



The Volokh Conspiracy: District Court Finds Bump Stock Ban May Constitute a Taking, Because the Federal Government Lacks a Police Power

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April 1, 2020

In 2018, the Trump Administration announced that federal gun control laws would now be read to prohibit bump stocks. Previously, the Obama Administration determined that the National Firearms Act and the Gun Control Act did not prohibit bump stocks. The Trump Administration's policy was challenged in several courts.

I filed an amicus brief on behalf of the Cato Institute in *Guedes v. Bureau of Alcohol, Tobacco, (D.C. Circ.)*. We contended that this reversal of positions from the prior administration was not entitled to deference. The Supreme Court ultimately denied cert in *Guedes*, over Justice Gorsuch's dissent. (Kristin Hickman and Jonathan Adler commented on the denial.)

As far as I am aware, all other courts have likewise turned away challenges to the bump stock ban. Until today at least.

Judge Starr of the Northern District of Texas found that the Trump Administration's policy may be unconstitutional. Here is the introduction from Lane v. United States:

Bump stocks allow semi-automatic rifles to fire at a rate close to machine guns. In December 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives issued a final rule determining that bump stocks qualify as prohibited machine guns under federal law and required their destruction or surrender. Brian Lane lawfully purchased three bump stocks before the rule took effect and raises a Fifth Amendment challenge that the federal government must compensate him for taking his property. The federal government responds that the rule falls under a valid use of the police power, which requires no compensation. But as explained below, the federal government forgot the Tenth Amendment and the structure of the Constitution itself. It is concerning that the federal government believes it swallowed the states whole. Assuming the federal government didn't abolish the states to take their police power, the Court **DENIES** the motion to dismiss **WITHOUT PREJUDICE**. The Court will allow the federal government to try again and explain which enumerated power justifies the federal regulation and whether it allows a taking without compensation. The Court requests that the federal government also address any limits on that federal power and the Court's proper role in examining the validity of the underlying rule when determining if there was a compensable taking.

Judge Starr rejects the notion that the federal government has a police power.

The federal government here raised the talisman of police power 31 times in its motion to dismiss and an additional 19 times in its reply. This seemed unusual to the Court because the Court had thought the police power is a power reserved for the states, not for the federal government. Fearful the Court was wrong, it turned to the first place one should always turn to with such questions: the Constitution. Article I, section 8 enumerates the powers the People gave to the federal government at our Nation's founding: the tax power, the borrowing power, the commerce power, the naturalization power, the bankruptcy power, the power to coin money, the postal power, the maritime power, and the war power.³⁹ None of these powers is the police power.

Instead, the federal government has to rely on one of its enumerated powers. And it hasn't. Judge Starr gave the parties a chance to re-plead their case.

Rather than deny the federal government's motion to dismiss outright, the Court will allow it an opportunity to file a new motion to dismiss, based on the limited enumerated powers the federal government has (as confirmed by the Constitution, the Supreme Court, and even Wikipedia). If the federal government opts for the commerce power, it should discuss the limitations in *Lopez* and *Morrison*. Also, the federal government should be prepared to address whether the validity of the final rule is an issue under the proper judicial framework for assessing the taking.⁵¹

Judge Starr is quite right. The federal government lacks a police power. And I haven't seen this argument addressed in any other bumpstock cases.

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