Title II traditionally appeared at Part 179, and now appear at Part 479.[5] Again, for simplification, old regulation section numbers have not been changed in the Deskbook, but the reader must be aware of the new numbers.

§ 2:4 Definition of a firearm

Title I of the Gun Control Act, 18 U.S.C.A. §§ 921 et seq., primarily regulates conventional firearms (i.e., rifles, pistols, and shotguns). Title II of the Gun Control Act, also known as the National Firearms Act, 26 U.S.C.A. §§ 5801 et seq., stringently regulates machine guns, short-barreled shotguns, and other narrow classes of firearms.

"Firearm" is defined in § 921(a)(3) as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

"Firearm is a term of art."[1] Given the above diverse definitions, an indictment should allege the type of firearm with specificity.

A firearm must be a "weapon" (i.e., an instrument of offense or defense). It would not include a starter gun such as is used at track meets unless it is readily convertible into a weapon. Proponents of the 1968 Act had argued that some manufacturers made starter guns that were easily drilled out for conversion to shoot live ammunition. An early case on starter pistols applied the test as follows:

> The steel plugs between the bases and barrels were bored to ascertain how quickly they could be rendered usable for live ammunition i.e. readily convertible to expel projectiles by the action of an explosive. The plugs were found soft enough for boring through in less than fifteen minutes, thus establishing that they were readily convertible.[2]

A Mondial Brevettata Model 1938 .22 caliber starter gun was held to be a firearm where the ATF expert "testified that the gun could be converted by cutting off the barrel with a hack saw and opening up the cylinder holes with a Dremel tool . . . . . [I]t would take 'easily less than an hour' to perform the conversion without

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[5]T.D. ATF-487, 68 F.R. 3744 (Jan. 24, 2003).

[Section 2:4]

[1]*U.S. v. Broadnax*, 601 F.3d 336, 341 (5th Cir. 2010).

[2]*U.S. v. 16,179 Molso Italian.22 Caliber Winlee Derringer Convertible Starter Guns*, 314 F. Supp. 179, 180 (E.D. N.Y. 1970), judgment aff'd, 443 F.2d 463 (2d Cir. 1971).

any specialized knowledge, and that he personally could do it in 'a matter of minutes if Murphy's law doesn't occur and everything goes right.' "[3]

An inoperable but fixable firearm is still a "firearm" if designed or readily convertible to expel a projectile such as a bullet or shot. Guns that did not work because the hammer was filed down, the firing pin was broken or missing, or the cylinder did not line up with the barrel were nonetheless still "designed" to fire a projectile.[4] Sufficient evidence existed where "the defense investigator testified that he had examined the gun and found it was workable only after about fifteen to twenty minutes of manipulating it."[5] The court in that case suggested that the conviction could be upheld under the "designed," "readily convertible," or "frame" definitions.[6]

U.S. v. Wada (D. Ore., 2004) found that firearms that had been rendered into inoperable "dewatted firearm-ornaments" were no longer "firearms" as defined.[7] The modifications "changed their fundamental character and rendered them inoperable as functioning firearms." The court agreed with evidence showing "the extreme difficulty and unlikelihood that, once modified, any such former 'firearm' could readily be restored to functional use." This included "cutting the frame of the firearm vertically or by removing and deactivating the slide rail from the top of a semi-automatic handgun," and "several methods to modify the barrels of semi-automatic handguns, which included cutting a slot out of the barrel and welding a metal rod to the barrel or drilling a hole on one side of the barrel and inserting a hardened metal pin into the barrel and through a steel rod."[8] The court concluded:

> After a "firearm" was "deactivated" by one of Wada's methods, it would take a great deal of time, expertise, equipment, and materials to attempt to reactivate the item so that it could "expel a projectile by the action of an explosive." As a result of Wada's modification methods, each "firearm" (a) no longer was "designed to . . . expel a projectile by the action of an explosive," (b) could not

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[3] *U.S. v. Mullins*, 446 F.3d 750, 755, 70 Fed. R. Evid. Serv. 79 (8th Cir. 2006).

[4] *U.S. v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993); *U.S. v. Yannott*, 42 F.3d 999, 1006, 1994 FED App. 0413P (6th Cir. 1994); *U.S. v. York*, 830 F.2d 885, 891 (8th Cir. 1987).

