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Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?

Ronald C. Griffin
ronald.griffin@famu.edu

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NOTES

OBTAINING RELIEF FROM FEDERAL FIREARMS DISABILITIES: DID CONGRESS REALLY SUSPEND THE RELIEF AVAILABLE TO FELONS THROUGH APPROPRIATIONS ACTS?*

This Note explores the current intercircuit conflict surrounding relief from federal firearms disabilities. Congress has prohibited funding to the Bureau of Alcohol, Tobacco, and Firearms to act upon any application filed by a felon for relief. The circuits are in conflict as to what in fact Congress intended to accomplish through these appropriations acts with relation to the relief statute. This Note sets out the conflict and recommends a proposal that is consistent with historic congressional concerns about the relief statute and would reconcile the conflict.

I. INTRODUCTION

In the United States, felons are prohibited from possessing firearms.[1] However, in 1965, Congress statutorily established a way for convicted

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1. *See* 18 U.S.C. § 922(g)(1) (1994).

> It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any

felons to obtain relief from this disability.[2] Under 18 U.S.C. § 925(c)'s scheme, a person prohibited from firearms possession may apply to the Director of the Bureau of Alcohol, Tobacco, and Firearms ("BATF") for relief from the firearms possession disability.[3] The BATF has the authority to either grant or deny an application for relief.[4] Should the BATF deny an application for relief, the applicant may seek judicial review of the denial in federal district court.[5] When reviewing a denial by the BATF, the district court is allowed to examine evidence outside the administrative record.[6]

In the 1993 Treasury Department Appropriations Act, Congress barred funding for the BATF to investigate or act upon applications for relief from federal firearms disabilities.[7] Since 1993, each fiscal year's appropriations act has continued to bar the BATF from acting upon applications for relief.[8] The BATF's refusal to act has caused some applicants to seek relief in the judicial system.[9]

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firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

2. *See* 15 U.S.C. § 910 (Supp. II 1965) (repealed 1968); *see also* 18 U.S.C. § 925(c) (1994) (providing the current relief provision).

> 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 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. Any person whose application for relief from disabilities is denied by the Secretary may file 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.*

18 U.S.C. § 925(c) (emphasis added). The Secretary of Treasury has delegated this authority to the Director of the Bureau of Alcohol, Tobacco, and Firearms. *See* 27 C.F.R. § 178.144 (1997).

3. *See* 27 C.F.R. § 178.144.

4. *See id.*

5. *See* 18 U.S.C. § 925(c).

6. *See id.*

7. *See* Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

8. *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 1997 U.S.C.C.A.N. (111 Stat.) 1272, 1277 (1997); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009, 3009-319 (1996); Treasury Department Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury Department Appropriations Act, 1995, Pub. L. No. 103-329,

Currently, the circuit courts are in conflict as to whether the appropriations acts have deprived federal district courts of subject matter jurisdiction over relief claims.[10] The Fifth, Ninth, and Tenth Circuits agree that federal district courts lack subject matter jurisdiction over these claims.[11] In addition, all three circuits agree that the appropriations acts have suspended something with relation to 18 U.S.C. § 925(c).[12] Exactly what was suspended is another question. The Fifth Circuit held that Congress, through the appropriations acts, suspended the relief provided in 18 U.S.C. § 925(c) for individuals.[13] The Ninth Circuit concluded that the failure to appropriate funds suspended that part of 18 U.S.C. § 925(c) which was affected.[14] And the Tenth Circuit, interpreted the appropriations acts as suspending the BATF's jurisdictional grant in 18 U.S.C. § 925(c).[15] On the other hand, the Third Circuit has concluded that the appropriations acts have not deprived district courts of subject matter jurisdiction over relief claims.[16] In addition, the Third Circuit construed the BATF's non-action as an undue delay, thereby excusing applicants from exhausting all administrative remedies that allow them to seek judicial review.[17] The background section of this Note will provide relevant history of federal firearms legislation leading up to the current issue caused by the appropriations acts. The Note will then thematically separate how the circuits have dealt with the issues the appropriations acts have created. Recognizing the current conflict, the next section of this Note will offer a proposal that will reconcile the circuits and is consistent with congressional concerns expressed in the relief statute and the appropriations acts. In light of the foregoing discussion, this Note will conclude with a critical analysis of the circuit courts' opinions.

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108 Stat. 2382, 2385 (1994); Treasury Department Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1228-29 (1993); Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).

9. *See* Owen v. Magaw, 122 F.3d 1350, 1352 (10th Cir. 1997); Burtch v. United States Dep't of the Treasury, 120 F.3d 1087, 1088 (9th Cir. 1997); United States v. McGill, 74 F.3d 64, 65 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 77 (1996); Rice v. United States Dep't of the Alcohol, Tobacco and Firearms, 68 F.3d 702, 704 (3d Cir. 1995).

10. *See Owen*, 122 F.3d at 1352; *Burtch*, 120 F.3d at 1090; *McGill*, 74 F.3d at 66; *Rice*, 68 F.3d at 706-07.

11. *See Owen*, 122 F.3d at 1354; *Burtch*, 120 F.3d at 1090; *McGill*, 74 F.3d at 67.

12. *See Owen*, 122 F.3d at 1353; *Burtch*, 120 F.3d at 1090; *McGill*, 74 F.3d at 67.

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

14. *See Burtch*, 120 F.3d at 1090.

15. *See Owen*, 122 F.3d at 1353.

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

17. *See id.* at 710.

II. BACKGROUND: HISTORY OF FEDERAL FIREARMS LEGISLATION

National firearms legislation can be traced back to the early 1930s.[18] During this time, the public became concerned about increased criminal activity.[19] As a result, the Department of Justice proposed[20] and Congress enacted the National Firearms Act of 1934.[21] The crux of the legislation dealt with applying a sales tax to firearms manufacturers and dealers.[22] If a dealer or manufacturer failed to pay the tax, the "firearm could not be shipped in interstate commerce."[23] In addition, the Act made it a crime for a person to possess a firearm that had been sold without applying the sales tax.[24]

Not long after the National Firearms Act, Congress again found it necessary to enact further legislation to shore up perceived shortcomings of the 1934 Act.[25] In 1938, Congress enacted the Federal Firearms Act.[26] Unlike the previous Act, the Federal Firearms Act "was based squarely upon the interstate commerce clause."[27] The relevant provisions of this Act required gun dealers and manufactures to obtain a license in order to transport or sale arms that traveled in interstate commerce;[28] made it unlawful for convicted persons to possess a firearm that had traveled in interstate commerce;[29] and authorized revocation of a license by the Secretary of Treasury for any violation of the Act.[30] However, the licensee could appeal the revocation and pay for a continuance bond, thereby continuing business until the appeal was heard.[31] In essence, therefore, the Federal Firearms Act was the first statute to deny firearm possession

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18. *See* National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801, 5841, 5861, 5871 (1994)).

19. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective,* 17 CUMB. L. REV. 585, 590 (1986-1987).

20. *See id.* at 591.

21. *See* National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (current version at 26 U.S.C. §§ 5801, 5841, 5861, 5871 (1994)).

22. *See* §§ 2-3, 48 Stat. 1236.

23. Hardy, *supra* note 19, at 592.

24. *See* § 6, 48 Stat. at 1238.

25. *See* Hardy, *supra* note 19, at 593.

26. *See* 15 U.S.C. §§ 901-909 (1964) (repealed 1968).

