of firearms lifted may go on to commit violent felonies, and because it believed that the government's time and taxpayer's money should not be spent on making decisions that are so fraught with danger. H.R. Rep. No. 183, *supra*, at 15. This Court should grant certiorari to prevent those adverse consequences from ensuing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40304

THOMAS LAMAR BEAN, PETITIONER-APPELLEE

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS;
UNITED STATES OF AMERICA,
RESPONDENTS-APPELLANTS

[Filed: June 20, 2001]

Before: POLITZ, DEMOSS and STEWART, Circuit Judges.

POLITZ, Circuit Judge:

The Government appeals the trial court's finding that it had jurisdiction to review the application of Thomas Lamar Bean for relief from the federal firearm disabilities resulting from a conviction in Mexico, as well as its grant of said relief therefrom. We affirm.

BACKGROUND

The facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act, giving certain convicted felons an avenue to regain the right to possess a firearm. They are set forth in great detail in the trial court's opinion; we merely summarize them here.

In March 1998, Bean, a Bureau of Alcohol, Tobacco and Firearms licensed firearms dealer, was in Laredo, Texas, participating in a gun show. One evening he and three assistants decided to cross the border into Mexico for dinner. He directed his assistants to remove any firearms and ammunition from his vehicle, a Chevrolet Suburban, before crossing the border; however, a box of ammunition containing approximately 200 rounds inadvertently was left in the back. The box was in plain view and Mexican customs officers saw it when they sought to enter the Mexican Port of Entry at Nuevo Laredo, Tamaulipas, Mexico. At the time importing ammunition into Mexico was considered a felony.[1] The three assistants were subsequently released but Bean, as the owner of the Suburban and the ammunition, was charged and convicted of the felony of unlawfully importing ammunition.[2]

Bean was incarcerated in Mexico for approximately six months before being released to the custody of the United States under the International Prisoner Transfer Treaty. He thereafter spent another month in federal prison before being released under supervision. As a convicted felon, under 18 U.S.C. § 922(g)(1) Bean lost all rights to possess firearms. Section 925(c) of the statute, however, provides a means for relief from the firearms disabilities. Upon completion of his period of

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[1] Purportedly because of the publicity arising from this case the offense has been reduced to a misdemeanor.

[2] The record reflects the difficulties experienced by Bean during his arrest and initial incarceration, primarily based upon procedural issues which were compounded by his unfamiliarity with the Spanish language. Bean and the trial court both refer to these difficulties as raising constitutional concerns. Our disposition of this appeal does not rely thereon.

supervision in July, 1999, Bean petitioned the BATF for such relief so that he might return to his business.

At issue herein is the action and inaction of Congress since 1992. For this nigh decade, Congress has stated in its annual budget appropriation bill that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C § 925(c)."[3] Because the BATF could not use any appropriated funds to fulfill its responsibilities under the statute, it sent Bean a notice that it would not act upon his request due to the congressional action. Bean then petitioned the district court, contending that the BATF's letter denied his petition and exhausted his administrative remedies.

The district court, in its detailed Memorandum Opinion, discussed the statute, congressional actions, the various circuit opinions on this issue, including our decision in *United States* v. *McGill*,[4] and determined that it did, in fact, have jurisdiction to hear Bean's appeal. In granting Bean's petition it further found that the facts of this case underscore why § 925(c) permitted not only judicial review, but judicial supplementation of the record to prevent a miscarriage of justice.

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[3] *See* Treasury, Postal Service and General Government Appropriations Act, 1993, Pub.L. No. 102-393, 106 Stat. 1729, 1732 (1992). The first year Congress denied the BATF funds to investigate *any* convicted felon. Beginning in Fiscal Year 1994, and in all subsequent appropriation acts applying to the BATF, a provision was added allowing funds to be used to investigate convicted *corporate* felons. *See infra* note 11.

[4] 74 F.3d 64 (5th Cir. 1996) (finding that federal courts have no jurisdiction to hear appeals from individuals).

ANALYSIS

Jurisdiction

In *McGill* we noted that Congress, through its appropriations acts, had reflected an intent to suspend the relief provided to individuals by § 925(c). As a consequence we opined that we lacked subject matter jurisdiction. As the Government correctly notes, ordinarily an inferior court is not at liberty to disregard the mandate of a superior court.[5] But in the instance herein presented, we must examine carefully the reasons and analysis by the trial court, and our earlier decision in light of, notably, the intervening passage of time and its effect.

The trial court, as had the *McGill* panel, extensively detailed the legislative history of the relief provisions and reached a different conclusion, noting: "Ultimately, the Court recognizes that an advocate can find an abundance of legislative history to support his position."[6] We do not here parse the committee or floor commentary but, rather, examine congressional action/inaction and its continuing effect.

As noted in the trial court's opinion, Congress first amended the Federal Firearms Act in 1965 to provide the potential and mechanism for certain convicted felons to obtain relief from federal firearms disabilities by petitioning the Secretary of the Treasury. It amended the relief provision in 1986 to provide for judicial review of executive decisions in order to better ensure that relief was available for those felons whose convic-

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[5] *See e.g., Gegenheimer* v. *Galan*, 920 F.2d 307 (5th Cir. 1991).

[6] *Bean* v. *United States*, 89 F.Supp.2d 828, 835 (E.D. Tex. 2000).

tions were based on technical or unintentional violations.

In large measure, as a result of newspaper editorials about the cost to taxpayers of performing the investigations necessary under the relief provision,[7] as well as a report published by the Violence Policy Center listing instances wherein convicted felons had their firearms privileges restored and committed violent crimes,[8] a senate bill entitled the Stop Arming Felons (SAFE) Act was introduced in 1992 to eliminate the relief provision.[9]

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[7] *See, e.g., Why Are We Rearming Felons?*, Washington Post, Sept. 25, 1991, at A24 (describing the relief provision as a "loophole"); and *Felon Gun Program Should Be Disabled*, Chicago Sun-Times, July 1, 1992, at 31.

