

WILLIAM J. OLSON
(VA, D.C.)

JOHN S. MILES
(VA, D.C., MD OF COUNSEL)

HERBERT W. TITUS
(VA OF COUNSEL)

JEREMIAH L. MORGAN
(D.C., CA ONLY)

ROBERT J. OLSON
(VA)

WILLIAM J. OLSON, P.C.
ATTORNEYS AT LAW
370 MAPLE AVENUE WEST, SUITE 4
VIENNA, VIRGINIA 22180-5615

TELEPHONE (703) 356-5070
FAX (703) 356-5085
E-MAIL: wjo@mindspring.com
<http://www.lawandfreedom.com>

114 CREEKSIDE LANE
WINCHESTER, VA 22602-2429
TELEPHONE (540) 450-8777
FAX (540) 450-8771

April 7, 2014
Via upload to regulations.gov

Mr. George M. Fodor
Enforcement Programs and Services
Bureau of Alcohol, Tobacco, Firearms and Explosives
U.S. Department of Justice
99 New York Avenue NE, Room 6.N-523
Washington, DC 20226

Re: Gun Owners of America, Inc. and Gun Owners Foundation
Comments in Docket No. ATF 51P
“Amended Definition of ‘Adjudicated as a Mental Defective’ and
‘Committed to a Mental Institution’ (2010R-21P)”

Dear Mr. Fodor:

Our firm represents Gun Owners of America, Inc. (“GOA”) and Gun Owners Foundation (“GOF”), which hereby submit these joint comments in response to the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (“ATF”) request for comments on a proposed “Amended Definition of ‘Adjudicated as a Mental Defective’ and ‘Committed to a Mental Institution.’”

- GOA is a national membership educational and lobbying social welfare organization, devoted to protecting and defending firearms rights across the country. GOA was incorporated in California in 1976, and is exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code (“IRC”).
- GOF is a nonprofit, educational and legal defense organization, defending the Second Amendment to the U.S. Constitution. GOF was incorporated in Virginia in 1983, is exempt from federal income tax under Internal Revenue Code Section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

On their behalf, we have conducted a careful review and analysis of the proposed changes in the Notice of Proposed Rulemaking (“PR”), along with the current definitions in 27 C.F.R. § 178.11. As discussed below, both the current definition of “**adjudicated as a mental defective**” and the proposed amendment exceed ATF’s authority. Additionally, both

the current definition of “**committed to a mental institution**” and the proposed amendment exceed ATF’s authority. Accordingly, we submit that ATF not only should withdraw its proposed amendment to 27 C.F.R. § 178.11, but also should repeal that section in its entirety. Before proposing new definitions, ATF should assess whether they would unconstitutionally infringe upon the right to keep and bear arms secured by the Second Amendment. Failure to consider compatibility with the Constitution, it is submitted, would be in violation of the executive officers’ Article VI oath to support the U.S. Constitution.

I. The Proposed Rule Redefining “Mental Defective” is Wholly Unauthorized by Law.

A. ATF Has No Authority to Treat “Mental Defective” as an “Outdated” Term.

18 U.S.C. § 922(g)(4) prohibits the possession of a firearm by anyone “adjudicated as a mental defective.” In the Summary to the PR, ATF boldly states that it “recognizes” that the term “mental defective,” even though it currently appears in the statute, is “outdated.”¹

As an administrative agency, ATF has no power to amend a statute. Thus, when ATF issues a PR to “clarify ... a statutory term” that it denounces as “outdated,” one cannot help but question whether the PR is really to “clarify” the meaning, or instead to bring that statutory definition into harmony with ATF’s own unstated “updated” term. Whatever authority ATF may have to regulate, it is strictly “secondary,” completely “subordinate” to the legislative power which is vested in Congress alone by Article I, Section 1.²

Apparently recognizing that the PR could be perceived as subverting an allegedly “outdated” statute, ATF concedes that the term “adjudicated as a mental defective” is “included in the statute and cannot be amended by regulation.”³ ATF claims that the statute that has become “outdated” is the Gun Control Act of 1968.⁴ ATF’s statement was calculated to create the impression that the “outdated” term to be “clarified” was from another era with no reasonable current meaning.

