

INFRINGED

A woman with blonde hair, wearing a black dress and high heels, stands with her back to the camera. She is holding a rifle in her right hand. In front of her is a large, ornate bell mounted on a stone pedestal. Behind the bell is a wide set of stone steps leading up to a grand, classical building with four large columns and a pediment. The sky is a dramatic, dark purple and blue.

*Are you a gun owner?
Know the law and your rights.*

ALEXANDRIA KINCAID
Firearms Law Attorney

CHAPTER 10

SIMPLE WORDS WITH COMPLICATED MEANINGS: DO YOU KNOW WHAT A FIREARM IS?

One of the mechanisms used by judges who want to change the meaning of existing law is to change the meaning of the words used in the law. Most people probably think they know what a “firearm” is, or what a “person” is, or what “possession” means. Most gun owners also think they know what the word “infringed” means. However, after lawyers, judges, and legislators are finished with the law, words you think you can define can mean something entirely different than the plain meaning of those words.

In this chapter, I illustrate this concept with a few key words in gun law lexicon.

Firearm

Most gun owners think they know what a “gun” is. But the word “gun” is rarely used in the law. The word “fire- arm” is used instead, and the meaning of the word can differ greatly depending on which law you are applying.

Some laws define parts of a firearm as a firearm, or certain types of explosives or firearm suppressors as firearms. A firearm might be a firearm under federal law but may not be a firearm under state law (or vice versa). **MAKE SURE YOU KNOW WHETHER YOUR “FIREARM” IS A FIREARM.**

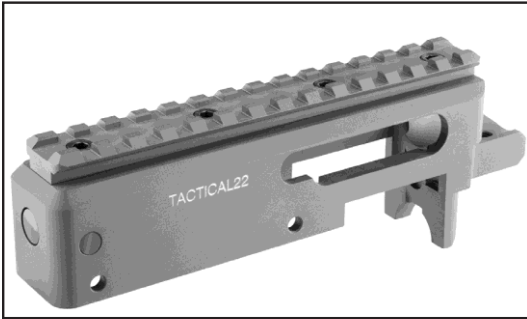
For example, under federal law, the “receiver” in the picture is a firearm, the suppressor (silencer) is a firearm, and, as we will see in a later chapter, small parts less than a couple of inches in length are considered machine guns. In contrast, firearms such as the muzzleloading rifle in the picture, are not necessarily considered firearms under the law.

A muzzleloader (or black powder rifle) is not a firearm under the definition in the federal law known as the National Firearms Act. However, it is a firearm under the definition in a different federal law known as the Gun Control Act—but it is excepted from the requirements of that law. A muzzleloader is also a firearm under the definitions found in many state laws.

I have spoken with more than one felon who thought he could own a muzzleloader because a muzzleloader is exempt from the requirements of the federal Gun Control Act, which is the federal law that prohibits a convicted felon from possessing a firearm. Information is easily spread around on the internet, and the word has been spread that a convicted felon can be in possession of a muzzleloader.

The unwary felon may not realize (and sometimes his public defender did not warn him) that his state’s law may not similarly exclude muzzleloaders, making his possession of a muzzleloader illegal and prosecutable.

A 10/22 receiver. A firearm under federal law. Photo by Oleg Volk.



A silencer. A firearm under federal law. Photo by Oleg Volk.



A reproduction flintlock rifle. Not a firearm under federal law. Photo by Oleg Volk.



I have also been asked by gun owners whether they can loan muzzleloaders to convicted felons. If you are not a felon, but you loan a firearm to a felon, you can be prosecuted for “aiding and abetting” the felon. Aiding and abetting can carry the same sentence (punishment) as the felon will get for unlawfully possessing the gun.

To help clarify how the definition of what constitutes a firearm differs, below are two different definitions of the word “firearm” under federal law:

Gun Control Act (GCA)

The GCA defines a “firearm” 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.

Despite this broad definition, this federal law excludes “antiques” (a firearm that was actually made in or before 1898 and replicas of pre-1898 firearms) and any muzzle loading rifle, shotgun, or pistol, which is designed to use black powder and cannot use, or be readily converted to use, fixed ammunition. This exception to the definition is why you can order muzzle loaders on the internet and receive them in the mail without using a licensed dealer.

National Firearms Act (NFA)

The NFA is another *federal* law. Under the NFA, the term “firearm” has a very narrow definition, which includes only certain types of firearms:

- A shotgun with a barrel or barrels of less than 18 inches in length;

- A weapon made from a shotgun if, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length;
- A rifle with a barrel or barrels of less than 16 inches in length;
- A weapon made from a rifle if, as modified, has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length;
- “Any other weapon” as defined in subsection (e) of 26 USC section 5845;
- A machinegun;
- A silencer; and
- A destructive device.

