

When is a Gun a Gun?



By Paul Engel

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- A gun, by any other name, is still protected by the Second Amendment.
- Who decides what the definition of a firearm is, Congress, the ATF, or the courts.
- Should a person be able to build their own firearm without government permission?

I cannot count how many times I've said it, but words mean things. It's one of the reasons I keep referring back to documents to see the actual words used so I can find their definitions. In the case *Garland v. VanDerStok*, the issue seems to come down not just to what the definition of a firearm is, but who gets to decide. What seemed to be forgotten in the oral arguments is the fact that an 'arm' by any other name, is still protected by the Second Amendment.

The Questions Presented to the Court

As in almost any other Supreme Court case, there are specific questions that are presented to the court for a decision.

The questions presented are:

1. Whether "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive, " 27 C.F.R. 478.11, is a "firearm" regulated by the Act.
2. Whether "a partially complete, disassembled, or

nonfunctional frame or receiver” that is “designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver,” 27 C.F.R. 478.12(c), is a “frame or receiver” regulated by the Act.

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Before we get into the oral arguments from the two parties, I want you to notice something from the questions presented. Specifically, whether parts of the Code of Federal Regulations (C.F.R.) are regulated by the Gun Control Act of 1968.

There’s another consideration to discuss before getting into oral arguments about the constitutionality of the Gun Control Act Congress passed (18 USC Chapter 44) back in 1968. As General Prelogar notes, Congress established several requirements as part of the law. The question no one is asking in this case is: Did Congress have the constitutional authority to create such legislation? In §921 – Definitions, Congress tried to tie this legislation to their power to regulate interstate commerce.

The term “interstate or foreign commerce” includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

[18 USC §921\(a\)\(2\)](#)

The terms “interstate of foreign commerce” are important, since Article I, Section 8, Clause 3 delegates to Congress the authority to:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[U.S. Constitution, Article I, Section 8](#), Clause 3

Keep these two acts in mind, as we'll be discussing them later.

Government's Oral Argument

As the petitioner, Attorney General Garland's attorney, Solicitor General Elizabeth Prelogar, is first to present her oral argument.

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

The Gun Control Act imposes straightforward but essential requirements. Firearms sellers and manufacturers must mark their products with serial numbers, maintain sales records, and conduct background checks. The industry has followed those conditions without difficulty for more than half a century, and those basic requirements are crucial to solving gun crimes and keeping guns out of the hands of minors, felons, and domestic abusers.

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The Gun Control Act does claim to impose requirements on the sellers and manufacturers of firearms. It also defines what is a firearm, which we'll get into later.

But, in recent years, companies like the Respondents here have tried to circumvent those requirements. They've begun selling firearms as easy-to-assemble kits and frames and receivers that require minimal work to be made functional. They've advertised the products, in their words, as "ridiculously easy to assemble and dummy-proof" and touted that you can go from opening the mail to have a fully functional gun in as little as 15 minutes, no serial number, background check, or records

required.

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The problem, as Mr. Garland claims, is that people have been manufacturing things that are not firearms, but can be made into firearms. Since these products, at the time when they pass through interstate commerce are not firearms, they do not have to meet the requirements established under the Gun Control Act. General Prelogar argues that, even though these kits do not meet the definition of firearm in the law, they are dangerous and should be labeled firearms.

Those untraceable guns are attractive to people who can't lawfully purchase them or who plan to use them in crimes. As a result, our nation has seen an explosion in crimes committed with ghost guns.

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While the news has been proliferating the idea that these Privately Made Firearms (PMFs), what General Prelogar refers to as "ghost guns," are popular among criminals and their use in crimes have "exploded," I've seen very little actual data to prove that. For example, in the ATF's [Crime Guns Recovered and Traced Within the United States and Its Territories](#):

Law enforcement agencies recovered and submitted 37,980 suspected privately made firearms (PMFs) to ATF for tracing between 2017 and 2021.

[Crime Guns Recovered and Traced Within the United States and Its Territories](#)

First of all, just because a firearm is submitted to the ATF for tracing does not mean it was used in the commission of a crime. Compare the 37,980 PMFs submitted to the ATF with the 1,922,577 total firearms submitted during the same timeframe, and you'll see they represent just under 2% of all guns

submitted to tracing. The ATF claims:

The dramatic rise in trace submissions involving PMF's reflects both increased criminal use of these firearms and enhanced awareness among law enforcement that ATF will process trace requests for PMFs.