[8] Josh Sugarman, *Putting Guns Back Into The Hands Of Felons: 100 Case Studies of Felons Granted Relief From Disability Under Federal Firearms Laws*, Violence Policy Center (1992). The Center is a Washington, D.C. based gun-control advocacy group.

[9] *See* 138 Cong. Rec. S2674-04, S2675 (daily ed. March 3, 1992) (floor comments on S. 2304 by its co-sponsor, Sen. Lautenberg (D-N.J.)). We note with particular irony that according to Sen. Lautenberg the original relief provision was enacted specifically to rescue the Winchester Firearms Co., whose parent corporation Olin Winchester had pleaded guilty to felony counts on a kickback scheme and whose very existence was threatened by the subsequent denial of its ability to possess and sell firearms. As previously noted, beginning in 1993 Congress amended its appropriations language to *permit* the BATF to process petitions for relief made by corporations. In the case at bar we are presented with a situation that is virtually indistinguishable from that used to justify those actions, *i.e.*, absent the ability to possess and sell firearms Bean will lose his business. Bean *is* his "corporation," and the inequities of the situation are readily apparent. To the suggestion that a corporation, unlike an individual, cannot be a physical threat to use firearms to harm the public we note that the

That bill, however, was never reported out of the Senate Judiciary Committee.

Although it obviously has the power, Congress has not enacted legislation eliminating or amending § 925(c). Rather, both the House and Senate Appropriations Committees proposed language for the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1993 that precluded the BATF from using any appropriated funds to investigate petitions for such relief.[10] That language was incorporated in the appropriations bill ultimately passed that year and has been included in each subsequent annual appropriations act relating to BATF funding.[11]

We observed in *McGill* that "Congress has the power to amend, suspend or repeal a statute by an appropriations bill, as long as it does so clearly."[12] We cited

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record is replete with testimony from legislators, law enforcement officers and BATF agents as to Bean's lawful character.

[10] *See* H.R. Rep. 102-618 (1992); S. Rep. 102-353 (1992).

[11] Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319 (1996); Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105- 277, 112 Stat. 2681-485 (1998); Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 434 (1999); and Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-129, (2000).

[12] *McGill,* 74 F.3d at 66.

Robertson v. *Seattle Audubon Soc*[13] as authority for that proposition. *Robertson* opined "[A]lthough repeals by implication are especially disfavored in the appropriations context . . . Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."[14]

The "especially disfavored" language hales from the high court's opinion in *Tennessee Valley Authority* v. *Hill, et al.*,[15] wherein the Court stated that the doctrine disfavoring repeals by implication "applies with ever *greater* force when the claimed repeal rests solely on an Appropriations Act."[16] In the subsequent *Will* case, upon which the *Robertson* Court relied, it addressed Congress' failure to fund promised federal pay raises previously authorized by statute by refusing to appropriate funds for those raises in each year's Appropriation Act. In *Will* the Court found Congress' actions were clear and intentional, and thus effectively rescinded the authorized raise for each year.[17] That decision led to the Court's comments in *Robertson*, noted above, upon which the *McGill* panel relied.

We find the facts at bar readily distinguishable from *Will*, and thus distinguishable from *Robertson*. *Will* involved authorized salary increases, a purely financial right, that Congress refused to fund. When it passed

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[13] 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992).

[14] *Robertson*, 503 U.S. at 440, 112 S.Ct. 1407 (citing *United States* v. *Will, et al.*, 449 U.S. 200, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)).

[15] 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

[16] *Id.* at 190, 98 S.Ct. 2279 (emphasis in original).

[17] With the exception of federal judges for two of the four years in question, where the Appropriation Act violated the Compensation Clause.

the Executive Salary Cost-of-Living Adjustment Act[18] in 1975 Congress promised certain federal employees annual cost-of-living salary increases, based upon certain financial criteria. It then changed its mind and rescinded *that year's* increase in each of the four years beginning in 1977.[19]

In the case at bar, Congress is not merely promising money then changing its mind and not making it available. Nor is it directly suspending a statutory provision. In enacting § 925(c) Congress granted certain persons administrative and judicial rights. The SAFE Act proposed to withdraw those rights, but Congress did not adopt that withdrawal. The Government insists, however, that Congress indirectly has abrogated those rights by necessarily recognizing same but declining expenditure of any funds for their enforcement. We find that action clearly distinguishable from the facts in the cited precedential cases and inimical to our constitutional system of justice.

In its early review of this conundrum, the *McGill* panel relied on *Robertson.* In addition to the noted factual differences of *Robertson, Will,* and *Dickerson,*

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[18] Pub. L. No. 94-82, 89 Stat. 419 (1975).

[19] The Supreme Court considered and rejected the contention that the authorized increase remained outstanding but unfunded, concluding that the raise itself was rescinded. *Will,* 449 U.S. at 224, 101 S.Ct. 471. In support of its position the Court cited *United States* v. *Dickerson,* 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940). *Dickerson* also pertained to statutorily authorized financial payments that were rescinded by an Appropriation Act, in that case the payment of an enlistment allowance for those military personnel who re-enlisted during the fiscal year. Like *Will, Dickerson* pertained to purely financial rights that Congress then rescinded by expressly refusing to fund same, and is distinguishable herefrom.

we have a critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary "suspension" of statutorily created rights. We must conclude that Congress seeks to abrogate administrative and judicial rights it created, by using funding bills, after declining to address actual amendments to or revocation of the creating statute. Section 925(c) was enacted for apparently valid reasons, and citizens like Bean are entitled to the rights therein created and authorized unless and until Congress determines to change same. We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights. We further hold that when the BATF notified Bean that it would not act on his petition, his administrative remedies *de facto* were exhausted.[20] Accordingly, the trial court had jurisdiction to entertain this appeal.