Of course, 1968 was the first time the term “adjudicated as a mental defective” was used in the statutory scheme, but it was not the last. ATF conveniently omits the fact that as

¹ 79 *Fed. Reg.* 774 (Jan. 7, 2014).

² See Bernard Schwartz, *Administrative Law*, pp. 10-11 (2d ed: Little , Brown, 1984).

³ 79 *Fed. Reg.* at 774.

⁴ *Id.* at 774 (“The Department of Justice proposes amending [ATF] regulations to clarify definitions of two categories of persons who are prohibited from receiving, possessing, shipping, or transporting firearms under the Gun Control Act of 1986.”).

recently as 2008, Congress enacted the “NICS Improvement Amendments Act of 2007” (“NIAA”). Section 3 of NIAA stated that “[t]he term[] ‘adjudicated as a mental defective’ ha[s] the **same meaning**[] as in section 921(g)(4)....”⁵

Had Congress believed the statutory term to be “outdated,” as ATF alleges, and felt it necessary to update the terminology, Congress would have done so. But Congress did not. Instead, it did just the opposite, reaffirming the 1968 statutory text. While the NICS Improvement Act of 2007 addressed a number of procedural matters concerning the administration of the “mental defective” term,⁶ it left the original statutory substantive definition in place.

Rather than seeking a legislative update to this term from Congress, which would be within its authority, ATF insists on acting *ultra vires* to redefine “adjudicated as a mental defective,” based only on ATF’s opinion that it is an “outdated” term. For this reason alone, the PR should be withdrawn as being outside the legitimate regulatory authority of the U.S. Department of Justice.

B. ATF’s Proposed Changes to 27 C.F.R. § 478.11.

The current version of 27 C.F.R. § 478.11, adopted by ATF in 1997, states that:

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) Is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b. [27 C.F.R. § 478.11]

The proposed rule purports to redefine “mental defective” to be:

*(a) A determination, **order, or similar finding** by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:*

(1) Is a danger to self or others; or

⁵ Public Law 110-180, Section 3(2) (Jan. 8, 2008) (emphasis added).

⁶ See 79 Fed. Reg. at 775.

- (2) *Lacks the mental capacity to contract or manage his or her own affairs.*
 (b) *The term shall include—*
 (1) *Those persons found **not guilty** by reason of insanity, **mental disease or defect**, or lack of mental responsibility by **a court in a criminal case**;*
 (2) *Those persons found **guilty but mentally ill** by a court in a criminal case in a jurisdiction that provides for such a finding; and*
 (3) *Those persons found incompetent to stand trial by a court in a criminal case.*

ATF's PR would amend the term "mental defective" in three ways:

- First, the current definition includes a "**finding of insanity**" while the new definition is much broader, including a finding of "**not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility.**"⁷
- Second, the new definition would add an entirely new category of a finding of "**guilty but mentally ill.**"
- Third, the new definition would extend certain categories which only applied to persons **in a court-martial** to such persons in **any criminal case**.

C. The Proposed Amendments to Redefine "Mental Defective" Conflict with the Statutory Meaning.

Under these proposed amendments, ATF would sweep entirely new categories of persons into the current definition. In support of such a broad definition, ATF cherry picks its way through the legislative history of the Gun Control Act of 1968, citing general floor remarks of four members⁸ of the U.S. House of Representatives, as if those four voices were the single voice not only of the entire House, but also the U.S. Senate and the President of the United States. ATF contends that statements by four Congressmen "indicates that Congress intended that the prohibition ... would apply broadly to '**mentally unstable**' or '**irresponsible**' persons."⁹

⁷ 79 *Fed. Reg.* at 775. (emphasis added).

⁸ 79 *Fed. Reg.* at 775.

⁹ *Id.* Under such broad statements as these, could not it be claimed that ATF agents and managers who participated in the infamous Fast and Furious operation, which led to countless innocent deaths, acted as "irresponsible persons" and, therefore, ought to be ineligible to possess firearms?

