



Can the ATF Regulate Ghost Guns?

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[00:00:00.3] Jeffrey Rosen: This week, on the second day of the new term, the Supreme Court heard oral arguments in *Garland versus Vander stock*. That's a case challenging the authority of the Bureau of Alcohol, Tobacco, Firearms and Explosives to regulate ghost guns under the Gun Control Act.

[00:00:18.9] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode of *We the People* we will recap the oral arguments, we'll debate whether ghost guns can be regulated as firearms by the ATF, and we'll explore the future of gun regulations at the Supreme Court. And joining me are two leading scholars of gun regulation and the Constitution. Clark Neily is Senior Vice President for Legal Studies at the Cato Institute. Before joining Cato, he was a senior attorney at the Institute for Justice. His most recent book is *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government*. Clark, it is always wonderful to welcome you to *We the People*.

[00:01:14.7] Clark Neily: Thanks Jeff. It's nice to be back.

[00:01:17.2] Jeffrey Rosen: And Dru Stevenson is a law professor at the South Texas College of Law. He previously served as a legal aid lawyer in Connecticut and became an assistant attorney general for the state of Connecticut. His current research focuses on firearms law and policy, and he's the author of many articles about the Second Amendment. Dru, it is wonderful to welcome you to *We the People*.

[00:01:35.7] Dru Stevenson: Thank you. I'm really honored to be here.

[00:01:39.4] Jeffrey Rosen: Let's jump right in with the oral arguments. Clark, this was a statutory case, not a Second Amendment case. Tell us what the leading issues were and how you saw the court responding to them.

[00:01:55.4] Clark Neily: Right, so this, as in other cases, this term involves a somewhat esoteric question of not so much whether Congress can do a particular thing, but whether they did a particular thing. A federal agency like ATF only has those powers that are delegated to it by Congress through a statute that Congress passed. So the argument in this case is whether Congress did or did not provide statutory authorization for the ATF to regulate a part of a firearm

called the receiver. We won't get very technical about it, but you just think of it as it's the thing in the middle between the barrel and the stock where the action happens. Where the round is set off by the firing pin and you get the explosion that propels the bullet out the end of the firearm.

[00:02:49.2] Clark Neily: Up until 2022 the ATF had one definition of what constitutes a firearm, and that would be in effect a gun that can fire or an object that could be readily converted into a gun that could fire or the receiver frame or receiver of that gun. What the ATF did in this rule, and what this case is really about is that it kind of expanded this definition so that now it's not just a gun that could be readily converted an inoperable gun that could be readily converted into an operable one, but a not fully finished receiver, a hunk of metal that's been machined in some way so that it's part of the way towards being a receiver, but it's not quite one yet. And this rule that's at issue in this case, we'll call it the Final rule, went into effect in April of 2022.

[00:03:43.3] Clark Neily: It expanded the ATF's understanding of what constitutes a firearm that has to have a serial number on it to include a receiver that isn't quite finished yet, and that requires some further act, some further tooling or machine shopping in order to turn into a receiver that would then actually work in a firearm. And the challengers in this case said, look, that's not the definition that Congress gave, and it's not a permissible definition for the ATF to provide. And so these gun kits that people have been buying that include almost finished but not quite finished receivers should not count as firearms within the definition of that term under the 1968 Gun Control Act. And therefore the ATF has no authority to require people to put a serial number on any gun that includes one of these, you have to finish it at home receivers. I know that's a mouthful, but to sum up what this case is about is whether Congress actually provided the statutory authority for this new rule that the ATF has been enforcing about unfinished receivers for firearms since 2022.

[00:04:51.5] Jeffrey Rosen: Great. Thank you so much for that helpful introduction to this technical case. As you just explained to us, ghost guns are untraceable weapons without serial numbers, they're assembled from components or kits. And you said the relevant debate is over this statute, the Gun Control Act and its definition of firearms. Section A as you said, is any weapon which may be readily converted to expel a projectile. And section B says that the frame or receiver of the weapon is relevant. Dru, how did you hear the justices interpreting both of those provisions? Why don't we begin with this section A, any weapon including a starter gun, which is or is designed to, or maybe readily converted to expel a projectile by the actions of an explosive, how are the justices interpreting that provision?

[00:05:43.6] Dru Stevenson: They are definitely agreeing that there are some incomplete or inoperable guns, let's say a gun that's missing a part or could easily be made functional and operational. And I think that there's no real argument in the case that those are banned by the statute. Because I teach administrative law, I do wanna add a caveat to what Clark Neily just said. There's also no real question, I think for the justices that the ATF does have some regulatory authority, and so Congress clearly put in the statute that the Attorney General now does it so the ATF can promulgate some regulations about how the statute should be, what it means and how it should be implemented. And so the problem is when an agency does that

interpretation and promulgates sort of fills in this, the gaps a little bit, is whether they went so far afield from what the statute said that they sort of went outta bounds from the statutory language.