The Merits

The Government cites as error the trial court's grant of relief, contending without citing any authority that when reviewing the actions of an administrative agency the court "stands in the shoes" of that agency and is bound by the applicable federal regulations. Here the Government contends 27 C.F.R. § 178.144(d) precludes

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[20] The BATF advised that it was not accepting petitions from individuals for restoration of rights, and told Bean he could apply "if and when Congress acts to remove the restriction currently imposed." This is not a case of mere agency delay in processing his petition, it is complete preclusion of administrative remedies for an indefinite, possibly infinite, period of time. Bean's administrative options were foreclosed, and thus exhausted for purposes of § 925(c).

relief where the petitioner is prohibited from possessing all types of firearms in the state in which he resides. It asserts that because Bean resides in Texas and under Texas law a convicted felon cannot possess firearms for five years after being released from confinement or supervised release,[21] it could not have granted his petition for relief in any event; therefore, the district court erred as a matter of law in doing so.

At the threshold we unqualifiedly reject the suggestion that a court stands in the shoes of an agency and is bound by *all* of its implementing regulations. Substantive federal regulations carry the force and effect of federal law; however, interpretive regulations serve merely to guide a court in applying a statute.[22] Generally, where a regulation "appears supported by the plain language of the statute and is adopted pursuant to the explicit grant of rulemaking authority," that regulation is considered as having legislative effect and accorded more than mere deference.[23] We find nothing in 27 C.F.R. § 178.144(d) that would come under such a definition. Nothing in § 925(c) authorizes the Secretary to restrict relief only to those cases where relief is available at the state level; indeed, nothing in the statute pertaining to relief even refers to the states. Section 925(c) pertains strictly to federal firearms disabilities and to relief from those federal disabilities. Absent any statutory language tying federal disabilities to state disabilities, or authorizing the Secretary to do so, we must hold that 27 C.F.R. § 178.144(d) is merely

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[21] Tex. Penal Code Ann. § 46.04(a)(1)(Vernon 1994).

[22] *Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977).

[23] *Atkins* v. *Rivera*, 477 U.S. 154, 162, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986).

an interpretive regulation and does not bind the district court in its determination.[24] Concluding that the trial court did not err as a matter of law in granting the relief requested, we need not and do not address its determination that Bean's foreign conviction was not a predicate offense triggering the provisions of 18 U.S.C. § 922(g)(1).

CONCLUSION

We are mindful of the serious concerns articulated about convicted felons regaining the right to possess firearms, and of the need for congressional review and enhancement of the safeguards and procedures for appropriately accomplishing this apparently worthy goal, but we are faced herein with the almost incredible plight of Thomas Bean who, at most, was negligent in not ensuring that his associates completely performed the simple task directed, and who served months in Mexican and U.S. prisons for a simple oversight. We do not believe that any reasonable observer is persuaded that his offense creates a likelihood he represents a threat to the public's well-being, and it is beyond peradventure to believe that Congress, or those seeking to rescind § 925(c), intended for someone like Bean to lose his livelihood on the basis of the facts such as are before us. Neither equity nor the law require such an injustice.

The judgment appealed is AFFIRMED.

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[24] For similar reasons we find that the provision in § 178.144(d) stating that the Director will not *ordinarily* grant relief if the applicant has not been discharged from parole or probation for a period of at least 2 years is also interpretive, particularly in light of its qualified language.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
Beaumont Division

No. CIV. A. 1:99-CV-724

THOMAS LAMAR BEAN, PETITIONER

v.

UNITED STATES OF AMERICA, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; RESPONDENTS

[Filed: Feb. 22, 2000]

MEMORANDUM OPINION

JOE FISHER, District Judge.

Before the Court is the Petitioner's "Petition for Relief from Disabilities Under the Federal Firearms Act." After considering the Petition, the evidence submitted, the Response from the Respondents, and arguments from counsel, the Court GRANTS the Petition. A separate Order will be entered in accordance with this Memorandum.

I. BACKGROUND

On Saturday, March 14, 1998, Mr. Thomas Lamar Bean ("Petitioner," "Mr. Bean," or "Bean") was attending a gun show as a dealer in Laredo, Texas. At the conclusion of the show, Mr. Bean and his three assis-

tants decided to cross the United States-Mexican border to have dinner at a restaurant in Nuevo Laredo, Mexico. Before leaving, Mr. Bean instructed his assistants to remove all firearms and ammunition from his 1994 Suburban. However, as the assistants removed said items from the vehicle, they inadvertently left approximately two hundred rounds of ammunition in plain view in the back of Mr. Bean's Suburban.

Mr. Bean's vehicle was stopped at the Mexican Port of Entry, Nuevo Laredo, Tamaulipas, Mexico, where the ammunition was discovered by Mexican officials. Although all four individuals were initially arrested, Mr. Bean's associates were soon released. Bean, however, was detained and charged with introduction of ammunition into the Republic of Mexico since he was the owner of the vehicle and the ammunition. While acknowledging that the ammunition was in plain view in the back of his Suburban, Bean stated that he was unaware that the ammunition was in the vehicle at the time he crossed the border. He was also unaware that possession of ammunition was an offense in the Republic of Mexico.

Mr. Bean was immediately taken into custody and almost two months later, on May 27, 1998, was sentenced to a term of imprisonment of five years and was fined in the amount of 17,679 pesos or the equivalent of twenty days of community service work. He remained in a Mexican jail until September 21, 1998, when he was transferred to the La Tuna Penitentiary in Anthony, Texas by virtue of the International Prisoner Transfer Treaty and the applicable federal statutes under 18 U.S.C. § 4100, *et seq.*

Bean was then released from La Tuna Penitentiary on October 21, 1998 and returned to his home in Orange

County, Texas. Pursuant to 18 U.S.C. § 4106A(b)(3), jurisdiction over the Petitioner was conferred upon the United States District Court for the Eastern District of Texas. Petitioner was initially placed on supervised release but this restriction was terminated by an order signed by this Court on August 30, 1999.

