President
Mark W. Pennak

MARYLAND SHALL ISSUE®
SELF DEFENSE IS A CIVIL RIGHT

April 9, 2018

WRITTEN COMMENTS OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, INC., REGARDING DOCKET NUMBER ATF 2017R-22

The undersigned is the President of Maryland Shall Issue ("MSI"). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. The undersigned is also an attorney and an active member of the Bar of the District of Columbia, having recently retired from the Department of Justice after more than 33 years of service in the Civil Division, Appellate Staff. These comments are submitted on behalf of MSI, its Board and Officers and members in response to the Notice of Proposed Rulemaking issued by the Alcohol, Tobacco, Firearms, and Explosives Bureau ("ATF") on March 29, 2018, at https://www.federalregister.gov/documents/2018/03/29/2018-06292/bump-stock-type-devices in docket number ATF 2017R-22.

A. THE REGULATION IS IMPERMISSIBLY RETROACTIVE WITHOUT CONGRESSIONAL AUTHORIZATION.

The proposed rule makes clear that it would require a current lawful owner of a bump stock to either destroy the bump stock or turn it into law enforcement. See Preamble at 30. There is no grandfather clause in the proposed regulation that allows an existing owner to retain possession. As statutory authorization, the proposed rule cites 18 U.S.C. § 926(a); 26 U.S.C. § 7801(a)(2)(ii), § 7805(a) as the authority to issue rules and regulations. None of these statutory provisions authorize retroactive rules or regulations with respect to the subject matter addressed in this docket number, *viz.*, the definition of machinegun and machine parts as otherwise regulated by 18 U.S.C. § 922(o) and as defined by 26 U.S.C. § 5845(b). Indeed, Section 7805(b) generally bans retroactive rulemaking with respect to internal revenue laws. As detailed below, the proposed rule is retroactive in requiring the destruction or dispossession of any existing bump stocks currently lawfully possessed by existing owners. Such retroactive rules exceed the authority of the ATF under the law for multiple reasons.

1. The ATF statutory justification for retroactive application fails.

The proposed rule explicitly purports to require the destruction of all existing bump stocks on the theory that registration of existing bump stocks is impossible because the NFA "provides that only the manufacturer, importer or maker of a firearm my register it." Proposed Rule at 25, citing 26 U.S.C. § 5841(b). That is incorrect as a

matter of law. While Section 5841(b) provides that manufacturers, importers or makers shall register covered firearms, nothing in Section 5841(b) states that "only" such entities may register.

Indeed, the ATF has permitted existing owners to register firearms lawfully owned where the ATF has issued interpretations that have brought existing firearms under the ambit of the National Firearms Act ("NFA") that were previously not registered by a manufacturer, importer or maker. See Expiration of the Registration Period for Possession of the USAS–12, Striker–12, and Streetsweeper Shotguns (ATF Ruling 2001–1), 66 Fed. Reg. 9748 (Feb. 9, 2001). In that ruling, the ARF reclassified certain firearms as "destructive devices" under the National Firearms Act retroactively, but applied the rule prospectively under Section 7805(b) to allow "the prospective application of the tax provisions" and to allow "registration without payment of tax." See 66 Fed. Reg. at 9749. Both Section 7805 and Section 5841(b) apply equally to the matters addressed in that ruling as it does to machineguns. Yet, the proposed rule does not even cite this prior approach, much less explain the departure in this rule making proceedings. ATF should follow the same approach here for the same reasons. A failure to do so would be "contrary to law" and arbitrary and capricious, an abuse of discretion and not in accordance with law and in excess of statutory jurisdiction, authority and limitations and short of statutory right under the APA, 5 U.S.C. § 706(2).

2. **The ATF's reliance on 18 U.S.C. § 922(o) creates an impermissible Ex Post Facto law and is otherwise misplaced.**

The proposed rule also relies on 18 U.S.C. § 922(o)(1), noting that under that provision it is unlawful for any person to possess a machinegun, except for those machineguns that were "lawfully possessed before the date" that the provision took effect (in 1986). (Id. at 25). First, this reliance on Section 922(o)(1) is circular, as it begs the question of whether existing bump stocks should be made illegal as "machineguns." As prior ATF rulings attest, this result can be easily avoided by interpreting the NFA as not to include bump stocks. Second, the reliance on Section 922(o)(1) would mean that, by virtue of an agency *ipse dixit*, all current bump stocks owners are instant felons **and** became felons on the very date in the past when they took possession of a bump stock, even though such possession was then expressly permitted by prior ATF interpretations. Such a retroactive application of an ATF rule would violate the *ex post facto* clause of the Constitution. See Article 1, Section 9, Clause 3 ("No Bill of Attainder or ex post facto Law shall be passed."). As the Supreme Court stated long ago, an *ex post facto* law is "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder v. Bull*, 3 U.S. 386, 390 (1798). See also *Peugh v. United States*, 569 U.S. 530 (2013) ("the Clause also safeguards 'a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'"), quoting *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

