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Comments of Stephen P. Halbrook on Proposed Regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, Docket Number ATF 2021R-08, Factoring Criteria for Firearms With Attached "Stabilizing Braces"

Summary

This concerns ATF's proposed regulations entitled "Factoring Criteria for Firearms With Attached 'Stabilizing Braces,'" 86 F.R. 30826 (June 10, 2021).[2] Congress defined "rifle" in the Gun Control Act ("GCA") and created crimes concerning certain rifles. ATF has no authority to redefine and expand the definition of "rifle" and thereby to create new crimes.

In enacting the Gun Control Act of 1968, Congress rejected making violation of a regulation a crime. Under the Firearm Owners' Protection Act of 1986, ATF's power to issue regulations under Title I of the GCA beame limited "only" to those that are necessary. ATF's power to issue regulations under the NFA does not extend to changing the definitions of firearm types. Any ambiguity in the definition of a firearm must be construed in a narrow manner. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992).

Pistols with braces are handguns, which are in common use by law-abiding citizens. As such, they are protected by the Second Amendment. *District of Columbia v. Heller,* 554 U.S. 570, 629 (2008).

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[2]https://www.govinfo.gov/content/pkg/FR-2021-06-10/pdf/2021-12176.pdf.

I. The Definition of "Rifle" Passed by Congress in Title I of the Gun Control Act Excludes Any Redefinition or Expansion by ATF

A. "Rifle" Has the Exclusive Meaning "As Used in this Chapter"

Title I of the GCA, 18 U.S.C. § 921(a)(7), provides:

> As used in this chapter – . . .
> (7) The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.

Title I further provides: "The term 'short-barreled rifle' means a rifle having one or more barrels less than sixteen inches in length . . . ." § 921(a)(8). It is unlawful for a non-licensee to transport a short-barreled rifle in interstate or foreign commerce except as authorized by the Attorney General. § 922(a)(4). It is also unlawful for a licensee to sell or deliver a short-barreled rifle to a person except as authorized by the Attorney General. § 922(b)(4). Violation of these provisions subjects a person to imprisonment for not more than five years. § 924(a)(1).

As noted, the term "rifle" has the meaning "[a]s used in this chapter." Section 921(a)(7) does *not* begin, "as used in this chapter *and as further defined in regulations*." It is unlawful to do the acts proscribed by §§ 922(a)(4) and (b)(4) with a certain rifle as defined in § 921(a)(7) and (8), not as defined in a regulation. Redefining and expanding the definition of "rifle" would allow ATF to create new crimes in §§ 922(a)(4) and (b)(4). It has no such authority.

B. In Enacting the Gun Control Act of 1968, Congress Rejected Making Violation of a Regulation a Crime

Redefinition and expansion of the term "rifle" by regulation would allow ATF to redefine and expand crimes in the GCA. But in passing the GCA, Congress explicitly rejected a regulatory power that would have allowed just that.

As originally proposed, the bill that became the GCA provided: "Whoever violates any provision of this chapter *or any rule or regulation promulgated thereunder* . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added.) It also stated that "the Secretary may prescribe such rules and regulations as he deems reasonably necessary to carry out the provisions of this chapter." 114 Cong. Rec. 14792 (May 23, 1968).

Senator Robert P. Griffin objected that "if there is one area in which we should not delegate our legislative power, it is in the area of criminal law. If we are concerned about due process, surely then, we should spell out in the law what is a crime." He added that, under the bill, "the Congress would delegate to the Secretary the power to prescribe regulations such as he

deems necessary, and would provide that a violation of such a regulation to be promulgated in the future – no matter what it says – would be a crime." Thus, "this provision violates a fundamental principle of constitutional law and that, as such, should be stricken from the bill." *Id.*

Senator Howard Baker objected to the provision, explaining:

> To permit, on the one hand, the Secretary to prescribe, to promulgate, and to propound regulations which he, and he alone, may propound, which are treated as criminal statutes and are punishable as such, is to me the height of the abdication of our responsibility with respect to the protection of all citizens.
>
> Even more serious is the idea that some future Secretary might change or alter a rule or a regulation in order to form it up into a criminal offense, and thus place in the hands of an executive branch administrative official the authority to fashion and shape a criminal offense to his own personal liking and charge a citizen of the United States with the peril of imprisonment for violation thereof.