27. Hardy, *supra* note 14, at 594.

28. *See* 15 U.S.C. § 902(a) (1964) (repealed 1968).

29. *See id.* § 902(f). The relevant portion of the section provided: "It 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 . . . ." *Id.* (footnote omitted).

30. *See id.* § 903(c).

31. *See id.*

privileges to felons and to disable gun dealers in violation of the Act. "The 1934 and 1938 Acts comprised the substance of federal firearm law for the next three decades."[32]

In 1965, Congress amended the Federal Firearms Act.[33] The amendment allowed convicted felons to make an application to the Secretary of the Treasury for relief from disabilities incurred from the Federal Firearms Act.[34] The Secretary could grant relief provided "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."[35] In addition, the amendment not only allowed a licensee to make an application for relief but also allowed the licensee to continue operations pending action on his application for relief.[36] In other words, the amendment does away with the continuance bond that formerly had to be paid.

Two additional Acts made up the next major federal firearms legislation: The Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act") and the Gun Control Act of 1968 ("Gun Control Act").[37] "[T]he two statutes [are] known collectively as the Gun Control Act of 1968."[38] The legislative history and the Acts themselves "cover[] a complex legislative reality,"[39] to say the least. For present purposes, it is sufficient to note that the Safe Streets Act amended title 18 of the United States Code by inserting a new chapter—chapter 44.[40] Under section 902 of the Safe Streets Act, Congress prohibited three categories of individuals from possession of firearms: fugitives from justice, those indicted for an offense punishable by more than one year of imprisonment, and those convicted of such an offense.[41] Section 902 allowed convicted felons to

32. Hardy, *supra* note 19, at 594-95.
33. *See* 15 U.S.C. § 910 (Supp. II 1965) (repealed 1968).
34. *See id.*
35. *Id.*
36. *See id.*
37. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (current version at 18 U.S.C. §§ 921-930 (1994)); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (current version at 18 U.S.C. §§ 921-930 (1994)). The name used when referring to 18 U.S.C. §§ 921-930 is the Gun Control Act of 1968. In realty, however, the Omnibus Crime Control and Safe Streets Act of 1968 created 18 U.S.C. §§ 921-928. 18 U.S.C. §§ 921-928 (1970) (amended in 1968 and 1986).
38. Hardy, *supra* note 19, at 595.
39. *Id.*
40. *See* § 902, 82 Stat. at 226.
41. *See* § 902, 82 Stat. at 230-31.

obtain relief from firearms possession disabilities in a manner similar to the 1965 amendment.[42] However, in order for a convicted felon to seek relief, the underlying conviction that caused the disability had to have been for a violation of one of the provisions in the new chapter.[43]

The Gun Control Act made minor changes to the relief provisions.[44] Under section 102 of the Gun Control Act, relief could now be sought for disabilities incurred by any federal law, not just chapter 44.[45] In addition, the Gun Control Act revised the standard for granting relief to applicants.[46]

In 1986, Congress once again found it necessary to enact additional legislation concerning firearms and enacted the Firearms Owners' Protection Act ("FOPA").[47] Specifically, Congress made substantial changes concerning prohibition and relief provisions.[48] The most significant changes occurred in the relief from disabilities provision in 18 U.S.C. § 925(c).[49] The relief provisions enacted subsequent to 1965 applied to a narrow class of persons: those barred from gun ownership by reason of conviction.[50] FOPA expanded the categories of who is eligible to make application for relief.[51] Congress accomplished this by amending the relief provision so that any person prohibited from possessing firearms may now seek relief.[52]

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42. *Compare* § 902, 82 Stat. at 233 (providing the relief exceptions), *with* 15 U.S.C. § 910 (Supp. II 1965) (repealed 1968) (creating the first relief from disabilities statute).

43. *See* § 902, 82 Stat. at 233.

44. *See* Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1225 (1968).

45. *See id.*

46. *See id.*

47. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449 (1986) (current version at 18 U.S.C. §§ 921-930 (1994)). Additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.

Id. (quoting § 101, 82 Stat. at 1213-14).

48. *See* 18 U.S.C. §§ 922, 925 (1994).

49. *See* § 925(c).

50. *See supra* notes 40-43 and accompanying text.

51. *See* 18 U.S.C. § 925(c).

52. *See id.*

In addition, FOPA made express provisions for judicial review of relief denial by the BATF.[53] "A right to review had previously been recognized, but on a very narrow basis."[54] Congress contemplated an active district court role in evaluating eligibility for relief because the Act allows the district court to admit additional evidence to avoid a miscarriage of justice.[55] "The delineation of these unique and practical measures underlines an intent that the review secure actual justice in each case."[56]

From 1993 until present, Congress has withheld funding from the BATF so that it cannot act upon relief applications.[57] However, Congress did reinstate funding for the BATF to act upon applications made by corporations in 1994 and has continued to do so through the present.[58] The circuit courts are in disagreement as to the availability of relief in light of the appropriations acts, and the circuit courts are in disagreement as to whether district courts have subject matter jurisdiction to hear evidence from applicants and grant relief.[59]

III. COMPETING APPROACHES ADOPTED BY THE CIRCUIT COURTS

A. Suspension Approach

In *United States v. McGill*, the Fifth Circuit held that Congress suspended relief provided for individuals in 18 U.S.C. § 925(c) through appropriations acts.[60]

Kenneth W. McGill ("McGill") pled guilty to making a false statement pursuant to 18 U.S.C. § 1014 and filing a false tax return pursuant to 26 U.S.C. § 7206.[61] McGill received two years probation in April

53. *See id.*
54. Hardy, *supra* note 19, at 644.
55. *See* 18 U.S.C. § 925(c).
56. Hardy, *supra* note 19, at 645.
57. *See supra* notes 7-8 and accompanying text.
58. *See* Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 1997 U.S.C.C.A.N. (111 Stat.) 1272, 1277 (1997); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009, 3009-319 (1996); Treasury Department Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 471 (1995); Treasury Department Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2385 (1994); Treasury Department Appropriations Act, 1994 Pub. L. No. 103-123, 107 Stat. 1226, 1228-29 (1993).
59. *See supra* notes 10-17 and accompanying text.
60. *See* 74 F.3d 64, 68 (5th Cir. 1996).
61. *See id.* at 65.

1993.[62] McGill obtained an early release from probation in September 1994.[63]

McGill requested information from the BATF about applying for relief from the 18 U.S.C. § 922(g) firearms disabilities.[64] The BATF informed McGill that it no longer accepted applications for relief from disabilities because Congress had denied funding for the program.[65] McGill then filed an application for removal of his federal firearms disabilities with the district court.[66] The district court dismissed the application for lack of subject matter jurisdiction.[67]

The Fifth Circuit's discussion focused on finding what Congress intended to accomplish with the appropriations acts. The court of appeals began its review with the statement "[a]lthough we doubt that the district court has original jurisdiction to consider an application to remove the Federal firearm disability, we pretermit that question because it is clear to us that Congress suspended the relief provided by 18 U.S.C. § 925(c)."[68] The court recognized Congress' power "to amend, suspend or repeal a statute by an appropriations bill, *as long as it does so clearly*."[69] Therefore, the issue for the court of appeals was whether Congress intended for the appropriations acts to suspend 18 U.S.C. § 925(c).[70]

