

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

Reply Brief of Appellant

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Amended Certificate of Interested Persons

Appellant certifies that the following is a complete list of persons and entities that are known to him to have an interest in the outcome of this case. Please take note that the names in *bold italics* are additions from all previous certificates filed by the parties and *amici*:

Akins, William

Albritton, A. Brian

Bagley, Nicholas

Gun Owners Foundation

Gun Owners of America, Inc.

Katsas, Gregory G.

Lazzara, Hon. Richard

Loesch, Sheryl

Miles, John S.

Monroe, John R.

Morgan, Jeremiah L.

Olson, William J.

Parrish, Paul

Rudy, John F.

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Soskin, Eric

Stern, Mark B.

Titus, Herbert W.

United States of America

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Summary of the Argument

The government fails to show that the District Court acted properly in granting the government's motion for summary judgment. The government continues to misstate the facts regarding the Akins Accelerator and to fail to adhere to the definition of "machine gun" established by Congress. Because the ATF acted unreasonably, inconsistently, and contrary to law, the judgment of the District Court should be reversed.

Argument and Citations of Authority

The ATF Did Not Act Reasonably

1. The ATF is not Entitled to Deference

The government begins its argument by claiming it is entitled to *Chevron* deference, relying in part on *Gun South, Inc. v. Brady*, 877 F.2d 858, 864 (11th Cir. 1989). In *Gun South*, the ATF imposed a temporary suspension on importation of certain rifles, in contravention of licenses it had issued previously to Gun South to import those rifles. This Court found the *temporary* suspension reasonable, partly because “The Government has further reassured the court that it will not revoke GSI’s permits without giving GSI the right to participate in a hearing.” 877 F.2d at 868. There also were stated exigencies (keeping certain rifles out of the country).

Here, the government has *permanently* destroyed Akins’ previously-determined right to manufacture and distribute Akins Accelerators. And, the government vigorously denies Akins a hearing. This Court in *Gun South* reasonably deferred to the ATF’s temporary action in a matter (importation of firearms) over which it is given specific congressional authority [18 U.S.C. § 925(d)] when it was given assurance that a hearing before the agency was forthcoming. No such assurances exist here, nor are there any exigencies (Akins already was producing and distributing the Akins

Accelerator at the time of the ATF's actions, based on ATF's twice approval of the Akins Accelerator).

It also is important to note that the ATF is a law enforcement agency, not just an administrative agency. When it comes to classifying devices as machine guns, there is no administrative purpose in doing so, only a law enforcement purpose¹. Law enforcement is not entitled to any deference as to what behavior is criminal and what behavior is not. Congress determines what behavior is criminal, and courts interpret that determination.

The Supreme Court has determined that a factor in weighing the extent of deference to which an agency is entitled is “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in power to control.” *SEC v. Sloan*, 436 U.S. 103, 117 (1978). Akins has consistently argued that the ATF's consideration evidences no thoroughness. At the heart of this case is whether the Akins Accelerator is a machine gun. It is self-evident that an agency endeavoring to make such a determination would inspect, test, and document its findings.

¹ When it still was legal for citizens to purchase new machine guns (i.e, before 1986), there was a taxing purpose in making classifications. Now that new machine gun purchases are banned for general citizens, classification of new devices as machine guns only has a law enforcement purpose.

While such documentation might come in many forms one would expect to see some kind of report written by a staff scientist or other expert. One also might expect the report to be thorough enough for anyone with sufficient knowledge and equipment to duplicate the tests performed (and presumably duplicate the results).

