Circulating Opinion

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W. Clark APOSHIAN, *Plaintiff-Appellant*

v.

Robert W. WILKINSON, *et al.*, *Defendant-Appellees*.

No. 19-4036, Decided March 5, 2021

U.S. Court of Appeals for the Tenth Circuit

Introduction:

Mr. Aposhian sued federal government officials and agencies to enjoin a regulation that classifies a "bump stock" as a type of machine gun. The district court found the defendants had committed no constitutional or statutory violation and denied the injunction. On appeal, a divided panel of the Tenth Circuit affirmed, holding that the defendants' interpretation of ambiguous National Firearms Act provisions merited judicial deference. The panel majority applied the *Chevron* test despite the defendants' waiver of deference under that doctrine. The Tenth Circuit granted Aposhian's motion for en banc rehearing and held oral argument. In its March 5 order, 2021 WL 833986, the court vacated the en banc order and reinstated its May 7, 2020 opinion.

Chief Judge Tymkovich, joined by four Circuit Judges, dissented. His opinion chides the majority for abdicating its judicial-review function in a case where the relevant statute was unambiguous and the court's invocation of *Chevron* deference was "uninvited" and inapplicable. And even if the statute were ambiguous, Chief Judge Tymkovich reasons, its criminal sanctions compel courts to utilize the rule of lenity to resolve any ambiguity.

Opinion Digest:

TYMKOVICH, Chief Judge, joined by HARTZ, HOLMES, EID, and CARSON, Circuit Judges, dissenting.

I dissent from the majority's decision to vacate the en banc order as improvidently granted. The issues that initially led this court to grant en banc rehearing remain unresolved and it is important that they be addressed to give guidance to future panels and litigants. I write separately to identify why the panel majority wrongly decided the case in the first place and why its opinion will have deleterious effects going forward. ***

I. Likelihood of Success on the Merits

As an initial matter, Mr. Aposhian has shown a likelihood of success on the merits. Section 5845(b) unambiguously excludes bump stocks from its ambit. And even if the statute is ambiguous, *Chevron* deference is inapplicable here for several reasons. ***

B. Statutory Framework

I am not the first to spill ink over this issue, so I will keep my description of the statutory regime brief. *** The NFA, originally passed in 1934, "imposes strict registration requirements on statutorily defined 'firearms.'" *Staples v. United States*, 511 U.S. 600, 602 (1994). Machine guns are among those firearms subject to regulation and registration under the NFA. *See* 26 U.S.C. § 5845(a). Under § 5845(b), a "machinegun" is "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without

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The **Honorable Timothy M. Tymkovich** serves on the U.S. Court of Appeals for the Tenth Circuit. *Chief Judge Tymkovich had no role in WLF's selecting or editing this opinion for our* CIRCULATING OPINION *feature.*

manual reloading, by a single function of the trigger." The statutory definition also includes "any part designed and intended ... for use in converting a weapon into a machinegun." *Id.* ***

ATF classified a bump stock device as a "machinegun" for the first time in 2006. Specifically, "ATF concluded that a device attached to a semiautomatic firearm that uses an internal spring to harness the force of a firearm's recoil so that the firearm shoots more than one shot with a single pull of the trigger is a machinegun." *Id.* at 66,514. But over the next decade, ATF issued classification decisions in which it repeatedly assured bump stock owners that non-mechanical bump stocks were not machine guns as understood in § 5845(b).

In 2017 *** following [a] tragic incident, members of Congress and the President asked ATF to examine these past classifications. ATF reviewed its definition and then went through the formal notice-and-comment process to update its understanding of what qualifies as a machine gun. *** The Final Rule was set to take effect on March 26, 2019, at which point everyone who possessed a bump stock was supposed to destroy it or turn it over to ATF.

C. The Statute Is Unambiguous

*** When evaluating an agency's interpretation of a statute, we often afford its interpretation *Chevron* deference. But such deference is not automatically warranted whenever an agency issues a statement regarding its understanding of a statute. Courts apply *Chevron* deference only "[i]f a statute is ambiguous, and if the implementing agency's construction is reasonable." *Nat. Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 980 (2005). Here, § 5845(b) contains no ambiguity so "*Chevron* leaves the stage." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

As a reminder, § 5845(b) defines a "machinegun" as "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." The question before the panel was whether this definition includes nonmechanical bump stocks. The panel majority regarded two parts of the statutory definition as sufficiently ambiguous for *Chevron* deference to apply: "single function of the trigger" and "automatically."

Chevron deference "is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity." *Epic Sys. Corp.*, 138 S. Ct. at 1630. Among other tools, this includes "examination of the statute's text, structure, purpose, history, and relationship to other statutes" with an emphasis on a word or phrase's "plain meaning." *Harbert v. Healthcare Servs. Grp., Inc.*, 391 F.3d 1140, 1147, 1149 (10th Cir. 2004).