Due to this Mexican conviction (and despite the termination of supervised release), Mr. Bean could not own or possess a firearm. Title 18 U.S.C. § 922(g)(1) prohibits any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from shipping, transporting, or possessing any firearms or ammunition. However, 18 U.S.C. § 925(c) permits any person to apply to the Secretary of Treasury for relief from the disabilities imposed under § 922(g)(1). The Secretary of Treasury is authorized to restore firearm privileges to the applicant "if it is established to [the Secretary's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c). The Secretary of the Treasury has delegated his authority to grant relief to the Director of the Bureau of Alcohol, Tobacco and Firearms ("BATF" or "ATF"). *See* 27 C.F.R. § 178.144.

Title 18 U.S.C. § 925(c) also states that "any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. . . ." 18 U.S.C. § 925(c).

Congress however, in 1992, enacted the Treasury, Postal Service, and General Government Appropriations Act (the "Appropriations Act"), mandating that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."[1] Since then, Congress has imposed similar funding limitations for each fiscal year.[2] This essentially meant that the ATF could no longer conduct investigations because they had been given no appropriations to do so.

On July 14, 1999, counsel for Mr. Bean wrote the Bureau of Alcohol, Tobacco and Firearms requesting the relief authorized by § 925(c). The ATF replied and informed Bean that the agency is not accepting applications for restoration of firearms privileges since Congress has specifically denied funding for ATF investigations, or actions on applications for § 925(c) relief, through a series of appropriations measures

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[1] *See* Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

[2] *See* Treasury, Postal Service, and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430 (1999); Treasury, Postal Service, and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. Treasury, Postal Service, and General Government 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993).

dating back to October 1992. Mr. Bean was instructed by the ATF to contact their office if and when Congress lifts the restrictions. Bean then filed in this Court his "Petition for Relief of Disabilities Under the Federal Firearms Act."

II. ANALYSIS

Bean's petition presents four questions for this Court: (1) whether the decision by Congress not to fund the review of applications for relief submitted to the ATF suspends the relief available provided for under 18 U.S.C. § 925(c); (2) whether the inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial; (3) whether a foreign conviction may serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1); and (4) whether Mr. Bean will be "likely to act in a manner dangerous to public safety" and if the "granting of the relief would . . . be contrary to the public interest." 18 U.S.C. § 925(c).

A. Congress' failure to fund the review of applications by the ATF was not a suspension of *relief* under 18 U.S.C. § 925(c), but rather Congress only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals.

This Court does not question that it is Congress' exclusive power to appropriate money and establish the jurisdiction of inferior federal courts. *See* U.S. Const., Art. I, § 8; U.S. Const., Art III, § 1. The Court also recognizes that Congress may also use appropriation acts to amend or repeal substantive legislation. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440, 112

S.Ct. 1407, 1414, 118 L.Ed.2d 73 (1992); *United States* v. *Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 1035, 84 L.Ed. 1356 (1940); *Director, OWCP* v. *Alabama by Products Corp.*, 560 F.2d 710, 719 (5th Cir. 1977).

Nevertheless, it is a general maxim that repeals by implication are "strongly" disfavored. *See Johnson* v. *Robison*, 415 U.S. 361, 373-74, 94 S.Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974). Before courts will hold that Congress has used an appropriation act to repeal substantive legislation or preclude judicial review of administrative action, the intention to do so must be clearly stated. *See Robertson*, 503 U.S. at 440, 112 S. Ct. at 1414 (Congress "may amend substantive law in an appropriations statute, as long as it does so clearly."); *Johnson* v. *Robison*, 415 U.S. 361, 373-74, 94 S. Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974) (courts require "clear and convincing evidence of congressional intent . . . before a statute will be construed to restrict access to judicial review").

Ultimately, this Court is relegated to determining Congress' intent, with respect to 18 U.S.C. § 925(c), when it suspended funds for the ATF to conduct investigations and whether such intent was "clear." The Court begins this analysis by discussing a similar case from the Third Circuit Court of Appeals, *Rice* v. *U.S., Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d. Cir. 1995).

In 1970, Phillip Rice ("Rice") pleaded guilty in state court to several felonies involving stolen auto parts. *Id.* at 704. More than twenty years later, Rice submitted an application to the ATF for restoration of his firearm privileges. *Id.* at 705. In response, the ATF sent Mr. Rice a letter notifying him that it could no longer process his application because Congress had passed an

appropriation bill which suspended funds for the ATF to investigate or act upon such applications. *Id.* Mr. Rice, pursuant to the express language in 18 U.S.C. § 925(c), then filed a petition for judicial review in federal district court. *Id.* at 705.

Concerning the question of legislative intent, the Court found that the Appropriation Acts failed "to show a clear intent to repeal section 925(c) or to preclude judicial review of (the) BATF's refusal to grant relief from firearms disabilities." *Id.* at 707. In making the determination, the Court looked at the language contained in the 1993 Appropriations Act and found it extremely important that the Appropriations Acts did not "expressly preclude a court from reviewing BATF's refusal to process an application for relief." *Id.* Subsequently, the Court held that the Appropriations Acts neither repealed 18 U.S.C. § 925(c) nor precluded "judicial review of administrative decisions concerning a convict's application for restoration of his firearm privileges." *Id.*

The Fifth Circuit Court of Appeals has also considered this issue in *United States* v. *McGill*, 74 F.3d 64 (5th Cir. 1996). McGill, who had previously pleaded guilty to two felony offenses, wrote the ATF requesting information about applying for relief from his 18 U.S.C. § 922(g)(1) disability. The ATF informed McGill that it was no longer accepting applications due to the appropriations measures. Like Rice, McGill then filed an application with the district court for the removal of his disabilities. However, the district court promptly dismissed McGill's application. *Id.* at 65-66.

In affirming the lower court, the Fifth Circuit quickly determined that the controlling question was Congress' intent as it suspended funds for the ATF to conduct

investigations. The Court first quoted the language of Section 925(c) and noted that the ATF has authority to act on these applications. It then considered the legislative history of some of the applicable appropriations measures in light of the government's argument that relief had been suspended. *Id.* at 67. The Court noted that the Appropriations Committee expressed concern over: (1) the use of limited resources for investigating these cases; and (2) the consequences to innocent citizens if BATF makes a mistake in granting relief to a felon from his firearm disabilities.[3] The court based its

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[3] For example, House Report No. 102-618 states:

> "Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms. . . . [BATF] may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest."
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> "Under the relief procedure, [B]ATF officials are required to guess whether a convicted felon or person committed to a mental institution can be entrusted with a firearm. After [B]ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens."
>
> "Thus, the Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by [B]ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities."

decision on the circumstances and the explanation by the Appropriations Committee and stated:

> "[I]t is clear . . . that Congress intended to suspend the relief provided by § 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications." *Id.* at 67.