2. The ATF did not Document Tests Done (If Any) on the Akins Accelerator

The record is completely devoid of any documentation of inspection or testing. Remarkably, the record contains more thorough testing of *other* devices besides the Akins Accelerator. For reasons only the ATF could explain, the ATF's administrative record of its determination that the Akins Accelerator is a machine gun contains video testing of the ATF's testfiring of the "GAT Trigger," the "BMF Activator," the "TAC Trigger," the "Hellstorm 2000," and the "Autoburst." There is no documentation of any kind in the record of any testing done on the Akins Accelerator. Presumably the ATF included this video testing of other devices in the administrative record because it was comparing these other devices to the Akins Accelerator, yet no such comparison exists in the record. Curiously, none of the aforementioned devices has been determined by the ATF to be machine guns.

Also of interest is that the ATF made no consistent effort to try to maximize the rate of fire of any of the devices in the video and likewise made no effort to measure the rate of fire. For example, it is apparent from the video of the GAT Trigger that it could fire much faster than the video demonstrates, but the tester turned the crank slowly so as to illustrate the operation of the device without maximizing its capabilities. And, the video of the BMF Activator shows a 10-round magazine in a Ruger 10/22 being emptied in approximately one second, indicating a firing rate of approximately 600 rounds per minute. [“Test 2” of the BMF Activator, approximately six minutes and 40 seconds into the test video filed as part of the administrative record]. Again, this is not a machine gun even by the ATF’s reckoning.

The ATF also is inconsistent in its classification of the Akins Accelerator compared to earlier decisions. The ATF describes the Autoburst as “keeping the spring tension on the rear of the trigger so that when a first shot is pulled the trigger is pushed back forward simulating a recoil operated bump fire condition that can be obtained without any device, but some devices will aid that method of firing....” [ATF video from approximately 12:45 to 13:07.] Again, the Autoburst is not considered by the ATF to be a

machine gun, even though this description of the Autoburst applies equally well to the Akins Accelerator.

3. The ATF's Re-Classification Lacks Consistency

Moreover, the ATF is not even being consistent with its own earlier classification of the Akins Accelerator. Although nothing changed in the description or operation of the device, the ATF ruled in 2003 that the Akins Accelerator is not a machine gun, and thereafter it ruled in 2006 that it is a machine gun. Thus, in 2006 the Akins Accelerator was a machine gun even though in 2003 it was not. In 2006 spring-assisted recoil bump firing devices were machine guns and in 2002 (and 2004) they were not.

4. The ATF's Reasoning is Invalid

The last factor listed in *SEC v. Sloan* is the validity of the agency's reasoning. In the instant case, the ATF apparently reached its conclusion that the Akins Accelerator is a machine gun by changing the word "function" to "pull" in the statute and by equating high rate of fire with machine gun (despite the utter lack of such a test in the statute).

The ATF defends its use of "pull" in place of "function" by relying on sources that use "pull" in place of "function" in circumstances where the only function of interest is the pull of the trigger. Government Brief at 13. ATF cannot cite a single source of any kind where "pull" is used in place of

“function” but where a different result would have been obtained if “function” were used. Brief of *Amicus Curiae*, pp. 7-13. That is, in every context cited by the ATF, it was irrelevant whether “pull” or “function” were used. Moreover, the ATF now concedes that “function does not limit ATF to a narrow definition such as ‘pull only.’” Government Brief at 16. The ATF nevertheless insists on using “pull only” when discussing the Akins Accelerator.

To be clear, Akins is not claiming that a pull of a trigger is not *a* function. He is claiming that the pull of a trigger is not the *only* function. In a “conventional” machine gun, the shooter pulls the trigger back and holds it back while the firearm fires automatically. That is, the only trigger function is that it is pulled.

With the Akins Accelerator, however, the shooter pulls the trigger and then the trigger moves rearward, disengages from the shooter’s finger, moves forward again, engages the shooter’s finger, being pulled/pushed (a matter of perspective in any context) by the shooter’s finger so that it fires again. R1-25(3)-4.

So, for each shot of the rifle, the trigger is pulled (or pushed) only once, but it also moves rearward and forward again for each shot. With the Akins Accelerator, a single shot is fired with *multiple* functions of the

trigger. It cannot be said that the rifle fires more than one shot with a single function of the trigger.

