Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Does ATF's Bump-Stock Ban Comport with the APA?

May 8, 2019

Congressional interest in regulating "bump stock" devices grew after authorities discovered that the perpetrator of the October 2017 mass shooting in Las Vegas had attached to his semiautomatic firearms an accessory that allowed his rifles to effectively mimic the firing capabilities of a fully automatic weapon (e.g., a machine gun). But to date, federal legislation has not been enacted that expressly regulates bump stocks. At the administrative level, though, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) banned these devices—effective March 26, 2019—in a final rule published in the *Federal Register* 90 days earlier on December 26, 2018. ATF achieved this ban by classifying bump-stock devices as "machineguns," as that term is defined in the National Firearms Act of 1934 (NFA) and the Gun Control Act of 1968 (GCA). Several bump-stock owners and advocates challenged ATF's rule in multiple lawsuits, arguing, among other things, that ATF promulgated the rule in violation of the Administrative Procedure Act (APA). In one of those lawsuits, *Guedes v. ATF*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld a lower court ruling that declined to preliminarily enjoin the rule from taking effect. This Sidebar explains the statutory framework for regulating machine guns, discusses ATF's final rule, and examines the APA-related litigation.

NFA & GCA Regulation of Machine Guns: Machine guns are separately regulated by the NFA and the GCA, but both statutes rely on the definition found in the NFA:

> The term 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, **automatically** more than one shot, without manual reloading, **by a single function of the trigger**. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and **any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person**.

The NFA imposes a tax on the importation, manufacture, and transfer of a machine gun, and also requires every machine gun manufacturer, dealer, importer, and owner to register with the Attorney General. The GCA, as amended by the Firearms Owners' Protection Act (FOPA), makes it unlawful to transfer or possess a machine gun subject to two exceptions: (1) transfers to or from, or possession by (or under the authority of) federal or state authorities; and (2) the transfer or possession of a machine gun lawfully

Congressional Research Service
https://crsreports.congress.gov
LSB10296

possessed before the effective date of the act (May 19, 1986). FOPA's machine-gun ban is codified at 18 U.S.C. § 922(o).

Before ATF promulgated this final rule, the agency via a policy statement had interpreted the phrase "automatically ... by a single function of the trigger" in the NFA's definition of "machinegun" to cover devices enabling a weapon to shoot "more than one shot, without manual reloading, by a single pull of the trigger." Still, before issuing the final rule, ATF had not treated bump-stock devices as a homogenous category of firearm accessory. And in previous determinations (in response to classification requests) as to whether a bump stock converts a semi-automatic firearm into a machinegun, ATF had reached different conclusions for different bump-stock devices based on how each device uniquely functioned.

What is a Bump Stock Covered under the Final Rule?: In the final rule, ATF reaches various "bump-stock-type-devices," including "'bump fire' stocks, slide-fire devices, and devices with certain similar characteristics." Regardless of the nomenclature used to describe the particular item, ATF characterizes devices covered by the rule as replacing a rifle's standard stock and allowing the rifle to slide back and forth rapidly by harnessing the energy from the firearm's recoil. The energy is harnessed either through an internal spring or by the shooter maintaining constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip, and constant backward pressure on the device's extension ledge with the shooter's trigger finger.

ATF Final Rule: ATF's final rule construed two terms in the NFA and GCA's definition of "machinegun": (1) "automatically," and (2) "single function of the trigger." ATF understood "automatically" to mean "functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger." ATF, in turn, defined "single function of the trigger" as "a single pull of the trigger and analogous motions." So defined, a bump-stock device is a machine gun because it "allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." Moreover, ATF determined that bump-stock devices governed by the rule were created *after* FOPA's effective date. Therefore, because the statutory definition of machine gun, as interpreted by ATF, encompasses bump-stock devices, those firearm accessories can no longer be possessed or transferred.

Guedes v. ATF: After ATF issued the final rule, several bump-stock owners and organizational advocates sued to block it from taking effect. They contended, among other things, that ATF lacked statutory authority to promulgate the final rule and, thus, violated the APA. The U.S. District Court for the District of Columbia concluded in *Guedes v. ATF* that the plaintiffs were unlikely to succeed on their APA claims and, thus, declined to preliminarily enjoin the final rule. The D.C. Circuit, in a split, per curiam opinion, affirmed.

