

# JUDICIAL REVIEW UNDER 18 U.S.C. § 925(c): ABROGATION THROUGH APPROPRIATIONS?\*

## I. INTRODUCTION

Johnny Hunter has a problem.<sup>1</sup>

Johnny became familiar with guns at an early age. He has hunted since he was twelve years old. He also collects guns and attends gun shows whenever possible. Over ninety percent of his firearms collection is commemorative and will never be fired. He is an NRA certified gun instructor.

When he was twenty-one years old, Johnny bought a car motor for \$250. Unfortunately, the motor was stolen, and police arrested Johnny. Johnny pleaded guilty to receipt of stolen goods, a felony. The county judge ordered him to pay restitution and placed him on probation for two years. Johnny served his probationary period and has remained out of trouble for over twenty years.

Last year, Johnny went to the Bureau of Alcohol, Tobacco, and Firearms (“BATF”) to apply for a gun dealer’s license. Unbeknownst to him, however, federal law prohibits a person convicted of any crime carrying a possible sentence of over one year in prison from dealing or possessing firearms.<sup>2</sup> When the BATF Special Agent learned of Johnny’s gun collection, he denied Johnny’s application for a federal firearm dealer’s license. The federal government then charged Johnny with unlawful possession of firearms, a felony. Johnny pleaded guilty before the district court and received a minimal sentence consisting of a \$250 fine. After reading 18 U.S.C. § 925(c), Johnny learned that he could petition BATF to have his firearms privileges reinstated.<sup>3</sup> He applied for relief from his federal firearms disabilities only to have BATF refuse even to consider his application. Although the statute says

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\* Inspired by the free spirit and loving memory of Shawn R. Carmichael. *Hope the huntin’ fine, bro.*

1. The facts of this hypothetical substantially mirror those of *Rice v. United States Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995). *Rice* is discussed *infra* at Part II.C. Some liberties have been taken for literary purposes.

2. See 18 U.S.C. § 922(g)(1) (1994), stating in part:

It shall be unlawful for any person . . . 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.

*Id.*

3. For the relevant text of 18 U.S.C. § 925(c), see *infra* note 13.

that he may petition BATF, an agent told him that since 1992, Congress has cut off all funding necessary to act on his application. Therefore the Bureau would not help him.

Johnny did not get discouraged because he learned that the statute explicitly gave him the right to seek judicial review of the denial of his petition. Moreover, the statute empowers the court to hear additional evidence if necessary to prevent a miscarriage of justice. Johnny was optimistic for not only was he well-liked and respected in the community, but recently the Governor of Pennsylvania pardoned his conviction for the twenty-year-old state offense. Surely, Johnny thought, a federal court would give him a hearing. The statute appears at least to give the court the discretion to do so.

So what is Johnny's problem? Johnny's problem is that many courts have decided that because Congress eliminated funding to BATF, the courts likewise lack the power to hear these cases. If Johnny resides in a circuit that sides with the majority, the doors of the federal courthouse are closed. Although Johnny has ample proof of his trustworthiness and the law allows consideration of such evidence, he has nowhere to turn to restore his federal firearms privileges.<sup>4</sup>

This Note examines the right of judicial review under 18 U.S.C. § 925(c). This section allows people whose federal firearms privileges have been revoked to apply to the Secretary of the Treasury for reinstatement.<sup>5</sup> The Secretary delegated this responsibility to BATF.<sup>6</sup> BATF makes an internal determination of the individual's fitness to have these privileges reinstated.<sup>7</sup> However, section 925(c) also allows for judicial review of a denied petition for reinstatement of privileges. The district court may, at its discretion, allow the presentation of additional evidence where failure to do so would result in

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4. While there is legislative history indicating that states were to have the power to remove federal firearms disabilities, the Supreme Court holding in *Beecham v. United States*, 511 U.S. 368 (1994), forecloses this possibility. See *infra* notes 22-23 and accompanying text.

5. See *supra* note 2, *infra* note 13 and accompanying text.

6. See 27 C.F.R. § 178.44 (1997). Subsection (a) provides that "[a]ny person may make application for relief from the [sic] disabilities under section 922 (g) and (n) of the Act." *Id.* § 178.44(a). Subsection (b) requires that such application will be filed with the Director of the Bureau of Alcohol, Tobacco and Firearms. See *id.* § 178.44(b). Subsection (c) requires the applicant to submit, among other things, three written references and written consent to obtain and examine personal records, including medical records, employment history, military service, and criminal record. See *id.* § 178.44(c).

7. The regulation directs the Director to consider the same factors found in 18 U.S.C. § 925(c). See 27 C.F.R. § 178.144(d). For the text of 18 U.S.C. § 925(c), see *infra* note 13. Additionally, the federal regulations state that the Director will not ordinarily grant relief if the applicant has not been discharged from parole or probation for a period of at least two years. See 27 C.F.R. § 178.144(d).

a miscarriage of justice.<sup>8</sup> Despite these statutory guarantees, Congress has continually withdrawn from BATF funding to investigate applications for removal of a disability under section 925(c).<sup>9</sup> Therefore, BATF has suspended processing these applications.

Subsequently, several applicants have sought judicial review under section 925(c). Many district courts have refused to hear these cases. Appeals are largely unsuccessful for varying reasons. The circuits disagree significantly both about the relevance and import of legislative history surrounding the statute and the proper legal analysis of these claims.<sup>10</sup> The Supreme Court has not yet taken an opportunity to resolve the split.<sup>11</sup>

In analyzing these issues, Part II of this Note examines the history behind the relevant appropriations measures and the reasoning and law behind the conflicting decisions of the various circuits. Part III proposes substantive legislation by which Congress should clearly express its intention on the matter. This Note also concludes that, in the interim, the federal courts should review petition denials under the theory that petitioners should be excused from exhausting their administrative remedies.

## II. HISTORY

Congress enacted the current version of 18 U.S.C. § 925(c) as part of the Firearm Owners Protection Act of 1986 ("FOPA").<sup>12</sup> FOPA added the judicial review provisions to section 925(c). Section 925(c) grants a right to judicial review of administrative denial for relief and empowers the court to

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8. For the text of 18 U.S.C. § 925(c), see *infra* note 13.

9. This situation began with the appropriations acts for fiscal year 1993. See *infra* note 17 and accompanying text.

10. For example, the Ninth Circuit considered only the text of the statute and determined that BATF had not issued denials, as such. Therefore, the court affirmed the district court's finding of lack of subject matter jurisdiction. See *Burtch v. United States Dep't of the Treasury*, 120 F.3d 1087 (9th Cir. 1997); see also *infra* Part II.A. For the text of 18 U.S.C. § 925(c), see *infra* note 13. The Tenth Circuit also upheld a district court's finding of lack of subject matter jurisdiction, but considered the legislative history underlying the appropriations measures. See *Owen v. Magaw*, 122 F.3d 1350 (10th Cir. 1997); see also *infra* notes 64-70 and accompanying text. The Fifth Circuit ignored the jurisdictional issue. Its analysis of the legislative history of the appropriations bills led it to determine that Congress suspended the relief offered by section 925(c). See *United States v. McGill*, 74 F.3d 64 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 77 (1996); see also *infra* notes 48-63 and accompanying text. Finally, the Third Circuit took yet another approach. It, too, did not analyze the problem in terms of lack of subject matter jurisdiction, but instead in terms of failure to exhaust administrative remedies. The Third Circuit excused exhaustion and allowed an applicant's claim to go forward. See *Rice v. United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995); see also *infra* Part III.C.

11. The Court denied certiorari in one case. See *McGill*, 117 S. Ct. 77. *McGill* is discussed *infra* at notes 48-63 and accompanying text.

12. Pub. L. No. 99-308, 100 Stat. 449, 459 (1986).

consider additional evidence if doing so would avoid a "miscarriage of justice."<sup>13</sup> This change from existing practice was intended to afford individuals not inclined to engage in criminal activity the "essential" opportunity to demonstrate trustworthy character.<sup>14</sup> A right to such review

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13. 18 U.S.C. § 925(c) (1994). The pertinent provision of 18 U.S.C. § 925(c) reads:

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

*Id.*

14. S. REP. NO. 98-583 (1984). The legislative history of FOPA during its seven-year evolution is extremely convoluted. For a thorough chronology of the bills and amendments that eventually became FOPA, see David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585 (1986/1987). Between 1982 and the passage of FOPA, Congress issued three committee reports on the subject of amendments to firearms laws. In a nutshell, FOPA was substituted for a rival bill and assumed the numbering of that bill. Thus, the House bill that ultimately became FOPA is supported by a report, but the report explains not why FOPA should have been adopted, but rather, why it ought to have been *rejected*. For the purposes of this Note, all three reports are significant.