5. Rate of Fire is not a Valid Basis Upon Which to Classify Devices

Finally, as mentioned earlier, there is no statutory basis for determining whether a device is a machine gun by referring to rate of fire. Many devices that shoot rapidly (such as the gatling gun from old Western movies, as well as the BMF Activator) are not machine guns, but a firearm need only fire twice (even if it fires only twice) with a single function of the trigger to be a machine gun.

The ATF defends its decision by saying it “reasonably concluded that the device, which is designed to permit a shooter to pull the trigger of a semi-automatic rifle a single time and expel a continuous stream of bullets at a rate of approximately 650 rounds per minute, comes within the compass of [26 U.S.C. § 5845(b)].” Government’s Brief at p. 13. Again, however, the government characterizes the facts contrary to what is in the record. If one were to re-write that sentence with facts that demonstrably are in the record, it would be:

The ATF *unreasonably* concluded that the device, which is designed to be a “trigger activator,” which the ATF has consistently held are not machine guns, and with which the trigger functions multiple times for each shot fired, thereby achieving a rate of speed that the ATF did not measure but assumed to be accurate based on alleged advertising of

unknown entities that is not in the record, was within the compass of 26 U.S.C. § 5845(b).

The government continues by claiming, for the first time on appeal, that “It would be anomalous to suggest that Congress disabled ATF from moving to prevent the distribution in interstate commerce of a weapon that is in every respect the practical equivalent of a machinegun.” Government Brief at 15. At the outset, it is appropriate to remind the Court that the Akins Accelerator is not a “weapon” at all. It is a replacement stock for a rifle. Standing alone, its only application would be as a club, and not a very effective one at that.

The ATF never has taken the position (even in the administrative record or in the District Court) that it interprets the statute to empower it to declare all “simulated” machine guns to be machine guns. It cites no other instances where it has taken that position. Indeed, just the opposite is true. In *United States v. Camp*, 343 F.3d 743, 745 (5th Cir. 2003), an ATF agent testified that a “ ‘trigger activator’ gives the illusion of functioning as a machine gun.” They work by “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....*” [Emphasis in original]. Again, the use of the word “pull” in this context means nothing, as the only “function” of the trigger in that case was the “pull.” The point of the quotation is to show that

devices that “give the illusion of functioning as a machine gun” do not constitute machine guns, and the ATF acknowledges as much.

It is helpful to look to the actual transcript of the testimony cited by the 5th Circuit². In the Transcript, the ATF agent testified that “because of those powerful springs within that TAC trigger [the trigger activator being discussed], *it makes you pull that trigger so fast that it gives the illusion of a machine gun.*” Transcript, p. 20. A device with recoil springs that pushes the trigger back into the shooter’s finger is legal, unless it goes by the name Akins Accelerator. Excerpts of a certified copy of the transcript are appended to this Reply Brief.

ATF Acted With Bias against the Akins Accelerator

For the first time on appeal, the government attempts to defend itself against Akins’ claim that the ATF acted with bias, by saying, “There is not a shred of evidence to suggest that agency personnel were motivated by anything but a bona fide desire to better effectuate the congressional prohibition on machine guns.” Government Brief at 17. Akins has never questioned ATF personnel’s motives. His claim of bias is based solely on the documents that ATF placed into the record. Those documents

² The testimony is publicly available from the clerk in *United States v. Camp*, No. 5:02-cr-50013-DEW-RSP, U.S. District Court for the Western District of Louisiana, Document No. 27, Transcript of Trial held August 19, 2002.

demonstrate that the ATF determined that the Akins Accelerator was a machine gun *before they tested it and even before they obtained a sample to test.*

