

Docket No. 08-15640-F

**The United States
Court of Appeals
For
The Eleventh Circuit**

William Akins, Appellant

v.

United States of America, Appellee

**Appeal from the United States District Court
For
The Middle District of Florida
The Hon. Richard A. Lazzara, District Judge**

Brief of Appellant

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Certificate of Interested Persons

Appellant certifies that the following persons are known to him to have an interest in the outcome of this case:

The Hon. Richard Lazzara
John R. Monroe, Esq.
Eric Soskin, Esq.
Sheryl Loesch, Esq.
John F. Rudy, Esq.
Paul Parrish, Esq.
William Akins
United States of America

Statement on Oral Argument

Appellant believes that oral argument would aid the Court in deciding this case. Many issues were raised below by Appellant and not explicitly ruled upon by the District Court. It is highly likely that the Court will have questions about the potential interaction of these issues. In addition, because there is no finding of facts in the agency record and no statement of facts in the government's briefs in the District Court, oral argument may assist the Court in determining whether, as Appellant asserts, there is a genuine issue of material fact.

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Statement Regarding Adoption of Briefs of Other Parties

Appellant does not adopt the brief of any party.

Statement on Jurisdiction

The District Court had federal question jurisdiction of this case under 28 U.S.C. § 1346(a)(2), as the United States was the defendant.

The District Court action was finally disposed of by order of the court on September 23, 2008. A judgment was entered by the clerk the same day. Appellant filed a Notice of Appeal on October 1, 2008, so his appeal is timely. F.R.A.P. § 4(a)(1)(A).

Statement of the Issues

1. There is a Genuine Dispute of Material Fact
2. BATFE May Not Change the Meaning of a Criminal Statute Because of Perceived Changes in Technology
3. Public Safety is not a Valid Consideration in Interpreting Criminal Law
4. The District Court's Decision was Contrary to Law
5. The District Court Decided the Case on an Incomplete Agency Record
6. BATFE Showed Bias Against Akins
7. Akins was Constitutionally Entitled to a Hearing Because He Contested the Factual Basis for BATFE's Finding a Device to be a Machine Gun
8. Akins was Entitled to a Predeprivation Hearing Because BATFE's Testing Procedures were Suspect
9. 26 U.S.C. 5845(b) is Unconstitutionally Vague As Applied to Akins
10. The District Court Ignored Akins' Declaratory Judgment Action

Statement of the Case

Nature of the Case

This is an Administrative Procedures Act review and declaratory judgment action, in which Plaintiff-Appellant William Akins seeks review of a Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”) action that declared a device invented by Akins to be a machine gun. In the alternative, Akins seeks a declaration that the statute defining a machine gun (26 U.S.C. § 5845(b) is unconstitutional as applied to him.

Proceedings Below

Appellants commenced the action below, in the United States District Court for the Middle District of Florida on May 21, 2008, against the United States. The action arose out of a series of actions of the BATFE regarding a device invented by Akins, the “Akins Accelerator.” BATFE classified it as a “nothing,” following which Akins began commercial production of the Akins Accelerator. BATFE then declared it (internally) to be a machine gun, and claims to have evaluated it subsequently to support its declaration. Thereafter, BATFE publicly declared it to be a machine gun and ordered Akins to cease its distribution. The District Court granted the government’s motion for summary judgment, and this appeal follows.

Statement of the Facts¹

Plaintiff invented a device he patented in August of 2000 that he later called the Akins Accelerator. The purpose of the Akins Accelerator is to replace the stock of a host firearm, a semiautomatic rifle, and through controlled “bump firing,”² increase the rate of fire of the semiautomatic rifle while maintaining aiming accuracy. Traditional methods of bump firing have two drawbacks that result in dissatisfaction to the shooter. First, it can be difficult to keep the proper and consistent forward force on the firearm with the shooter’s non-dominant hand. Second, it can be difficult to keep rearward tension in the trigger finger without actually moving the finger

¹ Because this appeal concerns the District Court’s grant of a defense motion for summary judgment, the evidence must be viewed in a light most favorable to the plaintiff (Akins). *Stanton v. Larsh*, 239 F.2d 104, 106 (5th Cir 1956). The statement of facts therefore draws largely on the Complaint and on the Statement of Disputed Facts filed by Akins in opposition to the government’s motion.

² “Bump firing” is a term used to describe a method of achieving rapid firing of a semiautomatic firearm. The theory behind bump firing is that the recoil of the firearm forces the firearm to move rearward and disengage the trigger from the shooter’s trigger finger (thus resetting the trigger for another shot through the normal operation of the firearm), while forward tension is applied to the firearm (such as by the left hand of a right-handed shooter), resulting in the firearm (and trigger) being forced forward again and causing the trigger to be “pulled” by the tension in the shooter’s finger. If done well, the result is that the firearm achieves firing rates equivalent to those of fully automatic weapons. The crucial aspects of bump firing are 1) the shooter must maintain tension in his trigger finger (so that the forward motion of the firearm and trigger meet the resistance of the finger and cause another shot to fire), and 2) forward pressure on the firearm (such as by the non-dominant hand) to counteract the rearward motion caused by the recoil.

rearward (and thereby “follow” the trigger and not allow it to move forward to reset for another shot). Even when these obstacles are overcome, the resulting back and forth movement of the firearm tends to be non-linear and accuracy cannot be achieved.

