UNITED STATES V. BEAN[1]: SHOVELING AFTER THE ELEPHANT?[2]

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[1]*United States v. Bean*, 537 U.S. 71, 123 S. Ct. 584, 154 L. Ed. 2d 483, 2002 U.S. Lexis 9236 (No. 01-704, decided December 10, 2002), *reversing* 253 F.3d 234 (5th Cir. 2001), reh. den., reh. en banc den., 273 F.3d 1105 (5th Cir. Aug. 21, 2001) (unpublished table decision), *judgment vacated and dismissed on remand, Bean v. United States,*322 F. 3d 829 (5th Cir. Feb. 19, 2003).

[2]In a case decided after the Fifth Circuit's decision in *Bean*, the Third Circuit sitting en banc reversed its own precedent, *Rice v. United States*, 68 F.3d 702 (3d Cir. 1995), discussed in text at note x, infra. In a concurring opinion expressing frustration with the issues of statutory construction raised in the case, Circuit Judge McKee wrote: "... I find myself identifying with the circus hand that our colleague, Judge Aldisert, alluded to while dissenting in *United States v. Gibbs*, 813 F.2d 596, 603 (3rd Cir. 1986) (Aldisert, J. dissenting). There, Judge Aldisert lamented that he 'would not be the circus hand following the ... elephant around the sawdust trail.' Here, I fear that we have been handed the shovel, and invited to clean up after the elephant. I am joining my colleagues in taking up the shovel. Given the parameters of the jurisprudence so deftly set forth by the majority opinion, I do not think we have a choice. The Supreme Court has granted certiorari in Bean, and this anomaly will now finally be resolved there." *Pontarelli v. United States*, 285 F.3d 216, 238 (3d Cir. 2002), no appellate history. *Pontarelli* is discussed in text at note y, infra. In *Bean*, the Supreme Court found no mess by the elephant to clean up.

Thomas Lamar Bean found trouble south of the Texas border. A federally licensed firearms dealer, Bean attended a 1998 gun show in Laredo, Texas. While there, Bean and three assistants traveled to Nuevo Laredo, Mexico for dinner. At the border crossing, Mexican customs officials found 200 rounds of shotgun ammunition in his Suburban. The rounds had been overlooked by Bean's assistants during the process of removing firearms and ammunition from the Suburban while the group prepared for a casual evening out. Bean was arrested by Mexican border agents and charged with felony smuggling under Mexican law. Following a conviction carrying a five-year prison term, and his incarceration for six months in a Mexican jail, Bean was returned to the United States under a prisoner exchange program.[3][4] When Bean's supervisory period ended, he filed an application with the United States Secretary of the Treasury[5] seeking to be relieved of possible federal firearms consequences arising from his

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[3]253 F.3d at 236. As a part of the prisoner exchange program, conducted under the International Prisoner Transfer Treaty, Bean spent another month in federal prison before being released under federal court supervision. The supervisory period terminated in the summer of 1999. Id.

[4]See 18 U.S.C. §922(g)(1), prohibiting the receipt or possession of firearms and ammunition shipped or transported in interstate or foreign commerce by persons convicted of an offense punishable by imprisonment exceeding one year.

[5]Referred to in this article as the "Secretary."

conviction in Mexico.[6] His application was returned by the Bureau of Alcohol, Tobacco and Firearms[7] which cited a congressional ban on expending federal funds for investigating or acting upon Section 925(c) requests made by individuals.[8] Bean then sought relief in federal district court, asserting that BATF's failure to act upon his application acted as a denial of relief under Section 925(c).[9] The district court agreed with Bean that it had subject matter jurisdiction to

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[6]The application sought relief under 18 U.S.C. §925(c) ("Section 925(c)").

[7]Referred to in this article as either "BATF" or "ATF."

[8]253 F. 3d at 236. The initial congressional ban on the use by BATF of appropriated funds to act upon Section 925(c) applications for relief made no distinction between types of applicants. *See* Treasury, Postal Service and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992). Beginning in fiscal year 1994 and following, Congress permitted appropriated funds to be used by BATF to investigate corporate applicants. *See* Appendix "A," *infra*. Citations to the relevant appropriation acts are contained in the Supreme Court's opinion in *Bean.* 537 U.S. 75, at n. 3.

[9]*Bean v. United States, BATF*, 89 F. Supp. 2d 828 (E.D. Tex. 2000), aff'd, United States v. Bean, 253 F.3d 234 (5th Cir. 2001), reh. den., reh. en banc den., 273 F.3d 1105 (5th Cir. Aug. 21, 2001) (unpublished table decision), writ granted, 534 U.S. 1112 (2002), rev., 537 U.S. 71, 123 S. Ct. 584, 154 L. Ed. 2d 483, 2002 U.S. Lexis 9236 (No. 01-704, decided December 10, 2002), judgment vacated and dismissed on remand, *Bean v. United States*, 322 F. 3d 829 (5th Cir. Feb. 19, 2003).

consider Bean's request. It also decided that Bean's administrative remedies from BATF had been effectively exhausted or that he was excused from seeking further administrative relief. Reaching the merits of Bean's request after conducting an evidentiary hearing, the district court ruled that he met the criteria for receiving relief under Section 925(c). Accordingly, the district court granted Bean's petition and removed his federal firearms disabilities.[10] The United States

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[10] *Bean*, 89 F. Supp. 2d at 840. The district court was also asked by Bean to determine whether or not the Mexican conviction could validly constitute a sufficient predicate for operation of the federal firearms ban for felons, found at 18 U.S.C. §922(g)(1). Citing the particular circumstances surrounding the proceedings against Bean in Mexico, the district court found that his conviction did not serve as a predicate offense. 89 F. Supp. 2d at 837-38. Because that court further found that Bean was entitled to disability relief under Section 925(c), a determination upheld by the Fifth Circuit, this question was pretermitted on appeal. 253 F.3d at 240. The sufficiency of foreign convictions in general, and of Bean's in particular, as a predicate for Section 922(g)(1) firearms disabilities is beyond the scope of this article. The Supreme Court did not reach the issue, leaving it to be addressed, if at all, by the Fifth Circuit. On remand, the Fifth Circuit did not address the question it had previously avoided, and simply remanded the case to the district court for entry of an order of dismissal for lack of jurisdiction. *Bean v. BATF*, 322 F.3d 829 (5th. Cir. Feb. 19, 2003). The Fifth Circuit did not explain why Bean's plea for declaratory judgment challenging the sufficiency of the Mexican conviction as a predicate for the federal firearms ban should also be dismissed for want of jurisdiction together with his claim for Section 925(c) relief.

appealed to the Fifth Circuit, where Bean again prevailed.[11] After granting the government's application for review,[12] the United States Supreme Court reversed.[13]

After an overview of the relevant federal firearms statutes as presently constituted, this article describes the legislative and decisional background related to the current provisions of Title 18, Chapter N of the United States Code at issue in *Bean*. It then examines the federal appellate decisions interpreting the effect of the BATF funding bans by Congress regarding Section 925(c) relief requests. These background discussions form the basis for a review and analysis of the Supreme Court's decision in *Bean*.

Part I: Relevant Provisions of Current Federal Statutes

Federal law[14] prohibits specified classifications of persons[15] from receiving or possessing

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[11]Bean, 253 F.3d at 234.

[12]534 U.S. 1112 (Order dated January 22, 2002).

[13]*United States v. Bean*, 537 U.S. 71, 123 S. Ct. 584, 154 L. Ed. 2d 483, 2002 U.S. Lexis 9236 (No. 01-704, decided December 10, 2002).

[14]18 U.S.C. Chapter N, consisting of §§921 - 930, contains the most commonly cited provisions of federal law establishing criminal penalties with respect to illegal receipt or possession of firearms and ammunition that have been shipped or transported in interstate or foreign commerce.

[15]18 U.S.C. § 922. In general, the categories of excluded persons include some, but not

most types of firearms[16] and ammunition.[17] In order to constitute a federal crime, the proscribed person's act of receiving or possession must be of a firearm or ammunition which "has been

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all, felons, 18 U.S.C. §922(g)(1); fugitives from justice, id., §922(g)(2); illegal drug users or drug addicts, id., §922(g)(3); persons adjudicated as mentally ill or committed to a mental institution, id., §922(g)(4); illegal aliens or aliens admitted into the United States under a nonimmigrant visa, id., §922(g)(5); dishonorably discharged service personnel, id., §922(g)(6); former United States citizens who have renounced their citizenship, id., §922(g)(7); persons under court order restraining them from committing or threatening to commit acts of domestic violence, id., §922(g)(8); and persons convicted of a misdemeanor crime of domestic violence, id., §922(g)(9). These nine categories are referred to in this article as the "Section 922(g) Exclusions."

[16]As defined by federal statute in the context of criminal law, "[t]he term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of any explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." The term "destructive device" is further defined in the statute to include explosive, incendiary or poison gas bombs, grenades, mines, or similar devices. Antique firearms are expressly excluded from the definition of "firearm." Id., §921(a)(4).

[17]"The term 'ammunition' means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm." Id., §921(a)(17(A).

shipped or transported in interstate or foreign commerce," and the act of receiving or possession must be "in or affecting commerce."[18] The federal scheme contains a variety of exceptions to the general rules, as well as mechanisms to avoid the preclusive effect of those general rules. For instance, so-called "white collar" felons convicted of violating state or federal antitrust laws, or who have been convicted of offenses pertaining to unfair trade practices, restraints of trade or the like, are expressly excluded from the definition of persons having been convicted of a "crime punishable by imprisonment for a term exceeding one year."[19] Although the federal law

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[18]18 U.S.C. §922(g)(last). For purposes of Chapter N of Title 18 of the United States Code, Congress has defined the term "interstate or foreign commerce" to include "commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone)." *Id.*, §921(a)(2). Thus it appears that Congress based its power to enact the federal criminal law sanctions concerning firearms and ammunition at least in part upon the Interstate Commerce Clause. U.S. Const., Art. I, §8, Cl. 2. The constitutional underpinnings of Congress' legislative activity in this area are beyond the scope of this article. The Supreme Court on several occasions has addressed the requirement of a nexus between possession, receipt or transportation of a firearm or ammunition, and interstate commerce. *See, e.g.*, United States v. Bass, 404 U.S. 336 (1971).

[19]18 U.S.C. §921(a)(20)(A). The traditional definition of a "felony conviction" as a

consequences of such convictions are matters to be determined by federal law, "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[20] Not all persons within the ambit of Section 922(g) remain permanently subject to its sanctions, however, because their federal firearms disability is relieved if the conviction has been expunged, set aside or pardoned, or if they have had their civil rights restored, unless their pardon, expungement, or restoration of civil rights expressly includes continuation of the firearms prohibitions.[21] The pardon, expungement or restoration of civil rights must be accomplished under the auspices of the jurisdiction giving rise

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crime being punishable by a term of imprisonment exceeding one year is the predicate for the offense of Unlawful Receipt or Possession of a Firearm by a Felon, established in 18 U.S.C. §922(g)(1). Congress has also excluded from the federal firearms and ammunition ban persons convicted of "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. §921(a)(20)(B). Thus a misdemeanant convicted of a crime punishable by a term of imprisonment for three years would be subject to federal firearms disabilities.

