

Written by Mike Hammond  
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*By Mike Hammond, legislative counsel to GOA  
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"You can dress up a pig, but you can't make it sing." Likewise, efforts to paint the McCarthy/Schumer gun control bill as anything other than an anti-gun travesty are going to be just as unsuccessful

There are a lot of (intentional) tricks in this bill. But there are two important things to remember:

\* First, for the first time, this bill would statutorily impose a lifetime gun ban on battle-scarred veterans, troubled teens, and ailing seniors -- based solely on the diagnosis of a psychologist, as opposed to a finding by a court.

\* Second, at the sole discretion of BATFE and the FBI, this bill would compile the largest mega-list of personal information on Americans in existence -- particularly medical and psychological records. But information on the mega-list could not be used to battle terrorism and crime... only to bar Americans from owning guns. And, incidentally, it's the medical records themselves, not just a list of names, that would be turned over under section 102 (b) (1) (C) (iv).

And while the worst aspects of a newly enacted law are not always immediately apparent -- it took 32 years for 922 (g) to be used against veterans -- they will eventually come back to haunt us. And, by then, it will be too late to do anything about it.

### **ANSWERS TO ERRONEOUS STATEMENTS MADE BY ONE "GUN GROUP"**

Recently, another gun group has released a document attacking Gun Owners of America and making a series of misleading statements. Here is a point-by-point rebuttal to that group's statements.

1. MISSTATEMENT: "... these bills [H.R. 2640 and any counterparts] would only enforce current prohibitions [on gun ownership]...."

THE TRUTH: BATFE has long tried to nudge the law to the point where a simple psychiatric diagnosis would put your name on the FBI's "list" and impose a lifetime gun ban on you. But this bill goes even farther in that direction than BATFE could have hoped.

## Point-by-Point Response To Proponents Of HR 2640 - Gun Owners of America

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First, a little history: 18 U.S.C. 922(d) & (g) make you a prohibited person if you are "adjudicated as a mental defective...." But the question of what "adjudicated" means and who has to do the "adjudication" is a battle which has been raging for decades.

When I was working in the Senate (1975-93), the view was that this provision barred gun sales to people who had been judged not guilty by reason of insanity -- or at least had come before a court, in a context where due process was afforded them. But, there has been an effort to extend this not just to the actions of courts, magistrates, etc., but also to any diagnosis by a federal-(or state)-sanctioned psychologist or psychiatrist.

Hence, if a person were --

- a. A vet found by a VA doctor to be suffering from post traumatic stress disorder [PTS],
- b. A kid put on Ritalin under the Individuals with Disabilities Education Act (IDEA), in part because of the increased danger of playground fights;
- c. A senior with Alzheimer's receiving home health care under the Medicare program --

then, under the new interpretation being pushed by anti-gun advocates, that person would be subject to a lifetime gun ban IF the term "adjudication" included a diagnosis, as opposed to just a court order.

The efforts of BATFE to expand its jurisdiction are most fully contained in C.F.R. 478.11, where BATFE regulations provide that adjudication can be made by any "lawful authority." The same regulations also expand the ambit of "mental defective" to include a person who is "a danger to himself or to others; or [who] [l]acks the mental capacity to contract or manage his own affairs...." Furthermore, in a letter dated May 9, 2007, BATFE writes that "danger" means any danger, not simply "imminent" or "substantial" danger...." [Emphasis added]

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Hence, BATFE takes the position that something short of adjudication by a court -- and that alone -- is enough to make an individual a "prohibited person."

In line with this interpretation, the Department of Veterans Affairs, in the final year of the Clinton administration, sent the names of 83,000 veterans to the Instantcheck system, based generally on findings of post-traumatic stress disorder. However, that action caused so much controversy that, to my knowledge, few if any, additional names have been sent, notwithstanding reports that as many as one-quarter to one-third of Iraq veterans suffer from this problem.

So, we have this very broad definition ("diagnosis" = "adjudication") which we have been battling over for more than a decade. And we have BATFE regulations which BATFE has been loathe to enforce, and which don't go quite so far as to say explicitly that a diagnosis is the same as court order, but could be interpreted to do so.

This bill would definitively resolve that debate on the side of anti-gun interpretation even broader than BATFE's, and would make it clear that a psychiatrist's diagnosis would be tantamount to a court order!

It would do this first in section 3(2), which provides BATFE's regulations concerning mental health issues now have the force of statutory law -- and cannot be changed, except by statute.