Thus, the court concluded that relief from federal firearms disabilities under Section 925(c) had been "clearly" suspended by the Appropriations Acts. Subsequently, the Fifth Circuit affirmed the district court's dismissal of the Plaintiff's petition for review. *Id.* at 68.

1. This Court's Analysis of all relevant legislative history.

This Court has diligently searched the legislative history of both 18 U.S.C. § 925(c) and the Appropriations Acts. In doing so, the Court has found many contradictory statements by Congressmen regarding these provisions. This Court has concluded that in looking at the legislative history as a whole, it does not reach the level of "clarity" needed to suspend the type of relief which is expressly provided for in the statute. *See* 18 U.S.C. § 925(c).

Individuals with convictions which are punishable by more than one year have long been prohibited from owning a firearm. Until 1965, there were no exceptions

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H.R. Rep. No. 102-618, at 13-14 (1992); see also S. Rep. No. 103-106, at 20 (1993) (same); S. Rep. No. 102-353, at 19-20 (1992) (same).

to this rule. However, beginning with the original relief provision in 1965, Congress believed the strict application of the Federal Firearms Act worked to the disadvantage of some individuals who posed no danger to the public by reason of firearm possession. *See* H.R. Rep. No. 89-708, at 1 (1965). The committee expressed concern that "[n]o consideration can be given to any circumstances which might cause a judge to properly mitigate or even suspend the punishment. Nor may consideration be given to the fact that the crime might be wholly unrelated to firearms and to the disability imposed by the Federal Firearms Act." *Id.*

Thereafter, Congress amended the Federal Firearms Act by providing a relief provision. *See* U.S.C. § 910 (Supp. II 1965) (repealed 1968). However, instead of having the courts make the determination with regards to relief to particular individuals and corporations, Congress empowered the Secretary of the Treasury with the task. *Id.* The relief provision provided the Secretary with a broad and subjective standard for either granting or denying relief. *Id.*

In 1986, Congress amended the relief provision and expressly provided for judicial review of relief denials by the ATF. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449 (1986) (current version at 18 U.S.C. §§ 921-930 (1994)). In regards to the change, the Judiciary Committee reported that "(t)his section reforms the provisions of 18 U.S.C. § 925(c) to *improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership.*" *See* H.R. Rep. No. 99-495, at 1 (1986) (emphasis added). Also, a Senate Report in 1984 explained that the legislation "is intended to provide a 'safety valve' whereby persons

whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness" may obtain relief. *See* S. Rep. No. 98-583, at 26 (1984). Adding judicial review to the existing legislation was intended to afford individuals not inclined to engage in criminal activity the "essential" opportunity to demonstrate trustworthy character.[4]

This history seems to establish three things: (1) Congress realized that not all persons convicted of felonies should be denied firearms privileges forever; (2) Congress provided the ATF with the ability to reinstate firearms privileges; and (3) Congress intended the judiciary to give the final word on the appropriateness of a denial by the ATF. *See generally* Ronald C. Griffin, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?*, 23 Okla. City U.L. Rev. 977 (1998).

Since 1993, the funding cuts have not allowed the ATF to conduct investigations with regard to relief applications. The McGill Court used the following Senate Report as conclusive evidence that Congress intended to suspend 18 U.S.C. § 925(c):

> "(u)nder the relief procedure, (B)ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a fire-

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[4] *See* S. Rep. No. 98-583, at 26 (1984). In this Senate Report, the Senate Committee on the Judiciary worried that lack of review by the ATF and the judiciary "could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. . . . *[M]aking relief available to such persons is essential.*" *Id.* (emphasis added).

> arm. After (B)ATF agents spend many hours investigating a particular applicant(,) they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime."

McGill, 74 F.3d at 67 (quoting S. Rep. No. 102-353, at 19 (1992)).

However, the McGill Court used the above statement without reviewing any congressional hearings that were the basis for the statement found in the Senate Report. The transcript of a Senate subcommittee hearing provides insight as to the true reason for the funding cuts. Here, the Director of the ATF responded to questions pertaining to the relief provisions. *See* Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the Senate Comm. on Appropriations, 102d Cong. 69 (1993).

The Director testified that although "every year about 3,000 to 4,000 people express an interest in (applying for relief)," only 1,000 applications (approximately) are found eligible to be acted upon. *Id.* However, the ATF had requested $3.7 million to fund the relief from disabilities program for the 1993 fiscal year. *Id.* According to these numbers, the ATF was spending an average of $3,700 per investigation.

The only "intent" that can be understood from these reports is that Congress was concerned with the ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself. It is true that Congress can suspend a statute through the use of appropriations acts if it does so "clearly." It is also true that Congress has modified the relief provision found in 18 U.S.C. § 925(c) several times. However, each time Congress has amended § 925(c), it has done so with a concern toward those persons who possess guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions. Given the genuine concern that Congress has expressed pertaining to the "essential" right of individuals to be given the opportunity to demonstrate trustworthy character, it is consistent to infer that Congress withheld funding to the ATF for *economic reasons*, not because they intended outright suspension of relief for worthy individuals. If Congress "intended" to change anything, it deleted administrative action from the statute, but otherwise left judicial relief available.

