

DEPARTMENT OF JUSTICE JOURNAL OF FEDERAL LAW AND PRACTICE



Volume 72

December 2024

Number 5

Director

Stephanie M. Hinds

Editor-in-Chief

Christian A. Fisanick

Managing Editor

Kari Risher

Associate Editor

Abigail Hamner

University of South Carolina Law Clerks

Alice Gooding

Bethany Lawless

Caroline McLean

LauraKate Roland

United States Department of Justice
Executive Office for United States
Attorneys

Washington, D.C. 20530

The Department of Justice Journal of
Federal Law and Practice is published
pursuant to 28 C.F.R. § 0.22(c).

The Department of Justice Journal of
Federal Law and Practice is published
by the Executive Office for United States
Attorneys

Office of Legal Education

1620 Pendleton Street
Columbia, SC 29201

Cite as:

72 DOJ J. FED. L. & PRAC., no. 5, 2024.

Internet Address:

[https://www.justice.gov/usao/resources/
journal-of-federal-law-and-practice](https://www.justice.gov/usao/resources/journal-of-federal-law-and-practice)

The opinions and views contained herein are those of the authors and do not necessarily reflect the views of the Department of Justice. Further, they should not be considered as an endorsement by EOUSA of any policy, program, or service.

Page Intentionally Left Blank

Firearms

In This Issue

Introduction

Mahogane D. Reed 1

Bruen Discontent: The *Rahimi* Recalibration and Its Initial Implementation in the Lower Courts

Joshua Handell 3

Garland v. Cargill and Machine Gun Conversion Devices

Melissa A. Anderson & Jonathan S. Jacobs 17

Juvenile Prosecution of Machine Gun Conversion Devices

Lee Smith 33

The Bipartisan Safer Communities Act: The National Instant Criminal Background Check System and Expanded Background Checks for Gun Buyers Under 21

Kristin Thigpen 41

New Tools for Combating Illegal Gun Trade: Firearms Trafficking Statutes Enacted Under the Bipartisan Safer Communities Act of 2022

Dineen A. Baker 53

Firearms-Related Predicate Offenses Added to the Racketeer Influenced and Corrupt Organizations Act: Straw Purchasing and Firearms Trafficking Under 18 U.S.C. §§ 932–933

Carl Alexandre 63

Note from the Editor-in-Chief

Christian A. Fisanick 77

Page Intentionally Left Blank

Introduction

Mahogane D. Reed
Trial Attorney
Criminal Division
Appellate Section

Welcome to this edition of the Department of Justice Journal of Federal Law and Practice (DOJ Journal). This lean-but-mighty issue of the DOJ Journal features timely writings on firearm-related topics of interest to federal prosecutors and the general public.

For the past several years, firearms and firearm safety have pervaded the discourse among legislators, lawyers, and law-enforcement officers. It has likewise been a top concern of the Department of Justice (Department), which has prioritized the prosecution of those who are responsible for gun violence in our communities. The widespread focus on firearms has stemmed from, or culminated in, a bevy of recent constitutional, legislative, and regulatory developments that bear on the work of the Department. This issue of the DOJ Journal, written by personnel from across the Department, highlights a few recent happenings.

The first two articles dive into the Supreme Court’s recent gun-related decisions. First, Joshua Handell, an attorney in the Criminal Division’s Appellate Section, discusses the Supreme Court’s recent Second Amendment precedent, including its landmark decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, and its more recent decision in *United States v. Rahimi*.¹ His insightful article adroitly explains the contours of *Bruen* and *Rahimi*; how courts of appeals have assessed the constitutionality of criminal gun laws in light of those decisions; and what *Bruen*, *Rahimi*, and lower-court decisions might portend for prosecutors who litigate Second Amendment claims. Next, Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF’s) Melissa Anderson and Jonathan Jacobs explain the Supreme Court’s highly technical decision in *Cargill v. Garland*—which addresses whether a bump-stock device satisfies the definition of “machinegun” in the National Firearms Act (spoiler alert: it does not)—and the decision’s potential implications for devices other than bump stocks.² The next article by Assistant U.S. Attorney Lee Smith from the Southern District of Mississippi explores the unique

¹ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022); *United States v. Rahimi*, 602 U.S. 680 (2024).

² *Garland v. Cargill*, 602 U.S. 406 (2024); 26 U.S.C. § 5845.

considerations for prosecuting juveniles for possessing or transferring machine gun conversion devices.

The last few articles in this issue cover various aspects of the Bipartisan Safer Communities Act of 2022 (the Act)—landmark legislation that, among other things, created and expanded law-enforcement mechanisms for addressing gun violence. Kristin Thigpen of the Federal Bureau of Investigation’s Criminal Justice Information Services Division describes the Act’s impact on the National Instant Criminal Background Check System and firearm transfers to individuals who are under the age of 21. Dineen Baker of ATF explains the Act’s impact on efforts to combat the flow of illegal guns used to commit violent crime, including the Act’s new prohibitions on straw purchasing firearms for prohibited persons or individuals who intend to use a firearm in furtherance of another felony. And Carl Alexandre of the Violent Crime and Racketeering Section addresses how those provisions’ incorporation into the Racketeer Influenced and Corrupt Organization Act and money-laundering statutes will increase the Department’s effectiveness in combating violent crimes.

I would like to thank everyone involved in preparing this edition of the DOJ Journal, including the authors, who devoted substantial time, attention, and effort to writing and editing these articles, and the editorial staff—specifically Chris Fisanick, who (among other things) proposed the topic for this issue of the DOJ Journal, and Kari Risher, whose leadership and welcome persistence ensured the timely publication of this issue—for their invaluable assistance. I sincerely hope you enjoy and find use in this edition of the DOJ Journal.

Bruen Discontent: The *Rahimi* Recalibration and Its Initial Implementation in the Lower Courts

Joshua Handell

Attorney

Criminal Division

Appellate Section

Thirty months ago, the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*¹ spurred a “tidal wave” of litigation² that portended a “seismic impact” on Second Amendment law.³ But even tsunamis have an undertow, and the Supreme Court’s grant of certiorari just two terms later in *United States v. Rahimi* hinted at possible unease with how far and how fast the lower courts had moved after *Bruen* effectively declared open season on the nation’s gun laws.⁴ Sure enough, in its June 2024 decision in *Rahimi*, an eight-justice majority chastised the lower courts for having “misunderstood the methodology” the Court required in *Bruen*.⁵

Although the caselaw thus far is limited, early returns indicate that the courts of appeals received the message sent in *Rahimi* and began tightening their analyses of facial constitutional challenges, searching for historical principles instead of identical statutes, and broadly upholding restrictions on persons who pose a danger to physical safety. But lingering divisions among appellate jurists suggest that harder questions—including the validity of the categorical felon-in-possession prohibition under 18 U.S.C. § 922(g)(1)—lie ahead.⁶

¹ 597 U.S. 1 (2022).

² Kaelan Deese, *Starting Pistol: “Tidal Wave” of Gun Laws Struck Down a Year After Supreme Court Bruen Ruling*, WASH. EXAM’R (June 12, 2023), <https://www.washingtonexaminer.com/news/2570086/starting-pistol-tidal-wave-of-gun-laws-struck-down-a-year-after-supreme-court-bruen-ruling-2/>.

³ Eric Ruben et al., *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 24 (2024).

⁴ *United States v. Rahimi*, 602 U.S. 680 (2024).

⁵ *Id.* at 691.

⁶ 18 U.S.C. § 922(g)(1).

I. *Bruen* sets the stage

To understand how we got here, it is worth taking a moment to remember the pre-*Bruen* world. In New York, an individual who wanted to carry a firearm outside his home was required to obtain a concealed-carry license, which was approved only if the applicant could establish that “proper cause exists” for issuance.⁷ An applicant satisfied the “proper cause” requirement if he could “demonstrate a special need for self-protection distinguishable from that of the general community.”⁸ The plaintiffs in *Bruen*, Brandon Koch and Robert Nash, were New York residents whose concealed-carry applications were denied based on the state’s determination that neither had satisfied the “proper cause” requirement.⁹ They brought a Second Amendment challenge to New York’s licensing regime, which both the district court and the Second Circuit rejected.¹⁰

In an opinion by Justice Thomas, the Supreme Court reversed.¹¹ The Court noted that, in the years since *District of Columbia v. Heller*¹² and *McDonald v. City of Chicago*¹³ identified an individual’s right to keep and bear arms for self-defense, “the Courts of Appeals ha[d] coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.”¹⁴ Notwithstanding this circuit consensus, the Court “decline[d] to adopt that two-part approach” and instead imposed a more rigorous test: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct,” and “to justify a regulation of such conduct, the government must demonstrate that the regulation is consistent with this nation’s historical tradition of firearm regulation.”¹⁵ The Court clarified that the justification component is an “analogical inquiry” that focuses on “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”¹⁶

Turning to the state law at issue in *Bruen*, the Court first concluded

⁷ N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2021) (amended July 5, 2022).

⁸ *In re Klenosky v. New York City Police Dep’t*, 75 A.D.2d 793 (N.Y. App. Div. 1980), *aff’d*, 53 N.Y.2d 685 (N.Y. 1981).

⁹ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 15–16 (2022).

¹⁰ *Id.* at 16.

¹¹ *Id.* at 11.

¹² *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008).

¹³ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

¹⁴ *Bruen*, 597 U.S. at 17.

¹⁵ *Id.* (cleaned up).

¹⁶ *Id.* at 29.

that concealed carry is covered by the Second Amendment’s plain text because “[t]h[e] definition of ‘bear’ naturally encompasses public carry.”¹⁷ The Court then engaged in a 36-page disquisition on “the Anglo-American history of public carry” to determine whether New York’s discretionary licensing regime comports with the “historical tradition of firearm regulation.”¹⁸ (To offer a flavor of this discussion, the Court noted that the “history ‘between the Stuart Restoration in 1660 and the Glorious Revolution in 1688’” is “particularly instructive.”¹⁹) Concluding that “the historical record . . . does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense” or of “limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense,” the Court held New York’s restriction unconstitutional.²⁰ The Court also suggested that its reasoning undermined the analogous licensing regimes in the other six jurisdictions (California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey) with laws permitting discretionary licensing—so-called “may issue” laws, by contrast to the 43 “shall issue” States, “where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements.”²¹

Justice Kavanaugh, joined by Chief Justice Roberts, concurred in full but wrote separately “to underscore two important points about the limits of the Court’s decision.”²² “First, the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court’s decision does not affect the existing licensing regimes—known as ‘shall-issue’ regimes—that are employed in 43 [s]tates.”²³ Second, “the Second Amendment ‘is neither a regulatory straightjacket nor a regulatory blank check,’”²⁴ and continues to “allow[] a ‘variety’ of gun regulations.”²⁵ Within this “[non]exhaustive” list of permissible regulations, Justice Kavanaugh recognized:

longstanding prohibitions on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 33–70.

¹⁹ *Id.* at 42 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008)) (cleaned up).

²⁰ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 38–39 (2022).

²¹ *Id.* at 14–15, 70–71.

²² *Id.* at 79 (Kavanaugh, J., concurring).

²³ *Id.* at 79–80 (Kavanaugh, J., concurring).

²⁴ *Id.* at 79–80 (Kavanaugh, J., concurring) (quoting *id.* at 30).

²⁵ *Id.* at 80 (Kavanaugh, J., concurring) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

firearms in sensitive places such as schools and government buildings, laws imposing conditions and qualifications on the commercial sale of arms, and laws prohibiting the carrying of dangerous and unusual weapons.²⁶

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. He identified three principal problems with the Court's disposition:

First, the Court decides this case [based on] the pleadings, without the benefit of discovery or an evidentiary record. . . . Second, the Court wrongly limits its analysis to focus nearly exclusively on history. It refuses to consider the government interests that justify a challenged gun regulation, regardless of how compelling those interests may be. . . . Third, the Court itself demonstrates the practical problems with its history-only approach . . . by ignoring an abundance of historical evidence supporting regulations restricting the public carriage of firearms.²⁷

The approach now imposed by the majority on the lower courts would, in Justice Breyer's view, lead to an unfortunate proliferation of "law office history," . . . "a results[-]oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion."²⁸ Instead of forcing lawyers and judges to moonlight as amateur historians, Justice Breyer would hold that, "when courts interpret the Second Amendment, it is constitutionally proper, indeed often necessary, for them to consider the serious dangers and consequences of gun violence that lead States to regulate firearms."²⁹

II. *Rahimi* flips the script

Just a year after the Court issued *Bruen*, it was forced to grant certiorari yet again to clean up the consequences of its earlier decision. In the 8–1 *Rahimi* decision issued in June 2024, the Court held that 18 U.S.C. § 922(g)(8)'s prohibition on firearm possession while subject to a domestic-violence restraining order does not violate the Second Amendment.³⁰

²⁶ *Id.* at 21; *id.* at 81 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626–27) (cleaned up).

²⁷ *Id.* at 83–84 (Breyer, J., dissenting).

²⁸ *Id.* at 107–08 (quoting Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss,"* 56 UCLA L. REV. 1095, 1098 (2009)).

²⁹ *Id.* at 84 (Breyer J., dissenting).

³⁰ 18 U.S.C. § 922(g)(8).

The defendant in that case, Zackey Rahimi, was involved in five shootings in and around Arlington, Texas over the course of two months in late 2020 and early 2021.³¹ On December 1, 2020, after completing a drug sale, he fired multiple shots into the purchaser’s residence.³² The next day, Rahimi was involved in a road-rage incident during which he shot at the other driver and fled the scene.³³ He then “returned to the scene in a different vehicle and shot at the other driver’s car.”³⁴ Three weeks later, Rahimi shot at a constable’s vehicle.³⁵ And two weeks after that, “Rahimi fired multiple shots in the air after his friend’s credit card was declined at a Whataburger restaurant.”³⁶

Astonishingly, none of that conduct earned Rahimi a firearms restriction. Instead, he was subject to a restraining order based on an assault on his girlfriend, during which he fired a gun at a bystander.³⁷ After he was arrested for a different assault, authorities searched Rahimi’s home and found multiple firearms—along with a copy of the restraining order expressly imposing the firearms prohibition.³⁸ The district court denied Rahimi’s motion to dismiss, and he pleaded guilty.³⁹ The Fifth Circuit reversed his conviction, concluding that section 922(g)(8) facially violated the Second Amendment in light of *Bruen*.⁴⁰

In an opinion by Chief Justice Roberts, the Supreme Court reversed, holding that “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.”⁴¹ The Court opined that “some courts have misunderstood the methodology of [its] recent Second Amendment cases” which “were not meant to suggest a law trapped in amber.”⁴² (Though it bears mentioning that Justice Thomas—the author of *Bruen*—was the lone dissenter in *Rahimi*, so query whether the fault for “misunderst[anding]” *Bruen* lay with the lower courts or the high one.)⁴³ The Court emphasized that, contrary to the unduly restrictive approach

³¹ United States v. Rahimi, 61 F.4th 443, 448–49 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), *rev’d and remanded*, 602 U.S. 680 (2024).

³² *Rahimi*, 61 F.4th at 448.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 448–49.

³⁷ United States v. Rahimi, 602 U.S. 680, 684–86 (2024).

³⁸ *Id.* at 686–88.

³⁹ *Id.* at 689.

⁴⁰ *Id.*

⁴¹ *Id.* at 702.

⁴² *Id.* at 691.

⁴³ *Id.* at 700–02.

adopted by certain lower courts, a modern regulation “must comport with the *principles* underlying the Second Amendment, but it need not be a ‘dead ringer’ or a ‘historical twin.’”⁴⁴

Turning to the statutory provision at issue, the Court explained that founding-era laws “target[ed] individuals who physically threatened others.”⁴⁵ Specifically, the Court pointed to historical surety laws and “going armed” laws, which prohibited those “who had menaced others with firearms” from carrying guns.⁴⁶ “Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”⁴⁷ Although section 922(g)(8) “is by no means identical to these founding era regimes,” it nevertheless “fits neatly within the tradition the surety and going armed laws represent.”⁴⁸ Thus, the Court rejected *Rahimi*’s facial challenge to section 922(g)(8) because the statute could constitutionally be applied to him.⁴⁹

In closing, the Court “reject[ed] the Government’s contention that *Rahimi* may be disarmed simply because he is not ‘responsible.’”⁵⁰ The Court acknowledged its use of that formulation in *Heller* and *Bruen* but now described “responsible” as a “vague term” that did not define who possesses the Second Amendment right.⁵¹

Although the Chief Justice’s opinion was endorsed by an eight-justice supermajority, *Rahimi* ended up producing nearly as many separate opinions as there are justices on the Court. Justice Sotomayor (joined by Justice Kagan) concurred, expressing her belief that *Bruen* was wrongly decided but agreeing with the *Rahimi* Court’s clarification of *Bruen*’s historical inquiry.⁵² Justice Gorsuch concurred, stressing the narrowness of the *Rahimi* opinion and the importance of the historical approach.⁵³

⁴⁴ *Id.* at 692 (emphasis added) (quoting *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022)).

⁴⁵ *Id.* at 694.

⁴⁶ *Id.* at 697.

⁴⁷ *Id.* at 698.

⁴⁸ *Id.*

⁴⁹ *Id.* at 701.

⁵⁰ *Id.*

⁵¹ *Id.* *Cf.* *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (Congress may disarm individuals who are not “law-abiding, responsible citizens.”); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022) (“American governments [have not] required law-abiding, responsible citizens to ‘demonstrate a special need for self-protection distinguishable from that of the general community’ in order to carry arms in public.”) (quoting *In re Klenosky v. New York City Police Dep’t*, 75 A.D.2d 793 (N.Y. App. Div. 1980), *aff’d*, 53 N.Y.2d 685 (N.Y. 1981)).

⁵² *Rahimi*, 602 U.S. at 702–08 (Sotomayor, J., concurring).

⁵³ *Id.* at 708–14 (Gorsuch, J., concurring).

Justice Kavanaugh concurred, explaining that a proper approach to constitutional interpretation “takes account of text, pre-ratification and post-ratification history, and precedent.”⁵⁴ Justice Barrett concurred, explaining that *Bruen* does not require a modern regulation to be “an updated model of a historical counterpart” and criticizing the faulty assumption by some lower courts “that founding-era legislatures maximally exercised their power to regulate.”⁵⁵ Justice Jackson also concurred, explaining that *Bruen*’s methodology—even as refined in *Rahimi*—fails to provide clear guidance to lower courts and legislatures.⁵⁶

Justice Thomas penned a lengthy dissent.⁵⁷ He rejected the majority’s reliance on surety laws, which, in his view, “imposed a materially different burden” on firearm possession.⁵⁸ And he said that the going armed laws “had a dissimilar burden and justification.”⁵⁹ In his estimation, the government had offered only two categories of historical evidence that were “even within the ballpark”—English laws disarming those dangerous to the peace of the kingdom and “commentary discussing peaceable citizens bearing arms”—but he concluded that “[n]either category ultimately does the job.”⁶⁰ Notwithstanding his Second Amendment analysis, Justice Thomas explained that “States have a ready mechanism for disarming anyone who uses a firearm to threaten physical violence: criminal prosecution.”⁶¹

III. The lower courts fill in the blanks

The initial wave of appellate decisions implementing *Rahimi* reflects a cautious—if uneven—pullback from some of the more absolutist Second Amendment decisions issued in the wake of *Bruen*. There was enough language in the Chief Justice’s majority opinion—not to mention the numerous separate writings of the concurring justices—to provide (*ahem*) ammunition to lower-court judges across the full spectrum of judicial philosophies. But all courts of appeals to have issued post-*Rahimi* decisions appear to agree, at minimum, that *Rahimi* did not further extend *Bruen*. The extent to which *Rahimi* supplanted *Bruen*—and, if so, with what new legal regime—has engendered less agreement.

⁵⁴ *Id.* at 714–36 (Kavanaugh, J., concurring).

⁵⁵ *Id.* at 737–40 (Barrett, J., concurring).

⁵⁶ *Id.* at 740–47 (Jackson, J., concurring).