The Akins Accelerator solved all these problems. The Akins Accelerator is a replacement stock for the host firearm.³ Not a conventional stock, the Akins Accelerator allows the Ruger 10/22 (minus the factory stock) to move in a linear motion forward and rearward. An internal spring applies a force that holds the Ruger 10/22 in its most forward position when the assembly (the Akins Accelerator and Ruger 10/22 together) is at rest. When the rifle is fired, the recoil of the shot overcomes the force of the spring and the Ruger 10/22 moves rearward inside the Akins Accelerator while the shooter’s hands hold only the Akins Accelerator.

As the energy from the recoil compresses the spring even farther, the force of the spring counteracts the recoil and pushes the Ruger 10/22 forward again. During the recoil operation, the spent shell is ejected and

³ The production model of the Akins Accelerator was made for a single host firearm: the popular Ruger 10/22 semiautomatic .22 caliber rifle. The theory of operation, however, could be used in a variation adapted for virtually any semiautomatic firearm. For simplicity’s sake, the host firearm will be referred to as a Ruger 10/22.

another live round of ammunition is put in the firing chamber of the Ruger 10/22 (these actions take place normally on a factory Ruger 10/22).

The second innovation on the Akins Accelerator is that it has finger stops for the trigger finger. When the assembly is fired, the trigger finger pulls the trigger rearward until the finger encounters a stop located slightly to the rear and on either side of the trigger. Thus, when the assembly is properly adjusted, the trigger finger can move rearward just far enough to fire the rifle before the finger is stopped by the finger stops. Then, as the rifle moves rearward (due to the recoil discussed above), the trigger “disappears” between the finger stops and moves inside the Akins Accelerator, losing contact with the trigger finger. The shooter thus can maintain tension against the finger stops, which counter the tendency of the finger to follow the trigger rearward.

Finally, as the rifle moves forward again due to the forward tension supplied by the spring, the trigger re-engages the trigger finger. Because the shooter maintains rearward pressure in the trigger finger, the trigger is “pulled” again (actually pushed into the finger), and the rifle fires. To summarize, a properly adjusted assembly (Ruger 10/22 and Akins Accelerator) will bump fire rapidly while achieving higher accuracy than is possible with other means of bump firing.

Plaintiff saw the market value in the Akins Accelerator, but wanted to ensure that there was no question regarding its status as not regulated by the federal government. Plaintiff is not licensed to manufacture firearms, including machine guns, and *had no interest in entering that industry*. Plaintiff obtained an opinion letter from a nationally-recognized firearms attorney that the Akins Accelerator was not a machine gun, or a firearm at all, subject to federal regulation. In March 2002, he forwarded this letter, along with a copy of his patent, to the Firearms Technology Branch (“FTB”) of the U.S. Department of Justice’s Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”), asking for a classification of the device.⁴

When FTB had not replied to his request 15 months later, Plaintiff sent a second, substantially similar request in June 2003. In July 2003, FTB responded to the first request, asking for a sample to test and inspect. Eleven days later, Plaintiff’s business associate, Tom Bowers, sent a sample to FTB. In October 2003, FTB responded to Plaintiff’s second request, asking for a sample to test and inspect. Because he already had submitted a sample, Plaintiff did not respond to the October letter.

⁴ FTB routinely classifies devices for anyone requesting a classification.

In November 2003, FTB responded to Mr. Bowers that it had inspected the sample and tested it on a host firearm.⁵ Although FTB said the sample did not operate as intended, FTB nonetheless concluded, “Our examination has determined that the submitted stock assembly does not constitute a machinegun as defined in the NFA [National Firearms Act].”

The November letter left an ambiguity: was the device not a machine gun because it did not function properly, or was it not a machine gun even if it functioned as intended? To resolve all doubts, Mr. Bowers called FTB and later wrote (in January 2004) regarding this issue. FTB responded later that month with, “Our classification of the stock assembly was rendered despite the fact that the screws dislodged from the frame. The theory of operation was clear even though the rifle/stock assembly did not perform as intended. In conclusion, your prototype shoulder stock assembly does not constitute a “machinegun” as defined in the NFA.”

Satisfied with legal advice and two letters from the government that the Akins Accelerator was not a machine gun, Akins invested his life

⁵ The sample provided was made for an SKS-type semiautomatic rifle. As noted above, however, the theory of operation can be applied to virtually any semiautomatic host firearm and is not dependent on the specific type of firearm. Contrary to the District Court’s opinion, manufacturing the Akins Accelerator for varying host firearms does not constitute “changes to the practical operation of the device.” The practical operation of the Akins Accelerator would be identical for any host firearm for which it was made.

savings into moulds, manufacturing capabilities, and marketing necessary to go into commercial production and sale.⁶

When Akins ultimately entered the market with the Akins Accelerator in 2006, initial response to the product was enthusiastic. On his way to recovering his investment and turning a profit, Akins' success was destined to be short-lived.