Senate Report No. 98-583, quoted in the accompanying text, explains that the power of the Secretary "is intended to provide a 'safety valve' whereby persons whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness" may obtain relief. S. REP. NO. 98-583, at 26 (1984). The Senate Committee on the Judiciary noted that the law in effect at the time restricted relief to a very narrow category of persons convicted of felonies. The Committee worried, "This could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. . . . [M]aking relief available to such persons is essential." *Id.* The Committee explained:

In a change from existing practice, [the amendment] authorizes the scope of review provided under 5 U.S.C. [§] 706 and empowers the court to consider additional evidence in making its finding where a failure to do so would result in a miscarriage of justice. In such a case, the court might in its discretion request the presence of an agent representing the Secretary, and stay the action for a suitable time to permit the Secretary to review his finding in light of the additional evidence. It would then proceed if that evidence did not alter the Secretary's determination.

*Id.* at 26-27. Senate Report No. 98-583 accompanied Senate Bill 914, 98th Cong. (1984). However, Senate Bill 914 was not passed. An updated version, Senate Bill 94, 99th Cong. (1985), was brought directly onto the Senate calendar. See 131 CONG. REC. 24 (1985). Therefore, there is no Senate Report accompanying Senate Bill 94, the measure that eventually became law. The language of Senate Bill 914, considered in Senate Report No. 98-583, was incorporated verbatim by Senate Bill 49, see 131 CONG. REC. 28, and eventually was amended to 18 U.S.C. § 925(c).

Senate Report No. 97-476 accompanied Senate Bill 1030, 97th Cong. (1982), a predecessor to FOPA. As with Senate Bill 914, the judicial review provision of Senate Bill 1030 was the same as that which eventually passed. See S. REP. NO. 97-476, at 38 (1982). Senate Report No. 97-476 gives additional insight into the impetus behind the provision for judicial review. After hearings by several committees on the subject of gun control enforcement, "it [became] apparent that the enforcement tactics made possible by [then] current firearms laws [were] constitutionally, legally, and practically reprehensible." *Id.* at 15. In a great many cases, enforcement efforts had been directed toward those

was previously recognized, but on a very narrow basis.<sup>15</sup> As noted in Part I, the Secretary of the Treasury has delegated the authority to the Bureau of Alcohol, Tobacco, and Firearms to administer petitions for the removal of a disability.<sup>16</sup>

Since 1992, however, Congress has eliminated funding for BATF investigations or action on these applications. Typical appropriations measures have provided that "none of the funds appropriated herein shall be

having committed only unintentional violations, often citizens with no police record whatsoever. *See id.* at 14-17. Thus, the Senate Committee on the Judiciary concluded, "In light of evidence before the Committee that Gun Control Act charges have been abused in the past with resultant convictions of persons not inclined to any criminal activity, making liberal relief available to such persons is essential." *Id.* at 24; *see also infra* note 119.

House Report No. 99-495 accompanied House Bill 4332, 99th Cong. (1986), and was issued during the congressional session in which FOPA was enacted. *See* H.R. REP. NO. 99-495 (1986). As Hardy explains, this report was generated for a rival bill of FOPA and is critical of FOPA. *See* Hardy, *supra*, at 588-89 nn.12-19. Significantly, however, even this report supports the provision for judicial review found in FOPA. Judicial review is mentioned in the report as a "positive feature" of Senate Bill 49. H.R. REP. NO. 99-495, at 15. Even the authors of this report deemed the judicial review provision to be "law enforcement neutral." *Id.*

The reports generated by the Senate Committee on the Judiciary during its consideration of FOPA contrast with the reports of the various congressional appropriations subcommittees. The appropriations committees opine that removal of federal firearms disabilities is a detriment to law enforcement. *See infra* note 20 and accompanying text.

15. *See* *Kitchens v. Bureau of Alcohol, Tobacco, and Firearms*, 535 F.2d 1197 (9th Cir. 1976). In *Kitchens*, the Ninth Circuit construed the nature of judicial review of petitions for relief under the Gun Control Act of 1968. The court held that under the Act, BATF's decision was subject to judicial review, but the scope of review would be limited to an examination of the reasons upon which BATF made its denial. *See id.* at 1199-200. Senate Report No. 98-583, discussed *supra* at note 14 and accompanying text, indicates that FOPA broadens the *Kitchens* scope of review. *See* S. REP. NO. 98-583, at 26-27 (1984).

16. *See supra* note 6 and accompanying text. During House subcommittee hearings on Treasury appropriations, Representative Steny Hoyer submitted written questions for the record to BATF Director Stephen Higgins. These questions and answers give some idea of the scope of BATF's function regarding petitions for relief:

Representative Hoyer: Convicted felons are now prohibited from owning firearms. A law from the early 60's [expanded by FOPA, *see supra* notes 14-15 and accompanying text] allows felons to apply to BATF to have their gun rights restored. . . .

Over the past six years, over 2,300 felons have gotten their gun rights restored - including convicted drug dealers and armed robbers.

How many of these permits [sic] were approved from 1960 to 1970, from 1970 to 1980, from 1980 to 1990, and from 1990 to 1992?

Mr. Higgins: From 1960 through 1980, we do not have any statistical information available.

From FY 1981 to FY 1990, a total of 5,005 firearms restorations were granted. From 1990 to February 1992, 675 restorations were granted.

Representative Hoyer: How much does BATF spend on the Gun Relief for Felons Program [sic]? What is the level and staffing required in the 1993 request?

Mr. Higgins: In FY 1992, the Bureau estimates that 38 FTE's and \$3,533,000 will be expended on this program. In FY 1993, we estimate the same staffing level and \$3,678,000.

*Treasury, Postal Service, and Gen. Gov't Appropriations for Fiscal Year 1993, Hearings Before the Subcomm. on the Treasury, Postal Service, and Gen. Gov't Appropriations of the House Comm. on Appropriations*, 102d Cong., pt. 1, at 993-94 (1992) [hereinafter *Hearings 1993*].

available for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c).<sup>17</sup> Subsequently, BATF refuses to process any individual<sup>18</sup> applications for relief.<sup>19</sup> Early reports accompanying these appropriations measures evinced congressional concern for public safety and crime control.<sup>20</sup> Reports from this time also indicate that federal firearms disability determinations were considered coterminous with state decisions about fitness to possess a firearm under 18 U.S.C. § 921(a)(20).<sup>21</sup> For example, one

17. See Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993); Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

18. Since 1994 these statutes have provided that "such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. [§] 925(c)." See Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997); Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3019 (1996); Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228 (1993). The additional opportunity for relief for corporations has made for at least one unsuccessful equal protection challenge. See *infra* note 39 and accompanying text.

19. See *infra* note 103 and accompanying text.

20. For example, House Report No. 102-618 states:

Under current law, a person convicted of a crime punishable by imprisonment for a term exceeding one year may not lawfully possess, receive, ship, or transport firearms. . . .

[BATF] may grant relief from these disabilities where it is determined that the applicant for relief will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.

Under the relief procedure, [B]ATF officials are required to guess whether a convicted felon or person committed to a mental institution can be entrusted with a firearm. After [B]ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens.

Thus, the Committee believes that the \$3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by [B]ATF in fighting violent crime. Therefore, the Committee has included language which states that no appropriated funds be used to investigate or act upon applications for relief from Federal firearms disabilities.

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

21. Section 921(a)(20) gives definitions for certain terms used in the chapter. Section 921(a)(20) states in part:

What constitutes a conviction of [a crime punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been

Senate Report states:

[T]he [Senate Appropriations] Committee has included language in the [appropriations] bill which prohibits the use of funds for [B]ATF to investigate and act upon applications for relief from *Federal firearms disabilities*. Under current policy, *States have authority to make these determinations* and the Committee believes this is properly where the responsibility ought to rest.<sup>22</sup>

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 provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (1994). Thus, by operation of the specified processes, persons culpable for firearms offenses under section 922(g)(1) by virtue of having a predicate conviction may have culpability under the statute removed. For the text of section 922(g)(1), see *supra* note 2. But application of this provision has been limited by the Supreme Court to the jurisdiction of conviction. Thus, it does not operate as to persons convicted of federal crimes. *See* *Beecham v. United States*, 511 U.S. 368 (1994); *see also infra* note 23 and accompanying text.

