

How Firearm Registration Abuse & the "ESSENTIAL OPERATIONAL MECHANISM" of Guns May Adversely Affect Gun Collectors



by Eric M. Larson

This article addresses firearms registration abuses by the federal government, and recent efforts to ban some guns on the basis of "their essential operational mechanism." Both issues may adversely affect gun collectors.

My concerns about registration evolved from my research on smooth bore pistols, which was published in two series of three-part articles in *CADA Gun Journal* (August, September and October 1994; and April, May and June 1995).

In 1997, my research triggered a Congressionally-directed audit of the firearms registration practices of the Bureau of Alcohol, Tobacco and Firearms (BATF)—the first ever by an outside entity. This audit is occurring because of my testimony before a Congressional subcommittee regarding the BATF's administration of the National Firearms Act (NFA) of 1934, and involves mismanagement, misconduct and criminal wrongdoing.

The NFA is designed to control firearms thought to be mainly used by criminals by requiring registration of the firearms, and using prohibitive taxes to reduce their manufacture, distribution, and ownership. It is a harsh federal law to discourage illegally manufacturing, selling or possessing hand grenades, machine guns and similar weapons, and the cutting down of conventional shotguns or rifles (regardless of their caliber) to make concealable firearms. Any vio-

lation of the NFA is a felony carrying a 10-year, \$10,000 fine penalty upon conviction.

NFA firearms are controlled under Title II of the Gun Control Act of 1968, and are said to have no legitimate sporting purpose. NFA firearms are often referred to as "Title II" firearms. Conventional rifles, shotguns, pistols and revolvers, which are considered to be sporting firearms, have considerably fewer legal restrictions and are controlled under Title I of the 1968 Act.

In 1934, a provision that would have included pistols and revolvers under the NFA failed to pass the Congress by a single vote. For technical reasons (because they were deemed concealable, but *not* to be pistols or revolvers) the Treasury Department ruled in 1934 that a small group of unusual or specialized firearms fell under the NFA. Most were relatively low-powered small-game guns, such as Marble's Game Getter Gun, the smooth bore .410 H&R Handy-Gun, and various animal trap guns. They were not—even in 1934—normally identified as "gangster weapons." Most others, such as knife-pistols, were obsolete long before 1934 and were designed more as gimmicks or gadgets than as firearms. All are

classified as "Any Other Weapon" (AOW) under the NFA. I estimate that fewer than 17,000 still exist today. AOWs manufactured in the United States in or before 1934 are among the rarest of firearms, and are highly prized by collectors.

What some people have told me regarding their discovery of one of these AOWs (usually a Game Getter or Handy-Gun) in the estate of a parent or other relative was disturbing. Upon attempting to transfer the ownership, ATF alleged the firearm was not registered—rendering it illegal contraband that nobody can own. But, after searching, some people said they found the registration. ATF then allegedly declared an error had been made, and processed the transfer. It is well-known that ATF will not allow any firearm, even a rare collector's item, to be voluntarily re-registered.

On April 30, 1996, I testified before the House Subcommittee on Treasury, Postal Service and General Government Appropriations, which funds the BATF. This opportunity occurred because the Collectors Arms Dealers Association (CADA) included me as a witness, at the invitation of its then-President, L. Richard Littlefield. I'd known Dick since about 1989.

Dick was aware of my research and thought it was time to make a case for a more reasonable treatment of these guns, as the law provides. Indeed, in 1938, 1945 and 1954, the Congress amended the NFA to provide for a more lenient treatment of many of these firearms, and in 1960 unanimously declared that all AOWs were mainly "gadget-type and unique weapons, which are often sought after by gun collectors," and unlikely to be used by criminals.

Under the Gun Control Act of 1968, the Congress provided that BATF could administratively remove such firearms from the NFA if it determined they are mainly collector's items and are not likely to be used as weapons. Under the 1968 provision, BATF may have administratively re-

moved 50,000 to 100,000 firearms from the NFA. Most are valuable shoulder-stocked Luger and Mauser semi-automatic pistols, or short-barreled Marlin or Winchester "trapper" carbines. After their removal, virtually none have been used by criminals.