On August 16, 2006, Sterling Nixon, the Chief of FTB wrote an internal email saying:

Two companies are manufacturing machineguns.... The firearms are using the motion of the weapon to move the finger back and forth. ***FTB has always evaluated these devices as machine guns.*** One of the manufacturers sent us a sample that did not function. We classified it as nothing. The manufacturer then changed the device and made it function and is now selling it on the internet.... I have been talking to James Vann and Teresa Ficaretta [two ATF lawyers]. ***We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these machineguns.***

(Emphasis supplied). The subject heading in Mr. Nixon's email was "Illegal machine guns." In that email, Mr. Nixon included an email from Daniel Pinckney, of the National Firearms Act Branch of the ATF, which said, "I guess by the current definition of a machine gun, it technically isn't one, but

⁶ At the time of production, the Akins Accelerator was manufactured and sold by a corporation, Akins Group, Inc. Akins is the successor in interest to this dissolved corporation, so no distinction is made between actions taken by Akins personally or by the corporation.

it sure has a pretty quick rate of fire.” Within a week, ATF emails from coast to coast had subject headings of “Akins machinegun.” By September 8, 2006, ATF “conferred with counsel ... and determined [the Akins Accelerator] to be a machinegun. *When our technical review is complete*, it will be forwarded to counsel with a recommendation that any sold should be recalled.” (Emphasis supplied).

On September 22, 2006, two weeks after ATF already had “determined it to be a machinegun,” ATF ordered an Akins Accelerator from Plaintiff (ATF did not identify itself as such when ordering the device). On October 31, 2006, ATF lawyer Ficaretta began trying to schedule a meeting “to discuss the classification” of the Akins Accelerator. At some point after this, an undated internal ATF memo says, “*The marketed device was radically different from the prototype* that was previously submitted. On further review and test fire, FTB determined that the operating principle was that of a machinegun.” (Emphasis supplied).

On November 22, 2006, FTB sent Akins a letter advising him that the Akins Accelerator had been classified as a machine gun. Contrary to the recent internal memo, the letter said, “*[T]he theory of operation of the prototype and the Akins Accelerator is the same.*” (Emphasis supplied). In the letter, ATF equated “function of the trigger” with “pull of the trigger.”

On December 13, 2006, ATF issued a rulemaking, ATF Rul. 2006-2, declaring a device exactly meeting the description of the Akins Accelerator to be a machine gun. The rulemaking also equated “function of the trigger” with “pull of the trigger.” ATF did not publish a notice of proposed rulemaking or seek comments pursuant to 5 U.S.C. § 553.

On February 6, 2007, Akins’ counsel wrote ATF asking that it reconsider its ruling. The letter informed ATF that it had evidence of errors on ATF’s part. Subsequently, Akins’ counsel made multiple requests for a hearing on the subject. ATF ultimately denied reconsideration and declined to hold a hearing.

ATF determined that the spring was the part that made the Akins Accelerator a machine gun. Thus, it required Plaintiff to remove the springs from his inventory of Akins Accelerators. Plaintiff likewise was required to provide ATF with a customer list, and ATF required purchasers of Akins Accelerators to remove the springs. All removed springs were seized by ATF. Now classified as machine guns, there no longer is a market for Akins Accelerators. Plaintiff was forced to close down his company and cease production and sales, leaving him in financial ruin.

In an undated internal memo apparently written after the events described above, FTB Assistant Chief Richard Vasquez distinguished the Akins

Accelerator from other devices because the shooter, he said, only has to have a single “initial conscious effort to pull the trigger.” (Emphasis in original). He went on to say the “firearm continues to fire without interruption until a second, *conscious* releasing of the trigger stops the firing sequence.” (Emphasis supplied). In the same memo, Mr. Vasquez retreated from the public position of the ATF by saying, “[I]t is FTB’s opinion that ‘function’ is the best description and does limit ATF to a narrow definition such as ‘pull only.’”

Statement on the Standard of Review

The District Court’s grant of summary judgment is reviewed *de novo*, applying the same legal standards as the District Court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the non-moving party. *Arrington v. Helms*, 438 F.3d 1336, 1341 (11th Cir 2006).

Summary of the Argument

The District Court granted Appellees' Motion for Summary Judgment based on "facts" that are not support on the record, and in disregard of the fact that the BATFE exhibited blatant bias against Akins and that BATFE did not provide the complete record for review. The District Court also ignored the genuine dispute of material fact apparent in the record. Finally, the District Court excused to Akins' detriment the government's failure to abide by the District Court's orders, and the District Court needlessly shortened the time for Akins to respond to BATFE's Motion. For the foregoing reasons, the judgment of the District Court should be reversed.

Argument and Citations of Authority

There is a Genuine Dispute of Material Fact

Astonishingly, the District Court came to the conclusion that there was no dispute of fact, and that Akins has not raised any such dispute. In the *very first paragraph* of the Complaint, however, Akins alleged that the BATFE's actions "were without factual support." R1-1. Moreover, Akins filed a multi-page Statement of Disputed Facts in response to the government's Motion. R1-25. The District Court failed to acknowledge this aspect of Akins' case. Likewise, the District Court made no attempt to reconcile the Statement of Disputed Facts with the positions of the government.