[00:07:04.8] Dru Stevenson: And because agencies can't do that they can't take something that says, "Okay, you're allowed to define what counts as a firearm and then decide that a tuna fish sandwich counts as a firearm." And I think everyone agrees that both the ATF has authority to make regulations that are compatible with the statute and not authority to make regulations that stray too far afield from the verbiage of the statute. And ultimately, this is a question most of the discussion at the Supreme Court this week seemed to really focus on how readily convertible the kits in question are, how long it takes to get one ready to fire, and how what tools are actually required and so forth. So the companies in question are not just shipping a hunk of metal. And at one point, the Solicitor General said she had put together one of these kits herself. "I actually had the experience of putting one of these kits together, and it's just like the record shows."

[00:08:18.4] Dru Stevenson: And it was as marketed, if these kits are marketed as they will only take about 15 minutes to, and our dummy proof to put together, if you have a drill and maybe a pair of pliers or a file things that a lot of people have in their home already, that you can have a gun that's ready to fire. And she conceded at one point that if something took longer than eight hours, that ATF would probably consider it not to be a firearm under the statute that you just quoted.

[00:08:54.7] Jeffrey Rosen: Many thanks for that and for flagging that one question is how long it takes to convert the weapon. Clark, there were a lot of hypotheticals at the oral argument about whether ghost gun parts were more like incomplete omelets or the pieces for a grocery list or IKEA furniture or bicycles without pedals. Tell us about that and how you saw the justices breaking down on the question of whether or not a ghost gun could or couldn't be readily converted into a weapon.

[00:09:23.6] Clark Neily: Yeah, it was fascinating. As a lover of colorful analogies, I was particularly entertained by this part of the case, but let's imagine that there's a law that all couches have to have a serial number on them. And there's a debate about what is the thing that you get from IKEA in the box? Is that a couch or is that just the components of a couch? And I think the argument in this case comes down to let's say that provisionally, that characterizing a box with a bunch of couch parts in it as a couch, and therefore it requires a serial number, is something that Congress could do. But then again, the question in this case is whether Congress actually did that. In normal parlance, we wouldn't call a box with a bunch of couch parts in it, a couch because it's not one yet.

[00:10:09.5] Clark Neily: It wouldn't be very comfortable to sit on, you wouldn't put it out for company, et cetera. So that's roughly analogous to the situation with firearms, because there are people who sell these kits that with enough work, you can turn this kit into a working firearm. And the really key part of that kit, again, is this thing called the receiver, which is where the actual explosion happens that causes the gun to project a bullet out the front of it. And so I think it's really two questions. First, is there enough room in the statute for the ATF to say, well, something that is not yet a receiver but is readily converted into a receiver, a working receiver that falls within the definition of firearm under the relevant statute, the 1968 Gun Control Act?

[00:11:00.1] Clark Neily: I think there's a pretty powerful statutory argument that it doesn't, because in the statute, the 1968 Gun Control Act, they specifically say that something is a firearm. Even if it is not operable at the moment, but if it's readily converted into a firearm, then it is a firearm because it's readily convertible. They could have used that same language with respect to the receiver. So a working receiver is considered to be a firearm under the '68 Gun Control Act, but they didn't add that additional language. There's nothing in the act that says, or in effect a not operable receiver that could be readily converted into a receiver. And so the challengers really fixated on that difference and said, look, and so did the Fifth Circuit and said, we assume that when Congress uses verbiage like that in a statute, in one part of the act, but not in another, the omission was intentional.

[00:11:48.4] Clark Neily: And they, both the Fifth Circuit and the challengers in this case argue that therefore a not currently operational receiver that could be readily converted into an operational receiver is just outside the scope of the ATF's ability to characterize that as a firearm within the statutory meaning of the 1968 Gun Control Act. Therefore this law is invalid. To tie it back to the couch thing the point is essentially that yes, Congress could have said that the frame of a couch unadorned with cushions is a couch within the meaning of this act, and you have to have a serial number on it. But if they didn't, does the Couch Agency get to say, well we can write a regulation that says you have to put serial numbers on couch frames anyway, because if you put enough cushions on it becomes a couch. And that's about the limit of the analogies, I think in this case. We could do omelets, we could do some of the other things, but I like couches for this illustration.

[00:12:46.3] Jeffrey Rosen: Great. Well, sticking to couches, Dru, what was your sense of the debate about whether or not the act when it talks about frames or receivers includes ghost guns? The Solicitor General said the ordinary meaning of a noun like frame or receiver includes objects that are nearly complete, but are missing just a few holes that need to be drilled. And Chief Justice Roberts suggested that drilling a hole to complete the ghost gun doesn't just convert it into a hobby. And at the same time, some of the justices were more sympathetic to the argument that ghost guns were not included in this frame of receiver definition. How did you see the justices breaking down in this question?

[00:13:26.2] Dru Stevenson: So I'm going to first of all, agree with most of the media. I guess and headlines after oral arguments ended that it seemed like most of the nine justices were agreeing with the Solicitor General and with ATF. And there Justice Alito was particularly combative, and Justices Thomas and Gorsuch were I guess a little harder to read. My read when I read the transcript was Justice Gorsuch sort of backed down at the end of his questioning. I also wanna say that the person who was arguing the case for the government for ATF Elizabeth Prelogar is one of the most gifted appellate lawyers alive right now. I mean, maybe the most gifted, but at least probably in the top 10, just, and she was at her best in this particular argument.

