

## RECOMMENDED ACTION MEMO

**Agency:** Department of Justice: ATF  
**Topic:** The Importance of Nominating an ATF Director with Strong Leadership and Public Safety Experience  
**Date:** November 2020

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### I. Summary

#### Description of recommended nomination

Housed within the Department of Justice, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is responsible for enforcing federal firearms laws and regulating the gun industry. But the ATF has faced challenges: an [estimated 393 million guns](#) in civilian hands, the explosive growth of the firearms industry, and the rising rates of gun violence across the country have left an often-stagnant ATF unable to keep up. As evidenced by its lack of funding and staffing, and legal hamstrings, the ATF remains without the tools to fulfill its mission effectively. Thanks to years of opposition from the gun lobby, a broad mandate, and lack of strong leadership, the ATF has also faced a personality and purpose crisis. Under the Biden administration, however, that can change. **The nomination and Senate confirmation of a permanent director with a background in law enforcement, a comprehensive understanding of this country's gun violence crisis, and strong leadership experience are pivotal to putting the ATF on the right track.**

#### Overview of process and time to enactment

An official nomination should be made within the first 100 days of the term.

### II. Current state

Gun violence in the United States has reached a 40-year high. Firearm homicides and assaults have risen precipitously in the last several years, and these increases have been particularly concentrated in communities of color. According to the Centers for Disease Control and Prevention (CDC), 39,740 people died from a gun in 2018—8,147 more than 10 years prior—and on average, nearly 109 people were killed by guns each day, which means that a gun death in America occurred every 13 minutes. Nearly 14,000 people were killed in a gun homicide in 2018; more than 24,000 died by gun suicide.

As the part of the federal government tasked with enforcing our nation's gun laws and protecting public safety, the ATF should be taking major steps to stop this scourge of gun violence. As the gun industry develops new products, the ATF's enforcement tactics should adapt; as guns flood communities through unlawful trafficking channels, the ATF should prioritize shutting down corrupt gun dealers and cracking trafficking cases. But instead of being the protectors of public

safety that they strive to be, ATF employees have been held back and limited due to resource and legal constraints. The ATF can only be most effective once the federal government treats gun violence like the public health crisis it is today.

## How we got here

The ATF was originally established within the Office of Internal Revenue (IRS) in the Treasury Department, intended to collect taxes on alcohol and tobacco products. Over time, the ATF gained its enforcement responsibilities, which grew significantly in the 1920s during Prohibition. Violence also increased during Prohibition, leading the transfer of the Department of Prohibition, as it was then known, to the Department of Justice. In response to this increased violence, largely perpetrated by organized crime syndicates, Congress passed the National Firearms Act of 1934 (NFA) and tasked the ATF with its enforcement. The NFA imposed an excise tax and registration requirements on a narrow category of particularly dangerous firearms, including machine guns, short-barreled shotguns or rifles, and silencers; it was the first major regulation of firearms commerce.

The 1960s and 1970s gave the ATF new enforcement responsibilities with the passage of the Gun Control Act of 1968 and the Explosives Control Act in 1970, as well as new independence: it was officially established as the Bureau of Alcohol, Tobacco and Firearms in 1972. Both of these pieces of legislation defined, for the first time, eligibility standards for purchasing and possessing firearms and explosives, and established requirements for individuals seeking to sell these items. But as the Gun Control Act was implemented, internal strife and disagreements led to changes in leadership within the National Rifle Association (NRA), allowing a more extreme, anti-regulation faction to take control. The NRA sought to tear apart the Gun Control Act as enforced by the ATF, and many other of ATF's regulatory capabilities.

While other federal law enforcement agencies grew substantially in the wake of the September 11, 2001 terror attacks, the ATF did not. Instead, its enforcement and regulatory responsibilities were transferred completely to the Department of Justice, and it was renamed the Bureau of Alcohol, Tobacco, Firearms, and Explosives, as it exists today. The Department of Justice was laser-focused on terrorism and national security at that time, and giving the ATF similar national security responsibilities as those held by the FBI, caused friction between the agencies. This has only been exacerbated as the FBI continues to grow: the FBI's budget [increased 62%](#) from 2005 to 2015, while ATF's budget increased by only 34%.

The ATF is expected to enforce firearm laws across the entire country. Yet the agency has fewer [special agents](#) than the Washington DC Metropolitan Police Department has [sworn officers](#). The agency had [fewer employees](#) in 2017 than it did in 2002, despite tens of millions of [guns entering civilian hands](#) during that period. Agents are tasked with more work than they can ever hope to accomplish and are forced to let certain leads go unpursued. As of June 2020, the ATF employed only 770 field industry operations investigators (IOI), who are responsible for compliance inspections of more than 53,000 federally licensed firearms dealers; other manufacturers; importers; and dealers of guns and explosives. As a result of such a vast

staffing shortage, only 7.7% of all independent dealers were inspected in 2018. This issue is a sustained one: in 2013, an OIG report found that over 58% of FFLs had not been inspected within the past five years, due, in part, to a lack of ATF resources.

The gun lobby's goal is to make the ATF ineffective at enforcing gun laws by cutting off its resources and tying its hands, and in large part, the gun lobby has succeeded. With the passage of the Firearm Owners Protection Act in 1986, the NRA succeeded in securing legislative language limiting the ATF to only one inspection of gun dealers per year and prohibiting a government-held national gun registry. In the 2000s, additional restrictions were added to the law in the form of legislative riders, known as the "Tiahrt amendments," which restrict the ATF's release of firearms trace data, require background check records to be destroyed within 24 hours of NICS approval, and prohibit the ATF from requiring gun dealers to submit inventories to law enforcement. Thanks to the gun lobby, the ATF is also limited in its ability to manage records from out-of-business gun dealers, consolidate current FFL records, deny dealer licenses, and change rules related to certain firearms imports. This makes the ATF's job significantly more difficult.

