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Legal Sidebar

Is ATF's Bump-Stock Ban Lawful? The Supreme Court Will Review

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Congressional interest in "bump-stock" devices—accessories that allow semiautomatic rifles effectively to mimic the firing capabilities of a fully automatic weapon—grew after authorities discovered that the perpetrator of the October 2017 mass shooting in Las Vegas had attached such devices to several of his semiautomatic firearms. Federal legislation does not expressly regulate bump stocks. At the administrative level, 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*. ATF accomplished 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 a series of decisions between 2019 and 2022, the U.S. Courts of Appeals for the Tenth and D.C. Circuits rejected APA challenges to the rule, and the Sixth Circuit divided evenly in a case that resulted in affirmance of a district court ruling upholding the rule. In contrast, on January 6, 2023, the Fifth Circuit, sitting en banc, held that the rule violates the APA and that an act of Congress is required to prohibit bump stocks, creating a circuit split with the earlier decisions. The government sought Supreme Court review of the Fifth Circuit decision. On November 3, 2023, the Supreme Court granted review, agreeing to resolve whether a bump-stock device is a "machinegun" as defined by the NFA at 26 U.S.C. § 5845(b). This Sidebar explains the statutory framework for regulating machineguns; discusses ATF's final rule; examines the APA-related litigation that has resulted in a circuit split and led to Supreme Court review; and offers considerations for Congress.

Statutory Regulation of Machineguns

Machineguns are separately regulated by the NFA and the GCA. 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

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> 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 various taxes on the importation, manufacture, and transfer of covered firearms like machineguns and requires registration with the Attorney General. The GCA, as amended by the Firearms Owners' Protection Act (FOPA), makes it unlawful to transfer or possess a machinegun 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 machinegun lawfully possessed before the effective date of the act (May 19, 1986). FOPA's machinegun ban is codified at 18 U.S.C. § 922(o).

Before ATF promulgated its final rule regarding bump stocks, the agency had interpreted via a policy statement 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 single, homogenous category of firearm accessory. Rather, in previous determinations responding 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.

2018 ATF Final Rule

In its final rule, ATF examined various "bump-stock-type-devices," including "'bump fire' stocks, slide-fire devices, and devices with certain similar characteristics." ATF characterized covered devices 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.

In concluding that bump-stock-type devices are machineguns, 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 explained in the final rule that it understood "'automatically' as it modifies 'shoots, is designed to shoot or can be readily restored to shoot'" 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, ATF concluded that a bump-stock device is a machinegun 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." ATF also determined that bump-stock devices governed by the rule were created *after* FOPA's effective date. Therefore, because the statutory definition of machinegun, as interpreted by ATF, encompasses bump-stock devices, those firearm accessories could no longer be possessed or transferred after the rule's effective date.

Prior Appellate Caselaw Regarding ATF's Bump-Stock Rule

After ATF issued the final rule, several bump-stock owners and organizational advocates filed lawsuits to block the rule from taking effect. They contended that ATF lacked statutory authority to promulgate the final rule and, thus, violated the APA. Between 2019 and 2022, the U.S. Courts of Appeals for the Sixth, Tenth, and D.C. Circuits considered APA challenges filed in their respective jurisdictions. These APA rulings mostly hinged on the circuit courts' 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 in a "legislative rule" of a statute it administers. At step one, courts determine whether an agency-administered statute is ambiguous. If so, courts proceed to step two, asking whether the agency's statutory interpretation is reasonable. Courts

uphold (and thus defer to) a reasonable agency interpretation, even if it is not necessarily the best or most reasonable available interpretation of the statute.

In the 2019 case *Guedes v. ATF*, a D.C. Circuit panel applied these principles to uphold ATF's bump-stock rule in a divided decision on the APA issue. The panel's majority concluded that the bump-stock rule is a legislative rule to which *Chevron* analysis applies, determining in the process 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 previously applied *Chevron* deference to agency interpretations of statutes with criminal law implications, including in the original *Chevron* case and in the federal securities law context.

Next, the D.C. Circuit applied the two-step *Chevron* framework to ATF's rule and concluded that (1) the two terms at issue ("automatically" and "single function of the trigger") 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." Under a different 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."