⁵⁷ *Id.* at 747–78 (Thomas, J., dissenting).

⁵⁸ *Id.* at 764 (Thomas, J., dissenting).

⁵⁹ *Id.* at 767 (emphasis omitted) (Thomas, J., dissenting).

⁶⁰ *Id.* at 753 (Thomas, J., dissenting).

⁶¹ *Id.* at 777 (Thomas, J., dissenting).

A. The consensus takeaways

In the first months of the post-*Rahimi* legal regime, the intermediate appellate courts have largely coalesced around three methodological takeaways from the Supreme Court's decision. First, they have followed the Court's direction to rigorously apply the requirements of facial constitutional challenges to federal laws. Second, they have accepted *Rahimi*'s clarification that the *Bruen* analysis operates at the level of "principles," not precisely analogous historical comparator laws. And third, they have broadly embraced the permissibility of disarming dangerous persons, meaning those who pose a threat of physical harm to themselves or others.

1. Disfavoring facial challenges

As noted above, *Rahimi* reversed the Fifth Circuit's *facial* invalidation of section 922(g)(8). Of course, *Rahimi* himself had no choice but to challenge the statute on its face; given his criminal history and the alarming allegations pending against him, an as-applied challenge was extremely unlikely to succeed.⁶² And that was enough for the Supreme Court: Cautioning that a facial challenge "is the 'most difficult challenge to mount successfully,' because it requires a defendant to 'establish that no set of circumstances exists under which the Act would be valid,'" the Court held that, "to prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications"—which it had, because "the provision is constitutional as applied to the facts of *Rahimi*'s own case."⁶³

The Fifth Circuit appears to have taken the hint. In *United States v. Connelly*, that court affirmed a marijuana user's as-applied challenge⁶⁴ to 18 U.S.C. § 922(g)(3), which prohibits firearm possession by anyone "who is an unlawful user of or addicted to any controlled substance."⁶⁵ But the court reversed the district court's separate determination that section 922(g)(3) is facially unconstitutional.⁶⁶ Undertaking the latter analysis, the Fifth Circuit relied on *Rahimi*'s directive that "[f]acial challenges should 'consider the circumstances in which the challenged act is most likely to be constitutional.'"⁶⁷ Because the "history and tradition of firearms regulation show that there are indeed some sets of circumstances

⁶² Cf. *id.* (Thomas, J., dissenting) ("Assuming C. M.'s allegations could be proved, Texas could have convicted and imprisoned *Rahimi* for every one of his alleged acts.").

⁶³ *Id.* at 693 (internal citations omitted).

⁶⁴ *United States v. Connelly*, 117 F.4th 269, 283 (5th Cir. 2024).

⁶⁵ 18 U.S.C. § 922(g)(3).

⁶⁶ *Connelly*, 117 F.4th at 283.

⁶⁷ *Id.* at 282 (cleaned up) (quoting *Rahimi*, 602 U.S. at 701).

where [section] 922(g)(3) would be valid, such as banning presently intoxicated persons from carrying weapons,” the court rejected the facial challenge.⁶⁸

Although not as pointedly rebuked as the Fifth Circuit, the other courts of appeals have likewise adhered to the Supreme Court’s guidance regarding facial challenges. The Sixth Circuit, for instance, invoked *Rahimi* in determining that a felon-in-possession defendant’s “facial challenge will fail if [section] 922(g)(1) is constitutional in even just one of its applications,” which is “a steep climb—one [this particular defendant] can’t make.”⁶⁹ The Eighth Circuit explained that, under *Rahimi*, litigants “asking this court to affirm the grant of [a] facial challenge, are ‘speaking for a range of people,’” any one of whom could individually preclude relief if the government could establish a single constitutional application.⁷⁰ Some courts have even repeated *Rahimi*’s stringent standard for facial challenges in contexts far afield of the Second Amendment.⁷¹

2. Searching for principles, not prototypes

Arguably, the Court’s most significant substantive holding in *Rahimi*—at least alongside its vindication of section 922(g)(8)—was the directive that courts should focus on the “principles” underlying founding-era restrictions, not scour the ancient scrolls for “‘historical twin[s].’”⁷² In so holding, the Supreme Court admonished lower “courts [that] have misunderstood the methodology of our recent Second Amendment cases . . . to suggest a law trapped in amber.”⁷³ Instead, the Court explained, “the Second Amendment permits more than just those regulations identical to ones that could be found in 1791”—it permits any modern-day “regulation [that] is consistent with the principles that underpin our regulatory tradition.”⁷⁴

Virtually every post-*Rahimi* appellate decision has recognized this

⁶⁸ *Connelly*, 117 F.4th at 282–83.

⁶⁹ *United States v. Williams*, 113 F.4th 637, 643 (6th Cir. 2024).

⁷⁰ *Worth v. Jacobson*, 108 F.4th 677, 685 (8th Cir. 2024) (quoting *United States v. Veasley*, 98 F.4th 906, 910 (8th Cir. 2024)).

⁷¹ *See, e.g., Satanic Temple, Inc. v. City of Bos.*, 111 F.4th 156, 168 (1st Cir. 2024) (quoting *Rahimi*, 602 U.S. at 692–93, for Establishment Clause and Free Exercise claims). *See also Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, 117 F.4th 389, 453 (6th Cir. 2024) (Readler, J., dissenting) (quoting *Rahimi*, 602 U.S. at 713–14, in an action challenging the validity of expenditures under the First Amendment).

⁷² *Rahimi*, 602 U.S. at 692.

⁷³ *Id.* at 691 (quoting *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022)).

⁷⁴ *Id.* at 690–92 (quoting *Bruen*, 597 U.S. at 26–31).

methodological shift, to one degree or another. Quoting extensively from the Court’s “principles” discussion, the First Circuit identified *Rahimi*—not *Bruen*—as “provid[ing] the governing legal standard that [it] must apply” in Second Amendment challenges going forward.⁷⁵ And in a seven-judge concurrence, the Ninth Circuit described *Rahimi*’s holding as an “important methodological point that bears repeating here: Rather than asking whether a present-day gun regulation has a specific historical analogue, courts must instead consider ‘whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.’”⁷⁶

Beyond simply recognizing the changing landscape, the courts of appeals have begun hunting for applicable “principles” themselves. For example, in upholding the application of section 922(g)(1) to persons discharging their terms of supervised release, the Third Circuit invoked *Rahimi* and read the “early American forfeiture laws—which required forfeiting property in general and arms in particular—[to] yield the principle that a convict may be disarmed while he completes his sentence and reintegrates into society.”⁷⁷ The Fourth Circuit described the post-*Rahimi* search for relevant “principles” as an “ongoing learning” process “as new sources become available and new insights are advanced,” quoting Justice Barrett’s concurrence for the idea that “[h]istorical regulations reveal a principle, not a mold.”⁷⁸

3. Disarming the dangerous

The *Rahimi* Court’s endorsement of a principles-based approach to *Bruen*’s historical inquiry raises the follow-up question of *what* principles the nation’s historical tradition supports. Although the Supreme Court did not engage in an exhaustive analysis along these lines, the courts of appeals appear to agree that *Rahimi* embraced at least one such principle: The Second Amendment permits the disarmament of dangerous persons.

In evaluating the proffered historical authorities supporting section 922(g)(3), the Fifth Circuit identified “an undeniable throughline run[ning] through these sources: Founding-era governments took guns away from those perceived to be dangerous.”⁷⁹ The court ultimately granted the as-applied challenge to that statute because “[t]he government identifie[d] no

⁷⁵ United States v. Langston, 110 F.4th 408, 418 (1st Cir. 2024) (citing *Rahimi*, 602 U.S. 680).

⁷⁶ United States v. Garcia, 115 F.4th 1002, 1008 (9th Cir. 2024) (mem.) (Sanchez, J., concurring) (quoting *Rahimi*, 602 U.S. at 692).

⁷⁷ United States v. Moore, 111 F.4th 266, 272 (3d Cir. 2024).

⁷⁸ Bianchi v. Brown, 111 F.4th 438, 462 (4th Cir. 2024) (quoting *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring)).

⁷⁹ United States v. Connelly, 117 F.4th 269, 278 (5th Cir. 2024).

class of persons at the [f]ounding who were ‘dangerous’ for reasons comparable to marijuana users.”⁸⁰ Similarly, when considering a challenge to Minnesota’s restriction on handgun possession by 18–20 year olds, the Eighth Circuit “[a]ssum[ed] that historical regulation of firearm possession can be viewed as an effort to address a risk of dangerousness.”⁸¹ Affirming its pre-*Rahimi* decision permitting the disarmament of criminal defendants awaiting felony trials, Ninth Circuit judges have noted that “*Rahimi* identified a historical tradition of ‘disarm[ing] individuals who present a credible threat to the physical safety of others’”⁸² That court accordingly read the “recent decision in *Rahimi* to vindicate our conclusion that the firearm condition as applied to these defendants fits within the government’s proffered historical tradition of ‘disarming people whose possession of firearms would pose an unusual danger, beyond the ordinary citizen, to themselves or others.’”⁸³ And, concurring in the Fourth Circuit’s en banc judgment upholding Maryland’s handgun-licensing statute, Judge Rushing explained that “history demonstrates the principle that certain dangerous individuals may be prohibited from possessing firearms at all, not just from carrying them publicly.”⁸⁴

B. *Rahimi* as Rorschach test

As might be expected in an ideologically polarized judiciary, appellate judges have differed as to what *Rahimi* portends for Second Amendment questions left open by the Court’s opinion. And there is plenty of room for disagreement: To hold together eight votes from widely divergent wings of the Court, Chief Justice Roberts appears to have rendered less of a bright line and more of an inkblot.

Two passages from *Rahimi* have animated the emerging conflict in the intermediate courts. On one hand, the *Rahimi* Court reiterated yet again the language from *Heller* that longstanding prohibitions on certain irresponsible groups, such as “felons and the mentally ill,” remain presumptively valid.⁸⁵ On the other hand, the Court went out of its way to reject the government’s effort to cabin gun rights to law-abiding, “respon-

⁸⁰ *Id.* at 272.

⁸¹ *Worth v. Jacobson*, 108 F.4th 677, 694 (8th Cir. 2024).

⁸² *United States v. Garcia*, 115 F.4th 1002, 1006–07 (9th Cir. 2024) (mem.) (Sanchez, J., concurring).

⁸³ *Id.* (cleaned up).

⁸⁴ *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 233 (4th Cir. 2024) (Rushing, J., concurring) (citing *United States v. Rahimi*, 602 U.S. at 680, 694–700 (2024)).

⁸⁵ *Rahimi*, 602 U.S. at 699 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008)).

sible” persons.⁸⁶ The tension between those statements has undergirded much of the disagreement appearing thus far in the initial post-*Rahimi* caselaw. Based on these early returns, it seems likely that the next major Second Amendment battleground will center on efforts to reconcile these dueling principles—particularly in the context of the felon-in-possession statute.

1. The responsibility principle

Most of the early *Rahimi*-implementing caselaw has simply ignored the Supreme Court’s rejection of the government’s proffered responsibility principle. Indeed, although not using the term “responsible,” the First Circuit held to the bulk of the Court’s traditional formulation, noting that “a series of decisions” has established that the Second Amendment “protects the right of an ordinary, law-abiding individual to keep and bear arms.”⁸⁷

Other courts, however, have seized on *Rahimi*’s rejection of a broad responsibility principle to indicate renewed skepticism of the government’s justifications for non-dangerousness-based restrictions. For instance, while upholding the prohibition on firearm possession by an unlawfully present non-citizen, the Fifth Circuit suggested that “*Rahimi*’s discussion of the term ‘responsible’ provides some indication that the Supreme Court may, in future cases, reject other arguments that the Second Amendment’s reference to ‘the people’ excludes certain individuals.”⁸⁸ In a similar vein, the Eighth Circuit bootstrapped the Court’s rejection of the responsibility principle into a broader conclusion that, “[a]t the step one ‘plain text’ analysis, a claim that a group is ‘irresponsible’ or ‘dangerous’ does not remove them from the definition of the people.”⁸⁹ And the Sixth Circuit used this opportunity to take a victory lap, criticizing “other circuits [for] read[ing] too much into the Supreme Court’s repeated invocation of ‘law-abiding, responsible citizens.’”⁹⁰

2. Presumptively valid restrictions

Finally, *Rahimi* reiterated the Court’s statement in *Heller* “that many [firearm] prohibitions, like those on the possession of firearms by ‘felons and the mentally ill,’ are ‘presumptively lawful.’”⁹¹ That language was no-

⁸⁶ *Rahimi*, 602 U.S. at 701–02.

⁸⁷ *United States v. Langston*, 110 F.4th 408, 417 (1st Cir. 2024).

⁸⁸ *United States v. Medina-Cantu*, 113 F.4th 537, 542 (5th Cir. 2024).

⁸⁹ *Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024).

⁹⁰ *United States v. Williams*, 113 F.4th 637, 646 (6th Cir. 2024).

⁹¹ *Rahimi*, 602 U.S. at 699 (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008)).

tably absent from Justice Thomas’s opinion for the Court in *Bruen*—leaving Justice Kavanaugh (joined by Chief Justice Roberts) to repeat the point in a concurring opinion.⁹²

Several courts of appeals have taken the *Rahimi* Court’s readoption of the *Heller* language as a signal that felon-in-possession statutes are likely safe. The Eighth Circuit, for example, reaffirmed its pre-*Rahimi* holding “that there is no need for felony-by-felony litigation regarding the constitutionality of [section] 922(g)(1)”⁹³ by reference to the Supreme “Court[’s] referr[ing] back to its statement in *Heller* that prohibitions on the possession of firearms by felons are presumptively lawful.”⁹⁴ Concurring in a decision by the Sixth Circuit upholding section 922(g)(1), Judge Davis wrote that she took this language “to mean that *Rahimi* did not intend for courts of appeals to abandon prior decisions that relied on the presumption in favor of conducting independent historical surveys to determine what it already settled: Categorical bans that prohibit felons from possessing firearms are ‘presumptively lawful’ and thus survive constitutional challenge.”⁹⁵ In enumerating its reasons for rejecting a similar claim by a felon in possession, the First Circuit observed that, “[m]ost importantly, the Supreme Court’s majority opinion in *Rahimi*, joined by eight justices, once again identified prohibitions on the possession of firearms by felons as ‘presumptively lawful.’”⁹⁶

Other jurists are less convinced. Although declining to find plain error in the defendant’s section 922(g)(1) conviction, the Fifth Circuit identified “an absence of binding precedent holding that [section] 922(g)(1) is unconstitutional” and opined that “it remains unclear whether *Bruen*—even with *Rahimi*’s clarification—dictates such a result.”⁹⁷ Perhaps most stridently, Judge VanDyke—dissenting from the Ninth Circuit’s grant of rehearing en banc in a case that had required felony-by-felony adjudication of section 922(g)(1)’s constitutionality—predicted that “judges who are more interested in sidestepping than following the Court’s Second Amendment precedent will latch onto phrases like ‘presumptively lawful’ and ‘law-abiding citizen’ while conveniently overlooking such bothersome details like the government’s burden of supplying relevantly similar

⁹² *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 81 (2022) (Kavanaugh, J., concurring).

⁹³ *United States v. Jackson*, 110 F.4th 1120, 1121–22 (8th Cir. 2024).

⁹⁴ *Id.* at 1125, 1129 (citing *Rahimi*, 602 U.S. at 699–700).

⁹⁵ *Williams*, 113 F.4th at 665 (Davis, J., concurring).

⁹⁶ *United States v. Langston*, 110 F.4th 408, 420 (1st Cir. 2024) (quoting *Rahimi*, 602 U.S. at 699).

⁹⁷ *United States v. Moya*, No. 22-40714, 2024 WL 3723900, at *1 (5th Cir. Aug. 8, 2024).

historical analogues.”⁹⁸ Given this putative tendency among his peers, Judge VanDyke admonished the Supreme Court for employing a “delay-the-inevitable approach to pressing Second Amendment questions,” and observed that “no single Second Amendment issue has divided the lower courts more than the constitutionality of the 18 U.S.C. § 922(g)(1) felon-disarmament rule’s application to certain nonviolent felons.”⁹⁹

IV. The rest of us wait

Whatever the merits of Judge VanDyke’s criticism of his fellow jurists, his prediction of further upheaval in the wake of *Rahimi* seems virtually assured. Indeed, the justices themselves appear to recognize that they have not yet spoken the final word here: The numerous concurring opinions—each staking out ground on simmering methodological, doctrinal, and policy-oriented disputes—belied the near-unanimity otherwise reflected by *Rahimi*’s lopsided margin. For now, however, government attorneys can take solace that there is *some* limiting principle to the post-*Bruen* dismantling of the nation’s firearm regulations. And that limiting principle really is a *principle*—not a historical twin.

About the Author

Joshua Handell is an attorney in the Criminal Division’s Appellate Section. He has previously completed details to the Civil Division’s Appellate Staff and the Office of the Deputy Attorney General, where he served as Senior Counsel and Deputy Chief of Staff to Deputy Attorney General Lisa Monaco. He received the Criminal Division’s Distinguished Service Award in 2023 for helping to coordinate the Department of Justice’s nationwide response to the *Bruen* decision.

⁹⁸ United States v. Duarte, 108 F.4th 786, 788 (9th Cir. 2024) (mem.) (VanDyke, J., dissenting).

⁹⁹ *Id.* at 787.

Garland v. Cargill and Machine Gun Conversion Devices

Melissa A. Anderson

Associate Chief Counsel for Litigation

Bureau of Alcohol, Tobacco, Firearms and Explosives

Jonathan S. Jacobs

Associate Chief Counsel

Firearms and Explosives Law Division

Bureau of Alcohol, Tobacco, Firearms and Explosives

I. Introduction

According to a 1934 statement by then-President of the National Rifle Association, a firearm “which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded as . . . a machinegun.”¹ In *Staples v. United States*, the Supreme Court defined a machine gun as “a weapon that fires repeatedly with a single pull of the trigger.”²

No longer. The above interpretation was rejected by a majority of the Supreme Court in *Garland v. Cargill*.³ In its place, a narrow interpretation of a broadly written statutory definition has already created confusion.⁴ The *Cargill* majority found instead that “[t]he phrase ‘function of the trigger’ refers to the mode of action by which the trigger activates the firing mechanism.”⁵ In place of the “single pull of the trigger” analysis, the majority went on to explain that its analysis examines the entire “trigger assembly” and its relationship to the “mechanics of the firing cycle.”⁶

¹ *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. On Ways & Means*, 73d Cong., 2d Sess. 40 (1934) (statement of Karl T. Frederick, President, National Rifle Association).

² 511 U.S. 600, 602 n.1 (1994).

³ *Garland v. Cargill*, 602 U.S. 406 (2024).

⁴ A machine gun is “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. [And] . . . any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun.” 26 U.S.C. § 5845(b).

⁵ *Cargill*, 602 U.S. at 407.

⁶ *Id.* at 413, 416.

II. Background

The following is important to the National Firearms Act's (NFA's) definition of machine gun:

The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.⁷

A “bump stock” is a device that modifies a semiautomatic rifle to achieve a rate of fire of 400 to 800 rounds per minute.⁸

The bump stock replaces the standard stock of a semiautomatic rifle, that is, the part of the rifle that rests against the shooter's shoulder, with a stock that allows the rifle's upper assembly to slide back and forth. A bump stock also includes a stationary finger rest, or extension ledge, on which the shooter places his finger. To initiate a firing sequence with a bump stock, the shooter either pulls the firearm's trigger or slides the firearm forward in the bump stock, pressing the trigger finger. The bump stock then maintains a continuous firing cycle so long as the shooter keeps the trigger finger stationary on the finger rest and uses the non-trigger hand to maintain constant forward pressure on the rifle's barrel or front grip.⁹

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) first encountered a type of bump stock in 2002: the Akins Accelerator.¹⁰ The Akins Accelerator had an internal spring in its stock to cycle the firearm back and forth, “bumping” the trigger against the shooter's trigger finger. The “bumping” occurs when the entire firearm moves while the trigger finger remains stationary. In 2006, ATF classified the Akins Accelerator as a machine gun,¹¹ finding the term “single function of the trigger” within the definition of machine gun was best understood to mean a single pull of the trigger based on *Staples v. United States* and the legislative history

⁷ 26 U.S.C. § 5845(b).