Although beyond the scope of this Note, it may be of interest to observe that this approach can produce anomalous results. In *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), the plaintiff was convicted in Vermont state court of larceny, a crime classified as a felony in that state. Under Vermont law, one so convicted who is not sentenced to jail does not forfeit civil rights, nor does Vermont forbid such felons from possessing firearms. Thirty years later, the plaintiff was convicted of possession of an automatic weapon in violation of section 922(g)(1). *See id.* at 1005-06. The plaintiff argued that not suffering the loss of civil rights upon conviction under state law is the functional equivalent of having civil rights "restored" for the purposes of the exemption granted by section 921(a)(20). *See id.* at 1007. The Second Circuit disagreed, defining the word "restore" as meaning "to give back (as something lost or taken away)." *Id.* (internal quotation omitted). The Second Circuit reasoned that restoration of a thing never lost or diminished is a definitional impossibility, and that the plaintiff thus did not come within the terms of the statute. *See id.* Thus, persons convicted of serious crimes who temporarily lose their civil rights are immune from prosecution under the statute, while those convicted of lesser offenses which do not justify stripping them of their civil rights remain subject to prosecution. The Second Circuit noted judicial criticism of this result, but observed that section 925(c) provides a mechanism for relief. *See id.* at 1009.

22. S. REP. NO. 102-353, at 20 (1992) (emphasis added); *see also* S. REP. NO. 103-106, at 20 (1993) (same). These statements suggest Congress considered federal and state firearms disabilities as coterminous. In early hearings on appropriations, the following dialogue took place between Representative Steny Hoyer and the Director of BATF, Stephen Higgins:

MR. HOYER. Let me ask you a specific question.

As I understand it, you spent \$4.5 million to get guns back in the hands of felons, is that correct?

MR. HIGGINS. You are describing the relief from disability programs, which Congress passed, which essentially says—

MR. HOYER. Hold it. Let me make sure that I was accurate. This program is designed for felons *convicted under federal or state statutes* who thereby are precluded from owning guns to get them back.

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MR. HIGGINS. It is only because there is a provision in law which says that if an individual who has been convicted of a felony and is disabled from carrying a gun, if they show after they are out of prison that over time they have been rehabilitated and no longer pose a threat to society, that they can petition our agency for relief. We do a background investigation, and if we come to that decision, their right to possess firearms is restored.

However, the Supreme Court's holding in *Beecham v. United States*<sup>23</sup>

There is also a provision in the law enacted in 1986, that essentially states that it does not matter whether we think that they are a threat to society [sic]. If a state has a law which restores their rights once they have served their sentence, they automatically have their rights restored. It is being done every day by operation of state law, as well as the process you have described.

*Hearings 1993, supra* note 16, pt. 1, at 971-72 (emphasis added). During the next year's House hearings on appropriations, Representative George "Buddy" Darden and Higgins had the following discussion:

MR. DARDEN. Another thing I want to observe as a former State official is, I recall that it is a violation of the criminal code of all 50 States, as well as the laws and statutes of the United States, to be a person convicted of a forcible felony and to possess a firearm. Is that correct, to the best of your recollection?

MR. HIGGINS. It is illegal for a felon to possess firearms unless they have received relief, either by—

MR. DARDEN. A pardon or—

MR. HIGGINS. Yes. There is a process by which they can get it back and I am not familiar with the laws of all 50 States.

MR. DARDEN. But generally speaking, in every single State in the union, it is State law, as well as a violation of the United States Code, to be a convicted felon, unless you file one of these exceptions to possess a firearm, it is not?

MR. HIGGINS. Yes, generally speaking. However, that cannot be said for every State in the Union. Some States impose firearms disabilities only upon conviction of violent felonies. Others impose disabilities only upon persons incarcerated as a result of their convictions. Others impose disabilities only for a prescribed period of time after conviction or incarceration.

*Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1994, Hearings Before the Subcomm. on the Treasury, Postal Service, and Gen. Gov't Appropriations of the Comm. on Appropriations, House of Representatives*, 103d Cong. pt. 1, at 693 (1993).

Thus, the Senate Reports suggest that if a State determines a person convicted of a crime punishable by imprisonment for over one year is fit to possess firearms, then as a matter of "policy," this determination will apply to federal determinations of fitness as well. Mr. Higgin's reference to "the law enacted in 1986" during the 1992 hearings can only indicate FOIA. This dialogue again suggests that relief from federal disabilities attaches when relief from state disabilities attaches.

23. 511 U.S. 368 (1994). In *Beecham*, the plaintiffs were convicted of violating 18 U.S.C. § 922(g)(1), a federal felony which prevents possession of a firearm by a person with a previous felony conviction. *See id.* at 370. However, 18 U.S.C. § 921(a)(20) defines, for the purposes of section 922(g)(1), what will be considered a previous conviction. The statute states that what constitutes a conviction will be determined by the law of the jurisdiction in which the proceedings were held. Also, it states that a conviction for which civil rights have been restored will not be considered a conviction for the purposes of section 922(g)(1). For the text of section 921(a)(20), see *supra* note 21. The issue in *Beecham* was how the jurisdictional clause and the exemption clause are related. Previously, the Ninth Circuit ruled in *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), that a state's restoration of civil rights to a person eliminates the underlying conviction as a predicate offense for the purposes of the federal firearms statutes, whether the conviction was for a state or federal offense. *See id.* at 1334. The Supreme Court disagreed with this determination, ruling instead that for these purposes, whether something is to be determined a conviction is governed by the law of the convicting jurisdiction. *See Beecham*, 511 U.S. at 371. In doing so, the Court explicitly rejected the Ninth Circuit's reasoning that because no federal procedure exists for restoring civil rights, Congress could not have expected the federal government to perform this function, and therefore the reference to restoration of civil rights in section 921(a)(20) refers to the state procedure. *See id.* at 372-73. The Court noted that some states have no procedure for the restoration of civil rights, then stated, "Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights." *Id.* at 373. Nothing in the Court's opinion gives any indication that it considered or even was aware of the legislative history suggesting that states

eliminated the role of states in providing alternative relief for persons convicted of federal felonies. Nothing in the *Beecham* decision indicates that the Court knew of the legislative intent described above. Therefore, it does not appear that such persons currently have any opportunity for obtaining relief, save 18 U.S.C. § 925(c).

There have been several efforts to dispel the confusion surrounding this issue. One House bill on fiscal year 1997 appropriations for the Treasury Department would have abrogated judicial review for felons convicted of drug-related, firearms or violent offenses.<sup>24</sup> By negative implication, all other petitioners would have had the right to judicial review. Alternate efforts to include language that would completely abrogate judicial review were defeated both in the House Committee on Appropriations<sup>25</sup> and in the House Committee of the Whole House.<sup>26</sup> The House passed the version of the bill containing the provision denying judicial review only to a limited class of persons.<sup>27</sup> However, any mention of judicial review was stricken by the Senate Committee on Appropriations,<sup>28</sup> and the final appropriations measure reflects this fact.<sup>29</sup> Appropriations measures for fiscal year 1998 did not

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were to perform this function regardless of the jurisdiction of conviction. The Court expressed no opinion as to whether a federal felon could have her civil rights restored under federal law, and noted the possible relevance of section 925(c). *See id.* at 373 n.\*.

24. The version of House Bill 3756 reported from the House Committee on Appropriations on July 8, 1996, would have provided that "the inability of the Bureau of Alcohol, Tobacco, and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review . . ." H.R. 3756, 104th Cong., at 15 (1996); *see also* H.R. REP. NO. 104-660, at 26 (1996) (explaining modification). The House of Representatives eventually passed this version of the bill. *See infra* note 27 and accompanying text.

25. On June 26, 1996, Representative Durbin made a motion before the House Committee on Appropriations to amend the provision to a strict prohibition of judicial review. The motion was the subject of a roll call vote and was defeated 24 to 12. *See* H.R. REP. NO. 104-660, at 124 (1996). Representative Durbin, however, was not dissuaded, and he unsuccessfully renewed his efforts in the Committee of the whole House. *See infra* note 26 and accompanying text.

26. Representative Durbin introduced a motion in the Committee of the Whole House to remove the language "for felons convicted of a violent crime, firearms violations, or drug related crimes" from the provision. *See* 142 Cong. Rec. H7678 (daily ed. July 17, 1996). Representative Parker made a point of order against the amendment on the grounds that it changed existing law and constituted legislation in an appropriations bill. *See id.* The Chairman sustained the point of order and the amendment was not subject to vote. *See id.* at H7679.

27. *See* 142 CONG. REC. H7713-14 (daily ed. July 17, 1996) (passage of the bill by a vote of 215 to 207).

28. Research revealed no further information save the historical fact of the amendment. *See* H.R. 3756, 104th Cong. (1996); 142 CONG. REC. S10141 (daily ed. Sept. 10, 1996). The Senate Committee on Appropriations Report contained no mention of the amendment. *See* S. REP. NO. 104-330 (1996). With no relevant exceptions, the Committee amendments were considered and agreed to en bloc, and no floor debate seems to have taken place over this particular change to House Bill 3756. *See* 142 CONG. REC. S10158 (daily ed. Sept. 10, 1996).

