2003

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Cover Page Footnote
The Author wishes to thank Dr. Jonathan Cohen, Professor at Hebrew Union College--Jewish Institute of Religion ("HUC-JIR") and Director of the Ethics Center, for all his support and encouragement during this past year. This Article developed, in part, out of several discussions in a seminar, entitled "Criminality and Civil Disabilities," that Dr. Cohen and the Author taught to a combined group of rabbinical students from HUC-JIR and law students from the University of Cincinnati College of Law. This was a rare and enriching experience, and much of the credit goes to my students. This Article is dedicated to the memory of my dear friend, Chet Wywialowski (1951-2002).
NO GUNS OR BUTTER FOR THOMAS BEAN:
FIREARMS DISABILITIES AND THEIR
OCUPATIONAL CONSEQUENCES

Mark M. Stavsky*

INTRODUCTION

The last thing that Thomas Bean expected on the evening he
drove across the border into Mexico for some dinner was that he
would end up staying there involuntarily for the next six months.
When Bean, a firearms dealer by occupation, crossed the border
into Mexico, customs officials there spotted some ammunition in
the back seat of his car.¹ He was arrested for and then convicted of
importing ammunition into Mexico. After serving time in a Mexi-
can prison, he was transferred to a federal prison in Texas to serve
out the remainder of his sentence.² He served a month in federal
prison; after that he served ten months under supervised release
before he was completely freed.³ As a convicted felon, Bean lost
both his right to possess firearms and his firearms license.⁴ He then
petitioned the Bureau of Alcohol, Tobacco, and Firearms ("ATF")
to restore his lost rights.⁵ 18 U.S.C. § 925(c) gives the ATF that
authority.⁶ Unfortunately for Bean, since 1992 Congress has pro-
hibited the ATF from using any of it annual appropriations to in-
vestigate requests for such relief.⁷ He then sought relief in federal

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ski (1951-2002).
³. See infra notes 49-68 and accompanying text.
⁴. See infra notes 69-71 and accompanying text.
⁵. Bean, 123 S. Ct. at 585.
⁶. Id.
⁷. See infra notes 81-115 and accompanying text.

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One of the provisions in the relief statute gave federal judges the power to review ATF denials of relief. Although the judge had no denial as such to review, he nevertheless found that the ATF's refusal to review Bean's petition amounted to a "denial." After a hearing, the judge granted Bean his requested relief. In reviewing the district judge's ruling, the Court of Appeals for the Fifth Circuit affirmed, ignoring the prevailing law in this area, including its own. On Dec. 10, 2002, in one of its earliest decisions of the term, the Supreme Court in the case United States v. Bean overturned the Fifth Circuit; the Court ruled that a federal district court has no authority under the relief statute when the ATF has not acted. "Denial" is not the same as inaction. Bean must now return to his used car business.

Bean's case is compelling for a number of reasons. The district and circuit court decisions must be accounted for, contrary as they were to prevailing law. Their decisions were driven in no small part by the concern for the unjustified imposition of a serious occupational disability upon an otherwise worthy individual, as well as the denial to him of an opportunity to demonstrate his worthiness.

Further, an examination of the federal firearms disabilities scheme, the relief provision, and the appropriations ban reveal that the current system, which prevents felons like Bean from reentering their professions, is severely flawed. In particular, the appropriations ban has removed the only remaining safe haven for individuals trapped in a cumbersome process that was already riddled with inefficiency, inconsistency and inequity.

Like other collateral consequences of conviction, occupational disabilities have received increased attention lately. This is due in

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11. See infra notes 121-236 and accompanying text.
13. See infra notes 237-306 and accompanying text.
large part to the enormous increase of individuals imprisoned in state and federal institutions. With approximately 600,000 felons released annually, occupational and employment disabilities impact an unprecedented number of individuals. These disabilities can be divided into three groups—unregulated occupational disabilities, regulated occupational disabilities, and secondary or derivative occupational disabilities. The first group is comprised of those in which private employers choose not to hire felons on the basis of fear, animosity, or pique. The other two types of disabilities are those imposed or derived from law.

Regulated occupational disabilities are comprised of specific laws that severely hamper the ability of ex-offenders to earn a livelihood since they prevent individuals from entering or remaining in certain professions, occupations, and government employment. These laws are endemic. They are found in statutes, ordinances, and even constitutional provisions; their impact leaves many ex-offenders with little choice other than the pursuit of illegal activities.

Lastly, there is a form of occupational disability which results from the secondary impact of another, non-occupational, type of disability. For example, a common disability imposed upon persons convicted of drug offenses is loss of driving privileges for a period that can extend to several years. Such a disability not only pre-

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17. See Travis et al., supra note 15, at 1.
19. Recent surveys of employers in five major cities indicate sixty-five percent would not imply ex-offenders. Petersilia, supra note 15, at 4-5.
22. During the 1970s, one study indicated that there were approximately 2,000 separate statutory provisions that affect the licensing of persons with an arrest or conviction record. May, supra note 20, at 193 (citing James W. Hunt et al., Nat'l Clearinghouse On Offender Emp. Restrictions et al., Laws, Licenses and the Offender's Right to Work: A Study of State Laws Restricting the Occupational Licensing of Former Offenders 9-12 (1973)).
23. See Travis et al., supra note 15, at 31 (discussing the relationship between employment and recidivism).
24. In Delaware, for example, individuals convicted of drug offenses have their driving privileges revoked for two years. Del Code Ann. tit. 21, § 4177K (2003).
vents the ex-offender from driving generally, it also prevents him from working at the many types of jobs, which require him to drive: these include chauffeur, delivery, cabdriver, etc.\textsuperscript{25} There are even more attenuated, but nevertheless real, consequences such as being unable to drive to work where there is no public transport. Another type of disability is denial of educational loans.\textsuperscript{26} Not only is the individual denied an opportunity to attend college, a benefit in itself, but also there is a secondary consequence to this educational disability—loss of access to employment which requires a higher education background.\textsuperscript{27}

These derivative occupational disabilities are often more problematic and insidious than those which specifically exclude individuals from pursuing certain forms of employment. They operate haphazardly, arbitrarily, and often unintentionally; since only some felons may be subject to the primary disability, the secondary occupational consequences are based on little more then the luck of the

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According to federal law, all states must enact laws that revoke or suspend the driver's license of any individual convicted of "any drug offense" for at least six months. Failure to comply results in loss of federal transportation funds. See 23 U.S.C. § 159 (2003). There is an opt-out provision if there is opposition to enactment of such a law by the governor or state legislature. See Nora V. Demleitner, Collateral Damage: No Re-Entry For Drug Offenders, 47 VILL. L. REV. 1027, 1037 (2002). "As of 2001, thirty-three states have expressed opposition to the policy, while seventeen states, the District of Columbia and Puerto Rico have enacted the legislation." \textit{Id.} at 1037 n.66 (citation omitted).

25. Professor Demleitner refers to these in general terms, calling them "indirect obstacles." Referring to revocation of driver's licenses, as well as other disabilities, including firearms, she writes, "Some collateral consequences indirectly affect the employability of ex-offenders because they make it impossible to fulfill basic job requirements." Demleitner, \textit{supra} note 24, at 1037.


As part of its 1998 reauthorization of Title IV of the Higher Education Act of 1965, Congress enacted a complicated eligibility restriction applicable to students who have prior convictions for possession or sale of controlled substances. Applicants subject to this bar cannot obtain Pell grants or student loans, which, for low-income students, effectively means a denial of higher education. Even applicants not technically subject to the bar may be discouraged from applying for financial aid as a result of misinformation, bad advice, or wrong assumptions about how the new law works. \textit{Id.} at 85-86. Depending on the type and number of prior drug crimes, ineligibility can last as little as one year or it can last indefinitely. \textit{Id.} at 87.

27. "Studies have shown that individuals who receive higher education while incarcerated have a significantly better rate of employment (60-75\%) than those who do not participate in college programs (40\%)." The Center on Crime, Cmty's. & Culture, Open Soc'y Inst., \textit{Education as Crime Prevention: Providing Education to Prisoners} 7-8 (Sept. 1977), \textit{available at} http://www.soros.org/crime/research_brief_2.html (last visited July 15, 2003); "Education increases employment opportunities for people with criminal records. . . ." Hirsch et al., \textit{supra} note 15, at 86.
Worse yet, secondary occupational disabilities, by their very nature are not specific—thus, a single non-occupational disability can exclude an individual from a number of employment opportunities. By contrast, although occupational disabilities are legion, they concern specific forms of employment. There may even be a nexus between the particular felony and the occupational disability. Finally, while it is debatable whether any thought goes into the enactment of occupational disability legislation, certainly little or no consideration is given to the possible secondary consequences. The critical importance of employment to successful re-entry into society demands that the derivative adverse consequences of any disabilities need to be carefully considered before they are imposed.

This is essentially the type of occupational disability faced by individuals like Thomas Bean. Loss of firearm privileges may not, in general, be as disabling as other types of collateral consequences—e.g., loss of public housing, loss of welfare, loss of child custody—but this loss takes on greater significance when it impacts an ex-offender's opportunity for employment. Firearms dealers are not the only individuals for whom loss of weapons privileges means an end to an occupation. There are others, including peace officers and security guards.

This Article will focus on the Bean case from the perspective of firearms disabilities and loss of occupational license. Part One will

29. Id.
31. One can argue that the occupational disability imposed upon Bean falls somewhere between the two types of disabilities. Federally licensed firearms dealers cannot have a record of felony convictions. See 18 U.S.C. § 921 (d)(1)(B) (2003). Nevertheless, the reason for his loss of his occupation is that, like every other felon, he can no longer possess firearms. Furthermore, as with every other felon—except corporate felons—the ATF is barred from investigating his request for relief under 18 U.S.C. § 925(c).
33. Id. at 27-41.
34. Id. at 53-84.
35. "[A]s ex-offenders are frequently barred from possessing firearms, when their handling is a prerequisite for employment, ex-offenders are indirectly excluded from these jobs." Nora V. Demleitner, Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL'Y REV. 153, 156 (1999).
36. Id.
37. "Among positions that may require the handling of firearms are private security services, private investigators, and bodyguards. For other employment, such as certain night work, the ability to handle a gun may not be a job prerequisite but may be considered an advantage." Id. at 156 n.53.
discuss the facts leading to Bean's conviction. Part Two will briefly outline the history of federal firearms disabilities, the relief statute, and the all-important appropriations ban. Part Three will analyze and critique the lower court decisions, in view of the significant role that Bean's loss of occupation played in their rulings. Finally, Part Four will: 1) focus on the adverse impact of Congress' decision to subvert the relief provision; and 2) reflect on the essentially incoherent nature of the entire federal firearms disabilities scheme.

PART ONE

When Thomas Bean entered Mexico, he had just left the gun show in Laredo, Texas, that he had been attending.\textsuperscript{38} He should have been far more careful in cleaning out his car before he crossed the border. At the time Bean was arrested, there were already dozens of Americans languishing in Mexican jails or serving prison sentences in Mexican penitentiaries for bringing guns and/or ammunition across the border.\textsuperscript{39} Mexican gun laws are far more strict than those in the United States,\textsuperscript{40} and generally only police and military personnel are legally entitled to carry guns or possess ammunition.\textsuperscript{41} While enforcement of these strict gun laws is designed to combat drug trafficking and armed insurgencies in Mexico,\textsuperscript{42} many Americans caught with weapons while entering Mexico are there to hunt.\textsuperscript{43} Although legitimate hunters can obtain per-


\textsuperscript{40} News Release, \textsuperscript{39} supra note 39; Small Arms and Domestic Gun Laws, SAWG Fact Sheets on Small Arms 2001, Small Arms Working Group, at http://www.fas.org/asmp/campaigns/smallarms/sawg.htm (last visited July 15, 2003).

\textsuperscript{41} Bosch, \textsuperscript{39} supra note 39.

\textsuperscript{42} The problem created by guns smuggled into Mexico from the United States is a very serious one. See Tim Weiner & Ginger Thompson, U.S. Guns Smuggled into Mexico Aid Drug War, N.Y. TIMES, May 19, 2001, reprinted in INT'L ACTION NETWORK ON SMALL ARMS (IANSA) NEWS, available at http://www.iansa.org/news/2001/may_01/us_smuggle.htm (last visited July 15, 2003). In fact, two federally licensed gun dealers sold scores of weapons in Mexico. Id.

\textsuperscript{43} For a description of availability of hunting in Mexico, see Hunting in Mexico, Mexico Online, at http://www.mexonline.com/huntmex.htm (last visited July 15, 2003).
mits to bring their weapons into Mexico, apparently a significant number of these individuals were unaware of this requirement.\textsuperscript{44}

In fact, United States government officials as well as California officials made concerted efforts to warn motorists heading toward the U.S.–Mexican border about the dangers of transporting weapons into Mexico.\textsuperscript{45} These efforts included distributing thousands of leaflets, installing highway signs, and establishing a low frequency AM channel warning of this danger.\textsuperscript{46} In California, the California Department of Transportation spent about $18,000 in its “Guns Into Mexico . . . Don’t Do It” public awareness campaign.\textsuperscript{47} Mexican officials also recognized the importance of this campaign; when the campaign was first unveiled, the Counsel General of Mexico in San Diego was one of the attendees.\textsuperscript{48}

Thomas Bean, a resident of Port Arthur, Texas became one more statistic when he was arrested by Mexican authorities for importing ammunition. After the gun show in Laredo was over, he crossed into Nuevo Laredo, Mexico to have dinner.\textsuperscript{49} Although he told his associates to remove all guns and ammunition from his Suburban, someone had inadvertently left approximately 200 rounds of ammunition in the back of the SUV.\textsuperscript{50} When they were stopped at the border crossing, Mexican officials discovered the ammunition.\textsuperscript{51}

Bean and his assistants were immediately arrested; all but Bean were soon released.\textsuperscript{52} Bean alone was charged with the crime of introduction of ammunition into the Republic of Mexico, apparently because he owned both the car and ammunition.\textsuperscript{53} He was then immediately taken into custody.\textsuperscript{54} While being held, Bean eventually signed a statement in Spanish prepared by the Mexican officials.\textsuperscript{55} He could not read, write, or understand Spanish, and was never provided with an interpreter or an English translation of

\textsuperscript{44} See id.
\textsuperscript{46} News Release, supra note 39.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 837. The federal district court judge who later heard Bean’s petition for firearms relief determined that “Mexican law requires an accused person to furnish a statement regarding the crime charged, even if the statement is incriminating. The
this statement. The document, it turned out, was a confession. After two months in custody, Bean was convicted, allegedly without any formal trial proceeding. He was sentenced to five years imprisonment, as well as fined. Although the facts are far from clear, Bean did not have an attorney during most of his detention. At some point, however, he did retain a Mexican CPA to assist him. Bean's conviction became a cause celebre among gun owners in the United States, who were outraged by his arrest and imprisonment. They organized a letter campaign directed to then-Governor George W. Bush.