The panel majority, however, evaded these rules of interpretation. Rather than attempt to *resolve* ambiguity, the panel majority performed interpretive gymnastics to *create* ambiguity. In truth, neither of the parties really dispute the *meaning* of any words or phrases in the statutory definition of "machinegun." They dispute only whether the meaning encompasses bump stocks. And the answer to that question is apparent on the face of the statute.

A "single function of the trigger" is not ambiguous. At the time the NFA was passed, a "function" meant the "action" of the trigger. Webster's New International Dictionary 1019 (2d ed. 1934). The use of the word "function" continues to capture the different ways that triggers can work. ***

The statute's plain meaning unambiguously excludes bump stocks. A semiautomatic rifle, equipped with a bump stock, does not fire multiple shots by a single function of the trigger. ***

Likewise, "automatically" is not so ambiguous as to imply Congress intended ATF to engage in gap-filling. In fact, ATF disclaims any gap-filling in the Final Rule. *See* Bump-Stock-Type Devices, 83 Fed. Reg. at 66,519. Far from indicating any statutory ambiguity, ATF's proposed definition in the Final Rule "accords with the everyday understanding of the word 'automatic[ally].'" *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 31 (D.C. Cir. 2019), cert. denied, 140 S. Ct. 789 (2020). ***

The statute is unambiguous about what makes the firearm shoot automatically: the function of the trigger. To track with the dictionary definition, the statute itself identifies the "predetermined point in the operation" at which the "self-regulating mechanism performs the required act." If a single function of the trigger *and then*

some other input is required to make the firearm shoot automatically, we are not talking about a "machinegun" as defined in § 5845(b). ***

D.* Chevron *Does Not Apply Here

1. The Government Waived *Chevron*

Throughout litigation, the government has maintained that the Final Rule represents the best reading of § 5845(b). It has consistently refused to invoke *Chevron* deference. The panel majority paid no heed to this steadfast refusal. Instead, the panel majority scoured the briefs to justify bringing an uninvited guest to the statutory interpretation party.

According to the majority, all the court needs is an "invitation" to apply *Chevron* deference. *Aposhian*, 958 F.3d at 981–82. And that invitation can be brought by either party—it need not be brought by the government, whom *Chevron* benefits. In fact, even a brief argument in a footnote *opposing* the application of *Chevron* deference constitutes such an invitation. *Id.* (citing *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1212 n.4 (10th Cir. 2016)).

This theory of waiver is untenable. Under the panel majority's theory, a party that challenges an agency's interpretation of a rule is forced to dance around *Chevron*, even where the government has not invoked it. *Chevron* becomes the Lord Voldemort of administrative law, "the-case-which-must-not-be-named." And litigants bold enough to expressly oppose *Chevron* in their briefing will be left guessing whether their reference to the case was fleeting or perfunctory enough to avoid making an invitation. All the while, courts are given a troubling amount of freedom when deciding whether to use *Chevron*—discretion that will dictate the outcome in many cases.

Even the panel majority acknowledged it was unsure whether its invitation theory is correct. *See id.* at 982 n.6. And yet the en banc majority is perfectly content to leave this confusion in place. This failure to clarify our rule about whether *Chevron* can be waived has real implications for litigants and courts in our circuit. Plaintiffs challenging an agency's interpretation of a statute are left guessing how to approach a given case. Should they argue vigorously against *Chevron* in their briefing? Should they go to lengths to avoid mentioning *Chevron* and its progeny at all? Or are all such litigation decisions futile because a court can sua sponte apply *Chevron* whenever it pleases? The majority's decision to vacate the en banc order leaves us all without a clear answer.

For my part, I believe we must abide by the government's decision to forgo *Chevron* deference. I come to this conclusion for two reasons.

First, the normal rules that govern party presentation and waiver should apply to *Chevron*. "[W]hen a party chooses not to pursue a legal theory potentially available to it, we generally take the view that it is 'inappropriate' to pursue that theory in our opinions." *Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1146 n.10 (10th Cir. 2010) (en banc). We refuse to consider arguments a party fails to make because we depend "on the adversarial process to test the issues for our decision" and are concerned "for the affected parties to whom we traditionally extend notice and an opportunity to be heard on issues that affect them." *Id.* ***

In practice, courts have applied the party-presentation rule to *Chevron*. The Supreme Court has deemed *Chevron* to be waived when inadequately invoked. *See, e.g.*, *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (concluding that when an agency does not ask for special deference to its interpretation "we need not resolve the difficult issues regarding deference which would be lurking in other circumstances"). We have followed the Court's lead in our own practice. *Hydro Res.*, 608 F.3d at 1146 ("[W]e need not decide whether EPA's interpretation of the statute is entitled to deference because, throughout the proceedings before the panel and now the en banc court, EPA itself hasn't claimed any entitlement to deference."). ***

Second, when the government does not invoke *Chevron* as part of its litigation strategy, the preconditions for *Chevron* are not present. For *Chevron* to apply, two conditions must be met: (1) Congress must delegate authority to the agency to make rules carrying the force of law and (2) the agency's ensuing interpretation must be "promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). ***

Here, in promulgating the Final Rule, ATF insisted its definitions represented "the best interpretation" and accorded "with the plain meaning" of the statute. Bump-Stock-Type Devices, 83 Fed. Reg. at 66,521, 66,527. *** If the agency disavows any reliance on *Chevron*, who are we to second-guess it?

