



ISSUE BRIEF | Center for Law & Justice

HOW THE ADMINISTRATIVE STATE IS BEING USED TO CRIMINALIZE LAWFUL GUN OWNERS

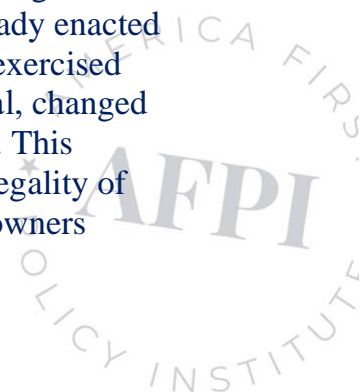
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TOPLINE POINTS

- ★ Without congressional approval, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has reinterpreted existing firearms law, contradicting determinations made by the agency over a decade ago.
- ★ The ATF is abusing its power and the federal rulemaking process to turn millions of law-abiding gun owners into felons.
- ★ If this kind of behavior by federal agencies remains uncontested, the significance of previous victories and future battles to defend the Second Amendment the courts and legislatures will be severely diminished.

INTRODUCTION

Although recent victories for the Second Amendment in the United States Supreme Court, such as *New York State Rifle & Pistol Association v. Bruen* (2022), may give many Americans the impression that the Second Amendment has become immune to attempts by state legislatures and Congress to violate it, the administrative state has been working behind the scenes to criminalize law-abiding gun owners. Over the last several years, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has been bypassing Congress and abusing its power to alter the definitions of firearms within already enacted laws. For decades, gun owners have abided by these definitions as they have exercised their constitutional rights. Most recently, the ATF, without Congress' approval, changed the definitions of firearms found in the National Firearms Act of 1934 (NFA). This change in definitions, via the ATF's new "rule," specifically jeopardizes the legality of "stabilizing braces," a popular accessory commonly used by millions of gun owners nationwide.



The new rule, released in January, establishes subjective and vague criteria the agency will use to determine when a stabilizing brace turns one's pistol into a short-barreled rifle. The possession of a short-barreled rifle would require gun owners to either register their firearm(s) with the federal government, turn them in to the ATF, destroy them, or make significant modifications to them. In states like Rhode Island that ban SBRs, a legal owner of a pistol with a stabilizing brace would instantly become the owner of an illegal SBR with little recourse but to get rid of the weapon simply because of an unjustified definition change by the ATF. In fact, the ATF criteria are sufficiently vague that attaching any of an overwhelming majority of stabilizing braces to a pistol will change the firearm classification to a short-barreled rifle. Gun owners who do not follow politics as closely may remain unaware of the rule and continue to use these stabilizing braces. In doing so, they could go to sleep with one type of firearm and unknowingly wake up with the same firearm that the government then deems subject to greater regulations and restrictions on ownership.

Without a single vote by Congress, the ATF is changing the law and turning millions of innocent, nonviolent, and lawful gun owners into felons and leaving affected gun owners few options besides registration or confiscation of their arms. If this kind of behavior by federal agencies remains uncontested, the significance of previous victories and future battles to defend the Second Amendment in both the courts and legislatures will be severely diminished.

WHERE DID THE REGULATIONS ON SHORT-BARRELED RIFLES COME FROM?

As the first enactment of federal gun control, the National Firearms Act (NFA) of 1934 was marketed to the public as a response to the national crime wave gripping America during the Great Depression. The NFA imposed a tax on the making and transfer of certain types of firearms, including what is known today as short-barreled rifles (SBRs) and short-barreled shotguns (SBSs), as well as machine guns, mufflers, and silencers.

Until the ATF's current attempt at changing definitions, the NFA and Gun Control Act of 1968 defined short-barreled[s] as "a rifle having a barrel less than 16 inches in length" and "a weapon made from a rifle if such weapon as modified has an overall length of fewer than 26 inches or a barrel or barrels of less than 16 inches in length."

Originally, the NFA sought to regulate handguns as stringently as machine guns—the latter being of interest because of their use by organized crime. Sawed-off shotguns were another weapon used by gangsters and common criminals at the time, justifying their inclusion alongside handguns and machine guns on the list of regulated weapons. Although SBSs were among the list of original NFA items, SBRs were only added to an updated version of the bill based on one committee member's misunderstanding of the



bill. This member believed such an addition was necessary in order to prevent traditional hunting rifles from falling under the definition of those firearms affected by the NFA's restrictions. Despite the removal of handguns from the final version of the NFA when enacted, neither SBRs nor SBSs were removed from the NFA and remained under its authority to this day.

WHAT IS A "STABILIZING BRACE", A.K.A. "PISTOL BRACE"?

A stabilizing brace is an accessory that can be attached to the end of a pistol. Stabilizing braces are designed, intended, and made to wrap around a shooter's forearm with the purpose of making use of the pistol more comfortable, accurate, and safe. Most braces are designed with two flaps made of plastic, elastic, or similar material. This design allows the brace to wrap itself around the forearm securely, and the brace is typically located above or next to the shooter's forearm while in use.

Stabilizing braces have significantly grown in popularity among disabled and non-disabled shooters alike in recent years. The ATF [estimates](#) that 3 million stabilizing braces and firearms are equipped with stabilizing braces. Additionally, the [Congressional Research Service](#), in a recent report on stabilizing braces, acknowledged, "unofficial estimates suggest that there are between 10 and 40 million stabilizing braces and similar components already in civilian hands, either purchased as accessories or already attached to firearms made at home or at the factory."