⁸ *Cargill*, 602 U.S. at 434 (Sotomayor, J., dissenting).

⁹ See Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66516 (Dec. 26, 2018) (codified at 27 C.F.R. pts. 447–79).

¹⁰ *Id.* at 66517.

¹¹ Mr. Akins filed suit against ATF, arguing that the classification of the Akins Accelerator as a machine gun was arbitrary and capricious. The district court found otherwise, and the court of appeals affirmed. See *Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009), *cert. denied*, 557 U.S. 942 (2009).

of the NFA.¹² Thus, ATF concluded in ATF Ruling 2006-2 that devices exclusively designed to increase the rate of fire of semiautomatic firearms were machine guns if, “when activated by a single pull of the trigger, [such devices] initiate[] an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted.”¹³ In a series of classification letters from 2008 to 2017 regarding particular bump stock devices *without* springs, however, ATF found that while they did operate by a single pull of the trigger, they did not convert a firearm to fire automatically because of the additional forward pressure that had to be applied to the rifle’s barrel.¹⁴ Although not a term used by ATF, these devices became known as “non-mechanical” bump stocks and are the devices at issue in *Cargill*.

In October 2017, a gunman in Las Vegas, Nevada used non-mechanical bump stock equipped rifles to commit the deadliest mass shooting in American history to date—killing 58 people and wounding approximately 500 more.¹⁵ As a result, then-President Trump directed the Department of Justice (Department) “as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.”¹⁶ ATF issued a Notice of Proposed Rulemaking on March 29, 2018, and issued its Final Rule, “Bump-Stock-Type Devices” on December 26, 2018.¹⁷

¹² See *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. On Ways & Means*, 73d Cong., 2d Sess. 40 (1934)

The distinguishing feature of a machine gun is that by a single pull of the trigger the gun continues to fire as long as there is any ammunition in the belt or in the magazine. Other guns require a separate pull of the trigger for every shot fired, and such guns are not properly designated as machine guns. A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded . . . as a machine gun.

Id.; *id.* at 41 (“Mr. Frederick: I am trying to bring within this everything that in my opinion should be included under the term ‘machine gun.’ Mr. Frear: That would be desirable.”); *Staples v. United States*, 511 U.S. at 602.

¹³ *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. On Ways & Means*, 73d Cong., 2d Sess. 3 (1934); *2006-2—Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire> (last visited Nov. 8, 2024).

¹⁴ 83 Fed. Reg. at 66517.

¹⁵ Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 83 Fed. Reg. 7949 (Feb. 20, 2018).

¹⁶ *Id.*

¹⁷ Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018) (codified at 27

The Final Rule reiterated that “single function of the trigger” was best understood to mean single pull of the trigger and analogous motions.¹⁸ The term *analogous motion* was added because while the firing process for machine guns, and vast majority of firearms, begins with the pull of the trigger—or the curved metal lever—at the time of the passage of the NFA, there were already machine guns that operated by the push of a button or a crank, hence the term *function* to capture all such machine guns. By interpreting function to mean pull, ATF did not want to imply that other types of triggers requiring a different motion would not be covered. The Final Rule also found that bump stocks did cause a firearm to shoot automatically because the dictionary definition of “automatically” at the time of the NFA’s passage meant “functioning as the result of a self-acting or self-regulating mechanism.”¹⁹ In an admitted change in interpretation, the Final Rule explained that just because some additional input is needed by the non-trigger hand, this does not mean that the firearm does not fire automatically. The bump stock functions as the result of a self-regulating mechanism because it “harnesses the firearm’s recoil energy as part of a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger.”²⁰ As a result, the Final Rule found that because bump stocks converted a firearm to shoot “automatically more than one shot . . . by a single function of the trigger,” they are machine guns.²¹ Since 1986, machine guns have been illegal to possess.²² As such, bump stocks also became illegal to possess.

During the rulemaking process, Michael Cargill purchased two bump stocks; after the Final Rule, he surrendered the bump stocks to ATF and filed suit.²³ The District Court for the Western District of Texas ruled in favor of the government, finding that bump stocks qualify as a machine

C.F.R. pts. 447–79).

¹⁸ *Id.* at 66534–35.

¹⁹ *Id.* at 66519.

²⁰ *Id.* at 66533.

²¹ 26 U.S.C. § 5845(b).

²² *See* 18 U.S.C. § 922(o)

Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun. (2) This subsection does not apply with respect to—(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Id.

²³ *Cargill v. Barr*, 502 F. Supp. 3d 1163, 1182 (W.D. Tex. 2020).

gun under the best interpretation of the statute,²⁴ and a panel of the Fifth Circuit affirmed.²⁵ The Fifth Circuit, however, granted rehearing and sitting en banc, reversed, with a majority finding the Final Rule violated the rule of lenity.²⁶ The government filed a writ of petition for certiorari, which was granted in November of 2023.²⁷ The Fifth Circuit’s decision created a circuit split, among other courts, the Court of Appeals for the District of Columbia upheld the Final Rule.²⁸ On June 14, 2024, the U.S. Supreme Court issued its opinion in *Garland v. Cargill*.²⁹

III. The *Cargill* decision

In *Cargill*, the 6–3 majority held that “a semiautomatic rifle equipped with a bump stock is not a ‘machinegun’ because it cannot fire more than one shot ‘by a single function of the trigger.’ And, even if it could, it would not do so ‘automatically.’”³⁰ The Court noted that the devices at issue in this case are non-mechanical bump stocks, not those that operate through the use of an internal spring.³¹ As an initial matter, the majority recognized that “[w]ith a machinegun, a shooter can fire multiple times, or even continuously, by engaging the trigger only once,” and “the shooter does not need to release and reengage the trigger between shots.”³² In contrast, with respect to a semiautomatic firearm, “[t]he shooter must release and reengage the trigger to fire another shot.”³³ Distinguishing firearms equipped with bump stocks from machine guns, the Court found that the “bump reengages the trigger and causes another shot to fire, . . . [but a]s with any semiautomatic firearm, the trigger *still must be released and reengaged* to fire each additional shot.”³⁴ Importantly, the majority noted that while a bump stock allows the shooter to fire faster, it does “not

²⁴ *Id.* at 1190.

²⁵ *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2021).

²⁶ *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023).

²⁷ *Garland v. Cargill*, 144 S. Ct. 374 (2023).

²⁸ *See Guedes v. ATF*, 45 F.4th 306 (D.C. Cir. 2022).

²⁹ *Garland v. Cargill*, 602 U.S. 406 (2024).

³⁰ *Id.* at 415. This article does not address the majority’s analysis of the “automatically” prong of the machine gun definition.

³¹ *Id.* at 411 n.1 (“Some bump stocks (called mechanical bump stocks) rely on an internal spring, rather than forward pressure from the shooter’s nontrigger hand, to force the rifle and trigger forward after recoil. These devices are not at issue in this case.”).

³² *Id.* at 410–11.

³³ *Id.* at 411.

³⁴ *Id.* at 411–12 (emphasis added). *See also id.* at 421 (“For each shot, the shooter must engage the trigger and then release the trigger to allow it to reset.”).

alter the basic mechanics” of the firearm’s trigger assembly.³⁵ “Nothing changes when a semiautomatic rifle is equipped with a bump stock. The firing cycle remains the same.”³⁶ In other words, in the majority’s view, the bump stock has no effect on the typical semiautomatic rifle’s trigger assembly.

The majority explained that on an unmodified semiautomatic rifle with a standard trigger assembly, “[f]or each shot, the shooter must engage the trigger and then release the trigger to allow it to reset.”³⁷ The Court referenced the internal components of the standard semiautomatic rifle trigger assembly, pictured below in Figure 1, to understand why engaging the trigger a single time will cause the firing mechanism to discharge one shot.³⁸

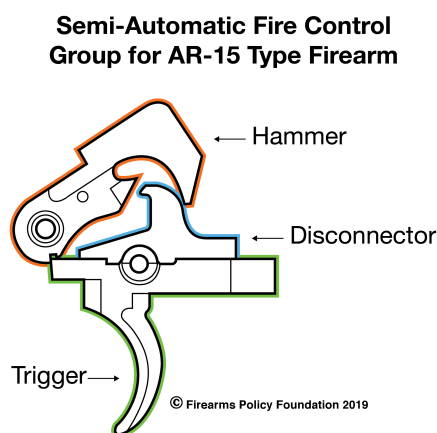


Figure 1: Internal Components of the Standard Semiautomatic Rifle Trigger Assembly

The shooter’s engagement of the trigger begins a mechanical process that fires a single shot. The trigger releases the hammer, which strikes the firing pin. The explosive force of the resulting shot forces the weapon’s “bolt carrier” backwards, and the rearward travel of the bolt carrier forces the hammer down until the hammer is retained by the disconnector. The disconnector “will hold the hammer in that position for as long as the shooter holds the trigger back, thus preventing the firearm from firing another shot.”³⁹ “[W]hen the shooter takes pressure off the trigger and

³⁵ *Id.* at 412.

³⁶ *Id.* at 421. *See also id.* at 422 (A “semiautomatic rifle will fire only one shot each time the shooter engages the trigger—with or without a bump stock”).

³⁷ *Id.* at 421.

³⁸ *Id.* at 417.

³⁹ *Id.* at 418–20.

allows it to move forward . . . the hammer slips off the disconnecter,” positioning the gun to be fired again.⁴⁰ This “complete process . . . constitutes ‘a single function of the trigger’” on such a weapon and “[a]ny additional shot fired after one cycle is the result of a separate and distinct ‘function of the trigger.’”⁴¹

The Court contrasted such weapons with machine guns equipped with “auto sears.” An auto sear—a common component of many machine guns, such as M16-type machine guns—allows a shooter to “fire multiple shots while engaging the trigger only once” because the auto sear “catches the hammer as it swings backwards, but will release [the hammer] again once a new cartridge is loaded if the trigger is being held back.”⁴² “An auto sear thus permits a shooter to fire multiple shots while engaging the trigger only once.”⁴³

IV. Devices other than bump stocks

The majority noted the difference between mechanical and non-mechanical bump stocks but explained that mechanical bump stocks “are not at issue in this case.”⁴⁴ Although the Court expressly limits the application of this ruling to non-mechanical bump stocks, the emphasis on the internal mechanics of a semiautomatic firearm raises concerns on the applicability of this analysis to other devices. In the government’s briefs filed in the Supreme Court and at oral argument, the government noted that a mechanically focused interpretation of function—with an emphasis on the inner workings of the firing cycle—as opposed to an interpretation of function as to what *initiates* the firing cycle, is problematic.⁴⁵ This mechanically focused interpretation is unsupported by contemporaneous evidence such as legislative history, the broad definition of machine gun, plain language, and the purpose of the NFA. The majority opinion does not meaningfully address these concerns; instead, it finds that the “function of the trigger” analysis is a “complete process” that required six diagrams to explain.⁴⁶

⁴⁰ *Id.* at 420.

⁴¹ *Id.* at 421.

⁴² *Id.* at 420 n.4.

⁴³ *Id.*

⁴⁴ *Id.* at 411 n.1.

⁴⁵ See Oral Argument, *Garland v. Cargill*, No. 22-976 (Feb. 28, 2024), ECF No. 70; Brief for the Petitioners, *Garland v. Cargill*, No. 22-976 (Dec. 18, 2023), ECF No. 48.

⁴⁶ *Id.* at 418–21. See also *id.* at 435.

This is not a hard case. All of the textual evidence points to the same interpretation. . . . The majority looks to the internal mechanism that initiates fire, rather than the human act of the shooter’s initial pull, to

The public safety implications are substantial. For example, so-called forced reset triggers and motorized trigger devices allow hundreds of rounds per minute to be fired with a single pull of the trigger.⁴⁷ During the operation of these devices, the trigger (that is, the curved lever) moves slightly while the shooter maintains continuous pressure on the trigger. Although in the context of non-mechanical bump stocks, the opinion states that “[o]n weapons with these standard trigger mechanisms, the phrase ‘function of the trigger’ means the physical trigger movement required to shoot the firearm.”⁴⁸

This opinion has understandably led to concerns from U.S. Attorney’s Offices (USAOs) and law enforcement offices regarding the impact of *Cargill* on machine gun prosecutions involving machine gun conversion devices (MCDs). It is beyond the scope of this article to discuss every device, but as a general matter, the Department maintains that the machine conversion devices determined to be machine guns pursuant to the NFA definition before *Cargill* remain machine guns after *Cargill*. Critically, unlike bump stocks, these devices alter the “basic mechanics” of the semiautomatic firearm by introducing a new trigger assembly that modifies the internal firing cycle. This modification allows a single engagement of the trigger to shoot the firearm continuously *without a release of the trigger* and corresponding reset. The Court in *Cargill* discussed the interaction between the disconnecter and the hammer in a standard semiautomatic rifle. “The disconnecter is the component responsible for resetting the hammer to its original position after a shot is fired.”⁴⁹ The disconnecter plays an important role in that it “will hold the hammer” in a position where the hammer cannot swing forward again “for as long as

hold that a “single function of the trigger” means a reset of the trigger mechanism. Its interpretation requires six diagrams and an animation to decipher the meaning of the statutory text. Then, shifting focus from the internal mechanism of the gun to the perspective of the shooter, the majority holds that continuous forward pressure is too much human input for bump-stock-enabled continuous fire to be “automatic.”

Id. (Sotomayor, J., dissenting) (internal citations omitted).

⁴⁷ This article does not discuss the application of *Cargill* to forced reset trigger devices. These devices have been the subject of litigation in the U.S. District Court for the Eastern District of New York and are currently subject to ongoing litigation in the U.S. District Court for Northern District of Texas and the U.S. Court of Appeals for the Fifth Circuit. *See* United States v. Rare Breed Triggers, LLC, 690 F. Supp. 3d 51 (E.D.N.Y. 2023); Nat’l Ass’n for Gun Rts., Inc. v. Garland, No. 4:23-cv-830, 2024 WL 3517504 (N.D. Tex. July 23, 2024), *appealed*, No. 24-10707 (5th Cir. Aug. 6, 2024).

⁴⁸ *Cargill*, 602 U.S. at 416.

⁴⁹ *Id.* at 417. *See also id.* at 419–20 (explaining the role of the disconnecter in the process of the firing cycle).

the shooter holds the trigger back, thus preventing the firearm from firing another shot.”⁵⁰ Many MCDs replace or modify the operation of the disconnecter or an equivalent component by altering the standard firing sequence that requires the shooter to release and reengage the trigger for each shot. Relatedly, these conversion devices consist of components or are themselves devices that, while not labeled “auto sears,” are functionally equivalent devices that do not need a separate and distinct release of the trigger to fire again.

V. Glock-type machine gun conversion devices

“Glock switch” or “Glock chip” devices are MCDs that convert a standard Glock firearm into an automatic weapon. A “Glock” switch or chip is not manufactured by Glock, Inc. The term is used colloquially to identify illegal MCDs that are specifically designed to convert Glock-type handguns into machine guns. There is a national, escalating trend of commissioners of violent crimes using MCDs and of officials recovering MCDs from individuals and criminal organizations. One national media outlet has reported that “[i]ncidents of machine gun fire have exploded by about 1,400% from 2019 through [2021],” with acoustic sensors in 130 U.S. cities detecting “roughly 5,600 incidents of automatic weapons fire” in 2021.⁵¹ Between 2017 and 2021, ATF recovered 5,454 MCDs, a 570% increase compared to 2012–2016.⁵²

This trend continues. ATF has determined that throughout 2022 and 2023, the number of MCDs recovered by law enforcement increased by approximately 97%, with the highest number of recoveries occurring in Florida and Illinois.⁵³ In calendar year 2023, there was a 314% increase in violent crime related MCD traces from the previous year.⁵⁴ The crimes

⁵⁰ *Id.* at 420.

⁵¹ Scott Glaver & Curt Devine, *A Device That Can Turn a Semi-Automatic Weapon into a Machine Gun in Moments is Wreaking Havoc on American Streets*, CNN (Aug. 30, 2022), <https://www.cnn.com/2022/08/30/us/automatic-machine-gun-fire-invs/index.html>.

⁵² *National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two Report—Part VII: Recommendations and Future Enhancements*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 4, <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-vii-recommendations> (last visited Nov. 8, 2024).

⁵³ This information was obtained from the ATF, Office of Intelligence Operations, Criminal Intelligence Division.

⁵⁴ This information was obtained from the ATF, Office of Intelligence Operations, Criminal Intelligence Division.

of violence involving MCDs include homicides, aggravated assaults, robberies, car jackings, and the murder of a police officer.

The trigger on a Glock-type firearm is the lever that activates the firing mechanism. On a standard Glock-type firearm without an MCD, the firing cycle requires the shooter to release the trigger and reengage it to fire another round. An internal component of the Glock—the rear of the trigger bar (cruciform)—acts as the sear and retains the firing pin, as displayed in Figure 2.⁵⁵ Engaging the trigger, as Figure 3 displays, causes the cruciform to release the firing pin and discharge a round.⁵⁶ The propellant gas from the discharged round causes the slide to move rearward. As the slide returns to its forward position, shown in Figure 4, the cruciform again retains the firing pin to prevent another round from being discharged.⁵⁷ The cruciform in a Glock-type firearm operates like the disconnecter in a semiautomatic rifle as described by the Court in *Cargill* because it mechanically requires the shooter to release the trigger to fire another round.⁵⁸ As a result, the cruciform’s retention of the firing pin requires the shooter to manually release the trigger and reengage the trigger for each shot.

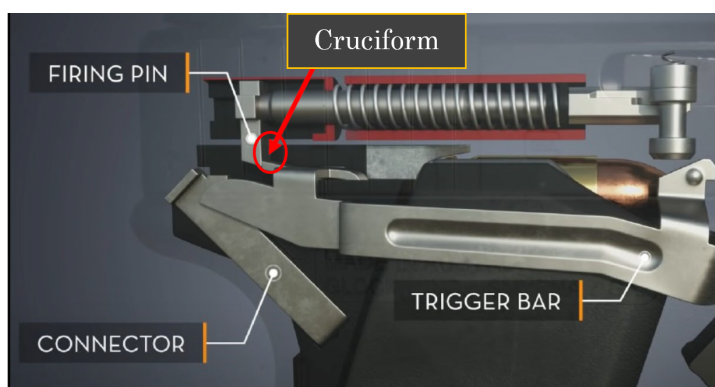


Figure 2: Firing Pin Retained by Trigger Bar (Cruciform)

⁵⁵ This information and the figure were obtained from ATF, Enforcement Programs and Services, Firearms and Ammunition Technology Division.

⁵⁶ This information and the figure were obtained from ATF, Enforcement Programs and Services, Firearms and Ammunition Technology Division.

⁵⁷ This information and the figure were obtained from ATF, Enforcement Programs and Services, Firearms and Ammunition Technology Division.

⁵⁸ *Garland v. Cargill*, 602 U.S. 406, 421, 437 (2024).