Whether we view the issue as one of waiver or of *Chevron*'s applicability, the result is the same. We cannot sua sponte raise *Chevron* deference. In this case, that means we must do what courts have done for centuries and interpret the statute the old-fashioned way: de novo. As indicated above, doing so leads to a clear result: bump stocks are not machine guns.

2. The Rule of Lenity Resolves Any Ambiguity

Even if *Chevron* cannot be waived and is applicable here, it cannot and should not jump the line when courts interpret an ambiguous statute. As a reminder, *Chevron* only kicks in once the traditional tools of interpretation have been exhausted. *See Epic Sys. Corp.*, 138 S. Ct. at 1630. But the panel majority did not exhaust all the traditional tools. We still have one left in our toolbox: the rule of lenity. And it "is more than up to the job of solving today's interpretive puzzle." *Id.*

The rule of lenity is a substantive canon of construction applied in statutory interpretation cases involving criminal laws. The rule dictates that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987). ***

But it is not clear to me that the level of ambiguity required to invoke the rule of lenity is any different from that necessary to invoke *Chevron*. And I am admittedly lost as to why *Chevron* gets to cut in front of the rule of lenity in the statutory interpretation line. *Chevron* is of recent provenance. It is a rule of interpretive convenience, rooted in notions of agency expertise and political accountability. *** The rule of lenity, by contrast, "provides a time-honored interpretive guideline." *Liparota v. United States*, 471 U.S. 419, 427 (1985). It addresses core constitutional concerns: fair notice and the separation of powers. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). *** Applying *Chevron* deference to an agency's interpretation of a statute does not address either of those concerns.

Take the present case as an example. The definition of "machinegun" in § 5845(b) has both civil and criminal consequences. *** The rule of lenity applies to such statutes. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). ***

Section 5845(b) as re-interpreted by ATF does not provide citizens with fair notice of what conduct is criminalized. When an agency can define criminal conduct, there is a genuine concern that "if [they] are free to ignore the rule of lenity, the state could make an act a crime in a remote statement issued by an administrative agency." *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring). The government insists fair notice concerns are not implicated here because the Final Rule is not tucked away in obscurity. Rather, the Final Rule went through notice and comment and is published in the Federal Register.

But this is cold comfort to a citizen tasked with conforming their conduct to the law. The government expects an uncommon level of acuity from average citizens to know that they must conform their conduct not to the statutory language, but to the interpretive gap-filling of an agency which may or may not be upheld by a court. Justice Gorsuch recently expressed this same concern regarding a case with nearly identical facts:

> How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess again whether a later and opposing agency interpretation will also be held "reasonable"?

Guedes, 140 S. Ct. at 790 (statement regarding denial of certiorari). When an agency plays pinball with a statute's interpretation, as the ATF has here, fair notice cannot be said to exist. ***

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Applying the rule of lenity to § 5845(b) would alleviate these concerns. The rule of lenity instructs us, when confronted with two possible understandings of a statute, to adopt the narrower construction. With the rule aiding our interpretation, § 5845(b) clearly answers the issue at hand: bump stocks do not fall within the definition of machine gun.

Still, the panel majority says the rule of lenity does not apply here.

In doing so, the panel majority fails to explain why the rule of lenity should receive such a disfavored status among the rules of construction. We have regularly applied similar substantive canons of construction before reaching *Chevron*. For instance, constitutional avoidance is a canon of construction that resolves statutory ambiguities to avoid potential constitutional issues. And like the rule of lenity, "the canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1245 (10th Cir. 2008). *** Why should we favor some substantive canons over *Chevron* but not the longstanding rule of lenity? ***

III. Conclusion

Anyone who has seen a semiautomatic rifle equipped with a bump stock understands it increases the rate of lethal fire. But Congress did not define "machinegun" based upon the speed at which a firearm shoots or the firearm's potential for mass carnage. Section 5845(b) defined "machinegun" based on its mechanical operation. The language of that statute and that statute alone is what we must apply.

The en banc majority has done the circuit no favors today. By dismissing the en banc order, the majority perpetuates confusion on difficult issues in the circuit. We are left not knowing whether the government can waive *Chevron*, whether the rule of lenity can ever trump *Chevron*, and whether formal concessions concerning a preliminary injunction factor before the district court is binding. For the sake of courts and future litigants who must wade through the panel majority's reasoning, I can only hope we receive clarity on these issues sooner rather than later.

For the foregoing reasons, I dissent from the majority's decision to vacate the en banc order.

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