The court of appeals set out a brief history of the Gun Control Act, 18 U.S.C. § 922, and 18 U.S.C. § 925(c).[71] It then discussed the district courts' role in relation to 18 U.S.C. § 925(c),[72] acknowledging that 18 U.S.C. § 925(c) allowed district courts to "admit additional evidence in extraordinary circumstances."[73] However, relying on the legislative history of the 1986 amendment to 18 U.S.C. § 925(c), the Fifth Circuit concluded that Congress intended for district courts to review the BATF's denial under an "arbitrary and capricious" standard.[74] In the court's view this placed a limitation on the district court's role in reinstating firearms

62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. *Id.* at 65-66.
69. *Id.* at 66 (emphasis added).
70. *See id.*
71. *See id.*; *see also supra* notes 33-56 and accompanying text.
72. *See McGill*, 74 F.3d at 66-67.
73. *Id.* at 66.
74. *See id.*

privileges because the district court's review is limited to only the BATF's denial and not conducting a *de novo* review of the application.[75]

The Fifth Circuit next turned to the appropriations acts to discern Congress' intent on suspension.[76] The court set out the relevant language from the 1993 Appropriations Act for the Treasury Department.[77] "That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)."[78] In addition, it examined a report to the Senate where the Appropriations Committee explained why it wanted to prohibit funds for the BATF to act on 18 U.S.C. § 925(c) applications:

> [u]nder the relief procedure, [B]ATF officials are required to determine whether a convicted felon, including persons convicted of violent felonies or serious drug offenses, can be entrusted with a firearm. After [B]ATF agents spend many hours investigating a particular applicant[,] they must determine whether or not that applicant is still a danger to public safety. This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made. The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime. Therefore, the Committee has included language in the bill which prohibits the use of funds for [B]ATF to investigate and act upon applications from relief from Federal firearms disabilities.[79]

The court construed the withholding of funds to the BATF along with the Senate Report as Congress' intention to suspend the relief provided in 18 U.S.C. § 925(c).[80] The court noted that it could not "conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications."[81]

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75. *See id.*
76. *See id.* at 67.
77. *See id.*
78. Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).
79. *McGill*, 74 F.3d at 67 (quoting S. REP. NO. 102-353, at 19 (1992)).
80. *See McGill*, 74 F.3d at 67.
81. *Id.*

In addition, the court found it relevant that the original appropriations act prohibited funding across the board for investigations;[82] whereas, in the subsequent acts, Congress restored funding to the BATF to investigate applications from corporations but continued to prohibit funding for investigations on individuals.[83] The court found that "[i]f 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."[84] Therefore, the court of appeals concluded that the appropriations acts suspended 18 U.S.C. § 925(c) relief to individuals.[85]

In *Burtch v. United States Department of the Treasury*, the Ninth Circuit held that the failure of the BATF to rule on applications for restorations of firearms privileges was not a denial of applications subject to judicial review.[86]

From 1984 to 1987, Robert F. Burtch ("Burtch") was convicted of four felonies.[87] As a result of these convictions Burtch was prohibited from firearms possession.[88] In January 1994, Burtch requested an application for relief from his firearms disabilities from the BATF.[89] The BATF notified Burtch that it was prohibited from acting upon these types of applications.[90] The BATF informed Burtch to contact its office if Congress ever restored funding to act upon these applications.[91]

In June 1995, Burtch filed a petition in federal district court seeking removal of the firearms disabilities.[92] Burtch alleged that his application was denied and requested the district court provide him relief from his firearms possession disabilities.[93] The district court dismissed Burtch's action for lack of subject matter jurisdiction.[94]

The Ninth Circuit centered its discussion primarily on statutory interpretation. The court of appeals acknowledged the intercircuit conflict around this issue;[95] however, the court framed the question as one of

82. *See id.*
83. *See id.*
84. *Id.* at 67-68.
85. *See id.*
86. *See* 120 F.3d 1087, 1090 (9th Cir. 1997).
87. *See id.* at 1088.
88. *See id.*
89. *See id.* at 1089.
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.* at 1090.

statutory interpretation.[96] In doing so, the court determined the starting point was the language of the statute itself.[97] The court set out and examined the relevant language of 18 U.S.C. § 925(c).[98]

The court of appeals interpreted the statute as "not authoriz[ing] the district court to build a record from scratch or make discretionary policy determinations in the first instance if the Secretary does not. 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."[99] Therefore, the court held the statute meant what it said.[100] In addition, the court interpreted the failure to appropriate funds to the BATF to conduct investigations "as a suspension of that part of section 925(c) which is affected."[101]

In summary, the Ninth Circuit agreed with the Fifth Circuit's conclusion, but because the statute was clear on its face, the Ninth Circuit determined that it did not need to examine legislative history.[102]

In *Owen v. Magaw*, the Tenth Circuit held that the district court did not have subject matter jurisdiction to review the BATF's refusal to investigate or act upon applications for relief from firearms possession disabilities because there had not been a denial by the BATF.[103]

In 1993, David Owen ("Owen") was convicted on two counts of filing false income tax returns.[104] Owen was sentenced to one year and one day for each conviction.[105] Upon release from prison, Owen inquired with the BATF about the application process for obtaining restoration of his firearms privileges.[106] The Director of the BATF responded by letter "that due to the restrictions contained in the Treasury appropriations bill, the BATF could not take any administrative steps toward investigating Owen and determining whether he should be allowed to carry a firearm."[107]

Owen filed suit in the district court seeking review of the BATF's refusal to consider such application by him.[108] The BATF moved to dismiss

96. *See id.*
97. *See id.*
98. *See id.*
99. *Id.*
100. *See id.*
101. *Id.*; *see also* United States v. Oldroyd, No. 97-30354, 1998 WL 55402, at *2 (9th Cir. July 28, 1998) (following the *Burtch* precedent).
102. *See id.*
103. *See* 122 F.3d 1350, 1354 (10th Cir. 1997).
104. *See id.* at 1351.
105. *See id.*
106. *See id.*
107. *Id.*
108. *See id.* at 1351-52.

the suit for lack of subject matter jurisdiction.[109] The BATF argued that it had not denied an application by Owen because it was precluded from acting or investigating upon such requests by lack of appropriated funds; therefore, the district court was without subject matter jurisdiction.[110] The district court agreed and dismissed the case for lack of subject matter jurisdiction.[111]

The Tenth Circuit phrased the question as whether district courts have subject matter jurisdiction to review the refusal of the BATF to investigate or act upon an application for relief from federal firearm disabilities when the BATF is prohibited from doing so by appropriations acts.[112] The Tenth Circuit set out the way the Third, Fifth, and Ninth Circuit Courts had dealt with the question.[113]

Owen's argument on appeal was similar to McGill's arguments in the Fifth Circuit. "[Owen's] central argument [was] that the appropriations statutes are silent as to the role of the judiciary, and that there has been no clear statement of Congress' intent to repeal the court's authority under § 925(c) to review the treatment by the BATF of applications for relief under the statute."[114] Therefore, Owen contended "that the appropriations statutes should not be read as having limited the role of the courts."[115]

Like the Fifth Circuit, the Tenth Circuit recognized that "'an appropriations act may be used to suspend or to *modify* prior Acts of Congress.'"[116] The court believed Congress intended to suspend the BATF's jurisdictional grant in 18 U.S.C. § 925(c) through the appropriations acts.[117] In addition, like the Fifth Circuit, the court disagreed with the argument that Congress had shifted the task of determining whether privileges should be restored from the BATF to the judiciary.[118] The court found that "[t]he only role for the judiciary is judicial review of a denial of relief under § 925(c) to restore firearm privileges."[119]

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109. *See id.* at 1352.
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.* at 1352-53.
114. *Id.* at 1353.
115. *Id.*
116. *Id.* (quoting Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir. 1973) (emphasis added)).
117. *See Owen*, 122 F.3d at 1353.
118. *See id.*
119. *Id.* at 1354.