Bean served approximately four months in a Mexican prison, and then was transferred to LaTuna Penitentiary in Anthony,

arrested person can be charged with a separate offense should the arrested person fail to make such statement.” Id.

56. Id.
57. Id.
58. Id. at 829.
59. Id.
60. Id. at 837 n.7.
61. Id.
63. Id. The June 5, 1998 alert instructed members to send the following form letter:

The Honorable George W. Bush
Office of the Governor
Box 12428
Austin, TX 78711

Dear Governor Bush:

I am writing to request relief for Thomas Lamar Bean, a resident of Vidor, Texas. From information supplied to us by some of our Texas members, Mr. Bean is facing a five-year sentence in a Mexican prison because he is accused of having entered Mexico with a box containing about $30 worth of ammunition of assorted calibers. The box was in open view, and the quantity clearly indicates that there was no intention on Mr. Bean's part to engage in smuggling ammunition into Mexico. Mr. Bean is truly an innocent man. Please use your good offices under the provisions of the prisoner exchange program, or any other means available to you, to obtain the release of Mr. Bean. And kindly let me know what you are able to do so I can keep our members informed.

Thank you very much for your assistance in this matter.

Sincerely,

Larry Pratt
Executive Director

Id.

64. Bean, 89 F. Supp. 2d at 829.
Texas\textsuperscript{65} pursuant to the International Prisoner Transfer Treaty.\textsuperscript{66} He served approximately one month of his sentence in the penitentiary and approximately another year under supervised release under the jurisdiction of the United States District Court for the Eastern District of Texas.\textsuperscript{67} On August 30, 1999, Bean was unconditionally released from his sentence.\textsuperscript{68}

Among the collateral consequences to which Bean was now subject was his inability to possess, transfer, or import firearms.\textsuperscript{69} He could no longer have any weapons in his possession since he was convicted of a crime punishable by more than one year in prison.\textsuperscript{70} The Mexican conviction apparently qualified, since it carried with it a term of five years in prison.\textsuperscript{71} Ironically, during the pendency of Bean's legal troubles, his crime became a far less serious one in Mexico.\textsuperscript{72} It has now become a misdemeanor to import firearms or ammunition into Mexico, punishable only by a fine.\textsuperscript{73} The Mexican legislature was in part reacting to the extensive publicity surround-

\begin{thebibliography}{9}
\bibitem{65} Id.
\bibitem{67} Bean, 89 F. Supp. 2d at 829.
\bibitem{68} Id.
\bibitem{69} See 18 U.S.C. § 922(g)(1). More specifically, anyone convicted in any court of a "crime punishable by imprisonment for a term exceeding one year," may not ship or transport a firearm or ammunition in interstate or foreign commerce, possess a firearm or ammunition in or affecting commerce, or receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. Certain crimes are specifically excluded: 1) "any Federal or State offenses pertaining to anti-trust violations, unfair trade practices, restraints of trade, or other similar offenses relating to regulation of business practices," Id. § 921(a)(20)(a); and 2) "any State offense classified by the laws of the State as a misdemeanor punishable by a term of imprisonment of two years or less." Id. § 921(a)(20)(B). See SUSAN KUZMA, U.S. DEPT OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 15-20 (2000).
\bibitem{70} Bean, 89 F. Supp. 2d at 829-30 (citing 18 U.S.C. § 922(g)(1)).
\bibitem{71} Id. at 829. The issue of whether Bean's foreign conviction fell within the firearms disability statute of the Gun Control Act was considered by the district court judge; he found that it did not. Specifically, the judge ruled that, "A foreign conviction cannot, as a de facto rule, serve as the predicate offense for a prohibition of firearms privileges under 18 U.S.C. § 922(g)(1)." Id. at 837. In so ruling, the judge conceded that the prevailing law was to the contrary. Id. In any event, such a ruling was an alternative basis for granting Bean his requested relief. The problem with such a finding, in this context, is that it cannot support a request for relief. If Bean's firearms restrictions could not have been imposed \textit{ab initio}, then he has no reason to need or seek relief. Bean did not pursue this particular claim before the Supreme Court, and, in fact, apparently conceded that the disability provision does apply to foreign convictions. This is not to say, of course, that the facts surrounding his particular foreign conviction are irrelevant to a determination of whether or not relief should be granted.
\bibitem{72} Id. at 838.
\bibitem{73} Id.
\end{thebibliography}
ing the prosecutions and convictions of individuals in circumstances similar to Bean's. Unfortunately for Bean, he was already branded a felon for purposes of federal firearms disabilities. Bean could no longer hunt, collect guns, or hold any occupation that required him to possess or have access to a weapon. He could no longer, for example, be a corrections officer or a security guard. Since many other types of occupations often require that the individual be armed, such as a jeweler or courier, he could not engage in these professions either. More to the point, because he could no longer possess, transport, or import firearms, he could no longer retain his firearms license. His ability to engage in his occupation was gone.

**PART TWO**

In his effort to renew his gun dealer's license, Bean needed to enter the rather Byzantine world of federal firearms disabilities. It has a long and complex and controversial history, some of which Bean may have been aware of as a licensed gun dealer.

In 1938, Congress enacted the Federal Firearms Act, which initiated federal regulation of interstate firearms traffic; it provided, *inter alia*, that individuals convicted of "crimes of violence" could not receive firearms transported in interstate commerce. Over the years, this prohibition was expanded to include virtually all felonies, i.e., crimes punishable by a term of imprisonment over one year. The current law, in force since 1961, states that it is a federal crime for "any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. . . [to] possess . . . any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

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74. *Id.* The trial judge ascribed this change in the law to the publicity surrounding Bean's arrest and conviction. *Id.;* see News Release, *supra* note 39. The timing seems right. An article in the *San Antonio Express-News* reported, on August 12, 1998, that such a proposed change in Mexican law had a good chance of passage. *Id.* At that time, Bean had already been convicted and was three months into his sentence. *Bean*, 89 F. Supp. 2d at 829.

75. Ironically, because Bean had already been convicted, he could not benefit from the change in the law which cases such as his may have prompted.

76. *Bean*, 89 F. Supp. 2d at 829, 837.

77. *Id.* at 829-30.


79. *Id.* In 1947, for example, the prohibition was expanded to include the felonies of burglary, house breaking, and assault. *Id.* at 3 n.3.

In 1965, Congress provided relief from this disability in cases where the ex-offender "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." The genesis for this relief provision was apparently the conviction of Olin Mathieson Corporation—the parent corporation of firearms manufacturer Winchester—for a felony involving a kickback scheme in dealings with foreign governments. Without relief from the firearms disability statute, Winchester would have been out of business since it would no longer be able to ship firearms. Congress, ever mindful of its corporate constituencies, quite correctly decided that relief in such cases as this would not be contrary to public interest.

Despite its apparent genesis in protecting corporations from the consequences of a conviction upon its ability to continue in the firearms trade, the relief provision applied not only to corporations, but to individuals as well. Twenty years later, in 1986, Congress...

81. Brief of Amicus Curiae Violence Policy Center at 3, Bean (No. 01-704).
83. See Nelson, supra note 82, at 565-66.
84. Id.
85. Id. This is, of course, of enormous practical significance because far more individuals—the bulk of felons, after all—can be expected to take advantage of the relief provision than corporations. This fact also raises the important issue of whether Congress merely wanted to bail out Winchester and other corporations finding themselves threatened with possible extinction, or actually intended to provide individuals generally with a means to seek relief. The two purposes do not conflict because by its terms, the relief provision furthers both—however, there still remains the question as to the primary impetus of the legislation. Although one commentator takes the approach that the true purpose was to provide individuals with relief, he appears to ignore the role that the Olin Mathieson case played in the creation of the precursor to current § 925(c). He explains the genesis as follows:

The legislative history behind the relief provisions shows that Congress recognized that not all felonies are created equal. Beginning with the original relief provision in 1965, it appears that Congress believed the strict application of the Federal Firearms Act worked to disadvantage some individuals who posed no danger to the public by reason of firearm possession. The Committee on Ways and Means submitted a report to the House of Representatives which stated in part:

Under present law, conviction of a felony (offense punishable by imprisonment for more than 1 year) automatically deprives the convicted person (including a corporation) of the right to have any dealing with any firearm or ammunition in interstate or foreign commerce. No consideration can
gress expanded this provision in several significant ways. It now included a specific provision allowing a petitioner who was denied relief to obtain judicial review of the Secretary of the Treasury’s adverse decision. In addition, persons convicted of crimes involving firearms or violators of the Gun Control Act of 1968, as well as others who were, until then, ineligible for disability relief, were now entitled to petition for it. Responsibility for administering this provision, along with all other matters pertaining to firearms, had been delegated to the Bureau of Alcohol, Tobacco, and Firearms.

Currently, 18 U.S.C. § 925(c), provides:

A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, ship-
ment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States District Court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USCS §§ 921 et seq.], who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefore.

While this relief statute has never been officially repealed, since 1993 Congress has provided a specific provision in its annual budget appropriations that prohibits the ATF from utilizing any of its funds to process requests from those seeking relief pursuant to the terms of the statute. "[N]one of the funds appropriated therein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 925(c)."

This appropriations ban continued to be in effect, renewed on an annual basis, up through the present. The only change occurred in the year following its initial passage when an exception was carved out for corporate felons. Winchester and other corporations in similar straits would still have recourse to § 925(c) relief.

The decision to impose this budgetary constraint upon the ATF's ability to perform the duties prescribed by § 925(c) did not occur in a vacuum. Not coincidentally, the Violence Policy Center

91. The Secretary of the Treasury has delegated his authority to the Director of the Bureau of Alcohol, Tobacco and Firearms.
92. Nelson, supra note 82, at 555-56.
94. Griffin, supra note 85, at 983. "However, Congress did reinstate funding for the BATF to act upon applications made by corporations in 1994 and has continued to do so through the present." Id. (citations omitted).
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(VPC), a gun control advocacy and research organization, had just released a report detailing how this provision is both costly to the government and places individuals at considerable risk from felons who have had their firearms disabilities removed.

The study, entitled "Putting Guns Back Into Criminals' Hands," provided extensive information regarding the way in which 18 U.S.C. § 925 (c) has been applied. Referring to this relief provision as "A Convicted Felon's Second Chance Club," the VPC was extremely critical of efforts to allow felons to regain their right to possess firearms.

The VPC compiled some extremely enlightening data. Between 1985 and 1990, the ATF processed more than 22,000 applications from felons seeking relief from their firearms disabilities. Once an application was received, it had to go through a rigorous process of investigation by ATF investigators. Between forty and fifty ATF employees were assigned this task on a full-time basis at a yearly cost of several million dollars. This cost varied from a low

95. In its own words, the VPC states that it is "a national nonprofit organization working to reduce firearms violence through research, education, and advocacy." Brief of Amicus Curiae Violence Policy Center at 1, United States v. Bean, 123 S. Ct. 584 (2002) (No. 01-704). More precisely:
The Violence Policy Center is at the forefront of organizations working to reduce firearms violence in our nation. To this end, VPC analyzes a wide range of current firearm issues and provides information to policymakers, journalists, scholars, public health professionals, grassroots advocates, and members of the general public. Since its founding in 1988, VPC has released more than 60 studies and books which have helped shape firearms legislation and policy on the federal, state, and local levels while increasing public understanding of firearms violence as a public health issue. In addition, VPC's Litigation Project, established in 2001, has filed amicus curiae briefs in precedent-setting cases in the federal and state trial and appellate courts. As a result of its unique expertise, VPC is often relied on and cited by national news outlets and other organizations. Its staff, which includes lawyers and health policy analysts, are nationally recognized experts on firearms violence, firearms manufacture, federal firearms law and the agencies empowered to enforce such laws (such as the Department of Justice and the Bureau of Alcohol, Tobacco and Firearms), and firearms litigation.

Id.

97. See generally id.
98. Id.
100. Id.
101. Id.
of $2,516,000 (in 1986) to a high of $4,270,000 (in 1991).

Approximately one-third of the applicants were granted relief, one-third denied relief, and one-third withdrew their applications while they were pending. Some applicants granted relief went on to re-offend. Among the group granted relief by the ATF, the VPC found sixty-nine cases where felons subsequently committed crimes again.

The VPC report also focused on one hundred specific cases—a random sampling of felons who had been granted relief by the ATF. Of the hundred, many of them committed serious, as well as, violent crimes. One commentator seemed so impressed with these statistics that he relied upon them to provide support for his position that firearms relief had little to recommend it.