The D.C. Circuit's APA ruling hinged on its application of the administrative law doctrine commonly called "*Chevron* deference," in reference to the Supreme Court opinion responsible for its genesis, *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel*. In that case, the Supreme Court announced a two-part framework for evaluating an agency's interpretation of a statute. In particular, *Chevron* deference applies to "legislative rules," under the assumption that if a statute administered by that agency is ambiguous, Congress implicitly delegated interpretive authority to the agency. At step one, courts determine whether the agency-administered statute is ambiguous. If so, courts proceed to step two, asking whether the agency's statutory interpretation is reasonable. Courts will uphold (and thus defer to) a reasonable agency interpretation. A "legislative rule" is "[a]n agency action that purports to impose legally binding obligations or prohibitions on regulated parties — and that would be the basis for an enforcement action for violations of those obligations or requirements." In contrast, courts do not apply *Chevron* deference to "interpretive rules," which "merely interpret[] a prior statute or regulation, and does

not itself purport to impose new obligations or prohibitions or requirements on regulated parties." In that case, courts defer to an agency's interpretation "only to the extent it is persuasive."

None of the parties advocated for the court to apply *Chevron* deference, but the D.C. Circuit nevertheless concluded the doctrine was applicable. The parties contended that *Chevron* deference was inapplicable to the bump-stock rule on the grounds that the rule is not a "legislative rule," and, further, that it would be inappropriate to apply *Chevron* to agency interpretation of criminal statutes. The plaintiffs also argued that the government had waived the applicability of *Chevron*.

But the D.C. Circuit concluded that the bump-stock rule is a legislative rule to which *Chevron* analysis applies because it "unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners." The court reasoned that rule does this by newly prohibiting bump-stock possession once the rule became effective and specifying how persons can avoid violating 18 U.S.C. § 922(o). Further, if the rule "is merely interpretive, it conveys the government's understanding that bump-stock devices have always been machine guns under the statute," which, the court noted, "would mean that bump-stock owners have been committing a felony for the entire time they have possessed the devices." But that understanding is inconsistent with the rule itself because, the court explained, the rule declares that a person "in possession of a bumpstock type device *is not acting unlawfully* unless they fail to relinquish or destroy their device *after* the effective date of this regulation." Next the court concluded that *Chevron* deference can be applied to agency interpretations of statutes with criminal law implications (an issue that has been the subject of some judicial dispute). In so doing, the appellate court reasoned that the Supreme Court has applied *Chevron* deference to agency interpretations of statute with criminal law implications, including in the original *Chevron* case. The court further pointed to federal securities laws, and stated that "[t]he SEC's interpretation of those laws regularly receives *Chevron* treatment, even though their violation often triggers criminal liability." As for the plaintiffs' argument that the government had waived application of *Chevron* deference, that court rejected that, too. Waiver, as relevant here, occurs when a party affirmatively decides not to invoke a right or privilege, like some legal defenses; courts will not consider waived legal doctrines, even if they would otherwise apply. The court concluded that "*Chevron* is not a 'right' or 'privilege' belonging to a litigant," but, rather, a legal doctrine directing courts how to construe statutes.

Next, the D.C. Circuit applied the two-step *Chevron* framework to ATF's rule and concluded that (1) the two terms are ambiguous, and (2) ATF reasonably interpreted those terms. As for the phrase "single function of the trigger," the court decided that the term is capable of two interpretations, neither of which is compelled. Under one interpretation, which would exclude bump stocks, the term would mean "a mechanical act of the trigger." But under another interpretation, which would encompass bump stocks, the term would mean "a single pull of the trigger from the perspective of the shooter." Thus, the court concluded that, "[i]n light of those competing, available interpretations, the statute contains a 'gap for the agency to fill.'" The court then held that ATF's reading is permissible, commenting that ATF "is better equipped than we are to make the pivotal policy choice between a mechanism-focused and shooter-focused understanding of 'function of the trigger.'"