The court of appeals agreed with the Fifth Circuit's analysis of the legislative history.[120] Thus, the Tenth Circuit held that absent a denial by the BATF, district courts are without subject matter jurisdiction.[121]

B. Exhaustion of Remedies Approach

In *Rice v. United States Department of Alcohol, Tobacco and Firearms*, the Third Circuit held that the lack of appropriations to the BATF for investigations regarding restoration of firearms privileges did not repeal that provision of 18 U.S.C. § 925(c) or preclude judicial review.[122] In addition, the Third Circuit held that exhaustion of administrative remedies would not be required for judicial review.[123]

Phillip Rice ("Rice") filed an action for equitable relief to obtain restoration of his firearms privileges from the BATF in district court.[124] In 1970, Rice pled guilty in state court to several felonies involving stolen auto parts.[125] Rice claimed that he did not realize the felony convictions deprived him of his privilege to possess firearms.[126] Rice continued to possess firearms because he hunted and collected guns.[127] In 1991, Rice pled guilty to a violation of 18 U.S.C. § 921(g)(1).[128]

In June 1992, Rice submitted an application to the BATF for restoration of his firearm privileges.[129] In November 1992, the BATF notified Rice by letter that it could no longer continue to process his application for relief because of a new federal law.[130] The new federal law the letter referred to was in fact the appropriations acts prohibiting funding to the BATF to act upon these applications. Therefore, the action Rice filed was for judicial review of the BATF's refusal to process his application.[131]

The BATF moved to dismiss Rice's complaint.[132] The BATF's argument in support of that position was that Rice was not entitled to judi-

120. *See id.* at 1354 n.1.
121. *See id.* at 1354.
122. *See* 68 F.3d 702, 707 (3d Cir. 1995).
123. *See id.* at 709.
124. *See* Rice v. United States Dep't of Alcohol, Tobacco and Firearms, 850 F. Supp. 306, 307 (E.D. Pa. 1994).
125. *See id.*
126. *See Rice*, 68 F.3d at 705.
127. *See id.*
128. *See Rice*, 850 F. Supp. at 307.
129. *See id.*
130. *See id.*
131. *See Rice*, 68 F.3d at 706.
132. *See id.*

cial review of its refusal to act on his application because it had never finally denied the application.[133] The appropriations acts forced the BATF to stop processing applications.[134] Therefore, the BATF contended that until there was a denial, district courts lacked subject matter jurisdiction.[135]

The district court commented that "[i]t [was] doubtful whether the [B]ATF may avoid judicial review under any and all circumstances simply by failing to process an application."[136] The district court found no evidence of bad faith or arbitrary or capricious conduct on the part of the agency; no undue delay; no funding available for the BATF to process Rice's application; and no fault on the BATF's part.[137] Therefore, the district court held it was without subject matter jurisdiction because the BATF's actions did not constitute a denial under 18 U.S.C. § 925(c).[138]

The Third Circuit's analysis focused primarily on the equity of the appropriations acts with respect to the applicant's position. The court of appeals held that the "district court erred in holding that Congress's elimination of appropriations for investigating and acting on section 925(c) application deprived it subject matter jurisdiction."[139] The court believed that the district court's order should be "analyzed in terms of a failure to exhaust administrative remedies rather than a lack of subject matter jurisdiction."[140] However, before the court embarked upon the exhaustion of remedies approach, it first had to satisfy itself that the district court had subject matter jurisdiction.[141]

The court of appeals acknowledged "Congress's exclusive power to appropriate money and establish the jurisdiction of inferior federal courts."[142] However, "before courts will hold that Congress has used an appropriations act to repeal substantive legislation or preclude judicial review of administrative action, the intention to do so must be clearly stated."[143] The court found that the appropriation acts failed "to show a clear intent to repeal section 925(c) or to preclude judicial review of [the]

133. *See id.*
134. *See id.*
135. *See id.*
136. *Id.*
137. *See id.*
138. *See id.*
139. *Id.*
140. *Id.* at 706-07.
141. *See id.* at 707.
142. *Id.*
143. *Id.* (citing Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992)).

BATF's refusal to grant relief from firearms disabilities."[144] In making this determination, the court looked at the language contained in the 1993 appropriations act.[145] "[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)."[146] The court noted that the next two appropriations acts extended the same language.[147] The court found it extremely important that the appropriations acts did not "expressly preclude a court from reviewing BATF's refusal to process an application for relief."[148] Therefore, the court held that the appropriations acts neither repealed 18 U.S.C. § 925(c) nor precluded "judicial review of administrative decisions concerning a convict's application for restoration of his firearm privileges."[149] The court concluded that the district court did have subject matter jurisdiction over Rice's action.[150]

The court of appeals then moved into an exhaustion of administrative remedy analysis.[151] The court of appeals relied primarily on three United States Supreme Court cases in conducting its exhaustion analysis: *McCarthy v. Madigan*;[152] *McKart v. United Sates*;[153] and *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*[154] The court of appeals set out several general rules and principles from these cases concerning the exhaustion of remedies doctrine.[155] "The general rule concerning exhaustion is 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'"[156] Deciding an exhaustion issue requires federal courts to perform a balancing test.[157] The court "'must balance the interest of the individual in retaining prompt access to a federal judicial forum'"[158] on the one hand, and "'countervailing institutional interests

144. *Rice*, 68 F.3d at 707.
145. *See id.*
146. Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992).
147. *See Rice*, 68 F.3d at 707.
148. *Id.*
149. *Id.*
150. *See id.*
151. *See id.*
152. 503 U.S. 140 (1992).
153. 395 U.S. 185 (1969).
154. 489 U.S. 561 (1989).
155. *See Rice*, 68 F.3d at 708.
156. *Id.* (quoting McKart v. United States, 395 U.S. 185, 193 (1969)).
157. *See Rice*, 68 F.3d at 708 (citing McCarthy v. Madigan, 503 U.S. 140, 146 (1992)).
158. *Rice*, 68 F.3d at 708 (quoting *McCarthy*, 503 U.S. at 146).

favoring exhaustion'"[159] on the other hand. The "'[a]pplication of this balancing principle is intensely practical.'"[160] Therefore, "a court may decline 'to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise.'"[161]

"In *McCarthy* the Court described 'three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion.'"[162] The Third Circuit relied on the first exception. "[A] court is less likely to apply exhaustion when it may cause 'undue prejudice to subsequent assertion of a court action.'"[163] "One way in which this 'undue prejudice' may occur is by an unreasonable or indefinite time frame for administrative action.'"[164]

In order to determine whether Rice was required to exhaust all administrative remedies before seeking judicial review, the court applied the balancing test to Rice.[165] The court found the indefinite delay the appropriations acts imposed unreasonable.[166] However, the court of appeals did recognize two factors that favored the exhaustion requirement: "[t]he initial determination that Rice qualifies for relief from his firearm disability involves the exercise of [the] BATF's discretion and relies on [the] BATF's expertise."[167] But, these two factors were not enough to outweigh the court's other findings.

