

**Comments
to the Social Security Administration**

**on the
Proposed Rulemaking entitled
“Implementation of the NICS Improvement Amendments Act of 2007”
(Docket No. SSA-2016-0011)
(July 5, 2016)**

filed on behalf of

**Gun Owners of America, Inc.
and
Gun Owners Foundation**

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Gun Owners of America, Inc. (“GOA”) and Gun Owners Foundation (“GOF”) submit these joint comments in response to the request of the Social Security Administration (“SSA”) for comments on its proposed rulemaking (“PR”) regarding the “Implementation of the NICS Improvement Amendments Act of 2007” (“NIAA”).¹ GOA and GOF appreciate that SSA has provided this opportunity to comment on this topic.

Background on Commenters

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 an educational and legal defense organization

¹ 81 FR 27059 (May 5, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-05-05/pdf/2016-10424.pdf> (“Proposed Regs”).

defending the Second Amendment of the U.S. Constitution the rights of citizens that it protects. GOF was incorporated in Virginia in 1983, and is exempt from federal income tax under IRC section 501(c)(3). GOA and GOF are headquartered in northern Virginia.

Comments

SSA claims that this Proposed Rulemaking is an attempt “to fulfill responsibilities that we have under the NIAA.” On the contrary, the PR is yet another of the series of lawless actions taken by the Obama Administration to disarm by stealth as many American citizens as possible, through whatever means necessary. These snake-in-the-grass tactics violate both the law and the Constitution, and for those reasons set out in these comments, the PR should be withdrawn.

1. Background of ATF Lawlessness.

In the United States, before a person can purchase a firearm from a Federal Firearm Licensee (“FFL”), he first must pass a background check run by the Federal Bureau of Investigations (“FBI”) through the National Instant Criminal Background Check System (“NICS”). The NICS system allegedly was designed to stop sales to those categories of persons who are ineligible to possess or receive firearms under federal law. *See* 18 U.S.C. Section 922(g)(1-9). Of significance here is the fact that federal law prohibits from firearm ownership anyone “who has been **adjudicated** as a **mental defective**.” 18 U.S.C. Section 922(g)(4) (emphasis added).

Years after the statute was enacted, ATF, while purporting to enact regulations to implement the term “adjudicated as a mental defective,” shamelessly and expansively changed every aspect of how Congress intended the statute to operate.

First, prior to the rise of the administrative state, the word “**adjudication**” as used in the statute clearly referred to a judicial process or proceeding involving a judicial ruling or decision.² The current 1997 version of 27 CFR section 478.11, however, says nothing about adjudication, having replaced the word “adjudication” with the word “determination,” and expanding the concept of judicial process (by a court) to include “a court, board, commission, **or other lawful authority**” (essentially, any government employee).

Second, ATF took the term “**mental defective**,” historically designed to encompass a relatively narrow field of persons understood to be “imbeciles” (*i.e.*, those with severe, permanent intellectual disabilities),³ and expanded the term to include anyone who has “marked subnormal intelligence, or mental illness, incompetency, condition, or disease,” including a person who “lacks the mental capacity to contract or manage his own affairs.”

Congress never intended to prohibit firearm ownership to any person with any type of condition that a medical professional association has decreed to be a “mental illness, incompetency, condition or disease.”⁴ Nevertheless, ATF took a statute designed to apply narrowly to those such as a severely mentally handicapped person with a child-like intellect,

² See R. Perry & J. Cooper, eds, Sources of Our Liberties 132, rev. ed. (ABA Found.1978) (“The main effect of the abolition of the Star Chamber was to establish ... a system of justice administered by the courts, instead of by the administrative agencies of the executive branch of the government.”)

³ Black’s Law Dictionary from 1968 (the same year the statute was adopted), “mental defect” is defined as “gross ignorance or imbecility....” West Publishing Co, 1968, p. 1137.

⁴ Indeed, until 1973, **homosexuality** was considered to be a mental illness by the American Psychological Association. http://www.torahdec.org/Downloads/DSM-II_Homosexuality_Revision.pdf.

and applied it broadly to those such as an Army combat veteran temporarily battling PTSD after returning from a recent deployment.

In support of its administrative expansion of the statutory text, ATF cherry-picked its way through the legislative history of the Gun Control Act of 1968, citing general floor remarks of four members (*see 79 Fed. Reg. at 775*) 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.” *Id.*

The position of ATF stands in open defiance of the views of certain federal courts. 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.” *See United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012). 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.**” *Id.* (emphasis added). 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.” *United States v. B.H.*, 466 F. Supp.2d 1139, 1146 (N.D. Ia. 2006). 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.” United States v. Hansel, 474 F.2d 1120, 1123-24 (8th Cir. 1973).