[Crime Guns Recovered and Traced Within the United States and Its Territories](#)

However, they seem to ignore both the fact that privately made firearms have grown in popularity, along with ATF's own fear mongering campaign regarding "ghost guns."

Let's go back to General Prelogar's argument.

In the face of that public safety crisis, ATF promulgated this rule to underscore two points about the Gun Control Act's plain text.

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Notice, the law was not changed, but ATF promulgated a rule. This is important for two reasons. First, a rule from an executive agency is not and cannot be law, since all power for making laws is vested in Congress ([Article I, Section 1](#)). Second, agencies rules are not listed as part of the supreme law of the land in [Article VI](#), Clause 2. This, too, will be an important part of our discussion later.

First, a weapon parts kit that can readily be converted to function as a gun with common tools, often in under an hour, is a covered firearm.

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Says who? It certainly isn't Congress, or the people they represent. Rather, it's a group of bureaucrats who claim that a parts kit is a covered firearm. That's something those bureaucrats are not authorized to do.

Second, a product is a frame or receiver under the Act even if the buyer must drill a few holes or remove a few superfluous pieces of plastic to make it functional.

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Again, says who? Because, according to the respondent, in the case *City of Syracuse v. ATF*, the agency stated that unfinished receivers did not meet the statutory definition of a firearm.

Both of those points are consistent with how ATF has interpreted and implemented the Act across five decades and 11 different presidential administrations.

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If the respondent is correct, that statement is not true. They claim that just a few years ago the ATF stated the exact opposite. Besides, does a wrong decision become right simply because it was followed for a long time?

Respondents now seek a sea change in the Act's scope. They claim that if a firearm isn't a hundred percent functional, if it's missing just one hole that could be drilled in seconds and immediately assembled into a working gun, that product can be sold to anyone online with no background check, no records, and no serial number.

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As we'll see in the respondent's oral arguments, they claim it's the ATF that's seeking a sea change in the scope of the Gun Control Act.

That contradicts the Act's plain text, and it also contradicts common sense. This Court should make clear that the Act regulates these products as what they are, firearms and frames and receivers of firearms.

I welcome the Court's questions.

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The Attorney General may believe that the respondent's position contradicts the plain text of the act, but the plain text of the act contradicts the Constitution of the United States. Before I sum this all up, let's look at the other side.

VanDerStok's Oral Arguments

Arguing for Ms. VanDerStok is attorney Peter Patterson.

1. PATTERSON: Mr. Chief Justice, and may it please the Court:

This case turns on decisions made by Congress in the Gun Control Act of 1968.

First, Congress altered the common understanding of "firearm" to include other weapons that may readily be converted to firearms.

Second, in a departure from prior federal law, Congress decided to regulate only a single part of a firearm, the frame or receiver, and Congress did not alter the common understanding of a "frame or receiver."

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The common definition of a firearm is:

a weapon from which a shot is discharged by gunpowder –usually used of small arms

[Firearm – Merriam-Webster Dictionary Online](#)

In other words, something you carry like a pistol, rifle, or shotgun. Congress, however, decided to expand that definition to what they call "destructive devices."

(4) The term “destructive device” means-

(A) any explosive, incendiary, or poison gas-

(i) bomb,

(ii) grenade,

(iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

[18 USC 921\(a\)\(4\)](#)

So Congress has basically redefined a “firearm” into anything that goes boom. But notice, Congress didn’t call them firearms, they redefined “destructive devices” as firearms. But according to Ms. VanDerShok, there’s more.

ATF has now exceeded its authority by operating outside of the bounds set by Congress.

One, ATF has expanded the definition of “frame or receiver” to include items that may readily be converted to a frame or receiver.

And, two, ATF has expanded the definition of “firearm” to include collections of parts that are not weapons and that do not include a frame or receiver.

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This is where language gets tricky. You see the law states that a firearm is a weapon that will or may be readily

converted to express a projectile. The law also states that the frame or receiver of such a weapon is also a firearm, but the “readily converted” is applied to the weapon, not the frame or receiver, which is the serialized part of many of these weapons.

Some concern has been raised about circumvention. But, of course, complying with a statute is not circumventing it. And as this Court said in *Abramski*, which has already been referenced, Congress, in the Gun Control Act, did not seek to pursue its purposes of controlling access to firearms to the nth degree.

And, notably, Congress did not regulate the secondary market for firearms, and that secondary market is a much bigger source of firearms for criminals than privately made firearms.