[00:14:36.7] Dru Stevenson: So the government couldn't have wished for a better advocate for that particular day. Most people thought that she did a good job. I do wanna respectfully disagree with the couch point and because I do think that if I pick something up at IKEA that's still in a box and come home and let's say ask my teenage sons to help me unload the car, I would say, I

bought a couch at IKEA. I need your help. And I think we would refer to it as a couch depending on the context even though it still needs to be put together. I've bought furniture from furniture stores online that like futon beds or things like that that really required just tightening, very little work, putting it together. You really just needed a screwdriver and put the two big pieces that were mostly complete together. And I have bought other things that I had to give up and just couldn't do, right. Like I spent hours trying to assemble something and failed. And that was actually that whole conversation or those experiences were talked about at length in the oral arguments. You brought up the omelet analogy, Justice Alito said If I set out eggs and chopped ham and peppers on my counter.

[00:16:17.7] Justice Alito: Pepper and onions is that a Western omelet?

[00:16:21.1] Dru Stevenson: And the solicitor general said, no, because you could actually do other things with those ingredients and might maybe be just as likely to, and then Justice Barrett jumped in and said.

[00:16:34.4] Justice Barrett: I just wanna follow up on Justice Alito's question about the omelet.

[00:16:38.4] Dru Stevenson: I think maybe a HelloFresh kit would be a better analogy where you get a box and it's clearly marketed and sold as just mixing these ingredients together in the order we describe. We have everything you need for the meal and you'll have a complete meal. And that's, I think, going to be part of the question in this case is whether this is more like just looking in your fridge and seeing what you have to put together for a possible dinner versus getting a HelloFresh kit that is marketed and sold and purchased as a complete meal in a box. And it wouldn't be that weird for people to say, "Oh, dinner was just left on the front porch, even though they still have to put the ingredients together and heat it up." I do wanna say that there were, in the online discussions about this case beforehand, there were some issues that didn't get a lot of attention from the justices.

[00:17:40.0] Dru Stevenson: I think that they didn't take it that seriously. So for example, the question of whether this rule affects a hobbyist who is buying each part individually like a gunsmith and assembles a gun for their own use at home, the regulation itself is very clear and says over and over again that it doesn't apply to that situation. This applies to introducing a gun into commerce. The other thing I wanna say that Justice Roberts and even some of the conservative justices we're concerned about is that these kits are being used to circumvent the entire sort of regime of federal law about firearm sales. And all that's really required of the parts Kits company is to put a serial number on it and keep records of that for the government so that when it's put together and the police recover it from a crime scene, which is happening a lot now they can have some hope of tracing it. But those serial numbers also sort of serve the purpose, like your social security number for the taxes that apply to guns for background checks when they apply and other things like that. And this is basically something that if the challengers are correct, it essentially thwarts the clear intention of Congress in other regards. And I think that that argument got a lot of traction.

[00:19:19.0] Jeffrey Rosen: Clark on the broader question of how significant ghost guns are in the market, how significant are they? How big a deal would it be if the court requires them to carry serial numbers? And do you think that they should be covered by the gun control act or not?

[00:19:40.1] Clark Neily: Yeah, let me first, if I may really quickly come back to this issue of the couch versus the omelet. I wanna say one thing. It is true that Elizabeth Prelogar is among the most gifted advocates of her generation. She's apparently among the most gifted gunsmiths of her generation as well, because she claimed to be able to take a kit and assemble a gun in something like 20 minutes. There's an amicus brief from a former high ranking ATF official who says that it is almost impossible for a sort of a non expert to assemble one of these kits. You'll almost always get it wrong. It takes a minimum of somewhere like five to seven hours, even if you have the necessary tools, which you normally are not gonna have in your house.

[00:20:20.6] Clark Neily: So there's a really interesting, I think, discrepancy in terms of credibility between that person, the former ATF official and the solicitor general, and I think it shows the limits of analogies, right? Because it's not the case that every gun kit is the same. Some of them would be like a couch. You get the box, you pull it out, you open a valve and the couch inflates itself, and there's literally nothing else that you need to do. Fair enough. That's a functional couch. The other end of the spectrum, you could have a couch "that comes in a box" and you have to do a lot of carpentry. You have to change some shapes, you have to use machine tools, some bolts to fit into the holes that you made, et cetera, et cetera. And gun kits come in all those different variations.

[00:21:02.1] Clark Neily: So it could be that we'll have some discrepancies. If the court gets that far, there may be some kits that are like yeah, this is just turnkey. So that's definitely a receiver, even though it's not quite there yet. And others, they'll say, "Hey, that's a lot closer to a hunk of metal. No ordinary person's going to be able to turn this into a receiver." So could be that we get a remand to the lower courts for more fact finding. But as far as the significance, it's always interesting when people use Pejoratives right out of the gate. So for example, in the Hardwick case involving gay sex we were told that the act in question was sodomy. But then when we get to Lawrence, it's not sodomy anymore, it's intimacy. And similarly here one person's ghost gun is another person's privately made firearm or PMF, and these are things that people have been making since the time of the founding in their own homes.