The government attempts to downplay the documents by recharacterizing them. “By August 2006, ATF had recognized that the Akins Accelerator was a highly dangerous device that transforms a rifle into the practical equivalent of a machinegun.” *Id.*, citing R1-19(3)-24. An inspection of that page of the record, however, reveals no such thing. Instead, it shows that the chief of the ATF Firearms Technology Branch declared on August 16, 2006 that “two companies are manufacturing machineguns.” He does not say anything about anything being “highly dangerous” or “practical equivalent of a machinegun.” He says they are machineguns, period. He continues by 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 machine guns.” He requests samples (to be procured in an undercover operation) for testing *even though he already has determined what the outcome would be.* If this is not pre-judging a matter that the chief of this branch would have jurisdiction over, then what is? The fact that the samples were to be obtained undercover also indicates that ATF did not wish to afford Akins an opportunity to participate in the matter. Undercover

operations are for criminal investigations, not routine administrative proceedings.

The government confuses this issue by asserting, “Plaintiff finds it suspicious that ATF did not re-test his device until after it opened its investigation.” Government Brief at 17, FN 2. This is incorrect. If the government merely opened an investigation and then tested the device, that would be normal. In this case, however, the ATF did not re-test the Akins Accelerator until *after* it completed its “investigation” and determined the Akins Accelerator to be a machine gun. Akins already stated the chronology in his opening Brief, but will repeat it here in a different format to try to clear up the government’s confusion:

<u>Date</u>	<u>Event</u>	<u>Record Citation</u>
1/17/2003	ATF determines Akins Accelerator is not a machine gun.	R1-19(3)-14
1/29/2004	ATF clarifies that ATF understands The theory of operation of the Akins Accelerator and made determination that Akins Accelerator is not a machine gun in spite of fact that sample provided did not function as intended.	R1-19(3)-22
8/16/06	FTB Chief declares (without additional testing or inspection) Akins Accelerator to be a machine gun; vows to stop them, and seeks way to make “legal case.”	R1-19(3)-24
9/8/06	Unnamed ATF employee says in email,	R1-19(4)-3

“We evaluated the device and conferred with counsel (9/8/06) and determined it to be a machine gun.”

- 9/22/06 ATF agents order Akins Accelerator for testing, using a P.O. box for apparent anonymity. R1-19(3)-54, 55
- 10/11/06 ATF agents that ordered Akins Accelerator sent it to FTB to testing. R1-19(3)-54

No matter how the government spins the facts, it cannot deny (nor does it attempt to do so in its Brief) that 1) the ATF FTB chief declared the Akins Accelerator to be a machine gun before his branch did any inspection or testing or even obtained a sample; and 2) an unnamed ATF employee met with ATF counsel and determined the Akins Accelerator to be a machine gun before any inspection or testing or obtaining a sample.

Again, Akins does not question the motives of these employees, as he has no information upon which to judge their motives. The facts remain, however, that the very branch of the ATF responsible for evaluating firearms determined before it ever saw or touched the Akins Accelerator that it was a machine gun. This is not the “neutral and detached judge” that due process requires. *Concrete Pipe & Products v. Construction Laborers and Pension Trust*, 508 U.S. 602, 617 (1993).

There is a Genuine Dispute of Material Fact

While the government urges that there is no dispute of fact, the government's brief is replete with misstatements of fact that call into question what facts actually were used by ATF in rendering its decisions. Because the administrative record contains *no findings of fact*, it is impossible for a reviewing court to know if the ATF even understood the facts when it made its decision to re-classify the Akins Accelerator

On p. 3 of its Brief, the government quotes Akins' patent abstract (R1-12-3) for the fact that "a shooter can pull a rifle's trigger a single time and fire a continuous stream of bullets." The one-paragraph abstract tells a different story. The final two sentences say:

The trigger is translated away from the immobilized trigger finger to effect a total disengagement therebetween. Sequentially thereafter *the trigger is biased into engagement with the immobilized trigger finger* to effect successive discharges of the firearm."