[5] *U.S. v. Reed*, 114 F.3d 1053, 1056 (10th Cir. 1997).

[6] *U.S. v. Reed*, 114 F.3d 1053, 1057 (10th Cir. 1997). But see *Reed*, 114 F.3d at 1058 (Ebel, J., dissenting) ("the district court erred in refusing to allow defendant adequately to argue or prove lack of knowledge that the gun possessed the physical characteristics which constitute a statutory 'firearm' ").

[7] *U.S. v. Wada*, 323 F. Supp. 2d 1079, 1180 (D. Or. 2004).

[8] *U.S. v. Wada*, 323 F. Supp. 2d 1079, 1180 (D. Or. 2004).

> "readily be converted" to do so, and (c) was no longer "the frame or receiver" of a weapon that was "designed to or . . . [could] readily be converted to expel a projectile by the action of an explosive." The Court, therefore, finds unconvincing the government's evidence that such modified firearms could "readily" be returned to functional use.[9]

The *Wada* court rejected the government's first argument that each item "was" designed to expel a projectile by an action of an explosive, because of the following:

> Section 921(a)(3)(A) is not written in the past tense and, in particular, does not speak in terms of whether an item "was" designed to expel a projectile. The statute explicitly applies to any weapon that "will," "is designed to," or "may readily be converted to" expel a projectile . . . . Under any ordinary interpretation, "will" does not mean "was," "is designed to" does not mean "was designed to," and "may readily be converted to" does not mean "was converted to." Thus, the Court rejects the government's argument . . . that each of the modified "firearms" originally was designed to expel a projectile by the action of an explosive.[10]

The court also rejected the government's second argument, that each item "will" expel a projectile by the action of an explosive. Even if it was possible to restore its capacity to fire if a person "invested significant time and effort and acquired all of the parts and equipment necessary to do so, that evidence is not sufficient to prove the item 'will' expel a projectile or could 'readily be converted' to do so."[11]

Finally, *Wada* rejected the government's third argument, that each item "was" the frame or receiver of any such weapon. Section 921(a)(3)(B) defines as a firearm "the frame or receiver of any such weapon" in the present tense.

United States v. Rivera (2nd Cir. 2005), agreed that "a weapon originally designed to fire a projectile could perhaps be so redesigned or modified to remove it from § 921(a)(3)'s coverage," and favorably cited *Wada*.[12] However, that case involved a pistol with a broken firing pin and a flattened firing-pin channel, which "did not fundamentally alter the gun's design," and thus it was still a "firearm."[13]

In that case, the defendant was indicted for possession by a felon of "a firearm, to wit, a loaded .380 Davis Industries semiautomatic pistol," and the judge instructed the jury not only

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[9]*U.S. v. Wada*, 323 F. Supp. 2d 1079, 1180 (D. Or. 2004).

[10]*U.S. v. Wada*, 323 F. Supp. 2d 1079, 1182 (D. Or. 2004).

[11]*U.S. v. Wada*, 323 F. Supp. 2d 1079, 1182 (D. Or. 2004).

[12]*U.S. v. Rivera*, 415 F.3d 284, 286–87 (2d Cir. 2005).

[13]*U.S. v. Rivera*, 415 F.3d 284, 287 (2d Cir. 2005).

of the definition of a firearm as an operable weapon, but also as the frame or receiver thereof. "The statutory definition of a firearm includes a frame or receiver, and the indictment did not limit the definition of firearm to a loaded weapon," according to that court.[14] Unfortunately, the indictment did limit the firearm to being a "pistol," and both counsel and the court overlooked the fact that "pistol" is defined as a complete weapon and not as a frame or receiver.[15]

Each element of the pertinent definition of a firearm must be proven to the jury beyond a reasonable doubt. Ruling on a State law definition with similarities to the federal definition, the Ninth Circuit overturned a conviction where the trial judge had instructed the jury that a flare gun was a firearm, explaining:

> the jury must decide whether the object used by the defendant was in fact (1) designed to be used as a weapon and (2) expels a projectile (3) through a barrel, (4) by the force of an explosion or other form of combustion. . . . In order to prove that the object Medley carried was a firearm under the statute, the prosecution had to prove to the jury beyond a reasonable doubt each of these four sub-elements.[16]

As noted, the term "firearm" means a "weapon . . . . which will

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[14]*U.S. v. Rivera*, 415 F.3d 284, 287 (2d Cir. 2005). In fact, 18 U.S.C.A. § 921(a)(3) provides:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The mere allegation of a "firearm," without more, would not inform the defendant whether the item was a weapon, a frame or receiver, a muffler or silencer, or a destructive device, which in turn could include anything from a explosive grenade to a rocket having a propellant charge of more than four ounces. § 921(a)(4).

