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## "MODERNIZATION" OR "EMASCULATION"?

*A deceptively entitled bill seeks to weaken what little gun dealer oversight there is*

By Julius (Jay) Wachtel. Imagine having been an agent for the renowned Bureau of Prohibition, those Al Capone-busting investigators whose intrepid work was glorified in the wildly popular TV series, "[The Untouchables](#)."

Then imagine being an ATF agent today. As public memory fades of the the horrific events that led to passage of the [Gun Control Act of 1968](#) – the assassinations of Dr. Martin Luther King, Jr. and Senator Robert Kennedy– ATF has become a convenient whipping boy for politicians of all stripes. With a majority of the Supreme Court supping at the same table as the NRA, [the President's promises](#) to institute record checks at gun shows and resurrect the assault weapons ban seem to have the same chance of coming to pass as the ATF has of gaining a permanent Director, a position that's been vacant since 2006 when it became subject to Senate confirmation.

But we digress. Imagine your astonishment some months ago when [Senate Bill 941](#), a bipartisan proposal enticingly named "Bureau of Alcohol, Tobacco, Firearms, and Explosives Reform and Firearms Modernization Act of 2009" popped out of the blue.

Turning the page, you found that its very first section, 101, seems to propose giving ATF *more* power, not less. To date the agency's only tool for disciplining wayward gun dealers has been to revoke their license. But under s. 941 there would also be fines and suspensions. On closer look, though, these new options seem mild and the exceptions many. Distinctions are made between "minor" and "serious" transgressions, and taking adverse action in even the former requires proof of "willfulness."

Your heart skips a beat, as you know quite well what "willful" did to the GCA.

When the Gun Control Act of 1968 [was first enacted](#) the term "willful" appeared only in section 923(d)(1), an innocuous provision about qualifying for a dealer's license. That changed with passage of the NRA-sponsored "[Firearms Owners Protection Act of 1986](#)." By embedding numerous instances of "willful" throughout the GCA (without, however, actually defining it) it sought to limit ATF's ability to go after crooked dealers, either criminally or administratively. Here's a comparison between the [original](#) and [amended](#) versions of section 923(e), which governs revocations:

Original: "The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter...."

As modified: "The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has *willfully* violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter...."

Still, “willfully” didn’t prove to be an absolute bar. In your blogger’s experience, evidence that dealers concealed or otherwise disguised transactions was usually enough to establish willfulness and go after them criminally. Ultimately the Supreme Court stepped in. In [Bryan v. U.S.](#), a prosecution for unlicensed gun sales, it ruled that the term requires proving that an accused thought they were acting illegally, although not necessarily in violation of a specific law.

That’s the ambiguity that section 103 of the [ATF Modernization Act](#) seeks to correct:

...For purposes of this subsection [923(e), relating to licensing proceedings] the term “willfully” means, with respect to conduct of a person, that the person knew of a legal duty, and engaged in the conduct knowingly and in intentional disregard of the duty.

ATF would have to prove that a licensee was intentionally flouting a specific law or regulation before they could be sanctioned. Aside from the tax codes, that level of intent is rarely required in the law. It really does make ignorance an excuse. And that’s not the only mischief that s. 491 would cause.

- [Section 101\(b\)\(ii\)](#) stipulates that “...violation of a provision of this chapter with respect to 2 or more firearms during a single transaction shall be considered a single violation of the provision.” If willfully pushing multiple guns out the back door counts the same as one, then why stop at one?
- [As originally enacted](#), GCA section 922(m) made it unlawful for licensees “to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record...” FOPA eventually drained most of the sting, reducing the penalty from a felony to a misdemeanor even in instances of false entry (see [924\[a\]\[3\]](#)). Section 107 of the Modernization Act would increase the wiggle room, changing “false entry” to “*materially* false entry,” “appropriate entry” to “materially significant entry,” and “properly maintain” to, simply, “retain custody of.”

[Decades of deregulation](#) have threatened the country’s economic stability and endangered the health and well-being of its citizens. In 2004 the Justice Department, ATF’s new home, issued a [report](#) severely chastising the hopelessly overburdened agency for its infrequent and superficial inspections of gun dealers. But instead of urging a substantial increase of staff it recommended that inspectors “streamline” their work. Just how much “streamlining” would be necessary was suggested in a [2007 article](#) in *Time*, which calculated that it would take ATF’s 600 firearms inspectors *seventeen years* to get around to every gun dealer.

If anything, things have gotten worse. For an example of the current regulatory climate look no further than [Shawano Guns](#). Despite years of misconduct, ATF admonishments and findings by a hearing officer and, on appeal, a District Court judge that it deserved to lose its license the Milwaukee-area gun store remained open. And when ATF finally said “no more” (see video clip) and demanded that Shawano shut its doors the same judge who once found against the store ruled that it could remain in business pending further appeals. And if that doesn’t work the owner’s nephew is waiting in the wings to take over the store, in which case everything would return to square one.

At least there’s no question about what the “modernization” crew intends. Giving ATF the illusory “authority” to levy minuscule fines and brief suspensions is nothing more than a ruse to distract from the

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"modernization" bill's real purpose: to diminish, for a bit of political gain, whatever influence the beleaguered agency still exercises over the firearms industry, the public interest be damned.

Senator Mike Crapo (R – ID) and his thirty-seven cosponsors ought to be ashamed.