R1-12-3 [Emphasis supplied]. Aside from the fact that the patent abstract does not use the colorful phrase, "fire a continuous stream of bullets," it is clear from the abstract that the shooter's finger must engage the trigger over and over again to fire the rifle.

The government uses other colorful verbs to describe the action of the host rifle and Akins Accelerator, but such verbs inaccurately describe the

action and may give rise to confusion³. The rifle no more “leaps” forward [government Brief at 3] than it “rocks.” [*Id.*]. As described both in the patent abstract [R1-12-3] and Akins’ declaration [R1-25(3)-4]⁴, the rifle moves rearward from the force of its normal recoil after firing, and it then moves forward again from a spring in the Akins Accelerator countering the recoil. And, the motion is held completely linear by two steel rods [R1-25(3)-4], as opposed to some “rocking” motion imagined by the government.

The government alternatively describes the Akins Acceleratory as enabling the host rifle to fire at a rate of 650 rounds per minute and 800 rounds per minute. The first figure is based solely on an unattributed hearsay statement repeated in letter by an ATF official. R1-19(4)-5 (a letter from ATF Assistant Chief of the Firearms Technology Branch Richard Vasquez to Akins’ business partner, stating that the device was “advertised to fire approximately 600 rounds per minute.”) There is no indication in the

³ By inciting fear of the Akins Accelerator and confusing the Court as to the operation of the device, it is possible the government hopes to induce the Court to throw up its hands in frustration and defer to the agency’s determination. It would not be necessary to deploy such tactics if there were a cogent, meaningful record that included a neutral report of tests actually performed on the Akins Accelerator.

⁴ The nomenclature used here, R1-25(3)-4, uses the Circuit rules for citations to the record but takes into account that District Court document numbers can refer to multiple documents. In this instance, the citation is the Record Volume 1, Document 25-3, page 4.

letter who made those advertising claims nor, more importantly, on what they were based. Again, however, this would not be an issue if the ATF actually had performed tests (perhaps even scientifically repeatable tests) on the Akins Accelerator and included those test results in its record. Instead, the agency apparently based its decision to shut down Akins' livelihood on uncorroborated and unattributed hearsay.

The second figure (800 rounds per minute) is not advertisement, as claimed by the government on p. 4 of its Brief. The source in the administrative record appears to be the first page of a magazine article about the Akins Accelerator, in which a "teaser" question is asked about a rifle that fires at that rate⁵. Again, it appears the government based its decision to reverse its 4-year-old determination upon which Akins relied upon a teaser in a magazine. Surely the premier firearms regulation agency in the world has the means to test firearms independently without relying on the press for its information.

The two foregoing paragraphs are not to say that Akins denies that the Akins Accelerator does not allow a .22 rifle to fire quickly. The point is that no claims about rates of fire attributed to Akins are contained in the record.

⁵ Somewhat like a television news teaser saying, "Is an asteroid going to collide with the Earth this week? You'll find out this and all the news tonight at 11." Such a teaser is hardly a valid basis for claiming in a legal document that an asteroid is going to collide with the Earth.

Even if there were, that does not excuse the ATF's failure to make its own tests and determine the facts for itself. Moreover, the government's brief implies that it is possible for a rifle with the Akins Accelerator to fire 650 (or 800) rounds in one minute. It is not. The Ruger 10/22 comes from the factory with a 10-round magazine. Commercially available magazines typically hold no more than 30 rounds. Finally, as discussed in Akins' opening Brief, the rate of fire of a firearm is completely irrelevant in determining whether the firearm is a machine gun. Even if it were, ATF official Vasquez claimed that he could move his finger with the trigger on the assembled combination, indicating that he can fire a Ruger 10/22 just as fast without the Akins Accelerator as with it. R1-19(5)-1. The ATF does not claim that the Ruger 10/22 is a machine gun.

