

Checklist of Federal Aggravated Felony Firearms Offenses

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Firearms offenses may fall within a number of different categories of aggravated felony, including (a) firearms trafficking,¹ and (b) miscellaneous offenses involving firearms and explosives.² Federal offenses falling within this statutory definition are included here. It is also possible for a conviction on this list to fall within other aggravated felony definitions, including (c) crimes of violence,³ and (d) drug trafficking.⁴

I. Trafficking in Firearms and Destructive Devices. Illicit trafficking in firearms or destructive devices is listed as an aggravated felony.⁵

(A) *Trafficking in Firearms or Destructive Devices.* Unlike the drug-trafficking definition, the firearms trafficking definition is limited to the common-sense definition of “trafficking,” and resort is had to federal statute only to define the “firearms,” “destructive devices,” or “explosives” that must be the subject of the illicit trafficking.

The generic nature of the language, “illicit trafficking,” however, leads to an analogy between the illicit trafficking in firearms under 8 U.S.C. § 1101(a)(43)(C) and illicit trafficking in controlled substances listed under 8 U.S.C. § 1101(a)(43)(B). Therefore, decisions interpreting the common-sense meaning of “trafficking” in controlled substances cases may be persuasive in deciding what conduct is included here.⁶ Drug “trafficking” is “the unlawful trading or dealing of any controlled substance.”⁷

(B) *Definition of Firearms and Destructive Devices.* For purposes of determining whether an offense involves illicit trafficking in firearms under 8 U.S.C. § 1101(a)(43)(C), “firearms” and “destructive devices” are defined in 18 U.S.C. §

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¹ INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).

² INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E).

³ INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

⁴ INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

⁵ INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C).

⁶ *Steele v. Blackman*, 236 F. 3d 130 (3d Cir. 201).

⁷ *Matter of Davis*, 20 I. & N. Dec. 536, 541 (BIA 1992).

921(a)(3). This section does not mention any criminal offense involving ammunition, except for “armor piercing ammunition.”⁸

(C) *Definition of Explosive Materials.* “‘Explosive materials’ means explosives, blasting agents, and detonators.”⁹ “Explosives” “means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion”¹⁰ “The Secretary shall publish and revise at least annually in the Federal Register a list of these and any additional explosives which he determines to be within the coverage of this chapter.”¹¹ “[S]mall arms ammunition and components thereof” are *not* considered to be explosives except for certain offenses contained in 18 U.S.C. § 844(d)-(i) involving intent to kill, injure, or intimidate or actual destruction of property.¹²

II. Other Firearms Offenses Listed as Aggravated Felonies.

The aggravated felony definition specifically lists a number of miscellaneous offenses “described in” statutes defining certain federal firearms offenses.¹³

The aggravated felony definition at 8 U.S.C. § 1101(a)(43)(E) includes an offense described in –

- (i) section 842(h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
- (ii) section 922(g)(1), (2), (3), (4), or (5) (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18, United States Code (relating to firearms offenses); or
- (iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses) (8 U.S.C. § 1101(a)(43)(E).)

This includes firearms and explosives offenses described in the following sections of Title 18, U.S. Code:

- 844(h) (using fire or explosive to commit, or carrying an explosive during commission of, any federal felony),

⁸ 18 U.S.C. § 921(a)(17)(B); see § 921(a)(17)(a) (generic definition of “ammunition”).

⁹ 18 U.S.C. § 841(c).

¹⁰ 18 U.S.C. § 841(d).

¹¹ *Ibid.*

¹² 18 U.S.C. § 845(a)(4).

¹³ INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E), added by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (October 24, 1994).

- 841(i) (shipping or receiving explosives in interstate or foreign commerce by indictee, felon, fugitive, addict, or mental defective or person committed as such),
- 844(d) (transportation or receipt of explosives in interstate or foreign commerce with intent to injure, intimidate or damage property),
- 844(e) (communication of threat or false information concerning attempt to injure, intimidate, or damage property by fire or explosive),
- 844(f) (malicious damage by fire or explosive to property of United States or organization receiving federal funds),
- 844(g) (illegal possession of explosive in airport),
- 844(h) (use or carrying of explosive in commission of federal felony),
- 844(i) (malicious destruction by fire or explosive of property used in or affecting commerce),
- 922(g)(1)-(5) (ship or receive firearms or ammunition by felon, fugitive, addict, mental defective or person committed as such, alien unlawfully in U.S., dishonorable dischargee, or person who renounced U.S. citizenship),
- 922(j) (receiving stolen arms or ammunition),
- 922(n) (ship or receive arms or ammunition by felony indictee),
- 922(o) (possession of machine gun),
- 922(p) (possession of undetectable firearm),
- 922(r) (assembly of illegal rifle or shotgun from imported parts),
- 924(b) (ship or receive firearm or ammunition with intent therewith to commit a felony), and
- 924(h) (transfer of firearm with knowledge it will be used to commit a crime of violence or drug trafficking offense).

The definition also includes “an offense described in” Internal Revenue Code § 5861 (26 U.S.C. § 5861) (failure to pay firearms tax, possession of unregistered firearm or one with serial number altered, etc.). That section prohibits the following acts:

- a. engage in business as firearms dealer without having paid special tax or registered as required in §§ 5801, 5802,
- b. possess a firearm transferred in violation of this chapter (26 U.S.C. §§ 5801-5872),
- c. possess a firearm made in violation of this chapter,
- d. possess a firearm not registered to the possessor in the National Firearms Registration and Transfer Record,
- e. transfer a firearm in violation of this chapter,
- f. make a firearm in violation of this chapter,
- g. alter identification of a firearm required by this chapter,
- h. possess a firearm with altered identification,
- i. possess a firearm not identified as required by this chapter,
- j. transport or receive any firearm in interstate commerce which has not been registered as required by this chapter,
- k. possess a firearm imported into the U.S. in violation of 26 U.S.C. § 5844, or
- l. knowingly make a false entry on any record required by this chapter.