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My intention in testifying in 1996 was to: (1) put a well-researched case on record disclosing the law and legislative history that supports a more reasonable treatment for "Any Other Weapon" firearms which were manufactured in the United States in or before 1934, and (2) provide BATF with an opportunity to do the right thing. Perhaps predictably, BATF did absolutely nothing, although I also presented some evidence that BATF had made errors in its record-keeping on these guns.

So I came back and testified again on April 8, 1997, almost a year later, before the same subcommittee. This time, I provided more details of evidence I mentioned briefly in my 1996 testimony, by documenting credible instances of mismanagement, misconduct and wrongdoing by BATF in administering the NFA. I found evidence that BATF employees have: (1) destroyed firearm registration documents rather than work on them; (2) illegally registered nearly 2,500 NFA firearms after the 1968 amnesty period expired; (3) since 1981, continued to allow thousands of machineguns and other NFA firearms to be registered to people that BATF knows are dead; and (4) added firearms to the NFA database because owners confronted BATF with regis-

tration documents, for which BATF lost or destroyed its records. In 1996, a federal district court dismissed five convictions for possession of unregistered NFA firearms on appeal because of the unreliability of BATF's firearm registration records. Significantly, BATF did not appeal the dismissals.

In May 1997 I complained to the Treasury Department Inspector General (IG), and requested an investigation. The IG responded by referring my complaint to BATF—which was something like putting my request into a bottle and consigning it to the ocean off Cape

Horn. I made a further complaint to the Congress that the IG simply wasn't doing its job, and that BATF would probably simply exonerate itself. In early October 1997, the House Committee on Government Reform and Oversight directed the IG to independently audit the BATF's firearm registration practices. Further information about my 1997 testimony and the current IG investigation may be found on the Internet at the following address: <http://www.cs.cmu.edu/afs/cs.cmu.edu/user/wbard-wel/public/nfalist/index.html>

How this case turns out will be critically important for gun collectors and the issue of firearms registration by the federal government. What happens when the government messes up the registration records? And what happens when the BATF breaks the law? At the least, in my judgement, the Congress will unquestionably not allow machineguns and similar firearms to continue to be registered to persons that the BATF has stated are dead.

Just as critical, in my judgement, is the issue of banning firearms on the basis of "their essential operational mechanism." I have quoted this phrase from a White House press

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release dated November 15, 1997. It contains the text of a Memorandum to the Secretary of the Treasury, directing him to conduct a 120-day review of "whether modified semiautomatic assault-type rifles are properly importable under the statutory sporting purposes test," and to suspend all imports of these guns during the 120-day period.

I am concerned about how the BATF will ultimately interpret political directives such as this one, because of its past activities involving handguns that are designed to fire .410 shotgun ammunition. As I will show, there are important similarities and potentials for abuse of discretion.

During the early 1990s, I unsuccessfully petitioned ATF to remove the smooth bore H&R Handy-Gun from the NFA. There is no credible evidence that the Handy-Gun would be likely to be used as a weapon. Indeed, there are more than a dozen handguns designed to fire .410 ammunition on the market today. None are subject to the NFA because their barrels are rifled; however, more im-

portantly, none have been identified as weapons of choice by criminals. A single-shot .410 is a perfect small-game or rodent gun, and not good for much else.

In a letter to me dated July 20, 1994, BATF Director John W. Magaw denied my appeal. The reason, Mr. Magaw stated, is that there is no "practical" difference between an H&R Handy-Gun and a sawed-off shotgun. Interestingly, Mr. Magaw rejected my contention that there was no "practical" difference between an H&R Handy-Gun versus the .410 Thompson Contender pistol, a popular sporting firearm. "We fail to see the basis for this comparison," he wrote, "because the Contender pistol is not a smooth bore shot pistol subject to the NFA."