Furthermore, the argument that Congress intended to absolutely suspend relief to convicted persons ignores the multitude of ways under 18 U.S.C. § 921(a)(20) that a state felon may obtain restoration of his federal firearm rights by operation of state law and without the involvement of any special ATF competency. Section 921(a)(20) provides that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction. . . ." 18 U.S.C. § 921(a)(20). The law of the convicting jurisdiction defines pardons, expungements, and restora-

tions of civil rights. *See Caron* v. *United States*, 524 U.S. 308, 118 S. Ct. 2007, 2011, 141 L.Ed.2d 303 (1998) (citing *Beecham* v. *United States*, 511 U.S. 368, 371, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994)). Thus, under § 921(a)(20), a state can restore the civil rights of a person convicted of a felony in that state such that his federal firearm disability is removed.[5] *McGrath* v. *United States*, 60 F.3d 1005, 1008 (2d Cir. 1995) recognized that "many states restore civil rights to convicted felons by means of a general law stating that all rights shall be reinstated upon the service of a sentence." Other states authorize officials to issue certificates of restoration after a given period of time following sentence or parole. *See Id.; United States* v. *Mullis*, 1998 WL 957334, at *3 (W.D. Tenn. 1998).

Congress, under § 921(a)(20), specifically allows for restoration of firearms privileges. Its clear that Congress never evinced a belief that a federal administrative agency was solely and specially capable of making the requisite determination. Instead, this Court concludes that Congress manifested exactly the opposite intent because it allowed states such wide latitude in restoring for state felons the same federal disability at issue here. It is inconsistent with the totality of the statutory scheme to hold that Congress intended that a convicted individual would never have the right to prove himself worthy of restoration of firearms privileges.

It is this Court's opinion that Congress' failure to fund the review of applications by the ATF was not a complete suspension of *relief* under 18 U.S.C. § 925(c),

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[5] A state cannot, however, remove a federal felon's federal firearm disability. *See Beecham*, 511 U.S. at 368, 114 S.Ct. 1669.

but rather Congress only intended the suspension of the ATF's ability to investigate or act upon applications for relief by individuals.

2. The proper place of legislative history in this case.

There is plenty of conflicting legislative history regarding this issue. Ultimately, the Court recognizes that an advocate can find an abundance of legislative history to support his position. The Court believes that the prudent thing to do is to focus in on language of the statute. After reviewing the pages and pages of committee notes, senate reports, and "hearings before subcommittees of committees,"[6] the Court reminded itself that statutory interpretation begins with the language of the statute itself. *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). And if the language of the statute is clear, "that is the end of the matter, and the court must give effect to [the] unambiguously expressed intent of Congress." *Norfolk & Western Railway Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 128, 111 S.Ct. 1156, 1163, 113 L.Ed.2d 95 (1991).

The fact of the matter is that 18 U.S.C. § 925(c) allows for relief from disabilities under the Federal Firearms Act. True, the ATF no longer has the funds in which to conduct their investigations. However, *the statute still provides for judicial review.* As one court has recently stated, "If Congress wants to preclude all applications by convicted felons, . . . it should so state and not attempt to achieve that result by means that

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[6] For example, *see* Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the Senate Comm. on Appropriations, 102d Cong. 69 (1993).

are 'indirect' at best." *McHugh* v. *Rubin*, 49 F.Supp.2d 105, 110, (E.D.N.Y. 1999).

It depends whose side you represent as to which committee report you choose to employ and which committee report you choose to ignore. And in reality, committee reports are not an authoritative interpretation of what the statute meant, nor an authoritative expression of what that Congress intended. *Pierce* v. *Underwood*, 487 U.S. 552, 567-68, 108 S. Ct. 2541, 2551-52, 101 L.Ed.2d 490 (1988). In this Court's opinion, the legislative history on the issue is far from "clear." If various district and appellate courts read the exact same legislative history and come to different conclusions (as the courts do on this issue), then it is this Court's opinion that the legislative history is far from "clear."

This is a textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes. After reviewing all possible legislative history, this Court almost concurs with Justice Scalia when he stated that "it would be better . . . to stop confusing the . . . Court, and not to use committee reports at all." *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 621, 111 S. Ct. 2476, 2490, 115 L.Ed.2d 532 (1991) (Scalia, J., concurring). Legislative history does have its purpose, but we must remember that "[r]eliance on legislative history in divining the intent of Congress is . . . a step to be taken cautiously." *Piper* v. *Chris-Craft Ind.*, 430 U.S. 1, 26, 97 S. Ct. 926, 941, 51 L.Ed.2d 124 (1977). After all, legislators legislate by legislating; not by talking in committee meetings.

3. Courts are suited to make the ultimate determination of the petitioner's application for relief.

The McGill Court is concerned that the judiciary is not a proper forum for determining whether applicants "are likely [to] act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c); *McGill*, 74 F.3d at 67.

On the contrary, this Court believes that courts are capable of deciding whether to grant or deny an individual's relief from disabilities request. As in the case now before this Court, the burden would be on the applicant to submit evidence that he would not act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. This evidence would include such things as the applicant's record, reputation, and the underlying reason for the disability. In addition, the court could require the applicant to submit additional evidence before making its determination on whether to grant relief.

Moreover, allowing a court to grant the relief solves several concerns expressed by Congress and the circuit courts. First, it would shift the financial burden from the government to the applicant. As in this case, the applicant would be responsible for paying court costs and attorneys fees. Second, instead of the ATF conducting investigations on the applicant, the applicant would have to secure all the necessary evidence in order to receive relief. And, if the court deems more evidence is needed, it will be up to the applicant to secure such evidence. Third, a court is a better-suited forum for deciding these issues because it is adjudicative in nature. In addition, if the court needs to know

how the ATF had conducted its investigations in the past, this information is available in the Code of Federal Regulations and case law. *See* 27 C.F.R. § 178.144; *Smith* v. *Brady*, 813 F. Supp. 1382, 1383-84 (E.D. Wis. 1993) (describing ATF's investigative procedures). Courts can decide relief questions without the need of ATF expertise, and if investigative work needs to be done, the applicant himself would have to conduct it. *See* Ronald C. Griffin, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?*, 23 Okla. City U.L. Rev. 977 (1998).