Giving guns to felons is not a politically popular position and it draws an emotional response from many, including the Violence Policy Center ("VPC"), a public interest organization, which describes the "relief from disabilities" program as a "second chance club" supported by the National Rifle Association. The VPC says that of one hundred felons who had been granted relief by the Secretary, five had convictions for sexual assault, eleven had burglarized, thirteen had been convicted of narcotics charges, and four had committed homicide. These kinds of statistics do not make for good public relations, and provide strong policy arguments against allowing government sanctioned "relief."

The national press was outraged. Members of Congress responded as well. On February 27, 1992, Representatives Larry

102. Id.
103. Id.
104. Id.
105. Id.
106. Id. Section Three: 100 Case Studies of Felons Granted Relief From Disability, at http://www.vpc.org/studies/relieftthree/htm (last visited July 15, 2002).
107. Id.
109. Substantial pressure developed to terminate the ATF program. See, e.g., Editorial: Felon Gun Program Should Be Disbanded, CHI. SUN-TIMES, July 1, 1992, at 31 ("It is outrageous in the extreme for the federal government to shell out millions of dollars helping convicted felons to get their hands on guns—legally!—under a program that offers 'relief' to felons with the 'disability' of being unable to own weapons."); Morning Edition: BATF Felon Gun Program A Campaign Issue? (NPR radio broadcast, July 30, 1992) (reporting that the ATF Director was "embarrassed by the fact that his bureaucrats have to spend $ 4 million of taxpayer's [sic] money every year to determine which felons should be allowed to carry guns and which should not"). Brief for Respondent at 3, United States v. Bean, 123 S. Ct. 584 (2002) (No. 01-704).
110. The following comments were made by Senator Lincoln Chafee:
Smith and Ed Feighan along with Senators Paul Simon and Frank Lautenberg introduced legislation to prohibit the ATF from using its appropriated funds to investigate request for relief under § 925(c). This provision has been contained ever since in every appropriations bill passed by Congress.

As a result of the appropriations bans, no individual ex-offenders could obtain relief from the ATF of their federal firearms disabilities. When petitions were submitted to the ATF pursuant to § 925(c), and the regulations setting out the proper procedure for doing so, the ATF responds that although federal law "provides

Dozens of convicted felons who have had their gun rights reinstated have been rearrested on new charges, including attempted murder, robbery, and child molestation.

This program [§ 925(c)'s relief provision] just does not make any sense. At a time when gun violence is exacting terrible costs upon our society, it seems absolutely crystal clear to me that the government's time and money would be far better spent trying to keep guns out of the hands of convicted felons, not helping them regain access to firearms.

I am pleased to note that the Appropriations Subcommittee has come to this same conclusion, and has stipulated in the bill that no appropriated funds may be used to investigate or act upon applications for relief from Federal firearms disabilities.


111. See id. at 227-29.
112. See id. at 218 n.3.
113. Brief for Respondent at 7, Bean (No. 01-704).
114. 27 C.F.R. § 478.144 (2003) states in pertinent part:

(a) Any person may make application for relief from the disabilities under section 922 (g) and (n) of the Act (see § 478.32).

(b) An application for such relief shall be filed, in triplicate, with the Director. It shall include the information required by this section and such other supporting data as the Director and the applicant deem appropriate.

(c) Any record or document of a court or other government entity or official required by this paragraph to be furnished by an applicant in support of an application for relief shall be certified by the court or other government entity or official as a true copy. An application shall include:

(1) In the case of an applicant who is an individual, a written statement from each of 3 references, who are not related to the applicant by blood or marriage and have known the applicant for at least 3 years, recommending the granting of relief;

(2) Written consent to examine and obtain copies of records and to receive statements and information regarding the applicant's background, including records, statements and other information concerning employment, medical history, military service, and criminal record;

(4) In the case of an applicant having been convicted of a crime punishable by imprisonment for a term exceeding 1 year, a copy of the indictment or information on which the applicant was convicted, the
the Secretary of the Treasury with the authority to grant relief from this disability, since October 1992, ATF's annual appropriations has prohibited the expending of any funds to investigate or act upon application for relief.\textsuperscript{115}

\textbf{Part Three}

That was the response Thomas Bean received from the ATF when he sought relief in order to regain his ability to possess firearms as well as regain his license.\textsuperscript{116} In addition, the ATF instructed Bean to "contact their office if and when Congress lifts the restrictions."\textsuperscript{117} Like others in the same boat,\textsuperscript{118} Bean filed suit in United States District Court for the Eastern District of Texas seeking review of the ATF's action (or, rather, inaction) pursuant to the judicial review provisions contained in the Act.\textsuperscript{119}

\begin{quote}
judgment of conviction or record of any plea of nolo contendere or plea of guilty or finding of guilt by the court, and any pardon, expunction, setting aside or other record purporting to show that the conviction was rendered nugatory or that civil rights were restored;
\end{quote}

\textit{(d) The Director may grant relief to an applicant if it is established to the satisfaction of the Director that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of the relief would not be contrary to the public interest. The Director will not ordinarily grant relief if the applicant has not been discharged from parole or probation for a period of at least 2 years. Relief will not be granted to an applicant who is prohibited from possessing all types of firearms by the law of the State where such applicant resides.}

\textit{Id.} (emphasis added).

115. Brief for Respondent at 7, \textit{Bean} (No. 01-704).

116. Pursuant to Section 925(c), respondent filed an application with the Secretary of the Treasury for permission to possess firearms and to regain his license as a firearms dealer. As required by the applicable regulation (27 C.F.R. § 178.144), the application detailed respondent's personal history, and the circumstances of his conviction. Respondent also attached letters from two local Chiefs of Police, the local Sheriff, a local City Marshal, and a State Judge, each attesting to respondent's good character and suitability to possess firearms." ATF, however, did not grant respondent the relief he requested. By letter, ATF advised respondent that, although federal law "provides the Secretary of the Treasury with the authority to grant relief from this disability," "since October 1992, ATF's annual appropriation has prohibited the expending of any funds to investigate or act upon applications for relief."

\textit{Id.}


118. \textit{See infra} notes 119-124 and accompanying text.

119. \textit{Bean}, 89 F. Supp. 2d at 830.
In order to understand the context in which Bean was decided by the district court, it is helpful to consider the prevailing judicial opinions regarding the effect of the appropriations ban upon the viability of the review provision contained in the relief statute. At the time Bean filed his petition, a number of United States Circuit Courts of Appeal had already held that federal district courts had no subject matter jurisdiction to consider a petition for relief under the judicial review provisions of § 925(c). The Ninth, Tenth and, most significantly the Fifth Circuit encompassing Texas all agreed on that point. Only the Third Circuit supported the notion that judicial review was available despite the appropriations ban. The majority usually gave one of two reasons for its rulings. One reason was that because appropriations were specifically denied the ATF to investigate petitions from felons seeking relief under § 925(c), Congress had implicitly suspended the relief provision. The other reason was that mere failure by the ATF to con-

120. See infra notes 124-128 and accompanying text.
121. See Burtch v. U.S. Dep't of Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997).
122. See Owens v. Magaw, 122 F.3d 1350, 1354 (10th Cir. 1997).
123. See United States v. McGill, 74 F.3d 64, 67 (5th Cir. 1996).
125. In Pontarelli v. United States Department of Treasury, 285 F.3d 216, 229-30 (3d Cir. 2002), in which the Third Circuit, sitting en banc, overturned the Rice decision, the court quoted from Senator Paul Simon’s strong criticism of Rice shortly after it was decided:

This misguided decision [referring to Rice] could flood the courts with felons seeking the restoration of their gun rights, effectively shifting from ATF to the courts the burden of considering these applications. Instead of wasting taxpayer money and the time of ATF agents[,] which could be much better spent on important law enforcement efforts . . . we would now be wasting court resources and distracting the courts from consideration of serious criminal cases.

Fortunately, [McGill] found that congressional intent to prohibit any Federal relief—either through ATF or the courts—is clear. . . .

Given this conflict in the circuit courts, we should clarify our original and sustaining intention. The goal of this provision has always been to prohibit convicted felons from getting their guns back—whether through ATF or the courts. It was never our intention to shift the burden to the courts.

. . . . It made no sense for ATF to take agents away from their important law enforcement work, and it makes even less sense for the courts, which have no experience or expertise in this area, to be burdened with this unnecessary job. Let me make this point perfectly clear: It was never our intent, nor is it now, for the courts to review a convicted felon’s application for firearm privilege restoration.

Id. at 229-30 (citing 142 CONG. REC. S10320-21).
126. See Griffin, supra note 85, at 983-89.
sider a felon’s petition for relief was not tantamount to a “denial”—the necessary precondition set out in the relief provision for judicial review.\footnote{127}

Bean’s petition was heard by United States District Court Judge Joe Fisher. Judge Fisher was already familiar with Bean’s predicament in Mexico. When Bean was transferred from Mexico to the United States to serve out the remainder of his sentence, Judge Fisher was assigned to his case. After Bean served approximately one month in a United States penitentiary, it was Judge Fisher who ordered that he be placed on supervised release. After ten months of supervised release, the judge released him outright.\footnote{128} Judge Fisher had developed a colorful reputation in his forty years on the bench.\footnote{129}

District Judge Fisher ruled in Bean’s favor. Ignoring his own circuit’s four-year-old precedent explicitly denying jurisdiction in these types of cases, the judge ruled that the district court had jurisdiction to consider Bean’s petition,\footnote{130} and granted him the requested relief after a hearing.\footnote{131} The judge found that Congress did not repeal or suspend § 925(c), but only ATF’s involvement in the process.\footnote{132} He relied on Rice v. United States, Department of Alcohol, Tobacco, and Firearms,\footnote{133} the only circuit decision upholding relief despite the appropriations ban.\footnote{134} In Rice, the Third

\footnote{127. Id. at 987.}
\footnote{128. Brief for Respondent at 6-7, United States v. Bean 123 S. Ct. 584 (2002) (No. 01-704).}
\footnote{129. Judge Fisher served for forty years on the federal bench after being appointed by a reluctant President Eisenhower in 1959. He was reported to be a very fair and principled jurist, but his tenure was not without controversy. Judge Fisher was named one of the best trial judges in the nation and displayed his principles both on and off the bench. In 1979, he ignored a presidential order requiring air-conditioning systems in federal buildings to run at no lower than eighty degrees, ordering his set at no higher than seventy-four. He clashed with the media on access to his courtroom during certain testimony and also with civil rights activists fighting for broader desegregation orders. He also presided over the landmark case allowing workers a cause of action against asbestos manufacturers for their injuries, which was upheld by the Fifth Circuit. Judge Fisher died just four months after deciding Bean at the tender age of ninety.}
\footnote{130. Bean v. United States, 89 F. Supp. 2d 828, 839 (E.D. Tex. 2000). It is not much of a stretch to suggest that the court’s decision concerning jurisdiction was connected to the particular circumstances of Bean’s case.}
\footnote{131. Id. at 831.}
\footnote{132. Id. at 831.}
\footnote{133. 68 F.3d 702 (3d Cir 1995).}
\footnote{134. Bean, 89 F. Supp. 2d at 839.}
Circuit held that Congress neither repealed § 925(c),135 nor precluded a federal district court from reviewing a request for relief.136 The Third Circuit decision notwithstanding, Judge Fisher no doubt felt compelled to explain the reasons that his own circuit’s ruling that judicial review was unavailable had been wrongly decided. This he did, by arguing that the Fifth Circuit’s decision in McGill made too much of the legislative history of the appropriations ban, and too little of the legislative history underlying the relief provision itself.137 In McGill, the court relied upon statements made during House and Senate committee discussions regarding the problems inherent in granting relief to felons.138

Judge Fisher went beyond the legislative history of the appropriations ban to consider the history of the relief provision itself.139 He found that as early as 1965, Congress was concerned that there was no individual consideration available to those felons who should not be burdened by firearms disabilities;140 therefore, Congress adopted the relief provision.141 Judge Fisher stated rather pointedly (almost critically) that the decision of whether to grant relief was relegated to an agency instead of a trial judge.142

After his review of the legislative history of the relief provision, the judge concluded the following:

135. Rice, 68 F.3d at 707.
136. Id.
137. Id. at 706-09.
138. For example, the McGill court quoted the following Appropriations Committee report:

Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant[,] they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for ATF to investigate and act upon applications from relief from Federal firearms disabilities.

United States v. McGill, 74 F.3d 64, 67 (5th Cir. 1996) (quoting S. Rep. No. 353, 102d Cong., 2d Sess. 77 (1992)). The McGill court found that “[t]his report expresses concern over: (1) use of limited valuable resources for investigating these difficult cases and (2) consequences to innocent citizens if ATF makes a mistake and grants relief to a felon from his firearm disabilities.” Id.