For example, Akins asserts that the trigger on a rifle mounted in an Akins Accelerator "must be functioned for each and every shot fired." R1-25(2)-5. The government contends the rifle fires automatically with a single function the trigger.⁷ The pre-litigation events underscore this factual dispute. Given that BATFE understood the operation of the Akins Accelerator it initially classified, it must have understood the facts attendant

⁷ The government appears to make this particular assertion in its brief on its Motion. R1-19-6. The government failed to file a statement of facts as required by the District Court's Scheduling Order. R1-18-2. This deficiency is compounded by the fact that BATFE made no findings of fact for inclusion in the record. It is thus difficult to cite with specificity to the facts asserted by the government.

with that operation. That is, the rifle fired once for every function of the trigger. If BATFE thought otherwise, it surely would have classified the device as a machine gun. This discrepancy begs the question: Was BATFE wrong about the facts in 2003 or was it wrong about the facts in 2006? Because the record supports either conclusion, it is impossible to determine on the record which is correct.

The District Court also made several factual statements that are disputed (and thus requiring a trial to reconcile) or not supported in the record at all. In the very first line of its Discussion, the District Court declared that the BATFE “concluded that the Akins Accelerator is a machinegun based on its testfiring of a retail-model Akins Accelerator.” The record shows otherwise. The Chief of the Firearms Technology Branch determined that the Akins Accelerator was a machine gun without any testing or inspection at all. In fact, he made the determination that it is a machine gun base on his review of videos posted on the internet. R1-19(3)-24. Only after he made this determination did he order his staff to build a legal case to support his meritless conclusion. *Id.*

The District Court also assigns a “failure to dispute” to Akins that Akins never had occasion to dispute. The District Court found that Akins “does not dispute that the purpose of the Akins Accelerator is to make it

possible for the shooter to act once and cause the rifle to fire repeatedly until its ammunition is exhausted *...or until the shooter takes an action to remove his finger from the device.*” R1-29-10 [emphasis supplied]. The District Court’s citation to the Statement of Disputed Facts, to support that conclusion, is inaccurate. No where does the government assert this fact, so it would have been odd for Akins to dispute something that no one posited. Quite the contrary, Akins gives a rather lengthy explanation of the purpose and operation of the Akins Accelerator, but no where does he claim the purpose cited by the District Court.

The District Court’s finding of fact that partially drives the ultimate conclusion (that the Akins Accelerator is a machine gun) is derived from an undated internal BATFE memo that appears to have been written after the re-classification of the Akins Accelerator had been made. (“FTB determined that ‘the person firing has to make one initial conscious effort to pull the trigger and once the triggering cycle is initiated, the firearm continues to fire without interruption until a second, conscious releasing of the trigger stops the firing sequence.’”) R1-29-10, citing to R1-19(4)-59.

The reason the memo appears to have been written after the fact is that it makes reference to issues “that were presented by Mark Barnes with respect to the Akins Accelerator.” R1-19(4)-57. Mark Barnes was Akins’

attorney who wrote BATFE a letter on February 6, 2007, seeking reconsideration of the November 22, 2006 re-classification of the Akins Accelerator. In order for the internal BATFE memo to have addressed the 2007 letter, the memo must have been written after the 2006 re-classification.

The District Court should not base any finding of fact on an internal memo written after the fact to bolster BATFE's case. One could just as easily make findings of fact by citing to Mr. Barne's 2007 letter, which said, "For each shot, the pressure is released as the trigger moves rearward, and when the trigger thereafter moves forward, it is pulled again." R1-12-27.

The District Court was thus faced with diametrically conflicting facts, and impermissibly chose one over the other. A motion for summary judgment cannot be decided by resolving genuine issues of material fact. Fed. R. Civ. P. 56. In cases where such issues exist, the motion must be denied.

BATFE May Not Change the Meaning of a Criminal Statute Because of Perceived Changes in Technology

The District Court refers to BATFE's "policy" and "views" in interpreting the criminal statute at issue in this case. The District Court seems to have concluded that BATFE is free to criminalize the possession of

any device it does not like by calling the device a machine gun, without regard to whether the device fits the statutory definition. Once the agency makes that determination (even if it gives affected parties no notice that such a determination is in the offing), reasons the District Court, a person in Akins' position is powerless to refute the finding. The District Court accepted, without question, BATFE's determination that the Akins Accelerator is a machine gun, reasoning that the BATFE may change its "views" and "policy" regarding criminal statutes to keep up with technology.

The District Court does not attempt to identify the supposed change in technology. Indeed, there was no such change. The District Court appears to place great emphasis on the fact that the original prototype submitted to BATFE was for a high-powered military-type weapon, an SKS rifle (the "precursor" of the AK-47), but that the commercial Akins Accelerator was for a common, low-powered .22 caliber rifle. This is no change in technology. The technology of the Akins Accelerator is not dependent on the host firearm. The Akins Accelerator could be manufactured for virtually any semiautomatic rifle. Moreover, the local extension of the District Court's opinion is that it would be okay for Akins to revert to the "old technology" and make his device for a much more powerful rifle.

The District Court also notes that BATFE acted to “close a loophole created by its earlier interpretation of the machinegun definition.” When it comes to criminal statutes, a “loophole” is nothing more than legal behavior that someone wishes were criminalized. What congress fails to criminalize cannot be corrected by BATFE. *See, e.g., United States v. Peters*, 403 F.3d 1263, 1275 (11th Cir. 2005), where congress had to modify the law to apply, to persons other than licensed gun dealers, the prohibition against selling guns to felons. In *Peters*, the “loophole” identified by congress was “closed” by congress. BATFE would have had no authority to arrest a non-licensee for violating a criminal provision that only applied to licensees. Likewise, in the case at bar, BATFE has no authority to declare devices that do not fit the statutory definition to be machine guns by changing the words of the statute. This is especially true where, as here, BATFE quickly changed the statute back to its original wording because it did not want to hem itself in with the fabricated definition.

