

GUN TRUSTS
THE LETHAL PITFALLS IN DRAFTING THEM
AND
FIREARMS ISSUES IN PROBATE

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FIREARMS LAW:
WHAT EVERY TEXAS LAWYER NEEDS TO KNOW
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31. Introduction

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, and similar items. That law is called the National Firearms Act (NFA). In this paper I will refer to items regulated by the NFA as “NFA firearms.” I will refer to the Bureau of Alcohol, Tobacco, Firearms and Explosives as “ATF.” Texas law also allows individuals to own and possess NFA firearms.

a. Crimes Committed with Legal NFA Firearms are “Minimal”

The NFA was enacted in 1934. It generally banned civilian ownership of machine guns, except those lawfully registered. Since then, there appear to be only two instances where a *legally*-owned machine gun was used in a crime. Both happened in Ohio. One was committed by a law enforcement officer. Crimes committed using *illegally* possessed machine guns are also rare.

http://www.guncite.com/gun_control_gcfullau.html.

In 1986, ATF Director Stephen E. Higgins testified before the Subcommittee on Crime: "Registered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement problem."

On June 1, 2019, a city engineer murdered twelve people in the Virginia Beach municipal building. It was reported that he used two legally-purchased pistols and a legally-purchased suppressor:

<https://abcnews.go.com/US/suspected-virginia-beach-gunman-resigned-personal-reasons-massacre/story?id=63449625>

Following the massacre, President Trump indicated that he was going to consider pushing for an outright ban on suppressors:

<https://www.washingtonexaminer.com/news/trump-seriously-considering-banning-suppressors-after-virginia-beach-shooting>

Despite the negative publicity, suppressors are also almost never used in crimes. In 2017 ATF released information to the Washington Free Beacon, reported here:

<https://freebeacon.com/issues/atf-despite-nearly-1-3-million-silencers-united-states-rarely-used-crimes/>

ATF reported that as of February 3, 2017, there were 1,297,670 suppressors registered with ATF. Almost 400,000, close to a third of the total number in civilian hands, had been registered in the previous year. ATF reported that it had only recommended prosecutions for 44 crimes involving suppressors in the last decade. Which means approximately .003% of them are used in crime each year. The column reports that in a leaked internal memo, ATF Associate Deputy Director Ronald Turk argued that silencers should be deregulated (no longer regulated under the NFA).

Between 1995 and 2005, there were only 167 federal prosecutions involving suppressors reported in Lexis or Westlaw between 1995 and 2005, out of 75-80,000 prosecutions per year. This includes not only convictions, but also sentence enhancements, allegations in the charging instrument, and similar occurrences. Many of these were for mere possession of a suppressor, without any further wrongdoing. There were eight cases where a suppressor was actually used, but not to hurt anyone. There were only two reported murders involving a suppressor during that time. The bottom line is that NFA firearms are almost never used in crimes.

b. Number of Registered NFA Firearms

It may be surprising just how popular NFA firearms have become. As of 2007 there were approximately 2 million firearms registered in the National Firearms Registration and Transfer Record (“NFRTR”), the database of NFA firearms maintained by ATF. ATF National Firearms Registration and Transfer Record (2007), posted at <http://www.justice.gov/oig/reports/ATF/e0706/final.pdf>. As of 1995, there were approximately 240,000 registered machine guns. Bureau of Justice Statistics, “Guns Used in Crime, July, 1995, posted at <http://www.bjs.gov/content/pub/pdf/GUIC.PDF>.

Twelve years later (as of May, 2019) the total number of registered NFA firearms had tripled, to 6,058,390. This includes 2,977,630 destructive devices, 1,750,433 “silencers,” and 699,977 machine guns.

The increased interest in NFA firearms has resulted in many more applications and a large increase in tax revenue. ATF publishes a report called “Firearms

Commerce in the United States - Annual Statistical Update.” <https://www.atf.gov/firearms/docs/report/2019-firearms-commerce-report/download>. The 2019 Update shows that in 1990, ATF processed a total of 7,423 transfers using Form 1 (application to make an NFA firearm) or Form 4 (application for tax-paid transfer). I am omitting Form 5 because it includes transfers through probate, but also transfers to governmental entities and certain dealers. The numbers steadily climbed, reaching 12,580 in 2000 and 38,228 in 2010. These applications reached their peak in 2016, totaling 183,896. They totaled 149,904 in 2018, the last year for which numbers are available. The number of transfers in 2018 is more than *twenty times* the number in 2000.

The amount of money ATF has been collecting for the occupational tax (to become an NFA dealer) and the transfer and making tax (to make or acquire an NFA firearm) has increased significantly. In 1984, ATF collected \$596,000 in occupational taxes, and \$666,000 in transfer and making taxes. In 2018, ATF collected \$6,753,000.00 in occupational taxes, and \$33,371,000.00 in transfer and making taxes.

c. Effect of Gun Control Laws on National Defense and Law Enforcement

Our gun laws may or may not have the intended effect, but they also have indirect effects on our national defense and law enforcement. When there is a robust civilian interest in shooting, and a strong market for guns and equipment, those communities benefit. Specifically, the military and law enforcement have benefitted from the advances in technology and technique that have been fueled in part by the civilian market. Consider these examples:

* The widespread enactment of concealed carry laws over the last 35 years or so has encouraged gunmakers to produce models balancing size, weight, and power. Now we have a wide variety of guns intended for carry, each emphasizing these factors to various degrees.

* The “leather slap” (fast draw) competitions grew into the International Practical Shooting Confederation, and its U.S. Region, the United States Practical Shooting Association. Eventually the International Defensive Pistol Association arose as an alternative to IPSC/USPSA. Equipment and techniques developed in the practical shooting sports are routinely adapted for use by the military and police.

* Military and police teams such as the Army

Marksmanship Unit and various SWAT teams compete regularly in 3-gun and other shooting competitions. They develop tactics and try out new equipment that finds its way into the streets and onto the battlefield.

* Civilian interest in self-defense and the shooting sports leads to a general increase in the population’s marksmanship skills. The Civilian Marksmanship Program is based on this concept, seeking to increase those skills by encouraging shooting and by making suitable guns available to civilians.

* Red dot sights first started appearing on civilian guns, as competitors used them to win action pistol matches. Now those sights are common on military and law enforcement firearms.

I believe the availability of NFA firearms like suppressors to consumers has fueled advances in the technology. Civilians may legally own suppressors if they meet the requirements. Manufacturers can create new products and sell them to the public, in addition to the military and police. As a result, today’s suppressors are smaller, lighter, easier to maintain, less expensive, and much more effective in reducing the sound of a gunshot.

In contrast, the technology of machine guns has advanced very little in the last 35 years. Civilians may legally own machine guns manufactured and registered before May 19, 1986, but because of the Hughes Amendment [18 U.S.C. § 922(o)], they may not legally own machine guns made after that date. Manufacturers can create new products, but they can *only* sell them to the government. As a result, today’s machine guns use virtually the same technology that was used in 1986 (and in 1916, for that matter). I believe it is indisputable that the Hughes Amendment has slowed the advance of technology and harmed our readiness.

d. Scope and Purpose of This Paper

The NFA was enacted pursuant to Congress’ power to tax, rather than its power to regulate interstate commerce. For that reason, the NFA was codified in Title 26 of the U.S. Code, otherwise known as the Internal Revenue Code. The Code defines “person” to include trusts, corporations, and other entities, and as a result, it is lawful to form a trust for the purpose of owning NFA firearms. This paper will discuss the various factors that must be considered in drafting National Firearms Act trusts.

The information in this paper is available in three

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