



Written by [Bob Adelman](#) on July 29, 2022

17 State AGs Sue ATF Over Unconstitutional Expansion of Powers

Arizona Attorney General Mark Brnovich submitted [a complaint](#) on Wednesday against the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Attorneys general from 16 other states, along with some gun-rights groups, joined him in the complaint.

At issue is the ATF's attempt to prohibit the making of "ghost guns" by private individuals by declaring the parts needed to make them as firearms themselves and therefore subject to ATF regulation.

As Brnovich noted, the ATF seeks to "regulate unfinished, non-functional parts as if they [are] complete firearms." This move "overshoot[s] the authority granted to it by Congress. The rulemaking is unconstitutional."

The issuance of the agency's "final rule," says the complaint,

unconstitutionally subverts Congress' authority, exercising quintessentially legislative powers in a manner that could never pass either (let alone both) houses of Congress today, which is precisely why defendants have no intent whatsoever to ask for legislative authorization to take such unprecedented actions.

In other words, the ATF action is another example of the administrative state — the unconstitutional fourth branch of government — run amok.

The complaint makes clear, from the agency's own words, that its purpose is to eliminate ghost guns altogether by regulating their parts into oblivion:

The Final Rule can be viewed as an effort by ATF to eliminate the market for 80% frames and receivers (and DIY homemade firearms) entirely, through arbitrary standards, intimidation, and threats of criminal charges for vague federal crimes.

In fact, ATF admits that the Final Rule "will reduce the overall supply and demand for ... firearm parts kits," and "estimates ... that 98% of such companies "will end up dissolving their businesses"....

The Final Rule can best be understood as an effort to eliminate entirely the market for DIY firearm parts that can be manufactured into functional firearms by law-abiding, "do-it-yourself" gun owners.



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The 161-page complaint declares that

The Final Rule upends existing federal gun law, imposing onerous burdens on federal firearms licensees and private gun owners alike, and creating out of thin air a new federal crime with respect to what ATF terms “privately made firearms,” all in clear disregard for the statutory text that Congress enacted.

To create that “new federal crime,” the ATF first must create a new definition of ghost gun. The new definition reads:

Privately made firearm (PMF): A firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced.

Under the new definition, any PMF that doesn’t have a serial number (none of them do) automatically becomes illegal to own.

The complaint states that the “ATF does not have the power to create new crimes,” just as the Executive Branch cannot, either through the president or one of its agencies, create criminal statutes. Under the Constitution, only Congress can do that:

Defendants may only exercise the authority conferred upon them by statute, and may not legislate through regulation in order to implement [the agency’s] perceived intent of Congress or congressional purpose behind federal gun control statutes.

The complaint spells out how the Constitution works, and how the ATF works to violate it:

Article I, § 1 of the U.S. Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

Article I, § 7, Clause 2 of the Constitution mandates that “[e]very Bill ... shall have passed the House of Representatives and the Senate” and “shall ... be presented to the President of the United States ... before it become a Law....”

The [ATF’s] Final Rule violates these provisions, usurping legislative powers. The Final Rule represents an attempt by an administrative agency to implement policy change and enact omnibus federal gun control legislation through bureaucratic regulation, rather than through legislation.

The complaint provides a helpful analogy:

The Constitution protects the corresponding right to sell firearm components, magazines, ammunition, and accessories, just as the freedoms of speech and press protect the right to buy and sell newspapers, books, paper, and ink.

Indeed, it would not mean much if there was a right to make a firearm, but no ability to



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purchase the materials necessary to do so.

The complaint, filed in the U.S. District Court of North Dakota, asks the court to rein in the ATF by declaring that

the Final Rule is unlawful and an *ultra vires* ["beyond the powers"] agency action and of no force and effect;

the Final Rule is an act "not in accordance with law" and of no force and effect;

the Final Rule violates the Separation of Powers doctrine embodied in the United States Constitution; and

the Final Rule violates rights protected by the Second Amendment and is of no force and effect.

Unfortunately, the complaint doesn't address the issue of the constitutionality of the ATF itself, or of Congress' original abrogation of the separation of powers doctrine by granting legislative authority to the ATF in the first place. As the complaint itself states, in its effort to perform an end run around the constitutional limitations built in by the Founders,

ATF has created an informal definition, within another informal definition, within a regulatory definition, within another regulatory definition, within a statutory definition, of a statutory term.

This will continue until such time as the ATF is abolished, or the Second Amendment is abolished by it.



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