There are no common law crimes in this country, and for good reason. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Only congress can act to include inadvertently omitted in a statute, no matter how salutary the purpose. *Viereck v. United States*, 318 U.S. 236, 243-245 (1943).

“The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach.” *Id.* “While Congress undoubtedly had a general purpose to [act] in the public interest ... we cannot add to [the statute’s] provisions other requirements merely because we think they might more successfully have effectuated that purpose.” *Id.* It is not the place of BATFE to move the boundary between legal and criminal to suit its needs (or desires). A person must be fairly put on notice what conduct is criminalized. If the agency is free to redefine the criminal code, without notice, in order to conform to a bureaucrat’s “views,” then the criminal code is nothing but the whim and caprice of the bureaucrat.

Public Safety is not a Valid Consideration in Interpreting Criminal Law

The District Court concluded that BATFE’s determination that the Akins Accelerator is a machine gun is “supported by ... the need to protect public safety.” R1-29-11. The District Court did not elaborate on how it came to this conclusion, other than to state, without citation to the record, that “weapons with a high rate of fire are extremely desirable to criminals.” R1-29-17. The District Court, however, has no authority to declare something to be criminal in the name of public safety. *Viereck*, 318 U.S. at 245 (“[M]en are not subjected to criminal punishment because their conduct

offends our patriotic emotions or thwarts a general purpose sought to be effected by specific commands which they have not disobeyed. Nor are they to be held guilty of offenses which the statutes have omitted, though by inadvertence, to define and condemn. For the courts are without authority to repress evil save as the law has proscribed it and then only according to law.”)

It likewise is improper to equate “weapons with a high rate of fire” with “machine guns.” As noted by Akins in his Brief to the District Court, congress could have elected to make “rate of fire” a factor (or even the sole factor) in determining if a device is a machine gun. It declined, however, to do so. As a result, many firearms (either standing alone or with after-market accessories) achieve very high rates of fire (just as the Akins Accelerator does), yet they are not machine guns. For example, the BMF Activator, a device consisting of a crank inserted into the trigger guard of a Ruger 10/22 (the same rifle for which the commercial version of the Akins Accelerator was produced) reported results in the rifle firing several hundred rounds per minute, yet the BMF Activator has been determined by BATFE not to be a machine gun. R1-25-15.

BATFE agents have testified that “trigger activators” (which are not machine guns) “involve using springs that force the trigger back to the

forward position, meaning that you have to separately pull the trigger each time you want to fire the gun, but it gives the illusion of functioning as a machine gun.” *Camp v. United States*, 343 F.3d 743, 745 (5th Cir 2003). Thus, the District Court’s reliance on the rate of fire as being significant is erroneous. It also is noteworthy that the Akins Accelerator performs exactly the function described by BATFE as a “trigger activator.”

Moreover, the Supreme Court has rejected the concept of “dangerousness” as a measure of whether a person knew a particular device was a machine gun. *Staples v. United States*, 511 U.S. 600, 618 (1994) (noting that all guns are “dangerous” and half of all U.S. households contain them, so a person would not equate dangerousness of a gun with illicit behavior in owning one).

The District Court’s Decision was Contrary to Law

The District Court erroneously accepted BATFE’s on again/off again equating of a single “function” of the trigger with a single “pull” of the trigger. For support of BATFE’s position, the District Court repeats BATFE’s citation to *Staples v. United States*, 511 U.S. 600, 603 FN 1 (1994), where the Court described a fully automatic weapon as one “that fires repeatedly with a single pull of the trigger.” The District Court cites

this quote as authority that the Supreme Court equates “pull” with “function.”

That is not the holding in *Staples*. No where is *Staples* was their an issue of whether “pull” means “function.” The only trigger function of interest in *Staples* was pulling, and no distinction was made with any other function. This is also true of the only other case cited by the District Court, *Camp*, 343 F.3d at 743. In *Camp*, the court found that a switch on an electric motor that in turn operates the factory “trigger” on a firearm is a “trigger” for the purpose of 18 U.S.C. § 5845. In *Camp*, one coincidentally pulled the switch (as opposed to pushing or performing some other function). Under the District Court’s view, *Camp* could have avoided criminal liability for possessing a machine gun if he had made the switch a push-button switch. This absurd interpretation flies in the face of common sense. *See, e.g., United States v. Fleischli*, 305 F.3d 643 (7th Cir 2002), where the court described an “application” of the trigger, no doubt because the electrical switch in that case is “pushed” and not “pulled” as in a conventional firearm.

The District Court also cites to the testimony before Congress of the NRA president in 1934 to support an interpretation of a law passed in 1934 that is first applied by BATFE in 2006. R1-29-12. The District Court does

not question why the BATFE took 72 years to adopt an interpretation of law based on a snippet of testimony buried in the congressional record by a non-member of Congress. Again, there is no indication that there was a debate during the testimony of a distinction between “pull” and “function.” In any event, Congress adopted the word “function,” and not “pull.”