The government attempts to downplay the dispute of fact by claiming, "There is no disagreement, however, about the manner in which the device operates: it harnesses the recoil of a semi-automatic weapon to allow it to rock hundreds of times per minute against a stationary trigger finger." Government Brief at p. 20. This is incorrect, as Akins never has asserted nor agreed that there is any rocking motion, as discussed above. In fact, Akins specifically designed the Akins Accelerator not to rock, but to maintain linear motion to improve firing accuracy. What is in agreement is the

government's next statement, "Each time the trigger presses against the shooter's finger, another bullet is fired." *Id.* Exactly. The trigger must function every time to fire another shot. Yet, no where does the ATF express this operational characteristic when explaining why it re-classified the Akins Accelerator to be a machine gun.

The Agency Record Was Incomplete

The government denies that it "first asserted the existence and service of a privilege log ... in its Reply Brief" in the district court." *Id.*, FN 4. The government attempts to refute this by pointing to a footnote in its record table of contents that says, "[a] copy of the privilege log will be supplied to Plaintiff." A statement of what *will be provided in the future* neither asserts that the document then existed or was served. Quite the opposite, it implies that the document has not been served. It still has not been served, and the record is devoid, even now, of any certificate of service that a privilege log has been provided.

The government complains that the lack of a privilege log was not raised in the District Court. *Id.* This is not true. In his Brief opposing the government's Motion for Summary Judgment [R1-25-4], Akins clearly states, "Moreover, many documents in the record have unexplained redactions on them, and 49 pages were omitted altogether (again without

explanation).” Because Akins did not receive a privilege log, he was in no place to complain about what was or was not included in it. And, this is an issue raised by the District Court in its order, where it found, without support in the record, that Akins had been provided a privilege log when in fact he had not.

The Government Confuses Pre-Deprivation Hearings with Post-Deprivation Hearings

The government excuses ATF’s failure to give Akins a *pre-deprivation* hearing under *Matthews v. Eldridge*, 424 U.S. 319 (1976) by saying Akins was “provided with notice of the classification decision and an opportunity to challenge that decision.” That is, the government says the Due Process clause never requires a *pre-deprivation* hearing (even though *Eldridge* holds otherwise) when there is an opportunity for a *post-deprivation* challenge. While the government glosses over it, its version of a post-deprivation challenge “opportunity” is that anyone can write a letter to the ATF and complain about what the ATF did. The government would have this Court rule that *having a mailing address is all that the Due Process clause requires*. This is absurd. If that is the law, then a hearing is never required by the Due Process clause, as every government agency has a mail box.

The government relies in part on *Darrell Andrews Trucking, Inc. v. FMCSA*, 296 F.3d 1120 (D.C. Cir. 2002) for the proposition that notice and an opportunity to present evidence is all that due process requires. Government Brief at 23. The government claims that notice after the fact of ATF's re-classification and the ability to mail a protest were Akins "notice" and "opportunity to present evidence." In *Darrell Andrews*, however, the notice was a citation sent before any decision was made. The opportunity to present evidence was such an opportunity before any decision was made. Here, ATF intentionally kept the proceeding a secret by conducting an undercover operation. Because the ATF kept the matter a secret, Akins had no notice and no opportunity to present evidence until after the decision was made.

The Statute is Unconstitutionally Vague

Finally, the government defends the constitutionality of 26 U.S.C. § 5845(b) based on the fact that "no court has ever held it unconstitutional." While true, that fact is irrelevant. In an as-applied challenge, it matters not one whit whether the statute has been upheld once or 1,000 times. What matters is whether this particular application is constitutional. Hence, the name "as-applied" challenge.

In addition, the government cannot cite to a single other instance where it determined a device not to be a machine gun, then later re-classified it to be a machine gun when nothing had changed. The government's inability to determine whether the device is or is not a machine gun leads one to believe that the statute does not put a person on notice what is prohibited.

