



The Federal Government's "Police Power" and the Takings Clause: Part III

Josh Blackman

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Part I in this series explained that Congress does not have a general police power. Part II added that Congress can seize property pursuant to its Commerce and Necessary and Proper Clause Powers. But the federal government cannot seize property if the requisite statutory authority exceeds Congress's enumerated powers. Part III will extend this analysis to the Trump Administration's ban on bump stocks.

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 final rule was challenged in several courts. (I filed an amicus brief on behalf of the Cato Institute in *Guedes v. Bureau of Alcohol, Tobacco*).

The Bureau of Alcohol, Tobacco relies on 18 U.S.C. 922(o) for the requisite statutory authority. This statute prohibits the possession of a machine gun. ATF determined that bumpstocks were "machine guns" within the meaning of 18 U.S.C. 922(o).

The final rule explained:

As 18 U.S.C. 922(o), with limited exceptions, prohibits the possession of machineguns that were not lawfully possessed before the effective date of the statute, current possessors of bump-stock-type devices will be obligated to cease possessing these devices. . . .

The NFA does not "usurp[] police power reserved to the States." *United States v. Miller*, 307 U.S. 174, 176 (1939). Further, "[b]ecause § 922(o) was a proper exercise of Congress's enumerated authority under the Commerce Clause, and because it does not compel, let alone commandeer, the states to do anything, the statute does not violate the Tenth Amendment." *United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996).

All bump stocks must be destroyed or surrendered prior to the effective date of the regulation (March 26, 2019).

After implementation of this final rule, bump-stock-type devices that meet the definition of "machinegun" under the NFA and GCA cannot be lawfully possessed because the pertinent provision of the GCA, 18 U.S.C. 922(o), prohibits persons from possessing a machinegun unless it was lawfully possessed before the effective date of section 922(o). Bump-stock-type devices currently possessed by individuals will have to be destroyed or abandoned prior to the effective date of this regulation.

The Bureau also cites 18 U.S.C. 922(o) as a defense to any takings claims:

The Department disagrees that lawabiding citizens would instantly become felons under this rule. This final rule provides specific information about acceptable methods of disposal, as well as the timeframe under which disposal must be accomplished to avoid violating 18 U.S.C. 922(o). Current possessors of bump-stock-type devices who properly destroy or abandon their devices will avoid criminal liability. As described in Part IV.D.1.b, this is not a compensable "taking" of property under the Constitution. . .

The Court of Federal Claims accepted this argument in McCutchen v. United States, 145 Fed. Cl. 42, 50-53 (Ct. Fed. Cl. 2019).

In this case, Plaintiffs' bump-stock devices were not "taken for a public use," within the meaning of the Takings Clause. Instead, because the devices have been designated as machineguns under ATF's regulatory authority, **they are subject to 18 U.S.C. § 922(o)**, which makes their possession a criminal offense. ATF, in the exercise of its **police power**, directed that owners of the devices must either destroy or abandon them at an ATF office, to avoid prosecution. Because the prohibition on possession involved an exercise of the government's police power, there was no taking within the meaning of the Fifth Amendment.

The terminology in this case is imprecise. The federal government lacks a general police power. ATF's authority to require destruction of bump stocks must rise and fall on 18 U.S.C. 922(o).

If 18 U.S.C. 922(o) is within Congress's enumerated powers, as applied to the bump stock ban, then compensation would not need to be provided for those who abandon their devices. If 18 U.S.C. 922(o) is beyond Congress's enumerated powers, as applied to the bump stock ban, then just compensation must be provided.

Part IV in this series will consider the constitutionality of 18 U.S.C. 922(o) as applied to bump stocks.

Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the President of the Harlan Institute.