

## Comments to the Bureau of Alcohol, Tobacco, Firearms and Explosives

*In the Matter of*

The Language of the National Firearms Act and the Definition of “Machinegun”  
83 FR 13442

June 21, 2018

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### The ATF’s Interpretive Reversal Is Based on Political Expediency, Not Statutory Ambiguity

The National Firearms Act of 1934 (NFA), as well as the Gun Control Act of 1968 (GCA), include the same, longstanding definition of a machine gun: “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.” Between 2008 and 2017, the Bush and Obama administrations determined in a series of classification decisions that “bump-stock type devices were not machine guns.”<sup>1</sup> The Trump administration reversed course and determined that the prior classifications “do[] not reflect the best interpretation of the term ‘machinegun’ under the GCA and NFA.”<sup>2</sup> Indeed, the rulemaking attacks the prior classifications for not “includ[ing] extensive legal analysis relating to the definition of ‘machinegun.’”<sup>3</sup>

What prompted this reversal? The proposed rulemaking reveals that the impetus for this change in position was not an organic review of agency policy. Instead, the change was triggered by public outrage over the October 2017 mass killing in Las Vegas, in which the shooter used a bump-stock-type device:

Following the mass shooting in Las Vegas on October 1, 2017, ATF has received correspondence from members of the United States Senate and the United States House of Representatives, as well as nongovernmental organizations, requesting that ATF examine its past classifications and determine whether bump-stock-type devices currently on the market constitute machineguns under the statutory definition. *In response*, on December 26, 2017, as an initial step in the process of promulgating a federal regulation interpreting the definition of “machinegun” with respect to bump- stock-type devices, ATF published an Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register.<sup>4</sup>

ATF admits that the rulemaking was commenced “in response” from outside pressure. The proposed rule recounts the president’s role in this reversal:

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<sup>1</sup> 82 Fed. Reg. at 91930.

<sup>2</sup> 83 Fed. Reg. at 13443.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 13446.

On February 20, 2018, President Trump issued a memorandum to Attorney General Sessions concerning “bump fire” stocks and similar devices. 83 FR 7949. The memorandum noted that the Department of Justice had already “started the process of promulgating a Federal regulation interpreting the definition of ‘machinegun’ under Federal law to clarify whether certain bump stock type devices should be illegal.” *Id.* at 7949. The President then directed the Department of Justice, working within established legal protocols, “to dedicate all available resources to complete the review of the comments received [in response to the ANPRM], and, as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.” *Id.* Publication of this NPRM is the next step in the process of promulgating such a rule.<sup>5</sup>

That process, however, was a *fait accompli*. On February 28, 2018, the president hosted a meeting with members of Congress to discuss school and community safety. Senator John Cornyn, the majority whip, suggested that Congress could pass legislation “on a bipartisan basis” to deal with “the bump stock issue.”<sup>6</sup> President Trump interjected that there was no need to consider legislation because he would deal with bump stocks through executive action:

And I’m going to write that out. Because we can do that with an executive order. I’m going to write the bump stock; essentially, write it out. So you won’t have to worry about bump stock. Shortly, that will be gone. We can focus on other things. Frankly, I don’t even know if it would be good in this bill. It’s nicer to have a separate piece of paper where it’s gone. And we’ll have that done pretty quickly. They’re working on it right now, the lawyers.<sup>7</sup>

Later during the meeting, Rep. Steve Scalise, the House majority whip, proposed other gun-control measures that Congress could vote on. Again, the president reiterated that there was no need to legislate on bump stocks, because he would prohibit them through executive action:

And don’t worry about bump stock, we’re getting rid of it, where it’ll be out. I mean, you don’t have to complicate the bill by adding another two paragraphs. We’re getting rid of it. I’ll do that myself because I’m able to. Fortunately, we’re able to do that without going through Congress.<sup>8</sup>

The president left little doubt how his administration would “clarify” the NFA and GCA. Yet, according to press accounts, there was internal dissent about whether ATF had the statutory authority to prohibit bump stocks. “[P]rivate and public comments from Justice Department officials following the October shooting,” the *New York Times* reported, “suggest there is little appetite within the agency to regulate bump stocks, regardless of pressure from the Trump administration.”<sup>9</sup> Reportedly, Justice Department officials told Senate Judiciary Committee staff that the government “would not be able to take devices off shelves without new legislation from