Id.

An amendment to the GCA bill was then adopted to delete the provision making it an offense to violate "any rule or regulation promulgated thereunder." *Id*. at 14793.

Yet ATF 2021R-08 would do exactly what Congress rejected when it enacted the GCA in 1968. It would redefine and expand the definition of "rifle," with the consequence that unlawful acts involving short-barreled rifles would be expanded by regulation. ATF has no such authority.

C. In Enacting the Firearm Owner's Protection Act of 1986, Congress Further Reduced ATF's Regulatory Power

In passing the Firearm Owners' Protection Act of 1986 (FOPA), Congress reaffirmed the Second Amendment right to keep and bear arms and found it necessary "to correct existing firearms statutes and enforcement policies." § 1(a), 100 Stat. 449 (1986). It added that "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968," as follows:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.

FOPA, § 1(b).

FOPA reduced ATF's regulatory power as follows: "The Attorney General may prescribe "*only* such rules and regulations as are necessary to carry out the provisions of this chapter" (chapter 44 of title 18). 18 U.S.C. § 926(a). FOPA deleted the prior language that "the Secretary may prescribe such rules and regulations *as he deems reasonably necessary* to carry out the provisions of this chapter." FOPA, § 106.[3] Thus, FOPA "will decrease regulation of law-abiding citizens who choose to own and use firearms for legitimate purposes." Senate Judiciary Committee Rep. 583, 98th Cong., 2d Sess., at 30 (1984).

Under FOPA, "regulations must be necessary as a matter of fact, not merely reasonably necessary as a matter of judgment. The deletion of the term 'reasonably' narrows the boundaries of an agency's discretion, discretion which has been at times exercised in an abusive manner. . . . In addition, the provision ensures that such regulations represent the least restrictive method of carrying out the intent of the law." 131 Cong. Rec., 99th Cong., 1st Sess., at S9171 (July 9, 1985) (remarks of Senator Mattingly).

In sum, the GCA delegated no power to ATF to make violation of a regulation a crime. FOPA delegated ATF power to prescribe "*only* such rules and regulations as are necessary to carry out the provisions of this chapter." ATF 2021R-08 is not only unnecessary to carry out the provisions of chapter 44, but also it conflicts with chapter 44 by expanding and changing the definition of "rifle."

II. The Definition of "Rifle" Passed by Congress in the NFA Excludes Any Redefinition or Expansion by ATF

The National Firearms Act, Title II of the GCA, Chapter 53 of the Internal Revenue Code, 26 U.S.C. § 5845, provides the following definitions that are exclusive:

> For the purpose of this chapter –
>
> (a) Firearm. -The term "firearm" means . . . (3) a rifle having a barrel or barrels of less than 16 inches in length . . . .
>
> (c) Rifle. -The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

Section 5845 does *not* say "for purposes of this chapter" those terms also have additional meanings adopted *in regulations*. That particularly applies to § 5861, which makes certain acts

[3]"The Protection Act requires that regulations issued be only those necessary to enforcement of the Act. (Current law allows any regulations the Secretary thinks reasonably necessary, a broader standard.)." *Id*. at S9125 (remarks of Senator Hatch).

unlawful. For instance, it is unlawful "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . ." § 5861(d). The term "firearm" as used in § 5861 is limited to the definitions in § 5845. It does not have additional meanings invented in ATF regulations. ATF has no authority fabricate new crimes in the NFA.

The NFA is very explicit in the limited instances in which provisions may be spelled out in regulations. For instance, ATF may not redefine "firearm" (or any type of firearm) by regulation, but it may provide by regulation how firearms are registered. Section 5841(c) provides in part: "Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed . . . ."[4] Again, no comparable provision authorizes the redefinition of "firearm" by regulation.

