Firearms offenses may fall within a number of different categories of aggravated felony, including (a) firearms trafficking, and (b) miscellaneous offenses involving firearms and explosives. 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, and (d) drug trafficking.

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

(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. Drug “trafficking” is “the unlawful trading or dealing of any controlled substance.”

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

(C) Definition of Explosive Materials. “Explosive materials’ means explosives, blasting agents, and detonators.” “Explosives” “means any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion. ...” “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.”

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.

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

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),

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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).
11 Ibid.
• 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, 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.

The Tenth Circuit failed to extend this decision to convictions for possession of unregistered sawed-off shotguns since no law bans their possession.\textsuperscript{16}

Other circuits have not adopted this reasoning.\textsuperscript{17}

The Ninth and Tenth Circuits have adopted a narrowed version of \textit{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.\textsuperscript{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.”\textsuperscript{19} “Firearm” does not include pistols or revolvers with rifled bores.\textsuperscript{20}


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

\textsuperscript{17} \textit{Hunter v. United States}, 73 F.3d 260, 261 (9\textsuperscript{th} 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); \textit{United States v. Ardoit}, 19 F.3d 177, 179-180 (5\textsuperscript{th} 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); \textit{United States v. Jones}, 976 F.2d 176, 183 (4\textsuperscript{th} 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 \textit{United States v. Gresham}, 118 F.3d 258, 260-264 & n.8 (5\textsuperscript{th} Cir. 1997)(conviction for possession of unregistered pipe bomb constitutional when registration impossible as practical matter though not legally impossible); \textit{United States v. Aiken}, 974 F.2d 446, 448-450 (4\textsuperscript{th} Cir. 1992) (same for short-barreled shotgun).

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

\textsuperscript{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).

\textsuperscript{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 length; (5) a firearm with a caliber of less than a 0.50 caliber.756 mm. (6) a firearm designed to be fired in a barrel 18 inches or less in length; (7) a firearm designed to fire a fixed shotgun shell. [26 U.S.C. § 5845(c).]
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.”

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. Title 18 U.S.C. § 922(a)(7) and (8) prohibit the manufacture,
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.