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# The Complex Interplay Between the Controlled Substances Act & the Gun Control Act

Dru Stevenson – Feb. 22, 2020



# Agenda

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- **Introduction – 18 U.S.C. §922(g)(3)**
- **Incorporation: “Unlawful User of or Addicted to Any Controlled Substance”**
- **Legal Marijuana & Gun Possession**
- **Alcohol: The Missing Piece of This Puzzle**
- **Conclusion**



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# Introduction

18 U.S.C. §922(g) “Prohibitors”



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**18 U.S.C. §922(g)(3)**

**Incorporation:**

**“Unlawful user of or addicted to  
any controlled substance”**

# Ex Ante: Users & NICS Background Checks



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## **14,200 “user” background check denials in 2019**

- 13.7% of all denials
- Most face no other repercussions & buy from private party

## **67,032 active records in NICS for “unlawful drug users/addicts” (2019)**

- Tens of thousands being added each year
  - Historically under-reported by local police, courts, rehab
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# Ex Post Enforcement

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## - Charges for violations of 922(g)(3) -

- Almost 200 prosecutions/yr as “lead charge” (increasing)
- Usually added to felon-in-possession or drug possession charges
- Sentencing enhancement for drug charges, etc.
- Substitute charge, “plea to lesser charge,” prosecutorial leverage

# ATF Regulatory Definition



## “Unlawful User or Addicted to Any Controlled Substance”

**T.D. ATF-391 & 27 C.F.R. 478.11 2019**

- “A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance;” and
- “any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.”

# ATF Regulatory Definition

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## “Unlawful User or Addicted to Any Controlled Substance”

T.D. ATF-391 & 27 C.F.R. 478.11 2019

- Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred **recently enough** to indicate that the individual is **actively engaged** in such conduct.



# ATF Regulatory Definition

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## “Unlawful User or Addicted to Any Controlled Substance”

T.D. ATF-391 & 27 C.F.R. 478.11 2019

- A person may be an unlawful current user of a controlled substance even though the substance is **not being used at the precise time** the person seeks to acquire a firearm or receives or possesses a firearm.

# ATF Regulatory Definition

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**“An inference of current use may be drawn...”**

- **conviction** for use or possession of a controlled substance within the **past year**
- **multiple arrests** for such offenses within the **past five years** if the most recent arrest occurred within the past year
- persons found through a **drug test** to use a controlled substance unlawfully, provided that the test was administered within the **past year**

# Constitutionality of §922(g)(3)

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- **Every** Circuit Court that has considered the issue has upheld the statute under Second Amendment intermediate scrutiny
- ***Heller* decision** stated that longstanding prohibitions like this were still valid
- Survives void-for-vagueness charges with judicial gloss of “temporal nexus”



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# Legal Marijuana & Gun Possession

# ATF Guidance Documents

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**Federal law still prohibits firearm possession for medical marijuana users or other state-legal users**

- **2011 Guidance Letter**
- **2018 “Sessions Memorandum” purported to rescind 2011 ltr**
- **2019 AG Barr Memo creates more confusion**



# Gun Permits & Licenses for Lawful Marijuana Users

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- *Willis v. Winters*, 253 P.3d 1058 (Ore. 2011)(permit must issue)
- *Bradley v. United States*, 402 F.Supp.3d 398 (N.D. Ohio, Aug. 14, 2019)(pre-registration challenge – unripe + no 2<sup>nd</sup> Amendment violation)
- *United States v. Bellamy*, 682 Fed.Appx. 447 (6<sup>th</sup> Cir. 2017)(unpublished)(§922(g)(3) applied even if defendant held a state-issued medical marijuana card)



# Medical Marijuana Registries & NICS

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- HIPAA & other privacy concerns, lack of reporting, uncertainty
- Analogous (?) express regulatory provision that provides for the disclosure for mental health concerns, permitting reporting of “protected health information for purposes of reporting to the National Instant Criminal Background Check System the identity of an individual who is prohibited from possessing a firearm under 18 U.S.C. 922(g)(4).”



# Gun Permits & Licenses for Lawful Marijuana Users

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# Alcohol: The Missing Piece of This Puzzle

# No Alcohol Abuse Prohibitor



- Federal law ignores alcohol abuse in its list of prohibiting factors in §922(g).
- California, Ohio, PA, and some other states have firearm prohibitions for DUI offenders, or “while intoxicated”
- *State v. Weber*, 132 N.E.3d 1140 (Ohio 2019).
- *Holloway v. Attorney Gen. United States*, 948 F.3d 164 (3<sup>rd</sup> Cir. 2020)(upheld the statute’s constitutional validity by holding that a DUI is considered a “serious crime.”)



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# Conclusion