The court of appeals looked at the district court's express and broad authority granted in 18 U.S.C. § 925(c)[168] and the relevant portions of the appropriations acts to determine that Rice was excused from exhausting all administrative remedies in order to invoke judicial review![169] Had the statute not given district courts the authority to receive independent evidence when necessary to avoid a miscarriage of justice, the court would have been hesitant to excuse exhaustion.[170] The court believed "Congress did not intend to apply rigidly the doctrine of exhaustion of administrative remedies in this context because it gave the district courts discretion to create or supplement the administrative record when necessary to

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* (quoting *McCarthy*, 503 U.S. at 146-47).
163. *Id.*
164. *Id.* (quoting *McCarthy*, 503 U.S. at 147).
165. *See Rice*, 68 F.3d at 709.
166. *See id.*
167. *Id.*
168. *See id.* "[S]ection 925(c) gives district courts [authority] to receive independent evidence when necessary to avoid a miscarriage justice." *Id.*
169. *See id.*
170. *See id.*

avoid a miscarriage of justice."[171]

The court of appeals reversed and remanded the case to the district court with instructions.[172] The district court, in its discretion, was to determine whether the facts Rice alleged indicated a *potential for a miscarriage of justice*.[173] If the district court found in the affirmative, it was to decide based on all the evidence whether Rice had met his burden of satisfying the standard set out in 18 U.S.C. § 925(c).[174]

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171. *Id.*

172. *See id.* at 709-10.

173. *See id.* at 710.

174. *See id.* On remand, the district court reinstated Rice's firearms possession privilege. *See* Rice v. United States, No. CIV.A.93-6107, 1997 WL 48945, at *4 (E.D. Pa. Jan. 30, 1997). *See also* United States v. Quintiliani, No. 75-438, 1997 WL 430973, at *1 (E.D. Pa. July 15, 1997); United States v. Mullis, No.CR. 94-20297 M1/A, 1998 WL 957334, at *1 (W.D. Tenn. Sept. 9, 1998).

In *Quintiliani*, the court recognized that under *Rice* it must first determine whether the facts alleged in the applicant's petition indicate *a potential for a miscarriage of justice* if the petition were to be denied by the BATF. *See id.* at *2. "If so, the [c]ourt should permit [the applicant] to submit evidence of his fitness to have his firearms privileges restored." *Id.* Then, the court should decide whether the applicant satisfies the standards of 18 U.S.C. § 925(c). *See id.*

The court found "that the allegations contained in Quintiliani's Petition, if true, constitute a potential for a miscarriage of justice were his petition to be denied." *Id.* Therefore, the court ordered that Quintiliani be given an opportunity to submit evidence in favor of his application. *See id.* Similar to this Note's recommendation in Section IV. C *infra*, the court advised Quintiliani that he "should be prepared to present at a hearing the same type of evidence that would be gathered in a BATF field investigation." *Id.* Therefore, the court ordered Quintiliani to submit the information that is requested on the BATF application for relief, including a list of witnesses and their expected testimony. *See id.*

In *Mullis*, however, the Sixth Circuit has yet to confront the issue of what affect the appropriations acts have had on the relief statute. *See Mullis*, 1998 WL 957334, at *1. Thus the parties in *Mullis* presented the district court with the approaches taken by the Third Circuit and the Fifth Circuit. (Obviously the United States advocated the approach taken by the Fifth Circuit, and Mr. Mullis advocated the approach taken by the Third Circuit.) *See id.* at *2-3. After analyzing both approaches, the district court held "that Congress' continued purposeful nonfunding since 1992 of 18 U.S.C. § 925 (c) . . . constitute[d] unavailability of an administrative remedy, and therefore [the] Defendant may petition [the] Court for relief." *Id.* at *3. The court rejected the government's argument that there was a "special problem" presented when an entity other than the ATF conducts the investigation under § 925 (c) on two grounds: "First, the statute itself grants federal courts judicial review of the Director's denial of an application, and expressly permits the consideration of any additional evidence deemed necessary by the Court to prevent a miscarriage of justice"; Second, the court noted that "this argument ignores the multitude of ways . . . that a state felon may obtain restoration of his federal firearm rights by operation of state law and without the involvement of any special ATF competency." *Id.*

Therefore, the court found that it would be "inconsistent with the totality of the statutory scheme to hold that federal courts are incompetent to make a case-by-case determi-

IV. A PROPOSAL TO RECONCILE THE CONFLICT

In light of appropriations acts prohibiting the BATF from acting upon 18 U.S.C. § 925(c) applications, three circuits have determined that federal district courts lack subject matter jurisdiction over relief claims. The three circuits agree that the appropriations acts have suspended 18 U.S.C. § 925(c). However, each of the three circuits has found different parts of 18 U.S.C. § 925(c) suspended. The Fifth Circuit found that Congress intended to suspend the relief available under 18 U.S.C. § 925(c). The Ninth Circuit interpreted the failure to appropriate investigatory funds as a suspension of that part of 18 U.S.C. § 925(c) which was affected. The Tenth Circuit found that Congress chose to suspend the BATF's jurisdictional grant in 18 U.S.C. § 925(c) through the appropriations acts.

On the other hand, the Third Circuit has found that the appropriations acts have not worked to deprive district courts of subject matter jurisdiction over relief from disabilities claims. The Third Circuit used an exhaustion of remedy approach and found that because of the appropriations acts, applicants need not exhaust all administrative remedies before seeking judicial review. However, neither the suspension approach nor the exhaustion approach is fully consistent with the congressional scheme of 18 U.S.C. § 925(c).

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nation regarding the removal of the federal disability after development of a complete record. . . ." *Id.* at *4.

After finding that the district court had subject matter jurisdiction, the court referred the petition to a magistrate judge to develop a record, make factual findings, and make a recommendation regarding the relief sought by Mr. Mullis. *See id.* The court instructed the magistrate, again consistent with this Note's recommendation in Section IV.C, that:

> In developing the record, the Magistrate Judge should consider all of the evidence that the ATF would have required an applicant to submit pursuant to 27 C.F.R. § 178.144, including: a written statement from each of three (3) references, who are not related to defendant by blood or marriage and have known Defendant for at least three (3) years, recommending the granting of relief; written consent to examine and obtain copies of records and to receive statements and information regarding the Defendant's background, including records, statements and other information concerning employment, medical history, military service, and criminal record; and a copy of the indictment or information on which the defendant was convicted, the judgment of conviction or record of any plea of nolo contendere or plea of guilty or finding of guilt by the court. The Magistrate Judge should also consider any additional evidence outside the scope of those regulations "where failure to do so would result in a miscarriage of justice."

Id.

Congress intended to modify 18 U.S.C. § 925(c) through suspension of funding to the BATF prohibiting it from acting or investigating upon relief applications. Because Congress intended to modify 18 U.S.C. § 925(c), federal district courts would have original jurisdiction to review relief applications. Thus, district courts could either grant or deny relief.

A modification approach takes into account what the appropriations acts have in fact suspended and what Congress has left in place. Congress has suspended the BATF (with respect to individuals) from the relief equation. And because the BATF is no longer involved in the relief process, the judiciary's role has been modified from one involving review of BATF denials to one involving the ability to either grant or deny relief. Congress has left the relief available under 18 U.S.C. § 925(c) intact. In order to obtain relief, an applicant must now file a petition for relief in federal district court. Based upon the evidence introduced, the district court can either grant or deny relief. To prove Congress intended to modify 18 U.S.C. § 925(c), a more complete examination of the legislative history surrounding the relief statute and the appropriations acts must be conducted.