As you can see from the above definitions, federal laws can have different definitions from other federal laws, which can add to the confusion and frustration.

The following is an example of a state law defining the word “firearm”: “Firearm means any deadly weapon capable of ejecting or propelling one (1) or more projectiles by the action of any explosive or combustible propellant, and includes unloaded firearms and firearms which are inoperable but which can readily be rendered operable.”

The following diagram shows how these two federal laws differ in defining the word “firearm,” and how a state’s laws may be even broader:



Person

A person is a living breathing human being, right? Wrong. A person is not just a human being. The Gun Control Act includes individuals, corporations, companies, associations, firms, partnerships, societies, or joint stock companies in the definition of “person.” Trusts are not “persons” under the GCA.

The National Firearms Act includes individuals, certain trusts, estates, partnerships, associations, companies or corporations in its definition of “person.”

Additionally, a state may have its own definition of the word “person” that may differ from the federal definitions.

Possession

Ownership and possession are not the same. If you are holding a firearm, you are possessing it, even though you may not own it. More specifically, if you are holding it, you

are in “actual possession” of the firearm. Most criminal laws restrict “possession,” not “ownership.” It is technically possible in some instances for people who cannot possess firearms to legally “own” them.

The most problematic aspect of “possession” is that the courts have decided that a person can be convicted of illegally possessing a firearm even if they do not own it or are not holding it. The key to determining whether you are in possession is whether you have the right (or ability) to control the firearm. If you have the right to control the firearm, you can be deemed to be in “constructive possession” and prosecuted if you are not lawfully allowed to possess that firearm.

Another way to look at constructive possession is to think about a situation where you live with another person. If you live with someone who is not supposed to possess firearms, it is not alright for that person to live with you just because the firearms belong to you. If you live with a felon and you own the firearms but leave them where the felon can access them, you could be prosecuted for aiding and abetting a felon to possess firearms. The felon with whom you live could also be charged with the crime of felon in possession of a firearm. In other words, you could both be charged with a felony.

A gentleman once told me a story about his son, who was temporarily committed to a mental institution by a court process, because he was suicidal over the death of a loved one. When released, the son went to live with his father. The father owned many guns, and was worried about whether he could legally allow his son to live with him. The answer depends on how the father keeps the firearms. If he leaves guns lying around the house where the son can have control

of (possess) them, then the dad is breaking the law. If the dad instead keeps the firearms locked in a safe to which the son does not know the combination, the son is not in possession. In the safe scenario, the father is taking the risk that a law enforcement officer, prosecutor, and jury will believe that the son did not know the combination to the safe . . . potentially risky business.

I am going to draw on my experience as the lead prosecutor for a couple of drug teams to further illustrate this point. When I and my law enforcement team would serve a search warrant on a suspected drug house, the homeowner did not need to be in the home, holding all the drugs to be charged with possession of controlled substances (illegal drugs). If we found drugs and paraphernalia in the drug dealer's car, and perhaps nothing inside the house, we could still arrest and prosecute him for possession. The reason is that under the law, actual possession is not required in order for that person to be charged with a crime. If the person violating the law is simply in constructive possession by exercising control over the illegal item (which he did because the drugs were in his car), that person is in "possession" and can be convicted of the crime.

Transfer

The term "transfer" means much more than selling a firearm. You might be transferring a firearm if you sell, assign, pledge, lease, loan, give away, or otherwise dispose of a firearm. Basically, if one person hands a firearm to another person, there may very well be, and likely is, a "transfer" that has taken place, even if the transfer is temporary.

When you transfer a firearm, you must comply with state and federal laws. For instance, some transfers require that you use a licensed firearms dealer as an intermediary to complete (and record) the transfer. Transferring a firearm from one person to another, whether temporary or permanent, requires you to comply with many laws.

Conviction

The jurisdiction, state or federal, where a person was convicted of a crime will control what the definition of “conviction” means for that state and for the federal system of laws. If a person was convicted of a state crime in New York, New York law will define what the word “conviction” means for both federal and New York jurisdictions. In other words, the state law where the person is charged with the crime will determine whether one is “convicted” of a crime sufficient to revoke that person’s right to possess a firearm under the federal system. Where a person has been convicted, no matter how long ago, dictates whether the person has any ability to erase the conviction from his or her record and regain his or her ability to own a firearm under both state and federal law.

However, other states may not recognize the originating state’s definition of “conviction.” For example, if the person in our New York example obtained a pardon of all his felony convictions, and moved to the state of Washington, Washington law may not recognize the pardons and instead, may deem the person to still be a convicted felon. This is an ongoing battle in certain states, and the states refusing to recognize other state’s pardons may be violating the U.S. Constitution. The legality of these state laws has not yet been decided by the courts.

