

AMERICA, GUN PURVEYOR TO THE CARTELS

Enforcing the weak-kneed laws that exist is hardly a solution

By Julius (Jay) Wachtel. Concerns that Mexico is losing its war with the cartels have focused attention on the flow of guns south. In May 2008 [ATF agents](#) scored a significant victory when they dismantled a trafficking ring that supplied nearly seven hundred guns to Sinaloan gangsters. Among these were the AK-47 rifles used to murder eight Culiacan police officers and an engraved super .38 pistol that drug kingpin [Alfredo Leyva](#) was caught carrying in his waistband.

Investigation revealed that two smugglers, brothers Hugo and Cesar Gamez got seven local residents to buy the guns at X-Caliber, a Phoenix gun store. Its owner, George Iknadosian, 47, was supposedly in on the scheme. In an unusual move, ATF chose to proceed under State law because [Federal prosecutors](#) were reportedly “bogged down with immigration cases.” Everything seemed to be going well until March 18 when Maricopa County (Ariz.) Superior Court judge Robert Gottsfield ruled that Iknadosian, the only one of the bunch who hadn’t pled guilty, was in fact innocent.

What was the hang-up? [Charges](#) against the dealer were predicated on his alleged possession of a “[false instrument](#)”, meaning the Federal gun sales form, [ATF Form 4473](#). Question 11(a) on the form must be answered “yes” or “no”:

Are you the actual buyer/transferee of the firearm(s) listed on this form?

Warning: You are not the actual buyer if you are acquiring the firearms(s) on behalf of another person. If you are not the actual buyer the dealer cannot transfer the firearm(s) to you. [Emphasis present.]

Iknadosian supposedly counseled the purported buyers to check “yes,” a lie, as they were only acting as agents for the brothers. (An exception on the form allows buying guns as gifts. Go figure.) But Judge Gottsfield concluded that under the circumstances that falsehood didn’t amount to a crime. Here’s an extract from his [order](#) exonerating Iknadosian:

The state’s case is based upon testimony of individuals who falsified question 11a on ATF Form 4473, i.e. that they were the actual purchaser of the firearms when they were not. The court agrees with the defense that for such falsity to amount to a fraudulent scheme or artifice...the falsification has to be a material misrepresentation. In order to be material, the falsification has to have resulted in an unlawful or prohibited person obtaining the weapons.

ATF Form 4473 is a Federal form, so the judge turned to Federal law to find out what it takes to falsify it. [Title 18, United States Code](#), § 922 (a)(6) forbids gun buyers from making “any false or fictitious oral or written statement...likely to deceive [a dealer] with

respect to any fact *material to the lawfulness of the sale* or other disposition of [a] firearm or ammunition under the provisions of this chapter [emphasis added] .” Among other things, dealers can’t deliver guns to felons, illegal aliens, juveniles, the adjudicated mentally ill and nonresidents (to keep local laws from being circumvented, persons are forbidden from buying guns outside their State of residence.) However, the law is silent about “straw purchase,” the practice of buying guns for others. There’s nothing in “the provisions of this Chapter” that forbids a dealer from selling guns to someone who intends to turn them over to a legally qualified possessor.

There’s no question but that straw purchases took place. But since the Gamez brothers and the pretend buyers were Arizona adults with clean records, and no evidence was introduced that a prohibited person wound up with a gun, the “yes” answers, while false, weren’t *materially* so. That view has been endorsed by appeals courts. In [U.S. v. Polk](#), the only known case directly on point [**that’s changed - see note below**], the Fifth Circuit held that “if the true purchaser can lawfully purchase a firearm directly, § 922(a)(6) liability under a ‘straw purchase’ theory does not attach.” More recently, in [U.S. v. Ortiz](#), the Eleventh Circuit ruled that “straw purchases of firearms occur when an *unlawful purchaser*...uses a lawful ‘straw man’ purchaser...to obtain a firearm [emphasis added].”

When the 1968 Gun Control Act was enacted Form 4473 didn’t ask buyers about their intentions. Lacking the political muscle to change the law, ATF got permission to insert what became Question 11(a) on the form (making clear that gift purchases were OK, of course.) This extralegal tinkering was mentioned in a footnote of the *Polk* decision, which pointed out that the 1991 and 1994 editions of the ATF Form 7 carried significantly different warnings. While the earlier form advised that a straw purchase was illegal **when the intended possessor is ineligible to buy a gun**, the more recent version made no such mention, thus leaving the impression that all straw purchases are no-no’s. But § 922(a)(6) hadn’t changed: just like [18 USC § 1001](#), the general false statements provision of Federal law, it’s always forbidden only *material* falsehoods. And that’s where things stand today [**that’s changed - see note below**].

It’s no surprise that the judge ruled as he did. What can be done to avoid such problems in the future?

- Federal law could be amended to prohibit purchasing a firearm on behalf of someone else. Doing so would automatically make a lie to question 11(a) “material” to the lawfulness of a sale. (Those who wish to give a gun as a gift could buy a gift certificate.)
- Exporting undeclared firearms is illegal. Given proof of a dealer’s guilty knowledge, one could proceed with a case like *Iknadosian*’s as a conspiracy to violate export control laws.
- Limiting the number of guns that a buyer can acquire can make the use of straw buyers cumbersome. A few States (not including Arizona) restrict

handgun purchases to one a month. That could be expanded nationally and broadened to include rifles.

- Innovation is key. During a Guns to Mexico campaign in the 1970's an Arizona dealer was suspected of procuring straw buyers to cover up sales to gun smugglers. ATF brought in an undercover agent who lived in California so that selling him guns directly or through go-betweens would be unquestionably illegal. Convictions of the dealer and the straws [held up on appeal](#) and the Supreme Court denied certiorari.

President Obama and Secretary Clinton have emphasized “enforcing the laws that exist.” It’s a tired cliché that overlooks the fact that Federal firearms laws are so toothless that corrupt licensees and traffickers have little fear of discovery or meaningful punishment. As long as the Administration keeps shying away from confronting the pro-gun lobby, the prospects for improving oversight of the gun marketplace seem bleak indeed.

Note: [In U.S. v. Johnson](#) (no. 11-10290, 5/29/12) the Ninth Circuit ruled that when a straw purchaser falsely answers “no” to question 11(a) on an ATF Form 4473, it is prosecutable as a false statement even if the real, underlying buyer is eligible to buy guns. That conflict between Circuits was resolved by the Supreme Court on June 16, 2014. Ruling in [Abramski v. U.S.](#), the justices held (5-4) that falsely answering “no” constitutes a lie to a material fact, and is thus illegal, even if the intended possessor can legally buy guns.