A. Relief Provision: Moving from the Administrative to the Judicial

The legislative history behind the relief provisions shows that Congress recognized that not all felonies are created equal. Beginning with the original relief provision in 1965, it appears that Congress believed the strict application of the Federal Firearms Act worked to disadvantage some individuals who posed no danger to the public by reason of firearm possession.[175] The Committee on Ways and Means submitted a report to the House of Representatives which stated in part:

> Under present law, conviction of a felony (offense punishable by imprisonment for more than 1 year) automatically deprives the convicted person (including a corporation) of the right to have any dealing with any firearm or ammunition in interstate or foreign commerce. No consideration can be given to any circumstances which might cause a judge to properly mitigate or even suspend the punishment. Nor may consideration be given to the fact that the crime might be wholly unrelated to firearms and to the disability imposed by the Federal Firearms Act.[176]

175. *See* H.R. REP. NO. 89-708, at 1 (1965).
176. *Id.*

Thereafter, Congress amended the Federal Firearms Act by providing a relief provision.[177] The relief provision incorporated these concerns expressed by the House Report. However, instead of the judiciary making the determination on whether to grant relief, Congress empowered the Secretary of the Treasury with the task. In addition, the relief provision provided the Secretary with a broad and subjective standard for either granting or denying relief.[178] This suggests that originally Congress was relying upon the Secretary's investigatory capabilities and its expertise to determine whether an applicant should be granted relief.

In 1986, the Judiciary Committee reviewed proposed legislation that would amend the relief provision and reported to the House of Representatives.[179] The proposed legislation would broaden the relief from disabilities.[180] The committee considered this to be a positive feature of the legislation and reported: "[t]his section reforms the provisions of 18 U.S.C. 925(c) to improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership (possession or receipt)."[181] Thereafter, Congress reinforced its intent to relieve sportsmen, hunters, and other deserving members of the public from firearms disabilities by enacting the Firearms Owners' Protection Act.[182] In addition, to ensure these congressional intentions, the Act expressly provided for judicial review of relief denials by the BATF.

This history establishes three things: (1) Congress realized that not all persons convicted of felonies should be denied firearms privileges forever; (2) Congress provided the Secretary (BATF) with the ability to reinstate firearms privileges because of, what appears to be, its investigatory background and its expertise; and (3) Congress revamped the relief provision allowing the judiciary to give the final word on the appropriateness of a denial by the BATF. Therefore, it is an accurate interpretation that Congress saw deficiencies in the way the BATF handled applications for relief from firearm disabilities and created a more expansive judicial involvement in the relief process.

B. The Real Reason for the Funding Cuts

Since 1993, the funding cuts have not allowed the BATF to take any action toward relief applications. Thus, individuals are submitting appli-

177. *See supra* notes 33-36 and accompanying text.
178. *See id.*
179. *See* H.R. REP. NO. 99-495, at 1 (1986).
180. *See id.*
181. *Id.* at 28.
182. *See supra* notes 47-56 and accompanying text.

cations for relief, but no action is taken. The majority of applicants who do seek judicial review of the BATF's refusal to act have their actions dismissed for lack of subject matter jurisdiction. These affects on the relief statute create a tension with congressional substantive views toward providing relief to deserving members of the public. However, there is an explanation harmonizing these apparently disparate views.

The underlying basis for the funding cut was the amount of money the BATF spent every year on relief applications with little to show for it. The Fifth and Tenth Circuit Courts used, as legislative history, a 1992 Senate Report as conclusive evidence that Congress intended to suspend 18 U.S.C. § 925(c). However, the courts did not review any congressional hearings that were the basis for the statement found in the Senate Report.

During a 1993 Senate subcommittee hearing, the Director of the BATF responded to questions pertaining to the relief provisions.[183] When questioned by Senator DeConcini about how the BATF processes applications for relief, the Director, Stephen Higgins, testified:

> [o]nce we get those applications . . . we will send th[em] out with one of our special agents for an investigation. They will conduct a background investigation, check the court records, check police sources in that particular area where the individual lives, check neighbors, employers, references and people who weren't given as references, and then make a report.
>
> The report is an indication in the judgment of the agent and then it goes up the line through review, as to whether or not that person, if given the right to have a gun, would pose a threat to the community. We look at the kind of crime the individual was convicted of; was it a violent crime or was it a white-collar-type-crime and other things, and then what has been their record since they were released from probation, parole or prison.
>
> If we are convinced that the individual does not pose a threat to society, then we would approve the relief from disability.[184]

Mr. Higgins also testified, "every year about 3000 to 4000 people express an interest in [applying for relief]."[185] However, only about 1000

183. *See Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1993: Hearings on H.R. 5488 Before the Subcomm. of the Senate Comm. on Appropriations*, 102d Cong. 69 (1993).

184. *Id.*

185. *Id.*

are actually sent in and found eligible to conduct investigations on.[186] In addition, the BATF requested $3.7 million to fund the relief from disabilities program for the 1993 fiscal year.[187] According to these numbers, the BATF was spending an average of $3700 per investigation. Therefore, an intent that Congress wanted to reduce the amount of money the BATF was spending on very few applications per year can be interpreted from the hearings.

It is this Note's position that a clear congressional intent can be construed from this legislative history that is consistent with the rationale used by all the circuits. This Note acknowledges that Congress did intend suspension—suspension of funding to the BATF to act upon applications, not suspension of the relief contained in 18 U.S.C. § 925(c). Rather than suspension of 18 U.S.C. § 925(c) through lack of funding to the BATF, this Note submits Congress modified 18 U.S.C. § 925(c) through the suspension of funding to the BATF. This position is consistent with congressional intentions expressed in the legislative history, the relief provision, and the appropriations acts.

Congressional concern appeared to be with the BATF's inefficient and wasteful administrative review process rather than a desire to curb the availability of relief itself. The Fifth and Tenth Circuits recognized that Congress could suspend, *modify*, or amend a statute through the use of appropriations acts if it did so clearly. The legislative history shows that Congress has modified the relief provision found in 18 U.S.C. § 925(c) a number of times. Each time Congress has done so because of concern toward those persons who hunt and collect guns in a lawful manner but are denied possession of firearms because of unrelated felony convictions. Given the genuine concerns Congress has expressed to those persons who have been denied gun possession because of unrelated criminal convictions, it is consistent to infer that Congress withheld funding to the BATF for economic reasons, thereby deleting administrative action from the statute but otherwise leaving the relief available.

This rationale might be better explained in an illustration. Suppose there is a room, in this room is justice; however, before a person can get into the room to obtain justice, he must first unlock the door. The only person with keys to the door, is the BATF. Congress has taken the keys from the BATF but left justice in the room. However, it is still possible to get into the room and obtain justice because the judiciary has a master key to all rooms where justice lies, it just has to find it. The preceding illustration is what happened to 18 U.S.C. § 925(c). In taking away the

186. *See id.*
187. *See id.* at 71.

keys, Congress eliminated the BATF from the process of granting relief. However, in doing so, Congress modified the situation because justice still remained in the room, but now the judiciary must open the door. And, there is a way the judiciary can open the door—original jurisdiction.