But that is not what 18 U.S.C. § 922(g)(4) actually states. The U.S. Court of Appeals for the First Circuit does not share ATF's view that it may substitute a term like "mentally ill" for "mental defective," observing that "Congress did not prohibit gun possession by those who were or are mentally ill or dangerous, ... such a free floating prohibition [being] very hard to administer."¹⁰ Rather, the court of appeals continued, "section 922 does not bar firearms possession for those who are or were **mentally ill** and dangerous, but (pertinently) **only** for any person "who has been **adjudicated as a mental defective**."¹¹

It is "the language and structure"¹² of 18 U.S.C. § 922(g)(4), not generalities about "instability," "irresponsibility," and "mental illness," that determines who is prohibited from owning firearms. Even applying ATF's 1996 definition of "mental defective,"¹³ the New Hampshire Supreme Court ruled that an adjudication that a person was incompetent to stand trial did not fit because "a competency determination is a limited inquiry ... that focuses upon '[w]hether the defendant has a rational and factual understanding of the proceedings against him or her, and sufficient present ability to consult with and assist his or her lawyer on the case with a reasonable degree of rational understanding.'"¹⁴

D. The Current Definition of "Adjudicated as a Mental Defective" Conflicts with the Statutory Meaning.

Not only is ATF's proposed redefinition of "mental defective" clearly beyond the scope of its authority, and contrary to the statutory text of 18 U.S.C. § 922(g)(4), but the current definition in 27 C.F.R. § 478.11 itself goes too far. Subsection (a) of the current definition states that a person has been adjudicated a "mental defective" if:

*(a) a person, as a result of marked subnormal intelligence, **or mental illness, incompetency, condition or disease:***

(1) Is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs."

Yet again, in "defining" the statute, ATF has revised it. The statute uses the word "adjudicated," yet subsection (a) says nothing about adjudication. In fact, various federal agencies such as the Veterans Administration have gone so far as to report persons to NICS

¹⁰ United States v. Rehlander, 666 F.3d 45, 50 (1st Cir. 2012).

¹¹ *Id.* (emphasis added).

¹² *See New Hampshire v. Buchanan*, 155 N.H. 505, 924 A.2d 42 (N.H. 2007).

¹³ *See* 61 *Fed. Reg.* 47095-098 (Sept. 6, 1996), 27 C.F.R. § 478.11.

¹⁴ New Hampshire v. Buchanan, 155 N.H. at 506-07, 924 A.2d at 424.

simply because an unelected and unaccountable bureaucrat has decided they are unable to manage their own affairs. This is clearly not an “adjudication” as the statute requires, yet ATF has for years used this impermissible definition to deny gun rights to countless Americans. If Congress had intended to permit such bureaucrats to deny Americans their gun rights, Congress would have said so, instead of requiring a formal “adjudication.”

The U.S. District Court for the Northern District of Iowa agrees, ruling that this “broader definition of ‘mental defective’” is inconsistent with the term’s well-established “historical use in the law.”¹⁵ Applying the rule of construction that “‘where words are employed in a statute which had at the time a well-known meaning ... in the law of this country, they are presumed to have been used in that sense,’” the Iowa district court concluded that, because there was no finding that the defendant possessed any but a normal degree of intellectual capacity, he was not adjudged as a mental defective under 18 U.S.C. § 922(g)(4). *Id.* at 1147.

Additionally, the U.S. Court of Appeals for the Eighth Circuit has previously held that “the term ‘mental defective,’ as used in the Gun Control Act, does not include mental illness,” because “[i]n law, a distinction has usually been made between those persons who are mentally defective or deficient on the one hand, and those that are mentally diseased or ill on the other.”¹⁶ The court of appeals adopted its “narrow meaning” in compliance with the rule that “criminal statutes are to be strictly construed,” and thus construed “mental defective” to “designate[] an individual of marked subnormal intelligence.”¹⁷ In Black’s Law Dictionary from 1968 (the same year the statute was adopted), “mental defect” is defined as “gross ignorance or imbecility....”¹⁸ Congress never intended to prohibit firearm ownership to everyone with a “mental illness, incompetency, condition or disease.” Indeed, until 1973, homosexuality was considered to be a mental illness by the American Psychological Association.¹⁹

II. The Proposed Rule Redefining “Commitment” is Wholly Unauthorized by Law.

Currently, 18 U.S.C. § 922(g)(4) disqualifies a person from possessing a firearm if that person “has been committed to a mental institution.” ATF’s current regulation defines this term as:

¹⁵ United States v. B.H., 466 F. Supp. 2d 1139, 1146 (N.D. Ia. 2006).