Following *Guedes*, the Tenth Circuit issued a similar ruling upholding ATF's bump-stock rule. Additionally, after a divided panel of the Sixth Circuit held that *Chevron* deference did not apply and that the statutory definition of machinegun does not include bump stocks, the Sixth Circuit granted rehearing en banc, vacated the panel opinion, and evenly divided on the merits. This division resulted in the affirmance of the district court's ruling upholding the rule. The en banc opinions in support of affirmance in that case determined that ATF's interpretation of "machinegun" was entitled to *Chevron* deference and that even without such agency deference, the rule set out the best interpretation of the statute using ordinary tools of statutory construction. The D.C. Circuit revisited the bump-stock rule in 2022 in *Guedes II* (having been denied a preliminary injunction, the plaintiffs in *Guedes* then appealed from the district court's grant of summary judgment in favor of ATF) and this time a panel upheld the rule without relying on the *Chevron* framework. The court concluded there was "no need to decide what deference, if any, [the] regulation should receive" because "the agency's interpretation of the statute is the best one," meaning the rule was lawful. The full D.C. Circuit subsequently voted not to hear the case en banc.

Circuit Split

On January 6, 2023, the en banc Fifth Circuit in *Cargill v. Garland* held that ATF's bump-stock rule is unlawful, splitting with the circuits that declined to invalidate or enjoin the rule. Twelve of the sixteen Fifth Circuit judges determined that, even assuming the relevant statutory terms were ambiguous, the rule of lenity—a canon of construction under which ambiguous criminal statutes are interpreted in favor of the

defendant—would apply, meaning that the definition of "machinegun" should be construed narrowly to exclude the bump-stock devices at issue. In disagreement with the 2019 *Guedes* panel's conclusion, the en banc majority further reasoned that *Chevron* deference does not apply to agency interpretations of statutes (including ATF's bump-stock rule) with criminal law implications, adding that legal obligations carrying criminal liability should come in the form of a statute from Congress, and not a rule from an administrative agency.

Eight judges also would have held that the statutory terms "automatically" and "single function of the trigger" are unambiguous, that they do not warrant *Chevron* deference, and that they do not by their own terms cover the devices at issue. If the terms were ambiguous, the judges asserted that *Chevron* deference still would be unavailable because the government waived the argument, the rule imposes criminal penalties, and the rule is inconsistent with ATF's prior treatment of bump stocks. Whereas their sister courts viewed a user-focused perspective as an available interpretation of the statutory language supporting ATF's rule, these judges focused on what they viewed as the statute's unambiguous reference to "the movement of the trigger itself, and not the movement of a trigger finger." So oriented, the judges described the function of the devices at issue: an individual pulls the trigger, leading to the firing of a single shot; subsequent shots are possible only when the user "maintain[s] manual, forward pressure on the barrel and manual, backward pressure on the trigger ledge." According to the judges, multiple shots from the bump-stock devices at issue depend on additional action and thus are not "automatic"; moreover, multiple shots still require multiple functions of the trigger itself, not a "single function" as the statute requires.

Three judges dissented. The judges objected to the majority's application of the rule of lenity, arguing that the majority impermissibly lowered the bar for when the rule should apply and thereby usurped the power of Congress to define federal crimes.

On April 25, 2023, a panel of the Sixth Circuit joined the Fifth Circuit in holding that bump stocks are not machineguns under the NFA. While acknowledging that the en banc Sixth Circuit was "split down the middle" on the issue, the Sixth Circuit panel determined that ATF's definition was not entitled to *Chevron* deference due to the predominantly criminal scope of the statutory scheme, among other things; that the statutory definition of machinegun was ambiguous in the context of bump stocks; and that the rule of lenity weighed against reading the definition to encompass bump stocks. The panel concluded that "[b]ecause the relevant statutory scheme does not clearly and unambiguously prohibit bump stocks," it was "bound to construe the statute in [the defendant's] favor."

Supreme Court Review

Following the Fifth Circuit's ruling in *Cargill*, the government filed a petition for a writ of certiorari. The government argued that Supreme Court involvement was warranted because "the Fifth Circuit's decision materially alters the legal landscape by creating an acknowledged circuit split," and a decision from the Court would "restore uniformity to federal law." The government also asserted that the Fifth Circuit case is "exceptionally important for federal law enforcement and public safety" in that it "is likely to mean that manufacturers within the Fifth Circuit will be able to make and sell bump stocks to individuals without background checks and without registering or serializing the devices," among other things.

On November 3, 2023, the Supreme Court granted the petition, agreeing to resolve whether a bump stock device is a "machinegun" within the meaning of 26 U.S.C. § 5845(b). A decision is expected by the end of the Court's current term.

Considerations for Congress

If Congress disagrees with an eventual Supreme Court interpretation of 26 U.S.C. § 5845(b), it may seek to supersede that decision through legislation amending the statute to clarify whether bump-stock devices are covered by the definition of a "machinegun." Congress could opt to codify ATF's interpretation of the relevant statutory language or could expressly exclude bump stocks from the definition.

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