[00:21:49.2] Clark Neily: There's nothing sinister about somebody making a gun at home. There never has been. There's been very little regulation of it, if any, at either the state or the federal level until very recently in our nation's history. And the law is that you can make a gun at home. You don't have to put a serial number on it, as long as you're not making it for the purpose of selling it to somebody else. So I think that this law, or this new rule is likely to affect the conduct of a relatively small group of people but one that is going to be able to make a very strong case that what they do in terms of taking parts and turning them into functioning firearms is something that people have been doing in this country for hundreds of years.

[00:22:31.9] Clark Neily: And that even in the founding era when the British made it difficult for the colonists to get firearms, some people made their own firearms so that they could resist

British tyranny. And I think the court has made very clear that it's sensitive to that kind of history. So in terms of how big a deal this is gonna be in the event the court upholds the ATF rule, which I agree with Dru, that it's likely to do, I think we will not have seen the last of this issue because I do think that there are possible constitutional challenges perhaps more of an as applied than a facial nature. And I don't think that every gun kit that people find themselves working with are gonna fit comfortably within the ambit of this new ATF rule, even if the rule itself is upheld facially.

[00:23:14.4] Jeffrey Rosen: Dru, what are your thoughts about the future of gun control regulations? If the court does uphold this one, do you see future constitutional challenges? And how does this fit into the important debate on the court about administrative law and how deferential the justices should be to agency interpretation of congressional statutes?

[00:23:35.9] Dru Stevenson: So I'm gonna start by saying, Mr. Neily and I agree that the court is, it seems likely that a majority of members of the court will uphold this particular regulation. And I agree with him that not all gun kits are the same. And the solicitor general conceded that at oral argument and basically left the door open for someone to bring some kind of an applied challenge and say, "Look, my kit was very difficult to assemble. You really had to have special equipment and machinery," and so forth. And that would be something that a defense, someone could raise to a prosecution if, and remember that ATF would also probably, she said, had no plans of bringing cases for those. But some things have changed since the founding era.

[00:24:36.1] Dru Stevenson: I do wanna say in the founding era, General Washington came up with a system of embossing numbers on all the guns that were brought to the continental Army, or that they collected from British soldiers on the battlefield and so forth, because people were walking off with the guns when their tour of duty was over. So we also have a long, long tradition of putting serial numbers on guns so that they can be traced in cases of theft or misuse and so forth. And the difference between an individual hobbyist making their own gun at home in their garage and these cases is these are being mass marketed online. And the technology that changed since ATF last issued a rule about this, about what counted in the early, I believe in the early '70s, is that not only are they able to market things more easily on the internet, but there are jigs or templates that make it much easier for a novice to put them together.

[00:25:42.9] Dru Stevenson: Now, in terms of the future, obviously that there's a lot of, I would call it chaos in the lower courts about the status of how to apply the Second Amendment after Bruen and Rahimi. And it's very hard to predict what will happen. This particular case was not, I want to reiterate, that was not a Second Amendment case. It's not gonna be decided on Second Amendment grounds or the history and tradition text or things like that. There are other cases working through the pipeline that are challenging other aspects of the Gun Control Act and that could end up bringing up the serial number. It rules itself, not just whether it applies to these guns, but based on the oral arguments, I didn't really see a majority of justices saying, "We don't think the government has any business requiring serial numbers, period on guns."

[00:26:38.6] Dru Stevenson: So I don't think that that's going to get a lot of traction. How much difference will this make? That actually was a big part of the oral arguments. Based on statistics, the police every year are recovering around the country, recovering more of these what they call

ghost guns from crime scenes, so it's now in the thousands every year. If you want to commit a crime and get away with it, this is the gun for you, right? It's an untraceable gun. And so the argument is that these are disproportionately appealing to people that want to do something that they don't want to get caught for with their firearm. And because otherwise you could just go buy a regular firearm or maybe buy a kit where the frame receiver indeed has a serial number on it, or make your own at home and not have it go into the stream of commerce at all. So this is becoming a significant crime issue. I do think that the companies that have been making these are going to, a lot of them are going to be shuttered or go out of business if the court upholds the rule.

[00:28:00.5] Jeffrey Rosen: Well, let us now turn to the constitutional question and the future of gun control regulations post Rahimi, the Rahimi case that the court recently decided. Clark, you wrote the section on Rahimi in the Cato Institute's comic book on the Supreme Court term, which is a unique and entertaining pamphlet. And you sum up very clearly in comic book form how the justices have disagreed post Rahimi about the role of text and history in interpreting the Second Amendment. To sum up that debate and what you think the future of ghost guns and other gun control regulations is post Rahimi.