[15]27 C.F.R. § 478.11, which was not cited in the opinion or in the Brief of Defendant-Appellant (see 2005 WL 3948664) provides:

> *Pistol.* A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s).

While a pistol has a frame or receiver, the above definition covers only a complete weapon. A frame or receiver standing alone is not a "weapon," is not designed to fire a projectile, is defined *not* to include a barrel, and has none of the other features defining a pistol. "*Firearm frame or receiver.* That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 478.11.

[16]*Medley v. Runnels*, 506 F.3d 857, 864 (9th Cir. 2007) (*en banc*). California Penal Code § 12001(b) defines a firearm as "any device designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion, or other form of combustion."

or is designed to or may readily be converted to expel a projectile," and also "the frame or receiver of any such weapon."[17] Both the "designed" definition and the "may readily be converted" definition apply to a weapon that expels a projectile, not to a frame or receiver. A frame or receiver is not a "weapon," will not and is not designed to expel a projectile, and may not readily be converted to expel a projectile.

ATF's regulatory definition, 27 C.F.R. § 478.11, provides: "*Firearm frame or receiver.* That part of a firearm which provides housing for the hammer, bolt or breechblock,[18] and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."[19] "There is nothing ambiguous about the regulation. To qualify as a receiver, a part *must* provide 'housing for the hammer, bolt or breechblock, and firing mechanism.' . . . Those are the only mandatory elements."[20] To put it more colloquially:

> A receiver is similar to the chassis of a car. It houses the operational parts that make a gun fire, much like a chassis houses the engine, transmission and other mechanisms necessary to make an automobile operate. The parts typically housed by a receiver are the gun's firing mechanisms—hammer, bolt, trigger, sear, and firing pins.[21]

The above raises issues concerning the status of receivers which are made in two parts, and of raw material which is only partially machined with receiver features.

Some rifles have receivers consisting of two parts. For instance, AR15 type semiautomatic rifles have an upper receiver and a lower receiver. As explained in a 1971 Treasury memorandum about the M16 machinegun receiver, which also applies to the AR15 semiautomatic receiver:

> The M-16 receiver is fabricated in two parts, and the Enforcement Division has determined that the lower portion should be considered the receiver . . . . Both parts were necessary to function as a "frame

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[17] 18 U.S.C.A. § 921(a)(3).

[18] "*Breechblock.* The locking and cartridge head supporting mechanism of a firearm that does not operate in line with the axis of the bore." *Glossary of the Association of Firearm and Toolmark Examiners* (2nd Ed. 1985), 21.

[19] The same definition appears in 27 C.F.R. § 479.11.

[20] *U.S. v. 1,100 Machine Gun Receivers*, 73 F. Supp. 2d 1289, 1292 (D. Utah 1999), judgment aff'd, 9 Fed. Appx. 815 (10th Cir. 2001). The court added: "There is no language in the regulation that a receiver must also be able to receive a barrel, by threading or some other means . . . ." Yet the regulation may be read to require that the item be able "at its forward portion to receive the barrel," but it may do so either with threading or some other method of attachment.

[21] *U.S. v. 1,100 Machine Gun Receivers*, 73 F. Supp. 2d 1289, 1291 (D. Utah 1999), judgment aff'd, 9 Fed. Appx. 815 (10th Cir. 2001).