[20]18 U.S.C. §921(a)(20)(first sentence following subsection (B)).

[21]18 U.S.C. §921(a)(20)(second sentence following subsection (B)). See also 27 C.F.R. §178.142 (titled, Effect of pardons and expunctions of convictions) and §178.143 (titled, Relief from disabilities incurred by indictment) (relating solely to licensees and continuation of their operations during the term of an indictment for a crime punishable by imprisonment for a term exceeding 1 year).

to the conviction or adjudication.[22]

In addition to the statutory exclusions from the effects of the general rule, Congress has provided an after-the-fact relief mechanism for having the federal firearms disability removed. Persons adversely affected by Section 922(g) may seek relief of their federal firearms disability by applying to the United States Secretary of the Treasury.[23] The Secretary may grant relief

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[22]*See* Beecham v. United States, 511 U.S. 368 (1994). Justice O'Connor wrote the opinion for a unanimous Court. The Court referred to the statutory language of 18 U.S.C. §921(a)(20). The opinion defined the statutory phrase "[w]hat constitutes a conviction [is] determined in accordance with the law of the jurisdiction in which the proceedings were held, ..." as the "choice of law clause," and the subsequent text, "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction ...," as the "exemption clause." 511 U.S. at 369. Determining that the two clauses must be construed together and should not be read separately, the Court held that a state's restoration of a felon's civil rights does not remove a disability of firearm possession imposed by federal law as a result of a federal conviction. Id. at 371. For an example of the effect of a gubernatorial pardon of a state felony upon the federal firearm disability, *see* United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978), no appellate history.

[23]18 U.S.C.§925(c). Reference to the Secretary of the Treasury includes his delegate. 18 U.S.C. §921(a)(18). The Secretary has delegated to the Director of the Bureau of Alcohol, Tobacco and Firearms his functions, powers and duties under 18 U.S.C. Chapter 44, relating to firearms. See 27 C.F.R. Part 178, §§178.1 et seq. In this article, a reference to the Director is to

from such disabilities "if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[24] If the requested relief is granted, the Secretary must "promptly publish in the Federal Register notice of such action, together with the reasons therefor."[25] In the event the Secretary denies the requested relief, the applicant may "file a petition with the United States district court for the district in which he resides for a judicial review of such denial."[26] In a judicial proceeding invoked by an applicant whose request for relief has been denied by the Secretary, the reviewing court "may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice."[27] The statute contains no express

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the Director of the BATF.

[24]18 U.S.C. §925(c). See 27 C.F.R. §178.144(d). See also, additional requirements for granting relief to persons who have been adjudicated to be a "mental defective" [sic] or committed to a mental institution. Those applicants must have been "subsequently determined by a court, board, commission, or other lawful authority to have been restored to mental competency, to be no longer suffering from a mental disorder, and to have had all rights restored." 27 C.F.R. §178.144(e).

[25]Id. See also 27 C.F.R. §178.144(g).

[26]Id.

[27]Id. Section 925(c) further provides for suspension of disabilities of licensed dealers and

standard of review or scope of review for the district court to apply in considering the action by the Secretary denying relief,[28] nor is the Administrative Procedure Act[29] explicitly referred to in connection with the express grant of judicial review. Although the Secretary is expressly authorized by statute to adopt administrative rules and regulations related to administration of Chapter N, those regulations are limited to "only such rules and regulations as are necessary to carry out the provisions of this chapter [Title 18, United States Code, Chapter 44] ..."[30]

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others pending "final action on an application for relief filed pursuant to this section." Id. Although Bean was at one time a licensee of BATF, his Section 925(c) application apparently did not involve his status as such. Regulation of BATF licensees under 18 U.S.C. Chapter 44 is beyond the scope of this article.

[28]Under traditional principles of administrative law, a reviewing court could evaluate the agency action under the substantial evidence standard, or where appropriate by utilizing the abuse of discretion standard. In some circumstances, judicial proceedings following administrative actions might involve a trial de novo. An extended discussion of the principles of judicial review of agency actions is beyond the scope of this article. It is sufficient to note here that Congress has failed to enact express directives about these matters in the context of Section 925(c).

[29]5 U.S.C. §§551 et seq.

[30]18 U.S.C. §926(a)(first). Before being amended in 1986, Section 926 provided that the Secretary "may prescribe rules and regulations as he deems reasonably necessary to carry out the

Part 2: Federal Statutory and Caselaw Background

A review of the relevant federal statutory and caselaw developments related to firearms disability and restoration is necessary to a complete understanding of the disputed issues in Bean.[31] Doing so provides a setting for the legal environment encountered by the courts at the

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provisions of this chapter." Public Law 99-308, §106, effective October 22, 1986, significantly rewrote the section and added several limitations to the regulatory authority of the Secretary. The amendment added the word "only" after the phrase "may prescribe," and replaced "as he deems reasonably" with "as are" in reference to permissible regulations. Notwithstanding those changes, one court has held that the Secretary is not severely restricted in his ability to promulgate regulations related to Chapter 44, and the courts must continue to give their customary deference to those regulations. See National Rifle Association v. Brady, 914 F.2d 475 (4th Cir.), cert. den., 499 U.S. 959 (1990). The Secretary has adopted regulations pertaining to applications under Section 925(c) and relief determinations by the Director of BATF as his delegate. See 27 C.F.R. §178.144.

[31]For additional discussions of the federal legislative background related to firearms, see Gregory J. Pais, Note, Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?, 23 Okla. City U. L. Rev. 977, 980 - 83 (Fall, 1998); Ronald C. Griffin, Note, Judicial Review under 18 U.S.C. §925(c): Abrogation Through Appropriations?, 76 Wash. U.L.Q. 1095 (1998); Hardy, David T., The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 Cumb. L. Rev. 585 (1986 - 1987). See also, Ryan Laurence Nelson, Rearming Felons: Federal Jurisdiction under

commencement of Congress' appropriations bans directed at BATF's processing of Section 925(c) applications for relief from federal firearms disabilities.

One of the early significant federal firearms legislation was the National Firearms Act of 1934.[32] Under that act, non-payment of federal sales taxes by firearms manufacturers and dealers resulted in sanctions, including the prohibition of shipping the subject firearm in interstate or foreign commerce and making a federal crime the possession of a firearm that had been sold in interstate or foreign commerce without payment of the sales tax.[33] The extent of federal regulatory activity substantially increased with passage of the Federal Firearms Act in 1938.[34] In addition to providing for the licensing of firearms manufacturers and dealers, certain persons were criminally sanctioned from receiving any firearm or ammunition which had been shipped or transported in interstate or foreign commerce.[35] Congress did not include any

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18 USC § 925(c), 2001 Univ. Chi. Legal Forum 551.

[32]Chapter 757, 48 Stat. 1236 (1934), eventually codified into various sections of Title 26 of the United States Code.

[33]Id.

[34]15 U.S.C. §§ 901 - 909 (repealed 1968).

[35]Before its repeal in 1968, 15 U.S.C. §902(f) provided that "[i]t shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, ..."

mechanism for relief from this prohibition in its original enactment of the Federal Firearms Act, and did not do so until almost three decades later.

In a 1965 amendment to the Federal Firearms Act, Congress added for the first time a procedure by which felons could seek to have their federal firearms disabilities removed.[36] This legislation established an administrative program within the Department of the Treasury. Applicants had to satisfy the Secretary that the statutory requisites to relief were met.[37] The amendment contained no specific provisions either authorizing or precluding judicial review of the Secretary's determinations under the program. A few years later, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968.[38] That same year Congress also enacted the Gun Control Act of 1968, which amended several provisions of the newly enacted Safe

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[36]15 U.S.C. §910 (repealed 1968).

[37]The Secretary could grant relief if "it was established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, were such that the applicant would not be likely to conduct his operations in an unlawful manner, and that the granting of relief would not be contrary to the public interest." Id.

[38]Section 902, Pub. L. No. 90-351, 82 Stat. 197 (1968), adding Chapter N to Title 18 of the United States Code, with particular sections codified as 18 U.S.C. §§ 921 - 28 (hereafter the "Safe Streets Act"). The Safe Streets Act also repealed and recodified various portions of the Federal Firearms Act formerly contained in Title 15 of the United States Code, including sections 901 through 910. Safe Streets Act, Section 906.

Streets Act.[39] Fugitives from justice, persons under indictment for an offense punishable by more than one year of imprisonment, and persons convicted of an offense punishable by more than one year of imprisonment were precluded by the Safe Streets Act from receiving or possessing firearms or ammunition which had been shipped or transported in interstate commerce.[40] The Safe Streets Act permitted certain felons[41] to apply for removal of the federal firearms disability, but only for disabilities arising under Chapter N, Title 18 of the United States Code. The firearms disability could not have arisen from offenses involving the use of a firearm or other weapon, or from a violation of Chapter N or of the National Firearms Act.[42] The Gun Control Act of 1968 expanded the relief provision by providing that relief could be sought by

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[39]Pub. L. No. 90-618, 82 Stat. 1213 (1968), amending various sections of Title 18, Chapter N, as added by the Safe Streets Act, and adding sections 929 and 930.

[40]§902, 82 Stat. at 1230-31.

[41]Curiously, many of the cases and commentaries refer to the disabilities as relating to a "convicted felon." The term is redundant, because a felon achieves that status only upon conviction following either a trial after pleading not guilty, or the entry of a judgment of conviction after a plea of no contest or guilty. Perhaps it would be more accurate to refer to the disabilities as affecting an "unpardoned felon."

[42]§902, 82 Stat. at 1233. Fugitives from justice, and persons under indictment for an offense punishable by more than one year, thus were not eligible to seek relief under this provision.

some felons for disabilities arising under any provision of federal law, rather than solely those arising from a violation of Chapter N.[43] Neither the Safe Streets Act nor the Gun Control Act contained explicit text either authorizing, or precluding, judicial review of the Secretary's determinations under Section 925(c).

Almost twenty years later, Congress amended Chapter N again, in portions of the Firearms Owners' Protection Act of 1986 ("FOPA").[44] FOPA amended Section 925(c) to expand the categories of persons eligible to seek relief from their federal firearms disabilities. Instead of being limited solely as a remedy for specified felons,[45] an opportunity to seek Section 925(c) relief was afforded to any person subject to such disabilities.[46] For the first time, Congress also made express statutory provision for judicial review of denials of relief by the Secretary.[47] Neither the standard of that judicial review, nor its scope, were prescribed.