This Court recognizes the importance of making the correct decision on the applicant's request for relief under the Federal Firearm's Act. However, part of the day-to-day role of the court is to make character determinations of the individuals before it. The judiciary is adjudicative in nature and is capable of handling this sensitive matter.

B. Inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial.

18 U.S.C. § 925(c) states that "[a]ny person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court . . . for a judicial review of such denial." The Government in this case argues that since the ATF has not expressly "denied" Mr. Bean's petition for relief, this Court does not have jurisdiction to hear the matter.

The general rule concerning exhaustion is "'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative

remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 1662, 23 L.Ed.2d 194 (1969) (quoting Myers, 303 U.S. at 50-51, 58 S.Ct. at 463); *see also McCarthy*, 503 U.S. at 144-45, 112 S.Ct. at 1085-86 ("This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts.") (citing *Myers*, 303 U.S. at 50-51 and n. 9, 58 S.Ct. at 463 and n. 9). "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145, 112 S.Ct. at 1086.

However, this Court holds that exhaustion of administrative remedies in this case is excused. Exhaustion of administrative remedies which would be wholly futile or inadequate due to lack of appropriations waives Petitioner's obligation to exhaust such administrative remedies. *See McCarthy* v. *Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). It seems clear to this Court that Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context because it gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice. *See* 18 U.S.C. § 925(c); *Rice* v. *United States*, 68 F.3d 702, 709 (3d Cir. 1995). In sum, "Plaintiffs cannot be expected to exhaust their administrative remedies when there are no administrative remedies for them to exhaust." *Chan* v. *Reno*, 932 F. Supp. 535, 540 (S.D.N.Y. 1996). Accordingly, this Court holds that inaction by the ATF constitutes a defacto denial of an application such that a United States district court may consider a petition for judicial review of the denial.

C. A foreign conviction cannot, as a defacto rule, serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1).

18 U.S.C. § 922(g)(1) makes it unlawful for a person who has been convicted in "any court" of a crime punishable by imprisonment for a term exceeding one year to possess a firearm. Both the Fourth Circuit, *United States* v. *Atkins*, 872 F.2d 94 (4th Cir. 1989), and the Sixth Circuit, *United States* v. *Winson*, 793 F.2d 754 (6th Cir. 1986), have addressed this issue and concluded that the a defendant may be restricted from possessing a firearm based on his having been convicted of offenses in courts outside the United States.

In particular, the Sixth Circuit supported its decision by stating that "[s]ince the object of the statute is to prevent the possession of firearms by individuals with serious criminal records [citations omitted], we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States." *Winson*, at 793 F.2d at 758. The dangerous flaw with this reasoning is that a "serious" crime in one country is not necessarily considered "serious" in the United States.

The circumstances of Mr. Bean's conviction are disturbing to this Court. Mexican law requires an accused person to furnish a statement regarding the crime charged, even if the statement is incriminating. The arrested person can be charged with a separate offense should the arrested person fail to make such statement.

Knowing that Mr. Bean could not read, speak, or understand the Spanish language, the Mexican officials

prepared a statement for Mr. Bean to sign. Bean was then instructed to sign the documents prepared in Spanish without the benefit of an interpreter who could explain to Mr. Bean what the documents stated or represented.[7] Mr. Bean came to find out later that the documents which he signed amounted to a confession. Pursuant to the signed confession, Mr. Bean was ultimately convicted and sentenced to a term of imprisonment of five years in Mexico for the "Introduction of Ammunition into the Republic of Mexico."

This Court believes that the punishment imposed on Mr. Bean in Mexico was far too severe, especially in light of how the Mexican officials handled his arrest, trial, and conviction. Mr. Bean was carrying a box of ammunition. This is hardly a crime "serious" enough to take away an individual's right to possess a firearm. The Court recognizes the right of Mexico to legislate its own laws within its own borders. However, even Mexican lawmakers have realized that the penalty does not fit the crime. After Mr. Bean's case was made public through the media, the Republic of Mexico relaxed the criminal statute in question to make the offense of introducing firearms or ammunition across its border a misdemeanor offense with only a fine on the first occasion.

This case is a perfect illustration as to why the phrase "any court" in 18 U.S.C. § 922(g)(1) cannot be

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[7] The record is not clear as to whether Mr. Bean had counsel during the crucial time periods throughout his arrest, trial, conviction, and subsequent imprisonment in Mexico. Mr. Bean stated that he did not have an attorney for much of his stay in Mexico. However, there is also evidence to suggest that he knowingly and voluntarily waived his right to an attorney and hired a Mexican C.P.A. to help him in his quest to return to the United States.

interpreted to mean "any court in the world regardless of the severity of the crime or the due process which the defendant was entitled during the defense of his case."[8]

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[8] *See* Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 Colum. J. Transnat'l L. 503, 518-21 (1997).

The above Note focuses on the use of foreign crimes in determining habitual criminal status. However, the same arguments apply with respect to using foreign convictions as a predicate offense for a prohibition of firearms under 18 U.S.C. § 922(g)(1). This Note states as follows:

> "In practice, the use of foreign convictions . . . contravenes the principle that defendants should be treated equally. Because some countries display a much more punitive policy than others by criminalizing more behaviors and prosecuting violations of the law more aggressively, the use of foreign convictions . . . invites arbitrary distinctions in punishment simply based on whether a defendant happens to have committed a prior crime in a country with strict, rather than lenient, policies. Despite the same actual conduct, different defendants could be prosecuted for very different 'crimes' (or not prosecuted at all) depending solely on the punitive attitude of the country in which the conduct was committed; defendants who have committed the same acts in the past, then, will start off on very different and arbitrarily unequal footings in subsequent United States proceedings that seek to take into account prior foreign convictions."
>
> "It is within each country's power to determine what punishment to prescribe for crimes committed within its borders, but the fact that different countries do decide to prosecute very different crimes and impose very different punishments compounds the difficulty of using foreign convictions. . . . Add to this the fact that prior criminal convictions from certain countries are necessarily easier for prosecutors to discover than others, and it is clear that the use

D. This Court has determined that Mr. Bean will not be "likely to act in a manner dangerous to public safety" and the "granting of the relief would not be contrary to the public interest." 18 U.S.C. § 925(c).

