"Happiness Is a Warm Gun"

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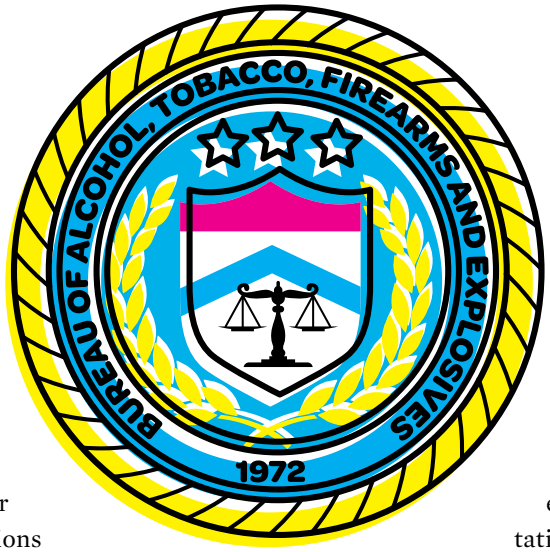

As a firearms regulatory agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) occupies a strange place. On the one hand, the ATF's own press releases routinely highlight the agency's role in prosecuting individuals accused of violating federal firearms laws. On the other hand, the ATF also promulgates regulations subject to the requirements of the Administrative Procedure Act (APA)—seemingly like any other civil regulatory authority. But the ATF is not like any other agency. The agency's dual role as law enforcer and technocratic regulator renders its actions uniquely vulnerable to APA challenges. Despite these unique vulnerabilities, however, the ATF has historically seen very few APA challenges—though the winds may be shifting.

ATF as Law Enforcer and Civil Regulator

The ATF's dual role as a criminal law enforcer and civil regulator means that its "regulations" are in effect criminal laws, the violation of which may constitute a felony. Consider, for example, the ATF's recent rule amending its interpretation of the phrase "frame or receiver" as used in the National Firearms Act and the Gun Control Act definitions of "firearm." 87 Fed. Reg. 24,652 (Apr. 26, 2022). Those firearm definitions determine whether a gun is subject to pervasive federal regulatory requirements. And while the agency previously defined "frame or receiver" as a single functional item that provided housing for mechanical elements of the firearm, its new interpretation added parts kits and partially complete frames and receivers. Thus, while couched as a technical regulatory measure, the ATF's new rule means that unregistered possession of certain gun parts may now carry a decade behind bars.

The criminal nature of the ATF's regulations affects how courts review the legality of the ATF's interpretations of firearms statutes. The normal rule is for courts to give agencies the benefit of the doubt when they interpret statutes. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court explained that courts should normally defer to an agency's interpretation of ambiguous statutory language. The Court grounded its deference principle in the relative expertise of agencies compared with courts when "implementing policy decisions in a technical and complex arena." But this deference principle does not apply to the ATF's interpretations of criminal statutes.

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In 1992—eight years after deciding *Chevron*—the Supreme Court held that it was bound to *reject* the ATF's interpretation of an ambiguous firearms statute in a case called *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992). In that case, the Court was tasked with adjudicating the validity of the ATF's interpretation of the terms "making" and "firearm" in the National Firearms Act. The ATF had taken the position that a manufacturer made a firearm when it sold a gun "kit" with pieces that would allow the end user to create either a regulated short-barreled "firearm" *or* an unregulated long-barreled rifle. But the Court disagreed. Five justices—split between a plurality and a concurrence—found that the statute was ambiguous and applied an interpretive principle called the "rule of lenity," which requires a reviewing court to construe ambiguous statutes in favor of criminal defendants. Under this rule, the majority coalition held that the kit did not make a short-barreled firearm.

Thompson/Center also made clear that the lenity standard applies even in civil challenges to ATF actions. The Court acknowledged that it was construing the National Firearms Act in "a civil setting." But, it explained, the "proper" course was to "apply the rule of lenity" in the plaintiff's favor, given that making "a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one."

Following *Thompson/Center*, the rule of lenity has continued to play a significant role in APA challenges to ATF rules. For example, in 2018, after the ATF sought to ban "bump stocks"—i.e., devices that allow individuals to more quickly pull a gun's trigger (*see* 83 Fed. Reg. 66,514 (Dec. 26, 2018))—the agency faced a raft of lenity-centric challenges. The cases turned on the meaning of "machinegun" and specifically whether bump stocks allow a user to fire "automatically more than one shot . . . by a single function of the trigger." Litigants argued that the statute was at least ambiguous on this point—given that using a bump stock requires the user to pull the trigger every time he or she fires the gun.