For the term "automatically," the court similarly concluded that the term is capable of multiple interpretations. The court opined that the term can include *some* human involvement, rejecting the plaintiffs' contention that "a gun cannot be said to fire 'automatically' if it requires both a single pull of the trigger *and* constant pressure on the gun's barrel, as a bump-stock device requires." The court reasoned that a single pull of the trigger combined with constant pressure on the trigger is "a quite common feature of weapons that indisputably qualify as machineguns." The court next concluded that ATF's construction of "automatically" is permissible because, by also requiring a "self-acting or self-regulating mechanism," the definition "demands a significant degree of autonomy from the weapon without mandating a firing mechanism that is completely autonomous."

Separately, the plaintiffs also argued that the rule is arbitrary and capricious in violation of the APA. The plaintiffs contended, for instance, that the rule "is the product of 'naked political desire,'" averring that ATF drafted the rule in response to the President's urging after the Las Vegas shooting. The court agreed that the rule arose from political considerations but noted "that is hardly a reason to conclude that the Rule is arbitrary." A politically motivated policy may stand, the court said, so long as the agency still engaged in reasoned decision making. And here, the court concluded, ATF articulated a satisfactory explanation for the final rule and, thus, did not act in an arbitrary and capricious manner.

Judge Henderson dissented on two grounds. First, she would have held that *Chevron* cannot be applied to criminal statutes. The Supreme Court has, at times, declined to defer to an agency interpretation under *Chevron* when the case involves a policy decision of great "economic and political magnitude." Judge Henderson would place ambiguous criminal statutes into that category of decisions and apply *Chevron* "only if the Congress expressly delegates its lawmaking responsibility." And, in her view, Congress's delegation to ATF of general rulemaking power is an insufficient delegation. Second, Judge Henderson opined that ATF's interpretation of the term "automatically" impermissibly expands the definition of machinegun as defined in the NFA and GCA. "The definition of 'machinegun,'" Judge Henderson asserted, "does not include a firearm that shoots more than one round 'automatically' by a single pull of the trigger **AND THEN SOME** (that is, by 'constant forward pressure with the non-trigger hand.')." Thus, because ATF's rule authorizes more human activity than a single pull of the trigger for a weapon to fire "automatically," Judge Henderson would have held that the rule unlawfully expands the statutory definition of machine gun.

***Aposhian v. Barr*:** Lower courts elsewhere have also refused to enjoin ATF's final rule. In *Aposhian v. Barr*, for instance, a federal district court in Utah declined to preliminarily enjoin ATF's bump-stock rule on APA grounds, and the court did so without applying the deferential *Chevron* framework. In contrast to the D.C. Circuit, the Utah district court concluded that ATF's rule is interpretive, not legislative. Still, the district court concluded that "single pull of the trigger" is the best interpretation of the statutory term "single function of the trigger." Like the D.C. Circuit, the district court adopted the interpretation from the shooter's perspective, opining that "it makes little sense that Congress would have zeroed in on the mechanistic movement of the trigger in seeking to regulate automatic weapons," given that "[t]he ill sought to be captured by this definition was the ability to drastically increase a weapon's rate of fire, not the precise mechanism by which that capability is achieved." In evaluating the term "automatically" the district court concluded that ATF's rule is the best interpretation of the statute because it is "consistent with its ordinary meaning at the time of the NFA's enactment and accords with judicial interpretation of that language."

Issues for Congress: Notwithstanding ATF's final rule, there is still room for congressional action if Congress deems it appropriate to legislatively restrict public access to bump stocks. Given ATF's (and some federal courts') conclusion that terms "automatically" and "single function of the trigger" are ambiguous, some lawmakers might wish to codify ATF's interpretation. Additionally, even if Congress agrees with ATF's interpretation, codifying the bump-stock ban through legislation would eliminate challenges to the rulemaking process, like those in *Guedes* and *Aposhian*. Alternatively, lawmakers who disagree with ATF's interpretation of existing law could seek to supersede it through legislation.

At least one measure has been introduced in the 116th Congress: The SAFER Now Act (H.R. 282) proposes, among other things, to ban bump-stock devices and, going a step further, any other firearm accessory that "is designed or functions to accelerate the rate of fire of a semiautomatic rifle but not convert the semiautomatic rifle into a machinegun."

Author Information

Sarah Herman Peck
Legislative Attorney

Disclaimer