139. Bean, 89 F. Supp. 2d at 832.
140. Id. at 832-33.
141. Id. at 833.
142. Id.
(1) Congress realized that not all persons convicted of felonies should be denied firearms privileges forever; (2) Congress provided the ATF with the ability to reinstate firearms privileges; and (3) Congress intended the judiciary to give the final word on the appropriateness of a denial by the ATF.\textsuperscript{143}

Judge Fisher then turned his attention to the appropriations ban. He referred to a number of Congressional concerns expressed in various committee reports to support his contention that the legislative history surrounding the enactment of the ban was conflicting.\textsuperscript{144} Judge Fisher conceded there is support for the claim that the ban was designed to keep firearms out of the hand of felons.\textsuperscript{145} There are other statements, however, indicating that Congress was primarily concerned with "the ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself."\textsuperscript{146}

Judge Fisher concludes that any analysis of legislative history relating to the appropriations ban reveals little about its underlying purpose.\textsuperscript{147} In any event, he suggests, because the appropriations ban undermines the still valid relief provision, courts need to be particularly cautious in utilizing legislative history to give such a ban its broadest possible interpretation.\textsuperscript{148} Particularly since the committee reports express various, if not conflicting,\textsuperscript{149} purposes,

\textsuperscript{143. Id.}
\textsuperscript{144. Id. at 835.}
\textsuperscript{145. Id. at 834.}
\textsuperscript{146. Id.}
\textsuperscript{147. Id.}

It depends whose side you represent as to which committee report you choose to employ and which committee report you choose to ignore. And in reality, committee reports are not an authoritative interpretation of what the statute meant, nor an authoritative expression of what that Congress intended. . . . In this Court's opinion, the legislative history on the issue is far from "clear." If various district and appellate courts read the exact same legislative history and come to different conclusions (as the courts do on this issue), then it is this Court's opinion that the legislative history is far from "clear."

\textsuperscript{148. Id. at 835 (citation omitted).}
\textsuperscript{149. There is plenty of conflicting legislative history regarding this issue. Ultimately, the Court recognizes that an advocate can find an abundance of legislative history to support his position. The Court believes that the prudent thing to do is to focus in on language of the statute. After reviewing the pages and pages of committee notes, senate reports, and "hearings before subcommittees of committees," the Court reminded itself that statutory interpretation begins with the language of the statute itself. And if the language of the statute is clear, "that is the end of the matter, and the court must give effect to [the] unambiguously expressed intent of Congress."
Judge Fisher instructs that the use of such reports to interpret the limits of the appropriations ban renders that effort a "textbook case on why the courts should be hesitant to use legislative history to suspend any substantive right which is expressly available in statutes."\textsuperscript{150}

Given Judge Fisher's finding that legislative history is not controlling with respect to the meaning of the appropriations ban, he asserts that: 1) despite the \textit{McGill} court's assertion to the contrary,\textsuperscript{151} judges are quite capable of determining whether or not to grant a felon relief from firearms disabilities;\textsuperscript{152} and 2) failure by the ATF to act on a petition for relief satisfies the statutory precondition necessary for the courts to intercede.\textsuperscript{153} Judge Fisher was unequivocal in claiming that judges are as capable, if not more so, as the ATF in making the initial determination as to whether a felon deserves to have his weapons rights restored.\textsuperscript{154} With respect

\textit{Id.} (citations omitted).

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} The \textit{McGill} Court is concerned that the judiciary is not a proper forum for determining whether applicants "are likely [to] act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." \textit{Id.} at 835-36 (citations omitted).

\textsuperscript{152} \textit{Id.} at 836.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}

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

\textit{Id.} Judge Fisher also found that judicial involvement would solve all the problems that were raised in the various Congressional committee meetings:

Moreover, allowing a court to grant the relief solves several concerns expressed by Congress and the circuit courts. First, it would shift the financial burden from the government to the applicant. As in this case, the applicant would be responsible for paying court costs and attorneys fees. Second, instead of the ATF conducting investigations on the applicant, the applicant would have to secure all the necessary evidence in order to receive relief. And, if the court deems more evidence is needed, it will be up to the applicant to secure such evidence. Third, a court is a better-suited forum for deciding these issues because it is adjudicative in nature. In addition, if the court needs to know how the ATF had conducted its investigations in the past, this information is available in the Code of Federal Regulations and case law. Courts can decide relief questions without the need of ATF expertise, and if investigative work needs to be done, the applicant himself would have to conduct it.
to the requirement that a "denial" by the ATF needs to precede judicial review, the judge was convinced that inaction by the ATF (due to the ban) constitutes a de facto denial.\footnote{155} He anticipates the argument that because § 925(c) requires that the administrative remedy must first be exhausted before judicial review is available, the absence of a ruling by the ATF constitutes failure to exhaust.\footnote{156} Exhaustion is excused, he states, under the principle that no exhaustion is necessary where it would be "wholly futile and inadequate due to lack of appropriations."\footnote{157}

Thereafter, the district court concluded its opinion by describing the hearing it conducted to determine, pursuant to the judicial review provision of § 925(c), whether Bean was entitled to restoration of his firearms privileges and dealer’s license.\footnote{158} In this type of setting, however, actual "judicial review" of the ATF’s failure to act is rather hampered since there was nothing available for the court to review.\footnote{159} Although § 925(c) states that "additional evidence" (over and above that collected by the ATF) can be admitted by the reviewing judge "where failure to do so would result in a miscarriage of justice,"\footnote{160} at Bean’s hearing the "additional evidence" was the only evidence the court heard.\footnote{161} Since no ATF investigation occurred (thanks to the appropriations ban), the onus was on Bean to produce sufficient evidence to persuade the court of his fitness for relief.\footnote{162}

At the hearing, Bean introduced both live testimony and affidavits.\footnote{163} Briefly, the court heard testimony from several law enforcement officials; most significantly, an ATF agent testified that Bean was a "cooperative [firearms] licensee [and maintained] excellent records."\footnote{164} The Police Chief of Port Arthur, Texas, also testified as to Bean’s reputation as a responsible firearms dealer.\footnote{165}

\footnote{Id. (citations omitted).}  
\footnote{155. Id.}  
\footnote{156. Id.}  
\footnote{157. Id. at 837.}  
\footnote{158. Id. at 838-40.}  
\footnote{159. See supra note 154, for Judge Fisher’s view of the court’s role when there is no ATF record to review.}  
\footnote{160. 18 U.S.C. § 925(c) (2000).}  
\footnote{161. See supra note 154 and accompanying text.}  
\footnote{162. See supra note 154 and accompanying text.}  
\footnote{163. Bean, 89 F. Supp. 2d at 838-39.}  
\footnote{164. Id. at 839.}  
\footnote{165. Id.}
Other members of the community testified to his "trustworthiness," and "good character."\(^{166}\)

Affidavits in support of his petition came from what appear to be unimpeachable sources. They included supportive statements from two chiefs of police, a city marshal, an assistant district attorney, and a clergyman.\(^ {167}\)

Judge Fisher concluded that Bean "satisfied his burden to this court in establishing that he 'will not be likely to act in a manner dangerous to public safety' and that 'the granting of relief will not be contrary to the public interest.'"\(^ {168}\)

Of all the judges that considered the Bean case, Judge Fisher was the one most familiar with the circumstances of Bean's Mexican conviction as well as his general reputation.\(^ {169}\) This seems to have worked to Bean's advantage. It would seem that the judge had a personal interest in seeing that Bean was treated fairly. Unfortunately for Judge Fisher, the prevailing law in the Circuits—as well as his own—was not favorable to Bean.\(^ {170}\) Nevertheless, Judge Fisher stretched the relief provision to its breaking point in order to provide the relief to which he believed Bean was entitled.\(^ {171}\)

It is hard to take issue with the conclusion that returning Bean's license would not be "dangerous to public safety." The witnesses who testified in his favor read like a "who's who" of Texas law enforcement.

In fact, during oral arguments before the Supreme Court, Bean's attorney, Thomas Goldstein, informed the Court that the government conceded Bean's fitness for relief.\(^ {172}\) This claim was never challenged.\(^ {173}\)

Then, while engaged in a colloquy concerning whether the appearance by the United States at Bean's court hearing itself constitutes a violation of the appropriations ban, Goldstein stated, "I think it's very important to recognize that this case has proceeded until today on the understanding of the parties that the evidence about Mr. Bean's entitled relief was overwhelming."

\(^{166}\) See id.

\(^{167}\) See id.

\(^{168}\) Id. at 870.

\(^{169}\) Judge Fisher was the district court judge who had jurisdiction over Bean's criminal case while he was serving his Mexican sentence in the federal penitentiary. Judge Fisher also oversaw Bean's supervised release and released him unconditionally after approximately ten months. See supra note 52 and accompanying text.

\(^{170}\) See, e.g., United States v. McGill, 74 F.3d 64 (5th Cir. 1996).

\(^{171}\) See Bean, 89 F. Supp. 2d at 838-40.


\(^{173}\) Id.
Six chiefs of police, a priest, a local . . .” when one of the Justices cut him off by stating, “I don’t know that that’s an argument, I mean, I concede that. . . .” No one, it seems, considered Bean a threat had he been able to retain his firearms privileges and thus his license.

It is difficult to imagine that if Bean had not made as strong a case for relief, Judge Fisher would have determined as a preliminary matter that he had jurisdiction to hear the case, particularly in view of all the precedents to the contrary. Had Bean been a multiple armed robber, for example, the Judge could have easily disposed of this case by merely citing McGill. It would be entirely consistent with Fisher’s expressed view of his obligation under the relief provision to assert jurisdiction over the petition for relief, and then deny it on the facts. It is difficult to imagine that he would do so. The facts of this case, it appears, determined the meaning of the law. A more generous view is that the circumstances of the Bean case demonstrated that Congress could not have possibly intended for the appropriations ban to cause an individual like Bean a permanent disability.

In assuming jurisdiction, Judge Fisher ignored the mandate of the Fifth Circuit, which may be forgivable if he was right. But he was not. At the same time that he criticized the McGill court for giving too much weight to ambiguous legislative history, Judge Fisher himself was presenting a less than complete account of relevant congressional history.

One commentator was particularly critical of Judge Fisher’s own failure to consider legislative history which conflicted with the judge’s own analysis, thereby weakening his argument that the relief provision gives him the jurisdiction to entertain Bean’s request for relief. Judge Fisher placed great emphasis upon the creation of a relief provision as a way by which Congress ameliorated the harsh effects of the firearms disability scheme upon individuals who would pose no threat if they are able to retain their weapons. Although he relied heavily upon statements made to that

174. Id. at 30-31. From a reading of the transcript, which does not identify the particular Justice asking the question, it appears the question was asked by either Justice Kennedy or Justice Breyer. The distinction is inconsequential.
175. Id. at 31.
176. See generally United States v. McGill, 74 F.3d 64 (5th Cir. 1996).
178. See Nelson, supra note 82, at 567.
179. See Bean, 89 F. Supp. 2d at 833.
effect in 1965, when the relief provision was first enacted,\textsuperscript{180} however, surprisingly he never referred to the alternative or supplemental explanation for the passage of the relief provision: Congress’ concern with the possibility that without some relief Winchester Corporation might be out of business.\textsuperscript{181} The judge also ignored Congress’ decision to exempt corporate felons from the appropriations ban.\textsuperscript{182} According to Nelson, this is a significant fact, since exemption of corporations from the ban meant that “Congress [through use of the ban] essentially reverted to the original scheme designed in 1968 [sic] to protect and assist corporate felons.”\textsuperscript{183} Nelson is correct when he claims that Judge Fisher ignored this history; the judge should have included it given the emphasis he himself placed in setting the record straight. Nevertheless, Nelson’s contention that these events mean that Congress used the appropriations ban to return to the 1965 status quo is not entirely convincing.\textsuperscript{184} Even in 1965, when the focus on relief for corporate felons was at its height, Congress did not restrict the relief provision to corporations. Individuals were included, as well.\textsuperscript{185} Nevertheless, Nelson scores some points when he criticizes Fisher for failing to take into account a failed Republican attempt in 1995 to enact legislation that would allow felons to apply for relief if they were willing to pay for the review by the ATF.\textsuperscript{186} The bill passed out of the House Appropriations Committee but was removed before a vote on the floor.\textsuperscript{187}

\begin{flushleft}
\textsuperscript{180} Id.
\textsuperscript{181} See Nelson, supra note 82, at 567.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 566.
\textsuperscript{184} Griffin provides an alternative explanation for why Congress chose to exempt corporations from the appropriations that is entirely consistent with the argument that judicial review under the relief provision is still available to individuals. See Griffin, supra note 85, at 1001-02.
\textsuperscript{185} See Nelson, supra note 82, at 554.
\textsuperscript{186} Id. at 567.
\textsuperscript{187} Id. at 556.
\end{flushleft}

The last notable piece of legislative activity involving § 925(c) occurred in 1995. Republicans on the House Appropriations Committee attempted to pass a provision that would have renewed an individual felon’s ability to apply for relief from their federal firearms disabilities. The provision would have allowed felons to pay a fee to have the ATF review their application. The provision passed out of committee, but the Appropriations Committee removed it less than two weeks later. Although there does not appear to be any discussion of the issue on the House floor, the media, including the Washington Post, noted that the proposal “ran into heavy criticism from law enforcement groups and gun-control activists,” which resulted in its prompt removal from further consideration.
This 1995 legislative failure suggests that the central concern for Congress was not to prevent ATF from wasting money; instead, Congress passed the statute with some other purpose in mind.\textsuperscript{188} Nevertheless, Judge Fisher stated, "[t]he only 'intent' that can be understood from these reports is that Congress was concerned with ATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself."\textsuperscript{189}

While the failed attempt to amend the appropriations ban by placing the financial burden on the petitioner helps to undercut the aforementioned portion of the district court's rationale, the judge

\textit{Id.} (citations omitted).

\textsuperscript{188} Statements by Senator Paul Simon are often quoted by critics of judicial review to indicate that: 1) the purpose of the appropriations ban is to keep guns out of the hands of felons; and 2) that it was never the intent of Congress in enacting the ban to permit the court to exercise judicial review.

\textit{Id.} at 572. (citations omitted); see Pontarelli v. U.S. Dep't of Treasury, 285 F.3d 216, 227-28 (3d Cir. 2002).

Supporters of judicial review are quick to point out that Senator Simon's statements were made during a failed effort in Congress to include a provision in the appropriations ban specifically stating that:

The Committee has modified a continuing provision prohibiting the Bureau of Alcohol, Tobacco and Firearms from acting upon applications for relief from Federal firearms disabilities. The modification holds that refusal to act upon such applications shall not be subject to judicial review for any felon convicted of a violent crime, firearms violation, or drug related crime.