[00:28:44.4] Clark Neily: Well, that's a lot to bite off. But the gist of it is that usually when the court tries to adjudicate a constitutional case where someone's asserting a right to do something and the government's asserting a power to regulate that thing, they'll do a kind of a balancing where they'll say, "Look, the government has to have either a very good explanation for regulating this conduct, or a pretty good explanation, or even just a conceivably good explanation." And there needs to be some fit, maybe a very tight fit, maybe a very loose fit between the government's stated interest and the regulation that they've issued. In Bruen what the court did was jettison that framework that again implies in most other constitutional settings in favor of something that's come to be called text history and tradition or historical tradition where they look back in time, and they don't even really tell us exactly when or how far back to look.

[00:29:37.6] Clark Neily: But we look back to some point in the nation's history to see if there was a similar regulatory scheme. And if so, then to the law that's being challenged today is probably okay. And if there's not, then it's probably not okay. Many scholars, and I would say myself included, have identified serious challenges and problems with this new historical tradition approach. I won't try to enumerate all of those here, but I think the court has really sort of taken a step off of the, into deep constitutional water with this new test that makes it difficult to assess the constitutionality of important questions. I'll take one example. Let's say that the constitutionality of requiring people to put serial numbers on firearms comes before the court. Does the fact that the government used to do that for inventory purposes during George Washington's time, give them the authority to force both private individuals and gun manufacturers to serialize firearms that they produce, is that a relevantly analogous sort of historical practice or is it not a relevantly analogous, and that by this, I mean, again, sort of the, what Dru mentioned is George Washington stamping numbers on firearms, that's to keep track of their own firearms, not to make sure they can keep track of yours.

[00:30:56.5] Clark Neily: So I think that that's going to be a real challenge for the court because it's not at all clear why historical practice answers modern day constitutional questions. Maybe

it's of some help in contextualizing them in some cases. But I'm deeply skeptical that historical practice yields or can yield a satisfying answer to all modern constitutional questions. But I'm afraid that that's the kind of box that the Supreme Court has painted itself into in the wake of the Bruen and Rahimi cases.

[00:31:28.5] Jeffrey Rosen: Dru your thoughts on how the post Rahimi debate might affect the future of ghost gun regulations and the landscape moving forward.

[00:31:39.2] Dru Stevenson: So this is a point where we completely agree. I think that the history of, and our legal history and traditions are always interesting and relevant and worth talking about, but the historical record is simply too incomplete and it's too much in the eye of the beholder, how much weight we give to one scrap of historical evidence versus another. If we have a letter from Thomas Jefferson that suggests he thought the Constitution meant one thing, and James Madison says the other, and we know they disagreed. Who do we side with? And the fact is judges, the lower court judges are trained as lawyers, not historians. Most of us like history and have watched the History Channel, but we can't do rigorous history.

[00:32:40.1] Dru Stevenson: We do kind of amateur history. And so I think that the Bruen test as Jake Charles at Pepperdine has called it, is kind of a Rorschach test where people see what they want as they try to apply it. The one thing that Bruen does is because it's so confusing, it guarantees that the cases are gonna keep coming to the Supreme Court, and they're gonna get to decide things on a case by case basis. And I think the contrast between how they ruled in Bruen versus Rahimi, where in Rahimi they upheld a federal statute, suggests that we have some people on the court including conservatives who are going to carve out some of our gun laws as okay. And, I know that there are a lot of people in America who would, what I would call Second Amendment absolutists.

[00:33:38.4] Dru Stevenson: They read the Second Amendment as saying Congress can't make any laws about guns at all, anything that relates to gun sales or use or ownership. But there is no one on the Supreme Court that seems to hold that view right now, a truly absolutist view about the Second Amendment. So it's going to come down to individual votes. What do I predict based on what they've signaled? I think that they will uphold the felon in possession law and some of the other 922 [G] categories, undocumented immigrants and so forth where they have had opportunities to overturn those laws even since Bruen and have passed on it. And so I think that we're gonna end up five years from now where they have basically sort of circled a bunch of our existing laws and they're going to say, "These are here to stay for now." And then others like maybe assault weapon bans. I don't know which way they're gonna go. Or some of the innovative rules that are coming out of California like microstamping. I really don't know how they're gonna go about that. Those are more likely to be challenged. I think the federal laws in 18 USC 922 G that we've had now for a whole generation, most of those are likely to stay with this court, with the current makeup of the court. That's my prediction.

[00:35:12.5] Jeffrey Rosen: Clark, you're a vigorous and eloquent defender of the Second Amendment, although you're a critic of the Bruen test. Give us a sense of how you think the court will approach issues ranging from the felon possession ban to assault weapons over the next five years.

[00:35:30.6] Clark Neily: Yeah, I think that Dru could be right. I think it'll depend maybe on the extent to which the justices are prepared to sort of become granular in their analysis, right? So it's one thing to say that somebody who commits an armed robbery of a bank loses their right to own a gun for the rest of their life. But it's another thing to say that somebody who committed some kind of state food stamp fraud 20 years ago, which is an actual case that's pending in the system, should never be able to own a gun again. And of course at the time of the founding, there weren't very many felonies and they were all very serious. And if you committed a felony in the late 18th century, you were probably a pretty bad person, or at least you'd engage in a significantly anti-social act.