> or receiver" in a machine gun. I can see some difficulty in trying to make cases against persons possessing only the lower part of a receiver, but insofar as the licensing, serial numbering, and special occupational tax requirements are concerned, I feel that this is the only practical solution.[22]

There would indeed be "difficulty in trying to make cases against persons possessing only the lower part of a receiver," and indeed there does not appear to be any reported decision of such a prosecution. The statute defines firearm to include "*the* frame or receiver," not just half of a frame or receiver. Moreover, referring to ATF's definition in § 478.11, the upper receiver, not the lower receiver, provides housing for the bolt, the breechblock (the bolt carrier functions as such), and the firing pin and certain other parts of the firing mechanism. The upper receiver, not the lower receiver, is threaded at its forward portion to receive the barrel.

While ATF considers the AR15 lower receiver to be the "receiver," it considers the FN FNC upper receiver to be the "receiver." ATF Ruling 2008-1 explains:

> The FNC rifle consists of two major assemblies, the upper assembly and the lower assembly. The lower assembly houses the trigger, hammer, disconnector, safety/selector, and an automatic trip lever in the automatic version. It also incorporates a pistol grip and a magazine release. The upper assembly houses a barrel that is attached to the upper assembly by means of a barrel extension. It also houses the bolt carrier with gas piston affixed, gas tube and handguard, bolt, operating rod and spring. The two assemblies are mounted together with a front and rear takedown pin. Since 1981, ATF has classified the lower assembly as the receiver for purposes of the GCA and NFA.
>
> ATF has reconsidered its classification of the lower assembly of the FNC rifle as the receiver. The upper assembly of the FNC rifle is more properly classified as the receiver. The upper assembly of the FNC rifle houses the bolt and provides a connection point for the barrel. Moreover, the upper assembly is classified as the receiver on similar types of firearms, to include other FN rifles, such as the FN FAL and FN SCAR.[23]

Similarly, the frame or receiver of semiautomatic pistols actually includes both the (lower) receiver and the slide. Referring to the definition in § 478.11, the slide, not the lower receiver, provides housing for the breechblock (the slide functions as such; no bolt exists), the firing pin, and certain other parts of the firing mechanism. The slide, not the lower receiver, receives the barrel

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[22]CC:ATF-12,736, Subject: M-16 Receivers, Internal Revenue Service, Department of the Treasury (March 1, 1971).

[23]ATF Ruling 2008-1, http://www.atf.gov/files/regulations-rulings/rulings/atf-rulings/atf-ruling-2008-1.pdf (visited May 30, 2013).

(which is usually not threaded). Again, there appears to be no case law addressing this issue.

As noted, a second issue is whether raw material which is only partially machined with receiver features may constitute a "frame or receiver." There are occasions in which ATF has obtained search warrants and instigated prosecutions on that basis. The statute refers to "the frame or receiver of any such weapon," not to partially-machined raw material which would require further milling, drilling, and other fabrication to be usable as a frame or receiver.

Referring to ATF's definition in § 478.11, an unfinished piece of metal is not a "part" that "*provides* housing" (in the present tense) for the hammer, bolt or breechblock, and other components of the firing mechanism, unless and until it is machined to accept these components. The definition does not include raw material that "*would provide* housing" for such components *if* further machined. Nor may it be said that such piece of metal "*is* . . . threaded at its forward portion" so that a barrel may be installed.

In ordinary nomenclature, a frame or receiver is a finished part which is capable of being assembled with the other parts to put together a firearm.[24] Raw material which is only partially machined requires further fabrication. The Gun Control Act recognizes the distinction between "assembly" and "fabrication."[25] The term "assemble" means "to fit or put together the parts of (a machine, etc.)."[26] The term "fabricate" is broader, as it also includes manufacture: "to make, build, construct, etc., esp. by assembling parts; manufacture."[27] Thus, drilling, milling, and other machining would constitute fabrication, but assembly more narrowly means putting together parts already fabricated.

In an analogous situation, ATF has defined a receiver in terms of whether it was "capable of accepting all parts" necessary for firing. Like the term "firearm," the term "machinegun" is also defined to include "the frame or receiver of any such weapon."[28] The Chief of the ATF Firearms Technology Branch wrote in 1978

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[24]"*Receiver*. The basic unit of a firearm which houses the firing and breech mechanism and to which the barrel and stock are assembled." *Glossary of the Association of Firearm and Toolmark Examiners* (2nd Ed. 1985), 111.