29. Treasury Department appropriations were made part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-319 (1996).

mention judicial review for these petitions.<sup>30</sup>

When individuals aggrieved by BATF's inaction have sought judicial review under 18 U.S.C. § 925(c), the courts of appeal have taken dramatically different approaches to the resolution of these cases. The Ninth Circuit concluded that the federal courts no longer have jurisdiction, based on the plain language of section 925(c). The Fifth Circuit concluded that Congress has suspended any relief available under section 925(c), based on the legislative history of the appropriations statutes. This same legislative history persuaded the Tenth Circuit to conclude that subject-matter jurisdiction is lacking. The Third Circuit, on the other hand, allows these cases to proceed and treats the problem as an exercise of discretion, under the doctrine of denial of administrative remedies.

#### *A. Denial of Jurisdiction as a Matter of Statutory Interpretation*

In *Burtch v. United States Department of the Treasury*,<sup>31</sup> the Ninth Circuit heard a case involving a person previously convicted of four felonies.<sup>32</sup> As Burtch had been convicted of a crime "punishable by imprisonment for a term exceeding one year,"<sup>33</sup> he lost his entitlement to possess any firearm or ammunition shipped or transported in interstate or foreign commerce pursuant to 18 U.S.C. § 922(g)(1).<sup>34</sup>

Burtch requested BATF to send him an application for relief from his firearms disabilities.<sup>35</sup> BATF notified him that appropriations measures prohibited it from acting upon or investigating applications for relief from federal firearms disabilities for individuals.<sup>36</sup> BATF recommended that Burtch's attorney "contact our office about obtaining restoration of Federal firearms privileges for your client should Congress act to remove the restriction currently imposed."<sup>37</sup>

Burtch filed a "Verified Petition for Removal of Federal Disabilities" in district court, naming as defendant the United States Department of the

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30. See Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1277 (1997) (no mention of judicial review); H.R. REP. NO. 105-240 (1997) (same). Committee prints of appropriations measures for fiscal year 1998 were not available at the time of publication.

31. 120 F.3d 1087 (9th Cir. 1997).

32. See *id.* at 1088.

33. *Id.*; see 18 U.S.C. § 922(g)(1) (1994).

34. For the text of 18 U.S.C. § 922(g)(1), see *supra* note 2.

35. See *Burtch*, 120 F.3d at 1089.

36. See *id.*

37. *Id.* (internal quotation omitted).

Treasury.<sup>38</sup> He alleged that his application was denied and requested that the court provide him with relief from his federal firearms disabilities. The plaintiff argued<sup>39</sup> that BATF's funding limitations do not "repeal or affect the validity of 18 U.S.C. § 925(c)."<sup>40</sup> The district court dismissed Burtch's action for lack of subject matter jurisdiction, holding that "[w]here no investigation occurs, there is no denial."<sup>41</sup>

After establishing that it would review the district court's conclusions of law de novo,<sup>42</sup> the Ninth Circuit stated that if the statutory language was unambiguous, it would not resort to legislative history, unless exceptional circumstances dictated otherwise.<sup>43</sup> The *Burtch* court defined the issue as: "Must . . . there first be a denial by [B]ATF for the district court to review, or is the failure to act the functional equivalent of a denial on the merits?"<sup>44</sup> The court concluded "[T]he statute is so clear that we hold it means what it says. Thus, the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected."<sup>45</sup>

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38. *Burtch v. United States Dep't of the Treasury*, 120 F.3d 1087, 1089 (9th Cir. 1997).

39. Congress originally repealed all funds for investigations under section 925(c), but later reinstated funding for the purpose of investigating corporations. *See supra* notes 17-18 and accompanying text. Thus, the plaintiff also challenged the statutes' distinction between individuals and corporations on equal protection grounds. *See Burtch*, 120 F.3d at 1089. On review, the Ninth Circuit stated, "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 1090 (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)). The court's analysis was limited to the statement that "Congress could rationally have believed that corporations guilty of corporate crime present less danger to the community than do individual felons." *Burtch*, 120 F.3d at 1090.

40. *Burtch*, 120 F.3d at 1090 (internal quotation omitted).

41. *Id.*

42. *See id.* at 1089.

43. *See id.* at 1089-90 (citing *Jenkins v. INS*, 108 F.3d 195, 200 (9th Cir. 1997); *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988)).

44. *Burtch v. United States Dep't of the Treasury*, 120 F.3d 1087, 1090 (9th Cir. 1997).

45. *Id.* In reaching its holding, the court cited *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). It is not entirely clear, however, that *Seattle Audubon* supports the Ninth Circuit's interpretation. In *Seattle Audubon*, various environmental groups challenged changes in timber harvesting policies made by the United States Forest Service and the Bureau of Land Management. *See id.* at 432-33. In response to this ongoing litigation, Congress enacted the Northwest Timber Compromise, which established a comprehensive set of rules to govern harvesting within a geographically and temporally limited domain. *See id.* at 433. The Ninth Circuit held that a subsection of the Compromise was unconstitutional, but that it could not effect an implied modification of substantive law because it was embedded in an appropriations measure. *See id.* at 436, 440. The Supreme Court found several errors in this reasoning. It affirmed a standing rule that repeals by implication are especially disfavored in the appropriations context. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) ("The doctrine disfavoring repeals by implication applies with full vigor when . . . the subsequent legislation is an *appropriations* measure." (citation omitted)). Nonetheless, the Court noted that Congress may amend substantive law in an appropriations statute, as long as it does so clearly. The *Seattle Audubon* court found that because the questioned section

The Ninth Circuit concluded that the statute did not authorize the district court to build a record “from scratch” or make discretionary policy determinations in the first instance if the Secretary had not done so.<sup>46</sup> It found that in the context of the entire statute, “denial” meant an adverse determination on the merits and did not include a refusal to act. Thus, the court upheld the district court’s ruling that it lacked subject matter jurisdiction under section 925(c) without examining the statute’s legislative history.<sup>47</sup>

### *B. Denial of Relief Based on an Examination of Legislative History*

In *United States v. McGill*,<sup>48</sup> the Fifth Circuit heard the case of a man who previously pleaded guilty to two felony offenses.<sup>49</sup> As in *Burtch*, the plaintiff wrote BATF requesting information about applying for relief from his section 922(g)(1) disability.<sup>50</sup> BATF informed him that it was no longer accepting applications due to the appropriations measures. The plaintiff filed an application with the district court for the removal of his disabilities. The district court promptly dismissed the application on the ground that it lacked jurisdiction and the plaintiff appealed.<sup>51</sup>

Like the Ninth Circuit, the Fifth Circuit reviews a district court’s dismissal for lack of subject matter jurisdiction *de novo*.<sup>52</sup> But the court stated: “Although we doubt that the district court has original jurisdiction to consider an application to remove the Federal firearm disability, we pretermitted the question because it is clear to us that Congress suspended the relief

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provided by its terms that compliance with certain new law constituted compliance with certain old law, the intent to modify was not only clear, but express. See *Seattle Audobon*, 503 U.S. at 440.

Comparing *Burtch*, it appears that the Ninth Circuit significantly extended the *Seattle Audobon* holding. It is not at all clear in the federal firearms disabilities relief cases that Congress has so much amended substantive law in an appropriations statute as it has suspended substantive law *by way of* an appropriations measure. That is, the congressional action in *Seattle Audobon* effected material changes in the substantive provisions of a statute, whereas in *Burtch*, Congress chose to allocate financial resources in a different manner but did not effect material changes to section 925(c). See *Seattle Audobon*, 503 U.S. at 440; *Burtch*, 120 F.3d at 1090.

46. *Burtch*, 120 F.3d at 1090.

47. See *id.* The *Burtch* court distinguished the Fifth Circuit’s decision not to examine the legislative history. See *id.* While both courts decided that Congress suspended relief, the Ninth Circuit addressed the issue of subject matter jurisdiction, whereas the Fifth Circuit did not. See *infra* notes 54-55 and accompanying text.

48. 74 F.3d 64 (5th Cir.), cert. denied, 117 S. Ct. 77 (1996).