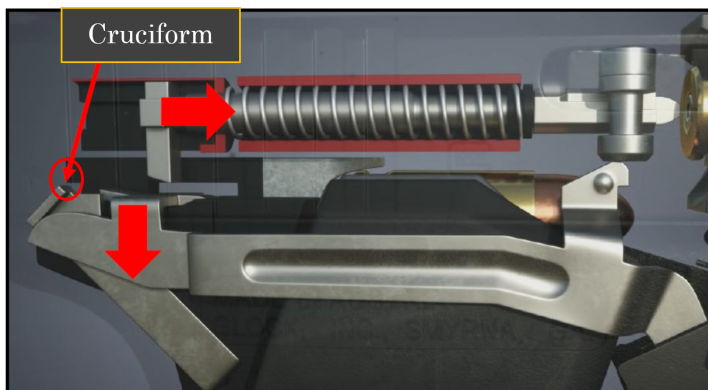


Figure 3: Engaging the Trigger to Release the Cruciform and Discharge a Round

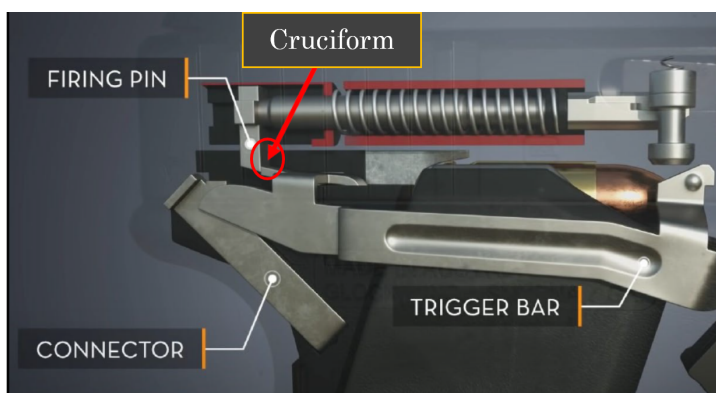


Figure 4: Slide Returns to Forward Position and Cruciform Retains Firing Pin to Prevent Discharge of Another Round

The Glock-type MCD disrupts a Glock-type firearm's standard firing cycle by automatically disconnecting the cruciform from the firing pin. A Glock-type MCD consists of three main parts: (1) a body that replaces the slide cover plate in a Glock-type pistol; (2) a "leg" that interacts with the cruciform of the host pistol; and (3) a push-button selector switch, pin, or similar mechanism to hold the device together. Glock-type MCDs have different configurations but ultimately include a "leg" that prevents the cruciform from retaining the firing pin. For example, a "chip" incorporates the slide cover plate and leg into a unitary piece. Further, the leg alone may be glued into the slide. The leg of a Glock switch has specific dimensions that serve to time the automatic fire. After a round is discharged and the slide is returning to its forward position, the cruciform momentarily holds the firing pin to the rear, compressing the firing pin spring. As the slide returns to its full forward position, shown in Figure 5, the leg of the MCD pushes down on the side of the cruciform, releasing

the spring tensioned firing pin and discharging another round automatically.⁵⁹ The overall effect of the leg of the Glock switch is to remove the cruciform's function to retain the firing pin in the cycle of operations; this causes the firearm to continue to fire until the ammunition in the magazine is exhausted or the shooter releases the trigger. A shooter only needs to engage the trigger once to activate the firing sequence and discharge multiple shots automatically from a Glock-type firearm equipped with a Glock switch.

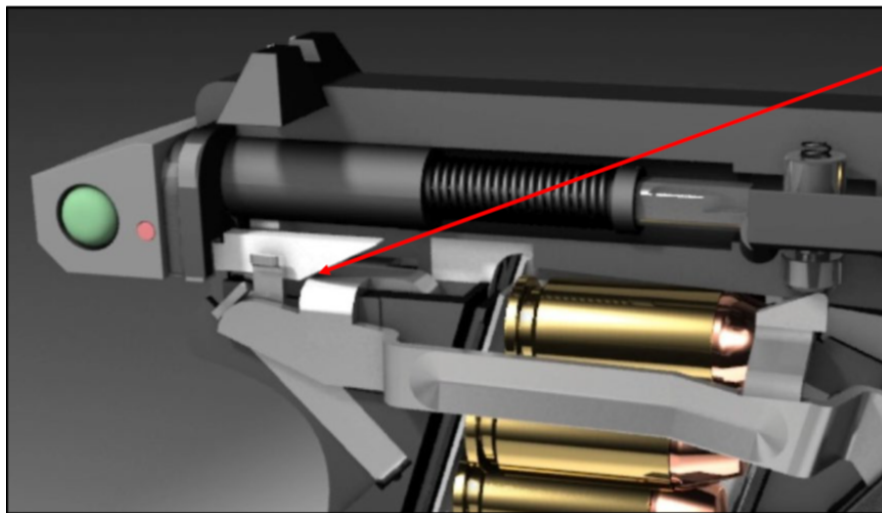


Figure 5: Slide Returns, Leg of MCD Pushes Side of Cruciform, Spring Released, and Another Round Automatically Discharged

The finding in *Cargill* that non-mechanical bump stocks do not convert a weapon to fire automatically by a single function of the trigger is not applicable to Glock-type MCDs.⁶⁰ As described above, a Glock-type MCD materially alters the internal function of a standard Glock-type firearm, whereas according to the *Cargill* majority, the bump stock did not materially alter a standard semiautomatic trigger assembly.⁶¹ In fact, the reasoning in *Cargill* supports the position that Glock-type MCDs remain machine guns based on the mechanical analysis presented by the Court.⁶² A Glock-type MCD mechanically disrupts the cruciform from functionally requiring the shooter to release the trigger. In firearms equipped with a Glock-type MCD, there is no need to “release pressure from the trigger and allow it to reset” to fire again, and there is no need to “engag[e] the

⁵⁹ This information and the figure were obtained from ATF, Enforcement Programs and Services, Firearms and Ammunition Technology Division.

⁶⁰ *Cargill*, 602 U.S. at 406–07.

⁶¹ *Id.* at 416.

⁶² *Id.* at 416–20, 435–41.

trigger a second time.”⁶³ Under the reasoning employed in *Cargill*, these Glock-type MCDs are machine guns in that “a shooter can fire multiple times, or even continuously, by engaging the trigger only once. This capability distinguishes a machinegun from a semiautomatic firearm.”⁶⁴

VI. AR-type conversion devices

Several well-known devices can be installed into an AR-type firearm to increase the rate of fire of the firearm, and these devices remain MCDs post-*Cargill*. These devices include, but are not limited to, drop-in auto sears, trigger control group travel reducers (also known as a “Swift Link” or “Yankee Boogle”), and lightning links.

ATF has long maintained that drop-in auto sear devices are machine guns that convert semiautomatic rifles into machine guns.⁶⁵ The *Cargill* opinion does not call into question this determination. The drop-in auto sear, displayed in Figure 6, uses M-16 machine gun parts and safety selector in an AR-type firearm.⁶⁶ The safety selector of the M-16 prevents the disconnecter from retaining the hammer, while the drop-in auto sear then serves the same function as a standard auto sear, as seen in Figure 7.⁶⁷ The device allows a shooter to “fire multiple shots while engaging the trigger only once,” because the auto sear “catches the hammer as it swings backwards, but will release [the hammer] again once a new cartridge is loaded if the trigger is being held back.”⁶⁸



Figure 6: Drop-In Auto Sear

⁶³ *Id.* at 421.

⁶⁴ *Id.* at 410–11.

⁶⁵ See *ATF Ruling 81-4*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/resource-center/docs/atf-ruling-81-4pdf> (last visited Nov. 8, 2024).

⁶⁶ Mike Searson, *Turning Your AR-15 into an M-16*, RECOIL MAG. (Feb. 13, 2024), <https://www.recoilweb.com/turning-your-ar-15-into-an-m-16-150631.html>.

⁶⁷ *Id.*

⁶⁸ *Cargill*, 602 U.S. at 420 n.4.

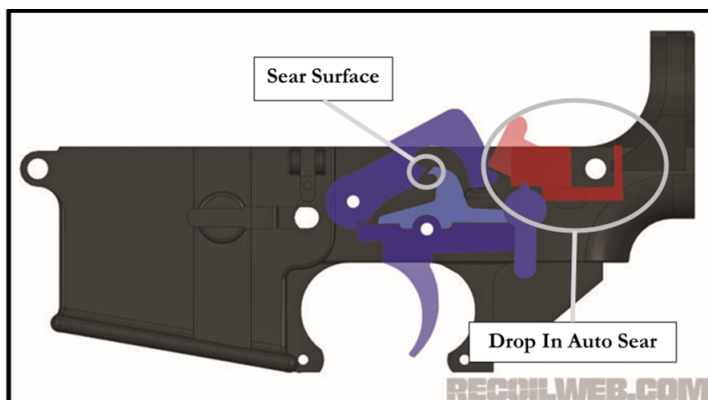


Figure 7: Diagram with Drop-In Auto Sear

The trigger control group travel reducer (shown in Figure 8) and lightning link devices (shown in Figure 9) also operate to disrupt the standard cycle of operations of a semiautomatic rifle to prevent the disconnecter from retaining the hammer as described in the *Cargill* opinion.⁶⁹ As pictured in Figure 10 and Figure 11, when the user installs these devices into the AR-type lower receiver, the device prevents the disconnecter from engaging the sear surface to retain the hammer.⁷⁰

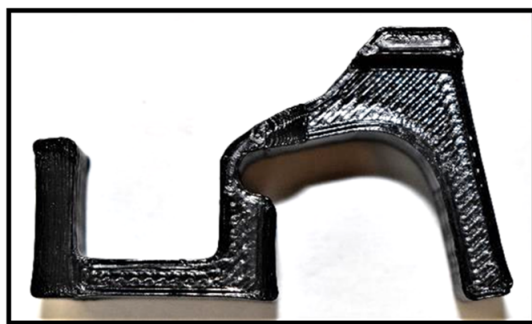


Figure 8: Trigger Control Group Travel Reducer



Figure 9: Lightning Link

⁶⁹ Searson, *supra* note 66.

⁷⁰ *Id.*

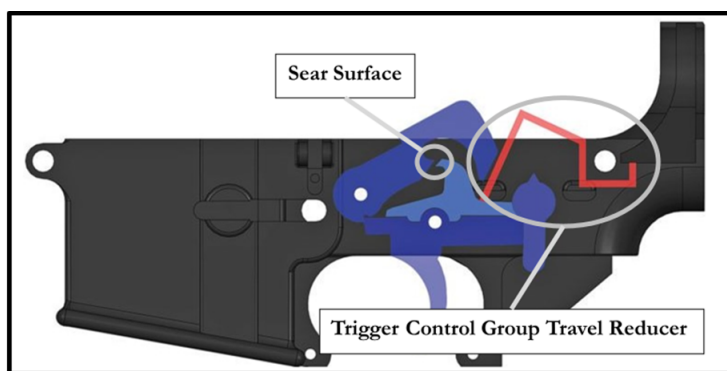


Figure 10: Diagram with Trigger Control Group Travel Reducer

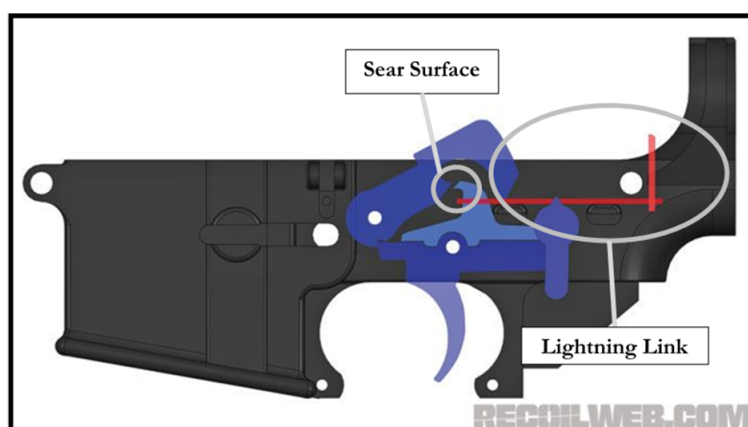


Figure 11: Diagram with Lightning Link

These devices alter the standard function of a semiautomatic rifle. As a result, a single continuous pull of the trigger causes the firearm to continue to fire until the ammunition in the magazine is exhausted or the shooter releases the trigger. Under the reasoning employed in *Cargill*, these AR-type conversion devices are machine guns that alter the standard operation of a semiautomatic rifle so that “a shooter can fire multiple times, or even continuously, by engaging the trigger only once,” which is the capability that “distinguishes a machinegun from a semiautomatic firearm.”⁷¹

VII. Conclusion

As stated above, of particular importance in the *Cargill* opinion is that bump stocks did “not alter the basic mechanics” of a semiautomatic firearm’s trigger assembly, and consequently, “the trigger still must be

⁷¹ *Cargill*, 602 U.S. at 410–11.

released and reengaged to fire each additional shot.”⁷² The majority’s analysis of semiautomatic fire and automatic fire—and the differences between the two—support the continued classification of these devices, and similar devices, as MCDs and consequently as machine guns under federal law.

About the Authors

Melissa A. Anderson began her career with ATF in 2001 in the Litigation Division of the Office of Chief Counsel. She became the Deputy Associate Chief Counsel of the Litigation Division in 2006 and the Associate Chief Counsel in 2014. Additionally, she served as the ATF Director’s Chief of Staff in 2012. Since February 2022, she has been Senior Legal Counsel, Administrative Procedure Act, and Second Amendment Litigation. She received her Juris Doctor from the University of North Carolina at Chapel Hill.

Jonathan S. Jacobs is currently the Acting Associate Chief Counsel of the Firearms and Explosives Law Division (FELD) within the ATF Office of Chief Counsel. He was previously Deputy Associate Chief Counsel and a Senior Attorney with the FELD. In addition, from May 2022 until June 2023, he was Division Counsel for the Washington Field Division of ATF. He also served as a Special Assistant U.S. Attorney assisting in ATF firearm related prosecutions in the USAO for District of Columbia from January 2021 to June 2021 and in the USAO for the Northern District of Ohio in September 2019. He received his Juris Doctor from Catholic University of America, Columbus School of Law.

⁷² *Id.* at 406.

Juvenile Prosecution of Machine Gun Conversion Devices

Lee Smith

Assistant U.S. Attorney

Southern District of Mississippi

I. Introduction

You are a few weeks into the successful investigation of a distributor of machine gun conversion devices when you learn the target is a juvenile. What do you do? That was the question this author faced. At the conclusion of this article, when you confront that question, you will have a foundation upon which to navigate the Juvenile Delinquency Act (JDA) with a particular focus on how to charge juveniles who possess or transfer machine gun conversion devices.

II. Definition and background of machine gun conversion devices

A. What is a machine gun conversion device?

The term “firearm” includes machine guns.¹ Federal law incorporates machine gun conversion devices into the definition of “machine gun” and therefore they qualify as a firearm. A “machine gun” is defined as

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a

¹ 26 U.S.C. § 5845(a)(6).

person.²

B. The growing threat posed by Glock switches

One of the most common types of machine gun conversion devices is referred to as a “Glock switch.” A Glock switch is a small device that allows a conventional semiautomatic Glock pistol to function as a fully automatic weapon.³ In fact, a Glock switch allows a traditional Glock handgun to fire 1,100–1,200 rounds per minute.⁴ These devices are commonly purchased online from China and are easily installed.

Because the federal definition of a machine gun includes parts designed exclusively for converting a weapon into a machine gun, possession of just a Glock switch can be charged as a federal crime.

III. Federal jurisdiction for juveniles

Anyone who commits a federal crime before the age of 18 and has not yet reached the age of 21 is considered a “juvenile.”⁵ The JDA governs prosecutions of juveniles in federal court.⁶ The JDA provides three prerequisites for federal jurisdiction:

(1) the juvenile court or other appropriate court of a state does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency; (2) the state does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a crime of violence that is a felony or an offense described in enumerated statutes, and that there is a substantial federal interest in the case or the offense to warrant the exercise of federal jurisdiction.⁷

You can allege any of the applicable grounds in the information. The Southern District of Mississippi was able to move forward on prosecuting a juvenile because Mississippi did not have a law that regulated machine guns before July 2024.⁸

² *Id.* § 5845(b).

³ *Internet Arms Trafficking: The Crime and Investigation*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (May 15, 2020), <https://www.atf.gov/our-history/internet-arms-trafficking>.

⁴ Press Release, U.S. Att’y’s Off., Dist. of Idaho, U.S. Attorney Hurwit Releases Public Service Announcement Warning Against Possession of Machinegun Conversion Devices (May 6, 2024).

⁵ 18 U.S.C. § 5031.

⁶ *Id.* §§ 5031–5043.

⁷ *Id.* § 5032 (cleaned up).

⁸ If your state does not have laws regulating machine guns, this basis for jurisdiction

IV. Kicking off a federal juvenile case

To start a juvenile case in federal court, file a juvenile information, file a certification, and attach an Assistant Attorney General Memo to the certification.

A. The juvenile information

The first step is filing the juvenile information. In the juvenile information, withhold the juvenile's name and use only initials. This is done to comply with the confidentiality requirements of the JDA.⁹ The information includes the venue, the charge, and alleges that the person being charged is indeed a juvenile. Figure 1 shows an example of a juvenile information.¹⁰

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION	
UNITED STATES OF AMERICA	
v.	CRIMINAL NO.
Juvenile's Initials Here (a juvenile)	18 U.S.C. § 922(o)
The United States Attorney charges:	
That on or about Date Here , in Blank County, in the Southern Division of the Southern District of Mississippi, and elsewhere, the defendant, Juvenile's Initials , a juvenile who had at the time not yet reached his eighteenth birthday, committed an act of juvenile delinquency, to wit: knowingly possessed or transferred a machinegun, which would have been a crime in violation of Title 18 United States Code, Sections 922(o) and 924(a)(2), if he had been an adult, all in violation of Title 18, United States Code, Section 5032.	
<hr/> United States Attorney	

Figure 1: Example of Juvenile Information

B. The required certification

File a certification at the same time as the juvenile information. This document certifies to the district court why it has jurisdiction over the juvenile case. Allege one, or more, of the bases under the JDA. The certification requires signature from the U.S. Attorney. The certification will

is likely your safest way to charge a juvenile in federal court.

⁹ 18 U.S.C. § 5038(e).

¹⁰ This example is based on an actual juvenile information but has been edited to remove identifying information.

also detail what crime the juvenile is being charged with (in this instance, violation of 18 U.S.C. § 922(o), possession or transfer of a machine gun).¹¹ Figure 2 shows an example of a certification.¹²

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF AMERICA

v.

Juvenile's Initials Here (a juvenile)

CRIMINAL NO.

18 U.S.C. § 922(o)

**CERTIFICATION TO PROCEED UNDER THE
JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT**

The United States Attorney for the Southern District of Mississippi, after investigation of the matters described herein, and with the delegation of the Attorney General of the United States and pursuant to Title 18, United States Code, Section 5032, certifies to this Court as follows:

1. This certification is made pursuant to the requirements under Title 18, United States Code, Section 5032 of the Juvenile Justice and Delinquency Prevention Act (18 U.S.C. §§ 5031-42), hereafter referred to as "the Act."

2. Juvenile's Initials ("Defendant"), is a "juvenile" as that term is defined in the Act, in that he has not yet attained the age of eighteen and is accused of committing acts of juvenile delinquency under Title 18, United States Code, Section 5032, as described in paragraph 3 herein.

3. Defendant has been charged by the United States with committing acts which, if he had been an adult at the time of the offense, would have violated Title 18, United States Code, Sections 922(o) and 924(a)(2), possession or transfer of a machinegun. In particular, Defendant is alleged to have transferred and been in possession of machine gun conversion devices ("Glock Switches").

4. **Basis for federal jurisdiction goes here.**

5. The United States Attorney, in filing this Certification, acts pursuant to the delegation of authority of the Attorney General of the United States pursuant to Title 18, United States Code, Section 5032; Title 28, Code of Federal Regulations, Section 0.57; and by Memorandum of the Assistant Attorney General which is attached to this Certification as Attachment A and made a part hereof for all purposes.

The United States Attorney now certifies to this Court that jurisdiction over the defendant as a juvenile committing acts of juvenile delinquency is proper in this Court.

Respectfully submitted,

UNITED STATES ATTORNEY

Figure 2: Example of Certification

C. The 2023 Assistant Attorney General Memo

The last step in starting a juvenile case is attaching the 2023 Assistant Attorney General Memo to the certification. Assistant Attorney General

¹¹ 18 U.S.C. § 922(o).

¹² This example is based on an actual juvenile certification but has been edited to remove identifying information.