Mr. Magaw's statement regarding the .410 Contender is "interesting" because for 16 years, BATF field agents took exactly the opposite position—despite the fact that no less a person than then-BATF Director Harold A. Serr had ruled that the .410 Contender was not subject to the NFA. Mr. Serr made this ruling in an official Memorandum dated February 11, 1969, which was distributed throughout BATF, including all ATF agents and other employees with law enforcement or regulatory responsibilities.

Nevertheless, on June 18, 1969, BATF agents Cecil Wolfe and Paul Westenberger (Washington, D.C., national office) and Victor Fezio (Boston Office) threatened Kenneth Thompson and Warren Center, of Thompson/Center Arms, that BATF would

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rule the .410 Contender to be an NFA firearm if they didn't stop manufacturing it. "Terminate production," Mr. Wolfe said, and instructed: "Whatever your story will be, please refrain from giving the impression that the 'Contender' is a firearm under the NFA." Mr. Wolfe's threat was flat out illegal, but effective. Mr. Thompson and Mr. Center complied, as do virtually all people who are threatened with either a criminal action or the economic disruption of their livelihood by a federal law enforcement agency with unlimited resources.

Mr. Wolfe's threat worked until 1985, when a Freedom of Information Act request by attorney Stephen P. Halbrook revealed the existence of the February 1969 memorandum.

Production of the .410 Contender soon resumed. Today, the .410 Contender is one of at least a dozen different modern handguns designed to fire .410 shotgun ammunition being currently manufactured and sold in the United States today. None are subject to the NFA because their barrels are rifled. Perhaps most importantly, none have to my knowledge ever been identified as weapons of choice used by criminals. I believe there are hundreds of thousands of modern .410 handguns in circulation today—the vast majority tucked in a fishing tackle box or hunting jacket to take on a hunting or fishing trip, for use against snakes, vermin or small game. I have found no credible evidence that any of these guns are commonly used in street crimes, or that they are weapons of choice by criminals.

In a 1981 prosecution, BATF argued in federal court that it was legally impossible for a firearm such as the smooth bore H&R Handy-Gun and a sawed-off shotgun to be regarded equal under the NFA. The law, BATF argued, requires a firearm like the Handy-Gun to be given "special and more lenient treatment" than a sawed-off shotgun. (In this particular case, a person sawed off the barrel of a 12 gauge shotgun, installed a pistol grip, and claimed it was an AOW.) The BATF presented an ironclad case that a sawed-off shotgun and an AOW are not identical, and cannot be identical according to law and legislative history. Although a sawed-off shotgun, a .410 H&R Handy-Gun, and a .410 Contender are all capable of firing identical ammunition through a barrel of nearly identical length, those shared characteristics are legally meaningless regarding their legal classification as firearms.

A similar example makes the point another way, and also illustrates why BATF's position is legally incorrect. Consider that the NFA prohibits the unauthorized cutting down of a conventional shotgun or rifle (regardless of caliber) to make a concealable firearm. Thus, a person who sawed off the barrel of a Ruger 10-22

carbine to a length of 10", and fashioned its stock into a pistol grip, would violate the NFA if he or she did not pay a \$200 tax to "make" the firearm, as well as obtain advance approval from BATF before making it. Note that a standard Ruger 10-shot semiautomatic target pistol with a 10" barrel is functionally identical to the sawed-off carbine. That is, each firearm is a semiautomatic, capable of firing 10 rounds of .22 caliber ammunition through a 10" barrel, and is concealable on the person.

It is clear, however, that the Congress, by requiring that a \$200 tax be paid to "make" a concealable firearm by cutting down a conventional rifle or shotgun, requiring advance permission to "make" such a firearm, and requiring its registration, that the Congress intends to reduce the legal manufacture of firearms made by cutting down conventional shotguns or rifles. The Congress has not, however, enacted a prohibitive tax and burdensome legal restrictions upon the manufacture and sale of a concealable, 10-shot semiautomatic firearm with a 10" barrel, such as the Ruger .22 caliber target pistol.