49. See *id.* at 65. McGill was convicted of making a false statement under 18 U.S.C. § 1014 and filing a false tax return under 26 U.S.C. § 7206. He was sentenced to two years probation. See *id.*

50. For the provisions of § 922(g)(1), see *supra* note 2 and accompanying text.

51. See *McGill*, 74 F.3d at 65.

52. See *id.*

provided by § 925(c).<sup>53</sup> Unlike the Ninth Circuit, the Fifth Circuit explicitly reserved the question of jurisdiction.<sup>54</sup>

The court instead relied on the proposition that Congress has the power to amend, suspend or repeal a statute by an appropriations bill, as long as it does so clearly.<sup>55</sup> To support this proposition, the court cited a 1940 case, *United States v. Dickerson*.<sup>56</sup>

The court first quoted the language of section 925(c) and noted that BATF has the authority to act on these applications. The court then considered the legislative history of some of the applicable appropriations measures<sup>57</sup> in light of the government's argument that relief had been suspended.<sup>58</sup> The court noted that the Appropriations Committee expressed concern over: (1) the use of limited resources for investigating these cases; and (2) the consequences to innocent citizens if BATF makes a mistake in

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53. *Id.* at 65-66.

54. The Fifth Circuit reserved the question of jurisdiction on the basis of *Norton v. Mathews*, 427 U.S. 524 (1976). "In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." *Id.* at 532. Avoiding the question of jurisdiction is known as the *Norton* doctrine. See generally John R. Knight, *The Requirement of Subject Matter Jurisdiction on Appeal: A Cardinal Rule with a Twist*, FED. LAW., Jan. 1997, at 16.

The *Norton* doctrine, or something akin to it, has possibly seen use in another section 925(c) case, *Bagdonas v. Department of the Treasury*, 93 F.3d 422 (7th Cir. 1996). Bagdonas was convicted in 1979 for the illegal possession and sale of a registered silencer-fitted gun. See *id.* at 423-24. Upon denial in 1989 of his first application for relief, Bagdonas reapplied in August 1993 by asking for reconsideration of his earlier application. See *id.* at 424-25. Bagdonas' second denial letter, like most considered in this Note, contained language indicating BATF was not processing applications because of the budgetary restrictions. But while the Seventh Circuit was aware of the *McGill* and *Rice* decisions, it merely mentioned in a footnote that neither Bagdonas nor the government argued any jurisdictional bar to the case. See *Bagdonas*, 93 F.3d at 425 n.5. The court only examined whether the Director's determination was arbitrary, capricious or unreasonable. See *id.* at 428. Eight days later, in *Stearnes v. Baur's Opera House*, 3 F.3d 1142 (7th Cir. 1993), the Seventh Circuit stated, "We are required to satisfy ourselves not only of our own jurisdiction, but also the jurisdiction of the district court. It is our duty to raise and consider the issue sua sponte when it appears from the record that jurisdiction is lacking." *Id.* at 1144 (citations omitted).

55. The court based its decision on the rationale of *Seattle Audobon*. For a discussion of *Seattle Audobon*, see *supra* note 45 and accompanying text.

56. 310 U.S. 554 (1940). *Dickerson* is perhaps a bit more on point than *Seattle Audobon*. In *Dickerson*, federal law allowed for a bonus to be paid to enlisted veterans who reenlisted. See *id.* at 554-55. The plaintiff did so, but was not paid the bonus because another law provided that no allocation for the year would be available for the payment of such allowances. See *id.* The Court held: "Congress could suspend or repeal the authorization . . . by an amendment to an appropriation bill, or otherwise." *Id.* at 555. *Dickerson*, unlike *Seattle Audobon*, dealt directly with appropriations *qua* appropriations, as opposed to substantive legislation embedded in an appropriations measure. *Dickerson* also dealt with a financial claim, not the abrogation of another right, such as the right of judicial review.

57. For a list of these measures, see *supra* note 17.

58. See *United States v. McGill*, 74 F.3d 64, 67 (5th Cir. 1998).

granting relief to a felon from his firearm disabilities.<sup>59</sup> The court based its decision on the circumstances and the explanation by the Appropriations Committee and stated:

[I]t is clear . . . that Congress intended to suspend the relief provided by § 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.<sup>60</sup>

Thus, the court concluded that relief from federal firearms disabilities under section 925(c) had been suspended<sup>61</sup> by the appropriations acts.<sup>62</sup> Therefore, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's petition for review.<sup>63</sup>

In *Owen v. Magaw*,<sup>64</sup> the Tenth Circuit also confronted the case of a person who was prohibited under section 922(g)(1) from owning or possessing firearms.<sup>65</sup> The plaintiff agreed that the *McGill* court had not reached an unreasonable result.<sup>66</sup> However, the plaintiff noted that the appropriations statutes were silent as to the role of the judiciary. The plaintiff argued that there had been no clear statement that Congress intended to repeal judicial authority under section 925(c) to review BATF's treatment of applications for relief. The plaintiff thus contended that the appropriations statutes should not be read as having limited the role of the courts.<sup>67</sup> The Tenth Circuit considered the legislative history cited by the Fifth Circuit in

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59. *See id.* These concerns were addressed in S. REP. NO. 102-353, at 19-20 (1992). This report mirrors that of H.R. REP. NO. 102-618, at 13-14 (1992). For the text of H.R. REP. NO. 102-618, see *supra* note 20.

60. *McGill*, 74 F.3d at 67.

61. The plaintiff also argued, alternatively, that if the court found section 925(c) was repealed or suspended, the court should have found that section 922(g)(1) was also suspended. The court did not consider this argument because the plaintiff raised it for the first time on appeal. *See McGill*, 74 F.3d at 68.

62. *See id.* The court also found the history of funding for investigating applications from corporations as evidence of congressional intent to suspend the relief available under section 925(c). It noted that the initial fiscal year 1993 appropriations act barred BATF from using funds to investigate any applications, but that the fiscal year 1994 appropriations act expressly restored funding to BATF to investigate corporations. *See id.* at 67; *see also supra* notes 17-18 and accompanying text. The court opined, "If Congress thought that courts were considering applications for relief under [section] 925(c), this restoration of funds to provide relief for corporations would have been unnecessary." *McGill*, 74 F.3d at 67-68.

63. *See McGill*, 74 F.3d at 68.

64. 122 F.3d 1350 (10th Cir. 1997).

65. *See id.* at 1351.

66. *See id.* at 1353.

67. *See id.*

*McGill*<sup>68</sup> and upheld the district court's dismissal of the case for lack of subject matter jurisdiction.<sup>69</sup> In rejecting the plaintiff's argument, the Tenth Circuit also explicitly rejected a similar analysis by the Third Circuit.<sup>70</sup>

### C. Jurisdiction as a Matter of Exhaustion of Administrative Remedies

The Third Circuit reached a very different conclusion than the other courts of appeal. In *Rice v. United States Department of Alcohol, Tobacco, and Firearms*,<sup>71</sup> the court heard the case of a man who pleaded guilty in 1970 to two related felonies involving stolen automobile parts.<sup>72</sup> Thus, he lost his firearms privileges under 18 U.S.C. § 922(g)(1).<sup>73</sup> Rice applied for relief under section 925(c). BATF informed Rice that it could not continue to process applications for relief from federal firearms disabilities and terminated further action on his application.<sup>74</sup> Rice then filed an action for judicial review. The district court dismissed his request for lack of subject matter jurisdiction.<sup>75</sup>

On appeal, the Third Circuit found that the district court erred in determining that it lacked subject matter jurisdiction. The court stated, "We believe the district court's order is more properly analyzed in terms of a failure to exhaust administrative remedies . . . ."<sup>76</sup> Before continuing, the court noted its independent obligation to determine that the district court had subject matter jurisdiction.<sup>77</sup> It acknowledged the power of Congress both to establish the jurisdiction of inferior federal courts and to appropriate money. It also acknowledged that Congress may use appropriation acts to repeal substantive legislation.<sup>78</sup> Here the Third Circuit, too, considered *Seattle*

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68. 74 F.3d 64, 67 (5th Cir. 1996). *McGill* relied upon Senate Report No. 102-353, at 19-20 (1992), which evinces congressional concern for the use of limited resources for investigating these cases and for the consequences to innocent citizens if BATF makes a mistake in granting relief. This report mirrors that of House Report No. 102-618, at 13-14 (1992). For the text of House Report No. 102-618, see *supra* note 20.

69. See *Owen v. Magaw*, 122 F.3d 1350, 1354 (10th Cir. 1997). However, *McGill* did not decide the question of subject matter jurisdiction. See *supra* notes 53-54 and accompanying text.

70. See *Owen*, 122 F.3d at 1353-54.

71. 68 F.3d 702 (3d Cir. 1995).

72. See *id.* at 704.

73. For the provisions of section 922(g)(1), see *supra* note 2 and accompanying text.

74. See *Rice*, 68 F.3d at 705.

75. See *id.* at 704.

76. *Id.* at 706-07.

77. See *Rice v. United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 707 (3d Cir. 1995); cf. *Bagdonas v. Secretary of the Treasury*, 93 F.3d 422 (7th Cir. 1996) (noting, but not addressing, the issue).