[00:36:15.7] Clark Neily: Now the whole concept of a felony has been utterly cheapened. There's some people who argue, I think credibly, that most adults at some point in your life, you've probably committed a felony of some kind, whether you know it or not. So I think it'll really come down to, are the justices willing to look at this on a case by case basis? Similarly, there's another provision of federal law that makes it illegal for an unlawful user of a controlled substance to possess a firearm. Well, guess what? That includes marijuana and more people in America now report being regular users of marijuana than alcohol. Does that mean that every single one of them gives up their Second Amendment rights during the time when they're using one intoxicant that frankly is probably safer for people to be using if they own a gun?

[00:36:57.4] Clark Neily: Because they're gonna be looking for a bag of Doritos, not a bank to rob. But anyway the court I think is not really clarified for us. Or the justices who tend to be more sympathetic to the Second Amendment have not made clear whether they're prepared to get down to that level of granularity to try to decide kind of what's sort of constitutionally defensible as to that particular litigant, whether it's a defendant or a plaintiff. And if they rule in broad brushstrokes, and I think Dru's right, most of the federal gun laws will be upheld. But if they're prepared to get down into the nitty gritty and say, "Is this law constitutional as applied to this particular person who came back from Iraq with post-traumatic stress disorder and smokes weed once in a while to help get himself to sleep." That's a much more sympathetic case, obviously, and I think we could get different results, but I just don't know which way the court will go.

[00:37:49.0] Jeffrey Rosen: In addition to the constitutional debate, there's an important debate about administrative law and how deferential the court should be to gun regulations from administrative agencies. In the Garland and Cargill case last term involving bump stocks, the court struck down the ATF's rule six to three. Dru gives us a sense of what the significance of the case was for how the court will view these questions of administrative deference and guns in the future.

[00:38:22.8] Dru Stevenson: So, as you know that this is all kind of happening, there's a parallel track of cases going on right now with something called Chevron, the Chevron doctrine and Chevron deference the court getting rid of that this past term. And I have to tell you, this is an area of law I follow, and again, since the Loper Bright case last summer, the lower court cases are a little bit all over the place. It doesn't mean that the agency always loses. It does mean that the agency has to come into court and convince the court that their interpretation of the statute is the best one. And that, on controversial questions like gun rights are very partisan, that's an

uphill battle. There's plenty of other regulatory questions that are less divisive. And in some ways, the case this week, VanDerStok is an example where it seemed like a lot of the justices, even though they ruled against ATF in about bump stocks, think that the serial number rule, the ghost gun ban is okay.

[00:39:40.5] Dru Stevenson: I agree that it makes things somewhat unpredictable and it's also going to make it a little bit higher stakes our congressional elections in the coming years because it shifts some of the way back to Congress to pass more specific statutes or to make it clearer in a statute. Here's a range of options that are acceptable for agencies to adopt and as regulations. I do wanna add, Congress has started only recently to routinely invoke the Congressional Review Act, which is a sort of a legislative veto of agency decisions. So we will have to see who wins the White House and whether one party is able to control both houses of Congress. Right now, when you have different parties controlling each House of Congress, very few statutory amendments get enacted and get passed.

[00:40:52.5] Dru Stevenson: And I sympathize with the position of the Cato Institute that I think that the founding fathers set up a system that would have a lot of friction and gridlock so that legal changes would have to happen incrementally. And I think that that is what we're going to see going forward with gun regulations and from the administrative law standpoint is that we're going to see more and more incremental change. I do wanna add, for probably the last five years, ATF has not been asking for Chevron deference either because they expected it to be overturned or because the new regulations were actually consistent with what they were already doing in practice. That's what they are claiming, for example, in both the ghost gun case and the bump stock case. And right now there's an even bigger problem than ghost guns or bump stocks is Glock switches or the auto seer devices that convert a Glock or some other firearms into fully automatics and they're now widely available and very cheap. And ATF is already prosecuting hundreds of people a year overlock switches, over making them or selling them or possessing them. And so part of what's happening is the regulations I think, are often catching up to enforcement practice.

[00:42:44.4] Jeffrey Rosen: Clark I think you're a fan of the overturning of Chevron. What difference will it make to the future of gun regulations and how significant is the bump stock case moving forward?

[00:42:56.4] Clark Neily: Yeah, I mean, look, I think that it's entirely reasonable for somebody to say that if my possession of a hunk of metal or polymer exposes me to a 15 year prison sentence, which is the significance of this new rule, you ought to know what exactly is it that you should not be possessing? And the ATF has this eight factor test, and it involves a bunch of considerations that I think could get a lot of disagreement. And so the ATF I think is counting on the idea that people will just not even take a chance. When in doubt don't possess anything that could be characterized as a receiver. And I don't really think that's the country most of us wanna live in. I mean, just flip the switch and instead of firearms, imagine we're now in the area of immigration or medication, maybe even a medication that's of particular interest to women who find themselves in a particular situation.