Similar to what SSA proposes to do here, various other federal agencies such as the Veterans Administration have gone so far as to report persons to NICS simply because an unelected and unaccountable bureaucrat believes they need assistance in managing their benefit payments. Under no circumstance does this type of bureaucratic determination constitute an “adjudication” as the statute requires, yet the federal government has for years used this impermissible definition to deny gun rights to countless thousands of Americans. If Congress had intended to empower nameless, faceless bureaucrats to deny Americans their gun rights based on whatever criteria they invent, Congress would have said so, rather than requiring a formal “adjudication.”

The reason that Congress required a formal adjudication process, accompanied by a specific finding of a “mental defect,” was addressed by the U.S. Court of Appeals for the First Circuit, which observed that “in section 922, Congress did not prohibit gun possession by those who were or are mentally ill” because “such a free floating prohibition would be very hard to administer....” *See Rehlander*, 666 F.3d at 50. As the court observed in Rehlander:

[T]he right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without **due process**. Ordinarily, to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required. [*Id.* at 48 (emphasis added).]

2. SSA's Push to Further Expand the Reach of Section 922(g)(4).

In Section 3 of NIAA, Congress stated that “[t]he term[] ‘adjudicated as a mental defective’ ha[s] the **same meaning**[] as in section 921(g)(4)....” Pub. L. 110-180, Section 3(2) (Jan. 8, 2008) (emphasis added). By expressly relying upon the statutory definition — rather than ATF’s expansive regulatory definition — Congress chose not to adopt ATF’s meaning of “adjudicated” as it appears in 27 CFR section 478.11, which includes “[a] determination by a court, board, commission, or other lawful authority.” On the contrary, section 101(c)(1)(C) of NIAA, states that:

No department or agency of the Federal government may provide to the Attorney General any **record of adjudication** related to the mental health of a person ... if ... the adjudication ... is without a hearing by a court , board, commission or other lawful authority, **and** the person has **not been adjudicated** as a mental defective consistent with section 922(g)(4) of Title 18, United States Code. [*Id.*]

Claiming to “implement” that NIAA provision, SSA now seeks to water down the statute even further, claiming that its closed-door administrative process qualifies as an “adjudication.” According to SSA, any bureaucrat’s personal opinion will do. But, even if one accepts the argument that an “adjudication” can include an administrative (rather than judicial) determination by a bureaucrat (rather than a court), SSA’s Proposed Rulemaking still falls far short.

SSA’s PR does not include provisions for any of the procedures one would ordinarily expect from an adjudicative process. The only thing SSA proposes to do is “provide both oral and written notice to the individual at the commencement of the adjudication process.”

- The PR does not state whether a person has the right to counsel before SSA takes away his Second Amendment rights.

- The PR does not provide the person with a right to a hearing before an impartial magistrate.
- The PR does not state whether the person has the right to call witnesses, present evidence or provide experts.
- The PR does not identify what rules of evidence apply, or what standards govern SSA's determinations.
- And, the PR does not explain whether there is a right to appeal SSA's determination.

On the contrary, SSA's process "only involves anonymous bureaucrats reviewing documents in a government-compiled file. That is hardly the process most Americans would consider an adjudication, and certainly not one sufficient to strip someone of fundamental liberties."⁵

3. Americans Are Entitled to Due Process Before Adjudication, and an Appeal Process to Restore Rights After they Have Been Taken Is not Sufficient.

NIAA section 101(c)(3) provides that:

any Federal department or agency that conducts proceedings to adjudicate a person as a mental defective under 922(d)(4) and 922(g)(4) of title 18, United States Code, **shall** provide both oral and written **notice** to the individual **at the commencement** of the adjudication process.

As discussed above, SSA apparently believes that this is the only procedural requirement it must comply with before taking away a person's Second Amendment rights.

But even SSA's notice fails basic due process requirements concerning notice. SSA proposes that it notify an "affected individual" **after** he has already been found "disabled" by a mental impairment. SSA proposes to provide no notice to a person before that finding, including notice to the person that he is in danger of losing his firearms rights, and without

⁵ <https://www.nraila.org/articles/20160429/social-security-administration-releases-proposed-rulemaking-on-disability-related-gun-ban>

having any opportunity to be heard by anyone in proper authority to “adjudicate” his case. *See* Sections 421.105 (affected individual) and 421.110. A finding that a person is disabled by a mental impairment is a very large part of the process in deciding that he should be reported to NICS, as a large subset of persons who have mental impairments would also be found to be unable to manage their benefit payments. A person should be advised up front that SSA’s finding of disability may lead to his eventual disarmament. Otherwise, a person is put in the Catch-22 position of trying to prove he is disabled (to get benefits), then trying to prove he is not disabled and is capable of managing his own affairs (to keep his Second Amendment rights). SSA’s tactic is thinly veiled, essentially attempting to beguile Americans to give up their firearms with the lure of disability benefits.