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[43]§102, 82 Stat. at 1225. The substantive standard for granting relief also was revised. Id.

[44]Pub. L. No. 99-308, 100 Stat. 449 (1986).

[45]That is, felons who had not been convicted of offenses involving the use of a firearm or other weapon, or a violation of [Chapter N] or the National Firearms Act.

[46]FOPA, Section 105(1)(A), (C).

[47]FOPA, Section 105(1)(D). Congress also provided for the admission of additional evidence when necessary to avoid a miscarriage of justice. Id.

The Appendices to this article set out the different versions of Section 925(c) as added or amended by these legislative actions. Appendix A contains Section 925(c) as added by the Safe Streets Act of 1968. Appendix B contains both the previous version of Section 925(c), as added by the Safe Streets Act of 1968 and redlined to show additions and deletions, and the "clean" version of Section 925(c), as amended by the Gun Control Act of 1968. Appendix C contains both the version of Section 925(c), as amended by the Gun Control Act of 1968 and redlined to show additions and deletions, and the "clean" version of Section 925(c), as amended by FOPA. Appendix D contains a redacted version of the current expression of Section 925(c), with text deleted with respect to matters not at issue in *Bean*, while Appendix E illustrates the substance of the text of the appropriations ban with respect to BATF and its processing of Section 925(c) applications.

Several reported cases illustrate the courts' early efforts to develop a coherent body of jurisprudence with respect to the procedural and substantive aspects of judicial review of Section 925(c) denials[48] by the Director before the congressional appropriations ban commenced in

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[48]That no decision could be found involving a challenge by the government to its own executive agency's determination in favor of an applicant is not surprising. A scenario in which the Director's favorable grant of Section 925(c) relief would be challenged by judicial review initiated by the United States is difficult to imagine. From that perspective, FOPA Section 105(1)(D) could be seen as superfluous. Yet black-letter principles of statutory construction counsel against interpretations rendering useless or ineffective language added by the legislature. Given the stated purpose of FOPA in making disability relief easier to obtain, Congress' addition

of language expressly providing for judicial review of Section 925(c) denials is most properly seen as the addition of a jurisdictional grant independent of that of the APA, or by operation of 28 U.S.C. §§ 1331 or 1337. This understanding does not end the jurisdictional inquiry, however, due to the textual reference in the statute, as amended, to courts' "review" of "denials" by the Secretary. Congress may condition, and often has conditioned, its jurisdictional grants conferred upon lower federal courts. For example, although the federal judicial power extends to cases and controversies arising between citizens of different states (diversity jurisdiction), diversity jurisdiction is not presently available unless the amount in controversy exceeds $75,000. See 28 U.S.C. §1332 (as amended by Pub. L. No. 104-366, §205(a)(1), (a)(2) (1996). The required amount in controversy was $3,000 until 1958, when it was raised to $10,000 (see Pub. L. No. 85-554, §2 (1958). It was raised again to $50,000 in 1988. Pub. L. No. 100-702, Title II, §201(a) (1988). Those same acts of Congress raised the amount in controversy requirement in the general federal question jurisdictional grant, contained in 28 U.S.C. §1331, from $3,000 to $10,000 in 1958. The threshold was eliminated with respect to actions brought against the United States or any of its agencies in 1976. Pub. L. No. 94-574, §2 (1976). It was eliminated altogether in 1980. Pub. L. No. 96-486, §2(a) (1980). Although the cases are legion involving particular case determinations about whether the threshold amounts were satisfied, no substantial issue exists about Congress' expressed intention to condition the jurisdictional grants upon the satisfaction of a condition precedent, namely the existence of an amount in controversy exceeding a specified sum of money.

1993.[49] Although the methodology and reasoning of these decisions differ in their details, several themes are

discernable. In the first instance, even without the express provision for judicial review added by FOPA, the courts consistently determined that they had subject matter jurisdiction to review BATF denials of Section 925(c) relief[50]. Secondly, the courts approached their task of reviewing

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[49]In advancing chronological order, the early cases include: *Kitchens v. United States, BATF*, 535 F.2d 1197 (9th Cir. 1976), no appellate history; *Thompson v. United States, BATF*, 533 F. Supp. 90 (Cen. Div. Utah 1981), no appellate history, further proceedings reported at 557 F. Supp. 158 (Cen. Div. Utah 1982); *Bradley v. United States, BATF*, 736 F.2d 1238 (8th Cir. 1984), no appellate history; *Young v. United States, BATF*, 690 F. Supp. 990 (SD Ala. 1988), no appellate history; *In re Porrazzo*, 771 F. Supp. 304 (DC Nev. 1991), no appellate history; *Smith v.United States, BATF*, 813 F. Supp. 1382 (DC ED Wis. 1993), no appellate history; *Lovell v. United States, BATF*, 867 F. Supp. 571 (DC WD Mich. 1994), no appellate history; *Bagdonas v. United States, BATF*, 93 F.3d 442 (7th Cir. 1996), no appellate history;

[50]See, e.g., *Kitchens v. United States, BATF*, 535 F.2d 1197 (9th Cir. 1976), no appellate history. In 1968 Kitchens, a licensed firearms dealer, entered a nolo contendere plea in a California state court to a charge of violating state law concerning possession of machine guns. In addition to deferral of his sentence, Kitchens was placed on three years' probation and fined $300. The terms of his probation included a requirement that he comply with all license requirements of state and federal law concerning weapons. After successfully completing the

BATF denials with a substantial deference to the agency's determinations. That deference continued notwithstanding the addition by FOPA of text[51] authorizing a reviewing court to admit

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requirements of his probation, Kitchens sought an expungement or reduction of his conviction pursuant to California law. He obtained the following relief: the offense to which Kitchens had entered the plea was reduced to a misdemeanor; his plea to the information was withdrawn and the information presenting the felony offense was dismissed; and the state court relieved Kitchens of all state penalties and disabilities incidental to his plea. 535 F.2d at 1198. Kitchens then filed an application with the Director for Section 925(c) relief. The application was denied by BATF on the grounds that "the statutory prerequisites had not been met." At that time, Section 925(c) contained no express text either authorizing or precluding judicial review of relief denials by the Director. See Appendix B to this article. On appeal, the court found jurisdiction for judicial review existed under 28 U.S.C. §1337, which vests district courts with original jurisdiction of "any civil action or proceeding arising under an Act of Congress regulating commerce ..." Because the court found the Gun Control Act of 1968 to be a federal statute regulating commerce, the court of appeals determined that the federal courts had subject matter jurisdiction. 535 F.2d at 1199 and n.5. See also *Thompson v. United States, BATF*, 533 F. Supp. 90, 92 (Cen. Div. Utah 1981), no appellate history, further proceedings reported at 557 F. Supp. 158 (Cen. Div. Utah 1982).

[51]FOPA, §105(1)(D). Given the stated purpose of FOPA in making disability relief easier to obtain, Congress' addition of language expressly providing for the admission by the reviewing court seems to have established a type of review independent of, or at least different

additional evidence where necessary to avoid a miscarriage of justice. Finally, the result of that deferential review routinely[52] resulted in decisions upholding the Director's exercise of

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from, the abuse of discretion standard contained in the APA. Congress could have, but did not, provide for a remand to the Secretary by the reviewing court in such instances, in order to fully develop a more adequate administrative record and a possible new or revised determination by the agency which would then be subjected to further judicial review. For example, the Federal Alcohol Administration Act, consisting of Chapter 8, Subchapter 1 of Title 27 to the United States Code, 27 U.S.C. §§ 201 et seq., contains a mechanism for remand in appeals from denials of permits related to commerce in liquor. See 27 U.S.C. §204(h). As discussed in the next section of this article, the "additional evidence" language was urged by petitioners seeking to overcome the congressional appropriations ban as statutory authority to permit a unique type of de novo determination by the district court in its "review" of a "denial" by the Director of BATF that had never been made by that agency.

[52]*See, e.g.*, *Bradley v. United States, BATF*, 736 F.2d 1238 (8th Cir. 1984), no appellate history. Bradley, a pawnbroker, pled guilty to felony larceny of an automobile in 1958. After receiving a pardon from Arkansas Governor Clinton, Bradley applied with the Director for Section 925(c) relief in 1981. Following an investigation by BATF, his request was denied. Bradley's petition for judicial review also failed to have his federal firearms disabilities relieved. The district court disposed of the case on cross-motions for summary judgment filed by the government and by Bradley. Citing various circumstances specified in the government's supporting affidavits, the court concluded that "[i]t is apparent from an examination of the entire

file that the Director's decision was not arbitrary or capricious, and was supported by substantial evidence." 736 F.2d at 1239. Although no jurisdictional predicate is mentioned in the decision, the case was decided under the APA. See the court's discussion of the standard of review. 736 F.2d at 1240. The Eighth Circuit evaluated Bradley's challenge by determining the proper standard of review under the APA. Because the determination by the Director was the result of informal proceedings, that is, the determination was not rulemaking or an adjudication, the court held that the agency decision was not reviewable under the substantial evidence test. Instead, it concluded that the "proper standard of review is whether the agency actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 736 F.2d at 1240, citing the APA, 5 U.S.C. §706. The appellate court discussed several principles associated with the "arbitrary and capricious" standard of review, such as its being narrow in scope and more restrictive than the "substantial evidence" test, the agency finding being subject to rejection "only if it is not supportable on any rational basis, and placing upon the complaining party the burden of proving that the action was willful and unreasoning, without consideration and in disregard of the facts or circumstances of the case." 736 F.2d at 1240 (citations omitted). After declaring these principles, on appeal the court found that, "[a]fter a careful examination of the record and the reasons given for denial, we agree with the district court that the Director's decision was not arbitrary and capricious and accordingly affirm the decision of the district court." 736 F.2d at 1240, citing the APA, 5 U.S.C. §706. The appellate court discussed several principles associated with the "arbitrary and capricious" standard of review, such as its being narrow in scope and more restrictive than the "substantial evidence" test, the agency finding being subject to rejection "only if it is not supportable on any rational basis, and placing upon the

discretion.[53]

Part 3: The Appellate Courts and the BATF Appropriations Ban

Following the congressional ban against BATF's use of appropriated funds to investigate or act upon applications for Section 925(c) relief by individuals, the focus of appeals from dissatisfied applicants shifted from administrative law questions governing the scope of judicial review, to the subject matter jurisdiction of federal district courts and the related question of exhaustion of administrative remedies. These decisions, summarized in this section, appear in

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complaining party the burden of proving that the action was willful and unreasoning, without consideration and in disregard of the facts or circumstances of the case." 736 F.2d at 1240 (citations omitted).