This *ex post facto* result can also be easily avoided by a proper application of Section 922(o). Specifically, Section 922(o)(2)(A) expressly provides that the ban imposed

on possession under Section 922(o)(1) does not apply with respect to any possession "under the authority of the United States or any department or agency thereof." That exception of Section 922(o)(2)(A) applies here because existing possessions of bump stocks were expressly permitted under the ATF's "authority," *viz.,* the prior ATF interpretations of "machinegun" to *exclude* the type of bump stocks currently owned by existing lawful owners. The ATF may not retroactively change that interpretation and then invoke the provisions of Section 922(o)(1) without running afoul of the ban on *ex post facto* laws. In short, ATF's decision to require destruction of existing bump stocks lawfully possessed by existing owners cannot be sustained.

3. **Retroactive application greatly impairs legitimate reliance interests without justification.**

There is no doubt that the proposed bump stock rule is retroactive. The rule against retroactive rulemaking was stated by the Supreme Court in in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), where the Court held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." As the Court explained, "an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress" and "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Id. Thus, "[e]ven where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." Id. at 208-09.

As explained in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 (2006), in assessing whether a rule has retroactive effect "we ask whether applying the statute to the person objecting would have a retroactive effect in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" Id. quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 278 (1994). Such retroactivity is highly disfavored in the law in accordance with "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring); *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2427 (2015) ("people still do not expect their property, real or personal, to be actually occupied or taken away").

Here, there is no question that existing owners of bump stocks are in fully lawful possession. As the proposed rule fully recognizes, prior ATF classification letters had expressly ruled that bump stocks did not convert a semi-auto firearm into a machinegun. https://www.federalregister.gov/d/2018-06292/p-38 In reliance on these prior rulings, existing owners purchased, possessed and owned bump stocks that were, at that time, fully legal and compliant with these ATF rulings. That reality is undisputed. These prior purchases were completed prior to this proposed new rule and thus the proposed rule would attach new legal consequences to those completed purchases. See *Landgraf*, 511 U.S. at 269-70. The new, proposed rule reverses these prior rulings to illegalize these devices and to require destruction or dispossession of any bump stocks that were purchased and possessed prior to the effective date of the new, proposed rule. It is thus incontestable that the proposed

rule would "affect" existing rights and impose new liabilities on continued possession of these heretofore legal items of personal property. The proposed rule therefore violates Section 7805 and the general rule against retroactive rulemaking, as articulated in *Georgetown Hospital*.

These principles have an especially powerful application to bump stocks because of the reliance that existing owners placed on the ATF's prior rulings applying an interpretation of the term "machinegun" it now reverses in the proposed rule. The Supreme Court has stated that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler v. Community Health Services*, 467 U.S. 51, 60 n.12 (1984). Similarly, the D.C. Circuit held in *Georgetown Hospital* that there is no exception to this rule against retroactive rulemaking for "curative rules." *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) ("both the express terms of the APA and the integrity of the rulemaking process demand that the corrected rule, like all other legislative rules, be prospective in effect only"). The D.C. Circuit has continued to adhere to that position. See, e.g*., ICORE, Inc. v. FCC*, 985 F.2d 1075, 1080-81 (D.C. Cir. 1993). Retroactive application of the proposed rule to ban existing, lawfully owned property fails under these principles. The ATF simply may not retroactively reverse its prior rulings.

At a minimum, the presence of such reliance interests places a heavy burden on the ATF to explain fully its change of its prior interpretation of the National Firearms Act. It has failed to do so, stating merely the new rule adopts "a better legal and practical interpretation of 'function'" of the trigger. (Proposed Rule at 19). That failure to address fully its prior interpretations alone makes clear that the ATF's proposed rule is not entitled to *Chevron* deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court's recent decision in *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016), is on point. There, the Court held that an agency's change in interpretation of statutory authority was not entitled to *Chevron* deference because the agency had failed to adequately explain its departure from its prior interpretation. As the Court stated, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars,* 136 S.Ct. at 2125. Yet, the Court stressed that "[i]n explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." Id. at 2126, quoting *FCC v. Fox Television Stations,* 556 U.S. 502 515 (2009). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." (Id.).