[25]Compare 18 U.S.C.A. § 921(a)(29) (defining "handgun" in part as "any combination of parts from which a firearm described in subparagraph (A) can be *assembled*") with § 921(a)(24) (referring to "any combination of parts, designed or redesigned, and intended for use in *assembling* ***or*** *fabricating* a firearm silencer or firearm muffler") (emphasis added).

[26]*Webster's New World Dictionary* (1988).

[27]*Webster's New World Dictionary* (1988).

[28]26 U.S.C.A. § 5845(b). The same definition is incorporated by reference in 18 U.S.C.A. § 921(a)(23).

concerning a semiautomatic receiver which was milled out to accept a full automatic sear, but the automatic sear hole was not drilled. He opined: "In such a condition, the receiver is not capable of accepting all parts normally necessary for full automatic fire. Therefore, such a receiver is not a machinegun . . . . As soon as the receiver is capable of accepting all parts necessary for full automatic fire, it would be subject to all the provisions of the NFA."[29]

The above concerned AR15/M16 receivers. However, in a 2002 determination, ATF stated about an "unfinished receiver" for an AR15 that "by performing minor work with hand tools, this receiver can be assembled into a complete rifle."[30] The letter continues:

The minor work includes:

(1) drilling the holes for the takedown/assembly pins;
(2) drilling the holes for the trigger and hammer pins;
(3) drilling the holes for the magazine catch; and
(4) drill and tap the holes for the pistol grip screw.

Our evaluation reveals that the submitted receiver "can be readily converted to expel a projectile by the action of an explosive," and is, therefore, a firearm . . . .

The above incorrectly assumes that the "can be readily converted" clause refers to a frame or receiver, when actually that clause refers to a weapon that can be so converted. A frame or receiver cannot, by itself, be converted to a weapon that expels a projectile. That would require the presence of all of the other firearm parts, and even then the above machine work would be required, together with assembly. While described as "minor," that machine work may well be beyond the ability of anyone other than experts with the required knowledge, tools, jigs and fixtures.

Regarding what were characterized as "80% complete 1911 style handgun receivers," ATF opined that such terms "are commonly used for advertisement purposes," but have no legal significance.[31] In reference to the item examined, "most major machining operations have been completed with the exception of cutting the slide rails, some extra material on top of the receiver

[29]Nick Voinovich, Chief, ATF Firearms Technology Branch, Feb. 13, 1978, T:T:F:CHB, 7540. Similar opinions were rendered by the Chief, ATF Firearms Technology Branch, Aug. 3, 1977 (reference number deleted); and C. Michael Hoffman, Assistant Director (Technical and Scientific Services), May 5, 1978, T:T:F:CHB, 7549?).

[30]Curtis H.A. Bartlett, Chief, Firearms Technology Branch, Oct. 22, 2002, 903050:RV. Somewhat humorously, the letter is signed upside down.

[31]Sterling Nixon, Chief, Firearms Technology Branch, July 14, 2003, 903050:RLB.

and final cut of the feed ramp. It is our opinion that a competent individual can complete this work in a minimal amount of time and the submitted items have reached a stage in the manufacturing process where they are frames or receivers for a firearm."

By contrast, ATF determined the following "unfinished pistol frame" not to be sufficiently machined to constitute a frame or receiver:

> The submitted sample is a steel casting of a Model 1911 type pistol frame. As received, it has been precision drilled for the following parts: thumb safety, slide stop, and grip screw bushing. Additionally, the ejector holes, mainspring housing, and mainspring housing pin have been cut or drilled. The hammer pin and sear pin holes have not been drilled. Finally, the frame rails have not been milled. This sample, as received, is not readily converted to operable condition and, therefore, as submitted, would not be classified as a "firearm" or the frame or receiver of same . . . .[32]

In another ATF opinion letter about "a partially machined M911A1 type pistol receiver," the following is stated: "The internal machining operations have been completed and the outside profile is to final shape. The slide rails have not been cut in the receiver and the top portion of the receiver has not been machined." The item "has not reached a stage in manufacture where it [would] be classified as a [frame or receiver]."[33]

"Congress did not distinguish between receivers integrated into an operable weapon and *receivers sitting in a box, awaiting installation*."[34] The absence of a single hole and the presence of a piece of extra metal may mean that an item is not a frame or receiver.[35]

To the extent that the terms "frame or receiver" are ambiguous, the rule of lenity requires that partially machined raw material not be interpreted to fall within those terms.[36]

In sum, based on the statutory text, the regulatory definition,

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[32]Sterling Nixon, Chief, Firearms Technology Branch, Sept. 26, 2003, 903050:AVH.