Some courts initially rejected this theory. The D.C. Circuit, in *Guedes v. ATF*, 920 F.3d 1 (D.C. Cir. 2019), held that deference—not lenity—applied when challenging a full-fledged regulation (distinguishing *Thompson/Center*, which concerned a tax refund). Further, the D.C. Circuit afforded the ATF deference, notwithstanding that the agency voluntarily waived *Chevron*. The Tenth Circuit likewise rejected the challengers' lenity arguments—though both circuits' decisions triggered vigorous dissents.

But the tides began to turn as more courts considered the bump-stock rule. In 2020, Justice Gorsuch issued a statement on the denial of certiorari from the D.C. Circuit case, reiterating that the Supreme Court "has never held that the Government's reading of a criminal statute is entitled to any deference." *Guedes v. ATF*, 140 S. Ct. 789, 790 (2020). Then, a year later, a panel of the Sixth Circuit in *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021), held that the bump-stock rule was invalid after finding that lenity—not deference—controlled the analysis. The panel's opinion was subsequently vacated by an equally divided en banc court, but, in 2023, the en banc Fifth Circuit held in *Cargill v. Garland*, 57 F.4th 447 (5th Cir. 2023), that the agency's new and more expansive interpretation of "machinegun" was foreclosed by the rule of lenity. The Sixth Circuit quickly followed suit in *Hardin v. ATF*, 65 F.4th 895 (6th Cir. 2023), with a panel of that court again finding the rule invalid under the rule of lenity.

This saga shows that—notwithstanding reticence by some courts—the ATF's rules are uniquely vulnerable to APA challenges because its regulations carry criminal penalties.

Regulation Approach Creates Vulnerability

The ATF's actions may also be vulnerable because of the way in which the agency regulates (although the ATF will often attempt to argue that its regulations are simply interpretive rules, rather than binding legislative rules). In particular, while the ATF has started to issue formal rules with more regularity—particularly on high-profile issues—it much more commonly regulates through informal letter rulings, much like the Internal Revenue Service. This quirk is largely due to the ATF's former status as a subagency within the Department of Treasury.

As detailed in the agency's *National Firearms Act Handbook* (2009), the ATF will typically determine whether a product is regulated by federal firearms statutes through a "classification letter." These letters represent the agency's "official position," but the ATF reserves to itself the discretion to "change" them later. And, indeed, the agency has received attention for such changes, with the Sixth Circuit observing "the ATF's frequent reversals on major policy issues." *Gun Owners of America*, 992 F.3d at 461.

Commentators have long criticized the ATF's approach to regulation. As the Heritage Foundation pointed out in 2019, by operating "almost exclusively by private letters," the ATF's regulatory scheme is such that "each industry member that asks a question about how to apply or interpret the rules gets its own private answer, an answer that none of its competitors knows about and which does not serve as a legal precedent." Ted R. Bromund, *Why Is the ATF Making Secret Rules for the Firearms Industry?*, Heritage Found., May 26, 2019. This opacity hinders the ability of industry to provide feedback—a hallmark of traditional APA notice-and-comment rulemaking—and can lead to inconsistent treatment. Further, despite the ATF claiming that classification letters are nonbinding and subject to change, it also regularly cites the letters as precedent in subsequent classification decisions and even rules.

Despite their informal nature, the ATF's classification letters are judicially reviewable. In *Sig Sauer, Inc. v. Brandon*, 826 F.3d 598 (1st Cir. 2016), the First Circuit explained that classification letters constitute "final agency action" under the APA—thus

opening them up to judicial review—because they represent the culmination of the agency's decision-making process and carry legal consequences for regulated parties.

Parties have found success in APA challenges to classification letters based on both their informality and abridged reasoning. For example, in *Innovator Enterprises, Inc. v. Jones*, 28 F. Supp. 3d 14 (D.D.C. 2014), the U.S. District Court for the District of Columbia vacated an ATF classification letter after finding it arbitrary and capricious. At issue was the ATF's determination that a device was a "firearm silencer" regulated by the National Firearms Act and Gun Control Act. The court first refused to afford the ATF any deference because the classification letter was a "brief and informal document" with "hardly any reasoning."