With the passage in 1988 of other provisions banning outright most of the firearms previously subject only to registration and taxation requirements,¹⁴ the constitutionality of punishing a person for failing to register or pay a tax on a completely prohibited firearm has become doubtful. The Tenth Circuit held that the Due Process clause of the Constitution prohibits conviction of a defendant under 28 U.S.C. § 5861(d) for possessing and transferring an unregistered machine gun, since registration is impossible because of the complete prohibition on possession of machine guns found in 18 U.S.C.

¹⁴ Compare 18 U.S.C. § 922(o) (illegal to possess machine gun not lawfully possessed before May 19, 1986) with 26 U.S.C. § 5812 (registration application denied where possession of firearm is illegal).

922(o).¹⁵ The Tenth Circuit failed to extend this decision to convictions for possession of unregistered sawed-off shotguns since no law bans their possession.¹⁶

Other circuits have not adopted this reasoning.¹⁷

The Ninth and Tenth Circuits have adopted a narrowed version of *Dalton*, holding that a defendant may escape liability under 26 U.S.C. § 5861 only upon a showing that the machine gun was acquired after 18 U.S.C. § 922(o) was enacted on May 19, 1986.¹⁸

Note: all of these acts prohibited under the Internal Revenue Code relate to “firearms”. Firearms are defined to include short-barreled shotguns, short-barreled rifles, machine guns, silencers, destructive devices, and “any other weapon.”¹⁹ “Firearm” does *not* include pistols or revolvers with rifled bores.²⁰

¹⁵ *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), cert. denied, 510 U.S. 892 (1993). See also *United States v. Gambill*, 912 F. Supp. 287, 288 (S.D. Ohio 1996) (due process prevents conviction under statute punishing failure to register a weapon when registration is prohibited by law).

¹⁶ *United States v. McCollom*, 12 F.3d 968, 968-971 (10th Cir. 1993) (although shotgun would probably be rejected for registration, conviction was valid because registration was not legally impossible).

¹⁷ *Hunter v. United States*, 73 F.3d 260, 261 (9th Cir. 1996) (conviction for possession of “unregistered machine gun under 26 U.S.C. 5861(d) constitutional, even though ban on possession of machine gun renders registration impossible); *United States v. Ardoin*, 19 F.3d 177, 179-180 (5th Cir.) (adopting Fourth Circuit analysis that convictions for possessing unregistered machine guns are constitutional, since Congress possesses power to tax illegal activity), cert. denied, 513 U.S. 933 (1994); *United States v. Jones*, 976 F.2d 176, 183 (4th Cir. 1992) (absent an affirmative showing of an intent to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable), cert. denied, 508 U.S. 914 (1993); see also *United States v. Gresham*, 118 F.3d 258, 260-264 & n.8 (5th Cir. 1997)(conviction for possession of unregistered pipe bomb constitutional when registration impossible as practical matter though not legally impossible); *United States v. Aiken*, 974 F.2d 446, 448-450 (4th Cir. 1992) (same for short-barreled shotgun).

¹⁸ *United States v. Kurt*, 988 F.2d 73, 76 (9th Cir. 1993) (requiring showing that defendant specifically affected in an unconstitutional manner by § 922(b)); *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992), rev’d on other grounds, 511 U.S. 600 (1994). See also *United States v. Gravenmeir*, 121 F.3d 526 (9th Cir. 1997).

¹⁹ “The term “any other weapon” means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.” 26 U.S.C. § 5845(e).

²⁰ 26 U.S.C. § 5845(e), last sentence. “The term “firearm” means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in

The terms “machine gun” (26 U.S.C § 5845(b)), “rifle” (26 U.S.C § 5845(c)), “shotgun” (26 U.S.C § 5845(d)), “antique firearm” (26 U.S.C § 5845(g)) are further defined in the sections noted.

“Destructive device” is defined to include explosive, incendiary, or poison gas bombs, grenades, or rockets with more than four ounces of propellant, and any weapon with a barrel greater than one-half inch in diameter that will expel a projectile, as well as kits for converting anything into a destructive device. The term does not include items not designed or redesigned for use as weapons, items “redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device,” “or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.”²¹

Ammunition *per se* is not included within the definition of firearms or destructive devices in 26 U.S.C. § 5845(a) and related sections. It is clear that Congress knew how to refer to ammunition when it wished to do so: It listed certain ammunition offenses as aggravated felonies.²² Title 18 U.S.C. § 922(a)(7) and (8) prohibit the manufacture,

length; (5) any other weapon, as defined in subsection (e); (6) a machine gun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term “firearm” shall not include an antique firearm or any device (other than a machine gun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon. 26 U.S.C. § 5845.

²¹ 26 U.S.C. § 5845(f).”The term ‘destructive device’ means (1) any explosive, incendiary, or poison gas (a) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term ‘destructive device’ shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.” 26 U.S.C. § 5845(f).

²² E.g., 8 U.S.C. § 1101(a)(43)(E), listing 18 U.S.C. §§ 922(g)(1)-(5) (ship or receive firearms or ammunition by felon, fugitive, addict, mental defective or committee, alien unlawfully in U.S., dishonorable dischargee, or person who renounced U.S. citizenship); 922(j) (receiving stolen arms or ammunition); 922(n) (ship or receive arms or ammunition by felony indictee); 924(b) (ship or receive firearm or ammunition with intent therewith to commit a felony).

importation, sale or delivery of armor-piercing ammunition, defined in 18 U.S.C. § 921(a)(17)(B). It could easily have listed ammunition generally in the definition of firearms if it had wished to do so.