[33]Edward M. Owen, Jr., Chief, Firearms Technology Branch, to Caspian Arms, Lt., May 17, 1991, LE:F:TE:EMO.

[34]*F.J. Vollmer Co., Inc. v. Higgins*, 23 F.3d 448, 450 (D.C. Cir. 1994) (emphasis added).

[35]*F.J. Vollmer Co., Inc. v. Higgins*, 23 F.3d 448, 452 (D.C. Cir. 1994) ("In the case of the modified HK receiver, the critical features were the lack of the attachment block and the presence of a hole"; "welding the attachment block back onto the magazine and filling the hole it had drilled" removed item from being a machinegun receiver).

[36]*U.S. v. Thompson/Center Arms Co.*, 504 U.S. 505, 518, 112 S. Ct. 2102, 119 L. Ed. 2d 308, 69 A.F.T.R.2d 92-1493 (1992) (where firm made rifle and pistol parts that could be assembled as a non-firearm or as a firearm under the

and common parlance, where a frame or receiver as designed is in two parts, both parts must be present for the items to constitute a frame or receiver. Moreover, the terms "frame or receiver" do not include partially machined pieces of metal which are not capable of being put together with the other parts to assemble a firearm, and which would require further milling and drilling to constitute a true frame or receiver. Counsel should be cautioned, however, that ATF often seeks to push the envelope of such definitions to expand its regulatory and criminal functions, and should be prepared to respond appropriately to search warrant affidavits and to indictments based on such theories.

An air gun is not a firearm because it expels a projectile by action of air or gas, not an explosive.

As noted, an antique firearm is not a "firearm" and is not regulated by Title I of the Gun Control Act. 18 U.S.C.A. § 921(a)(16) provides:

> The term "antique firearm" means—
> (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and
> (B) any replica of any firearm described in subparagraph (A) if such replica—
> (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
> (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
> (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

In establishing that an item is a firearm, the prosecution need not prove in the first instance that it is not an antique.[37] However, once a defendant sets forth an affirmative defense by producing some evidence to put the exception at issue, the government must prove beyond a reasonable doubt that the item is not an antique.[38]

National Firearms Act, "It is proper . . . to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor.").

[37] *U.S. v. Laroche*, 723 F.2d 1541 (11th Cir. 1984).

[38] *U.S. v. Mayo*, 705 F.2d 62, 73–76 (2d Cir. 1983).

However, one court held that the government must prove in its case-in-chief that a gun was made after 1898.[39]

Regarding what is an antique firearm "replica," the item need not be identical to or even look like any specific firearm manufactured before 1898. Replicas are typically muzzle loading rifles, pistols and shotguns; revolvers that are loaded with loose powder and ball in the cylinder; or cartridge firearms for which cartridges are not readily available commercially. Many modern "replicas" use plastic stocks and look like modern firearms, but utilize an antique ignition system, such as a percussion cap.

BATF's official position is consistent with the above, although it has occurred that a felon is prosecuted for possession of an antique replica because the local Special Agent and prosecutor are unaware of BATF's interpretation. Recently, a dispute has arisen on whether a muzzle loading rifle designed to accommodate either a percussion cap or a shotgun primer (such as are used in modern shotshells) is a "firearm" and not an antique replica. The above statutory language—not designed for using "fixed" ammunition—is adverse to BATF's view. However, BATF opines that a shotgun primer is not a percussion cap "or similar type of ignition system."

In a civil case, a district court resolved the issue in favor of BATF by holding a muzzle loading rifle using a shotgun primer to be a "firearm."[40] In response, Congress amended the definition to insert subparagraph (C) above, which removes from "firearm" any muzzleloading firearm which uses black powder and "which cannot use fixed ammunition." The issue is significant, in that antique firearms may be sold commercially without licenses and may be possessed by felons, but it is a felony to deal in "firearms" without a license or for a felon to possess a "firearm."