[00:43:52.0] Clark Neily: Do we want people in those situations to be exposed to a 15 year prison sentence because they essentially made a rational and reasonable decision to do something that it turns out some federal bureaucrat says, nope, that was within the ambit of the statute as we understand it. And I think all of us want to know that it was Congress that decided this is going to be the policy, and we think that this is a serious enough act of misconduct to put you in prison for a long time, and not again some federal agency that can change its position with the change of administrations, which is what the elimination of the Chevron doctrine in part was, is hopefully going to avoid where agencies change their position on the meaning of statutes as different presidents come in with different priorities.

[00:44:40.6] Clark Neily: The last thing I wanna say is that this point about the exposure of people to significant prison sentences for just possessing the wrong hunk of metal or polymer was raised at oral argument. And the solicitor general kind of tried to wave it away by assuring the court that the ATF had no plans of going after people on borderline cases and so forth. And I just wanna make sure everybody understands that those assurances are completely worthless. They are utterly and completely worthless. Those assurances were made in a case called Stevenson involving a law forbidding certain depictions of animal cruelty, and the government assured the courts that they would only enforce this law against the absolute most indefensible wanton cruelty to animals with a prurient interest in sex, et cetera.

[00:45:26.3] Clark Neily: And it didn't take him more than a few months to abandon all of those assurances and go after, in this case, Mr. Stevenson just had a, he had produced a self-made CD documentary about pit bulls that included a very short image of pit bulls fighting. So I just, again, I wanna make sure everybody understands that they shouldn't put any stock whatsoever in the government's assurance that the ATF will only go after obvious violators of this law. There is absolutely nothing in the history of the DOJ's enforcement of laws like this that is consistent with those assurances, and the court has dismissed them correctly in my view, in other cases, and it should dismiss them in this case as well.

[00:46:01.6] Dru Stevenson: Can I respond to that?

[00:46:03.7] Jeffrey Rosen: Please do Dru. Final thoughts on the administrative law question, and then we'll have a closing argument.

[00:46:07.9] Dru Stevenson: So I don't agree. First of all, from the standpoint of most citizens, they have any more awareness of what federal statutes say than what agency regulations say. And so most people, if you really wanna avoid following the law, you have to go pay a lawyer to look it up for you before you do something. And whether it's a statute and/or an agency ruling, and the same by the way was a critique of our common law courts that Jeremy Bentham raised in the founding era, that people, you have no way of knowing what a court is going to decide, what the Texas Supreme Court, for example, will decide that yesterday they decided that what you're doing is a crime.

[00:47:02.0] Dru Stevenson: That said, I disagree that there's a big risk of surprise in the ghost gun, with the ghost gun regulation. The agencies have to follow the administrative procedure Act. They have to announce that they intend to regulate something, they have to allow a public

comment period. Then they promulgate a final rule. And usually there's kind of a grace period before that goes into effect. So if somebody wants to, bothers to look or ask if it is actually pretty clear you shouldn't be surprised, you can find out that everyone knows that this regulation was passed. And not only that the regulation really focuses on commerce, not what individuals are doing in their own home. And so I disagree with the characterization. You have a hunk of metal, could the ATF show up at your door and say, "Hey, that's a gun."

[00:48:00.1] Dru Stevenson: That's not what the regulation is about. And the companies that are manufacturing these and shipping them, and that's their whole business, they have legal counsel before they act that counsels them either in-house or outside counsel that tells them, here's what you can do that would comply with the law and the regulations. I know that they've done that with their workers' comp and their payroll and other areas. Their business registration, their corporate taxes. Corporations hire lawyers who advise them. And so I'm not worried that the corporation is going to be completely blindsided by a regulation of their core product line, they're obviously going to have advice of counsel. And not only that, as the solicitor general pointed out, now, I agree with Clark Neily that there's no legal significance to a solicitor general promising at oral argument before the Supreme Court that the agency doesn't intend to do something because after the next election, the agency can just rearrange its enforcement priorities.

[00:49:12.6] Dru Stevenson: And they're not bound by that. But you know what they are bound by. If you request an opinion letter from the ATF that your product would not subject you to legal liability, you can go into the court and argue estoppel. It's not foolproof, but they actually, courts often do hold agencies to what they promise to individual companies, we approve this product. And so if you are going to invest and buy equipment and hire people to manufacture these 80 percent kits, as they call them and market them, it's just one more little task for your lawyer to write to ATF and ask for approval of what you're doing and have them sign off on, we think that this actually does comply with the regulation, or they come back to you and say, if you change this and this and this, then it would be in compliance with the regulation and you would not have to worry about a prosecution.

[00:50:16.2] Dru Stevenson: So we don't all just have to sit around worrying when the government is gonna show up at my door and arrest me for something I didn't even know I did. And there was also a significant part of the oral arguments that a lot of the laws that people would actually be charged with do require knowledge or willfulness of a violation in this particular case. And so I think that the person, and it can be a defense to a willful violation in some cases that you were advised by counsel that what you were doing was legal or that the agency sent you a letter saying that they thought what you were doing was legal. So it is possible to get legally binding reassurances from the agency about your particular product.