This provision was never adopted. H.R. Rep. No. 660, 104th Cong., 2d Sess. 26 (1996). Nevertheless, there are statements contained in appropriations bans for other years which suggest that judicial review was not contemplated by the drafters. H.R. Rep. No. 104-183, at 15 (1995) states, in pertinent part:

For the fourth consecutive year, the Committee has added bill language prohibiting the use of Federal funds to process applications for relief from Federal firearms disabilities. The Committee understands the controversial nature of the underlying law allowing convicted felons to have their right to own a firearm restored. However, those who commit serious crimes forfeit many rights and those who commit felonies should not be allowed to have their right to own a firearm restored. We have learned sadly that too many of these felons whose gun ownership rights were restored went on to commit violent crimes with firearms. There is no reason to spend the Governments' time or taxpayer's money to restore a convicted felon's right to own a firearm.

This is just one of the problems with trying to interpret the meaning of a statute that is renewed yearly.

also made the rather audacious suggestion that perhaps Congress thought that courts would do a better job at determining who is entitled to relief.190 "[A] court is a better-suited forum for deciding these issues because it is adjudicative in nature."191

Judge Fisher attempted to correct what he perceived as an injustice to Bean—the fact that he was subject to firearms disabilities without recourse to an ATF evaluation—by circumventing the appropriations ban.192 The lawfully enacted ban, however, not only prohibits the ATF from investigating a claim for relief; from the perspective of the relief statute, the ATF cannot provide the critical process and decision which are necessary to trigger the type of remedy which Judge Fisher was so eager to provide.193 The words "additional evidence," "judicial review," and "manifest injustice" presume that the district court has something to consider other than a mere letter to a petitioner stating that Congress prohibits the ATF from acting on the petition.194

Nevertheless, Judge Fisher felt compelled to act. In the subtext of the opinion, the judge seems most concerned that an individual who committed a minor, non-violent crime in a country that provided him with something less than due process can lose his livelihood without any individual consideration of a claim that he is entitled to relief. Judge Fisher's insistence that a court is just as capable as an agency, if not more so, of making such an individual determination is not hubris, but based on actual practice.

Under the provisions of the federal sentencing law, federal district judges are often in a position to consider whether occupational disabilities are warranted with respect to certain convicted felons.195 For example, as a condition of probation or supervised release, a sentencing court may impose occupational restrictions upon a defendant.196 These restrictions, however, must demonstrate a "reasonably direct relationship" between the criminal conduct and the defendant's occupation and that they are "reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage

190. Id. at 835.
191. Id. at 836.
192. See generally id.
193. See generally id.
194. See generally id.
196. Id. § 5D1.3(e)(4).
in conduct similar to that which the defendant was convicted.”

That language of the standard which the judge must apply in determining whether a disability is appropriate is not significantly different in substance from the test the ATF must apply in determining whether to grant relief under § 925(c). The ATF must decide if the applicant “will not be likely to act in a manner dangerous to public safety.”

It is easy to see why Judge Fisher believed that he was fully capable of considering whether Bean was entitled to retain his license. If the ATF refused to act, the judge would do so. Certainly, nothing in the appropriations ban specifically prohibited him from ruling on the matter. Unfortunately, the only authority he had was contained in a statute that Congress effectively nullified.

On appeal, the Fifth Circuit affirmed, reversing its own decision in United States v. McGill, decided only five years before; it relied extensively on the district court’s legal and factual analysis. In the opening page of the appeal court’s opinion, the court telegraphed in not so subtle fashion that it was going to affirm. “The facts of this case illustrate in caps underscored why Congress added the relief provision to the Federal Firearms Act, giving certain convicted felons an avenue to regain the right to possess a firearm.”

This focus on the relief provision—and implicitly Bean’s circumstances—is curious and revealing. The issue before the court concerned the validity of the McGill decision, which explored the legal implications of the appropriations ban. The merits of the relief provision itself were never an issue. While the court did recognize the validity of the government’s argument that “ordinarily an inferior court is not at liberty to disregard the mandate of a superior court,” it then suggested that this is no ordinary situation.

The court explained that, in reviewing Judge Fisher’s opinion, it had to “examine carefully the reasons and analysis by the trial court.”

197. See KUZMA, supra note 69, at 4 (quoting 18 U.S.C. § 3563(b)(5) and U.S. Sentencing Guidelines Manual § 5F1.5(b)).
200. Id.
202. 74 F.3d 64 (5th Cir. 1996).
203. See Bean, 253 F.3d at 235-36.
204. Id.
205. Id. at 237-39.
206. Id.
207. Id. at 237.
208. Id.
court, and our earlier decision in light of, notably, the intervening passage of time and its effect.”

The court relies less on intervening events, i.e., congressional renewal of the appropriations ban, and more on reconsideration of its original finding that Congress repealed the relief provision when it passed the ban. The court revisited legislative history, and noted that during the period the appropriations ban was adopted, a bill was introduced in the Senate to eliminate § 925(c) outright. The proposed bill, called the Stop Arming Felons Act (“SAFE”) was never even reported out of the Senate Judiciary Committee.

The fact that the 1992 SAFE bill was never enacted could not have been news to the court, since McGill was decided in 1996; in this case, however, it took on greater significance. It seemed to demonstrate for the court that Congress deliberately chose the appropriations route—as opposed to alternative methods—to deal with perceived problems in the administration of the relief provision by the ATF. As the court put it, “[a]lthough it obviously has the power, Congress has not enacted legislation eliminating or amending section 925(c).”

Therefore, Bean is still entitled to have a court review his application for relief.

Section 925(c) was enacted for apparently valid reasons, and citizens like Bean are entitled to the rights therein created and authorized unless and until Congress determines to change same . . . . We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights. We further hold that when the BATF notified Bean that it would not act on his petition, his administrative remedies de facto were exhausted. Accordingly, the trial court had jurisdiction to entertain this appeal.

Without question, the Fifth Circuit was moved by Bean’s predicament. To what extent the facts of his particular case prompted the court to overturn its own precedent is anyone’s guess. It appears,

209. Id.
210. See id. at 239.
211. See generally id.
212. Id. at 237.
213. Id. at 237-38.
214. Id.
215. Id. at 238.
216. Id. at 239 (citation omitted).
however, that the circumstances of Bean's case brought home to the Court the full implications of a broad interpretation of the appropriations ban. The Court seemed particularly troubled by the fact that Bean, although barely a felon, would lose his occupation as a result of it. In a footnote referring to Congress' decision to exempt corporations from the effects of the appropriations ban, the Court found parallels between the circumstances faced by corporations and those faced by Bean. "[W]e are presented with a situation that is virtually indistinguishable from that used to justify [corporate exemptions], i.e., absent the ability to possess and sell firearms Bean will lose his business." Finally, the Court concludes its opinion with a particularly strong assertion that Bean is entitled to relief.

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

217. See id. at 240.
218. Id.
219. Id. at 238 n.9.
220. Id.
221. Id. at 240.
222. Id. In their reply brief, petitioners take issue with the Court's conclusion that Bean has lost his livelihood:
While [Bean] had a license to sell firearms before his felony conviction, he earned his livelihood as a used car salesman both before and after his conviction. [Bean] indicated in his testimony [during the hearing in District Court] that he sought relief from firearms disabilities so that he would be able to hunt.

Reply Brief for Petitioners at 8, United States v. Bean, 123 S. Ct. 584 (2002) (No. 01-704) (citation to Joint Record omitted).
This is beside the point. Bean sought to recover his dealer's license, not just his right to possess firearms. His motive at the time of the hearing is interesting, but his intent is what drives the legal claim. Paradoxically, the government is relying on testimony at a hearing that it claims should never have taken place. Moreover, the extent
On December 10, 2002, in one of the first decisions of the 2002-03 Term, the United States Supreme Court unanimously reversed the Fifth Circuit Court of Appeals, effectively ending Bean’s efforts to regain his license. Justice Clarence Thomas authored the Court’s terse decision. The Court ruled that the district courts have no jurisdiction to consider such claims under the relief provision. Relying primarily on the language of § 925(c), the Court held that given that the ATF never actually denied Bean his requested relief—due, of course, to the appropriations ban—the prerequisite for judicial review never occurred. In other words, an “actual adverse denial” by the Secretary of the Treasury must first occur: inaction by the ATF does not amount to a “denial” under the meaning of § 925(c).

The opinion never delved into legislative history, and gave little consideration to the purpose, legitimacy, or meaning of the appropriations ban. In fact, it expressed no concern with the ban, other than taking it as a given. Instead, the Court focused almost entirely on briefly explicating the judicial review provision contained in the relief statute. In the language of the statute, Justice Thomas found the answer to the question of what are the limits of a court’s authority when the Secretary fails to act due to an appropriations ban. Specifically, the answer lies in the very words of the provision as well as in the procedures it mandates. With respect to the language of the provision, the court found that the term “denial by the Secretary” is inextricably linked to the decision whether or not to grant the requested relief. Thus, “denial” cannot mean the same as “inaction.” As the Court put it:

\[\text{to which Bean earned his livelihood selling firearms was never considered by the courts. Unquestionably, though, he was a licensed firearms dealer before his conviction, and a felon unable to hold such a license after the conviction. Finally, a full investigation by the ATF or a court could have taken into account any questions relating to the economic use Bean made of his license. The appropriations ban prevented the former, while the government’s position was that the latter was absolutely prohibited.}\]

224. Id. at 585.
225. Id. at 587.
226. Id. at 588.
227. Id.
228. Id. at 585.
229. Id. at 585-88.
230. Id. at 587.
231. Id.
232. Id.
Grammatically, the phrase "denied by the Secretary" references the secretary's decision on whether an applicant "will not be likely to act in a manner dangerous to public safety," and whether "the granting of the relief would not be contrary to the public interest." The determination whether an applicant is "likely to act in a manner dangerous to public safety" can hardly be construed as anything but a decision actually denying the application.  

Since such a denial presupposes this determination, "denial" can only mean one thing—the Secretary has made a decision. The Court was unmoved by Bean's argument that insofar as he was concerned, refusal of relief has the same practical effect as a denial. The Court's reliance upon the procedural aspects of the relief provision—the other prong on which it based its opinion—also led it to conclude that an "actual adverse decision" is a prerequisite for review. The Court noted that according to the relief provision, an applicant must first petition the "Secretary and establish to the Secretary's satisfaction that the applicant is eligible for relief." Furthermore, the Secretary has the authority to deny relief even if an applicant fully satisfies all the requirements of § 925(c). Since the Secretary is given such broad discretion as to deny relief, even when the merits weigh in favor of the felon, "judicial review... cannot occur without a dispositive decision by the ATF." For one thing, the Court noted, such a requirement follows from the Administrative Procedures Act ("APA"). Judicial review of administrative discretion is governed by the APA when no other standard of review is set out. That is the case with the relief provision. Moreover, under the APA judicial review is rather limited in scope. Judicial review is usually limited to determining whether agency action is arbitrary, capricious an abuse of discretion or otherwise not in accordance with law.

In this case, the existence of the arbitrary and capricious test, "contemplates review of some action by another entity, rather than

233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
239. Id. at 587-88.
240. Id.
an initial judgment of the court itself.”241 How can a court determine if a decision is arbitrary and capricious if no decision is rendered?

Second, the Court reasoned that the type of inquiry and analysis that determine whether relief is appropriate are those that are typically allocated to the executive branch, not the judiciary.242

Whether an applicant is “likely to act in a manner dangerous to public safety” presuppose an inquiry into that applicant’s background—a function best performed by the Executive, which unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation. Similarly, the “public interest” standard calls for an inherently policy-based decision best left in the hands of an agency.243

The Court apparently ignored the irony inherent in its reasoning. After all, the appropriations ban—which placed Bean in this conundrum and led to the Court’s consideration of this issue—was passed in the wake of a scorching report that pilloried the ATF for providing relief in a manner that was, in fact, detrimental to the public interest.244 Congress expressed its own concern with judgment calls made by the ATF in the most oblique way.245 Third and lastly, the Court considered that § 925(c), by its terms, limits a district court’s consideration of “additional evidence” of eligibility for relief to very limited circumstances.246 A district judge exercising

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241. Id.
242. Id.
243. Id. at 588.
244. See supra notes 95-112 and accompanying text. Although the rate of recidivism for those granted relief was rather low—2.6 percent—the crimes they allegedly went on to commit were often very serious ones. It needs to be noted that for the majority of these recidivists, the ATF did not keep track of the disposition of their cases after arrest. The crimes included attempted murder, attempted rape, sexual assault, child molestation, and trafficking in cocaine. Id.
245. Under the relief procedure, ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After ATF agents spend many hours investigating a particular applicant[,] they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task that could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately forty man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for the ATF to investigate and act upon applications for relief from federal firearms disabilities.
246. Bean, 123 S. Ct. at 588.
judicial review can only admit such additional evidence where "failure to do so would result in a miscarriage of justice." Thus, a judge that admits essentially all the evidence in a hearing that reviews an ATF decision is acting beyond the limits of § 925(c).

A judge must first consider the evidence already existing in the record prepared by the ATF. The term "review" signifies just that; it does not allow a judge to grant relief based upon his evaluation of the merits, "absent an antecedent actual denial by ATF." Thus, a judge that admits essentially all the evidence in a hearing that reviews an ATF decision is acting beyond the limits of § 925(c).