[53]The decisions prior to the appropriations ban acknowledge that the Director's discretion is quite broad but not absolute, for if it were absolute then judicial review would be pointless. The opinions further address the need to make probing, searching evaluations of the administrative record when determining whether the Director's decision rested upon any rational basis. So long as the administrative record revealed at least some negative information upon which a denial could rationally be made, the courts typically refused to re-weigh that negative information against information supporting the granting of relief. It appears that only *Porrozzo*, discussed in the text at note x, *supra*, involved a direct reevaluation of the credibility of witnesses which led the court to discount negative information. In that decision only, a lack of credible negative information, contrasted with the existence of favorable information, resulted in the Director's decision being overturned as an abuse of discretion.

the order in which they were reported.

Rice v. United States.[54] Rice pled guilty to a Pennsylvania felony involving stolen automobile parts. After learning of the effect of his felony plea upon his firearms privileges, Rice applied for Section 925(c) relief from BATF. During the course of its investigation BATF discovered that Rice had committed numerous violations of the federal firearms prohibitions, leading to a guilty plea by Rice to federal charges under 18 U.S.C. §922(g)(1). In February 1992 Rice was pardoned for his state law convictions and that criminal episode was expunged from his state criminal record. After applying a second time to the BATF for Section 925(c) relief in June 1992, presumably from the disability remaining from his federal firearms law conviction, Rice again failed to succeed. This time the investigation was terminated by BATF due to the congressional funding ban, about which Rice was informed by BATF.[55] Rice then sought review of BATF's refusal to grant his June 1992 application.[56]

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[54]68 F.3d 702 (3d Cir. 1995), no appellate history, overruled en banc by *Pontarelli v. United States, BATF*, 285 F.3d 216 (3d Cir. 2002), no appellate history. Pontarelli is discussed in text at note z, *supra*.

[55]68 F.3d at 705.

[56]Id. Rice also raised constitutional issues under the Second Amendment, asserting that BATF's refusal to act denied him his constitutional right to bear arms, and due process and equal protection claims under the Fifth Amendment. Id. The district court granted the government's motion for summary judgment on these issues, id., and the Third Circuit affirmed the disposition

The district court dismissed the application under Section 925(c), concluding that it lacked subject matter jurisdiction over [Rice's] statutory claim for judicial review of BATF's inability to complete the investigation that is a prerequisite to its action granting a convict's section 925(c) application. The court reasoned that judicial review was unavailable because BATF had not finally denied Rice's application, but simply "lacked any present means to continue processing it."[57] Reversing the district court's dismissal for lack of subject matter jurisdiction, the appellate court remanded the case "to the district court so that it can exercise its statutory discretion to decide whether BATF's failure to grant Rice the relief he seeks would be a miscarriage of justice. If it decides this question in the negative, it should dismiss Rice's request for judicial review on its merits. If it decides in the affirmative, Rice should be given an opportunity to present evidence relevant to section 925(c)'s standards for restoration of firearm privileges and thereafter the court should decide the merits of Rice's case on the completed record."[58] Although acknowledging that Congress has constitutional authority to appropriate

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of these issues. Id. at 706, n. 3.

[57]Id. at 704.

[58]Id. Years later, faced with a strong attack upon Rice, another panel of the Third Circuit further explained this procedure. Rather than determining whether the denial of relief itself would create a miscarriage of justice, the question to be determined by the district court was whether the applicant's petition for judicial relief alleged sufficient facts that would indicate a potential for a miscarriage of justice and, if so, the applicant would be permitted to submit additional evidence on his fitness to have his disabilities removed. Palma v. United States, 228

money and to limit the jurisdiction of inferior federal courts,[59] the court noted that, "Before courts will hold that Congress has used an appropriation act to repeal substantive legislation or preclude judicial review of administrative action, the intention to do so must be clearly stated."[60] Finding that the appropriations ban did not expressly preclude a court from reviewing BATF's refusal to process an application for relief, the court next considered "whether BATF's inability to process Rice's application is a final denial. ... This issue is most appropriately analyzed in accord with the doctrine of exhaustion of administrative remedies."[61] Applying the typical balancing test used in exhaustion analysis,[62] the court found the balance tipped in favor of proceeding with Rice's application. One of the crucial weights in the balance was the FOPA

F.3d 323 (3d Cir. 2000), no appellate history. Because Palma's alleged need to possess firearms on its face failed to demonstrate the potential for a miscarriage of justice, the appellate court held that the district court erred in granting him relief under Section 925(c) and ordered it to dismiss the application. 228 F.3d at 331. The government's challenges to Rice, while noted, thus were not reached due to the court's disposition on the merits. 228 F.3d at 329.

[59]Id. at 706 (citations omitted).

[60]Id. at 706 - 07 (citation omitted).

[61]Id. at 707.

[62]Id. The balancing test weighs the "interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." Id. (citations omitted).

amendment permitting the introduction of additional evidence to avoid a miscarriage of justice: "Were it not for the express authority section 925(c) gives district courts to receive independent evidence when necessary to avoid a miscarriage of justice, we would be hesitant to excuse exhaustion where, as here, Congress has entrusted a decision to an agency under standards including one so broad as ensuring the public interest."[63] In the event that Rice was permitted to introduce additional evidence, the district court was ordered to "decide, on the basis of all the evidence before it, whether Rice has met his burden of showing he 'will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[64] In contrast to the earlier opinions discussed in Section 2 of this article, the district court thus was directed to make its own decision upon the merits as to whether a Section

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[63]Id. at 708 - 09. This provision, the court reasoned, "gave the district courts discretion to create or supplement the administrative record when necessary to avoid a miscarriage of justice. What further part the agency should play in the ongoing court proceedings if the district court decides that it is necessary to receive independent evidence as to whether Rice has become fit for relief from his firearms disability is not presently before us. In that respect the record is not yet complete. We note, however, that the relevant provisions of the appropriation acts do not seem to preclude the agency from presenting its views on the propriety of granting Rice's application on the record created in a judicial forum." Id. at 709.

[64]Id.

925(c) applicant satisfied the statutory requirements for relief from firearms disabilities.[65]

United States v. McGill.[66] McGill's guilty pleas in 1993 to two federal felony offenses[67] triggered the federal firearms disabilities created by Section 922(g)(1). Following his early release from probation in September 1994, McGill filed an application for Section 925(c) relief with BATF. Citing the congressional appropriations ban, BATF advised McGill that it was no longer accepting such applications. McGill's attempt to secure judicial relief was dismissed on the basis of lack of subject matter jurisdiction.[68] The dismissal was affirmed on appeal, but on different grounds. The jurisdictional issue[69] was pretermitted because it was "clear to [the Fifth

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[65]The court commented upon several aspects of the case that might be relevant to the merits of Rice's claim for relief, and concluded those comments with a reminder that "the Supreme Court has held that the right to possess a firearm after a disabling conviction is a privilege, not a right. *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L. Ed. 2d 198 (1980). Thus, Rice bears a heavy burden in his attempt to support his statutory claim." 68 F.3d at 709.

[66]74 F.3d 64 (5th Cir.), cert. denied, 519 U.S. 821 (1996).

[67]The two offenses were making a false statement, in violation of 18 U.S.C. §1014, and filing a false tax return in violation of 26 U.S.C. §7206. 74 F.3d at 65.

[68]Id.

[69]"Although we doubt that the district court has original jurisdiction to consider an

Circuit panel] that Congress suspended the relief provided by §925(c)."[70] Whether the appropriations ban effected a suspension of the relief available under Section 925(c) was said to turn on the intent of Congress.[71] In its effort to ascertain that intent, the court reviewed both the textual evolution of the appropriations ban[72] and the Senate report by the Appropriations Committee accompanying the 1993 Appropriations Act.[73] After that review, it was clear to the panel "that Congress intended to suspend the relief provided by § 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower

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application to remove the Federal firearm disability, ...: Id.

[70]Id.

[71]Id.

[72]The court noted that the 1992 appropriations ban originally extended to BATF's processing of any Section 925(c) applications, but was modified in 1993 and 1994 to expressly permit the processing of such applications filed by corporations. Id. at 66. "If Congress thought the courts were considering applications for relief under § 925(c), this restoration of funds to provide relief for corporations would have been unnecessary." Id. at 67.

[73]Id. That report was summarized by the court as expressing concerns over: "(1) use of limited valuable resources for investigating these difficult cases and (2) consequences to innocent citizens if ATF makes a mistake and grants relief to a felon from his firearm disabilities." Id.

or expertise to investigate or evaluate these applications."[74] Disagreeing with the contrary conclusion in *Rice*,[75] the court concluded that "relief from federal firearms disabilities for individuals under § 925(c) [was] suspended by the last three appropriations acts."[76] Accordingly, the dismissal below was affirmed, on the basis that the relief under Section 925(c) was suspended rather than on the basis of lack of subject matter jurisdiction.[77]

Burtch v. United States, BATF.[78] Burtch's four felony convictions between 1984 and 1987 resulted in his being subject to federal firearms disabilities under Section 922(g)(1). His application to BATF for Section 925(c) relief, filed in January 1994, was returned unprocessed by BATF with a letter citing the congressional funding ban. In response to Burtch's petition for

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[74]Id. at 67.

[75]Id. The court focused on the conclusion in *Rice* that the appropriations ban did not expressly repeal Section 925(c) nor expressly preclude judicial review of BATF's refusal to grant relief from firearms disabilities. Id.

[76]Id.

[77]Id. By leaving open the jurisdictional question, McGill presented an opportunity for the panel in Bean to distinguish the prior decision on the basis of the passage of time, recasting the then short-term suspension involved in McGill to a seemingly permanent attempt by Congress to repeal the remedy in an appropriations context without expressly repealing the statute.

[78]120 F.3d 1087 (9th Cir. 1997), no appellate history.

judicial relief, the district court dismissed the action for want of subject matter jurisdiction, holding that, "'where no investigation occurs, there is no denial.'"[79] In analyzing the jurisdictional issue, the appellate court relied upon the express terms of the statute, which states that judicial review occurs in reference to a "denial" by BATF of an application for relief. The court stated that '[t]he statute is so clear that we hold it means what is says. Thus, the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected."[80] Declining to find that the ability to supplement the administrative record with additional evidence in order to avoid a miscarriage of justice permits a reviewing court to "build a record from scratch or make discretionary policy determinations in the first instance if the Secretary does not,"[81] the court construed the term "denial" by the Secretary to mean "an adverse determination on the merits and does not include a refusal to act."[82] Because the court found a clear intention by Congress to suspend the ability of the BATF to act upon, and thus deny, a Section 925(c) application, and the existence of a denial is a jurisdictional predicate for judicial review, the Ninth Circuit declined to follow the Fifth Circuit's review of the

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[79]Id. at 1089, quoting the ruling by the district court. "Burtch also challenged as an equal protection violation the appropriation statutes' distinction between individuals, who are not permitted to have their applications processed by ATF, and corporations, which are." Id.