Finally, as noted above, BATFE quickly retreated from its use of “pull” in the place of “function” after the one-time use of the narrow term against Akins. In an internal memo, BATFE noted that using “pull” instead of “function” would result in boxing the BATFE in unnecessarily. It is difficult to take BATFE’s use of the term “pull” seriously when it abandoned that use before the ink was dry on BATFE’s abuse of Akins.

The District Court Decided the Case on an Incomplete Agency Record

Akins noted in his brief to the District Court that the “record” filed by BATFE was full of redactions (107 pages) and deleted pages (49 pages), without explanation. R1-25(1)-4. The government excuses its incomplete record by incorrectly (and without factual support) claiming that “Plaintiff has been furnished with a privilege log explaining the reasons for these redactions...” R1-28-2.

The government first asserted the existence and service of a privilege log (again, without citation to an affidavit or other source) in its Reply Brief,

which the District Court permitted the government to file over Akins objection. R1-27. To be clear, counsel for Akins hereby certifies to this Court that he has received no such privilege log. Moreover, an agency's failure to claim a privilege "with respect to certain documents ... could be construed as a waiver of its claim to privilege." *Tafas v. Dudas*, 530 F.Supp.2d 786, 801 (E.D. Va. 2008).

Even if such "privilege log" had been received, however, that would not end the inquiry. The *Tafas* opinion makes clear that the burden is on the government to prove the validity of the privilege asserted. *Id.* Mere assertion in a privilege log is not proof. A privilege log is only the government's assertion of the privilege. Akins still retained, if he had received a privilege log, the right to object to the assertion of the privilege as to specific documents. By failing to provide the privilege log, however, the government both waived the privileges that might have been asserted and deprived Akins of an opportunity to object to any such asserted privileges. The District Court erroneously found, however, that BATFE provided Akins with a privilege log. R1-29-9. This finding apparently was based on the unsupported claim in BATFE's Brief that it had done so.

Aside from the materials that BATFE redacted from the record, the record is remarkable for what it does not contain. No where in the

voluminous record of documents and video files is there even a single page of a report or documentation of BATFE's inspection and testing of the Akins Accelerator. Astonishingly, the record does contain video testing of five devices *other than the Akins Accelerator*. Lacking any record evidence, BATFE still concluded *ipse dixit* that the Akins Accelerator is a machine gun. The District Court accepted this conclusion with no citations to any reasoned, fact-based conclusions.

BATFE's failure to support its conclusions with articulable facts is not novel:

This court routinely defers to administrative agencies on matters relating to their areas of technical expertise. We do not, however, simply accept whatever conclusion an agency proffers merely because the conclusion reflects the agency's judgment. In order to survive judicial review in a case arising under § 706(2)(A), an agency action must be supported by reasoned decision making. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. Courts enforce this principle with regularity when they set aside agency regulations which, though well within the agencies' scope and authority, are not supported by the reasons that the agencies adduce.... We therefore owe no deference to ATFE's purported expertise because we cannot discern it."

Tripoli Rocketry Association, Inc. v. B.A.T.F.E., 437 F.3d 75, 76 (2006).

"The agency has never provided a clear and coherent explanation for its classification.... ATFE has never articulated the standards that guided its analysis." *Id.* At 81.

BATFE Showed Bias Against Akins

Imagine a district court judge in Atlanta taking a lunchtime walk near Five Points, where he spots a street vendor selling Nike sneakers for \$50 per pair. Thinking this to be an unbelievably low price, he sends an email to the Marshal's office, saying, "Someone is selling counterfeit sneakers at Five Points. We need to stop those sales ASAP. In order to make a legal case, I need to inspect a pair of these counterfeit shoes." The marshal buys a pair of shoes and brings them to the judge. The judge sends the shoe seller a letter concluding that the shoes are counterfeit, together with an injunction prohibiting any further sales of the tennis shoes. There was no hearing, and the shoe man did not even know the judge was "investigating" the shoes. The shoe man appeals, and the record on appeal consists of the email to the marshal and the letter and injunction. Is there any possibility the injunction would be affirmed?

Akins showed in his Brief that BATFE displayed blatant bias against his device. The Chief of the Firearms Technology Branch wrote an internal email, *before it ever inspected or tested the Akins Accelerator*, in which he said, after describing the history of the device, "We feel that ATF needs to put a stop to the sales ASAP. In order to make a legal case, FTB needs to evaluate these *machineguns*." [Emphasis supplied]. R1-19(3)-24. The

subject heading in the email was “Illegal machine guns.” *Id.* Thus, the Chief of FTB determined the Akins Accelerator was an “illegal machine gun” before his branch had inspected or tested it. He then directed his staff to “build a legal case” to support his biased conclusion. Not surprisingly, his branch ultimately concluded that the device was a machine gun.

Later, a BATFE employee said in an email, “We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun.” R1-19(4)-3. This email shows that BATFE “evaluated the device” and “conferred with counsel” *two weeks before* it ordered the Akins Accelerator for testing on September 22, 2006. R1-19(3)-54, 55. This was *33 days before* the field office that purchased the Akins Accelerator sent it to FTB for examination. R1-19(3)-54. Thus, the agency confirmed the conclusions of the FTB Chief before it ever saw the device.

[D]ue process requires a neutral and detached judge in the first instance.... That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. Before one may be deprived of a protected interest, whether in a criminal or civil setting, one is entitled as a matter of due process of law to an adjudicator who is not in a situation...which might lead him not to hold the balance nice, clear, and true.