Lack of resources have also caused the ATF to struggle to keep up with high demand for NFA-regulated products: over the past eight years, the number of silencers registered with the ATF has increased sixfold, with 285,087 silencers registered in 2010 (10% of all registered NFA weapons), and 1,750,433 registered in May 2019 (28.89% of all registered NFA weapons). The average reported wait time for a silencer transfer to an individual is [between 7 and 8.5 months](#).

The firearms industry, however, has responded to the increased demand. An average of [8.4 million guns](#) were manufactured each year from 2009 to 2018—double the yearly average from 1986 to 2008—hitting its 31-year peak in 2016 with 11.5 million guns produced. The number of licensed gun manufacturers [increased 255%](#) from 2009 to 2018. While many of these manufacturers are law-abiding, others choose to capitalize on the ATF's limitations and antiquated federal gun laws by [purposely producing products that skirt the law](#). Though the ATF took a positive step toward common sense gun regulation in banning bump stocks after one was used to kill 58 people and injure hundreds more in Las Vegas in 2017, the agency has failed to adequately regulate other products that are likewise intended to skirt the NFA's intent. The ATF routinely tells Congress that the agency is doing the best it can, given its legal and resource restrictions.

### **III. Proposed action**

In order to make the case for increased staffing, resources, and help from Congress most effectively, the ATF needs a strong leader. During the first 34 years after its establishment as an independent bureau in 1972, the ATF had seven different directors; however, this steady pattern of leadership was upended in 2006, when the NRA successfully lobbied to require Senate confirmation for the position of ATF director. The gun lobby then opposed the nomination of a Republican US attorney, nominated by the Bush administration, as well as the head of the ATF Chicago division, nominated by the Obama administration. During this period, the ATF was led

by three different acting directors. As part of the Obama administration's gun violence prevention push after the 2012 shooting at Sandy Hook, then-Acting Director B. Todd Jones was nominated to fulfil the permanent role; in a victory for the administration, he was confirmed as the ATF's first permanent director in seven years with a vote of 53-42. Since his resignation in 2015, the ATF has returned to acting directors. The Trump administration's single official nominee, Fraternal Order of Police President Chuck Canterbury, did not come until 2019; due to a disastrous nomination hearing and long history with firearms that caused concern from both sides of the aisle, his nomination was rescinded in 2020. As a result, the ATF remains without a permanent leader today.

Without a permanent director, the ATF has been unable to prepare for its future effectively, or regulate the rapidly expanding gun industry. It has also been particularly susceptible to "mission creep" among the other DOJ agencies. The ATF is tasked with the enforcement of firearms laws as well as the investigation of firearms, arson, alcohol, and tobacco crimes, but also with the regulation of the gun and explosives industries. Because the ATF shares many of these investigatory responsibilities with the FBI, coordination between the two agencies is critical. This is especially true since the FBI is larger, better funded, and without the legal restrictions that hamper the ATF. Lacking experienced leadership can make this dynamic a challenge and result in the ATF being viewed as the "little brother" of federal law enforcement.

The Biden administration must nominate a permanent ATF director within the first six months of entering office and ensure their swift Senate confirmation. A strong ATF leader is also crucial for effectively advocating for additional resources and political support from Congress.

As outlined in the accompanying memos, among the ATF director's top priorities should be:

- (1) regulating ghost guns
- (2) increasing the ATF's emphasis on gun trafficking cases, and producing an updated gun trafficking report for public consumption
- (3) ensuring the ATF inspects all licensed firearms and explosives dealers annually, and enforcing strict consequences on dealers who skirt the law
- (4) improving and modernizing the ATF's process of tracing guns
- (5) putting an end to the importation of assault weapons

#### **IV. Legal justification**

The ATF's current structure began to take shape through the Homeland Security Act of 2002, which codified the requirement that the agency have a director, although at that time, the attorney general could simply appoint the director.<sup>1</sup> Then, in 2006, Congress reauthorized the Patriot Act, including a provision requiring the ATF director to be appointed by the president, with the advice and consent of the Senate.<sup>2</sup> This provision was [reportedly](#) added at the behest

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<sup>1</sup> 107 P.L. 296, 116 Stat. 2135 (2002).

<sup>2</sup> USA Patriot Improvement and Reauthorization Act of 2005, 109 P.L. 177, 120 Stat. 192 (2006).

of the NRA, which lobbied Rep. F. James Sensenbrenner Jr. (R-Wis), then chairman of the House Judiciary Committee, to insert it.

Thus, the president may nominate an ATF director, and the Senate must confirm this nominee. This process is well known and referenced in the Constitution, and is therefore unlikely to spark any legal challenges.<sup>3</sup>

Notably, since 2006, the NRA has lobbied against several nominees for ATF director, making it difficult for the Senate to fulfill its role in this process. This problem was confounded by the filibuster, which enabled a minority of senators to block the confirmation of an ATF director (and other officials). However, in 2013, the Senate [changed its rules](#) so that only a simple majority is needed to end debate and confirm a new director. Consequently, it may be easier for the next president to get the Senate to confirm an ATF director than it has been in the past.

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<sup>3</sup> U.S. Const. Art. II, sec. 2 ("the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ...public Ministers and Consuls, ...and all other Officers of the United States, whose Appointments are not herein otherwise provided for...").