The proposed rule fails address the heavy reliance interests on the ATF's prior interpretation. Indeed, the ATF estimates that there are as many as 520,000 bump stocks devices currently in possession (Proposed Rule at 33), with a value of up to $96,242,750. (Id. at 34). Yet, the ATF accords absolutely no recognition of the enormity of this reliance interest in deciding to change its interpretation. As *Encino Motorcars* holds, that failure indicates that the agency's action is "arbitrary and capricious" under 5 U.S.C. § 706, "[a]nd arbitrary and capricious regulation of this

sort is itself unlawful and receives no *Chevron* deference." *Encino Motorcars*, 136 S.Ct. at 2126. The reliance interests here also suggest that the ATF should not require the destruction of $96.2 million of lawfully acquired and legally owned private property. For all the foregoing reasons, the retroactive aspects of the proposed rule will not survive judicial review. The ATF should thus modify the proposed rule to make clear that the rule will not apply to possession of existing bump stocks already lawfully owned.

B. THE PROPOSED RULE VIOLATES THE TAKINGS CLAUSE OF THE CONSTITUTION.

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amendment 5. As explained in *Horne v. Dept. of Agriculture*, 135 S.Ct. 2419, 2426 (2015), the Clause "protects 'private property' without any distinction between different types." Under the Takings Clause, the government simply does not have the right to take property by declaring, in an *ipse dixit*, the property to be noxious or in the interest of public safety. In *Horne* the Supreme Court held that there is a fundamental difference between a regulation that restricts only the use of private property and one that requires "physical surrender … and transfer of title." *Horne*, 135 S. Ct. at 2429. *Horne* squarely holds that the latter situation is a Takings that must be compensated. See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."). As detailed below, the ban on possession of existing property in the proposed rule is a total regulatory taking that must be compensated.

This duty to compensate may not be evaded by invoking the general police power to provide for the common good. In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Supreme Court held that the State may ban the sale and manufacture of beer from a brewery. However, the case did not involve a seizure of the brewery itself. The Court made that clear in stating "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation *does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it*, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." 123 U.S. at 668-69 (emphasis added).

These limits of *Mugler* were stressed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the Supreme Court reversed a lower court's reading of *Mugler* as allowing a State to ban harmful or noxious private property. The Court stated:

> [T]he legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be

> compensated. If it were, departure would virtually always be allowed." 505 U.S. at 1026 (emphasis added).

The proper test, the Court held, is:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. (Id. at 1027) (emphasis added).

See also *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 425 (1982) (accepting the lower court's holding that the regulation at issue was "within the State's police power," but holding that "[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid"); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding there was no Taking because the Government did not "compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them").

The Proposed Rule does not even mention the Takings issue, much less this body of controlling Supreme Court precedent. Here, an owner's possession of bump stocks and magazines were indisputably "interests" that were "part of his title to begin with." *Lucas*, 505 U.S. at 1027. Illegalizing such interests constitutes a "total regulatory taking" which must be compensated under the Court's "categorical rule."

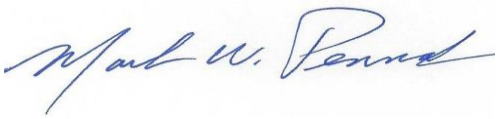
Specifically, banning possession by lawful owner of his own property is "tantamount to a direction appropriation or ouster" under *Loretto v. Teleprompter Manhattan CATV Corp*. 458 U.S. 419, 426 (1982), because possession is an essential property interest. The word "property" in the Takings Clause of the federal Constitution means "the group of rights inhering in [a] citizen's relation to [a] ... thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). As the Ninth Circuit has held, "it is sufficient" that the law "involves a direct interference with or disturbance of property rights," even if the government itself does not "directly appropriate the title, possession or use of the propert[y]." *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977).

The Taking at issue here is not supported by *Akins v. United States*, 892 Fed. Cl. 619 (2008). In that case, the AFT ruled that a particular new invention, (the Akins accelerator) violated previously existing law on the manufacture of machineguns. In holding that this AFT ruling did not effect a Taking, the Court of Federal Claims ruled that the government may invoke its police power to enforce existing criminal law by banning the sale or possession of property that is in violation of that previously existing law. *Akins* did not involve a retroactive ban on a person's existing lawful possession of a machinegun. Rather, *Akins* is in accord with the rule that "the Takings Clause does not prohibit the uncompensated seizure of evidence in a criminal investigation, or the uncompensated seizure and forfeiture of criminal contraband." *Spann v. Carter*, 648 Fed. Appx. 586 (6th Cir. 2016), citing *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006). Existing

bump stocks are lawful property under prior ATF rulings, not contraband. As stated in *Lucas* "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed." 505 U.S. at 1026.

In summary, the ATF may not retroactively ban such existing bump stocks without express Congressional authorization (which it lacks) and it certainly may not impose such a ban without paying just compensation.

Sincerely,



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