78. See *Rice*, 68 F.3d at 707.

*Audobon* and *Dickerson*.<sup>79</sup> Yet the court analyzed the situation under the “clear intention” standard of *Seattle Audobon* and came to a different conclusion than that reached by the Ninth Circuit in *Burtch*.<sup>80</sup> The court analyzed the plain language of the relevant appropriations acts<sup>81</sup> and found that none of them seemed to expressly preclude a court from reviewing BATF’s refusal to process an application for relief.<sup>82</sup> Thus, the Third Circuit found that Congress did not repeal section 925(c) in its entirety.<sup>83</sup>

In its consideration of the doctrine of exhaustion of administrative remedies, the court paid close attention to the history and rationale behind the doctrine, as developed by the Supreme Court in cases such as *Myers v. Bethlehem Shipbuilding Corp.*,<sup>84</sup> *McKart v. United States*,<sup>85</sup> *Coit*

79. For a discussion of *Seattle Audobon*, see *supra* note 45. For a discussion of *Dickerson*, see *supra* note 56 and accompanying text.

80. For a discussion of *Burtch*, see *supra* Part II.A.

81. For the text of the appropriations act, see *supra* note 17 and accompanying text.

82. See *Rice*, 68 F.3d at 707.

83. See *id.*

84. 303 U.S. 41 (1938). In *Myers*, the National Labor Relations Board (“NLRB”) informed Bethlehem Shipbuilding that it would hold a hearing on a complaint made by a third party and against the corporation. See *id.* at 44-45. Congress granted the NLRB exclusive power to undertake such hearings. See *id.* at 48. Bethlehem filed a bill in equity to enjoin the board from holding such a hearing. See *id.* at 46. Bethlehem argued, among other things, that a hearing would subject it to irreparable damage, and that its constitutional rights would be violated unless the district court had jurisdiction to enjoin the hearing by the NLRB. See *id.* at 50. The Supreme Court held that this contention was “at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Id.* at 50-51.

85. 395 U.S. 185 (1969). In *McKart*, the petitioner was indicted for willfully and knowingly failing to report for and submit to induction into the Armed Forces of the United States. See *id.* at 186-87. *McKart* defended on the grounds that he was exempt under a certain provision of the Selective Service Act of 1948. See *id.* at 187 & n.2. The district court held that he could not raise that defense because he failed to exhaust the administrative remedies provided by the Selective Service Administration. See *id.* at 187. The Supreme Court first reiterated the *Myers* doctrine. See *id.* at 193. The Court continued:

Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

*McKart*, 395 U.S. at 193-94 (citations omitted). The Court went on to hold application of the doctrine

*Independence Joint Venture v. FSLIC*<sup>86</sup> and *McCarthy v. Madigan*.<sup>87</sup> The

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improper. *See id.* at 197.

86. 489 U.S. 561 (1989). In *Coit*, the petitioner filed suit against a third-party institution which subsequently went into receivership with the FSLIC. *See id.* at 565. The FSLIC removed the case to federal court, where it was dismissed. *See id.* at 565-66. The FSLIC argued on appeal that it had the power to require claimants to exhaust the administrative process leading to allowance, settlement or disallowance before suing on the claims in court. *See id.* at 579. *Coit* contended that the statutory provisions relied on by the FSLIC did not demonstrate a congressional intent to require exhaustion of administrative remedies by claimants before filing suit in court. *See id.* The Supreme Court first recognized precedent, including *Myers*, holding exhaustion of administrative remedies necessary where required by statute. *See id.* The Court further explained that where a statutory requirement of exhaustion is not explicit, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme." *Id.* (quoting *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 502 n.4 (1982)). Moreover, a court "should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Coit*, 489 U.S. at 580 (quoting *Patsy*, 457 U.S. at 501-02). The Court found that the applicable regulations did not place a "clear and reasonable time limit" on the FSLIC's consideration of whether to pay, settle or disallow claims. *Coit*, 489 U.S. at 586. The Court then stated that administrative remedies that are inadequate need not be exhausted. *See id.* at 587 (citing *Greene v. United States*, 376 U.S. 149, 163 (1964); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926)). The Court here found that the lack of a reasonable time limit in the administrative claims procedure rendered it inadequate. *See Coit*, 489 U.S. at 587.

87. 503 U.S. 140 (1992). In *McCarthy*, a federal prisoner filed a damages action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Tenth Circuit ruled that exhaustion of the internal grievance procedure promulgated by the Federal Bureau of Prisons was required before the plaintiff could initiate a suit. *See McCarthy*, 503 U.S. at 141. The Supreme Court began its analysis by explaining:

The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decisionmaking. Of "paramount importance" to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.

*Id.* at 144 (citations omitted). The Court explained that exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency:

As to the first of these purposes, the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer. Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise. . . .

As to the second of the purposes, exhaustion promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.

*Id.* at 145 (citations omitted). The court then considered the circumstances under which exhaustion will not be required:

Notwithstanding these substantial institutional interests, federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. . . . Accordingly, this Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. . . . Application of this

court began with the proposition that “[e]xhaustion, though often referred to as a question of jurisdiction, does not have the same rigidity as true issues of subject matter jurisdiction. A district court cannot consider a case without subject matter jurisdiction, but failure to exhaust is not always fatal.”<sup>88</sup> The doctrine of exhaustion of administrative remedies is thus one which governs the timing of judicial decision making, much like the doctrines of abstention, finality and ripeness.<sup>89</sup>

The Third Circuit recognized the general rule that “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”<sup>90</sup> The court noted that exhaustion is generally required because it serves the twin purposes of protecting the authority of administrative agencies and promoting judicial efficiency.<sup>91</sup> The court recognized that a significant inquiry in determining the applicability of the exhaustion doctrine is congressional intent and that “[w]here Congress specifically mandates, exhaustion is required.”<sup>92</sup>

The Third Circuit noted that when deciding an exhaustion issue, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.<sup>93</sup> The court noted that application of this balancing principle is “intensely practical” because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.<sup>94</sup> Thus, a court may decline to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise.<sup>95</sup> The Third Circuit looked to *McCarthy* for circumstances in which the interests of the individual weigh heavily

balancing principle is “intensely practical,” because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided.

This Court’s precedents have recognized . . . broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. [R]equiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action.

*Id.* at 146-47 (citations omitted).

88. *Rice v. United States Department of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 708 (1995) (citing *Myers*, 303 U.S. at 50-51; *McCarthy*, 503 U.S. 140); see also *supra* notes 84, 87.

89. See *Rice*, 68 F.3d at 708 (citing *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

90. *Rice*, 68 F.3d at 708 (citing *McKart v. United States*, 395 U.S. 185, 193 (1969); *McCarthy*, 503 U.S. at 144-45).

91. See *Rice*, 68 F.3d at 708 (citing *McCarthy*, 503 U.S. at 145).

92. *Rice*, 68 F.3d at 708 (quoting *McCarthy*, 503 U.S. at 144).

93. See *Rice*, 68 F.3d at 708 (citing *McCarthy*, 503 U.S. at 146).

94. *Rice v. United States Dep’t of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 708 (3d Cir. 1995) (citing *McCarthy*, 503 U.S. at 144) (quotation omitted).

95. See *Rice*, 68 F.3d at 708 (citing *McCarthy v. Madigan*, 503 U.S. at 140, 144 (1992)).

against requiring administrative exhaustion.<sup>96</sup> One such situation occurs where the requirement of exhaustion may cause undue prejudice to subsequent assertion of a court action.<sup>97</sup> For example, undue prejudice may result due to “an unreasonable or indefinite timeframe for administrative action.”<sup>98</sup>

The Third Circuit then discussed *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corporation*<sup>99</sup> to analyze this type of situation.<sup>100</sup> In *Coit*, the Supreme Court reviewed the adequacy of FSLIC proceedings to determine claims against savings and loans associations under FSLIC receivership. The claim in question had been retained for “further review” and held without action for over 13 months.<sup>101</sup> The Court held that “[t]he lack of a reasonable time limit in the current administrative claims procedure render[ed] it inadequate” and “[a]dministrative remedies that are inadequate need not be exhausted.”<sup>102</sup>

Next, the Third Circuit applied the balancing test found in *McCarthy* in conjunction with the principles of *Coit* and found that they favored waiver of the exhaustion doctrine in Rice’s case. The court decided that although the four-month delay imposed after passage of the appropriation act may have been reasonable, an indefinite delay was unreasonable.<sup>103</sup>

The court found that the case posed a special problem, because the initial determination of Rice’s qualification *vel non* for relief involved BATF’s discretion and relied on BATF’s expertise—two factors that favored strict application of the exhaustion doctrine.<sup>104</sup> The court considered these factors in light of the express authority that section 925(c)<sup>105</sup> gives courts to receive

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96. See *Rice*, 68 F.3d at 708.