In addition, section 101(c) (1) (C) is a Trojan Horse which makes this even clearer -- and goes even further. It provides that a person can be made a prohibited person, based "solely on a medical finding of disability" if that finding is (presumably, explicitly or implicitly) based on a finding that the person is a danger to himself or others or is unable to manage his own affairs.

Hence, a VA-, IDEA-, or Medicare-related diagnosis of a veteran, kid or senior, based on a psychiatrist's finding of even microscopic amount of danger (or inability to manage one's own affairs) is enough to put the vet, kid, or senior on the FBI's "list."

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Remember:

- \* According to the May 9 letter, the "danger" can be microscopic in magnitude.
- \* In addition, cases of post-traumatic stress disorder, ADD, or Alzheimer's inherently involve at least some amount of "danger" or incapacity.

2. MISLEADING STATEMENT: "H.R. 2640 would allow some people now unfairly prohibited from owning guns to have their rights restored...."

THE TRUTH: I was personally involved in creating a path for restoring the Second Amendment rights of prohibited persons like Iraq veterans when I shepherded the McClure-Volkmer Firearms Owners' Protection Act of 1986 on behalf of Senator James McClure. Unfortunately, for years, Chuck Schumer has successfully pushed appropriations language which defunded this procedure. And, now, ironically, it is Schumer who is trying to lure us to pass his bill by a "restoration of rights" procedure which is more limited than the one currently on the books -- and which he has consistently blocked.

3. MISSTATEMENT: "... H.R. 2640, introduced by Reps. John Dingell, (D-Mich.), Carolyn McCarthy...."

THE TRUTH: In fact, McCarthy -- not Dingell -- is the chief sponsor of the legislation. Dingell isn't even the chief cosponsor.

4. MISLEADING STATEMENT: "H.R. 2640 would prevent use of federal 'adjudications' that consist only of medical diagnosis without findings that the people involved are dangerous or mentally incompetent."

THE TRUTH: First of all, up until now there has been no statutory basis for making a person a prohibited person on the basis of a diagnosis. So McCarthy isn't doing gun owners any favor by establishing this principle -- and then "generously" carving a small loophole in it.

Second, in the case of veterans with post-traumatic stress disorder, kids with attention deficit disorder, or seniors with Alzheimer's, *de minimis* levels of "danger" or incompetence are almost

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always an underlying issue (and, hence, an implicit finding). And the statement conveniently fails to mention the standard in the BATFE's May 9 letter, starting that "any" danger, no matter how *de minimis*, is sufficient.

Third, note the use of the word "federal." State diagnosis in connection with IDEA, Medicare or the state National Guard would be enough to make veterans, kids, and seniors prohibited persons -- even without meeting the *de minimis* "danger" standard in 101(c) (1) (C), which is applicable only to federal diagnosis, not state diagnosis.

5. MISLEADING STATEMENT: "H.R. 2640 would require all federal agencies that impose mental health adjudications... to provide a process for 'relief from disabilities'...."

THE TRUTH: As we have seen, McClure-Volkmer created a path for restoring the Second Amendment rights of prohibited persons like Iraq veterans. Given that Chuck Schumer has successfully pushed appropriations language which has defunded this procedure since 1992 (without significant opposition), what is it to prevent him from doing the same thing with respect to the new (redundant) procedures? This is like stealing our money and then using it to bargain with us. And, incidentally, why should we reward Schumer for his bad faith in blocking relief from disabilities under McClure-Volkmer by passing his bill in exchange for a restoration-of-rights "chit" which is more limited than the law currently on the books -- and which he has consistently blocked?

6. MISLEADING STATEMENT: "As a practical matter, the mental health disability is the only firearm disqualifier that can never be removed."

THE TRUTH: As a practical matter, this is just not true. States vary widely on the ability to expunge felonies and "Lautenberg misdemeanors," even for crimes which are very old, relatively minor, or regulatory in nature.

7. MISLEADING STATEMENT: "H.R. 2640 would prohibit reporting of mental health adjudications or commitments by federal agencies when those adjudications or commitments have been removed.... H.R. 2640 would also make clear that if a federal adjudication or commitment has expired or been removed, it would no longer bar a person from possessing or receiving firearms...."

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THE TRUTH: This is not exactly true.