Concrete Pipe & Products v. Construction Laborers and Pension Trust, 508 U.S. 602, 617 (1993). It is clear in this case that the FTB Chief’s thumb

was on the balance before any measurements took place. With the bias shown against Akins (seeking to “stop sales ASAP” before any adjudication had taken place), this agency should have disqualified itself in the first instance.

The District Court did not address this important issue raised by Akins in his brief. BATFE did not attempt to rebut Akins’ claim of bias when it filed a reply brief. Due process requires that the agency’s classification be reversed, with the matter re-evaluated by a neutral party.

Akins was Constitutionally Entitled to a Hearing Because He Contested the Factual Basis for BATFE’s Finding a Device to be a Machine Gun

Akins clearly alleged in his Complaint that BATFE was factually wrong in concluding that the Akins Accelerator is a machine gun. R1-1-9 (“Defendant acted arbitrarily, capriciously, and without factual basis”). Akins showed in his Statement of Disputed Facts that the Akins Accelerator was not a machine gun “because the trigger must be functioned for each and every shot fired.” R1-25(2)-5.

It is clear, therefore, that Akins contends that BATFE “made a mistake of fact, i.e., that [the Akins Accelerator] does not meet the criteria set out in the BATF’s expanded definition of ‘machine gun.’” “[C]onstitutional due process does require a hearing if [the device

manufacturer] contends the agency made a mistake of fact, i.e., that his gun does not meet the criteria set out in the BATF's expanded definition of 'machine gun.'" *York v. Secretary of the Treasury*, 774 F.2d 417, 421 (10th Cir. 1985). Akins, therefore, was constitutionally entitled to a hearing. Although Akins raised this issue in the District Court, the District Court did not address it.

Akins was Entitled to a Predeprivation Hearing Because BATFE's Testing Procedures were Suspect

The *York* test articulated above applies to a *post-deprivation* hearing, to which Akins was entitled but did not receive. The District Court focused solely on whether Akins was entitled to a *pre-deprivation* hearing. The Supreme Court has established three factors that must be weighed in determining if a party is entitled to a pre-deprivation hearing:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The District Court attempted to weigh these factors. Applying the first factor, the District Court determined that Akins has an important

interest in marketing his invention, but that this interest is lessened by the government's interest in regulating the firearms industry. R1-29-15. In other words, the District Court concluded that the third factor (the government's interest) is not only weighed by itself, but its weight can somehow lessen the weight that ought to be accorded Akins under the first factor.

As grounds for this conclusion, the District Court cited to the Court of Federal Claims' opinion in a takings case Akins brought against the government. R1-29-15. That opinion, however, is not final and no judgment has been entered in that case. Moreover, the opinion rests on the illogic that the Akins Accelerator must be a machine gun (and therefore a "firearm" as that term is used in federal statutes) because the government has a strong interest in regulating firearms. "[A] business owner beginning manufacture of rapidly-repeating firearms 'ought to be aware of the possibility that new regulation might even render his property economically worthless.'" R1-29-15. It ignores the fact that Akins had no interest in manufacturing firearms, rapidly-repeating or otherwise, and scrupulously avoided entering the firearms industry. R1-25(2)-5. Moreover, the District Court observed that if the Akins Accelerator is not a machine gun, it "would not fall under any federal regulatory scheme of any kind." R1-29-18. Thus,

the government's interest in regulating the Akins Accelerator only exists if the Akins Accelerator is a machine gun.

Finally, the District Court ignored the holding of the 10th Circuit Court of Appeals that an actual firearms manufacturer (as opposed to an accessory manufacturer such as Akins) had a strong interest (undiminished by the government's interest) in bringing his device to market. *York*, 774 F.2d at 421.

The District Court also weighed the second factor, the risk of erroneous deprivation, in the government's favor. The District Court concluded that Akins suffered no risk of erroneous deprivation because he was able to write a letter to BATFE *post-deprivation*. R1-29-16. Thus, the District Court determined that there was little risk of erroneous deprivation from lack of a *pre-deprivation* hearing because Akins wrote a lengthy *post-deprivation* letter to BATFE.

The District Court's logic renders the second factor a nullity. Presumably, every federal agency receives mail. It follows, therefore, that any party aggrieved by an agency deprivation could write such agency a letter. If the risk of erroneous deprivation is low because any party can write the agency a post-deprivation letter, then the second factor always weighs in the government's favor. The factor thus has no meaning. A more logical

approach to the second factor is to keep in mind that the *Eldridge* factors apply only to determine whether due process requires a *pre-deprivation* hearing. It stands to reason that nothing that might occur *post-deprivation* can ameliorate the entitlement to a *pre-deprivation* hearing.

Applying the second factor in the language articulated in *York*, we must look at whether “the evidence upon which the government relied to classify the [device] as a machine gun is scientific, engineering data – sharply focused, easily documented and not based to a significant extent upon witness credibility or other subjective determinations.” 774 F.2d at 421. This application of the second *Eldridge* factor necessarily requires raising again the terrific inadequacy of BATFE’s record. There are no data, scientific, engineering, or otherwise, because BATFE failed to report on or document any testing it may have performed on the Akins Accelerator. There is no sharp focus because there are no findings of fact clearly laid out in the record. Witness credibility is paramount, because the record only contains anecdotal accounts and no testimony or objective evidence at all. Finally, the determinations are sensationally subjective, as BATFE apparently made its revised classification based at least in part on the subjective criterion of a “conscious” pull of the trigger. In short, applying

the *York* explanation to the second *Eldridge* factor results in a high risk of erroneous deprivation and therefore it weighs heavily in Akins' favor.