36

DOJ Journal of Federal Law and Practice

December 2024

Kenneth A. Polite issued the 2023 Assistant Attorney General Memo, which delegates authority to U.S. Attorneys to prosecute juveniles.¹³ The memo simply makes clear that the authority to prosecute juveniles has been delegated to each U.S. Attorney.¹⁴

V. Arrest of the juvenile

When the juvenile is arrested, you must follow certain procedures.¹⁵ Read the juvenile his rights immediately. Agents should inform the juvenile of the charges and the essential elements of the charge. Contact the juvenile's parents or legal guardians and inform them of the juvenile's rights, the charges, and when the initial appearance will occur. Take the juvenile before the magistrate judge and do not detain the juvenile for longer than a reasonable time.¹⁶

VI. Detention and speedy trial considerations

If you are seeking detention of a juvenile, be aware of the speedy trial clock under the JDA.¹⁷ If the magistrate judge enters a detention order, the juvenile must be brought to trial within 30 days.¹⁸ Because of the abbreviated schedule for the proceedings, having discovery ready to hand over to defense counsel at the initial appearance is essential.

VII. The juvenile delinquency hearing

You have filed the information, certification, and Assistant Attorney General Memo and you have a case with a juvenile defendant. You have complied with discovery and the speedy trial calendar. What is next? It is time for the "trial," or what is referred to as the juvenile delinquency hearing when there is a juvenile defendant.

A juvenile is not entitled to a jury trial because a juvenile court proceeding is not a "criminal prosecution" within the meaning of the Sixth Amendment, which guarantees the right to a jury trial.¹⁹ Therefore, if

¹³ Memorandum from Kenneth A. Polite, Jr., Assistant Att'y Gen., Crim. Div. on Revised Memorandum on Selection of Monitors in Criminal Division Matters to All Criminal Division Personnel (Mar. 1, 2023).

¹⁴ *Id.*

¹⁵ 18 U.S.C. § 5033.

¹⁶ *Id.*

¹⁷ *Id.* § 5036.

¹⁸ *Id.*

¹⁹ *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

the juvenile wishes to have a trial, it will be held before a district judge at a bench trial.

Further, there are no findings of guilt per se. If the allegations contained in the information are proven beyond a reasonable doubt, the judge will find the juvenile to be “delinquent” instead of “guilty.”²⁰

VIII. The disposition hearing

In a juvenile case, if there is a finding of juvenile delinquency, there is a “disposition” hearing, not a “sentencing” hearing. This hearing must occur 20 court days after the juvenile delinquency hearing.²¹

A. Options for the judge

If there is a finding of juvenile delinquency, the court can suspend the findings of juvenile delinquency, place the juvenile on probation, or commit the juvenile to official detention, which may include a term of juvenile delinquent supervision to follow detention.²²

B. The maximum penalty

If an adult is being prosecuted for possession of a machine gun conversion device, they face up to 10 years in prison.²³ Compare that to the penalties available for a juvenile. In the case of a juvenile who is less than 18 years old, the maximum penalty is the lesser of the date when the juvenile becomes 21 years old or the maximum of the guideline range.²⁴

While the guidelines are not explicitly applicable to a juvenile case, they are calculated to determine what the range would be. If the top end of the guideline range would result in the juvenile being released before turning 21, then that would be the maximum penalty the juvenile is facing.

IX. Other considerations and final thoughts

A. Miscellaneous considerations

If your district is similar to the author’s and juvenile prosecutions are rare, early notifications to everyone involved may be appropriate. If possible, give early notice to the marshals, magistrate judges, public defenders, and your pretrial services office. Without giving details of your

²⁰ United States v. Parker, 956 F.2d 169 (8th Cir. 1992).

²¹ 18 U.S.C. § 5037(a).

²² *Id.*

²³ *Id.* § 924(a)(2).

²⁴ *Id.* § 5037(c).

investigation to these parties, inform them that a juvenile case is coming to allow them to research and prepare for the different issues a juvenile case raises.

B. Final thoughts

While prosecuting a juvenile case is rare and challenging, it is not impossible. Prosecutors should consider charging, if appropriate and applicable, when a juvenile is in possession of a machine gun conversion device because of the danger and proliferation of them in our communities.

About the Author

Lee Smith is an Assistant U.S. Attorney in the Southern District of Mississippi where he serves as the Project Safe Neighborhoods Coordinator for the Southern Division. In addition to prosecuting firearms cases, he prosecutes cases involving child exploitation and is the Victim Rights Coordinator. He received a degree in Political Science from Mississippi College, and a juris doctorate from the Mississippi College School of Law.

Page Intentionally Left Blank

The Bipartisan Safer Communities Act: The National Instant Criminal Background Check System and Expanded Background Checks for Gun Buyers Under 21

Kristin Thigpen

Supervisory Special Agent

Criminal Justice Information Services Division

National Instant Criminal Background Check System Section

Federal Bureau of Investigation

I. The National Instant Criminal Background Check System

The National Instant Criminal Background Check System (NICS) was established on November 30, 1998, due to the passage of the Brady Handgun Violence Prevention Act of 1993 (Brady Act).¹ The Brady Act amended various provisions found in 18 U.S.C. §§ 921–934 as part of imposing a mandatory background check of persons that seek to obtain firearms from federal firearm licensees (FFLs).² The NICS Section is an integral part of the Federal Bureau of Investigation’s (FBI’s) Criminal Justice Information Services (CJIS) Division located in Clarksburg, West Virginia. NICS conducts firearm background checks on potential gun buyers or transferees and provides final determinations on whether available information demonstrates that a person is ineligible to lawfully possess or receive a firearm based on firearm restrictions imposed under federal and

¹ *National Instant Criminal Background Check System Celebrates 20 Years of Service*, FED. BUREAU OF INVESTIGATION (Nov. 30, 2018), [https://le.fbi.gov/cjis-division/cjis-link/national-instant-criminal-background-check-system-celebrates-20-years-of-service#:~:text=NICS%20was%20created%20in%20response,receive%20or%20possess%20a%20firearm](https://le.fbi.gov/cjis-division/cjis-link/national-instant-criminal-background-check-system-celebrates-20-years-of-service#:~:text=NICS%20was%20created%20in%20response,receive%20or%20possess%20a%20firearm.). See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

² 18 U.S.C. §§ 921–934.

state law. NICS centralizes and streamlines the background check process when it receives requests from FFLs for potential firearm transfers. Ordinarily, 10 federal prohibitions, enumerated in 18 U.S.C. § 922, prevent an individual from legally purchasing a firearm (shown in Table 1).³

A potential buyer or transferee will be federally prohibited from legally receiving or being transferred a firearm if the person:

18 U.S.C. § 922(g)(1) ⁴	Has been convicted of a crime punishable by imprisonment for a term exceeding one year (or a misdemeanor crime punishable by imprisonment over two years)
18 U.S.C. § 922(g)(2) ⁵	Is a fugitive from justice
18 U.S.C. § 922(g)(3) ⁶	Is an unlawful user of or addicted to any controlled substance
18 U.S.C. § 922(g)(4) ⁷	Has been adjudicated as a mental defective or committed to a mental institution
18 U.S.C. § 922(g)(5) ⁸	Is an alien and is illegally or unlawfully in the United States
18 U.S.C. § 922(g)(6) ⁹	Has been discharged from the Armed Forces under dishonorable conditions
18 U.S.C. § 922(g)(7) ¹⁰	Has renounced their U.S. citizenship
18 U.S.C. § 922(g)(8) ¹¹	Is subject to a qualifying protection or restraining order
18 U.S.C. § 922(g)(9) ¹²	Has been convicted in any court of a misdemeanor crime of domestic violence
18 U.S.C. § 922(n) ¹³	Is under indictment or information for a crime punishable by imprisonment for a term exceeding one year

Table 1: 10 Federal Prohibitions as Outlined in 18 U.S.C. § 922(g)(1)–(9); (n)¹⁴

³ *Id.* § 922(g)(1)–(9), (n).

⁴ *Id.* § 922(g)(1).

⁵ *Id.* § 922(g)(2).

⁶ *Id.* § 922(g)(3).

⁷ *Id.* § 922(g)(4).

⁸ *Id.* § 922(g)(5).

⁹ *Id.* § 922(g)(6).

¹⁰ *Id.* § 922(g)(7).

¹¹ *Id.* § 922(g)(8).

¹² *Id.* § 922(g)(9).

¹³ *Id.* § 922(n).

¹⁴ *Id.* § 922(g)(1)–(9), n.

Specifically, 18 U.S.C. § 922(d) applies to buyers or transferees under 21 years of age (U21).¹⁵ This section makes it unlawful to sell or “dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile”:

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance . . . ; (4) has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older; (5) who, being an alien (A) is illegally or unlawfully in the [U.S.]; or (B) . . . has been admitted to the [U.S.] under a nonimmigrant visa . . . ; [or] (6) who has been discharged from the Armed Forces under dishonorable conditions.¹⁶

In addition to the federal prohibitions, each “state” (which includes territories and the District of Columbia) can impose additional, more restrictive firearm prohibitions.¹⁷ A background check may be completed by either the NICS Section or a point of contact (POC). A POC is a state or local entity, designated by law, that serves as an intermediary between FFLs in that jurisdiction and NICS.¹⁸ The use of POCs will depend on whether the state has opted to use the FBI’s NICS Section for its background checks, or if it will use state resources to process the checks itself.¹⁹ The three categories of firearms background checks for each state and territory include non-POC, full-POC, and partial-POC, as illustrated in Figure 1.²⁰ Currently, the FBI conducts background checks on behalf of 37 states.²¹ Fifteen full-POCs handle all firearm background checks for their own state by conducting a query through NICS and may also query other state-held databases.²² In addition, four partial-POC states split their processing with the FBI depending on whether a handgun or a long gun is sought for transfer.²³

¹⁵ *Id.* § 922(d).

¹⁶ *Id.*

¹⁷ *Id.* § 921(a)(2).

¹⁸ 28 C.F.R. § 25.6.

¹⁹ *Id.*

²⁰ *About NICS: NICS Participation Map*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/ab-out-nics> (last visited Oct. 7, 2024).

²¹ *Id.*

²² *Id.*

²³ *Id.*

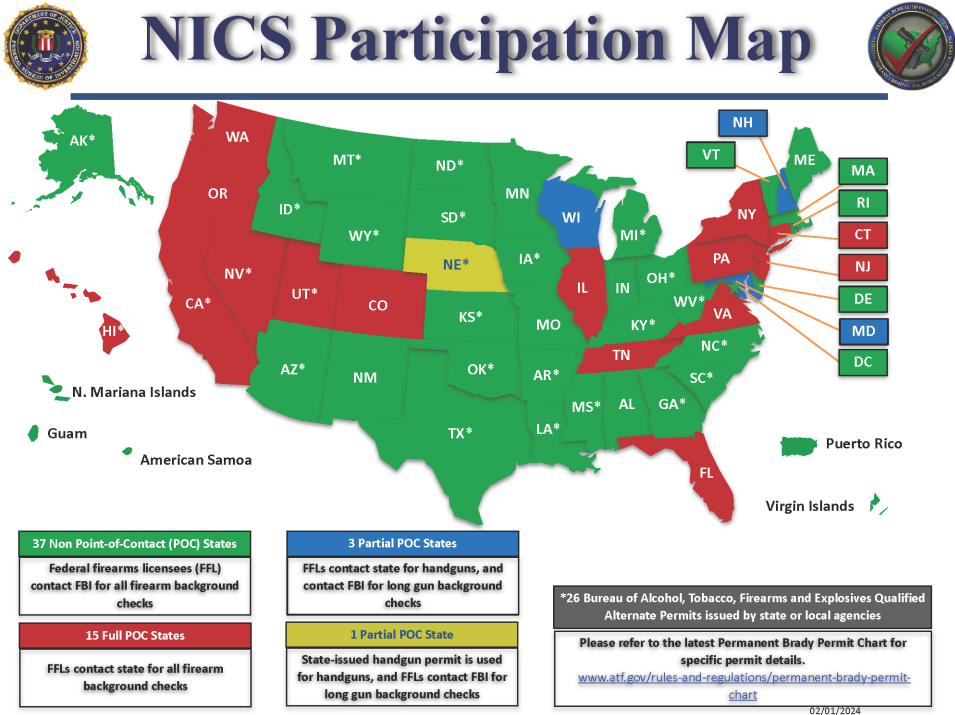


Figure 1: NICS Participation Map

II. The Bipartisan Safer Communities Act

The Bipartisan Safer Communities Act (BSCA) was signed into law on June 25, 2022, effecting immediate impacts upon NICS.²⁴ BSCA instituted specific legislation that directly impacted the FBI as well as full- and partial-POC states. Specifically, BSCA requires additional outreach for NICS transactions where the potential transferee is U21. Some persons convicted on or after June 25, 2022, of violence against someone with whom they were currently or recently in a “dating relationship” became subject to federal law’s existing “misdemeanor crimes of domestic violence” firearm prohibition.²⁵

This article will highlight the expanded background checks of U21 transactions and the impact BSCA has had on the FBI as well as state and local agencies across the country.

To successfully implement the provisions of BSCA, the NICS Section received congressional funding to increase personnel, bolster its information technology infrastructure, and support the growing functionality of the NICS application. Additionally, educational outreach at the state level

²⁴ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1329 (2022) (codified at 34 U.S.C. § 40901(1)).

²⁵ *Id.* at 1332.

was needed to ensure each aspect of the legislation is being, or will be, applied and implemented in accordance with BSCA. Upon passage, the FBI collaborated with various entities of the Department of Justice (Department), including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the FBI Office of the General Counsel; the Department's Office of Tribal Justice; and the Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP). The NICS Section conducted additional outreach to state courts and local law enforcement agencies to educate them about the new U21 provisions.

The NICS Section also met with groups like the International Association of Chiefs of Police (IACP) and NICS POC states to ensure success and accuracy in implementing BSCA-required provisions.

A. Expanded background checks for potential buyers or transferees under the age of 21

Historically, when a firearm background check was submitted to NICS, NICS queried three databases including the National Crime Information Center (NCIC), the Interstate Identification Index (III), and the NICS Indices.²⁶ The NICS Indices (also known as the NICS Index) is a database of records—maintained by the NICS Section—that determines if a potential buyer or transferee is prohibited by federal or state law from receiving or possessing a firearm.²⁷

BSCA expanded background checks on prospective U21 firearm transferees by requiring NICS to immediately contact the state criminal history repository or juvenile justice information system, the state custodian of mental health adjudication records, and local law enforcement for the state and jurisdiction where the potential transferee resides.²⁸ Responses to the additional outreach allows NICS legal instrument examiners (NICS examiners) to determine if the prospective transferee has juvenile criminal history or mental health information that is potentially prohibiting and that may not already be available to NICS in NCIC, III, or the NICS Indices.²⁹ When the expanded outreach establishes cause that a potential juvenile prohibition exists (as described under 18 U.S.C. § 922(d)), BSCA allows U21 transactions to be delayed up to 10 business days if necessary to conduct further research of that potential prohibition.³⁰ NICS is required to notify the FFLs of that additional delay “as soon as possible”

²⁶ 28 C.F.R. §§ 25.4, 25.6.

²⁷ *Id.* § 25.2.

²⁸ 34 U.S.C. § 40901(l)(1)(A)–(C).

²⁹ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1329, 1332 (2022).

³⁰ 34 U.S.C. § 40901(l)(3); 18 U.S.C. § 922(d).

but no more than three business days.³¹ Barring no other potentially prohibiting record or event being established, federal law would not prohibit the FFL from transferring the firearm after the 10th business day without first receiving a “Proceed” status.³² Seeing a “Denied” response from NICS at any point before the firearm being transferred means the transfer may not occur.³³

This means that, while recognizing agencies may not be obligated to provide NICS with responses, if state and local agencies are not responsive to the requests for information, NICS examiners may not be able to make a final determination as to whether the person is prohibited, and the firearm can be transferred to a prohibited person. Even when state laws restrict dissemination of juvenile justice or mental health records, responses to NICS with that update can assist NICS with timely adjudications of transactions. As with all NICS background checks, NICS uses this expanded information only for NICS purposes in accordance with the Privacy Act of 1974 and the limitations of the Brady Act.³⁴

1. A local approach to gun safety

Before implementing the new BSCA requirements like U21 transactions, the NICS Section engaged with all 56 “states” to validate privacy laws, identify what juvenile and mental health information could legally be shared with NICS, and formalize appropriate state contacts for requesting information. Of those, the FBI identified 20 states that were permitted to share juvenile justice information and 22 that were permitted to share juvenile mental health records.³⁵ As of this writing, the FBI has established or believes 31 states are restricted from sharing juvenile justice information and 28 states are restricted from sharing juvenile mental health records.³⁶ Regardless of those limitations, the NICS Section still requests that those agencies respond to each request, even if the reply only confirms that state law limits or prohibits sharing such records. Regardless of these limitations, because 34 U.S.C. § 40901(1)(1) provides no exceptions, NICS shall conduct the enhanced background checks on

³¹ 34 U.S.C. § 40901(1)(2).

³² 18 U.S.C. § 922(t)(1)(C).

³³ *Id.* See also 28 C.F.R. §§ 25.2 (defining “Denied”), 25.6(c).

³⁴ Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896; Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

³⁵ *Reducing Gun Violence: States’ Legal Ability to Provide Juvenile Information*, U.S. DEP’T OF JUST. (Sept. 26, 2024), <https://www.justice.gov/doj/reducing-gun-violence#:~:text=These%20statutes%20are%20shared%20by,of%20the%20juvenile%20justice%20system.>

³⁶ *Id.*

every U21 transaction, regardless of whether the agencies contacted are or may be prohibited from providing the information sought.³⁷

The NICS Section began a phased implementation of the enhanced background checks for U21 transactions on October 14, 2022, and by January 3, 2023, enhanced background checks were being submitted during each U21 transaction the FBI conducted.³⁸ Full-POC states, handling their own firearm background checks for persons U21, implemented their own U21 processes independent of this timeline with the support, guidance, and resources provided by the NICS Section. As of July 28, 2023, all existing full-POC states complied with the U21 provisions of BSCA.³⁹ New York and Washington, which later became full-POC states, implemented their own U21 processes the day of transition.⁴⁰

In the 25 years since its inception, the NICS Section has relied mainly on court records to provide final adjudication information and does not regularly engage with local law enforcement agencies. To make BSCA fully operational, the NICS Section established state and local contacts and educated agencies on the purpose and expectations of the NICS requests. This educational effort proved to be a significant hurdle for the FBI to overcome when the U21 process was first implemented. While BSCA does not require that each state and local agency respond to U21 requests for information, it is imperative the NICS Section receives an answer as soon as possible to process these transactions accurately and efficiently.⁴¹

B. The evolution of the Bipartisan Safer Communities Act for transferees under the age of 21

By far, the largest impact BSCA had on NICS processing was the expanded background checks for prospective U21 firearm transferees.⁴² As

³⁷ 34 U.S.C. § 40901(1)(1).

³⁸ *A Closer Look: NICS Enhanced Background Checks for Under-21 Gun Buyers Showing Results*, FED. BUREAU OF INVESTIGATION (Mar. 25, 2024), <https://www.fbi.gov/news/stories/nics-enhanced-background-checks-for-under-21-gun-buyers-showing-results>; Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Marks More Than 500 Illegal Firearm Purchases Stopped by New Enhanced Background Checks (Jan. 5, 2024).

³⁹ U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 2022 OPERATIONAL REPORT (2022) [hereinafter OPERATIONAL REPORT].

⁴⁰ *Id.*

⁴¹ *Id.* at 14.