¹⁶ United States v. Hansel, 474 F. 2d 1120, 1123-24 (8th Cir. 1973).

¹⁷ *Id.* at 1123-24.

¹⁸ West Publishing Co, 1968, p. 1137.

¹⁹ http://www.torahdec.org/Downloads/DSM-II_Homosexuality_Revision.pdf.

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

ATF proposes to extend this prohibition to “both inpatient and outpatient commitments.”²⁰ Relying upon a single federal district court decision, ATF insists that the “plain language” of section 922(g)(4) “only requires commitment *to* a mental institution, not commitment *in* a mental institution.”²¹

This is a very slender, if not invisible, textual reed upon which to rest what would, if enacted, constitute a major change in policy. Civil inpatient commitment to a psychiatric hospital is an “extraordinary measure” by which a court or government body believes a person is unable to continue functioning adequately in society, and “orders a person to be confined ... without consent and against his or her will.”²² Outpatient commitment, on the other hand, is a community-based, involuntary program of treatment, such as “requiring the person to take medication and sometimes directing where the person lives and how his or her day is spent.”²³

It is, therefore, anomalous for ATF to take the position that “committed to a mental institution” extends both to those persons who are involuntarily hospitalized, and also to those who may or may not be subject to an order limiting their movements or confining them to a place of residence.

III. The Proposed Amendments to 18 U.S.C. § 922(g)(4) Ignore the Second Amendment.

In United States v. Rehlander, the U.S. Court of Appeals for the First Circuit observed that the Supreme Court’s District of Columbia v. Heller decision²⁴ adds a “constitutional

²⁰ 79 *Fed. Reg.* at 775.

²¹ *Id.* (italics original).

²² See Judge David L. Bazelon Center, “Outpatient and Civil Commitment,” <https://www.bazelon.org/Where-We-Stand/Self-Determination/Forced-Treatment/Outpatient-and-Civil-Commitment.aspx>.

²³ *Id.*

²⁴ District of Columbia v. Heller, 554 U.S. 570 (2008).

component” to every effort by the federal government to regulate the possession and use of firearms. No longer may the ATF assume, as it has in this rulemaking proceeding, that it may take action to deprive American citizens their access to firearms, without first ascertaining whether the proposed action conforms to the Second Amendment.

Additionally, the Rehlander Court observed that “the right to possess arms ... is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process.”²⁵ Yet, that is precisely the policy that ATF is perpetuating by its failure to reexamine the process due an American threatened with loss of his Second Amendment right to keep and bear arms, even in self-defense in his own home. Indeed, instead of ensuring the type of due process in the enforcement of section 922(g)(4) that would normally be associated with a formal “adjudication,” 27 C.F.R. § 478.11 provides that it is enough that a court, board, commission, or indeed any lawful authority make an informal “determination, order, or similar finding” that a person meets one or more “free floating prohibit[ing]”²⁶ conditions. Without specific constraints placed on the bodies making such determinations, Americans are, “*ex parte*,” being deprived of their firearm rights.²⁷

IV. Conclusion

ATF claims that one of the key terms in 18 U.S.C. § 922(g)(4) has become “outdated.” What is really outdated is ATF’s continued refusal to be under the authority of the Second Amendment. ATF has no authority to expand the provisions of the Gun Control Act of 1968. ATF has no authority through regulation to deny gun rights to a broader swath of Americans than Congress has done through statute. And yet that is precisely what ATF has done in its 1997 regulation, and that is precisely what ATF proposes to do with its current regulation. This may be what Americans have come to experience from a lawless, rogue agency, but it is not what they deserve. Government officials are servants of the people, not their overlords.

For the reasons stated above, the proposed amendments to 27 C.F.R. § 478.11 should be withdrawn, and the current regulations should be repealed.

Sincerely yours,

/s/

Herbert W. Titus

HWT:slf

²⁵ *Id.*, 666 F.3d at 48.

²⁶ *See Rehlander*, 666 F.3d at 50.

²⁷ *Id.* at 48.