The third and final *Eldridge* test is the government's interest. To be sure, the government has an interest in regulating machine guns. On the other hand, the government has no interest in regulating devices that are firearm accessories (and therefore not firearms at all). Thus, the degree of government interest in this case hinges on the outcome of the case.

It is helpful in this case to see how the government's interest in the case was addressed without a pre-deprivation hearing and what a pre-deprivation hearing would have done, if anything, to frustrate the government's interest. The earliest evidence in the record that BATFE took renewed interest in the Akins Accelerator is when the FTB Chief sent his email on August 16, 2006, declaring the Akins Accelerator to be a machine gun and requesting development of a "legal case." On November 22, 2006 (98 days later), the FTB Chief sent Akins the letter informing him of the revised classification. Thus, while the BATFE built its "legal case" quickly, it did not employ any kind of summary disposition.

If, on the other hand, BATFE had determined on August 16, 2006 that it wanted to revisit its classification of the Akins Accelerator and had informed Akins of that fact, it also could have established a procedural

schedule that could have included a hearing and still resulted in a decision by November 22. It is well within the realm of possibility that BATFE could have given requested a sample for testing, set a hearing within 45 days, required post-hearing briefs within 20 days after that, and issued a decision 30 days after receipt of briefs, for a total of 95 days (three fewer than it actually took BATFE without a hearing). While the government had some interest at stake, therefore, its interest would not have suffered had it made a pre-deprivation hearing available to Akins. The third *Eldridge* factor weighs equally in both parties' favor, at the very least.

The District Court said that BATFE was entitled to a “presumption of validity” and that the standard of review of BATFE’s actions is “exceedingly deferential.” This statement of the general rule overlooks the exception that applies when an agency displays blatant bias against a party.

26 U.S.C. 5845(b) is Unconstitutionally Vague As Applied to Akins

The District Court reached its conclusion based in large part on the fact that Akins conservatively asked BATFE to classify his device before investing his life savings on commercial production. (“[Akins’] own actions in communicating repeatedly with ATF suggest that the statute gave him fair notice that Akins Accelerators *might* well fall within the prohibited standard of conduct. He sufficiently understood the section 5845(b) definition to

submit the device to FTB for classification.”). R1-29-19. [Emphasis supplied].

It is difficult to understand how Akins’ uncertainty about what BATFE might think makes the statute at issue not vague. As the District Court noted, “a statute is not unconstitutionally vague unless it is substantially incomprehensible and men of common intelligence must necessarily guess at its meaning.” R1-29-18, *citing Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663, 669 (11th Cir. 1984) (internal quotation marks omitted).

In this case, BATFE asserts (and the District Court accepts) that “single function of the trigger” really means “single conscious pull of the trigger” and “release” really means “conscious release.” BATFE also asserts that “trigger is released” really means “shooter stops allowing the trigger to be pulled repeatedly.”

It is incomprehensible that the words take on the meaning ascribed by BATFE and accepted by the District Court. Akins would have had to guess (and guess wildly) to come up with those definitions. Moreover, BATFE never applied those definitions when it classified the Akins Accelerator the first time. It would have been even more outlandish for Akins to have guessed at these revised definitions *before* BATFE came up with them.

There simply is no way a person of ordinary intelligence would have guessed that the words have suddenly taken on the meanings now given them by BATFE.

The District Court Ignored Akins' Declaratory Judgment Action

The District Court only considered this case from the standpoint of an APA review of BATFE's actions. The District Court ignored the fact that Akins also brought a declaratory judgment action against the government. In that respect, Akins is seeking a declaration that the Akins Accelerator is not a machine gun and therefore not a firearm at all. Under 28 U.S.C. § 2201, courts of the United States have jurisdiction to declare the law in "case of actual controversy." The controversy between the United States and Akins is clear. The government insists the Akins Accelerator is a machine gun and would subject anyone possessing one to arrest and prosecution. Akins desires to resume production and sales and also wishes to possess them for his own personal use, but he is in fear of arrest and prosecution for doing so.

Akins seeks to resolve this controversy. Because the government chose not to afford Akins an opportunity for a hearing on the subject (having made its reclassification without even advising Akins that it was conducting

an “investigation”), the matter has not been adjudicated between the parties. Akins is entitled to a decision on his declaratory judgment action.

Conclusion

The District Court erred by ignoring the genuine issue of material fact (whether the Akins Accelerator fires “automatically” with a single “function” of the trigger). Resolving the facts in a light most favorable to Akins (the non-moving party), the government was not entitled to summary judgment. The District Court’s interpretation of the word “function” to mean “pull” was contrary to law. The District Court also ignored BATFE’s blatant bias against Akins and failed to address this and many other issues raised by Akins. For these and other reasons, the decision of the District Court must be reversed.

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Certificate of Compliance

I certify that this Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Brief of Appellant contains 8,450 words as determined by the word processing system used to create this Brief of Appellant.

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Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via U.S. Mail on November 19, 2008 upon:

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