

CASE NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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WILLIAM AKINS,  
PETITIONER

V.

UNITED STATES OF AMERICA,  
RESPONDENT

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ON PETITION FOR WRIT OF CERTIORARI  
TO  
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH  
CIRCUIT

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PETITION FOR CERTIORARI

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May 4, 2009

## Questions Presented

- 1. Does the Due Process Clause require a hearing when the Government asserts in a non-criminal proceeding that a device constitutes a machine gun and the owner of the device disputes the factual basis for the Government's assertion?**
- 2. Does the Government deprive a person of due process when the official deciding a matter makes a determination before a record is developed and before the agency has conducted any investigation or analysis?**
- 3. Is 26 U.S.C. § 5845 unconstitutionally vague as applied when even the Government is equivocal about whether a certain device is a machine gun?**
- 4. Can a court constitutionally review an agency determination when the agency does not supply the reviewing court with a complete record?**

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## **Statement on Jurisdiction**

On May 21, 2008, Petitioner sought review in the District Court of a Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) determination that a device invented by Petitioner is a machine gun under 26 U.S.C. § 5845. The District Court granted summary judgment to the Government on September 23, 2008. Petitioner sought timely review in the Court of Appeals (a notice of appeal was filed October 1, 2008). The Court of Appeals entered a judgment affirming the District Court on February 4, 2009. Because Petitioner seeks a writ of certiorari to the Court of Appeals, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## **Constitutional Provisions Involved**

This case involves the Due Process Clause of the 5<sup>th</sup> Amendment to the Constitution, which states, in pertinent part, “[N]or shall any person ... be deprived of life, liberty, or property, without due process of law....” This case also involves 26 U.S.C. § 5845(b), which states, “The term ‘machine gun’ means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun,

and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.”

### **Proceedings Below and Statement of Facts<sup>1</sup>**

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,”<sup>2</sup> 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

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<sup>1</sup> 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 (5<sup>th</sup> 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.

<sup>2</sup> “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.

actually moving the finger 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.<sup>3</sup> 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 another live round of

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<sup>3</sup> 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.

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.<sup>4</sup>

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.

In November 2003, FTB responded to Mr. Bowers that it had inspected the sample and tested it on a host firearm.<sup>5</sup> Although FTB said the sample did not

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<sup>4</sup> FTB routinely classifies devices for anyone requesting a classification.

<sup>5</sup> 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

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

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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.

<sup>6</sup>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.

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 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.’”

The District Court had jurisdiction of Petitioner's claim under 28 U.S.C. §§  
1331 and 1346(a)(2).

## **Argument for Granting Petition**

### **I. There is a Split Among the Circuits**

By affirming the District Court, the United States Court of Appeals for the Eleventh Circuit has created a split among the circuits. The Tenth Circuit has ruled that a party challenging the ATF's determination that a device is a machine gun, on factual grounds, is entitled to a hearing after the determination has been made. *York v. Secretary of the Treasury*, 774 F.2d 417, 421 (10<sup>th</sup> Cir. 1985). (“We believe, however, that constitutional due process does require a hearing for York after the issuance of the order classifying [the device] as a machine gun, if he 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.’”) In the instant case, however, the Eleventh Circuit ruled that Petitioner is not entitled to a hearing, despite Petitioner's repeated assertions that his invention does not meet the criteria in the statute to be a machine gun.

Petitioner consistently has contested the factual basis for the ATF's decision. He filed a lengthy Statement of Disputed Facts in the District Court. He has always stated, and continues to state, that his device does not enable the host firearm to fire more than one shot with a single function of the trigger. He was not given a hearing by the ATF. He was not given a hearing in the District Court. He was not given a hearing in the Court of Appeals.

A petition for certiorari is properly granted when one court of appeals issues a decision in conflict with another court of appeals. Rule 10(a). The interpretation and application of 26 U.S.C. § 5845(b) is an important legal matter, which this court has considered important enough to review on prior occasions. *See, e.g., Staples v. United States*, 511 U.S. 600 (1994). The determination of whether a device is a machine gun or some other type of firearm bears great importance to a fundamental constitutional right: the right to keep and bear arms guaranteed by the Second Amendment. If a device is a machine gun, then it may be subject to greater regulation than other types of firearms. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2815 (2008). If, on the other hand, the device is a firearm but not a machine gun, then its possession and use will be subject to constitutional protection with a heightened level of scrutiny. *Id.* at 2816. How the classification of the device is made, therefore, becomes a matter of national importance.

The decision of the Court of Appeals also creates a split with the Fourth Circuit over the completeness required in an agency record on appeal.

[I]n making its review, the Court must have the whole record on which the agency acted.... This is so, because, in its review, the Court is to engage in a substantial inquiry into the reasonableness of the agency action and as a part of that inquiry it must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment since it is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination.

*Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir 1973). In the case at bar, the ATF made redactions on 107 pages of its record and deleted 49 other pages in their entirety. The Court of Appeals did not address this issue (though it was raised by Petitioner), thus implicitly sanctioning court review of the ATF's actions on an incomplete record.

In this age where the “fourth branch of government” is so pervasive, the process used to review the actions of administrative agencies is of vital national importance. This Court should grant certiorari to establish whether an agency may withhold its record from a reviewing court.

## II. The Court of Appeals' Decision Conflicts with Relevant Decisions of this Court

Due process requires that an agency must make decisions in an unbiased and impartial manner.

[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).

In the instant case, the head of the ATF's Firearms Technology Branch ("FTB") played the part of the Queen of Hearts in the Knave's trial, declaring, "Sentence first -- verdict afterwards."<sup>7</sup> FTB Chief Sterling Nixon, before his department saw, inspected, or tested Petitioner's device, wrote an internal memo saying, "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. Mr. Nixon thus declared the device to be a machinegun, passed sentence to halt sales of the product, and then set out to evaluate the device in order to get a verdict to support his sentence.

Due process also requires that "a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909 (1976). The ATF afforded Petitioner *no notice* of the case against him, or even that there was a case against him, until after a decision had been made. Moreover, the ATF afforded Petitioner no opportunity to meet the case. The Court of Appeals ruled that the fact that Petitioner's attorney wrote a letter to ATF after the fact constituted such an opportunity. Surely every government agency has a mailing address. If the ability to send an agency a letter is all that the Due Process Clause requires, then the volumes of treatises and thousands of cases discussing that clause were for naught.

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<sup>7</sup> Carroll, Lewis, *Alice's Adventures in Wonderland*, Chapter 12 (1865).

Under the Court of Appeals' logic, if the agency receives mail, then due process has been given. Surely, that is not the law.

### **Conclusion**

Petitioner has shown that the decision of the Court of Appeals both conflicts with other circuits and with precedents of this Court on matters of national importance. For these reasons, this Court should grant this Petition for Certiorari.

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## **Appendix**

- 1. Judgment of the Court of Appeals**
- 2. Decision of the District Court**