It should be noted that the attachment of a stabilizing brace to a pistol does not increase the lethality of the rounds fired or the pistol's rate of fire. Indeed, the attachment of a stabilizing brace increases the overall weight and size of the pistol it attaches to, making the firearm more difficult to conceal.

In November 2012, the ATF [determined](#) that the attachment of a stabilizing brace to a pistol does not re-classify the firearm as an SBR under the NFA.

In 2014, responding to questions of whether shouldering a pistol with an attached stabilizing brace re-classified it as an SBR, the ATF issued a [letter](#) addressing those concerns. The ATF letter explained that shouldering a pistol with an attached stabilizing brace did not change the design or intent of the stabilizing brace—shouldering the pistol with an attached stabilizing brace would not make the pistol a more regulated SBR or SBS, enforceable under the NFA.

In 2015, however, after four years of gun owners purchasing and attaching stabilizing braces to their pistols, the ATF [contradicted](#) their previous statements in a third letter, asserting that the mere act of shouldering a pistol attached with a stabilizing brace,



despite being designed and intended to be fired with one hand, “redesigns” the pistol into a firearm regulated by the NFA.

Just months after issuing this third letter, the ATF [approved](#) the building of stabilizing braces with the capability to adjust their position/length of pull on handguns to make the use of a brace more comfortable for individuals of all different body types and builds.

In 2017, the ATF issued one more [letter](#), resolving the confusion and legal complications generated by the agency in 2015. The agency walked back the implications of their 2015 letter, that “incidental, sporadic, or situational ‘use’ of an arm-brace” would constitute a “redesign” of a firearm. The gun owners would no longer have concerns that a brace’s contact with one of their shoulders could “redesign” the firearm, changing its classification to an SBR.

WHY DO THESE LETTERS MATTER?

On June 10, 2021, the Department of Justice released a draft of its new rule affecting pistols with stabilizing braces. Titled “Factoring Criteria for Firearms with Attached ‘Stabilizing Braces,’” this rule would contradict previous ATF approval of stabilizing braces and, under new definitions/interpretations of existing law, re-classify pistols with an attached stabilizing brace as SBRs/SBSs. During the comment period following its publication, the first version of this rule received an overwhelmingly negative response. Over 217,000 comments of the roughly 237,000 submitted were opposed—in whole or in part—to what was contained in the proposed rule.

On January 13, 2023, the ATF released the final version of its new rule on stabilizing braces, officially publishing it in the Federal Register on January 31. The first version of the rule, which was open to comments from the public, contained a [worksheet](#) and point system for gun owners, dealers, and manufacturers to determine if their stabilizing braces would re-classify their pistols as SBRs. The point system received heavy criticism from the public for how easily any stabilizing brace could receive four or more points, which is the number required for the pistol and attached brace to be classified as an SBR. It also generated more questions than answers based on the criteria and confusing word choices used throughout the worksheet.

After receiving complaints regarding the ambiguous criteria included in the worksheet and point system, the final rule removed the worksheet and point system. However, the final rule made clear that the ATF and its agents will still use vague, subjective, and ambiguous criteria to determine if a stabilizing brace turns one’s pistol into an SBR. The criteria include weight and/or length of the firearm, length of pull, surface area, “the manufacturer’s direct and indirect marketing and promotional materials indicating the intended use of the weapon,” and “information demonstrating the likely use of the



weapon in the general community.” To be clear, nothing in the ATF’s criteria clearly establishes an existing stabilizing brace—not even a hypothetical version—that would *not* re-classify a “pistol” as an SBR.

WHAT DOES THIS RULE MEAN FOR LAWFUL GUN OWNERS?

The ATF’s final rule and vague criteria will result in nearly, if not all, law-abiding gun owners with a pistol and attached stabilizing brace becoming illegal possessors of a firearm regulated under the NFA.

Starting January 31, 2023, all affected gun owners with a pistol, and attached stabilizing brace will be given 120 days to choose one of the following options: modify their pistol either by removing the short barrel and attaching a barrel at least 16 inches long, or “permanently remove[ing] and dispose[ing] of, or alter[ing] the ‘stabilizing brace’ such that it cannot be reattached”; undergo the process of registering the affected firearm(s) under the NFA, including giving the ATF your name, address, and fingerprints; turn the firearm(s) into the ATF, or; destroy the firearm(s). Based on this rule, failure of an individual to comply would result in a violation of the NFA and, upon conviction, being sentenced to imprisonment for not more than 10 years or fined not more than \$250,000. For individuals who own one or more pistols with stabilizing braces in a state with stringent gun laws—for example, a state that bans ownership of SBRs and/or what is commonly labeled “assault weapons”—their options for complying with the rule will be more limited. Gun owners found in those situations may only have the option to destroy the firearm or turn it in to the ATF.

Today, millions of peaceful, law-abiding owners of these stabilizing braces on one or several of their pistols will likely not become aware of the new rule when it goes into effect. After May 31, 2023, many could unknowingly become felons in the eyes of the federal government by mere bureaucratic (or “administrative”) fiat.

Neither the ATF nor any other agency of the federal government has the authority to usurp Congress’s lawmaking powers, changing what the existing law means and giving innocent Americans the binary choice of becoming a criminal or submitting to their unconstitutional demands.