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It is difficult to take issue with the Court's decision that Bean was not entitled to judicial review. Whether or not Congress actually intended to repeal or suspend § 925(c) through the appropriations ban is, in reality, a moot question given the effect the ban had upon the ATF's involvement. According to the most common understanding of these words in English language, it simply cannot be said that "failure to consider" Bean's request for relief is equivalent to a "denial." Inaction is the opposite of action, not its equivalent. In fact, the ATF explicitly told Bean that if funds were ever released for them to resume investigations of requests for relief, they would then consider his request. The end result to Bean is, of course, the same—loss of his license. Nevertheless, both the language of § 925(c), as well as its requirement of an investigation conducted by the ATF strongly suggests that the right to judicial review had not been triggered. The primary right contained in § 925(c) is the right to a review by the ATF for relief from firearms disabilities. The appropriations ban effectively elimi-

247. Id.
248. Id.
249. Id.
250. Because § 925(c) unequivocally makes a "denial" by ATF a jurisdictional prerequisite, we must consider whether ATF's inability to act because of the appropriations ban constitutes a "denial." We hold that it does not. "The word 'denial' means an adverse determination on the merits." In contrast, an inability to grant a request is not commonly understood to constitute a "denial." See, e.g., Webster's Third New International Dictionary 602 (3d ed. 1993) (defining a "denial" as a "refusal to grant, assent to, or sanction" or a "rejection of something requested . . .").

252. See U.S. SENTENCING GUIDELINES MANUAL § 5F1.5 (2002).
254. Id.
nated that right.\textsuperscript{255} Judicial review assumes both the existence of that right, and its denial.\textsuperscript{256} No review can take place without it.\textsuperscript{257} While the Supreme Court briefly reviewed the facts leading to Bean's disability, it did not seem to be at all concerned by the merits of his claim for relief before the ATF and the District Court.\textsuperscript{258} Unlike the District Court and the Court of Appeals for the Fifth Circuit, the Court did not allow itself to be influenced in the least by the peculiar facts of Bean's case in its interpretation of the relief provision.\textsuperscript{259} The Court focused entirely on issues of law, not equity.\textsuperscript{260}

**PART FOUR**

The problem with the *Bean* decision is not that it was wrongly decided; the problem is that the case even needed to be brought to court in the first place. The culprit was the appropriations ban. The Court was confronted with a scheme that turned a federal statute into a mirage. The Court had no choice but to treat it as such.

By using an appropriations ban to effectively nullify an otherwise valid statutory, and seemingly enforceable, legislative provision, Congress comes up short. Putting aside the merits of the relief provision, there is something not quite kosher about Congress using its appropriations power to eliminate statutory disability relief. At the very least it is hypocritical to retain a statute which promises relief from a potentially serious collateral consequence of conviction, and yet deliberately refuse to fund its implementation.

The rationales for the appropriations ban are less than compelling. One of several rationales, articulated during committee hearings, is that the money spent by the ATF would be better spent fighting violent crime. There are other methods, however, to control spending the ATF to investigate § 925(c) petitions. The statute itself could be amended to correct this particular problem. For example, Congress could limit the types of applicants eligible for relief to nonviolent and/or first-time offenders. Such a revision of the statute would significantly reduce the total number of appli-

\begin{itemize}
  \item \textsuperscript{255} *Bean*, 123 S. Ct. at 585.
  \item \textsuperscript{256} *Id.* at 588.
  \item \textsuperscript{257} *Id.*
  \item \textsuperscript{258} *Id.* at 585-86.
  \item \textsuperscript{259} *Id.*; see *Bean* v. Bureau of Alcohol, Tobacco & Firearms, 253 F.3d 234, 238-39 (5th Cir. 2001).
  \item \textsuperscript{260} *Bean*, 123 S. Ct. at 587-88.
\end{itemize}
cants, in view of the VPC report indicating that a large percentage of serious felons actually receive relief.\textsuperscript{261} It could also impose a waiting period before a felon is eligible for relief.\textsuperscript{262} Additionally, the statute could require that petitioners for relief pay their own costs for investigation.\textsuperscript{263}

More to the point, budget constraints notwithstanding, Congress has an affirmative duty to fund the ATF's statutory responsibilities under § 925(c). It was Congress, after all, that chose to impose firearms disabilities in the first place.\textsuperscript{264} The relief provision—which was enacted after firearms disabilities were extended to virtually all felonies—was the way in which Congress acknowledged that not all felons who were rearmed were a threat to public safety.\textsuperscript{265} The appropriations ban causes this self-correcting system to cease functioning. Congress denied funding to correct an inequity it created itself by passing an overbroad firearms disability law. The relief provision was not designed to provide the same type of remedy that Congress creates when it seeks to fill a perceived social need in its capacity to provide for the general welfare of its citizens; in that situation, Congress is attempting to solve a problem as well, but not one of its own making. In cases such as these, where Congress creates the inequity, it should be far more constrained in denying relief.

The other rationale for the ban, that a decision by the ATF to grant relief creates an unacceptable risk of harm to the public, is a reason to repeal or amend the provision, not deny ATF appropriations on a yearly basis.\textsuperscript{266} Congress chose not to repeal. Instead, the ban was the preferred means to resolve a conflict over the relief provision between gun control advocates and their opponents.\textsuperscript{267} After all, attempts at eliminating the relief provision

\textsuperscript{261} This strongly suggests that such felons make up a substantial number of applicants. If not, we have the rather bizarre situation that the ATF is less likely to grant relief to serious and violent felons than non-violent ones. See \textit{supra} notes 96-107 and accompanying text.

\textsuperscript{262} Currently, ATF regulations provide for a two-year waiting period from the time of release. There is no reason that this could not be extended to five years or more. See 27 C.F.R. § 478.144(d) (2003). Many states provide such waiting periods before firearms privileges can be restored. See \textit{Office of the Pardon Attorney}, \textit{supra} note 21; see also Pontarelli v. U.S. Dep't of Treasury, 285 F.3d 216, 225 (2002).

\textsuperscript{263} This is unlikely to occur. An attempt in Congress to amend the appropriations ban to allow the ATF to investigate petitions of individuals willing to pay the costs was defeated. See \textit{supra} note 187 and accompanying text.


\textsuperscript{265} \textit{Id.}

\textsuperscript{266} Nelson, \textit{supra} note 82, at 558-59.

\textsuperscript{267} \textit{Id.} at 562 n.92.
outright had failed. While legislators are expected to engage in compromise, particularly in one of the most controversial and contentious issues in Congress, the appropriations ban is not a genuine compromise. It is more like the avoidance of compromise. It is simply too easy for Congress to resolve an important issue of public policy by using its appropriations power in this way. Every year that the appropriations ban is renewed means one more year a true resolution of the conflict over the merits of the relief provision can be avoided. As a result, it seems that law itself is compromised. According to one law stated in § 925(c), felons are entitled to be considered for relief; yet, according to another law, the appropriations ban, they are effectively prevented from seeking that relief. Laws are often inconsistent, but in this case one law effectively negates the other. This disconnect can hardly be called a compromise.

Compromise or not, the method Congress chose to correct perceived problems with the ATF’s performance in carrying out its responsibilities is less than ideal. It results in some unintended consequences. For the felon, this type of de facto repeal of an existing statute hardly provides the notice that society expects of laws concerning criminal matters. One’s first notice of this “repeal” would likely come in a response by the ATF that it has no funds to investigate an individual’s eligibility. While § 925(c) relief appears to be the law, it is merely an illusion; such a statute does little to foster respect for the legal system. The continued existence of the relief provision makes it appear as if relief is indeed still available. For all these reasons, repeal or revision of the relief provision would have been preferable to the appropriations alternative.

Bean’s loss of license may very well have been an unintended consequence of the appropriations ban. It was inevitable, however, that this type of situation would occur when all but corporate

268. Id.
270. Further, for those individuals who believe that permanent civil disabilities are justified by their deterrent value, an appropriations ban is not likely to make them as sanguine as the outright repeal of the relief provision. There is no deterrent benefit to be gained from this method of making relief from firearms disabilities permanently unavailable. While it can be argued that the absence of relief from civil disabilities has little, if any, deterrent effect on behavior, it is axiomatic that whatever deterrent effect it does have is reduced by the possibility—gleaned from reading § 925(c)—that relief is apparently available.
271. As one of the Justices of the Supreme Court stated when he questioned the government’s attorney during oral argument, “Why didn’t [Congress] just repeal the thing, then, because it didn’t have the votes?” Transcript of Oral Argument at 12, United States v. Bean, 123 S. Ct. 584 (Oct. 14, 2002) (No. 01-704).
felons were excluded from ATF relief by the appropriations ban. The relief provision is part of a very extensive, complicated, and somewhat arbitrary system of firearms disabilities. Congress, by effectively eliminating this relief provision without adequately considering its impact in relation to the other provisions in the firearms disability scheme, created an imbalance in the system. To the extent that providing relief to felons is a problem that needs to be addressed, it is a polycentric272 one, such that correction of this one aspect of the statutory scheme by simply eliminating it will inevitably create consequences that may be unintended, undesirable, or unfair.273

The relief provision, by its terms, functions much like a safety net. It permits the ATF to consider each individual's particular circumstances.274 It is an ad hoc means to correct or reevaluate the per se imposition of disabilities upon felons. The ATF can address, on an individual basis, problems, anticipated or otherwise, not addressed elsewhere in the rather complex disabilities scheme.

A. The Adverse Impact of the Appropriations Ban Upon Occupations

Without funds, the ATF is barred from considering the fact that a felon is seeking to recover firearms relief in order to carry out an

272. A polycentric problem has been described as follow: "A polycentric problem is one that cannot be solved on a step-by-step or issue-by-issue basis because decisions as to each issue affect all the other issues. Instead, polycentric problems can only be solved by addressing all the issues simultaneously." David Urban, Customs's Proper Role in Strict Product's Liability Actions on Design Defect, 38 UCLA L. REV. 439, 450 (1990).

273. Justice Robert Jackson, writing in Michelson v. United States, 335 U.S. 469 (1948), provides an apt description of the types of problems which arise when an attempt is made to correct a legal problem in isolation without regard to the structure as a whole. Speaking in that case of the somewhat illogical system of rules governing the admissibility of character evidence, he states:

We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one missshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

Id. at 486. Much of what he states can be applied in the context of the firearms disabilities scheme. The "missshapen stone" is, of course, the relief provision. His advice on a matter entirely unrelated to that scheme should have been considered by Congress in 1992, before it acted, and should be considered by Congress now, because it continues to pass the same ban on ATF funding on an annual basis.

occupation—not just a hobby. Reviewing requests for relief on the basis of occupational consequences resulting from firearms disabilities has been an important function of the ATF. In the 1992 Violence Policy Center Report listing a sample of one hundred cases in which the ATF granted firearms relief to convicted felons, eleven of those applicants (including two corporations) sought relief in order to pursue various occupations which required access to firearms.\(^{275}\)

Four of the felons were licensed federal firearms dealers, while one of them sought such a license.\(^{276}\) Of the others, three applicants wanted to be able to operate pawn shops (presumably involving guns): one needed a firearm because he had been elected a state constable; another needed a firearm in order to work as a hunting guide; and one needed a gun to protect his fish market located in a rough neighborhood.\(^{277}\) The crimes for which these applicants were convicted varied extensively: burglary, tax evasion, drug dealing, manufacturing moonshine, illegally purchasing food stamps, violating federal firearms licenses, making illegal campaign contributions, killing a longhorn sheep, and abandonment of wife and child.\(^{278}\) Most of these crimes were not considered serious enough to warrant sentences longer than six months, if that.\(^{279}\) One sentence for burglary was three years imprisonment: the felon who served that sentence was eventually elected constable.\(^{280}\)

The merits of the ATF’s decision to restore firearms privileges to these felons, or any one of them in particular, is not the present issue. What these cases demonstrate is that a significant number of felons face occupational disabilities as a result of firearms restrictions. Given the importance of maintaining legitimate employment as a means to reduce recidivism, any fair consideration of the relative merits of a relief provision must take into account this important function of such a provision.

Given the serious consequences which result from occupational disabilities, it is particularly striking that the appropriations ban specifically excludes corporate but not individual licensees from its restrictions on ATF investigations. While not all individuals seeking relief for occupational purposes are licensees, those that are—

\(^{276}\) Id.
\(^{277}\) Id.
\(^{278}\) Id.
\(^{279}\) Id.
\(^{280}\) Id.
like Bean—should expect to be treated in the same manner as corporate ones.

Not only have the origins of the relief provision been traced to Congress' concern with protecting firearms-related business interests—albeit corporate business interests—but this concern has carried over into the specific provisions of the current version of the relief statute. These provisions, in both the statute itself as well as the ATF's regulations, single out all licensees, corporate, and individual. The statute provides all licensees added protection from the adverse effects of the federal firearms disabilities generally.

A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter [18 USC §§ 921 et seq.], who makes application for relief from the disabilities incurred under this chapter [18 USC §§ 921 et seq.], shall not be barred by such disability, from further operations under his license pending final action on an application for relief filed pursuant to this section.