[80]Id. The court also noted the conflict between *McGill* and *Rice*.

[81]Id.

[82]Id.

legislative history underlying the appropriations ban. It also declined to follow the Third Circuit's holding in *Rice* that subject matter jurisdiction existed under Section 925(c) even in the absence of a denial of relief by BATF.[83] Also unlike the Fifth Circuit, the dismissal below on the grounds of lack of subject matter jurisdiction was expressly affirmed.[84]

Owen v. United States, BATF.[85] Due to his felony convictions in 1993 on two counts of filing false tax returns, Owen became subject to federal firearms disabilities by operation of Section 922(g)(1). After completion of his prison term, Owen applied to BATF for relief under Section 925(c). As in the previous cases, the Director advised him that the application could not

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[83]Id. The court also easily disposed of Burtch's equal protection claims. Burtch agreed that his challenge should be assessed under the "rational basis" standard. This in turn meant that, in "areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. (citation omitted). Because "Congress could rationally have believed that corporations guilty of corporate crimes present less danger to the community than do individual felons," id., the equal protection challenge failed. Burtch apparently did not argue that he had an individual right to own and bear firearms under the Second Amendment, which if true would subject the classification scheme to "strict scrutiny."

[84]Id.

[85]122 F.3d 1350 (10th Cir. 1997), no appellate history.

be processed due to the then-continuing congressional appropriations ban.[86] The district court dismissed the ensuing lawsuit filed by Owen under Section 925(c) on the basis of lack of subject matter jurisdiction.[87] In a variation to the issue as phrased in the earlier cases, the question on appeal was said to be "whether the district court had jurisdiction to review the refusal of the BATF to investigate or act on an application for relief from the denial of firearms privileges to a convicted felon on the ground that Congress had, through appropriations statues, provided that none of the funds appropriated thereby are available for investigating or acting on such applications."[88] Not surprisingly, Owen urged the Tenth Circuit to follow *Rice* rather than *McGill* or *Burtch*. The court followed the ultimate holding in *Burtch*, that "in the absence of a denial by the BATF of an application by Owen for relief pursuant to 18 U.S.C. §925(c), the district court lacked subject-matter jurisdiction and properly dismissed."[89] Unlike the Ninth Circuit, the court in *Owen* followed the Fifth Circuit's reference to legislative history in aiding its

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[86]Id. at 1351.

[87]Id. at 1352.

[88]Id. The court noted the differing opinions on the jurisdictional question contained in *Rice*, *McGill*, and *Burtch*. Id. It then provided a summary of the background and holding of those cases. Id. at 1352 - 54.

[89]Id. at 1354.

statutory construction of what might only superficially appear to be a statute clear on its face.[90] In view of that legislative history, the court stated that "[t]o infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements. The BATF has the requisite manpower and expertise for making this determination, while the courts do not."[91]

Saccacio v. United States, BATF.[92] After his conviction for the federal felony of making a false statement to a federal agent, in violation of 18 U.S.C. §1001, Saccacio became subject to federal firearms disabilities under Section 922(g)(1).[93] His application for Section 925(c) relief, filed in 1998, was returned by the BATF which informed him it could not act upon it, due to the appropriations ban. Saccacio's petition for judicial review was denied for lack of subject matter jurisdiction. On appeal, the Fourth Circuit cited *Burtch* for the proposition that the word "denial" means "an adverse determination on the merits," rather than merely "a refusal to act."[94]

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[90]Id. and at id., n.1.

[91]Id., citing *McGill*, supra, 74 F.3d at 67.

[92]211 F.3d 102 (4th Cir. 2000), no appellate history.

[93]Id. at 103, n.1.

[94]Id. at 104. In dictum, the court also explained its view that a contention that BATF's failure to act constituted a "constructive denial" of the application, although not argued by Saccacio, also would have failed to win a reversal.

Therefore, "because section 925(c) authorizes judicial review of only the denial of an application for relief, and the ATF's failure to process Saccacio's application during the less than six-month period prior to his filing of this action in district court is not the denial of an application, the district court correctly concluded that it was without subject-matter jurisdiction."[95] In the only substantive law footnote in the opinion, *Rice* was said to have only held that Section 925(c) "is a judicially waivable exhaustion requirement, rather than a jurisdictional prerequisite. In so holding, that court was not obliged to – and did not – construe the 'denial of application' language of section 925(c), which we only construe here."[96]

McHugh v. United States, BATF.[97] McHugh was convicted under New York law of a misdemeanor crime of domestic violence,[98] and thus became subject to the federal firearms disabilities established by Section 922(g)(1). When BATF, citing the appropriations ban, did not act upon his Section 925(c) application, filed in June 1998, McHugh filed suit in federal district court seeking either an order of mandamus compelling action by the BATF upon his application, or in the alternative a trial de novo on the application by the court. The trial court denied the government's motion to dismiss. On appeal, the court reversed and held that no basis existed for

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[95]Id., citing *Owen*, *Burtch*, and *McGill*.

[96]Id. at n.2. The *Caccacio* court failed to address the discussion by the court in *Rice* concerning the subject matter jurisdiction of the district court.

[97]220 F.3d 53 (2d Cir. 2000), no appellate history.

[98]Defined in 18 U.S.C. §921(a)(33)(A).

an order of mandamus, and the district court lacked subject matter jurisdiction to adjudicate the application for Section 925(c) relief.[99] The requested relief of mandamus was easily disposed of, because the court refused to order the agency to perform an act (investigate and act upon the application) that was expressly prohibited by law in the appropriations ban.[100] Regarding the request for the district court to act upon the application notwithstanding the absence of an express denial of relief by the Director, the court reasoned that "Section 925(c) makes an agency 'denial' of an application a predicate to district court jurisdiction, and no such denial has been issued here."[101] The court laid out three justifications for its holding. First, it noted that Section 925(c) "was not written so as to create a freestanding opportunity for relief from federal firearms disabilities which might be vindicated pursuant to 28 U.S.C. §§1331 or 1337, which establish original district court jurisdiction over cases involving federal questions and congressional commerce regulations, respectively. Rather, the statute states that a person 'may make application to the Secretary' and 'the Secretary may grant such relief.' 18 U.S.C. § 925(c)."[102] Second, the standard for granting relief is phrased broadly in terms of a determination of what is

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[99]220 F.3d at 55.

[100]Id. at 57 - 58.

[101]Id. at 59. The court declined to follow the view expressed in *Rice* that the issue of judicial review was best analyzed under the doctrine of exhaustion of administrative remedies. Id. at n.3.

[102]Id. at 59.

in the "public interest," a matter the court believed to be best left for administrative agencies rather than the courts.[103] Third, the court concluded that the statutory language for admission of new evidence is a restriction on the power of the courts, rather than a grant of additional judicial authority, and "suggests that the initial adjudication of applications is limited to the Secretary of the Treasury."[104]The Second Circuit cited as favorable authority *Saccacio*, *Owen*, *Burtch*, and *McGill*, and declined to follow *Rice* and the reported decision by the district court in *Bean*.[105]

Mullis v. United States.[106] A 1994 felony conviction for falsifying business travel expenses subjected Mullis to firearms disability under Section 922(g)(1). He sought twice to remove that disability under Section 925(c). His first attempt, in October 1996, resulted in no action by BATF due to the appropriations ban. When Mullis subsequently petitioned for Section

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[103]Id.

[104]Id. at 59 - 60.

[105]Id. In dictum, the court stated that even if the BATF's failure to act, in view of the congressional appropriations ban, amounted to a "de facto denial" of the application, such a denial would not be arbitrary or capricious, as required by the applicable standard of review under Section 706(2)(A) of the Administrative Procedure Act. Id. at 61, citing *Bagdonas*, *McGill* and *Bradley*.

[106]230 F.3d 215 (6th Cir. 2000), no appellate history.

925(c) judicial relief, his request was denied without prejudice.[107] Mullis again wrote the ATF in October 1997, and was again told that the agency was not accepting applications. His second petition for judicial relief was referred to a magistrate judge, notwithstanding the objection to lack of subject matter jurisdiction made by the United States. The district court adopted the magistrate judge's Report and Recommendations favorable to Mullis, and the government appealed.[108]

In response to the jurisdictional objections, Mullis argued that the appropriations ban prevented BATF from acting without altering the judiciary's role in making Section 925(c) determinations. After canvassing the previous circuit court decisions in *Rice*, *McHugh*, *Owen*, *Burtch*, and *McGill*, the Sixth Circuit agreed with the Second Circuit "that the satue [sic, statute] contemplates judicial review of the discretion exercised by the Secretary in denying an application, not independent discretion exercised in a de novo review of an application."[109] After

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[107]Id. at 216. The trial court stated that Mullis could reapply after exhausting his remedies "by submitting an application made pursuant to § 925(c) to the ATF at least two years after the termination of his probation." The trial court's order appears to have taken into consideration 27 C.F.R.§ 178.144(d), which states that the "Director will not ordinarily grant relief if the applicant has not been discharged from parole or probation for a period of at least 2 years."

[108]230 F.3d at 217.

[109]Id. at 219.

noting that the statute established only a mechanism of judicial review of the underlying agency determination, under the arbitrary and capricious standard, the court also examined the "practicalities" of the federal judiciary conducting an appropriate background examination, and concluded that federal courts were ill equipped to perform this function.[110] As additional support of its conclusion, the court stated that "the legislative history [of the appropriations bans] only serves to further reinforce the conclusion that Congress did not intend to modify § 925(c) to permit de novo judicial review of applications for the reinstatement of firearm privileges."[111] Therefore, the court concluded, "Congress, through its appropriations act, has chosen to at least temporarily suspend the operation of § 925(c) in its entirety, thereby removing subject matter jurisdiction from the district court."[112]

Bean v. United States, BATF.[113] The background facts in *Bean* were discussed earlier in

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[110]Id. at 220.

[111]Id. "Given this history, it is unreasonable to believe that Congress intended that federal courts devote their judicial resources to consider – on a more limited record than that before the ATF – the weighty question of whether a felon's firearm rights should be restored." Id. at 220 - 21.

[112]Id. at 221.

[113]*United States v. Bean*, 253 F.3d 234 (5th Cir. 2001), reh. den., reh. en banc den., 273 F.3d 1105 (5th Cir. Aug. 21, 2001) (unpublished table decision), writ granted, 534 U.S. 1112 (2002), reversed, ___ U.S. ___, 2002 U.S. Lexis 9236 (Slip Opinion December 10, 2002).

this article.[114] Following its introductory comments of the issues involved in the case, the Fifth Circuit first addressed the issue of jurisdiction and its prior decision in *McGill*. "In McGill we noted that Congress, through its appropriations acts, had reflected an intent to suspend the relief provided to individuals by § 925(c). As a consequence we opined that we lacked subject matter jurisdiction."[115] The court expressed doubts about the utility of looking to floor comments by members of Congress or to committee reports. Instead, the court examined the statutory history of the actions ultimately taken, or not taken, by Congress in its quest to determine the legislative intent underlying the appropriations ban.[116] That statutory review began with a recognition that the amendment by FOPA to Section 925(c) was intended by Congress "to provide for judicial review of executive decisions in order to better ensure that relief was available for those felons whose convictions were based on technical or unintentional violations."[117] Also significant to

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[114]See text accompanying notes x through y, *supra*.

