

Ramifications Of The 9 May BATFE Letter Considering The Current Parameters Of 18 U.S.C. 922(d) (4)

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SUMMARY

In the wake of BATFE's most recent letter of May 9, 2007, spelling out its current position on who is a prohibited person by reason of a mental defect, I have sought to lay out the current state of law. My conclusion is that, particularly in the hands of an anti-gun administration, there is a substantial danger that the term "prohibited person" can include the following:

- * Persons who are ordered by courts to be evaluated by psychologists or psychiatrists in connection with child custody or other proceedings (the so-called "Alec Baldwin proviso");
- * Persons who, in a wide variety of juvenile cases, are evaluated by psychiatrists because of school-related problems, and perhaps put on Ritalin as a result;
- * Seniors receiving home health care under Medicare who are evaluated by professionals for Alzheimer's;
- * Veterans suffering from post-traumatic stress disorder;
- * Persons who are arrested and referred, without due process, for psychiatric evaluation, followed by a finding that the person has no mental or emotional problems or does not require commitment;

* Persons whose psychologists commit them with no due process at all.

18 U.S.C. 922(d)(4) & (g)(4)

18 U.S.C. 922(d)(4) and (g) (4) prohibit the sale, receipt, possession, etc., of a firearm by a person who has been "adjudicated as a mental defective" or has been "committed to any mental institution." (These are two separate grounds for banning guns, although a broad interpretation of who can do the "adjudicating" may also spill over to the question of who can do the "committing." So our analyses of the two will, to some extent, be interwoven.)

As someone who has drafted more gun law than any other living person -- with the possible exception of the draftsmen of the 1968 Act -- I can report the we always assumed that the language addressed persons who were found not guilty of violent crimes by reason of insanity. But suffice it to say that BATFE has consistently worked to expand that definition -- and anti-gun advocates in the media and elsewhere are now working to expand it even more dramatically.

Their ridiculously broad interpretations were not as much of a problem when there was no effective enforcement mechanism. But, with Carolyn McCarthy and Charles Schumer now pushing legislation which would force states and persons receiving treatments to report such information to the FBI, efforts to prevent the intent of statute from being co-opted are of greater concern.

THE CONTEXT

Therefore, we need to examine this language in terms of the political feeding frenzy which is taking place in the wake of the Virginia Tech tragedy:

For example, the commitment portion of the statute applies only to a person who has been committed to a "mental institution." But the governor of Virginia, by the stroke of a pen, used an executive order to "improve upon" that statutory law and turn over to the FBI the names of persons referred for both inpatient and outpatient treatment, whether or not an individual is actually "committed to a mental institution."

With this in mind, this statute has to be looked at in view of partisans' frenetic efforts to prove that it is relevant to Cho Seung-Hui -- notwithstanding the fact that Virginia, which turns over

more psychiatric records to the FBI than any other state, did not feel that he was covered by it... and notwithstanding the fact that Cho was covered by being voluntarily referred to an institution, for evaluation only, and was not subsequently found to be sufficiently dangerous to warrant commitment.

WHO CAN "ADJUDICATE" A PERSON TO BE A "MENTAL DEFECTIVE"?

27 C.F.R. 478.11 states that the adjudication may be made by a "court, board, commission, or other lawful authority."

Anti-gun advocates have tried to create the impression in the media that "other lawful authority" means some judicial or quasi-judicial forum. But nothing in either the regulations or in BATFE's letter of May 9 says or implies this. "Authority" could be:

- * A school psychologist to whom "behaviorally challenged" kids are referred;
- * A psychiatrist commissioned by Medicare to evaluate seniors for Alzheimer's (an interpretation which is reinforced by the fact that such a finding by such a person is legally effectual for qualifying such a person for Alzheimer's grants);
- * A Veteran's Administration psychiatrist who evaluates returning soldiers for post-traumatic stress disorder (large numbers of these names have already been turned over to the FBI by the Clinton administration);
- * A psychologist who, under provisions of law, involuntarily commits a patient with no due process at all.

A fortiori, the same person whose findings are enough to "adjudicate" a person as a "mental defective" are equally capable of being able to legally "commit" the person under the second disqualifying clause, within the terms of the statute.

WHAT TYPE OF COMMITMENT CAN TRIGGER THE COMMITMENT

LANGUAGE?