Mr. Bean is a resident of Orange County, Texas, in the Eastern District of Texas. He is sixty years of age, has been married to his wife since 1962, and has two adult children. Before his conviction in Mexico, Mr. Bean was a licensed firearms dealer. He has also worked as a car dealer in Port Arthur, Texas for several years.

The Court starts the analysis as to Mr. Bean's character by taking notice that Mr. Bean has never been charged with or convicted of a crime in the United States, except for minor traffic offenses. He has also submitted the following evidence to support that he

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of foreign convictions will penalize defendants with convictions from some countries much more strictly than others."

"Furthermore, procedural due process concerns are automatically raised with the use of foreign criminal convictions. The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials. The whole system of due process protections that the American system provides amounts to more than just the sum of the individual procedural safeguards of which it is made. Although other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions. . . ."

would not be a danger to public safety if he were allowed to possess a firearm:

1. During the hearing of January 20, 2000, Carl Fronabarger, an inspector for the Bureau of Alcohol, Tobacco and Firearms, testified that he was responsible for checking Petitioner's firearms records as a licensed dealer and found Petitioner to be a cooperative licensee and to maintain excellent records.

2. During the hearing of January 20, 2000, M.E. "Duke" Gorris, Chief of Police of Port Arthur, Jefferson County, Texas, testified that he personally knows Petitioner and confirmed Petitioner's reputation for being a law abiding citizen of the community and a cautious licensed firearms dealer when Petitioner held his license.

3. During the hearing of January 20, 2000, Lionel Herrera, a deputy sheriff from near Laredo, Texas, confirmed Petitioner's trustworthiness and good character.

4. During the hearing of January 20, 2000, Joe Bob Kinsel, Jr., a well-known and respected businessman and business competitor of Petitioner testified that he has known Petitioner for approximately 20 years and confirmed Petitioner's good personal and business reputation and credible character.

5. During the hearing of January 20, 2000, John Neil, a local businessman and friend of Petitioner's who has hunted with Petitioner in the

past, testified that Petitioner was a safe handler of firearms.

6. During the hearing of January 20, 2000, several letters of recommendation were admitted into evidence. *See* Exhibit 6. The letters were written by the following individuals: (1) James L. Reynolds, Chief of Police, Vidor Texas; (2) Mike White, Sheriff of Orange County Sheriff's Department; (3) M.E. Gorris, Chief of Police, Port Arthur, Texas; (4) Stephen B. Savoy, City Marshal, Groves Police Department; (5) Buddie Hahn, State District Judge, 260th Judicial District, Orange County, TX; (6) Paul M. Fukuda, Assistant District Attorney, Orange County, Texas; (7) Dr. Carl J. Beaudry, Petitioner's Orthopedic Surgeon, Port Arthur, Texas; (8) Thurman Bobo, President of the Young Men's Business League, Beaumont, Texas; (9) Joe E. Polk, President and Chairman of the Board of Buddy Chevrolet, Inc., Port Arthur, Texas; and (10) Mark E. Viator, Pastor of the Friendship Baptist Church, Beaumont, Texas. All of these letters refer generally to the Petitioner's good moral character, integrity, and reputation.

Mr. Bean has satisfied his burden to this Court in establishing that he "will not be likely to act in a manner dangerous to public safety" and that "the granting of relief will not be contrary to the public interest." 18 U.S.C. § 925(c).

CONCLUSION

For the reasons discussed above, Mr. Bean's "Petition for Relief from Disabilities Under the Federal Firearms Act" is to be GRANTED. A separate Order will be entered in accordance with this Opinion.

ORDER

On the 20th day of January, 2000, came on to be heard the Petition for Relief from Disabilities Under Federal Firearms Act filed in the above entitled and numbered cause of action by Petitioner, THOMAS LAMAR BEAN, who appeared in person and by and through his attorney of record.

Respondents, UNITED STATES OF AMERICA, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, appeared by and through Mr. Paul Naman, Assistant United States Attorney.

The Court having considered the pleadings, evidence and argument of counsel, finds that the circumstances regarding the disability imposed by law and Petitioner's record and reputation are such that Petitioner will not be likely to act in a manner dangerous to public safety and that the granting of the relief requested would not be contrary to the public interest, and that said petition should be granted.

In accordance with the Memorandum Opinion entered on this date, it is therefore ORDERED, ADJUDGED AND DECREED in accordance with 18 U.S.C. § 925(c) that Petitioner, THOMAS LAMAR BEAN, is hereby GRANTED relief from all disabilities imposed by Federal laws with respect to Petitioner's acquisition, receipt, transfer, shipment, transportation, or possession of firearms resulting from his foreign conviction on

May 27, 1998, in Nuevo Laredo, Tamaulipas, Republic of Mexico.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40304

THOMAS LAMAR BEAN, PETITIONER-APPELLEE

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS;
UNITED STATES OF AMERICA,
RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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[Filed: Aug. 21, 2001}

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/20/01, 5 Cir., ____, ___ F.3d _____)

Before: POLITZ, DEMOSS and STEWART, Circuit Judges.

PER CURIAM:

(_) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. APP. P. and 5th Cir. R.

35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this case en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
HENRY A. POLITZ
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX D

1. **§ 922. Unlawful Acts**

* * * * *

(g) It shall be unlawful for any person -

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

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.

2. **§ 925. Exception: Relief from disabilites**

* * * * *

(c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from

disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

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3. Act of Nov. 12, 2001, Pub. L. No. 107-67, 115 Stat. 514.

An Act

TREASURY AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2002

* * * * *

TITLE I–DEPARTMENT OF THE TREASURY

* * * * *

Bureau of Alcohol, Tobacco and Firearms

SALARIES AND EXPENSES

* * * * *

519:

* * * none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c): * * *

* * * * *

Identical language can be found at: Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763A-129; Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 434; Treasury and General Government Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-485; Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1277; Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-319; Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471; Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385; Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228.