Although licensed dealers and manufacturers are covered by both the disabilities and relief statutes, they are given preferential treatment under the terms of the latter. In this regard, they enjoy favored status. Under the terms of § 925(c), a typical felon seeking relief has already been deprived of his privilege to possess firearms. If he wants relief he has to petition the ATF. Only if he obtains that relief is he then legally entitled to possess weapons again. A licensed felon, however, can continue to conduct his business even after conviction as long as he files a timely claim for relief. According to ATF regulations, the dealer's claim for relief has to be filed within thirty days of his conviction. He can then continue to operate his business during the pendency of his

281. Like almost every other assertion made about the history of the firearms disability scheme, this one is hotly contested. See supra notes 82-85 and accompanying text. One can safely assume that at least some—if not all—of the motivation behind the original 1965 relief provision was driven by concern for keeping Winchester in business.
283. Id.
284. Id.
285. Id.
286. Id.
287. Id.
288. Id.
290. Id. § 478.144(i)(1).
application. If his relief is eventually denied, he still has thirty days from the date of denial to conduct his business.\textsuperscript{291} Apparently, this is designed so that he can wind down his business operations.\textsuperscript{292}

Significantly, neither Congress, nor the ATF distinguishes between corporations and individuals when it comes to firearms licensees or manufacturers.\textsuperscript{293} The impact of disabilities on either is the same; individuals will be out of work. The fact that Congress, in the relief statute, recognized the occupational implications of disabilities to both licensed individuals and corporations renders the appropriations ban with its sole corporate exemption rather inconsistent.\textsuperscript{294} Why distinguish between the two types of felons, placing Bean and other legitimate gun dealers into a categorical limbo? One answer that has been tendered is that a corporate felon is not a living, breathing entity, and thus not as likely to be a danger if it is rearmed in the same way as an individual felon.\textsuperscript{295} This argument has some appeal, but its appeal is strictly superficial. First, it fails to account for the fact that under the provisions of the relief statute individual dealers had always been allowed to continue operating even after conviction, during the pendency of the investigation for relief, and even for a short time after a denial for relief. This provision not only argues for parity on historical and statutory grounds, but also suggests that at least when it comes to individual licensed dealers, there exists a presumption that they do not pose as grave a threat to the public as other individuals. The existence of the provision is also an implicit recognition that firearms disabilities which impact occupations are more burdensome than disabilities that do not.

Second, the appropriations ban fails to recognize that corporations can only commit felonies through the actions of their employees.\textsuperscript{296} When Olin Mathieson, or any corporation for that matter,

\textsuperscript{291} Id.

\textsuperscript{292} United States v. Douglas, 974 F.2d 1046, 1047-48 (9th Cir. 1992) (discussing the “winding down” exception under 18 U.S.C. § 925(B)).

\textsuperscript{293} See 27 C.F.R. § 479.11. Under the statute, “person” is defined as “a partnership, company, association, trust, estate, or corporation, as well as a natural person.” Id.

\textsuperscript{294} It has been argued, unsuccessfully, that this distinction between corporations and individuals, generally, violates equal protection. See Burtch v. U.S. Dep’t of Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997) (“Congress could rationally have believed that corporations guilty of corporate crime present less danger to the community than do individual felons.”).

\textsuperscript{295} Burtch, 120 F.3d at 1090.

\textsuperscript{296} 1 Kathleen Brickey, Corporate Criminal Liability: A Treatise on the Criminal Liability of Corporations, Their Officers and Agents 8 (2d
is convicted of a state or federal crime, its culpability is based on derivative liability. In federal prosecutions, derivative liability is based upon the principle of *respondeat superior.* In state prosecutions, it is usually some variation of the Model Penal Code approach. In any event, it means that some living, breathing human being, or often beings—the very kind of beings that justify the exclusion of individual licensed felons from the exemption in the appropriations ban—committed a felony for which the corporation is being held accountable and for which it can lose its firearms privileges. The individual employee, as well as the corporation, are equally liable. In reality, often the corporation alone is charged because: 1) a corporation facing only a fine may be more likely to plead guilty than an individual; or 2) the individual or individuals who committed the crime are unidentified; or 3) the individual who is caught is only a minor official instead of the actual corporate officer responsible. The point is that a particular individual, although guilty of a crime, sometimes avoids not only punishment, but also firearms disabilities that follow. This rather fine distinction between a corporate licensee and an individual licensee is hardly sufficient to warrant such disparate treatment in an appropriations ban, particularly when the relief statute treats them identically.

ed. 1991) ("Corporate liability for crime is derivative liability in the sense that the acts and intent of corporate officers and agents are imputable to the corporate entity.").

297. See id. In the Olin Mathieson case, there was a conviction of an "associated individual," as well. 368 F.2d 525, 525-26 (1966).

298. KATHLEEN BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS 27 (2d ed. 1995) ("The only general limitation on corporate liability under the respondeat superior rule is that the agent who commits the crime must be acting within the scope of his or her authority and on behalf of the corporation.").

299. The Model Penal Code takes a more conservative approach, requiring general involvement in the illegal activity by a "high managerial agent." See MODEL PENAL CODE § 2.07 (1)(c).

300. In United States v. Wise, 370 U.S. 405 (1962), the individual defendant in a Sherman Act prosecution against both him and his corporation unsuccessfully argued that since the Act defines "person" to include corporations it must therefore exclude individuals acting on its behalf. The Court was unreceptive to this absurd argument. Id. at 407.


302. Interestingly, even if the agent is acquitted of the underlying criminal conduct, the corporation can still be convicted. See 1 BRICKEY, supra note 296, at 10. ("Notwithstanding that corporate liability for crime is predicated upon ascribing the acts and intent of corporate agents to the corporation, however, corporate criminal liability is not contingent upon conviction of the wrongdoing agent.").
Thus, while corporations are different than individuals, it is not a significant difference for relief purposes. There is no real difference between a corporate officer in a firearms factory—who eludes culpability by shifting it to the corporation—and a licensed gun dealer who is seeking relief.

Congress, in designing the appropriations ban, reasoned otherwise. Nowhere else does this distinction appear to exist. At the very least, the appropriations ban should have remained consistent with the structure of the relief provision, and included all licensed felons, corporate as well as individual. Indeed, given the detrimental effect the ban will have on those individuals seeking relief from firearms disabilities for occupational purposes who are not licensed, Congress could justifiably include those individuals as well in the exemption from the ban. It would be consistent with Congress’ concern with occupational relief in the statute. Using the data in the VPC report, one can speculate that these individuals would comprise only about ten percent of the number of petitions filed for relief that had been filed in the past; that number would be a far more manageable group, less of a drain on ATF resources, and more worthy of consideration.

B. The Adverse Impact Upon Relief From Illegitimate Foreign Convictions

The appropriations ban denies the ATF another particularly important responsibility under the relief provision—evaluation of the validity of a foreign conviction. This responsibility was thrust upon the ATF by the prevailing federal case law that foreign convictions fall within the purview of the federal disabilities statute.

The rationale for the rule that the term “any court” in the firearms disability statute includes foreign as well as domestic courts

303. The exemption for corporations in the appropriation ban is not, by its terms, limited to corporate licensees. Nevertheless, it would be odd if Congress had an interest in exempting non-licensed corporations from the ban, particularly in view of the history of the relief provision and its role in saving Winchester. It is possible, however, that a corporate felon not involved in the sale, distribution, or manufacturing of firearms might seek relief so that it can, for example, continue to arm its security guards. Nevertheless, the exemption of all corporations from the appropriations ban does not diminish an individual licensee’s claim for favored treatment given the terms of the statute.

304. See supra note 280 and accompanying text.
   “It shall be unlawful for any person . . .
is expressed well in one of the leading cases in this area, *United States v. Winson.*\(^{307}\) The court held:

Since the object of the statute is to prevent the possession of firearms by individuals with serious criminal records, we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States. Moreover, we do not perceive any congressional intent to exclude from the Act's coverage a class of felon whose unlawful conduct occurred outside of this country.\(^{308}\)

It is difficult to argue with the contention that an individual who has committed violent crimes in a foreign country is less likely to be a threat than someone who committed the same crime in the United States. Cases that have dealt with the issue of foreign convictions in the context of firearms disabilities almost always involve defendants convicted of serious crimes in those countries.

While courts recognize that a foreign conviction may have been obtained in violation of the defendant's civil rights or contrary to [a] cherished principle of American constitutional law,\(^{309}\) they have relied upon § 925(c) as the method by which a foreign felon can assert that his conviction was unlawfully obtained.\(^{310}\) This should be done, the Supreme Court noted, before the foreign felon attempts to obtain a firearm.\(^{311}\)

The relief provision, by its terms, is broad enough to fully assay the validity of a foreign conviction, and the necessity of imposing firearms disabilities. The ATF can take into account that a foreign felony conviction was for a relatively minor offense by American standards.\(^{312}\) This was the case with Bean's conviction. It was also significant that the crime was eventually reduced to a misde-

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\(^{1}\) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

\(^{307}\) 793 F.2d 754, 758 (6th Cir. 1986).
\(^{308}\) *Id.* (citations omitted).
\(^{309}\) *Id.* at 757.
\(^{310}\) *Id.* at 758.
\(^{311}\) Lewis v. United States, 445 U.S. 55, 64-65 (1980) ("It seems fully apparent to us that the existence of [18 U.S.C. § 925] suggests that Congress clearly intended that the defendant clear his status before obtaining a firearm, thereby fulfilling Congress' purpose 'broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous.'") (citation omitted).
The crime with which Bean was charged in Mexico may not have required mens rea, a fundamental element of felonies in the United States.

The ATF could also consider the means used to obtain the conviction, i.e., whether it was obtained in a manner consistent with fundamental fairness or basic notions of due process. Such an inquiry would include an examination of the conduct of foreign officials during the investigative stage of the criminal proceedings, as well as during the trial stage. For example, a confession may have been obtained through subterfuge, brutality, or other questionable methods. The ATF could also consider whether the sentence and subsequent punishment comported with evolving standards of human decency.

To impose a civil disability upon an individual who can make a credible claim that his conviction violates basic norms of state conduct would render our system somewhat complicit in the barbaric conduct leading to conviction. After all, without the conviction—which may never have survived an appeal in the United States—there would be no basis for the disability. If the conviction is rendered unreliable as well, not unusual where the suspect is denied basic rights, a stronger case would be made for relief.

In the Bean case, for example, District Court Judge Fisher found that Bean was essentially compelled to confess when he was forced to sign a document he could not understand. In the United States, such a confession would surely be suppressed. The alleged absence of a trial or some other judicial proceeding giving Bean an opportunity to be heard would be another important consideration. Given the appropriations ban, however, Bean and others like him are left with a compelling argument of injustice without a forum such as the relief provision to advance it. He was denied a forum in Mexico; and now is denied one in the United States.

This opportunity was critical for any foreign felon considering either entering a profession where firearms are necessary, or merely seeking to obtain a firearm for other lawful purposes. The reason is not only because foreign felons are subject to firearms disabilities, but also because a defendant charged as “a felon in

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314. 18 U.S.C. § 925(c).
316. Id.
possession” cannot claim he is not a “felon” because his earlier conviction was invalid.\textsuperscript{317}

Since this alternative is no longer available, a foreign felon is unable to obtain relief from disabilities caused by an invalid foreign conviction; assuming the foreign conviction is valid, he cannot even obtain a denial by the ATF which would at least put him on notice that he is subject to criminal penalties if he violates the firearms disability provision. In either case, he is presumptively a felon.

Thus, the appropriations ban wreaks havoc upon a judicial scheme which resolves to balance the goal of preventing dangerous foreign felons from possessing weapons against a foreign felon’s right not to be bound in the United States by convictions obtained through unacceptable foreign conduct.

Individuals like Bean are particularly prejudiced by the inability to seek relief from foreign convictions created by the appropriations ban. Not only is he especially harmed because his occupation is on the line, but also because the circumstances of his conviction as well as the relatively minor nature of his crime make him an ideal candidate for relief.\textsuperscript{318}

\section*{C. Exceptions and Exemptions: The Futility of the Appropriations Ban}

Prior to its nullification by the appropriations ban, the relief provision partially managed to alleviate the inequitable, inconsistent and ineffectual treatment of felons under the federal firearms disabilities scheme.\textsuperscript{319} The firearms disabilities statute contains some very formidable exceptions and exemptions. By virtue of the appropriations ban, not only is unequal treatment exacerbated, but Congress has also effectively eliminated a relatively innocuous relief provision, all the while retaining major exceptions that significantly undermine the fundamental purpose of the federal disabilities scheme—keeping guns out of the hands of violent and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{317} \textit{Id.}
\item \textsuperscript{318} If Bean’s claim were ever to be considered by the ATF, disability relief would probably be granted. If one were to compare the circumstances surrounding Bean’s conviction with the circumstances of the one-hundred felons referred to in the VPC report, all of whom were granted relief, Bean would rank among the most deserving of relief. Domestic felons—those convicted in state or federal court—have numerous ways to challenge their convictions through the appeals process. A felon convicted in a foreign country may not. \textit{See Violence Policy Ctr., supra note 96.}
\item \textsuperscript{319} Nelson, \textit{supra} note 82, at 554-55.
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\end{footnotesize}
dangerous felons. What follows is a description of those exemptions and exceptions unaffected by the appropriations ban.

1. White Collar Crime Exemption

By definition, not all felons are subject to the federal firearms disabilities. One group exempted is individuals convicted of certain white-collar offenses. One can argue that this is justified because this category of felons is so unlikely to engage in violent crimes that they do not need to have their firearms rights removed. The trouble with this rationale is that not all white-collar felons are included within the statutory exemption. Tax fraud, for example, a paradigmatic white-collar crime, is not covered by the exemption. In the statistics gathered by the VPC, a significant number of applicants were convicted of tax-related felonies as well as other white-collar crimes. This inconsistency, however, was somewhat ameliorated by the former availability of the relief provision.

As a consequence of the appropriations ban, an inconsistency in the law now appears to be an injustice. Felons convicted of unexempted white-collar crimes have no avenue for relief. Their counterparts do not even need relief. They have suffered no disability from the very start.

Not only are certain white-collar criminals subject to the appropriations ban, but also so are other individuals convicted of other non-violent or minor felonies. If the rationale for exempting some categories of felons from disabilities due to the non-violent nature of their crimes is a valid one, there appears to be no principled reason not to exempt virtually all white-collar crimes as well as non-violent crimes as well. Given that such felons have no recourse to the relief provision under the current appropriations ban, perhaps now is the time for Congress to exempt those individuals from the appropriations ban or the disabilities statute itself. This should be done for the sake of consistency, if nothing else.