While the 1998 amendment removed certain guns from the "firearm" status, some firearms have interchangeable barrels, some for use with modern ammunition and others are "muzzleloading" for use with black powder. These guns are not antique firearms.[41] Moreover, "certain muzzle loading weapons such as modern mortars, rocket launchers, and firearms converted into

[39] *U.S. v. Smith*, 685 F. Supp. 1523, 1533 (D. Or. 1988), aff'd in part, rev'd in part on other grounds, 876 F.2d 898 (9th Cir. 1989).

[40] *Modern Muzzleloading, Inc. v. Magaw*, 18 F. Supp. 2d 29 (D.D.C. 1998).

[41] ATF, "What qualifies as an antique firearm?" lists the following as being "firearms":

1. Savage Model 10ML (early, 1st version).
2. Mossberg 500 shotgun with muzzle loading barrel.
3. Remington 870 shotgun with muzzle loading barrel.
4. Mauser 98 rifle with muzzle loading barrel.
5. SKS rifle with muzzle loading barrel.

muzzle loaders are still 'firearms' as defined in 18 U.S.C.A. § 921(a)(3)."[42]

Specific types of conventional firearms regulated by the Act are also defined. Stripped of somewhat confusing references to design, make, and intent, these definitions are fairly simple. A shotgun has a shoulder stock, a smooth-bore barrel, and for each pull of the trigger, fires a number of ball shots or a single projectile (a slug).[43] A rifle also has a shoulder stock but its barrel has a rifled bore—meaning that it has lands and groves to give the bullet a twist, stabilizing its flight—and fires a single projectile (bullet) with each pull of the trigger.[44] A semiautomatic rifle is a repeating rifle which uses energy from the firing cartridge to extract the fired cartridge case and chamber the next round. A handgun is a firearm with a short stock (handle or grip) designed to be held and fired with a single hand, or a combination of parts from which a handgun can be assembled.[45]

The Act also defines a destructive device, firearm muffler or silencer, short-barreled shotgun or rifle, and machine gun.[46] These items are regulated primarily by the National Firearms Act (NFA) and are described in detail in Chapter 6.

One noteworthy deletion from the definition of "firearm" in Title I is a conversion kit for a machine gun, which is regulated by the NFA and by 18 U.S.C.A. § 922(o). Since a machine gun

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6. RPB sM10 pistol with muzzle loading barrel.
7. H&R/New England Firearm Huntsman.
8. Thompson Center Encore/Contender.
9. Rossi.50 muzzle loading rifle.

http://www.atf.gov/firearms/faq/collectors.html#antique-definition (visited April 16, 2013).

[42]ATF, "What qualifies as an antique firearm?" lists the following as being "firearms":

1. Savage Model 10ML (early, 1st version).
2. Mossberg 500 shotgun with muzzle loading barrel.
3. Remington 870 shotgun with muzzle loading barrel.
4. Mauser 98 rifle with muzzle loading barrel.
5. SKS rifle with muzzle loading barrel.
6. RPB sM10 pistol with muzzle loading barrel.
7. H&R/New England Firearm Huntsman.
8. Thompson Center Encore/Contender.
9. Rossi.50 muzzle loading rifle.

http://www.atf.gov/firearms/faq/collectors.html#antique-definition (visited April 16, 2013).

[43]18 U.S.C.A. § 921(a)(5).

[44]18 U.S.C.A. § 921(a)(7).

[45]18 U.S.C.A. § 921(a)(29).

[46]18 U.S.C.A. § 921(a)(4), (6), (8), (23), (24).

conversion kit is not a "firearm" in Title I, it is not subject to Title I restrictions other than Section 922(o).[47]

In addition, Title I defines a "firearm" in part as a weapon that expels a projectile "by the action of an explosive,"[48] while the NFA defines a "machinegun" in part as a weapon that shoots automatically without regard to whether it shoots by the action of an explosive. A machinegun that shoots by the action of a propellant other than an explosive would not be a "firearm" as defined in Title I.