Yet, under Mr. Magaw's logic, BATF could outlaw the Ruger 10-shot semiautomatic target pistol because "there is no practical difference between the two types of weapons in terms of design and function." In this example, the point is clear and the language is much less emotional—and no less correct than in the example involving an H&R Handy-Gun. It is legally incorrect for Mr. Magaw to use the terms "design and function" to place a firearm in some classification that is different from what the Congress has specifically defined. Should an ordinary, perfectly legal .22 Ruger semiautomatic target pistol with a 10" barrel be outlawed simply because a sawed-off Ruger .22 semiautomatic carbine with a 10" barrel and a pistol grip is capable of firing the same ammunition and is also concealable? If Mr. Magaw's logic were followed, then BATF could probably successfully outlaw virtu-

ally every sporting firearm in the United States.

Which bring us to 1997, and the White House memorandum to the

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Treasury Department regarding "Importation of Modified Semiautomatic Assault-Type Rifles," which was written at the order of President Bill Clinton. Again, consider the language: "Manufacturers have modified many of these weapons banned in 1989 to remove certain military features without changing their essential operational mechanism" (emphasis added).

I believe this is a pretty slippery slope. I predicted this would happen and said so in an article in the June 1995 issue of *CADA Gun Journal*, and I quote:

"The NFA is relevant to any citizen who owns a sporting firearm—not just to people who choose to own a gun for self-protection. The "assault weapon ban" has lots of regulatory tensions, because "assault weapons" are classified as Title I firearms. NFA firearms—machine guns, and the like—are classified as Title II firearms. Under the Gun Control Act of 1968, firearms that don't have a "sporting purpose" are supposed to be classified under Title II. This is why I believe there will be continuous difficulty over how so-called "assault weapons" are regulated. And if past history is any guide, ATF will misapply the law to include sporting firearms exempted from the 'ban.'"

In my judgement, gun collectors are on the verge of facing the gravest—and, perhaps, the most bizarre—challenge ever concocted by the government. Namely, how can one differentiate between collector's-item semiautomatic firearms and so-called "assault weapons" if the basis for making a decision is "their essential operational mechanism"? It seems to me that "their essential op-

erational mechanism" is obviously identical. Where does that leave us?

To confront the "essential operational mechanism" issue, I have explained why firearms

like Marble's Game Getter Gun and the smooth bore H&R Handy-Gun are valuable historical artifacts, and the fact that the Congress determined in 1960 they are

mainly collector's items and unlikely to be used as weapons by criminals. Why are they valuable historical artifacts? In short, they: (1) were created at a time when there were virtually no laws regarding firearm design; (2) are very specialized firearms that had a limited commercial market even at the time they were manufactured; (3) unlike any other NFA firearm, the Congress repeatedly lessened controls on them, although the NFA virtually destroyed the retail market for these types of firearms; (4) represent a unique niche in U.S. firearms evolution, design and genealogy, and there's nothing else like them; and (5) are extremely rare—I believe that fewer than 17,000 still exist. Yet, in 1997, these pre-1934 AOWs are still controlled as strictly as machineguns. I am committed to trying to achieve a more reasonable treatment under the law for these particular AOWs.

Given the difficulties I have encountered, I believe that gun collectors are on the verge of beginning to experience serious problems in explaining to the government why certain semiautomatic rifles are collector's items. I also believe that gun control law and policy should be guided by facts, rather than by emotional appeals which bear no relationship to the particular firearms being regulated. ■

Eric M. Larson is a contributing Editor to the *Blue Book of Gun Values*, the *Standard Catalog of Firearms*, the *Official Price Guide to Antique and Modern Firearms*, and has been a Life Member of the National Rifle Association of America since 1968. His research has been published in *The Gun Report*, *Machine Gun News*, *Guns Illustrated*, and he is author of *Variations of the Smooth Bore H&R Handy-Gun: A Pocket Guide to Their Identification*. A journalist and demographer by training, he graduated with honors in 1974 from the University of Texas at Austin, where he also earned a Ph.D. and three master's degrees.