⁴² *Id.* at 17.

with any new program, the initial response rates of state and local agencies and NICS system functionality increased slowly.⁴³ NICS assembled an internal task force to facilitate the implementation of the expanded background checks, which laid the groundwork for successfully obtaining records from state and local agencies pertaining to juvenile justice and mental health records. The growth from January 2023 to date has been significant.⁴⁴ With continued outreach, education and supplementing resources, the response rates of state and local agencies continue to grow. Figure 2 illustrates the success of expanded background checks and shows the value of conducting in-depth research to maintain the integrity of the Second Amendment, while preventing individuals who are legally barred from possessing or receiving firearms through FFLs.⁴⁵

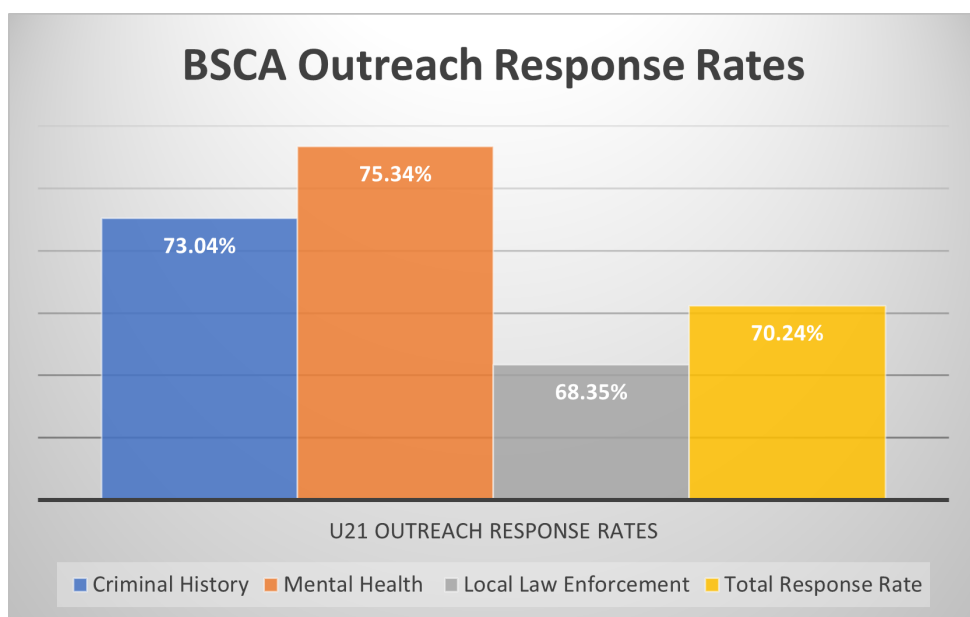


Figure 2: Comparison of U21 Response Rates Across All Three Sources as of September 9, 2024

As of September 9, 2024, the NICS Section processed 303,628 U21 transactions.⁴⁶ Prohibiting information was located for more than 880 of

⁴³ *A Closer Look: NICS Enhanced Background Checks for Under-21 Gun Buyers Showing Results*, FED. BUREAU OF INVESTIGATION (Mar. 25, 2024), <https://www.fbi.gov/news/stories/nics-enhanced-background-checks-for-under-21-gun-buyers-showing-results>.

⁴⁴ *Id.*

⁴⁵ FED. BUREAU OF INVESTIGATION, NICS FIREARM BACKGROUND CHECKS: DAY/MONTH/YEAR (2024).

⁴⁶ *Id.*

the U21 checks conducted during this timeframe and were subsequently denied due to information obtained through the expanded U21 outreach, which likely would not have been available to the NICS Section before the passage of BSCA.⁴⁷

C. Communication advancements

When BSCA was enacted in 2022, the NICS Section had a short window to become operational and begin collecting pertinent records for U21 transaction.⁴⁸ Initially, there was a concerning lack of responses to U21 requests across all three types of agencies, especially from local law enforcement agencies. In January 2023, the FBI held webinars with 24 low-responding states to educate local agencies on how and why to respond to the enhanced U21 requests. One factor contributing to low response rates was the method through which the FBI provided the data and the way local law enforcement agencies received these requests for information. The FBI had an existing telecommunication method used to contact law enforcement agencies for other criminal justice purposes through NCIC. This method of communication, however, was not created for the purpose of requesting data from agencies and was therefore not conducive for agencies to respond efficiently. Information technology partners within the NICS Section created an alternative method of communication where, if an email address could be obtained and validated for an agency, the agency would receive an email with a secure link and access pin to view and respond to the U21 request in a single session. The NICS Section was able to convert over 13,000 local law enforcement agencies to the link and pin method, which yields a 75.56% average response rate.⁴⁹

The FBI continues its efforts to increase response rates across the country. During fiscal year 2023, NICS Section liaisons presented at more than 130 law enforcement events, over 100 events with state and judicial personnel and employees of FFLs and involved over 6,000 external stakeholders in BSCA discussions.⁵⁰ Joint guidance was drafted with OJJDP, individual letters were sent to each state's attorney general's office, and six national articles were drafted for publication, including in the IACP *Police Chief* magazine and *Law Enforcement Bulletin*.⁵¹

⁴⁷ OPERATIONAL REPORT, *supra* note 39, at 18.

⁴⁸ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1329 (2022).

⁴⁹ OPERATIONAL REPORT, *supra* note 39.

⁵⁰ *Id.*

⁵¹ See generally *Issue Archive*, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.policechiefmagazine.org/magazine-issues/> (last visited Nov. 19, 2024); *Archives*, FED. BUREAU OF INVESTIGATION L. ENF'T BULL., <https://leb.fbi.gov/archives> (last visited Nov. 19, 2024).

D. The future of the National Instant Criminal Background Check System and the Bipartisan Safer Communities Act

BSCA was enacted with a sunset date of September 30, 2032.⁵² The FBI continues to enhance the effectiveness of BSCA while working toward a comprehensive implementation of the remaining provisions. Specifically, the NICS Section has completed an assessment on the lowest-responding agencies and developed an outreach plan to boost responsiveness to U21 requests. NICS liaison specialists engage with states and agencies through virtual webinars and in-person visits to provide information and education on the vital role they play in the accurate and comprehensive processing of U21 transactions.

In addition to the broad-scale outreach, NICS examiners processing U21 transactions conduct targeted, transaction-specific outreach in an average of 2,000 follow-up requests on a weekly basis for information from state and local agencies to make a final determination in a timely manner.⁵³ This may entail obtaining final dispositions from clerks of court, medical records pertaining to mental health, incident reports from local law enforcement, or juvenile history records with prohibiting information.

The requirements set forth by BSCA, specifically for U21 transactions, were unprecedented and had a significant impact on the operations and mechanics of NICS' (and full-POCs') processing procedures, as well as the CJIS Division as a whole. This critical legislation bolstered the FBI's efforts to use available information to make accurate and timely determinations of a person being ineligible to legally obtain firearms, keep Americans safe, and protect the Second Amendment rights of individuals.

E. Additional Resources

If you have additional questions or would like to follow up on statistics reported in this article, you can email the NICS liaison (NICSliason@fbi.gov) or visit the NICS website.⁵⁴

⁵² Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1324 (2022) (codified as a statutory note to 34 U.S.C. § 40901).

⁵³ OPERATIONAL REPORT, *supra* note 39, at 24.

⁵⁴ *About NICS*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics> (last visited Nov. 19, 2024).

About the Author

Kristin Thigpen is a Supervisory Special Agent (SSA) with the FBI's CJIS Division, working in the NICS Section. Before becoming an FBI Special Agent, she was an Assistant District Attorney in Charlotte, North Carolina for five years where she focused on prosecuting felony drug crimes. She began her FBI career in the New York Division where she investigated international terrorism cases for three years. She then transferred to the Pittsburgh Division and investigated domestic terrorism, human trafficking, white-collar crime and health-care fraud violations. Since she joined the CJIS Division, she has assisted in building the NICS External Services Unit, which focuses on operational support to the FBI field offices and state and local law enforcement. She is currently assigned to the NICS Business and Liaison Unit and leads the Legal Analysis Teams.

Special thanks to the NICS Business Liaison Unit for sharing voluminous data and records that are meticulously maintained.

Page Intentionally Left Blank

New Tools for Combating Illegal Gun Trade: Firearms Trafficking Statutes Enacted Under the Bipartisan Safer Communities Act of 2022

Dineen A. Baker

Counsel to Field Operations

Bureau of Alcohol, Tobacco, Firearms and Explosives

I. Introduction and background

On June 25, 2022, the Bipartisan Safer Communities Act (BSCA) was signed into law, marking the most significant gun violence prevention law in decades.¹ One of the key provisions of BSCA is the enactment of firearms trafficking statutes, including prohibitions on straw purchasing.² The new statutes are found in sections 932 and 933 of Title 18.³ The new statutes, as discussed *infra* sections II and III, directly prohibit straw purchasing and firearms trafficking and significantly enhance the penalties for those crimes.⁴ The new firearms trafficking statutes enhance measures already in place, such as the “lying and buying” offense of making false statements to a firearms dealer.⁵

On April 4, 2024, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) published the Firearm Trafficking Investigations report, part of the comprehensive multi-volume National Firearms Commerce and Trafficking Assessment.⁶ The report showed that the most frequent

¹ WHITE HOUSE OFFICE OF GUN VIOLENCE PREVENTION, A REPORT ON THE IMPLEMENTATION OF THE BIPARTISAN SAFER COMMUNITIES ACT 2 (2024).

² Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

³ The Bipartisan Safer Communities Act revised many sections of the U.S. Code and the Gun Control Act; this article, however, focuses only on the new firearms trafficking statutes.

⁴ 18 U.S.C. §§ 932–933.

⁵ 18 U.S.C. § 922(a)(6).

⁶ BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): FIREARMS TRAFFICKING INVESTIGATIONS—VOLUME THREE (2024) [hereinafter NFCTA].

type of trafficking channel identified in ATF gun trafficking investigations was unlicensed firearms dealing by private persons, constituting 40.7% of total cases.⁷ These investigations accounted for over half of the firearms identified as trafficked in ATF investigations.⁸ The second most frequent trafficking channel was straw purchasers.⁹

On May 26, 2021, the Department of Justice (Department) established a comprehensive Violent Crime Reduction Initiative to support local communities in preventing, investigating, and prosecuting gun violence and other violent crime, specifically providing that firearms traffickers who provide weapons to violent offenders are an enforcement priority across the country.¹⁰ As part of the Violent Crime Reduction Initiative, on June 22, 2021, the Department announced the creation of five cross-jurisdictional Firearms Trafficking Strike Forces in New York, Chicago, Los Angeles, San Francisco, and Washington, D.C. to help reduce violent crime by addressing illegal gun trafficking in significant firearms trafficking corridors.¹¹ The goal of the Strike Forces is focused enforcement against entire trafficking networks, from the places where guns are unlawfully obtained (source states) to the areas where they are used to commit violent crimes (market states). ATF subsequently established the National Firearms Trafficking Center (NFTC), providing unique capabilities by combining and operationalizing premier crime gun intelligence tools with expert firearms trafficking analysis to generate timely and actionable intelligence. The NFTC works with Crime Gun Intelligence Centers (CGIC) around the country to provide a unified investigative and intelligence forum providing comprehensive, coordinated, and effective intelligence and strategies to identify, disrupt, and dismantle illegal firearms trafficking. With the passage of BSCA and the creation of new firearms trafficking offenses, the partnership between ATF's NFTC and CGICs and U.S. Attorneys' Offices (USAOs), including the Firearms Trafficking Strikes Forces, will prove invaluable in combating the flow of illegal guns used to commit violent crime.

⁷ *Id.* part III at 1–2.

⁸ *Id.* part V at 7–8, part XI at 2.

⁹ *Id.* part III at 1–2.

¹⁰ Press Release, Off. of the Att'y Gen., Attorney General Merrick B. Garland Announces New Effort to Reduce Violent Crime (May 26, 2021).

¹¹ Press Release, Off. of the Att'y Gen., Department of Justice Announces Formation of Firearms Trafficking Strike Forces to Crack Down on Sources of Crime Guns (June 22, 2021).

II. Straw purchasing of firearms

Straw purchasing is a component of firearms trafficking. Traffickers often use non-prohibited persons to obtain guns from Federal Firearms Licensees (FFLs) and then divert those firearms for illicit purposes. A “straw” is a person who purchases a firearm from an FFL, including completing required paperwork and undergoing a background check, when the person is not the actual buyer of the gun. As enacted by BSCA, 18 U.S.C. § 932 criminalizes the purchase of any firearms for, on behalf of, or at the request of, any other person if that person is prohibited or intends to use the firearm in furtherance of a felony or drug trafficking offense.¹² Before the BSCA, prosecutors were often restricted to charging straw purchasers with making false statements on firearms transaction forms; the new section 932 provision gives Assistant U.S. Attorneys (AUSAs) a stronger tool to hold straw purchasers accountable.¹³

Specifically, in section 932, it is now unlawful for any person to knowingly purchase, or conspire to purchase, a firearm for, on behalf of, or at the request or demand of any other person, knowing or having reasonable cause to believe that the other individual is a prohibited person.¹⁴ The new law also forbids a person from purchasing a firearm for, on behalf of, or at the request or demand of, another person knowing that the other person intends to utilize the firearm in furtherance of a felony, federal crime of terrorism, or a drug trafficking crime.¹⁵ A person is not the actual transferee-buyer of a firearm if they are acquiring the firearm for, on behalf of, or at the request or demand of any other person. There are exceptions when the firearm is a bona fide gift or is retrieved for someone else after repair.¹⁶ The penalties upon conviction include imprisonment for up to 15 years and up to 25 years if committed while knowing or having reasonable cause to believe that the firearm would be used to commit a felony, a federal crime of terrorism, or a drug trafficking crime.¹⁷

When an individual purchases a firearm at an FFL, the person is required to complete ATF Form 4473: Firearms Transaction Record.¹⁸

¹² 18 U.S.C. § 932(b).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 932(b)(2).

¹⁶ *Firearms Transaction Record: ATF Form 4473*, U.S. DEP’T JUST., BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Aug. 2023), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>. See Question 21(a) at page 1 and Instructions for Completing Questions 21(a) at page 4.

¹⁷ 18 U.S.C. § 932(c).

¹⁸ *Firearms Transaction Record: ATF Form 4473*, U.S. DEP’T JUST., BUREAU OF

Question 21(a) on Form 4473 asks:

Are you the actual transferee/buyer of all of the firearm(s) listed on this form and any continuation sheet(s) . . . ? **Warning: You are not the actual transferee/buyer if you are acquiring any of the firearm(s) on behalf of another person. If you are not the actual transferee/buyer, the licensee cannot transfer any of the firearm(s) to you.**¹⁹

Question 21(n) on Form 4473 asks if the buyer intends “to sell or dispose of any firearm(s)” to any person who is prohibited from receiving or possessing a firearm.²⁰ By signing the form, the individual certifies that their answers are true, correct, and complete. If the individual is not the actual buyer, or if the individual intends to transfer the gun to a prohibited person, the individual is a straw purchaser. Form 4473s are maintained by the FFL, and ATF special agents can obtain copies of the forms from the FFL to further the straw purchasing investigation.

An example of the importance of utilizing the new straw purchasing statute occurred in Des Moines, Iowa, in 2022, when Dontavius Sharkey, a gang member whose felony conviction prohibited him from legally purchasing firearms, recruited Marissa Morgan to straw purchase several guns on his behalf.²¹ In less than one month during the summer of 2022, Morgan purchased pistols at three different FFLs in the Des Moines area at the request of Sharkey.²² During each purchase, Morgan completed the requisite paperwork and falsely stated that she was the actual buyer, when in fact she was buying the guns for Sharkey, who she knew was prohibited due to his conviction.²³ Sharkey later converted one of the pistols to a machinegun.²⁴ Following a joint ATF–Des Moines Police Department investigation, both Sharkey and Morgan were convicted under the new straw purchasing statute, section 932.²⁵ Sharkey was convicted

ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Aug. 2023), <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

¹⁹ *Id.* (emphasis in original).

²⁰ *Id.*

²¹ *United States v. Sharkey*, 693 F. Supp. 3d 1004 (S.D. Iowa 2023); Indictment, *United States v. Morgan*, No. 4:23-cr-020 (S.D. Iowa Feb. 15, 2023), ECF No. 2.

²² Plea Agreement, *United States v. Morgan*, No. 4:23-cr-020 (S.D. Iowa Apr. 26, 2023), ECF No. 29.

²³ *Id.*

²⁴ Press Release, U.S. Att’y’s Off., S.D. Iowa, C-Block Member Sentenced to 384 Months in Federal Prison (Feb. 8, 2024).

²⁵ *Sharkey*, 693 F. Supp. 3d 1004; *United States v. Morgan*, No. 4:23-cr-020 (S.D. Iowa Nov. 16, 2023). *See also* 18 U.S.C. § 932 (straw purchasing of firearms).

for conspiracy to commit a straw purchase, as well as possession of the converted machinegun, and sentenced to a total of 360 months incarceration.²⁶ Morgan was convicted of straw purchasing.²⁷ This case illustrates how straw purchasers put guns into the hands of violent individuals and how the new law will hold individuals who obtain guns through straw purchasing accountable.

III. Trafficking in firearms

The second firearms trafficking statute enacted as part of the BSCA is 18 U.S.C. § 933, which directly addresses firearms trafficking.²⁸ Simply stated, firearms trafficking is the diversion of legal firearms to illegal commerce. Section 933 prohibits any person from shipping, transporting, causing shipment or transportation, or otherwise disposing of any firearm to another person with the knowledge or reasonable cause to believe the transferee's use, carrying, or possession would constitute a felony.²⁹ The law also prohibits the receipt of such firearm if the transferee knows or has reasonable cause to believe that receiving such firearm would constitute a felony.³⁰ The law also encompasses attempts and conspiracies.³¹ This law is the first standalone federal statute specifically designed to target unlawful gun trafficking.³²

It is notable that the statute does not contain a minimum number of firearms to prove trafficking, rather, the law uses the phrases “any firearm” and “a firearm.”³³ The statute looks to what the defendant knew, or had reasonable cause to believe, at the time.³⁴ The defendant's state of mind can be gleaned through different ways: interviews with the defendant; conversations with undercover agents and confidential informants; electronic communications, including evidence obtained via cell phone search warrants; and social media. Tracing of suspected trafficked firearms through ATF's National Tracing Center and analyzing shell casing through the National Integrated Ballistic Information Network are

²⁶ *Sharkey*, 693 F. Supp. 3d 1004.

²⁷ *Morgan*, No. 4:23-cr-020 (S.D. Iowa).

²⁸ 18 U.S.C. § 933.

²⁹ *Id.* § 933(a)(1).

³⁰ *Id.* § 933(a)(2).

³¹ *Id.* § 933(a)(3).

³² Press Release, Off. of the Att'y Gen., Justice Department Secures More Than 500 Prosecutions Under New Firearms Statutes Enacted by Bipartisan Safer Communities Act (June 11, 2024).

³³ *Id.* § 933(a)(1), (a)(2).

³⁴ *Id.* § 933(a)(2).

tools that provide valuable evidence of trafficking behavior.³⁵ The National Tracing Center can provide the timeline of when a gun was lawfully purchased to when law enforcement recovered it, or when its shell casings were first recovered at a crime scene. The shorter this “time to recovery” or “time to crime” is, the greater the chance the gun was trafficked illegally.³⁶ The NFTC works with CGICs around the country to provide agents and AUSAs with actionable trafficking intelligence to ensure that the elements of the new statutes can be proven.

Section 933 became law on June 25, 2022, and the USAOs, in partnership with ATF and local law enforcement, immediately put the new law into action.³⁷ Less than a month after its enactment, Said Hernandez was charged with a section 933 violation in the Southern District of Texas.³⁸ Hernandez purchased eight firearms in two days, including several from vendors at a gun show; the firearms were interdicted as Hernandez attempted to transport them to Mexico.³⁹ Hernandez was ultimately indicted for trafficking 17 firearms to Mexico pursuant to section 933, and as part of this plea agreement, he admitted to trafficking over 100 guns for thousands of dollars in profit.⁴⁰ Hernandez was sentenced to 80 months incarceration.⁴¹ The Hernandez case was the first of many successful prosecutions under the new law.