Then, the court proceeded to find that the ATF failed to adequately explain its classification decision—a seemingly direct result of the agency's abridged and informal analysis. In particular, the agency purported to determine that the device was a silencer because it had three physical characteristics that were "allegedly common to known silencers." The court found this reasoning flawed because the ATF failed to consider whether the device muffled the sound of a gunshot—a crucial factor in determining whether a device is a silencer. Compounding the error, the court found, the ATF's surface-level determination that the device shared physical characteristics with silencers was inadequate. As the court put it, "Bud Light is not 'Single-Malt Scotch,' just because it is frequently served in a glass container, contains alcohol, and is available for purchase at a tavern." Finally, the court faulted the agency for the vague and amorphous test it purported to apply, having never specified where the list of physical characteristics came from or how many shared characteristics a device would need to possess to be classified as a silencer.

Innovator Enterprises is not the only example of a court taking issue with the ATF's abridged classification decision-making. In *Tripoli Rocketry Ass'n v. ATF*, 437 F.3d 75 (D.C. Cir. 2006), the D.C. Circuit held in favor of a group of model rocket hobbyists that ATF's decision-making was arbitrary and capricious when it classified a type of fuel used in hobby rockets as an "explosive" based on a determination that the fuel "deflagrates," i.e., burns quickly. Once again, the court refused to afford any deference to the ATF's letter ruling because of its truncated reasoning, finding that the agency's analysis "lack[ed] any coherence." Substantively, the court took issue with the fact that the ATF never explained *why* the fuel "deflagrated." Instead, the agency claimed that the fuel burned "much faster" than other materials—but never offered a metric or otherwise fleshed out its "unbounded relational definition." The court found that "the agency's complete absence of standards for determining when a particular material deflagrates" rendered its classification arbitrary and capricious.

These cases show that it is not only the criminal consequences of the ATF's regulations but also the *method* of regulation that can render the agency's decision-making vulnerable to APA challenges. Courts may find that the ATF's decisions issued as informal letters are not entitled to deference. And beyond the formality itself, this kind of abridged decision-making behind closed doors can also affect the quality of the agency's reasoning.

Low Rate of Regulatory Challenges

Despite these unique APA vulnerabilities of ATF regulatory actions, the agency has historically seen a stunningly low rate of regulatory challenges. A Westlaw search for "Administrative Procedure Act" & "ATF" yields about 300 cases. For reference, the same search for the Environmental Protection Agency yields about 9,000 cases. Although this methodology is far from perfect, it suggests that there truly is a disparity and that—for many years—the ATF has regulated with little pushback.

But that may be changing as savvy litigants increasingly bring APA challenges to ATF rules. The recent bump-stock cases demonstrated that litigators can leverage the unique aspects of ATF rulemaking to curb the agency's expansive exercise of authority. And those cases may just be the tip of the iceberg. ATF's "frame or receiver" rule discussed above was likewise challenged across the country after it was issued, and a federal district court in Texas vacated the rule on June 30, 2023, in *VanDerStok v. BlackHawk Manufacturing Group Inc.* (N.D. Tex. 2023). Further, in *Mock v. Garland*, No. 23-10319 (5th Cir. May 23, 2023), the Fifth Circuit recently enjoined, pending appeal, another ATF rule revising its regulatory definitions to encompass firearms accessories known as "stabilizing braces." 88 Fed. Reg. 6478 (Jan. 31, 2023).

This new proliferation of APA challenges against the ATF marks a change—for the regulated industry, the public, and even the agency itself. As Congress has explained, the APA's judicial review provision was designed to prevent its statutes from becoming "blank checks drawn to the credit of some administrative officer or board." H.R. Rep. No. 79-1980, at 41 (1946). And, as the lenity cases recognize, the protective provisions of the APA are even more important where an agency's interpretation of statutory language can result in criminal penalties for members of the public. Finally, if the ATF is held to the standards of the APA, the agency will have better incentives to fully consider all legal and policy ramifications before acting and—when it does act—ensure that it fully explains its reasoning and the basis for its authority.

At bottom, an accountable agency is a good agency, and the APA is a powerful tool for ensuring agency accountability. ■