By accepting that Congress intended to modify 18 U.S.C. § 925(c), relief claims can now be brought in federal district court, and the federal district court will have original jurisdiction over the action pursuant to 28 U.S.C. § 1337(a).[188] This statute provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce. . . ."[189] The relief provision is part of the Gun Control Act, which is an Act regulating commerce.[190] This would now satisfy the jurisdictional concerns expressed by the circuit courts. Instead of looking at the jurisdictional problem as one of subject matter jurisdiction to review inaction by the BATF, having found a modification of 18 U.S.C. § 925(c) the correct analysis should be one of invoking original jurisdiction over the matter.

C. Modification or Exhaustion: The Same Ends, But Different Means

The equitable concerns addressed in determining whether to excuse a party from exhausting all administrative remedies are implicit in a modification result. Professor Davis best summarizes the policy behind excusing exhaustion by advocating a four-prong test for courts to use as a guide in determining whether exhaustion is appropriate.[191] The test requires balancing four considerations:

> (1) the extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency fact-finding or application of expertise, and (4) the extent to which the agency has already completed its fact-finding or applied its expertise.[192]

The injury inflicted upon persons eligible to apply for relief weighs heavily against the historic congressional attitudes toward providing re-

188. *See* 28 U.S.C. § 1337(a) (1994).
189. *Id.*
190. *See* 18 U.S.C. § 922 (1994).
191. *See* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2, at 315 (3d ed. 1994).
192. *Id.*

lief. Assuming a person is otherwise eligible for relief, requiring that person to await indefinitely to have his firearms privileges restored can cause substantial impairments to be placed upon that person that go against congressional intentions. The person will not be able to possess a firearm for the purposes of "hunting, trap-shooting, target shooting, personal protection, or any other lawful activity."[193] These are the very things Congress did not want to burden with undue or unnecessary federal restrictions. Therefore, given Congress' traditional position on this issue, it is inconsistent to conclude that Congress would suspend firearms relief to deserving individuals.

Courts will have no difficulty in deciding whether to grant or deny an individual's relief from disabilities request. Courts will examine the same types of evidence that the BATF used in making its determination on whether to grant or deny relief. Before modification, the applicant had to establish to the BATF's satisfaction that he would not "likely act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[194] In reality, the applicant needed to satisfy only the field agent conducting the investigation that he would not act in the manner described. The field agent then made a report containing a recommendation to the Director of the BATF as to whether relief should be granted. In order to obtain relief now, the applicant will have to establish to the court, by a preponderance of the evidence, that relief should be granted. So although there is little difficulty in determining the merits of whether relief should be granted, the burden of persuasion is higher when the court is determining whether to grant relief.

A court can resolve relief issues without relying on BATF background investigations or expertise. Under a modification approach, the burden would be on the applicant to submit evidence that he would not act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. This evidence would include such things as the applicant's record, reputation, and the underlying reason for the disability. In addition, the court could require the applicant to submit additional evidence before making its determination on whether to grant relief.[195] Moreover, allowing a court to grant the relief solves several concerns expressed by Congress and the circuit courts. First, it would shift the financial burden from the government to the ap-

193. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449 (1986).
194. 18 U.S.C. § 925(c).
195. *See* United States v. Quintiliani, No. 75-438, 1997 WL 430973, at *2 (E.D. Pa. July 15, 1997).

plicant. The applicant would be responsible for paying court costs and attorneys fees. Second, instead of the BATF conducting investigations on the applicant, the applicant would have to secure all the necessary evidence in order to receive relief. And, if the court deems more evidence is needed, it will be up to the applicant to secure such evidence. Third, a court is a better-suited forum for deciding these issues because it is adjudicative in nature. In addition, if the court wanted to examine how the BATF had conducted its investigations in the past, this information is available in the Code of Federal Regulations[196] and case law.[197] Therefore, the court can decide relief questions without the need of BATF expertise, and if investigative work needs to be done, the applicant himself would have to conduct it.

Reinstating funding to the BATF to act upon relief applications from corporations is not dispositive that Congress intended the prohibition of the BATF to act upon relief applications from individuals as suspending that portion of 18 U.S.C. § 925(c). Because Congress suspended funding to the BATF to act upon 18 U.S.C. § 925(c) applications, the Fifth Circuit concluded that Congress intended to suspend that portion of 18 U.S.C. § 925(c) which it had previously funded. However, this action by Congress can be explained in a way consistent with modification and not suspension. Originally, once a corporation incurred a disability, it would have to pay a continuance bond in order to conduct business while awaiting the Secretary (BATF) to act upon the application. However, Congress amended this requirement, and corporations were allowed to operate with a disability while awaiting action by the BATF. The inference that if Congress believed the judiciary was acting on relief applications, it would not have reinstated funding for the review of corporations is incorrect. Corporations would have no incentive to seek relief from the judiciary because its operations never stopped as a result of the disability. Moreover, this is a circular argument. Because there is no legislative history on why Congress reinstated the funding, the same argument can be made that Congress knew the judiciary was acting upon relief applications and wanted the BATF to handle corporate applications and the judiciary to handle applications from individuals. Regardless, the fact that Congress has provided funding to the BATF to act upon corporate applications does not alter the analysis or conclusion that Congress modified 18 U.S.C. § 925(c) through appropriations acts.

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196. *See* 27 C.F.R. §178.144.

197. *See* Smith v. Brady, 813 F. Supp. 1382, 1383-84 (E.D. Wis. 1993) (describing BATF's investigative procedures).

The legislative history supports the position that Congress intended to modify 18 U.S.C. § 925(c). Congress has historically expressed concern toward individuals who have been denied firearm possession privileges based upon nonviolent felonies. Congress increased the judiciary's role in the relief process because of the BATF's inability to conduct fair reviews. Congress suspended funding to the BATF because of the amount of money it spent on relatively few applications every year. Therefore, Congress eliminated the BATF from granting relief to individuals. However, Congress otherwise left the relief available under 18 U.S.C. § 925(c) intact.

This proposal for reconciliation is consistent with the rationales used by the circuit courts. Congress did intend a suspension; however, it did not intend to suspend that portion of 18 U.S.C. § 925(c) that grants relief to individuals. Congress only intended to suspend funding to the BATF. In addition, because the determination of whether to grant or deny relief is now in federal district court, this proposal is also consistent with the Third Circuit's exception from exhaustion conclusion.

D. Critical Analysis of the Circuit Courts

The Fifth and Tenth Circuits took the best approach in determining what Congress intended with the appropriations acts. However, neither circuit examined all of the available legislative history pertaining to the appropriations acts and the relief provision. The two circuits conducted a one-sided examination of the legislative history. The Fifth Circuit relied solely on the language found in a Senate Report, where the Appropriations Committee used the "40 man-years spent annually to investigate and act upon these investigations and applications [by the BATF] would be better utilized to crack down on violent crime,"[198] language to conclude that Congress intended to suspend the relief provided in 18 U.S.C. § 925(c). The Fifth Circuit further noted that it could not "conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the [B]ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications."[199]

The Tenth Circuit agreed with this analysis of the legislative history. And, it too rejected the argument that Congress had shifted the task of determining whether privileges should be restored from the BATF to the

198. S. REP. NO. 102-353, at 19 (1992); *see supra* note 79 and accompanying text.
199. United States v. McGill, 74 F.3d 64, 67 (5th Cir. 1996).

judiciary.[200] Rather, in the Tenth Circuit's view, the only role for the judiciary was judicial review of a denial of relief by the BATF under 18 U.S.C. § 925(c).