IV. Other Bipartisan Safer Communities Act firearms trafficking offenses

In addition to the section 933 firearms trafficking statute, BSCA created other new criminal offenses that proscribe the unlawful transfer of firearms.⁴² Sections 922(d)(10) and (d)(11) prohibit the transfer of a firearm or ammunition to a person who the individual knows or has reasonable cause to believe intends to sell or otherwise dispose of the firearm

³⁵ See generally *National Tracing Center*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 19, 2024), <https://www.atf.gov/firearms/national-tracing-center>; *National Integrated Ballistic Information Network (NIBIN)*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (July 8, 2024), <https://www.atf.gov/firearms/national-integrated-ballistic-information-network-nibin>.

³⁶ NFCTA, *supra* note 6, part III at 23.

³⁷ 18 U.S.C. § 933.

³⁸ *United States v. Hernandez*, No. 5:22-cr-1008 (S.D. Tex. Aug. 9, 2022).

³⁹ *Id.*

⁴⁰ Plea Agreement, *United States v. Hernandez*, No. 5:22-cr-1008 (S.D. Tex. Sept. 27, 2022), ECF No. 29.

⁴¹ Judgment, *United States v. Hernandez*, No. 5:22-cr-1008 (S.D. Tex. Feb. 2, 2023), ECF No. 46.

⁴² 18 U.S.C. § 933.

or ammunition in furtherance of any federal or state felony or intends to sell or otherwise dispose of the firearm or ammunition to any prohibited person.⁴³ Section 924(h), as amended by BSCA, makes it unlawful for a person to receive or transfer a firearm or ammunition, or attempt or conspire to do so, knowing or having reasonable cause to believe that it will be used to commit any federal or state felony.⁴⁴ Section 924(k), as amended by BSCA, makes it unlawful for a person to smuggle a firearm or ammunition with the intent to engage in or promote conduct that constitutes any federal or state felony or to attempt or conspire to do so; this applies not only to smuggling into the United States but also out of the United States if the conduct would constitute a felony prosecutable in a U.S. court if it occurred within the United States.⁴⁵ In addition to sections 932 and 933, discussed *supra* sections II and III, these statutes should also be considered when pursuing firearms trafficking charges.⁴⁶

Furthermore, BSCA established a broad, new criminal forfeiture provision found in section 934 that authorizes the government to seize any proceeds or property from persons convicted under the new straw purchasing and firearms trafficking violations, as well as any property used, or intended to be used, in any manner to facilitate those violations.⁴⁷

V. Sentencing

BSCA increased maximum terms of imprisonment in 18 U.S.C. § 924(a) for unlawful transfer and possession of firearms under the Gun Control Act of 1968, from 10 to 15 years, and up to 25 years if a straw purchased firearm is intended to be used to commit any federal or state felony.⁴⁸ Additionally, BSCA contained a directive to the U.S. Sentencing Commission (the Commission) stating that the Commission:

shall review and amend its guidelines and policy statements to ensure that persons convicted of an offense under section 932 or 933 of title 18, United States Code, and other offenses applicable to the straw purchases and trafficking of firearms are subject to increased penalties in comparison to those currently provided by the guidelines and policy statements for such straw purchasing and trafficking of firearms offenses. In its review, the Commission shall consider, in particular, an

⁴³ *Id.* § 922(d) (10)–(11).

⁴⁴ *Id.* § 924(h).

⁴⁵ *Id.* § 924(k).

⁴⁶ *Id.* §§ 924, 932–933.

⁴⁷ *Id.* § 934(a).

⁴⁸ *Id.* § 924(a).

appropriate amendment to reflect the intent of Congress that straw purchasers without significant criminal histories receive sentences that are sufficient to deter participation in such activities and reflect the defendant's role and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. The Commission shall also review and amend its guidelines and policy statements to reflect the intent of Congress that a person convicted of an offense under section 932 or 933 of title 18, United States Code, who is affiliated with a gang, cartel, organized crime ring, or other such enterprise should be subject to higher penalties than an otherwise unaffiliated individual.⁴⁹

On April 5, 2023, the Commission, pursuant to Congress' directive, voted to promulgate a series of amendments to the U.S. Sentencing Guidelines (U.S.S.G.) to address the implementation of BSCA.⁵⁰ The amendments went into effect on November 1, 2023.⁵¹ Accordingly, a section 932 or section 933 offense carries a base offense level of 14,⁵² unless the defendant committed the offense after conviction for a felony crime of violence or a controlled substance offense, in which case the base offense level is 20.⁵³

The amendments also revised U.S.S.G. § 2K2.1(b)(5) to provide a tiered enhancement.⁵⁴ A 2-level enhancement applies when the defendant transferred a single firearm, or possessed a firearm intending to transfer it, with reason to believe the firearm would end up with a prohibited person or with someone who intended to use or dispose of the firearm unlawfully.⁵⁵ Another 2-level enhancement applies if the defendant committed the firearm offense in connection with the defendant's participation in a group, club, organization, or association of five or more persons, with the defendant knowing, being willfully blind, or consciously avoiding knowledge that the group had "as one of its primary purposes the commission of criminal offenses."⁵⁶ A 2-level enhancement also applies if the defendant

⁴⁹ Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313, 1328 (2022).

⁵⁰ Press Release, U.S. Sent'g Comm'n, New Policies Increase First Steps Toward Second Chances, Take Targeted Action on Gun Trafficking and Fentanyl, and Expand Alternatives to Incarceration (Apr. 5, 2023).

⁵¹ *Id.*

⁵² U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(6) (U.S. SENT'G COMM'N 2023).

⁵³ *Id.* § 2K2.1(a)(4)(A).

⁵⁴ *Id.* § 2K2.1(b)(5).

⁵⁵ *Id.* § 2K2.1(b)(5)(B).

⁵⁶ *Id.* § 2K2.1(b)(8).

was convicted under section 933(a)(2) or (a)(3).⁵⁷

A 5-level increase applies if the defendant “transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of” two or more firearms knowing or with reason to believe they would be received by a person: (1) with a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence; (2) who was under a criminal justice sentence; or (3) who intended to use or dispose of the firearms unlawfully.⁵⁸

In August 2024, the Commission published a Primer on Firearms Offenses that addresses the new statutes and provides guidance on applying the U.S.S.G. to section 932 and section 933 firearms trafficking offenses.⁵⁹

VI. Conclusion

On June 22, 2024, the second anniversary of BSCA, the Department announced that 525 defendants in 280 cases had been charged under the new trafficking and straw purchasing provisions and that the cases include significant prosecutions of firearms trafficking linked to transnational cartels and narcotics distribution.⁶⁰ But this is just the beginning.

The new firearms trafficking statutes are a powerful tool that law enforcement and prosecutors are encouraged to utilize in all applicable cases. ATF Division Counsel can assist AUSAs as cases develop that may be appropriate under the new statutes.

Additionally, ATF’s NFTC and CGIC are valuable resources that AUSAs and agents should consider in the fight against violent crime resulting from illegal firearms trafficking. Firearms trafficking and the violent crime that results from illegal firearms inflict devastation on communities throughout the United States, and together, armed with these new statutes, we can hold those responsible accountable.

About the Author

Dineen A. Baker serves as Counsel to Field Operations at ATF in Washington, D.C. Before joining ATF, she was an AUSA in the District of Columbia and in the Middle District of Florida. She served as the Chief of the Violent Crime and Narcotics Trafficking Section in the USAO for the District of Columbia. Before becoming an AUSA, she was a local

⁵⁷ *Id.* § 2K2.1(b)(5)(A).

⁵⁸ *Id.* § 2K2.1(b)(5)(C).

⁵⁹ OFF. OF THE GEN. COUNSEL, PRIMER ON FIREARMS OFFENSES (2024).

⁶⁰ Press Release, Off. of the Att’y Gen., Fact Sheet: Two Years of the Bipartisan Safer Communities Act (June 25, 2024).

prosecutor at the State Attorney's Office in Fort Myers, Florida. She received her Juris Doctor degree from the Catholic University of America in Washington, D.C.

Firearms-Related Predicate Offenses Added to the Racketeer Influenced and Corrupt Organizations Act: Straw Purchasing and Firearms Trafficking Under 18 U.S.C. §§ 932–933

Carl Alexandre

Counselor for Transnational Organized Crime

Violent Crime and Racketeering Section

Criminal Division

I. Introduction

Firearm violence plagues communities across the country. Data from the Centers for Disease Control and Prevention (CDC) and a report based on that data published by the Johns Hopkins Bloomberg School of Public Health indicate 48,117 firearm-related deaths occurred in the United States in 2022.¹ More than half of the firearm-related deaths were suicides and more than 4 out of 10 were homicides.² Firearm injuries were the leading cause of death among children and teens ages 1–19.³ The Gun Violence Archive (GVA), an independent non-profit organization tracking gun violence across the United States, recorded 644 incidents of mass

¹ *About Firearm Injury and Death*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, FIREARM INJURY & DEATH PREVENTION (July 5, 2024), <https://www.cdc.gov/firearm-violence/about/index.html>; *CDC Provisional Data: Gun Suicides Reach All-time High in 2022, Gun Homicides Down Slightly from 2021*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, CTR. FOR GUN VIOLENCE SOLS. (July 27, 2023), <https://publichealth.jhu.edu/center-for-gun-violence-solutions/2023/cdc-provisional-data-gun-suicides-reach-all-time-high-in-2022-gun-homicides-down-slightly-from-2021>.

² *CDC Provisional Data*, *supra* note 1.

³ *Id.*

shootings in 2022 alone.⁴ The GVA defines “mass shootings” as different types of incidents, “including public shootings, bar [and] club incidents, family annihilations, drive-by, [and] workplace” shootings with “a minimum of four victims shot, either injured or killed, not including any shooter.”⁵

To address the epidemic of firearm violence, in June 2022, Congress enacted and then-President Biden signed the Bipartisan Safer Communities Act (BSCA).⁶ The BSCA took several landmark steps: (1) it extended and enhanced background checks for firearm purchasers between the ages of 18 and 21; (2) it kept firearms out of the hands of convicted felons and individuals who pose a danger to themselves and others; (3) it sanctioned those evading compliance with licensing requirements; (4) it narrowed the “boyfriend loophole” by prohibiting individuals who committed a domestic violence misdemeanor during a dating relationship from purchasing or possessing a firearm for at least five years; and (5) it armed law enforcement and prosecutors with new tools to pursue firearms traffickers and straw purchasers.⁷

The Department of Justice (Department) has traditionally prioritized combating the epidemic of gun violence in our communities. More recently, the Department’s fiscal years (FYs) 2022–2026 Strategic Plan continued to highlight this important priority.⁸ Building on current efforts to partner with state, local, and tribal law enforcement agencies to identify and disrupt illicit activities certain to put firearms in the hands of violent criminals, the Department’s Strategic Plan expresses an unwavering commitment to target the most significant drivers of violent crime, including gun violence.⁹

This article focuses on the new tools provided to investigators and prosecutors by the BSCA, and how those tools can be used to contribute to the Department’s mission to prevent and solve gun-related violent crime.

⁴ *GVA—10 Year Review*, GUN VIOLENCE ARCHIVE (Nov. 18, 2024), <https://www.gunviolencearchive.org/>.

⁵ *Explainer*, GUN VIOLENCE ARCHIVE (Feb. 15, 2024), <https://www.gunviolencearchive.org/explainer>. See also *Past Summary Ledgers: Gun Violence Archive 2022*, GUN VIOLENCE ARCHIVE (Nov. 20, 2024), <https://www.gunviolencearchive.org/past-tolls>.

⁶ The Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022) (codified at 18 U.S.C. §§ 921–934).

⁷ 18 U.S.C. §§ 932–933.

⁸ U.S. DEP’T OF JUST., FYs 2022–2026 STRATEGIC PLAN (2022).

⁹ *Id.* at 27–28.

II. The legislative framework of federal firearm legislation

To understand the BSCA's new tools, it is helpful to understand the gaps they fill in prior firearm legislation. Over the years, Congress has enacted several laws regulating firearms. Four statutory schemes, however, are often cited as governing the transfer, sale, and possession of firearms: the National Firearms Act (NFA) of 1934; the Gun Control Act (GCA) of 1968; the Brady Handgun Violence Prevention Act (Brady Act) of 1993; and now, the BSCA of 2022.¹⁰

A. The National Firearms Act of 1934¹¹

The NFA was passed to discourage the transaction of certain firearms that fell within the NFA's coverage, including automatic machine guns, short-barreled shotguns and rifles, silencers, and a catch-all category defined as "any other weapon."¹² To accomplish this, the NFA imposes a tax on persons and entities "engaged in the business" of importing, manufacturing, and dealing in NFA-regulated firearms, but the tax has never been adjusted for inflation, thus making it ineffective.¹³ The NFA also required the annual registration of each location where the business is to be carried out and the registration of firearms regulated by the NFA.¹⁴

¹⁰ The list of firearms legislation enacted by Congress between 1934 and 2022, reproduced here, is not exhaustive but includes the most relevant pieces of legislation that would be of interest to investigators and prosecutors: National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (amended at 26 U.S.C. § 5849); Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (current version at 18 U.S.C. § 921); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (amending 18 U.S.C. § 921); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (amending 18 U.S.C. §§ 921–934); Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. § 921, 18 U.S.C. § 845); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (amending 18 U.S.C. §§ 921–922); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1994) (amended 18 U.S.C. §§ 921–922); Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022) (establishing 6 U.S.C. § 665k, 18 U.S.C. §§ 932–934).

¹¹ 26 U.S.C. § 5801.

¹² Gun Control Act of 1968, Pub. L. No. 90-618, Title II, § 201, 82 Stat. 1213, 1230 (amending Pub. L. No. 94-455, Title XIX, § 1906(b)(13)(A), (J), 90 Stat. 1834, 1835 (1976)); Firearms Owners' Protection Act, Pub. L. No. 99-308, § 109, 100 Stat. 449, 460 (1986); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, div. A, Title VIII, § 809(h)(3), 132 Stat. 1842 (2018).

¹³ Gun Control Act of 1968, Pub. L. No. 90-618, Title II, § 201, 82 Stat. 1213, 1227, *amended by* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, Title X, § 10512(g)(1), 101 Stat. 1330–1449.

¹⁴ Gun Control Act of 1968, Pub. L. No. 90-618, Title II, § 201, 82 Stat. 1213, 1227, *amended by* Tax Reform Act of 1976, Pub. L. No. 94-455, Title XIX, § 1906(b)(13)(A),

Transferees seeking possession of any NFA-covered weapons must wait until the transfer and registration of the weapons are approved.¹⁵ Most “handguns,” however, are excluded from the NFA’s coverage.

B. The Gun Control Act of 1968¹⁶

The GCA is considered the primary federal firearm legislation in the United States. The GCA has been amended several times, including by the Brady Handgun Violence Prevention Act and the BSCA. The GCA specifies the requirements regarding the sale, purchase, and possession of firearms, including “handguns.” This includes the requirement that all persons “engaged in the business” of importing, manufacturing, and selling firearms be a federal firearms licensee (FFL).¹⁷ The GCA also requires FFLs to maintain records on all commercial firearms transactions. Importantly, the GCA established categories of persons who are barred or prohibited from transferring firearms to certain others or restricting the interstate transportation, shipping, receiving, or possessing firearms or ammunition.¹⁸

C. The Brady Handgun Violence Prevention Act of 1993¹⁹

The Brady Act supplemented the GCA by requiring FFLs to initiate background checks on any prospective unlicensed customer who seeks to acquire a firearm through a sale or trade to determine whether the transfer or receipt of a firearm by a prospective purchaser is authorized. The Brady Act requires a national namecheck of the customer by the FBI-administered National Instant Criminal Background Check System (NICS). NICS is a computer “system of systems” that queries federal, state, local, tribal, and territorial records that could indicate that a prospective customer is ineligible to receive a firearm. Despite the Brady Act’s additions to the GCA, the background check provision applies only

90 Stat. 1834; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XI, § 110301(b), 108 Stat. 1796, 2012.

¹⁵ Gun Control Act of 1968, Pub. L. No. 90-618, Title II, § 201, 82 Stat. 1213, 1229, *amended by* Pub. L. No. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834 (1976); 26 U.S.C. § 5841(a). *See also* 27 C.F.R. § 479.101; Pub L. No. 90-618, 82 Stat. 1213 (1968); 18 U.S.C. §§ 921–934.

¹⁶ 5 Pub L. No. 90-618, 82 Stat. 1213 (1968); 18 U.S.C. §§ 921–934.

¹⁷ Definition of “Engaged in the Business” as a Dealer in Firearms, 89 Fed. Reg. 28968 (Apr. 19, 2024) (codified at 27 C.F.R. pt. 478).

¹⁸ 18 U.S.C. § 922(d).

¹⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), *amended by* 18 U.S.C. §§ 921–922.

to licensees. Non-licensed sellers of firearms are not subject to the record-keeping or background check provisions of the GCA.

D. The Bipartisan Safer Communities Act of 2022²⁰

To close some gaps in prior legislation, the BSCA attacks firearms trafficking more directly. As stated in the introduction, the BSCA requires enhanced background checks for firearm purchasers under 21 years old, authorizes funding for state “red flag laws” and other crisis intervention programs, creates new federal offenses for firearms trafficking and straw purchases, and partially closes the “boyfriend loophole,” which previously allowed dating partners to skirt firearm restrictions imposed for domestic violence, while spouses in similar circumstances would be subject to firearm restrictions. Considering the amendments made to the GCA by the BSCA, and the Department’s increased emphasis on reducing gun violence, this paper highlights the new criminal provisions enacted by this legislation.

III. The Bipartisan Safer Communities Act Targets Straw Purchasing and Firearm Trafficking as Federal Predicate Offenses under the Racketeer Influenced and Corrupt Organizations Act, Electronic Surveillance, and Forfeiture

A. Using the Bipartisan Safer Communities Act to Combat Firearms Trafficking and Straw Purchasing

Firearm trafficking is the movement of guns from legal to illegal streams of commerce and occurs both within states and across state lines.²¹ To reduce violent crime, it is essential to prevent illegal firearms trafficking. A Bureau of Alcohol, Tobacco, Firearms and Explosives survey found that once a firearm was trafficked, it was “used to commit further crimes” almost 25% of the time.²² Of that quarter, around 12% involved homi-

²⁰ 18 U.S.C § 921.

²¹ *Crime Guns: Trafficking & Straw Purchasing*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing/> (last visited Nov. 20, 2024).

²² *National Firearms Commerce and Trafficking Assessment (NFCTA): Firearms Trafficking Investigations—Volume Three, Table of Contents: Director’s For-*

cides, 10% involved attempted homicides, and 20% involved aggravated assaults.²³ To stop violent crime before it is committed, investigators and prosecutors should use all available legal tools to pursue firearm traffickers using both the BSCA and previously enacted firearm legislation.

B. Prohibited persons²⁴

The GCA makes it unlawful to sell or otherwise dispose of any firearm or ammunition to any person (including a juvenile) knowing or having reasonable cause to believe that such person:

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; (2) is a fugitive from justice; (3) is an unlawful user of or addicted to any controlled substance; (4) has been adjudicated as a mental defective or has been committed to any mental institution at 16 years of age or older; (5) who, being an alien—(A) is illegally or unlawfully in the United States; or (B) has been admitted to the United States under a non-immigrant visa; (6) who has been discharged from the Armed Forces under dishonorable conditions; (7) who, having been a citizen of the United States, has renounced their citizenship; (8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner or child of such intimate partner or person; (9) has been convicted in any court of a misdemeanor crime of domestic violence; (10) intends to sell or otherwise dispose of the firearm or ammunition in furtherance of a felony, a federal crime of terrorism, or a drug trafficking offense; or (11) intends to sell or otherwise dispose of the firearm or ammunition to a person described in any of paragraphs (1) through (10).²⁵

Anyone falling within the listed categories is prohibited from having a firearm. Before the passage of the BSCA, 18 U.S.C. § 922(d) made it unlawful to sell or otherwise dispose of a firearm or ammunition to persons meeting the same criteria as provided in 18 U.S.C. § 922(g) and (n).²⁶ The BSCA, however, added new criteria to section 922(d) to

ward, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Apr. 4, 2024), <https://www.atf.gov/firearms/national-firearms-commerce-and-trafficking-assessment-nfcta-firearms-trafficking>.