To be sure, Section 421.140 gives notice to an “affected individual” that he may seek relief from federal firearms prohibitions. But the opportunity to seek relief and a hearing **after** losing constitutional rights is very different from an opportunity to be heard **before** they are taken away. As Section 421.150 provides, the affected individual may apply for relief only after SSA has reported him to NICS as a person who as been adjudicated as one with a disqualifying “mental defect.” Having had no hearing or opportunity to be heard before his rights are taken, section 421.155 then places the burden of proof on the individual to get his rights reinstated, requiring that he “must prove that he or she is not likely to act in a manner dangerous to the public safety and that granting relief from the prohibitions imposed by 18 U.S.C. sections 922(d)(4) and g(4) will not be contrary to the public interest.” *See also* Section 421.160.

4. **The Proposed Rulemaking Infringe the Second Amendment Right to Keep and Bear Arms.**

In United States v. Rehlander, the U.S. Court of Appeals for the First Circuit observed that the Supreme Court's decision in District of Columbia v. Heller⁶ adds a "constitutional component" to every effort by the federal government to regulate the possession and use of firearms. SSA may not assume, as it has in this Proposed Rulemaking, that it can deprive American citizens of their Second Amendment rights 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."⁷ Yet, that is precisely the policy that SSA is perpetuating by its failure to examine 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 that normally would be associated with a formal "adjudication," SSA assumes that it is sufficient that a government bureaucrat make an informal finding that a person meets one or more "free floating prohibit[ing]"⁸ conditions. Without specific constraints placed on those making such determinations, Americans will be, "*ex parte*," deprived of their firearm rights.⁹

⁶ District of Columbia v. Heller, 554 U.S. 570 (2008).

⁷ *Id.*, 666 F.3d at 48.

⁸ *See Rehlander*, 666 F.3d at 50.

⁹ *Id.* at 48.

5. Needing a Representative Payee Does Not Mean a Person is Incapable of Managing His Affairs.

Even accepting for a moment ATF's definition that inability to manage one's affairs because of a mental illness qualifies a person as a "mental defective," SSA's Proposed Rulemaking still fails. SSA apparently believes that if a person needs help managing receipt of his benefit payment, this alone qualifies as being unable to manage one's affairs. This is hogwash. Managing one's affairs consists of more than simply balancing a checkbook, and many who have difficulty with the latter are still capable of the former. One's "affairs" most certainly include, for example, such things as driving a car, holding down a job, making financial and investment decisions, paying bills, purchasing goods and services, entering into contracts, and making health decisions.

For example, only recently has the American Psychiatric Association removed **dyslexia** from the list of mental illnesses in the Diagnostic and Statistical Manual (the "DSM-5"), and it is still unclear whether it is considered a mental disorder. Imagine a person with severe dyslexia, who no doubt would find it difficult to perform many daily tasks related to many jobs, and it is reportedly possible to qualify for SSI benefits based on one's dyslexia alone. Additionally, a person with severe dyslexia no doubt would find it difficult, if not impossible, to verify accurate payment of disability benefits, or to balance his checkbook. Based on this, SSA might determine that he is unable to manage his own affairs due to his mental handicap, and thus in need of a "representative payee" to manage his benefit payments. Under the PR, SSA's determination would cause such a person would qualify as a "mental defective" and be disqualified from ever possessing firearms. Of course, mixing up the numbers and words on a

page has nothing to do with whether a person is dangerous, and whether he is a responsible firearm user. Although he is able to manage all other aspects of his life except for balancing his checkbook, he would be disarmed by SSA's thoughtless proposal. SSA's Proposed Rulemaking is overbroad to the point of discrimination.

Conclusion

The SSA PR is predicated on a falsehood, that the Gun Control Act's term "mental defective" is an elastic one, a veritable definitional smorgasbord, extending to any "marked subnormal intelligence, or mental illness, incompetency, condition, or disease," as if the ATF definition supplants the statutory definition of the term. The U.S. Court of Appeals for the Eighth Circuit put a damper on that notion, ruling that "the term 'mental defective,' as used in the Gun Control Act does not include mental illness." United States v. Hansel, 474 F.2d 1120, 1123 (8th Cir. 1973). *A fortiori*, the term "mental defective" does not mean "mental impairment" as SSA would prefer.

SSA should not permit itself and this rulemaking process to be used in a political manner, as a weapon to disarm innocent, law-abiding Americans. For the reasons stated above, the Proposed Rulemaking must be withdrawn.

Respectfully submitted,

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