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<sup>5</sup> *Id.*

<sup>6</sup> Remarks by President Trump, Vice President Pence, and Bipartisan Members of Congress in Meeting on School and Community Safety (Feb. 28, 2018), <https://bit.ly/2M6Mjvz>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Ali Watkins, *Despite Internal Review, Justice Department Officials Say Congress Needs to Act on Bump Stocks*, N.Y. Times, Dec. 21, 2017, <https://nyti.ms/2EFFpy9>.

Congress.”<sup>10</sup> Likewise, the ATF director told police chiefs that his agency “did not currently have the regulatory power to control sales of bump stocks.”

While the Department stated that “no final determination had been made,” President Trump boasted that the “legal papers” to prohibit bump stocks was almost completed. Indeed, moments before the rulemaking as announced, President Trump tweeted: “Obama Administration legalized bump stocks. BAD IDEA. As I promised, today the Department of Justice will issue the rule banning BUMP STOCKS with a mandated comment period. We will BAN all devices that turn legal weapons into illegal machine guns.”<sup>11</sup> The *Times* would later report that “[t]he reversal was the culmination of weeks of political posturing from Mr. Trump, whose public demands have repeatedly short-circuited his administration’s regulatory process and, at times, contradicted his own Justice Department.”<sup>12</sup>

To be clear, there is no problem when the president exercises his constitutional authority to direct the actions of his principal officers. There can be a problem, however, when those actions *reverse* past executive actions by *discovering* new authority in old statutes. One of us has referred to the former phenomenon as *presidential reversals*<sup>13</sup> and the latter as *presidential discovery*.<sup>14</sup> When interpreting an unambiguous statute, courts should hesitate before deferring to exercises of reversal coupled with discovery:

There is nothing nefarious when a new administration disagrees with a previous administration. Indeed, it is quite natural that presidents see things differently. The question is how courts should treat this reversal. Outside of *Chevron*’s framework, the Supreme Court has maintained that presidential reversals are “entitled to considerably less deference.” . . . Within the cozy confines of “*Chevron*’s domain,” however, old interpretations of ambiguous statutes are not chiseled in stone, so “sharp break[s] with prior interpretations” do not weaken deference. Both blends of reversals are policy decisions all the way down and should give courts pause to consider whether the newly minted interpretation is any more reasonable than the abandoned one.<sup>15</sup>

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Because the phrase “single function of the trigger,” as used in the NFA, is not ambiguous, *Chevron* deference is inappropriate. Furthermore, due to the combination of presidential reversal and discovery, the rulemaking ought to be “entitled to considerably less deference.”<sup>16</sup> If the proposed rule is adopted and later challenged in court, the Cato Institute will likely intervene.

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<sup>10</sup> *Id.*

<sup>11</sup> Donald Trump (@realDonaldTrump), Twitter (Mar. 23, 2018, 1:50 PM), <https://bit.ly/2DPV1cY>.

<sup>12</sup> Ali Watkins, *Pressured by Trump, A.T.F. Revisits Bump Stock Rules*, N.Y. Times, Mar. 13, 2018, <https://nyti.ms/2tczdWI>.

<sup>13</sup> Josh Blackman, *Presidential Maladministration*, 2018 II. L. Rev. 397 at 405 (“The first species of presidential maladministration is by far the most commonplace: when the incumbent administration abandons a previous administration’s interpretation of a statute. Every four to eight years, to comply with the new President’s regulatory philosophy, political appointees in agencies alter certain interpretations of the law.”).

<sup>14</sup> *Id.* at 423 (“The second species of presidential maladministration is *presidential discovery*, which occurs when the President’s administration of the regulatory process affects the location of some new authority, jurisdiction, or discretion that was heretofore unknown. This influence may constitute a reversal . . . or it may be a novel discovery altogether on a question the agency never considered.”).

<sup>15</sup> *Id.*

<sup>16</sup> *Watt v. Alaska*, 451 U.S. 259, 273 (1981).