97. See *id.* (citing *McCarthy*, 503 U.S. at 146-47). Other circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion are those where there is some doubt about the agency’s power to grant effective relief, or where an agency is shown to be biased or has otherwise predetermined the issue before it. See *McCarthy*, 503 U.S. at 147-48.

98. *Rice*, 68 F.3d at 708. (quoting *McCarthy*, 503 U.S. at 147).

99. 489 U.S. 561 (1989). For a discussion of *Coit*, see *supra* note 86.

100. See *Rice v. United States Dep’t of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 708-09 (3d Cir. 1995).

101. *Coit*, 489 U.S. at 586.

102. *Id.* at 587.

103. See *Rice*, 68 F.3d at 709. BATF conceded it could not state a date on which it would consider Rice’s application, nor could it even state whether it would ever consider his application. In fact, after Congress enacted the appropriation measures, BATF notified Rice that even if Congress removed the restrictions, he “would need to submit an updated application” to restore his federal firearms privileges. BATF also stated that it had concluded its participation in the process and was not preparing any further record that would help the court in resolving the dispute. See *id.*

104. See *id.* (citing *McKart v. United States*, 395 U.S. 185, 194 (1969); *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

105. For the text of section 925(c), see *supra* note 13.

independent evidence when necessary to avoid a miscarriage of justice.<sup>106</sup>

The Third Circuit concluded that Congress did not intend to apply rigidly the doctrine of administrative remedies in this context. The court based its decision, in part, on the original grant of jurisdiction and power “[to] create or supplement the administrative record when necessary to avoid a miscarriage of justice.”<sup>107</sup> The court noted that the relevant provisions of the appropriations acts did not seem to preclude the agency from presenting its views on the propriety of granting the plaintiff’s application in a judicial forum.<sup>108</sup> Thus, the court remanded the case with directions to consider the interests expressed in the statute.<sup>109</sup>

106. See *Rice v. United States Dep’t of Alcohol, Tobacco and Firearms*, 68 F.3d 702, 709 (3d Cir. 1995).

107. *Id.*

108. See *id.*

109. See *id.* at 709-10. The saga of Mr. Rice after the Third Circuit’s remand is an interesting one. The United States District Court for the Eastern District of Pennsylvania delayed deciding the case. In *Rice v. United States Dep’t of Alcohol, Tobacco and Firearms*, No. 93-6107, 1996 WL 494138 (E.D. Pa. Aug. 21, 1996) (“*Rice II*”), the district court noted that shortly after the decision by the Third Circuit, the Fifth Circuit handed down its contrary opinion in *McGill*. For a discussion of *McGill*, see *supra* notes 48-62 and accompanying text. The district court also noted that McGill had filed a petition for certiorari to the Supreme Court. See *Rice II*, 1996 WL 494138, at \*1.

Rice argued that the law of the case doctrine required that he receive an expedited judicial hearing regarding his application for removal of his federal firearms disabilities. He cited *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), for the proposition that when a court “decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.” *Id.* at 816. Rice argued that the Third Circuit’s decision was the final adjudication of a plaintiff’s right to a hearing and therefore had become the law of the case. See *Rice II*, 1996 WL 494138, at \*1.

The district court, however, decided to await the Supreme Court’s determination about whether to grant certiorari in *McGill*. See *Rice II*, 1996 WL 494138, at \*2. Citing concerns of judicial efficiency and economy, the court speculated that if the Supreme Court affirmed *McGill* because the district court lacked subject matter jurisdiction, it necessarily would have to dismiss Rice’s action, as subject matter jurisdiction is exempt from law of the case principles. See *id.* (citing *Christianson*, 486 U.S. at 816). Thus, while the court recognized it normally would be bound by the Third Circuit’s decision, it stated that a later relevant decision of the Supreme Court “trumps” the Third Circuit in a case in which a final judgment has not been entered. *Rice II*, 1996 WL 494138, at \*2. The court assured the parties that if the Supreme Court were to deny certiorari in *McGill*, it would “proceed expeditiously” to determine whether a failure to admit Rice’s evidence would result in a miscarriage of justice. *Id.*

The Supreme Court indeed denied the petition for a writ of certiorari in the *McGill* case, see *supra* note 11 and accompanying text, and *Rice II* resumed. See *Rice v. United States*, No. 93-6107, 1997 WL 48945 (E.D. Pa. Jan. 30, 1997) (“*Rice III*”). The court found in *Rice III* that Rice had been the victim of “an unfortunate set of circumstances and bad timing,” stemming from a criminal offense he committed when he was just nineteen years old. *Id.* at \*4. The court considered the fact that Rice had obtained expungement of his state criminal record and received a gubernatorial pardon just one year after his federal conviction for unlawful possession of firearms by a convicted felon. See *id.* The court noted that had this pardon been approved one year earlier, Rice could not have been convicted of the federal crime of possession of a firearm by a previously convicted felon, and the case never would have arisen. See *id.*

The court therefore undertook an analysis based on the considerations mentioned in section 925(c). The court noted that Rice was convicted in 1971 of a nonviolent crime, and other than his

### III. ANALYSIS AND PROPOSAL

As enacted, 18 U.S.C. § 925(c) expanded the jurisdiction of the federal courts and offered citizens an opportunity to have their federal firearms privileges restored by demonstrating that they pose no threat to society or the public welfare.<sup>110</sup> Congress withdrew funding for the administrative agency involved in this process, BATF, but enacted no legislation regarding the continuing scope of judicial review of these cases.<sup>111</sup> Some courts of appeal have concluded that their part in obtaining relief for these individuals has likewise been abrogated, but the rationale behind these decisions varies significantly.<sup>112</sup> At least one circuit continues to allow individuals to bring relief petitions for judicial review.<sup>113</sup>

Given that the meaning and intent behind the appropriations measures is ambiguous, Congress is in the best position to remedy this problem by enacting clearer legislation. Congress already dictated the role of BATF regarding these applications. The legislative history of the various appropriations bills leaves little doubt that Congress suspended administrative action in processing these applications.<sup>114</sup> Despite the appropriations bills, section 925(c) still grants federal court jurisdiction over these matters and directs the courts to avoid a “miscarriage of justice.” Currently, there is no guidance as to how the appropriations bills are intended to affect federal court jurisdiction. Thus, the standard form appropriations measure should be amended as indicated in boldface brackets:

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federal conviction based solely upon this prior state crime, he had had no subsequent entanglement with the law. The state court judge, as well as the federal judge, had imposed the lightest of penalties. The court found, moreover, that Rice was well known in and had significant ties to his community. He submitted 97 affidavits from friends and neighbors which stated that he was a “truthful, law abiding citizen.” The court found his reputation and character to be exemplary. *See id.* Therefore, after Rice had lodged three unsuccessful petitions to BATF and a federal lawsuit, the District Court for the Eastern District of Pennsylvania restored Rice’s privilege to own and possess firearms. *See id.* at \*5.

110. For the text of 18 U.S.C. § 925(c), see *supra* note 13. For its effect on existing law, see *supra* notes 14-15 and accompanying text.

111. For a list of the relevant appropriations measures, see *supra* note 17 and accompanying text.

112. See, for example, *Owen v. Magaw*, 122 F.3d 1350 (10th Cir. 1997), discussed *supra* notes 64-70 and accompanying text, which concludes that the legislative history of the appropriations measures indicates that federal courts are not to take jurisdiction of these petitions; *Burtch v. United States Department of the Treasury*, 120 F.3d 1087 (9th Cir. 1997), discussed *supra* Part II.A, which concludes that in this situation, the plain language of section 925(c) does not grant jurisdiction; and *United States v. McGill*, 74 F.3d 64 (5th Cir. 1996), discussed *supra* notes 48-63 and accompanying text, which concludes without jurisdictional inquiry that Congress intended to suspend relief from federal firearms disabilities.

113. See *Rice v. United States Dep’t of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995).

114. See *supra* note 20 and accompanying text.

Treasury, Postal Service, and General Government Appropriations  
Act, 19\*\*

TITLE I – DEPARTMENT OF THE TREASURY

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BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

SALARIES AND EXPENSES

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*Provided further*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities. [Nothing herein shall be deemed to preclude the right of an applicant to judicial review of these applications pursuant to 18 U.S.C. § 925(c). In the absence of an offer of evidence by the Bureau of Alcohol, Tobacco and Firearms, the admission of evidence remains at the sound discretion of the court, in the interests of avoiding a miscarriage of justice.]