[00:51:05.4] Jeffrey Rosen: Well, it's time for closing arguments in this great discussion. Clark, first ones, do you, final thoughts on whether or not you think the court should allow the regulation of ghost guns under the Gun control act or not, and why?

[00:51:21.3] Clark Neily: So let me start by saying that I think that individuals face real exposure to criminal liability under this new ATF rule. And it's not just people who are in the

business of manufacturing gun kits. Second, as for being able to get assurances from the ATF, they actually specifically disclaimed in this case, a position they took in court three years ago in the Southern District of New York. So this is an agency that will flip flop in ways that can be both pernicious and cavalier. But putting that aside, I think that the correct answer in this case as it is in so many administrative cases, is to say, if this is such a problem, in other words, if the advent of these so-called ghost guns and the increased use of of them by criminals is such a big problem, then Congress should be the one to decide how that problem needs to be dealt with and pass a law explicitly dealing with the problem rather than looking back at a statute that was written 56 years ago in 1968 and say, "Well, if we look at this thing sideways, we can see a grant of authority to a federal agency to change its longstanding policy about what constitutes a firearm under the statute."

[00:52:29.5] Clark Neily: I just don't think that's the way we want our government to work in the mine run of cases. Sure. If it's a situation or an issue where you don't like what people are doing, like making guns without serial numbers, it's easy to say, well, it seems to me this statute can be stretched to accommodate this new rule, but just flip it even a little bit and take something you care a lot about in the other direction, like immigration or access to medications. And I bet almost everybody in the whole cast of characters in this litigation will jump ship for the other side as soon as this arises in a context where they feel strongly the other way. Watch and see what happens.

[00:53:06.5] Jeffrey Rosen: Dru, last word. Should the court uphold the regulation of ghost guns under the Gun Control Act and why?

[00:53:12.5] Dru Stevenson: I think so because these have become, have gone from a situation of a handful of individual hobbyists and metal workers around the country making their own do it yourself firearms to a whole industry. And the industry, again, is completely thwarting the clear will of Congress to have guns be traceable, to have background checks to prohibit certain individuals from having guns, to have an excise tax on the manufacturers that is earmarked to be used for conservation and things like that. And so it allows people to use tax sheets. It allows people who lawfully cannot own a gun to easily obtain one. It allows people to essentially get a gun through the mail instead of having to show up in person somewhere. And I think that that got traction with a couple of the conservative justices that if we don't uphold the ban, we're gonna kind of say goodbye to the rest of our federal gun laws.

[00:54:30.7] Dru Stevenson: And then I agree that in an ideal world we would have a Congress that could do everything for us, but the fact is we live in a modern age, and I'm actually gonna go back to the Federalist Papers and Federalists tend where they thought the real danger for democracy was not just the majority, the tyranny of the majority or something like that, but was the problem of political factions that most am they knew most Americans go about their lives, like thinking about sports and only murders in the building or whatever the latest show is and other pop culture things and their families and the next holiday and aren't really involved in a lot of these kind of nitty gritty issues that might be pending before Congress about the exact, let's say, reach of the Clean Air Act or the Clean Water Act, or what counts as, how complete does something have to be to count as a frame or receiver.

[00:55:46.4] Dru Stevenson: They don't think about it at all. And what that does is it allows what, and they called it factions in the founding era. We would call it special interest groups to exert way too much disproportionate influence over Congress. And through lobbying and funding of campaigns and so forth. And the agencies are part of our buffer against that, I feel like, and that they give us more protection from special interest groups kind of cramming down their will on the rest of us, just because they are super motivated and organized and have enough money to buy the right number of people in Congress.

[00:56:33.0] Jeffrey Rosen: Thank you so much, Clark Neily and Dru Stevenson for a vigorous and illuminating discussion of the future of gun regulations. Clark, Dru, thank you so much for joining.

[00:56:43.6] Dru Stevenson: Thanks for having me.

[00:56:45.3] Clark Neily: Thank you, Jeff.

[00:56:51.4] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, Matthew Spero, and Yara Daraiseh. Friends I am thrilled to share that the NCC has partnered with Khan Academy and launched our new Constitution 101 course. We launched it on Constitution Day, and it's so exciting, and I want you to check it out on the Khan platform.

[00:57:17.4] Jeffrey Rosen: We've brought together the leading constitutional scholars and historians in America of different perspectives to teach the Constitution for free to high school students. And the course is great for learners of all ages. So check it out. It's khanacademy.org/constitution101. Take the quiz, and if you find it as challenging as I did, let me know. And also let me know how you did. And always recommend the show to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional debate. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. All of the great work we're able to do is possible only because of the generosity of people like you who are inspired by our nonpartisan mission. Support it by becoming a member at constitutioncenter.org/membership. Any amount, \$5 or \$10, or of course more is welcome. And sign up for the great material at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.