[115]Id. at 237.

[116]Id. "We do not here parse the committee or floor commentary but, rather, examine congressional action / inaction and its continuing effect." Id. *McGill* was considered "in light of, notably, the intervening passage of time and its effect." Id.

[117]Id. That observation, grounded upon Congress's express statements of purpose and findings in FOPA, appears to be the only appellate recognition that the changes made by FOPA were intended to change the law, at least in part, pronounced by the decisions predating the amendments, by broadening the availability of relief to applicants under Section 925(c).

the court was the failure of Congress to pass the SAFE bill, or any other legislation expressly repealing or amending Section 925(c).[118] While acknowledging that Congress appears to have both created statutory rights but has also indirectly abrogated those rights by prohibiting expenditures to enforce them, the court found "that action clearly distinguishable from the facts in [cited cases][119] and inimical to our constitutional system of justice."[120]

Apart from what it found to be distinguishable aspects of Bean's circumstances from those involved in previous cases, the court pointed to what it characterized as a

> Critical additional factor, the intervening passage of time and the resulting reality of the effective non-temporary 'suspension' of statutorily created rights. We must conclude that Congress seeks to abrogate administrative and judicial rights it created, by using funding bills, after declining to address actual amendments to or revocation of the creating statute. Section 925(c) was enacted for apparently valid reasons, and citizens like Bean are entitled to the rights therein created and authorized unless and until Congress determines to change same. We must now conclude that merely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights. We further hold that when the BATF notified Bean that it would not act on his petition, his

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[118]Id. The SAFE bill (an acronym for Stop Arming Felons) is discussed in more detail in the following text of this article examining the *Pontarelli* decision by the Third Circuit.

[119]The court reviewed earlier cases, such as *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), *United States v. Hill*, 437 U.S. 153 (1978), *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), *United States v. Will*, 449 U.S. 200 (19uu), and *United States v. Dickerson*, 310 U.S. 554 (1940).

[120]253 F.3d at 239. No authority was cited for this conclusion.

administrative remedies de facto were exhausted.[121]

Pontarelli v. United States, BATF.[122] The final court of appeals to consider the effect of the appropriations ban, after the Fifth Circuit opinion but before the decision of the Supreme Court in *Bean*, was also the first one to do so, in *Rice*. Pontarelli was convicted of bribery, a federal felony, in 1991, and among other penalties was sentenced to three years of probation. His 1998 application to BATF under Section 925(c) was not acted upon by the BATF, which cited the appropriations ban. Pontarelli's petition for judicial relief was granted, and the government appealed. The Third Circuit heard the case en banc to reconsider *Rice*.[123] Following a critical review of that earlier decision, the en banc court overruled *Rice* and held that the trial court "lacked subject matter jurisdiction to review Pontarelli's application."[124] That holding was based upon the court's determination of congressional intent from the structure of the statute as directly impacted by the appropriations ban.[125] In dictum, the court also considered the

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[121]Id.

[122]285 F.3d 216 (3d Cir. 2002), no appellate history.

[123]Id. at 219. An earlier panel of the Third Circuit, while noting the government's attack on *Rice*, denied relief on the merits. See *Palma*, discussed in note 58, supra.

[124]Id. at 218.

[125]Id. at 226: "The texts of § 925(c) and the appropriations ban demonstrate convincingly that Congress did not intend for district courts to review individual felons' § 925(c) applications

legislative history of the appropriations ban, finding the history supportive of a congressional intent to suspend judicial relief under Section 925(c).[126] As additional support for its holding, the court examined the policy aspects of a contrary decision, and stated in further dictum that "[d]istrict courts' institutional limitations suggest that Congress could not have intended for the appropriations ban to transfer to them the primary responsibility for determining whether to restore felons' firearms privileges."[127]

Judge McKee "reluctantly" concurred with the judgment of the court.[128] He wrote his opinion "to express my concerns over the more fundamental issue confronting us, and because I think this case is more momentous than the majority's analysis and the weight of the aggregate authority suggest."[129] He formulated the issue, as "whether Congress's failure to appropriate

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in the first instance." Footnote omitted.

[126]Id. at 226 - 30.

[127]Id. at 230 - 31. The decision in *Bean* was said to have "ignored the texts of § 925(c) and the appropriations ban, departed from Supreme Court precedent on when an appropriations act can change a substantive statute, and distorted the legislative history of the appropriations ban." Id. at 218, n. 4.

[128]Id. at 231.

[129]Id. at 231. Although Judge McKee was certain that Congress wanted to suspend felons' ability to obtain Section 925(c) relief, he was "not nearly as certain that Congress actually suspended those privileges as opposed to merely having created a situation that leaves the

funds for the investigation mandated by § 925(c) was tantamount to rescinding subject matter jurisdiction of the federal courts even though the statute conferring that jurisdiction was neither amended nor formally repealed."[130] Judge McGee reviewed the complex factual, legislative and judicial history involved in the *TVA* decision,[131] In Judge McGee's view, "[t]he primary issue facing the Supreme Court [in *TVA*] on appeal from the court of appeals' decision granting an injunction was whether Congress's continued funding of the project under these unique circumstances implied the repeal or amendment of the Endangered Species Act as applied to the Tellico project."[132] After referring to the Supreme Court's statement that the doctrine

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jurisdictional grant in place while making its exercise absolutely impossible. In this latter situation, courts have no alternative but to conclude that subject matter jurisdiction under § 925(c) is an impossibility and the statute therefore becomes a dead letter. There is a fine but important distinction between concluding that Congress intended to repeal a statute that confers subject matter jurisdiction, and concluding that it is impossible to exercise subject matter jurisdiction because the condition precedent to its exercise can never be satisfied although the grant of jurisdiction remains. Moreover, to the extent that the latter formulation of the issue necessarily implies the former, I write to express my concern that courts are being forced to repeal legislation that Congress has intentionally decided to leave alone." Id. at 232.

[130]Id. at 233.

[131]*Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

[132]Id. at 236.

disfavoring repeals by implication "'applies with even greater force when the claimed repeal rests solely on an Appropriations Act,'"[133] Judge McGee also pointed to the Court's observation "that the appropriations legislation that Congress approved for the project did not specifically state that the Tellico project was to be completed 'irrespective of the requirements of the Endangered Species Act.'"[134]

Because of the duration of the repeated annual "suspension" of relief under Section 925(c),[135] and Congress's failure to pass plainly substantive legislation explicitly repealing or modifying Section 925(c),[136] Judge McGee opined that the "courts are forced to read the tea

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[133]Id., citing *TVA*, supra, 437 U.S. at 190.

[134]Id., citing *TVA*, supra, 437 U.S. at 189. Unlike the situation in *TVA*, Congress made a specific reference to Section 925(c) in the appropriations ban. See Appendix D to this article.

[135]Judge McGee expressed discomfort "with the notion that Congress can grant subject matter jurisdiction on the one hand while indefinitely suspending it on the other without altering the text of the jurisdictional statute." 285 F.3d at 237.

[136]Opponents of the relief mechanism afforded by Section 925(c) introduced the SAFE bill, an acronym for the Stop Arming Felons Act. It failed to pass. The majority in *Patronelli* characterized the appropriations ban as a political compromise providing for annual, temporary suspension of relief in lieu of the proposed full repeal of Section 925(c). 285 F.3d at 223. The SAFE bill was reviewed in detail by the majority, as was the history of various legislative battles within the appropriations context. Id. at 228 - 30. "That Congress chose not to repeal § 925(c)'s

leaves sprinkled about the legislative history, and divine a resolution for the irreconcilable tension remaining between the continuing grant of a substantive privilege, and the failure to fund the mechanism for its realization. I agree that, given the nature of the statutory problem, we are unable to exercise subject matter jurisdiction under § 925(c)."[137] Noting that the Supreme Court had granted review of the decision by the Fifth Circuit in *Bean*, Judge McGee expressed his hope that "this anomaly will now finally be resolved there."[138]

As *Bean* made its way to the Supreme Court, the weight of appellate authority was that the appropriations ban effectively eliminated both the ability of BATF to investigate and act upon requests for relief, and also the availability of district court relief for dissatisfied applicants. Although the ultimate rationale for the decisions varied, recurring themes and principles emerge. Notwithstanding a lack of uniformity of application, settled authorities were repeatedly invoked. The following discussion summarizes principles consistently referred to in the appellate court decisions evaluating the effects of the appropriations ban, with citations to typical authority supporting the propositions.[139]

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relief provision does not mean that it did not intend to suspend it." Id. at 229.

[137]Id. at 238.

[138]Id.

[139]These settled principles are not, in and of themselves, particularly difficult to understand. Like many areas of the law, the difficulty lies in the application of the principles to a particular case, rather than development of new rules to fill gaps in existing law. Citations are

Federal district courts are courts of limited jurisdiction and, absent constitutional boundaries imposed upon those courts and the Congress, are subject to congressional limits upon their jurisdiction.[140] Congress has the exclusive authority to appropriate federal funds,[141] and to both authorize and prohibit their being expended for specified purposes.[142] Unless constitutional rights are involved, Congress can preclude or condition judicial review of administrative agency action, or inaction.[143] District courts typically lack jurisdiction to entertain challenges to administrative proceedings unless agency processes have been exhausted or exhaustion is

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solely to representative Supreme Court decisions.

[140]See, e.g., Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.")(footnote omitted). Those limits may neither be disregarded nor evaded. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). Congress' authority is broad, and it may "give, withhold or restrict ... jurisdiction at its discretion ..." Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922). Conversely, absent circumstances in which abstention is appropriate, the district courts cannot decline to exercise jurisdiction conferred upon them by Congress. citation

[141]See U.S. Const., Art. I, §8.

[142]Federal funds may not be spent absent their appropriation by act of Congress. See, e.g., OPM v. Richmond, 496 U.S. 414 (1990).