Moreover, *the government concedes that for the Akins Accelerator, "Each time the trigger presses against the shooter's finger, another bullet is fired."* Government Brief at 20. Yet, somehow the government believes that a person of ordinary intelligence would know that such a device is included in the definition, "shoot(s), automatically more than one shot, without manual reloading, by a single function of the trigger." The government is wrong. It is illogical for the ordinary person to equate another bullet being fired "each time the trigger presses against the shooter's finger" with more than one shot for "a single function of the trigger." They are exact opposites.

Even more telling is the fact that the ATF misunderstands the purpose and effect of the statute. The government somehow interprets *United States v. Haney*, 264 F.3d 1161, 1168 (10th Cir. 2001) as standing for the proposition that it was "Congress' manifest intent to get automatic weapons

off the market.” Government Brief at 14. The section the government quoted from *Haney* says nothing more than that there is a “federal scheme to regulate interstate commerce in dangerous weapons.” Regulating commerce is not the same as a “manifest intent” to eradicate commerce. The ATF fails to mention to this Court that all machine guns manufactured before 1986 continue to exist in the market and can readily be bought and sought by citizens. If every device declared by the ATF to be a machine gun is found to be a machine gun because ATF believes there is a manifest intent to get machine guns off the market, then this circular logic surely renders the statute unconstitutional. What person of ordinary intelligence is going to be able to predict with any degree of certainty what the ATF’s whim of the day is?

Finally, the ATF’s ruling in this matter, 2006-2, extends the congressional definition of machine gun to virtually all semiautomatic firearms. In the ruling, the ATF determined that a device is a machine gun when, “once activated by a single pull of the trigger, initiates an automatic firing cycle which continues until either the finger is released or the ammunition supply is exhausted.” Despite the fact that the description of the Akins Accelerator’s operation includes the finger being released from the trigger in between each and every shot, the ATF determined that this

definition includes Akins Accelerator. The problem with this ruling is that virtually every semiautomatic firearm can be made to “bump fire,” and therefore any semiautomatic firearm could be deemed to be a machine gun under this definition. It is not at all clear that Congress intended this result.

The Court of Federal Claims Case Still is Appealable

The government also claims that Akins did not appeal the dismissal of his Court of Federal Claims case. Government’s Brief, p. 7. While this is true, what the government fails to tell the Court is that the Court of Federal Claims judgment was not entered until December 22, 2008⁶, *one day before the government filed its Brief*. Akins has 60 days from that date to file a notice of appeal of that case. The fact that Akins had not yet filed a notice of appeal within one day after he was first entitled to do so does not in any way imply that the Court of Federal Claims opinion has become a final, nonappealable judgment.

⁶ The Order of the Court of Federal Claims was not entered as a separate document judgment, as required by Ct. Fed. Cl. R. 58(a). The judgment of the court is therefore deemed entered by operation of law 150 days after the Order was docketed. The 150th day was December 21, 2008, a Sunday. Assuming that a judgment is not entered on a weekend, the judgment was therefore entered on December 22, 2008.

Conclusion

Because the government has failed to overcome the District Court errors described in Akins' opening Brief, the judgment of the District Court must be reversed.

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Certificate of Compliance

I certify that this Reply Brief of Appellant complies with Rule 32(a)(7)(B) length limitations, and that this Reply Brief of Appellant contains 5,809 words as determined by the word processing system used to create this Reply Brief of Appellant.

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Certificate of Service

I certify that I served a copy of the foregoing Reply Brief of Appellants via U.S. Mail on January 9, 2008 upon:

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Appendix

Excerpts of Certified Copy of Transcript in *USA v. Camp*

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA * CRIMINAL ACTION
* NO. 02-50013-01
VERSUS *
* August 19, 2002
ERNEST CAROL CAMP * 9:00 a.m.
* Shreveport, Louisiana
* * * * *

Certified Copy

Certified transcript of trial proceedings held before the
Honorable Donald E. Walter, United States District Judge.