III. ATF Has No Authority to "Improve" on What Congress Enacted or to Create New Crimes Not Enacted by Congress

The proposed rule purports to correct a perceived inadequacy or deficiency in the definitions of "rifle" that Congress enacted in Title I and in the NFA. That is not the role of an administrative agency. This is particularly the case because the definitions enacted by Congress apply to criminal provisions, which ATF has no authority to enlarge.

"We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 328 (2014).[5] Yet like other agencies, ATF is "a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. . . . Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. E.P.A.,* 268 F.3d 1075, 1081-82 (D.C. Cir. 2001). Further, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S.

[4]Regulations are also authorized for specific purposes, not including regulations to "improve" on the definitions set by Congress. E.g., § 5812(a) (for transfer of a firearm, the transferor, transferee, and firearm are "identified in the application form in such manner as the Secretary may by regulations prescribe"); § 5822 (similar for making a firearm); § 5842(a) (firearms to be identified with such "identification as the Secretary may by regulations prescribe").

[5]"Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Texas v. FCC*, 569 U.S. 290, 296 (2013); *id*. at 307 ("Where Congress has established a clear line, the agency cannot go beyond it").

120, 161 (2000).[6]

What Congress had in mind when it defined "rifle" is not for ATF to mold like clay into something different. As the Supreme Court has reiterated, "we have never held that the Government's reading of a criminal statute is entitled to any deference." *United States v. Apel*, 571 U.S. 359, 369 (2014) (also noting that executive branch "views may reflect overly cautious legal advice . . . . Or they may reflect legal error."). *See Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (Attorney General not entitled to deference in interpretation of criminal law); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

Abramski v. United States, 573 U.S. 169, 191 (2014), rejected ATF's interpretation of a GCA provision with this explanation:

> The critical point is that criminal laws are for courts, not for the Government, to construe. . . . We think ATF's old position no more relevant than its current one – which is to say, not relevant at all. Whether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly. . . , a court has an obligation to correct its error.

In sum, Congress enacted the definitions of "rifle" in the GCA, and ATF has no authority to change them.

IV. The Proposed Rule Would Eviscerate the GCA Definition of "Rifle" With the Arbitrary, Made-Up Factoring Criteria

Even if ATF has regulatory power to "clarify" the definitions of firearms set by Congress – which it does not – ATF 2021R-08 proposes a radical departure from the GCA definitions of "rifle." ATF regulations currently define "rifle" exactly as in the two versions in the GCA. 27 C.F.R. §§ 478.11, 479.11. That reflects ATF's acknowledgment since enactment of the GCA in 1968 that Congress, not ATF, defines the types of firearms. The proposed rule would add to this definition:

> *Rifle*. * * * The term shall include any weapon with a rifled barrel equipped with an accessory or component purported to assist the shooter stabilize

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[6] *See Synovus Financial Corp. v. Board of Governors*, 952 F.2d 426, 437 (D.C. Cir. 1991) (even if the purpose of a law "would be thwarted" unless the agency could regulate certain activity, "the language of the amendment limits the Board's authority and we cannot remove that congressionally imposed limitation"); *National Rifle Ass'n v. Brady*, 914 F.2d 475, 483-84 (4th Cir. 1990), *cert. denied* 499 U.S. 959 (1991) (invalidating ATF regulations which contradicted "the plain language of the statute" and rejecting ATF's policy arguments as a matter for Congress).

> the weapon while shooting with one hand, commonly referred to as a "stabilizing brace," that has objective design features and characteristics that facilitate shoulder fire, as indicated on Factoring Criteria for Rifled Barrel Weapons with Accessories commonly referred to as "Stabilizing Braces," ATF Worksheet 4999, published on [date final rule is published].