The result is that if you are convicted of the crime of possessing a controlled substance in New York, but later have that conviction expunged from your record, federal law does not consider you “convicted.” In addition, if you move to another state, you will need to make sure that whichever legal process “erased” any earlier convictions is recognized by your new home state.

CHAPTER 11

WHY GUN LAWS ARE LIVING, BREATHING, EVOLVING BEASTS

Under our current system, certain behavior may be legal in one location in this country, but criminal in another location. This situation is due to different states passing different laws and the appellate judges' different interpretations of those laws. A judge hearing a case in one court may decide that a law violates the Constitution, while a judge in another court may decide that the same law does not violate the Constitution. New federal and state cases determining the meaning of the Second Amendment continue to be decided, and unfortunately, continue to restrict gun owners' rights. The structure of our legal system explains this phenomenon.

Our Founding Fathers designed America to be a nation consisting of strong, individual state governments that would be united (as in the United States) by a weaker federal, or central, government. The idea was that the sovereign states would serve as "laboratories of democracy," and the federal government would exist as a subservient government responsible for functions like providing for the national defense and regulating interstate commerce. The federal government was designed by the Founders with the intent for it to play a supporting role in the grand scheme of America, never to be the supreme governing body.

The Second Amendment to the United States Constitution reads:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The title of this book is “Infringed,” because so many laws have now been passed both by Congress and by state legislatures that, despite the plain wording of the Second Amendment, most gun owners would agree that our Second Amendment protection has indeed been “infringed.”

Gun owners often ask, “I don’t get it—doesn’t the Constitution say ‘shall not be infringed’? How can there be so many laws that restrict the right to keep and bear arms?”

The short answer is that the interpreter of our Constitution, the United States Supreme Court, has decided that some restrictions on our right to keep and bear arms are allowed. Justice Antonin Scalia wrote in the landmark case of *District of Columbia v. Heller* (see Chapter 13 for more about this important court case):

Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court’s opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

While the Heller decision was a victory for gun owners, Justice Scalia (whom I greatly admire) and the Supreme Court as a whole, unfortunately, left a great deal open to interpretation by the lower appellate courts.

The first problem with the quoted language is that it leaves open the question of what would constitute a constitutional restriction on the right to keep and bear arms. Only a few examples are given of lawful restrictions. These examples are the concealed carry laws, possession by felons, possession by the mentally ill, and possession in certain locations. Judges across the country have since found many other reasons to justify restricting our right to keep and bear arms.

The second problem with the vague language is that Justice Scalia's written court decision does not provide lower courts with guidance on what standard to use to determine whether a law is an unconstitutional infringement on the right to keep and bear arms.

Many court cases will interpret a law when there is no clear answer, setting a precedent for the lower courts (trial and lower appellate courts) to follow. In doing so, they will often give detailed examples or even create a definition so a lower court knows how to decide a case when the same subject comes up in its jurisdiction. Two possible consequences of leaving a law open to interpretation are inconsistency and injustice. We are now living these consequences across America.

For example, a case arose in Texas in which a federal judge ruled that part of the federal Gun Control Act is unconstitutional. The judge ruled that the part of the Gun Control Act that prohibits a resident of one state from buying a handgun in another state

violates the potential buyer's Second Amendment right to keep and bear arms. A similar lawsuit could be filed by a potential handgun purchaser who wishes to purchase a handgun in Wisconsin. The Wisconsin plaintiff, however, may not receive the same decision from the judge. The Wisconsin judge may decide the case differently, even though the facts are similar (the plaintiff wishes to buy a handgun in a state other than his home state) and the legal question is the same (Does the Gun Control Act violate the would-be purchaser's right to keep and bear arms?). The Wisconsin district court judge may decide that the law banning the purchase of handguns in other states is constitutional, because there is no bright line standard for judges to use to decide upcoming Second Amendment cases.

Worse for gun owners, we have to be aware of which courts decide that a law is unconstitutional. The case in Texas only applies in Texas. After that case was decided, I was flooded with inquiries from gun business owners asking if they could now sell handguns to people who live in another state. The answer is "NO," unless you live in the District of Texas. Even then, the case may be appealed to a higher court and decided differently a couple of years from now. When we hear about "wins" in court through the media, it does not necessarily mean that the law has changed in every jurisdiction. A case involving federal laws or the United States Constitution has to be decided by the United States Supreme Court before gun owners throughout the United States can rely on the decision.

Despite this lack of clarity, gun owners have some certainty about what will constitute a violation of the laws we already have in place. In the next section, we review what we do know with more certainty (for now) about the federal gun laws passed by Congress.