APPEARANCES:

FOR THE GOVERNMENT: AUSA James G. Cowles, Jr.
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FOR THE DEFENDANT: Mr. J. Ransdell Keene
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PROCEEDINGS PRODUCED BY MECHANICAL STENOGRAPHY AND TRANSCRIBED
BY COMPUTER.

1 A. Yes, sir.

2 Q. And that only took one human pull of the trigger; is that
3 correct?

4 A. Yes, sir.

5 Q. All right. And so the only way that gun would stop
6 firing would be if the ammunition is gone or depleted and
7 you've released the trigger?

8 A. That's correct.

9 Q. You don't have to reload each time you shoot, do you?

10 A. No, sir.

11 Q. All right. Does it fit the technical -- well, not
12 technical, but does it fit the legal definition of a "machine
13 gun"?

14 MR. KEENE: Objection.

15 A. Yes, sir, it does.

16 MR. COWLES: He can opine on --

17 THE COURT: Yeah, he did. I overruled it.

18 BY MR. COWLES:

19 Q. Now, are you familiar with what's called "trigger
20 activators"?

21 A. Yes, sir, I am.

22 Q. And did I show you some documentation that -- copies of
23 documents apparently printed off the internet that, as I told
24 you, Mr. Keene had submitted to me as part of their argument of
25 what this thing actually was, that --

1 A. Yes, sir.

2 Q. -- I showed this to you?

3 Okay. Would you explain to the Court what a trigger
4 activator is, first. Can you go ahead -- are you familiar with
5 trigger activators?

6 A. Yes, sir.

7 Q. What are they?

8 A. Trigger activators are a commercially-produced firearm
9 accessory known by various trade names as "TAC Trigger,"
10 "Autoburst," "Autoburst II," depending on who the manufacturer
11 is. They are in fact a legal device, and what they do is they
12 attach to the trigger of a firearm, and there are various
13 springs involved with this device, and as you pull the trigger
14 and fire the weapon, these devices use a small powerful spring
15 that force the trigger back to the forward position, meaning
16 that you have to separately pull the trigger each time you want
17 to fire the gun, but it gives the illusion of functioning as a
18 machine gun.

19 Q. All right. Now, and have you evaluated trigger activator
20 devices as part of your duties as an expert with ATF?

21 A. Yes, sir, I have.

22 Q. Now, is there a difference between a trigger activator
23 legal device and this contraption that the defendant put
24 together?

25 A. Yes, sir, there is.

1 Q. All right. What is the difference?

2 A. If I can point to the weapon to show. The trigger
3 activator --

4 Q. All right. Move that piece of paper, because we can't
5 see any of that.

6 A. The trigger activators that are commercially produced fit
7 over the trigger of a firearm similar to the way this fishing
8 reel hand crank is positioned over the trigger of this
9 particular firearm. The difference is with these TAC triggers
10 or trigger activators, you have to actually manually pull the
11 trigger each time you want to fire the weapon; and as I stated
12 earlier, because of those powerful springs within that TAC
13 trigger, it makes you pull that trigger so fast that it gives
14 the illusion of a machine gun.

15 Q. And those are legal in some states?

16 A. Yes, sir, they are, because you have to pull the trigger
17 each time you want to fire the weapon.

18 Q. So that does not fit the definition of the National
19 Firearms Act, does it?

20 A. No, sir, it doesn't.

21 Q. All right. Okay. Now go ahead and explain it to me.

22 A. Now, the difference with this firearm is although we have
23 a fishing reel that's -- we all know how you hand crank a
24 fishing reel when you want to reel in a fish; well, this is
25 rigged so that that fishing reel crank would in fact pull the

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C E R T I F I C A T E

I, Marie Moran Runyon, Official Court Reporter, do hereby certify that the foregoing pages numbered 1 through 35 do constitute a true and correct record of proceedings had in said trial to the best of my ability and understanding.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Subscribed and sworn to this 10th day of March, 2008.



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