Reflecting the above, the United States has acknowledged to the Supreme Court that "there are 'machineguns' that do not operate 'by the action of an explosive,' and so are not 'firearms' under 18 U.S.C.A. 921(a)(3)(A) . . . ."[49]

The meaning of the term "firearm" under the various laws of the States may differ from the federal definition. In a Virginia prosecution for being a felon in possession of a firearm, the defendant put into evidence a letter from the Chief of the ATF Firearms Technology Branch stating that a flare gun "was not designed as a weapon or to expel a projectile by the action of an explosive and was not a firearm" under the Gun Control Act, and a stipulation that an ATF witness would so testify.[50] The Virginia Supreme Court responded: "We consider both statements irrelevant. How the BATF interprets the federal statute and decides what is and what is not a firearm is not binding upon this Court, or even persuasive."[51]

The federal crime legislation of 1994, which expired in 2004, enacted a category known as "semiautomatic assault weapon."[52] That term is defined to include "any of the firearms, or copies or duplicates of the firearms in any caliber, known as," after which follows a list including "Norinco, Mitchell, and Poly Technologies Avtomat Kalashvikovs (all models)," "Colt AR-15," and several others. Vagueness problems exist in the specified names as well

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[47]*See* 18 U.S.C.A. § 922(a)(4), (b)(4), and (o). BATF successfully argued that a machine gun conversion kit is not a Title I "firearm" in Francis Warin v. Director, Dep't of the Treasury, BATF, No. C 80-210, slip op. (N.D. Ohio Oct. 14, 1983), but later argued that it *is* in *U.S. v. Hunter*, 843 F. Supp. 235, 256 (E.D. Mich. 1994).

[48]18 U.S.C.A. § 921(a)(3).

[49]Brief for the United States, *United States v. Martin O'Brien*, No. 08-1569, U.S. Supreme Court, at 18 n.4 (2010).

[50]*Morris v. Com.*, 269 Va. 127, 134 n.6, 607 S.E.2d 110 (2005).

[51]*Morris v. Com.*, 269 Va. 127, 134 n.6, 607 S.E.2d 110 (2005). Curiously, while holding the flare gun to be a "firearm" for purposes of the felon-in-possession prohibition, the court stated that it was not a "firearm" for purposes of dealer transfers and background checks. *Morris*, 269 Va. at 133 n.5.

[52]18 U.S.C.A. § 921(a)(30).

as the terms "copies or duplicates." Also included are several generic definitions, such as a semiautomatic rifle that can accept a detachable magazine and has a folding stock and a pistol grip that protrudes conspicuously beneath the action of the weapon. Once again, vagueness problems lurk, and counsel should consult with firearms experts.

The 1994 act also defined the "large capacity ammunition feeding device," which is a magazine, belt, or similar device manufactured after the enactment that has a capacity of, or can be readily converted to accept, more than ten rounds of ammunition.

◆ **Tactical Tip:** Counsel should become familiar with the type of firearm involved in a given case. The advice of technical experts may be critical, but counsel should still learn the design characteristics of the firearm in the case. This is particularly the case if a question exists of whether the item is the type alleged or a firearm at all.

§ 2:5 Intent requirements: knowing or willful

Prohibited acts under the Gun Control Act are set forth largely in 18 U.S.C.A. § 922. The prohibited acts are subject to one of two intent standards—knowingly or willfully. These standards are provided in Section 924(a), which concerns penalties. As passed in 1968, the Act had no such intent standards, leading to a perception that BATF was making felony cases against honest and well-meaning gun collectors and businesses. The legislative history of the Firearms Owners' Protection Act, which enacted the knowing and willful standards, and applicable case law, will make clear the intent necessary to be proven to establish a crime under the Act.

The analysis of each prohibited act in the rest of this chapter will specify which offenses are knowing and which are willful. Unless otherwise specified, offenses are punishable by a $5,000 fine and five years imprisonment.[1]

As originally enacted, the GCA had no explicit intent standards. However, as amended by FOPA, 18 U.S.C.A. § 924(a)(1) punishes whoever "knowingly" commits certain specified acts and whoever "willfully violates any other provision of this chapter . . . ."

In *Bryan v. U.S.* (1998), the Supreme Court held that a conviction for "willfully" violating the law requires a showing that the defendant knew his conduct was unlawful, not that he was aware

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[Section 2:5]

[1]18 U.S.C.A. § 924(a).