First, it's not entirely clear how a diagnosis gets "removed" -- or what incentive any psychologist would have for issuing a written finding that there is not "any danger" whatsoever that a battle-scarred veteran or an ADD kid will never get into even a minor scrape as a result of the condition. Even if that were possible, the process of proving that to a government agency and getting the agency to tell the FBI to take a name off its "list" is certainly something 83,000 veterans currently wrongly classified as prohibited persons are not going to be able to do.

Second, there is language in the bill which could arguably restore the rights of the most dangerous -- but not those who were simply "diagnosed" with PTS, ADD, Alzheimer's, etc. Hence, while someone who was actually intended to be covered by 922(d) & ) (g) and is dangerous and locked up might actually be able to get his rights back by proving that he had been "released and discharged" under 101(c) (1) (C) (A), someone who is just subject to a diagnosis -- and hence can't be "released or discharged" from an institution which never restrained him -- cannot benefit from this provision.

Third, again, note the use of the word "federal." State diagnosis in connection with IDEA, Medicare, or the State National Guard would be enough to make veterans, kids and seniors prohibited person -- but these victims would not be able to restore their rights under sections 101(c) (1) (A), even if a thousand psychologists testified that they were wholly "normal."

8. MISLEADING STATEMENT: "States that receive funding would also need to have a relief from disabilities program for mental adjudications...."

THE TRUTH: As we've already stated twice, McClure-Volkmer created a path for restoring the Second Amendment rights of prohibited persons like Iraq veterans, ADD kids, and seniors with Alzheimer's. Given that Chuck Schumer has successfully pushed appropriations language which has defunded this procedure since 1992 (without significant opposition), it is certainly not beyond the capacity of an appropriations rider to bar even state procedures which are directly or indirectly funded by federal funds under this bill.

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Incidentally, even before Schumer blocked the procedure, the ability to get "relief from disabilities" under section 925(c) was always an expensive long shot. Presumably, this new procedure will be the same.

9. STATEMENT: "... it would give states an incentive to report people [like Seung-Hui Cho]... who were found after a full court hearing to be a danger...."

OBSERVATION: You can debate forever whether the facts of the Cho case bring him under 18 U.S.C. 922(g). But the fact is that, if you want to reach persons adjudicated by court, why don't you just limit the bill to court adjudications, rather than extending it to diagnoses?

10. STATEMENT: "The legislation requires removal of expired, incorrect or otherwise irrelevant records."

OBSERVATION: Subsection (g) of the Statutes-at-Large portion of the Brady Law already requires removal of inaccurate information. However, persons we know who have tried to invoke this section have received a form letter summarily rejecting their requests. If the FBI is willing to ignore subsection (g), why would we expect that a redundant procedure doing the same thing would be effectual?

11. STATEMENT: "The legislation prohibits federal fees for NICS checks."

OBSERVATION: I DRAFTED THE ORIGINAL Smith amendment, which, in modified form, is carried over annually on appropriations bills to achieve this result. (Incidentally, the "gun group" which is currently attacking GOA was, at the time, urging Smith not to force his amendment to a vote, on the assumption that he would lose.) If we really want to make the Smith amendment permanent -- and I suspect there is supermajority support for this -- we can do it on this year's appropriations.

12. STATEMENT: "The legislation requires an audit [by the GAO]...."

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OBSERVATION: A congressman -- particularly a chairman or ranking member -- can order a GAO audit anytime he wants without this legislation.

13. MISLEADING STATEMENT: "Neither current federal law, nor H.R. 2640, would prohibit gun possession by people who have voluntarily sought... counseling...."

THE TRUTH: 27 C.F.R. 478.11 does, at least initially, exclude a person who voluntarily seeks counseling. However, the regulation specifically states that the "voluntariness" can quickly turn to "involuntariness" under a number of circumstances, such as when the individual seeks to withdraw from the "voluntary" arrangement.

Section 101(c) (1) (C) of this bill establishes that a diagnosis based "solely on a medical finding or disability" makes a person a prohibited person under the bill -- and requires that the person's "records" be turned over to the FBI -- if the diagnosis is based on a finding of even a microscopic amount of risk, which will be invariably involved with any PTS veteran, ADD kid, or Alzheimer's senior.

This subparagraph makes no voluntary/involuntary distinction, and will probably trump section 3(2), which statutorily codifies 27 C.F.R. 478.11.

As a result, it is fairly clear that the question of whether treatment is voluntary or involuntary will no longer be relevant under the bill.

### SUMMARY

Agencies invariably use the regulatory process to try to expand their jurisdiction. And it is never a "status quo act" to codify these abusive and expansive regulations -- which only gives an agency a platform to expand further.

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