[143]See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672-73.

excused.[144] Legislation may explicitly, or implicitly, repeal, amend or suspend other substantive law. Congress may use appropriation acts to affect substantive law, as long as it does so clearly.[145] Implied repeals, suspensions or amendments of substantive law are particularly

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[144]See, e.g., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (50-51 (1938). The exhaustion of remedies doctrine is "one among related doctrines – including abstention, finality, and ripeness – that govern the timing of federal court decisionmaking." McCarthy v. Madigan, 503 U.S. 140, 144 (1992). Exhaustion "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." Id. at 145. In deciding exhaustion issues, federal courts "must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." Id. at 146. Circumstances factoring into the balance include the effect of requiring exhaustion upon later court action, substantial questions about whether the agency is empowered to grant effective relief, and the presence of agency bias or predisposition of the question. Id. at 148. Other factors include the exercise of agency discretion and expertise. Each case must be examined in its particular context. Id. Where "Congress specifically mandates, exhaustion is required." Id. at 144. However, if "a statutory requirement of exhaustion is not explicit, 'courts are guided by congressional intent in determining whether application of the doctrine [of exhaustion] would be consistent with the statutory scheme.'" Coit Independence Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561, 579 (1981) (quoting Patsy v. Florida Bd. of Regents, 457 U.S. 496, n.4 (1982).

[145]See Robertson v. Seattle Audubon Society, 503 U.S. 429, 440 (1992); United States, v.

disfavored in the context of appropriation acts.[146]

Because the starting point in statutory construction is the determination of congressional intent, the inquiry focuses first upon the actual language selected by Congress to be included in the statute or statutes in question. Legislative history, at least in some circumstances, may be useful in construing the meaning of statutes but should be cautiously considered.[147]

Except for *Rice* and *Bean*, application of these principles led the appellate courts to conclude that the statutory structure of Section 925(c) vests the granting or denial of relief in the first instance solely to the Director as the designee of the Secretary.[148] In their view, federal

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Will, 449 U.S. 200, 222 (1980); United States v. Dickerson, 310 U.S. 554, 555 (1940).

[146]See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978). No formulaic language is required. Instead, a "positive repugnancy" between the existing statute and the appropriations statute is sufficient to indicate repeal or suspension of the earlier statute. Id. at 190.

[147]In construing a statute, "the legislative history is not to be ignored even though we feel that the 'legislative intent is clearly manifested in the language of the statute itself.' Train v. Colorado Public Interest Research Group, 426 U.S. 1, 9-10. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train, 426 U.S. at 10, quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940).

[148]See, e.g., Owen, 122 F.3d at 1354 ("The only role for the judiciary is judicial review of

district courts are relegated under Section 925(c) solely to reviews of "actual denials" of relief by the Director, and BATF's compliance with the appropriations ban is not the equivalent of an actual denial that authorizes judicial review.[149] From their perspective, the standards authorizing the granting of relief reflect considerations best determined by agency action on behalf of the executive branch of the federal government and not by the federal judiciary. Evaluating this aspect from a practical perspective, the majority courts concluded that BATF, in contrast to the judiciary, has the staffing and expertise necessary to investigate applications and to properly

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a denial of relief under § 925(c) to restore firearms privileges.").

[149]See, e.g., Burtch, 120 F.3d at 1090 ("In the context of the entire statute, the word "denial" means an adverse determination on the merits and does not include a refusal to act."); Owen, 122 F.3d at 1354 ("We hold that in light of the absence of a denial by the BATF of an application by Owen for relief pursuant to 18 U.S.C. §925(c), the district court lacked subject-matter jurisdiction and properly dismissed."); Saccacio, 211 F.3d at 104 ("We conclude that the jurisdictional requirement of section 925(c) is not satisfied merely by the ATF's failure to process Saccacio's application. As the Ninth Circuit has held, we believe that, as used in section 925(c), 'the word "denial" means an adverse determination on the merits,' rather than merely 'a refusal to act.'") (citation to Burtch omitted); McHugh, 220 F.3d at 61 ("We are nonetheless persuaded by the contrary view that the word 'denial' connotes more than a mere refusal to act."); Mullis, 230 F.3d at 219 ("We agree with the Second Circuit that the statute contemplates judicial review of the discretion exercised by the Secretary in denying an application, not independent judicial discretion exercised in a de novo review of an application.").

evaluate whether Section 925(c) relief should be granted.[150] The ability of a reviewing court to admit additional evidence to avoid a miscarriage of justice does not, for the majority, confer upon district courts de novo jurisdiction to determine applications absent BATF's actual denial of relief.[151] The legislative history of the appropriations ban is claimed to support of the

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[150]See, e.g., McGill, 74 F.3d at 67 ("We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications."); Owen, 122 F.3d at 1354 ("To infer that Congress intended to transfer this important and subjective task to the courts simply flies in the face of Congress' statements. The BATF has the requisite manpower and expertise for making this determination, while the courts do not."); McHugh, 220 F.3d at 59 ("Second, the standard for granting relief is worded so broadly as to connote administrative agency decisionmaking. ... Administrative agencies are far better suited than are courts to make determinations based on the broad policy question of what is in the 'public interest.'");

[151]See, e.g., McGill, 74 F.3d at 67 ("Even though § 925(c) allows the district court to admit additional evidence in extraordinary circumstances, the legislative history of this amendment makes it clear that Congress intended for district courts to review only the Secretary's denial under an arbitrary and capricious standard."); McHugh, 220 F.3d at 59 ("Third, § 925(c) contains a restriction on the consideration of new evidence by the district courts, stating: ...This constraint on the admission of evidence suggests that the initial adjudication of applications is limited to the Secretary of the Treasury.")(In a footnote, the court

conclusion that Congress intended to suspend the program in its entirety rather than to reallocate resources from BATF to the courts.[152] As a part of that history, the lifting of the appropriations ban for agency investigations and determinations of relief applications for corporations indicates

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refers to legislative history of FOPA, then states that "Congress's cautious attitude toward plenary district court review suggests that § 925(c) does indeed state a limit on district court jurisdiction to consider in the first instance applications for relief from federal firearms disabilities. 220 F.3d at 60, n. 4); Mullis, 230 F.3d at 219 ("Even if there were any doubt concerning Congress' intent, the practicalities of conducting the requisite investigation only serve to reinforce the conclusion that Congress intended to suspend § 925(c)'s operation. ... the court would only be able to conduct a very one sided inquiry, relying largely on letters of recommendation and testimony from individuals hand selected by an applicant. Unlike the ATF, the court cannot canvas the circle of neighbors and acquaintances who may have negative information concerning such things as the applicant's tendency toward violence or use of drugs and alcohol. These institutional disadvantages make it highly unlikely that Congress intended district court to review an applicant's dangerousness to society in the first instance. Nor would the costs to the courts in making an investigation be less than the costs to the ATF. They might well be greater since there would be no investigation or testimony by trained agents for the court to rely on.")

[152]See, e.g., McGill, 74 F.3d at 67 ("By withdrawing funds to the ATF to process these applications under these circumstances and with this explanation by the appropriations committee, it is clear to us that Congress intended to suspend the relief provided by § 925(c).");

that Congress intended to continue to deny Section 925(c) relief for individuals.[153]

Part 4: The Supreme Court and the Appropriations Ban

As viewed by the Supreme Court,[154] the issue before it was "whether, despite appropriation provisions barring [ATF] from acting on applications for relief from firearms disabilities of persons convicted of a felony, a federal district court has authority under [Section 925(c)] to grant such relief."[155] Following a brief discussion of the factual and procedural history of the case,[156] Justice Thomas summarized the key statutes involved and traced the basic history of the appropriations ban. Disagreeing with Bean's contention that ATF's failure to act, due to the appropriations ban, constitutes a "denial" within the meaning of Section 925(c), the Court held that "an actual decision by ATF on an application is a prerequisite for judicial review, and that mere inaction by ATF does not invest a district court with independent jurisdiction to act

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[153]See, e.g., McGill, 74 F.3d at 67 ("We also find the history of funding for investigating applications from corporations as evidence of the intent of Congress to suspend the relief available under § 925(c). ... If Congress thought the courts were considering applications for relief under § 925(c), this restoration of funds to provide relief for corporations would have been unnecessary.");

[154]Justice Thomas wrote for a unanimous Court.

[155]537 U.S. at 72.

[156]Id. at 72-73.

on an application."[157] That holding was grounded on grammatical and policy considerations.

First reviewing the statute from a grammatical perspective, the Court construed the phrase in the statute "denied by the Secretary" to refer to the Secretary's decision on the merits, which in turn revolves upon his determination of whether an applicant "will be likely to act in a manner dangerous to public safety" and whether "the granting of the relief would not be contrary to the public interest."[158] The opinion observes that the Secretary's determination could "hardly be construed as anything but a decision actually denying the application."[159]

The three-step procedure contained within Section 925(c) also persuaded the Court "that

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[157]Id. at 76.

[158]Id. The Court also noted that the APA distinguishes between an agency's "denial" of relief and its "failure to act" with respect to a request for relief. Id. at 76, n.4. Judicial review is available only in the case of a denial, id., in contrast to a failure to act, in which an applicant's remedy lies under 5 U.S.C. §706(1), involving a proceeding to "compel agency action unlawfully withheld or unreasonably delayed." Id. at 75, n.2. Secondary authority was cited in support of the conclusion drawn from the use by Congress of different words within the APA for occasions in which an applicant for relief was unsuccessful before an agency. "The use of different words within related statutes generally implies that different meanings were intended." Id. at 76, n.4, citing 2A N. Singer, Sutherland on Statutes and Statutory Construction §46.06, p. 194 (6th ed. 2000).

[159]Id. at 76.

an actual adverse action on the application by ATF is a prerequisite for judicial review."[160] Because the standard of judicial review is not specified under Section 925(c), the Court first noted that the APA provides for an "arbitrary and capricious action" standard.[161] Applying that standard in the context of judicial review of Section 925(c) proceedings "indicates that judicial review is predicated upon ATF's dispositive decision: the 'arbitrary and capricious' test in its nature contemplates review of some action by another entity, rather than initial judgment of the court itself."[162]

Analysis of the statutory grounds for granting of relief formed the second source of support for the Court's conclusion. The task of predicting whether an applicant "is likely to act in a manner dangerous to public safety" was said to presuppose "an inquiry into that applicant's background – a function best performed by the Executive, which, unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation."[163] The other prong of the standard, requiring a determination of whether "the granting of the relief would not be contrary to the public interest," was found by the Court to require "an inherently policy-based decision

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[160]Id. These steps involve the filing of an application, action by the Secretary granting or denying the application, and judicial review of a denial. Id.

[161]Id. at 77, citing 5 U.S.C. §§701(a) & 706(2)(A).

[162]Id. at 77.

[163]Id.

best left in the hands of an agency."[164]

As a third basis of support for its reading of the statutory scheme, the Court observed that additional evidence could be admitted only in order to avoid a miscarriage of justice. "Congressional assignment of such a circumscribed role to a district court shows that the statute contemplates that a district court's determination will heavily rely on the record and the decision made by ATF. Indeed, the very use in §925(c) of the word 'review' to describe a district court's responsibility in this statutory scheme signifies that a district court cannot grant relief on its own, absent an antecedent actual denial by ATF."[165]

By virtue of its grammatical and structural analysis of the statute and the procedural framework it creates, the Court ultimately held "that the absence of an actual denial of respondent's petition by ATF precludes judicial review under §925(c), and therefore [we] reverse the judgment of the Court of Appeals."[166] Neither the published Slip Opinion nor the decision as bound in the reporters ordered the case remanded to the Court of Appeals to consider the unaddressed issue of whether the foreign felony conviction, in Bean's particular circumstances, operated as a sufficient predicate to activate the federal firearms ban under Section 922(g)(1).[167]

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[164]Id.