The Factoring Criteria lists various features with assigned points, too many of which transforms a pistol with a brace into a short-barreled rifle. The Factoring Criteria consists of prerequisites, accessory characteristics, and configuration of weapon, each of which is discussed in the commentary. 86 F.R. 30831-34. The listed features are arbitrarily designated as being characteristics of short-barreled rifles based on conjecture and speculation about how such features may be used. In designating certain features as too long or as too light or heavy, it assumes a fictitious "average person" standard that fails to take account of a person's size and strength.

This complex, mathematical formula is a radical departure from the GCA's definition of a rifle as "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder." The mere possibility that some feature "might" be more or less useful for firing with one's hand or from the shoulder does not mean that it is designed, made, and intended to be fired from the shoulder. That kind of assumption was rejected in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992).

The Supreme Court in *Thompson/Center* was presented with "the question whether a gun manufacturer 'makes' a short-barreled rifle when it packages as a unit a pistol together with a kit containing a shoulder stock and a 21-inch barrel, *permitting the pistol's conversion into* an unregulated long-barreled rifle, or, if the pistol's barrel is left on the gun, *a short-barreled rifle* that is regulated." *Id*. at 507 (emphasis added). The Court noted: "The packaging of pistol and kit has an obvious utility for those who want both a pistol and a regular rifle, and the question is whether *the mere possibility* of their use to assemble a regulated firearm is enough to place their combined packaging within the scope of 'making' one." *Id*. at 513 (emphasis added).

Thompson/Center thus held that, although the unit's parts "permitt[ed]" it to be converted into a short-barreled rifle, the "mere possibility" of such use did not make it such. *Id*. The same reasoning applies here. The weights, configurations, and other features listed in the Factoring Criteria are based on the same "mere possibility" of use test, instead of the statutory requirements of being designed, made, and intended to be fired from the shoulder. "For the definition of 'rifle' requires that it be 'intended to be fired from the shoulder,' § 5845(c) . . . ." *Id*. at 523 (Scalia, J., concurring) (noting that the only intent in the record was to make a rifle with a 21-inch barrel).

Thompson/Center concluded that "we are left with an ambiguous statute," that "the NFA has criminal applications," and that "[i]t is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor." *Id.* at 517. The same reasoning applies here, and it precludes the substitution of the Factoring Criteria for the statutory elements of being

designed, made, and intended to be fired from the shoulder.

Finally, the proposed redefinition of "rifle" conflicts with ATF's regulatory definition of "pistol." The latter provides: "*Pistol.* A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s)." 27 C.F.R. 478.11; 27 C.F.R. 479.11.

It is indisputable that AR-15 type pistols were "originally" designed, made, and intended to fire when held with one hand. That is obviously the case before a brace is installed. Installation of the brace does not change that. Pistols with braces are simply not designed, made, or intended to be fired from the shoulder, and instead were originally designed, made, and intended to be fired when held in one hand.

V. The Rule Would Ban Pistols Protected by the Second Amendment

The Second Amendment guarantees that "the right of the people to keep and bear arms, shall not be infringed." Pistols, including those with braces, are protected by the Second Amendment, inasmuch as "the American people have considered the handgun to be the quintessential self-defense weapon. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *District of Columbia v. Heller,* 554 U.S. 570, 629 (2008). The proposed rule would effectively ban a large number of handguns.

Heller held that the Second Amendment protects arms "in common use" that are "typically possessed by law-abiding citizens for lawful purposes . . . ." *Id*. at 625. ATF acknowledges: "Anecdotal evidence from the manufacturers of the affected 'stabilizing braces' indicates that the manufacturers have sold between 3 million and 7 million 'stabilizing braces' between the years 2013 to 2020 or over the course of eight years." 86 F.R. 30845-46. That certainly meets *Heller*'s common-use test.[7]

Pistols with braces are commonly possessed by law-abiding citizens for lawful purposes. Having acknowledging them to be pistols for many years, ATF may not now ban them as short-barreled rifles.

[7]See *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (200,000 stun guns in civilian hands meet common-use test).