²³ *Id.*

²⁴ Although Congress amended 922(d) with respect to the transfer of firearms, it did not simultaneously amend 922(g) to align the prohibited person possession statute.

²⁵ 18 U.S.C. § 922(d) (cleaned up).

²⁶ *Id.*; *id.* § 922(g), (n).

match new prohibitions on straw purchases and firearms trafficking in 18 U.S.C. §§ 932–933.²⁷

C. The Bipartisan Safer Communities Act and the new provisions to address straw purchasing and trafficking in firearms

Before the BSCA, several statutes worked together to criminalize firearm trafficking.²⁸ With the addition of 18 U.S.C. § 933, prosecutors are now armed with a more precise statute to pursue firearm traffickers.²⁹ Straw purchases are “illegal firearms transactions in which a person serves as a middleman by posing as the transferee, but is actually acquiring the firearm for another person.”³⁰ Straw purchases are the second most common method of firearm trafficking (39.5%), only slightly behind unlicensed dealing by private persons (40.7%).³¹

With the passage of these two sections of the BSCA, codified in 18 U.S.C. §§ 932–933, powerful new tools were established to combat straw purchasing and firearms trafficking.³² Trafficked firearms are often linked to violent crimes and gang activity. By targeting traffickers, investigators and prosecutors can reduce the availability of illegal guns and, in turn, decrease gun violence in communities. These two statutes closed a gap by criminalizing conduct that was not specifically addressed by federal law and thereby making it easier to prosecute those involved in arming prohibited persons.

Before the enactment of the new firearms trafficking statute, federal law did not explicitly address firearms trafficking, making it challenging to pursue cases against individuals and gun trafficking networks supplying firearms to prohibited persons. Section 933 closes that loophole by

²⁷ *Id.* § 922(d); *id.* §§ 932–933.

²⁸ *See id.* §§ 922(a)(6), 924(a)(1)(A) (criminalizing making misrepresentations in the course of purchasing a firearm); *id.* § 932 (criminalizing acting or conspiring to act as a straw purchaser); *id.* § 922(a)(1)(A) (criminalizing engaging in the business of dealing firearms without a license); *id.* § 922(b)(5) (criminalizing dealing firearms off-the-books as a federal firearm licensee); *id.* § 922(j) (criminalizing trafficking in stolen firearms); *id.* § 933(a) (criminalizing transferring, receiving, or attempting or conspiring to transfer or receive a firearm in certain circumstances).

²⁹ *Id.* § 933.

³⁰ CONG. RSCH. SERV., GUN CONTROL: STRAW PURCHASE AND GUN TRAFFICKING PROVISIONS IN P.L. 117-159 (2024).

³¹ BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): FIREARMS TRAFFICKING INVESTIGATIONS—VOLUME THREE, PART III: FIREARM TRAFFICKING CHANNELS AND METHODS USED 2 (2024).

³² 18 U.S.C. §§ 932–933.

allowing law enforcement to directly target these individuals and networks. Similarly, many firearms used in crimes are acquired through straw purchasers, which are often key drivers behind illegal firearms sales. Before the enactment of section 932, prosecuting straw purchasers was also challenging because offenders were prosecuted under other laws, which tended to be more general in nature. Now, with section 932, enforcement is tailored to target key actors and gain the cooperation of lower-level offenders to reach higher-up criminals. By charging under this section, law enforcement can cut off a critical supply chain of illegal guns that would otherwise end up in the hands of prohibited persons.

Moreover, consistent with Congress' intent to deter would-be traffickers and straw purchasers, these two statutes introduced significant penalties for offenders. In the case of trafficking, violators can face up to 15 years in prison, which increases to 25 years if the offense involves gang activity or if the firearms are intended for use by a criminal enterprise.³³ In the case of straw purchasers, the law imposes penalties, up to 15 years in prison.³⁴ These significant penalties provide one more reason to pursue sections 932 and 933 charges whenever possible.

Sections 932 and 933 are welcomed additions to the arsenal available to law enforcement for combating firearms trafficking and straw purchasing. These new statutes are more focused, provide clear and specific legal authority, impose harsher penalties, close key legal gaps, and help disrupt the illegal gun supply chain. They are indeed essential tools in reducing gun-related violence and in enhancing public safety across the country.

Notwithstanding the availability of sections 932 and 933, investigators and prosecutors should continue to deter straw purchasers and firearms traffickers by charging them, as appropriate, with other violations of the firearm statutes without concern that it will result in a challenge to the indictment on multiplicity grounds. The goal in doing so is to hold criminals accountable and deter others.

D. Using section 933 and other statutes to combat firearm trafficking

"Multiplicity is the charging of a single offense in several counts."³⁵ The tests commonly used for determining whether an indictment is multiplicitous are: "(1) identical proof[;] and (2) legislative intent. The first test simply involves the determination of whether each offense requires

³³ *Id.* § 924.

³⁴ *Id.* § 932.

³⁵ U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL 919. *See* Blockburger v. United States, 284 U.S. 299 (1931).

proof of an additional fact that the other does not.”³⁶

Firearms trafficking does not operate in a vacuum; it requires dealers who are ready to skirt the law or look the other way or individuals willing to stand in as a middleman to purchase a firearm for another either because of a personal relationship or for money. Ideally, a robust trafficking investigation would sweep all the enablers in the trafficking chain—from criminal organization, dealer, transferee, middleman, and ultimate user of the firearm.

Section 922(a)(1)(A) criminalizes “engaging in the business” as a dealer in firearms and ammunition without first obtaining a license to do so.³⁷ Several other provisions of the federal firearms statutes operate to criminalize off-the-books transactions by imposing stringent record-keeping requirements on FFLs and by criminally sanctioning the failure to comply. These sections turn on the dealer’s status as an FFL and the use of that status to deal in firearms while evading compliance with the licensing requirements or while holding a license but operating outside the law. Non-compliance with the law and off-the-book transactions by FFLs have the undesired effect of putting firearms in the hands of those who are prohibited from possessing them. Beyond focusing on criminal actors, prohibited persons, and the organizations they operate, enforcement action should likewise be directed at FFLs flouting the law.

Together with section 933, several sections of the GCA of 1968 work in tandem to address the conditions under which the sale of firearms may be made and limit the flow of illegal firearms to communities by the few FFLs engaged in illicit conduct. Examples of the enforceable requirements on FFLs include 18 U.S.C. § 922(m), which prohibits FFLs from falsifying, omitting, or improperly maintaining any records they are required to keep; section 923(g)(1)(A), requiring FFLs to maintain detailed and accurate records of all firearms transactions; section 923(g)(3)(A), imposing additional reporting requirements on FFL for multiple sales of handguns to an unlicensed persons; section 924(a)(1)(D), imposing criminal penalties for FFLs who knowingly fail to properly record firearms transactions; and section 924(b), criminalizing transactions where the FFL knowingly engages in illegal activities, including off the-the-books sales in interstate or foreign commerce.³⁸ Repeated violations of these statutes may form the basis to explore more serious criminal violations by the FFL and other enablers.

While the above-mentioned statutes focus on the status of the accused

³⁶ U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL 919.

³⁷ 18 U.S.C § 922(a)(1)(A).

³⁸ *Id.* §§ 922(m), 923(g)(1)(A), (g)(3)(A), 924(a)(1)(D), (b).

as a licensee, one's status as an FFL is not an element of the offense in a section 933 trafficking in firearms prosecution. Section 933(a) makes it unlawful for any person to do the following: (1) "ship, transport, transfer, cause to be transported, or otherwise dispose of any firearm to another person" knowing that the use or possession of the firearm by the recipient would constitute a felony; or (2) receive a firearm from another person with reasonable cause to know the receipt would constitute a felony; or (3) "attempt or conspire to commit the conduct" in (1) and (2).³⁹ Section 933 can be violated regardless of the defendant's FFL status. Similarly, sections 922(m), 923(g)(1)(A), 923(g)(3)(A), 924(a)(1)(D), 924(b) can be violated as distinct offenses because the facts required for conviction are different in each instance.⁴⁰

Section 932(b) concerns the unlawful purchase or conspiracy to purchase a firearm on behalf of another person having reasonable cause to believe that person (1) is prohibited from receiving a firearm from a licensed dealer under section 922(d); or (2) intends to possess or dispose of the firearm in furtherance of a felony, federal crime of terrorism, or drug-trafficking crime; or (3) intends to sell or dispose of the firearm to a person described in (1) or (2) of section 932.⁴¹ Applying the well-established tests for determining whether an indictment is multiplicitous—identical proof and legislative intent—sections 932 and 933 require proof of additional and different facts that the other section does not require. Straw purchasing is a distinct transaction from the trafficking process.

In sum, prosecutors should feel confident in charging any combination of the statutes identified above together.

E. Using section 932 and other statutes to combat straw purchasing

As part of the BSCA, Congress specifically criminalized acting or conspiring to act as a straw purchaser.⁴² Making misrepresentations while purchasing a firearm (sections 922(a)(6) and 924(a)(1)(A)), however, can and has also reached straw purchasers.⁴³ Notwithstanding the availability of section 932, prosecutors can and should continue to use sections 922(a)(6) and 924(a)(1)(A) when prosecuting straw purchasers.

First, there is no multiplicity issue when charging both misrepresentation statutes together (sections 922(a)(6) and 924(a)(1)(A)). Section

³⁹ *Id.* § 933(a).

⁴⁰ *Id.* §§ 922(m), 923(g)(1)(A), (g)(3)(A), 924(a)(1)(D), (b).

⁴¹ *Id.* § 932(b); *id.* § 922(d).

⁴² *Id.* § 932.

⁴³ *Abramski v. United States*, 573 U.S. 169, 193 (2014) (holding that 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) can reach straw purchasers).

922(a)(6) requires a material misrepresentation.⁴⁴ That is not required to satisfy section 924(a)(1)(A).⁴⁵ Section 924(a)(1)(A) requires the misrepresentation to be about information, required by 18 U.S.C. chapter 44, to be kept in the dealer's records.⁴⁶ That is not required to satisfy section 922(a)(6). Because each section requires additional proof the other does not, there is no multiplicity issue, and these two statutes can be charged together.

Second, there is no multiplicity issue if the two misrepresentation statutes—sections 922(a)(6) and 924(a)(1)(A)—are charged with section 932, the straw purchasing of firearms. Section 932 criminalizes acting or conspiring to act as a straw purchaser.⁴⁷ The defendant must have purchased or conspired to purchase a firearm and done so on behalf of another; the misrepresentation statutes do not require this as an element of the offense. To violate the misrepresentation statutes, the defendant must simply make a false statement. No misrepresentation is necessary to violate section 932. Identical proof cannot satisfy these sections. Section 932 is “targeted at ‘additional conduct’ beyond that covered by [section] 922(a)(6)” and section 924(a)(1)(A).⁴⁸ For example, section 932 reaches straw purchasing from private sellers, whereas 922(a)(6) and 924(a)(1)(A) apply only to purchases from a licensee.

Prosecutors should similarly feel free to use all three statutes to attack straw purchasers and discourage others from engaging in such conduct.

F. “Duplicity” concerns with sections 932 and 933

“Duplicity is the joining in a single count of two or more distinct and separate offenses.”⁴⁹ The tests commonly used are identical to those used for determining whether an indictment is multiplicitous: (1) identical proof; and (2) legislative intent. As previously noted, “the first test simply involves the determination of whether each offense requires proof of an additional fact that the other does not.”⁵⁰

Section 932 has a few duplicity challenges to be aware of. First, section 932(b) criminalizes acting as a straw purchaser and conspiring to do the same. Charging a defendant with acting as a straw purchaser and conspir-

⁴⁴ 18 U.S.C. § 922(a)(6).

⁴⁵ *Id.* § 924(a)(1)(A).

⁴⁶ *Id.*; 18 U.S.C. § pt. 1, ch. 44.

⁴⁷ *Id.* § 932.

⁴⁸ *United States v. Childs*, No. 22-CR-327, 2023 WL 6892132, at *3, (N.D. Ga. Aug. 18, 2023); 18 U.S.C. § 922(a)(6); *United States v. Childs*, No. 22-CR-327, 2023 WL 6845830, (N.D. Ga. Oct. 16, 2023); 18 U.S.C. § 924(a)(1)(A).

⁴⁹ U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL 919.

⁵⁰ *Id.*

ing to act as a straw purchaser in the same count is duplicitous because they constitute separate crimes.⁵¹ Additionally, although no court has yet addressed the issue, subsections 932(b)(1) through (b)(3) lay out several groups of people for which acting as a straw purchaser is criminal: (1) a prohibited person; (2) a person who intends to use the firearm in furtherance of a felony, a federal crime of terrorism, a drug-trafficking crime; or (3) anyone listed here. Proving which group the recipient belongs to may require different facts. It is also possible, however, that subsections 932(b)(1) through (b)(3) simply list different ways to complete a crime and, therefore, are not duplicitous.

Section 933 also has duplicity issues to be aware of. Section 932(b), subsection 933(a)(3) criminalizes conspiracy and attempt. Although attempt is a lesser included offense and can be charged in the same count without inviting a challenge on the ground of duplicity, the same cannot be said about conspiracy.⁵² Additionally, subsections 933(a)(1) and (a)(2) likely constitute different substantive offenses. The only district court to consider the issue came to this conclusion by reasoning that “the available sources do not identify whether Congress intended to create different trafficking offenses or different means of committing trafficking.”⁵³ “More importantly, the two subclauses of the statute require very different acts and different proof.”⁵⁴

Although little caselaw exists, sections 932 and, especially, 933 likely have duplicity issues. Both statutes have provisions charging a crime and a conspiracy to commit that crime. Additionally, one district court found section 933’s subsections to be duplicitous when included in a single count.⁵⁵ That same logic applies, although not as cleanly, to the subsections of 932. Prosecutors should be careful when charging violations of these statutes’ multiple subsections in a single count.

G. BSCA follow-on provisions: RICO, Electronic Surveillance, Civil Forfeiture, and Fines

In addition to sections 932 and 933, the BSCA amended the GCA with a follow-on provision, 18 U.S.C. § 934, making any person convicted of either straw purchasing or trafficking in firearms subject to civil forfeiture and a fine of twice the gross profits or other proceeds of the offense(s).⁵⁶

⁵¹ *Id.*

⁵² *United States v. Strukov*, No. 3:23-CR-127-4, 2024 WL 1468975, at *6 (M.D. Tenn. Apr. 4, 2024).

⁵³ *Id.* at *8 (cleaned up).

⁵⁴ *Id.*

⁵⁵ *Strukov*, 2024 WL 1468975, at *5.

⁵⁶ 18 U.S.C. § 934.

The BSCA also amended three significant federal statutes by adding sections 932 and 933 as predicate offenses to the following three statutes: (1) the Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. § 1961(1)(B),⁵⁷ that enumerates racketeering activity indictable under Title 18 of the U.S. Code; (2) 18 U.S.C. § 1956(c)(7)(D),⁵⁸ the provision of the money laundering statute that defines specified unlawful activity; and (3) 18 U.S.C. § 2516(1)(n),⁵⁹ the provision of the electronic surveillance statute that permits a court-ordered T-III for felony violations of federal firearm statutes.

Within the guidelines established by the Department's Justice Manual, RICO is now an effective modern-day tool used to hold the leaders and associates of criminal enterprises accountable for violations of predicate offenses listed in the statute, which, since the enactment of the BSCA, include trafficking in firearms, straw purchasing, and money laundering. Instead of pursuing criminal actors one by one, this powerful tool allows investigators and prosecutors to charge and present, in a single trial, the complete and broad scope of conduct of all those engaged as a unit in the criminal enterprise with the knowledge that the enterprise was engaged in criminal activities, and it simultaneously helps dismantle a complex, sophisticated, multifaceted criminal organization. RICO violations carry prison terms of up to 20 years (and, in some cases, life), severe financial penalties, and the forfeiture of assets.⁶⁰

Including sections 932 and 933 as predicates in the federal racketeering and money laundering statutes, permitting enhanced investigative capability afforded by electronic surveillance, and allowing for broad forfeiture and fines clearly indicates that organized criminal enterprises, such as gangs or cartels, should be subject to higher criminal sanctions than non-affiliated offenders. These amendments reflect the expressed congressional intent that straw purchasers and traffickers in firearms receive sentences proportional to their role and culpability and to deter them and others from participating in such activities.⁶¹

IV. Conclusion

Before the BSCA, the last time Congress enacted a major firearm legislation was nearly 30 years ago. Combating gun violence has long been

⁵⁷ *Id.* § 1961(1)(B).

⁵⁸ *Id.* § 1956(c)(7)(D).

⁵⁹ *Id.* § 2516(1)(n).

⁶⁰ *Id.* § 1961(1)(B). *See also* U.S. DEP'T OF JUST., JUSTICE MANUAL 9-110.000, 9-110.200, 9-110.310.

⁶¹ The Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

a priority for the Department. In June 2024, the Department released a “fact sheet” on law enforcement’s two years of efforts on the BSCA aimed at combating illegal firearms trafficking in firearms and straw purchasing.⁶² The statistics released reflect that 525 defendants in 280 cases have been charged under these new trafficking and straw purchasing provisions.⁶³ These cases include significant firearms prosecutions linked to transnational cartels and narcotics distribution.⁶⁴ Progress has been made in curbing gun violence. There were more than 48,000 firearm-related deaths in 2022 (approximately 132 individuals per day), however, and investigators and prosecutors have been asked to increase their efforts to pursue firearms traffickers and straw purchasers by using the new tools enacted under the BSCA and as expressed by the FY 2022–2026 Department of Justice Strategic Plan.⁶⁵

About the Author

Carl Alexandre is Counselor for the Criminal Division of the Department’s Transnational Organized Crime in the Violent Crime and Racketeering Section. He has more than 35 years of criminal justice experience, including 31 years at the Department, 23 of which he served as a member of the Senior Executive Service. During his career at the Department, he served as trial attorney, senior trial attorney, resident legal advisor, and security sector reform expert. He directed the Department’s rule of law and international criminal justice capacity development program for 16 years, and he assembled and deployed teams of Department prosecutors and U.S. legal and international experts to assist foreign governments modernize their criminal justice systems, including the security sector. During his nearly four-year secondment to the United Nations, he provided strategic leadership and oversight to the police, rule of law, human rights, and the community violence reduction program as the Deputy Chief of the United Nations’ Peacekeeping Mission in Haiti. More recently, he led strategic planning, public–private partnerships, and diplomatic outreach at the International Criminal Police Organization as Executive Director for Partnerships and Planning.

⁶² Press Release, U.S. Dep’t of Just., Off. of Pub. Affs., Fact Sheet: Two Years of the Bipartisan Safer Communities Act (June 25, 2024).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ U.S. DEP’T OF JUST., FYS 2022–2026 STRATEGIC PLAN (2022).

Note from the Editor-in-Chief

Firearms cases are challenging to prosecute. The U.S. Supreme Court's Second Amendment jurisprudence is inscrutable; things such as machine gun conversion devices and bump stocks are complex and technical; and regulation, in the face of firearms violence and conflicting ideologies, is controversial. This last issue of the year has two goals: (1) to assist federal prosecutors in handling these difficult cases; and (2) to give the general reader a feel for the current state of the law. Our authors have admirably succeeded in both endeavors. And I hope you'll agree after you've read their articles on the landmark cases, new technology, and current legislation.

As always, many folks work hard to produce our law review. Thanks to our authors, all experts in the field, who took time to share their expertise. A special thanks goes out to Mahogane Reed, who served as point of contact for this issue, set the topics, and recruited the authors. And Managing Editor Kari Risher, Associate Editor Abbie Hamner, our University of South Carolina law clerks, and tech whiz Jim Scheide came through with their usual excellent editorial and typesetting work.

Finally, I would be remiss in not thanking you, the reader, for your interest this past year. I hope you'll join us again in 2025. Until then, take care and have a happy and relaxing holiday season.

Chris Fisanick
Columbia, South Carolina
December 2024