It is, however, unlikely to happen. According to the VPC report, even individuals who had been convicted of non-violent felonies went on to commit more serious crimes after obtaining firearms relief. Given the enormous influence of this report upon Con-

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320. The term "crime punishable by imprisonment for a term exceeding one year" does not include, "(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . ." 18 U.S.C. § 921(a)(20) (2003).
321. See Violence Policy Ctr., supra note 96.
323. See Violence Policy Ctr., supra note 96.
gress' decision to enact the appropriations ban in the first place, it is hardly likely that Congress would remove a substantial portion of felons from the operation of the ban. This leaves only one question: given the unpredictability of criminals, non-violent as well as violent, how can Congress justify exempting any felons, even white-collar ones, from the firearms disabilities statute?

2. Law Enforcement Exemption

Another exception to the disability provision is in cases where the felon receives his firearm from a governmental agency. The purpose of this exception is to allow states or the federal government to arm employees who are otherwise barred by the federal disabilities provision. This exception is used when state or federal laws permit felons to seek to become or remain police officers, prison guards, probation officers, or other types of peace officers. The very existence of this exception demonstrates that Congress was not only aware that firearms disabilities can have devastating consequences upon one's profession, but also felt prompted to provide relief to those individuals. Congress could also have been prompted to enact this exception by a desire to provide the government discretion to hire whomever it wishes to perform law enforcement duties.

3. Exception for State Restoration of Civil Rights

In theory, the federal firearms disability statute applies to virtually all felons. Nevertheless, there is quite a large exception. According to § 921(a)(20), individuals who have had their "civil rights restored" are no longer covered by the disabilities provision, unless the "restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." This ex-

324. The provisions of this chapter [18 U.S.C. § 921-29], . . . shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.
325. Id.
326. (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include . . . Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly pro-
ception for restoration of civil rights significantly limits the number of felons actually covered by federal firearms disabilities.  

For a felon convicted in federal court, only a pardon will restore his firearms privileges—a rare occurrence indeed.  

For state felons, however, the prospect of restoration of firearms privileges is far brighter. Although some states impose a lifetime firearms ban upon felons, unless a pardon is issued, a number of other states have provisions for the restoration of civil rights which include firearms privileges. Restoration can occur automatically, upon release from sentence or after a waiting period, or it can occur as a result of an administrative hearing. Some states, in fact, have no civil disabilities at all; thus, there are no rights to restore. While some states limit restoration of state firearms privileges to non-violent crimes, others have no such limitations.

Thus, an individual convicted of a felony in a state where firearms disabilities are lifted upon release from prison will not be subjected to federal firearms disabilities either. His counterpart in a state where state firearms disabilities are permanent will, in addition to state firearms disabilities, be subject to federal firearms disabilities. One very tangible consequence of this disparity is that only in the latter case will the individual be charged with the federal firearms crime of being a felon in possession of a firearm if he happens to go hunting one day.

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327. Id. § 921(a)(20).
328. Id.
329. Brief for Respondent, United States v. Bean, 123 S. Ct. 584 (2002) (No. 01-704), lists fourteen states where firearms rights are restored automatically, and five states where firearms rights can be restored by judicial action. Id. App. For a comprehensive listing of state laws regarding restoration of firearms disabilities, see Office of the Pardon Attorney, supra note 21.
331. See id.; see also Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records, 30 Fordham U. L. J. 0000, 0000 (2003).
333. 18 U.S.C. § 922(g)(1)
334. The statute states, in part:
(g) It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition
What does this mean in the context of a Bean-type scenario? Had Bean been convicted of a felony in Vermont—where there are no firearms disabilities—he would have retained his federal firearm's dealer's permit. While § 925(c) hardly corrected the imbalance caused by this statutory exception, it could correct the most blatant inequities caused by a disabilities scheme that penalizes you only if you are convicted of a crime in the wrong jurisdiction.

The most significant point about the civil rights restoration provision is that state law determines whether an individual is to be subjected to a federal firearms scheme. Not only does this compromise uniformity, it also promotes unequal treatment among felons. Whether a felon is subject to a federal disability, and the related criminal statutes, is determined by the vagaries of state law! Prior to the adoption of the appropriations ban, all felons were at least provided a means to seek relief from disabilities regardless of their individual state's law. The effective elimination of the relief provision meant that this method for leveling the playing field no longer exists.

In view of the appropriations ban, this major exception is particularly problematic. It directly puts into question the efficacy of the federal disability scheme. For example, because state restoration laws vary, federal firearms disabilities do not apply uniformly.\textsuperscript{335} Therefore, the purpose for which they were passed (keeping guns out of the hands of violent felons) can only be accomplished hazily at best. However misguided the ATF's decisions in individual § 925(c) petitions, which prompted the ban, it could never come as close to defeating the purpose of the firearms disabilities scheme as that achieved by this, the wholesale exception for all felons living within particular states.

The numbers signify this. The ATF restored approximately 7,000 licenses in a five-year period.\textsuperscript{336} Given that hundreds of thousands of felons are released every year—some to states which automatically restore civil rights, the number of felons who


\textsuperscript{336} See supra notes 96-107 and accompanying text.

\textsuperscript{337} Currently, approximately 600,000 felons are released from prison each year. See supra note 17 and accompanying text.
have had firearms rights restored under § 925(c) is a miniscule percentage of the total.338

Before the appropriations ban was enacted, the relief provision ameliorated some of these problematic aspects of the federal disability scheme; the appropriations ban only exacerbates it. If Congress were truly determined to eliminate a “second chance club” for felons,339 the elimination of this exception would have had a much greater impact than the ban. Likewise, if Congress were genuinely troubled with the ATF’s arbitrary decisions, they should have been more concerned with the procedures states used when restoring civil rights to felons. More troublesome even are states that automatically restore civil rights. Congress was clearly aware of the problem created by state procedures for restoration of civil rights.340 In fact, members of Congress on several occasions sought to modify the exception for felons who have had their civil rights restored.341 All such efforts have been unsuccessful.342 As it stands, Congress will apparently trust state administrative bodies—over whom they have little authority—to correctly determine which felons are entitled to federal relief, but not their own agen-

338. See Brief for Respondent at 45 n.19, Bean (No. 01-704) (citing Morning Edition: BATF Felon Gun Program A Campaign Issue?, supra note 335) (reporting view of then-Representative Charles Schumer, chair of the House Committee overseeing ATF that “the bigger problem is not the BATF program... but that many states have their own programs to re-arm felons. Tens of thousands get their gun rights back automatically as soon as their sentences are complete.”); David C. Morrison, How Even the Strange Can Get Rearmed, NAT'L J., Mar. 21, 1992, at 702 (reporting ATF official’s statement that “the real problem lies not in Washington but in state capitals... because convicted felons whose civil rights have been restored by state laws are exempted from the gun ban.”).

339. That is the term used by the VPC for the relief provision. Needless to say, it is a pejorative one. See VIOLENCE POLICY CTR., supra note 96.

340. “Congress also was fully aware of the effect of [state restoration provisions] in the debates over the appropriations measures, but notably did not adopt proposals to repeal that provision.” Brief for Respondent at 45, Bean (No. 01-704) (citations omitted).

341. See id. For example, in 2000, an effort was made to amend the civil rights restoration provision contained in 18 U.S.C. § 921(a)(2) to exclude felons who have been convicted of serious drug offenses or violent felonies. Moreover, before any eligible felon will be excused from the firearms disabilities statute, “the authority that grants... the restoration of civil rights... expressly authorizes the person to ship, receive, and possess firearms; and expressly determines that the conviction and the person's record and reputation are such that the person is not likely to act in a manner that is dangerous to the public safety, and that the granting of the relief is not contrary to the public interest.” Brief for Respondent at app., Bean (No. 01-704) (quoting ENFORCE Act, S.2338, 106th Cong., 2d Sess. § 301 (2000)). Interestingly, states would have been bound by the same standard that applied to felons under the federal relief provision.

342. See Brief for Respondent at 45, Bean (No. 01-704).
cies. That, of course, assumes that an administrative decision is even necessary. The United States Supreme Court held that in those states where state civil rights are automatically restored, no specific state determination of rehabilitation is needed before a felon falls within the exception contained in 18 U.S.C. § 921(a)(20).\footnote{343. Caron v. United States, 524 U.S. 308, 313 (1998).}

The white collar and law enforcement exemptions also put into question the legitimacy and fairness of firearms disabilities. From an occupational standpoint, the scheme explicitly allows an individual felon to pursue some occupations involving firearms, but not others. Moreover, non-violent felons are not all treated equally; some are specifically exempted, while others are placed in the same category for disabilities purposes as dangerous felons. Not even all white-collar felons are treated equally!

**Conclusion**

The ability to work in our society cannot be overestimated. This is even more true for individuals with a criminal background. To deny a felon access to an occupation solely by virtue of his status is unfair. It is unfair to Thomas Bean; it is unfair to every other felon as well.

Thus, while in some ways the circumstances leading to Thomas Bean's loss of license are rather unique, the most critical aspects of his case are emblematic of the inherent nature of many occupational disabilities. His disability was imposed automatically, by the operation of a statute. There was no requirement of a nexus between the nature and circumstances of his conviction and the disability imposed. His only means of regaining his license was a statutory provision that allowed him to petition the ATF for relief. Since 1992, however, Congress has prohibited the ATF from using any of its appropriated funds to investigate such petitions.

This appropriations ban, which has been renewed annually, was a political compromise—or, arguably, a failure of compromise—between those in Congress who wanted to eliminate the relief provision outright, and those who sought to retain it.

\footnote{Nothing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights to this particular offender. While the term 'pardon' connotes a case-by-case determination, 'restoration of civil rights' does not. Massachusetts has chosen a broad rule to govern this situation, and federal law gives effect to its rule. All Courts of Appeals to address the point agree. Id. (citation omitted).}
Although there is an exemption for corporate felons in the appropriations ban, there is none for individuals for whom the ability to possess firearms is necessary for their livelihood. Congress, in its rush to correct one problem—the ATF's alleged mishandling of its discretion by granting relief to dangerous felons—has created another one. Individuals who might otherwise qualify for relief under a more restrictive application of the relief provision are lumped into the same group as violent career criminals who have no legitimate occupational need to possess firearms. In enacting the appropriations ban, Congress has cast too wide of a net.

The Fifth Circuit expressed its dismay that Congress seemed to cut off the only remedy available to Bean when it enacted the appropriations ban. Therefore, they provided him with a remedy. They were criticized by their colleagues on the Third Circuit for acting out of sympathy for Bean:

The Bean panel repeatedly expressed sympathy for the felon whose application was at issue. For instance, it said that because the felon was a licensed firearms dealer prior to his conviction, it would be “inequitable” for him to be unable to resume his business while a corporation that sells firearms may seek relief under § 925(c). However, the panel did not cite the Ninth Circuit's rejection in Burtch of a felon's contention that Congress violated the Equal Protection Clause by distinguishing between individual and corporate applicants. Nor did it cite the Supreme Court's statement that “Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm.” It appears that the Bean panel was frustrated that Congress left § 925(c) intact but barred individual felons from taking advan-

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344. There are other inconsistencies in the overall disabilities scheme. Although there is an exemption in the disabilities statute itself for some white collar crimes, there is no exemption for those who commit minor, non-violent crimes. Although there is an exception for felons who receive their firearms through official channels so they can continue to be peace officers, there is no exception for individuals who wish to engage in private occupations requiring access to weapons. Finally, although there is an exception for individuals who have had their civil rights restored, there is no exception for those convicted in foreign countries in violation of their civil rights.

345. While being a licensed gun dealer may not be a favored occupation, it is a lawful occupation nonetheless.

346. Bean v. Bureau of Alcohol, Tobacco & Firearms, 253 F.3d 234, 240 (5th Cir. 2001)

347. Id.
tage of the statute’s relief provision by (seemingly perpetually) continuing the appropriations ban.\textsuperscript{348}

The \textit{Pontarelli} court was correct on the law, as the Supreme Court would soon confirm. Nevertheless, the Fifth Circuit’s decision plainly reveals an intuitive sense of injustice whenever the law arbitrarily denies an individual his occupation merely because he is a felon. The fact that the injustice does not amount to a constitutional violation does not make it acceptable. It falls into a gray area of bad legislation, where many other occupational disabilities reside.

In his concurrence in \textit{Pontarelli}, Judge McKee noted the incompatibility between the appropriations ban and the relief provision. Congress “created a situation that leaves the jurisdictional grant [contained in the relief provision] in place while making its exercise absolutely impossible.”\textsuperscript{349} For individuals, the tension between the two laws is also problematic. They are placed in a kind of suspended legal state.

Accordingly, persons seeking relief from the federal firearms-disability can still petition the Secretary for relief from that disability under § 925(c). No one suggests that Congress repealed that portion of the statute. Rather, Congress has placed the applicant as well as the courts in a Catch 22 reminiscent of a Kafka novel.\textsuperscript{350}

Mixed literary allusions aside, Judge McKee effectively makes his point. To those for whom firearms disabilities mean an end to the pursuit of a lawful occupation, this is more than problematic. It is unconscionable.

\textsuperscript{348} Pontarelli v. U.S. Dep’t of Treasury, 285 F.3d 216, 224 n.16 (3d Cir. 2002) (citations omitted). This type of criticism has been made elsewhere.

\textsuperscript{349} Id. (McKee, J., concurring).

\textsuperscript{350} Id. at 236 (McKee, J., concurring) (emphasis added).