This provision adequately addresses the concerns of all interested parties. Both the text and the history behind section 925(c) display concern for the distribution of justice and for the “essential” right of a party to demonstrate<sup>115</sup> trustworthiness and good character.<sup>116</sup> Moreover, the legislative history of section 925(c) itself suggests that the judiciary is to have an active role in the oversight of these claims.<sup>117</sup> This provision safeguards these concerns, while preserving the discretion of the court. The legislative history of the appropriations measures evinces congressional concern over fiscal and safety

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115. Given the broad statutory mandate to consider the “public interest” and a “miscarriage of justice,” 18 U.S.C. § 925(c) (1994), the nature of a petitioner’s proof will undoubtedly vary on a case-by-case basis. The statute anticipates a consideration of “the circumstances regarding the disability, and the applicant’s record and reputation.” *Id.* The *Code of Federal Regulations* requires certain forms of proof by a petitioner, including medical history, employment history, military service and criminal record. *See* 27 C.F.R. § 178.44 (1997); *supra* notes 6-7. In *Rice v. United States*, No. 93-6107, 1997 WL 48945 (E.D. Pa. Jan. 30, 1997), the court considered, among other things, the facts that the plaintiff was sentenced to the minimum allowable penalty for both of his convictions, received a gubernatorial pardon for one of these offenses, had a long history of noninvolvement with law enforcement, submitted 97 affidavits from friends and neighbors which stated that he was a truthful, law-abiding citizen and that the government had no evidence to the contrary. *See also supra* note 109.

116. *See supra* notes 13-14 and accompanying text.

117. *See supra* note 14 and accompanying text.

issues.<sup>118</sup> This proposal adequately protects both concerns. The funding provisions of the appropriations measures remain unchanged. Also, the provision makes clear that courts retain discretion in these matters and that they should exercise their discretion to avoid a miscarriage of justice. Moreover, by including the suggested language in the appropriations measures instead of section 925(c) itself, this proposal will require annual renewal on the part of Congress. The renewal requirement increases legislative flexibility and allows for ongoing analysis of the provision's effectiveness.<sup>119</sup>

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118. See *supra* note 20 and accompanying text.

119. Provisions introduced during the 104th Congress would have amended the appropriations measures with language indicating that "the inability of the Bureau of Alcohol, Tobacco and Firearms to process or act upon such applications for felons convicted of a violent crime, firearms violations, or drug-related crimes shall not be subject to judicial review." This provision was not incorporated into the final appropriations measures. See *supra* notes 24, 27-29 and accompanying text.

This Note concludes that such a provision inadequately addresses the concerns underlying the passage of FOPA and its predecessor, particularly the restriction on those convicted of firearms violations. While the appropriations measures have eliminated BATF's authority to *remove* firearms disabilities, BATF's ability to *impose* such disabilities through its primary sphere of enforcement authority remains unchecked. Extensive Senate hearings prior to the passage of FOPA established rampant abuses of enforcement power by BATF. For a list of these hearings and capsule summaries of major transgressions by BATF agents, see Hardy, *supra* note 14, at 606 n.118. Senator DeConcini, who chaired the hearings in the Appropriations Committee, concluded:

Frankly, I was shocked by yesterday's testimony. The problem appears much greater in scope and more acute in intensity than I had imagined. It is a sobering experience to listen to *average, law-abiding citizens* present evidence of conduct by an official law enforcement agency of the federal government which borders on the criminal. . . . The testimony offered yesterday, together with supporting documentary data, is extremely disquieting. . . . (It) indicates that *BATF has moved against honest citizens and criminals with equal vigor*.

Senate Report No. 97-476 (1982) at 15 (emphasis added) (alteration in original). Thus, the drafters of FOPA found the "safety-valve" measure of judicial review to be "absolutely essential." See *supra* note 14.

The well-publicized tragedies at Ruby Ridge and Waco, both initiated by BATF, foreclose any notion that things have gotten better at the Bureau. Senator Arlen Specter, Chairman of the Terrorism, Technology & Government Information Subcommittee of the Senate Judiciary Committee, concluded after Subcommittee hearings on the Ruby Ridge incident that BATF is "out of control. . . . [BATF] went overboard, went to extremes." Specter noted that BATF lied about Randy Weaver, whose 14 year-old son and wife were killed in the incident:

[BATF] said [Weaver] had a prior record of convictions . . . . Not true. [BATF] said that [Weaver] was a suspect in a bank robbery case. Not true. . . . And yet when the hearings were on, the director of the [BATF, John Magaw,] came in and made an effort to defend those misrepresentations, and later had to concede at the hearing that the conduct was inexcusable.

Ken Fuson, *An 'Out of Control' ATF Should Be Abolished, Says Senator Specter*, DES MOINES REG., Oct. 24, 1995, at 1. A report on the incident by the Treasury Department, which oversees BATF, found "disturbing evidence of flawed decision-making, inadequate intelligence gathering, miscommunication, supervisory failures, and deliberately misleading post-raid statements about the raid and raid plan by certain [B]ATF supervisors." BATF employees were among the federal agents cited for attending "Good Ol' Boy Roundups" in east Tennessee which included drunkenness and racist behavior. Holly Yeager, *Guns in America/ATF: A Mixed Heritage*, HOUSTON CHRON., Oct. 22, 1997, at 20.

Absent any clear direction from Congress, such as that in the proposed appropriations measure, the Supreme Court should grant review of a section 925(c) case to clarify the rights of applicants<sup>120</sup> and to resolve the split among the circuits.<sup>121</sup> Review is further appropriate because these cases involve weighty issues of subject matter jurisdiction, statutory interpretation, the doctrine of exhaustion of administrative remedies and a statutory mandate to avoid the "miscarriage of justice." Moreover, as the Court recognized, its decision in *Beecham* further complicated the issues surrounding 18 U.S.C. § 925(c).<sup>122</sup> The time has come for a definitive resolution of these matters.

Absent either congressional or Supreme Court resolution of this problem, the lower federal courts should undertake review of these petitions. Both the text of 18 U.S.C. § 925(c) and the history behind the statute demonstrate that Congress expanded the role of the judiciary to extend beyond whatever evidence the Secretary of the Treasury may or may not have to offer in any particular case.<sup>123</sup> Moreover, both the text of the statute and its legislative history reveal a congressional concern for justice and for trustworthy individuals to be afforded the opportunity to vindicate their standing in the eyes of the law.<sup>124</sup>

This Note concludes that narrow reasoning, such as that applied by the Ninth Circuit in *Burtch*, is ill-founded. Even if resolution of these cases were to turn on the narrow issue of statutory construction of the term "denial," the analysis of the Third Circuit regarding the doctrine of administrative exhaustion reveals that the *Burtch* court was making law in a vacuum. Supreme Court precedent dictates that Congress may repeal substantive rights, such as the right to judicial review, through appropriations measures only if it does so "clearly."<sup>125</sup> The appropriations measures at issue here are silent on the issue.<sup>126</sup> The only affirmative attempt by either house of Congress to address the issue would have defined the right, not destroyed it.<sup>127</sup> The fact that this attempt initially succeeded only in the House of Representatives is at best a mixed message, a far cry from the Supreme Court's standard of a "clear" indication of congressional intent. Lower

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120. The Supreme Court denied McGill's petition for a writ of certiorari. *See McGill v. United States*, 117 S. Ct. 77 (1996).

121. *Compare Burtch v. United States Dep't of the Treasury*, 120 F.3d 1087, 1089 (9th Cir. 1997), and *United States v. McGill*, 74 F.3d 64 (5th Cir. 1996), with *Rice v. United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995).

122. *See Beecham v. United States*, 511 U.S. 368, 373 n.\* (1994).

123. *See supra* notes 13-14 and accompanying text.

124. *See supra* notes 13-14 and accompanying text.

125. *See supra* note 45 and accompanying text.

126. *See supra* note 17 and accompanying text.

127. *See supra* notes 24, 27-28 and accompanying text.

federal courts should consider these cases with a view toward effecting the policies expressed by 18 U.S.C. § 925(c). Recognition of these claims reflects both the letter and spirit of the law.

#### IV. CONCLUSION

Currently, federal law allows a person unable to lawfully possess firearms to apply to BATF for a removal of this disability. Yet Congress tied the hands of BATF by removing all funding for investigations of these applications, although Congress kept section 925(c) right of petition and judicial review on the books. BATF has refused to take any part in the further resolution of these petitions or any ensuing litigation. The courts of appeal, on the other hand, meet petitioners seeking judicial review with conflicting determinations. The Supreme Court has thus far been unwilling to determine the rights of the parties, the jurisdiction of the federal courts or the intent of Congress. Legislative or judicial redress of this situation is sorely needed.

*Gregory J. Pals*