In the wake of the Virginia Tech shooting by a person who was "committed" "voluntarily" for "evaluation," efforts have been made to argue the Cho was a "prohibited person," and that the voluntary nature of the referral and the fact that the initial referral to the institution was made for evaluation were irrelevant.

The May 9 letter fails to limit the statute from applying to referrals for treatment. And, hence, a hypothetical "Alex Baldwin" who was referred by a court for evaluation in connection with a child custody or similar proceeding would presumably be covered by that interpretation.

BATFE does take the position that the referral must be "involuntary" -- ironically, imposing a requirement not set by the statutory language itself. However, the child, senior, soldier, arrestee, patient, or parent ordered by the school, Medicare, Army, police, psychologist, or court to be evaluated are arguably all acting "involuntarily." Furthermore, BATFE specifies that "voluntary" can be changed to "involuntary" if the person tries to leave.

WHAT TYPE OF FINDING MAKES ONE A "MENTAL DEFECTIVE"?

This archaic language is not likely to be found in any regulation or court order. And, as I started earlier, it was initially thought to apply to persons found not guilty of violent crimes by reason of insanity.

But the BATFE regulations and BATFE's May 9 letter apply it to any person who "[i]s a danger to himself or to others, or [l]acks the mental capacity to contract or manage his own affairs."

Clearly, this broad definition:

* Will automatically apply to anyone with Alzheimer's (meaning gramps will lose his gun collection);

* Will probably apply to troubled kids (in view of teenage suicide);

* Will probably apply to vets (in view of isolated instances of violence by returning soldiers).

Furthermore, under the "better safe than sorry" rule, professionals are increasingly being pushed to adjudicate patients as "dangerous" or "suicidal" in order to avoid blame, in the remote event that something goes wrong. And, in this regard it is significant that BATFE explicitly states that "danger" means any danger, not simply "imminent" or "substantial" danger...." [Emphasis added.]

It is hard to imagine a situation where a psychologist would certify that there is absolutely no danger whatsoever.

TO WHOM MUST A "PROHIBITED PERSON" BE COMMITTED IN ORDER TO LOSE HIS GUN RIGHTS?

Both BATFE and the statute talk about commitment to a mental "institution" -- although BATFE, in its May 9 letter leaves open the possibility that commitment for outpatient treatment would even qualify.

But, whatever BATFE says, it is significant that Virginia, which submits more records on its disabled citizens to the FBI than any other state -- but was unable to stop Cho -- has now taken unilateral action to apply 922 (g) (4) to "outpatient" as well as "inpatient" referrals -- thereby completing the final link on the chain necessary to declare Alec Baldwin a prohibited person.

This means that -- in Virginia and any other state which chooses to do so -- "commitment" can mean simply ordering a person to see a psychologist for evaluation.

Virginia had already worded its state gun forms to disqualify a person who is "incapacitated" (as opposed to a "mental defective") -- a term broader in some respects than BATFE's definition.

But, by the stroke of a pen, governor Kaine also expanded the records which he would turn over to the FBI from persons "committed [to a] "mental institution" to persons "committed" for outpatient treatment. In press accounts, he made it clear that this applied to anyone ordered to see a psychologist or psychiatrist. And, while the first operative sentence of the executive order refers to commitment procedures under section 37.2-817 of Virginia law, subsequent language requiring the Virginia State Police to "request copies of orders both for involuntary inpatient and involuntary outpatient care from the appropriate district court" aren't explicitly tied to the commitment provisions.

WHAT ABOUT DUE PROCESS?

In its May 9 letter, BATFE does, to its credit, emphasize the importance of giving due process to persons whose names are submitted pursuant to (g) (4).

Thus, a person who is entitled to due process -- and who does not receive due process -- may be able to challenge his inclusion in the list of prohibited persons.

But this proviso takes us only so far.

The courts have found that a juvenile has few, in any, due process rights at all. The same is, increasingly, true of persons who are held by police for evaluation. I can say from experience that, in many places, a senior can be declared incompetent in, at most, a "star chamber" *ex parte* proceeding -- and possibly by a simple petition without notifying family or giving the senior an attorney. Finally, a patient who is civilly committed by his own psychologist may also, depending on state law, have limited rights.

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