[165]Id. at 77-78.

[166]Id. at 78.

[167]This question had been pretermitted by the Court of Appeals. See discussion of this

This decision is noteworthy both for what it reveals about the Court's method of statutory construction and also for what it indicates the Court finds as the appropriate allocation of policy-based functions between the Executive and the Judiciary. Other than the decision of the appellate court below, the Supreme Court cites no decisional law in its opinion. It does not mention, much less reaffirm, black-letter principles of statutory construction, such as the search for congressional intent, the impact of ambiguity or the role of legislative history. The Court fails to delve into the subtleties of the debates in Congress related to the appropriations bans, or the partial repeal of the appropriations bans as they relate to applications for relief by corporations.[168] Nor does the Court explore the implications of the amendments to Section 925(c) introduced by FOPA, including the expressed intention to make Section 925(c) relief more readily available to persons who have committed technical violations of law. None of the other appellate decisions addressing the significance of the appropriations ban are mentioned. No concern is expressed about suspension, amendments or repeal of substantive legislation by implication, especially in the context of appropriations statutes. Instead, the Court turns solely to a grammatical and structural analysis of the statute in order to reach its holding. Each prong of the Supreme Court's analysis is open to criticism.

Grammatically, the antecedent of the phrase "denied by the Secretary" is the application

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issue at n. 10, supra.

[168]The opinion cites the various appropriations bans and notes that they affect applications by individuals, but does not mention that BATF is not barred from processing applications made by corporations. 537 U.S. at 75 and n.3.

for relief from disabilities filed by any person. The phrase does not, as posited by the Supreme Court, reference the necessary predicates for the Secretary's granting of relief, that is, the "public safety" and "public interest" requirements. Statutory interpretations focusing on the meaning of a specific word or phrase typically look to several principles, none of which were cited in the opinion.[169] For instance, one canon of construction calls for words to be given their ordinary and common meaning and understanding, in the absence of a particular statutory definition or where the context of the statute clearly requires a different meaning.[170] Chapter N of Title 18 of the United States Code does not provide an express definition of the word "denied." Thus it would not be unusual for a court to consult prior decisions, or outside authority such as Black's Law Dictionary.[171] Another grammatical aid leads a court to define one word or phrase by

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[169]Like most general rules, canons of statutory construction are means to an end, and not ends in and of themselves. Thus, they "need not be conclusive and are often countered, of course, by some maxim pointing in a different direction." Circuit City Stores v. Adams, 532 U.S. 106, 116 (2001).

[170]See, e.g., Scheidler v. NOW, Inc., 537 U.S. 393,402 (2003). But see Williams v. Taylor, 529 U.S. 420, 431 (2000) ("We give the words of a statute their *ordinary, contemporary, common meaning,* absent an indication that Congress intended them to bear some different import ..." (internal quotation marks omitted; emphasis added).

[171]A search on Lexis on September 21, 2003 reveals more than one hundred seventy citations to Black's Law Dictionary by the Supreme Court.

contrasting and comparing it with another word or phrase elsewhere in the statute being reviewed.[172] This technique would have pointed the Court to the last sentence of Section 925(c), requiring that whenever the Secretary "grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor."[173] Thus the statute itself contemplates only two actions by the Secretary when processing an application: relief is either granted or relief is denied. Seen in contrast to one another, interpreting the word "denial" in opposition to a "granting" of relief would have buttressed the grammatical analysis engaged in by the Court. If the Court had pursued these avenues of inquiry, it might have determined that the seemingly plain phrase, "denied by the Secretary," might benefit from further analysis.

Statements by the Court about the substantive grounds for relief, and the respective roles of the Executive and the Judiciary, would significantly erode the role of judicial review in Section 925(c) proceedings, if they again become funded by Congress. For instance, the statute requires the Director to determine whether an applicant "is likely to act in a manner dangerous to the public safety ..." In order to make that determination, the Court correctly anticipates that a background inquiry is required. With no analysis or empirical data to support its assertion that such an inquiry is "a function best performed by the Executive," the courts are said not to be

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[172]For a case in which the Supreme Court engages in extensive parsing of a portion of the Fair Labor Standards Act, see NLRB v. Ky. Riv. Comty. Care, Inc., 532 U.S. 706 (2001).

[173]Section 925(c).

"institutionally equipped for conducting a neutral, wide-ranging investigation."[174] This assertion is questionable in several respects. First, within the context of a judicial proceeding under Section 925(c), the district court is not, itself, the entity conducting the investigation. Instead, the traditional adversarial process is operative, and seems more than adequate to produce appropriate information upon which the court may base its policy decisions. Second, the Supreme Court's presumption that the Executive's inquiry will necessarily be "neutral" ignores the circumstance that the agency performing the investigation is charged with law enforcement responsibilities. It is naive to believe that political influences, coupled with a predisposition to "keep guns out of the hands of felons" will not, at least from time to time, factor into the investigative process. Nothing in the enabling regulation entitles the applicant to have access to the investigative information produced following the filing of an application for relief. The applicant is not expressly authorized to participate in investigative interviews, or to cross examine persons providing information during the investigation. Rank hearsay and unsubstantiated "feelings" or "hunches" by neighbors and coworkers also may make their way into a report.

If, as stated by the Court, a determination of whether "the granting of the relief would not be contrary to the public interest" is indeed "an inherently policy-based decision best left in the hands of an agency,"[175] then reviewing courts have extremely limited roles to play in judicial review of such agency decisions. The statute contains no procedure for remand by a reviewing

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[174]537 U.S. at 77.

[175]Id.

court that determines the Director has abused his discretion, leaving to the reviewing court the ultimate responsibility to decide the validity of the application's merits. Courts routinely decide matters involving weighty issues affecting the public interest, and no principled reasons exist to presume that the courts cannot effectively act within the subjective requirements of Section 925(c).[176] Furthermore, the FOPA amendment permitting the admission of additional evidence if necessary to avoid a miscarriage of justice indicates that Congress has afforded the courts with the evidentiary resources needed to make that decision, in contrast to limiting their decisions to matters shown by the record below.

Addressing that amendment by FOPA, the Court characterized a reviewing court's role as being "circumscribed" by Congress.[177] Until that amendment, however, reviewing courts consistently held that their review was limited to the administrative record, and in some circuits review was limited to the stated reasons expressed by the Director for the denial. Given the congressionally stated purpose of FOPA to broaden the availability of relief under Section 925(c), the amendment serves as a type of "relief valve" when the investigative processes of the agency have been inadequate, or when circumstances have materially changed following the completion of the investigation. Because the threshold of allowing additional evidence is the avoidance of a miscarriage of justice, a reviewing court would be able to admit evidence that is

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[176]The disputed 2000 presidential election, the Microsoft antitrust case, and numerous abortion rights decisions are readily cited examples of matters affecting the public interest decided by federal courts.

[177]Id.

favorable, and also unfavorable, to the request in order to avoid injustice. Seen in the light of FOPA, the role of the judiciary in Section 925(c) proceedings is plenary, rather than circumscribed.

Part 5: Conclusion

Taken together, the Court's policy rationales announced in support of its decision in *Bean* evidence an unwillingness to enter the politically sensitive arena of fashioning remedies for worthy applicants, while optimally utilizing scarce public resources and avoiding the appearance of improperly "putting guns back into the hands of felons." The policy statements were not necessary to the decision, in view of the Court's evaluation of the grammatical structure of Section 925(c). Congressional suspension of Section 925(c) by successive appropriation acts was not seen as a mess by an elephant that needed shoveling by the nation's highest court. Instead, the Court failed to see evidence that an elephant had passed through at all.[178]

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[178]In one sense, the issue is now settled so long as the annual appropriations ban remains in place. The Director may continue to "not act" on applications due to the appropriations ban, and the substantive relief tantalizingly held out by Section 925(c) will remain beyond the grasp of applicants. Congress should consider the substantive requirements for granting relief, and revisit the question of the classifications of persons eligible to seek relief under the statute. Many avenues of change suggest themselves. Persons convicted of violent crimes, with or without the use of firearms, might be excluded. Applicants might be required to wait a specified time period after their federal firearms disability arises before seeking relief, in order to provide a sufficient time for a post-disability record of "clean" conduct to occur, thus aiding an inference

of the absence of future danger to the public. Finally, a successful applicant might be required to bear all, or at least some, of the cost of agency investigation.

APPENDIX “A”

As added by the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §925(c) originally read as follows:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities under this chapter incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant’s record and reputation, are such that the applicant will not be likely to conduct his operations in an unlawful manner, and that the granting of the relief would not be contrary to the public interest. A licensee conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

APPENDIX "B"

The following redline marking show the amendments to 18 U.S.C. §925(c) made by the Gun Control Act of 1968. Bracketed text indicates where the changes occurred, with additions being underlined and overstrike font identifying ~~deletions~~.

A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities [~~under this chapter~~] [imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and] incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to [~~conduct his operations in an unlawful manner,~~] [act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A [~~licensee~~] [licensed importer, licensed manufacturer, licensed dealer, or licensed collector] conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under

his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

After removing the redline markings showing the amendments to 18 U.S.C. §925(c) made by the Gun Control Act of 1968, Section 925(c) provided as follows:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to

this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

APPENDIX "C'

The following redline marking show the amendments to 18 U.S.C. §925(c) made by the Firearms Owners' Protection Act, enacted in 1986. Bracketed text indicates where the changes occurred, with additions being underlined and overstrike font identifying ~~deletions~~.

A person who [~~has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act)~~] [is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition] may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, [transportation] or possession of firearms [~~and incurred by reason of such conviction~~], and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. [Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such

denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.] A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

After removing the redline markings showing the amendments to 18 U.S.C. §925(c) made by the Firearms Owners' Protection Act, Section 925(c) provided as follows:

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

petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter by reason of such a conviction, shall not be barred by such conviction from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Secretary grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

APPENDIX “D”

The current version of Section 925(c), redacted to delete text not relevant to the matters at issue in Bean, reads as follows:

> A person who is prohibited from possessing, ... firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the ... possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. ...

EXHIBIT “E”

The texts of the various appropriations bans after Fiscal Year 1992 read substantially as follows:

> *Provided further*, That none of the funds appropriated herein [for the BATF] shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c); *Provided further*, That such funds shall be available to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities under 18 U.S.C. 925(c): ...