However, the Fifth and Tenth Circuits neglected to review the legislative history of the relief provision in conjunction with the legislative history of the appropriations acts. The Court decisions cited by the circuits set out a very extensive review of legislative materials; however, the Fifth and Tenth Circuits failed to consider the legislative history as a whole.[201] Although it is difficult to set out a detailed review of the legislative history relating to the appropriations acts, this Note has examined the legislative history behind the relief provision in conjunction with the legislative history, although scant, behind the appropriations acts to show that Congress' historical attitude has been to "improve the ability of the deserving members of the public to obtain relief from the legal disqualification from firearms ownership."[202] In addition, this type of review has indicated that Congress perceived deficiencies in the way the BATF handled applications for relief from firearms disabilities and created a more expansive judicial involvement in the relief process.[203] Moreover, by examining the legislative histories side-by-side, this author has determined that Congress intended to modify the relief provision and, because the judiciary is a better-suited forum, intended to allow the district courts to either grant or deny relief pursuant to original jurisdiction. Therefore, had either circuit conducted a more detailed analysis of the legislative history pertaining to the relief provision and the appropriations acts, they would have been able to discern a more complete congressional intention to modify the relief statute.

The Ninth Circuit first identified the problem as one of statutory interpretation. The Ninth Circuit then conducted, what this Note considers, a "superficial examination" of the statute and determined that the statute was clear on its face; and that a denial by the BATF was needed in order for subject matter jurisdiction to exist. While the Ninth Circuit did note that the appropriations acts suspended part of 18 U.S.C. § 925(c), it did not define exactly what part of the statute was suspended.[204] So what was suspended? Was it the jurisdictional grant to the BATF? Was it the de-

200. *See supra* notes 116-121 and accompanying text.

201. *See* United States v. Will, 449 U.S. 200 (1980); United States v. Dickerson, 310 U.S. 554 (1940).

202. H.R. REP. NO. 99-495, at 28 (1986).

203. *See supra* notes 179-182 and accompanying text.

204. "Thus, the failure to appropriate investigatory funds should be interpreted as a suspension of that part of section 925(c) which is affected." Burtch v. United States Dep't of the Treasury, 120 F.3d 1087, 1090 (9th Cir. 1997).

nial requirement needed to invoke judicial review? Or, was it the relief provision itself? The court determined the statute was clear on its face, but it raised, and left unanswered, these questions about what affect the appropriations acts had on the statute. To answer these questions, the court would have had to know what Congress intended for the appropriations acts to do with relation to the relief statute. However, this Note's position is that it is impossible to ascertain this intention by simply examining the language of the statute itself and not examining any other extrinsic materials (like legislative history) that support and reveal what Congress wanted to accomplish with these subsequent acts.

The Ninth Circuit's approach actually raises other questions that are outside the scope of this Note, but are interesting nonetheless—questions of statutory interpretation. There is present in law that age-old debate concerning legislative history: should legislative history ever be used? If so, when? What kind of history to use? Can the history create an ambiguity in an otherwise clear statute that requires the examination of more history to clear up the now present ambiguity? The questions could go on and on. Worthy of mention is Professor Eskridge's article, *The New Textualism*, which details how the competing approaches to statutory interpretation work.[205] In his article, Professor Eskridge sets out and discusses the "traditional" approach of statutory interpretation against, what he calls, the "new textualism," an approach developed by Justice Scalia. Under the "traditional" approach:

> The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context. Sometimes that context will suggest a meaning at war with the apparent acontextual meaning suggested by the statute's language. . . . The Supreme Court's traditional resolution of this conundrum has been to consider virtually any contextual evidence, especially the statute's legislative history, even when the statutory text has an apparent "plain meaning."[206]

Whereas under the "new textualism":

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205. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 3-37 (Amy Gutmann ed., 1997) (providing a concise, but effective discussion of the competing approaches); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).

206. *Id.*

> Once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction.[207]

Professor Eskridge does find some validity in both of these approaches.

What approach did the Ninth Circuit take? It would appear that the Ninth Circuit's approach would fall under Professor Eskridge's "new textualism." However, this Note's position has not been that there was something ambiguous in the relief statute where legislative history was needed to clear it up; rather, it is that the affirmative actions by Congress in the form of appropriations acts have in effect changed the relief statute as it once existed. Moreover, the Ninth Circuit acknowledges that the appropriations acts have affected 18 U.S.C. § 925(c). Then given this disparity between the statutory language and the subsequent acts of Congress, the court should have examined legislative history to answer the very questions it raised. And, in examining the legislative history, it should have examined the appropriations acts in conjunction with the legislative history behind the relief provision and the effect this had on the statute. If the court had conducted such an examination, it should have come to the same conclusion—Congress eliminated the BATF from the equation and shifted the task for determining relief to the judiciary via original jurisdiction.

The Third Circuit's holding that the appropriations acts did not repeal 18 U.S.C. § 925(c) is consistent with the modification proposal set forth in this Note. It is a general maxim that repeals by implication are "strongly" disfavored.[208] However, when the Third Circuit conducted its review of the appropriations acts, it too failed to examine all the relevant legislative history that would have displayed a true congressional intent of modification. In addition, it seems somewhat disingenuous that the Third Circuit began by satisfying itself first that the appropriations acts did not work to repeal the statute. In phrasing the question as whether Congress intended to repeal the statute by implication, because repeals by implications are so strongly disfavored, the court virtually guaranteed itself of being able to reach the exhaustion of remedies issue. In other words, the Third Circuit predetermined the outcome by the test it chose

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207. *Id.* at 623-24.

208. *See* Johnson v. Robison, 415 U.S. 361, 373-74.

to determine subject matter jurisdiction. Thus, the Third Circuit applied the repeal by implication doctrine correctly; however, this approach should not have been used because Congress did intend to alter 18 U.S.C. § 925(c) through the appropriations acts. When a court is deciding whether to excuse a party from the exhaustion of remedies requirement, it is weighing equitable considerations. These very considerations are implicit in the modification approach advanced in this Note.[209] Therefore, the Third Circuit reached the correct result, allowing district courts to determine relief questions, but with the incorrect approach.

V. CONCLUSION

This Note has traced firearms legislation from the 1930s to the present. With this legislation Congress has placed disabilities on felons in the United States by depriving them of the privilege to possess firearms. Congress recognized that the strict application of these laws disadvantaged some individuals who posed no danger to the public by reason of firearms possession. Therefore, Congress created a way for deserving individuals to gain relief from firearms disabilities. And, Congress modified this ability numerous times.

However, even given this strong concern, Congress, through appropriations acts, eliminated funding to the BATF to act upon applications for relief from firearms disabilities submitted by individuals. This has created controversy over what exactly Congress intended to achieve with the appropriations acts.

It has been this Note's position that the circuit courts have misconstrued Congress' true intent with the enactment of the appropriations act. In trying to determine if courts had subject matter jurisdiction to review non-actions on the part of the BATF, the courts missed what Congress' intent really was. There was no need to look at this issue solely as one of judicial review. Just as the appropriations acts eliminated the BATF from the relief provision, so too did the acts eliminate the ability to review. However, had any of these courts examined the legislative history of the relief provision in conjunction with the appropriations acts, they would have uncovered the answer: modification and original jurisdiction.

RONALD C. GRIFFIN

209. *See supra* Section IV. C.