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Here, Mr. Patterson deals with some of General Prelogar’s assertions. First, the assertion that companies were trying to circumvent the law by complying with its specific language. He also questions the assertion that these personally made firearms are a major source of weapons for crime.

There also has been questions raised about the agency’s prior practice. There definitely has been a sea change by the agency here. The agency projected that its rule would put 42 out of 43 unlicensed manufacturers out of business.

And what the agency said in the Syracuse litigation was they said: “An unfinished frame or receiver does not meet the statutory definition of ‘firearm’ simply because it can be designed to or can readily be converted into a frame or receiver.” That’s the exact standard they’ve now adopted.

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It seems quite obvious from ATF statements that their goal is

to put these manufactures out of business. Was that the goal ATF was given when it was created? As stated before, Mr. Patterson points to a previous case where the ATF stated that unfinished frames or receivers do not meet the statutory definition of firearm. So who is trying to change the rules, Ms. VanDerStok or the ATF?

Instead, what they looked at was whether critical machining operations had taken place. And, to be clear, we have no quarrel with that prior practice. We have raised as alternatives, one, something has to be completely machined, or, two, the critical machining operation test.

And the – the latter, we submit, is more consistent with the statutory language and solves the machine gun problem because, if you say, in the machine gun provision, a frame or receiver is also regulated, and if one hole is all that separates a semi-automatic receiver from a machine gun receiver, it's hard to see how the "readily" standard would not also be applied there.

I welcome the Court's questions.

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Which brings us to the crux of this matter: What does the word "readily" mean? According to the Merriam-Webster Dictionary Online, "[readily](#)" means without much difficulty. Yet as I understand it, these unfinished receivers are also known as 80% receivers, since only about 80% of the machining has been completed. How "readily" does that make them?

Questions for the Justices

While most of the time was spent on questions. In this case, there are only a couple of questions from Justice Alito I'd like to discuss here.

JUSTICE ALITO: – if I show you – I put out on a counter some

eggs, some chopped-up ham, some chopped-up pepper, and onions, is that a western omelet?

GENERAL PRELOGAR: No, because, again, those items have well-known other uses to become something other than an omelet.

The key difference here is that these weapon parts kits are designed and intended to be used as instruments of combat, and they have no other conceivable use.

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A lot of time was spent on when does a part become a frame or receiver, and there were many examples and analogies. What I found interesting here was not Justice Alito's question analogizing a frame or receiver with a western omelet, but part of General Prelogar's response. In her mind, there is no other reason in the world for a weapon than combat, which Merriam-Webster's Dictionary Online defines as:

a fight or contest between individuals or groups active fighting in a war

[Combat: Merriam-Webster's Dictionary Online](#)

But there are numerous uses for weapons that do not involve combat. There is sport and target shooting, hunting, and collecting, to name just a few. General Prelogar delves into this further in her rebuttal, which I will get to soon.

The second question/analogy from Justice Alito was presented to Mr. Patterson.

JUSTICE ALITO: Suppose I see that my neighbor is restoring a classic car, and – but he's taken out the – some critical parts. And then someone says, well, what is that? And I – I might well say, well, that's a 1957 Thunderbird, even though you couldn't drive it and it would take some work to make it do the thing that it was originally created to do.

So isn't that what – isn't that the essence of your backup argument? The thing must still be such that one would call it a frame or receiver even if it is not fully ready to be functional as a – as a frame or receiver at this time?

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The serious flaw in Justice Alito's analogy is while the work in progress may be a car, it does not need to be registered or otherwise regulated until it is used on the road. Based on this analogy the whole concept of "readily converted" falls apart.

Prelogar's Rebuttal

As the attorney for the petitioner, Solicitor General Prelogar was given the opportunity to rebut her opponents statement and answers.

But I also think it's contradicted by the facts on the ground because what the evidence shows is that these guns were being purchased and used in crime. They were sold to be crime guns. There was a 1,000 percent increase between 2017 and 2021 in the number of these guns that were recovered as part of criminal investigations.

And it makes perfect sense because the whole reason why you would want to get your hands on one of these unserialized, untraceable firearms is if you are a prohibited person or you want to use that gun in a crime.

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General Prelogar claims there is evidence, but doesn't provide any actual evidence that unfinished frames and receivers are being purchased to be used in crimes. Yes, there has been a huge increase in the number of these guns sent to the ATF for tracing, but even they do not claim all of these weapons are "crime guns." Such an increase should be expected given the

once growing number of manufacturers and kits.

The evidence shows that actually, the market for ghost guns essentially collapsed after this rule was permitted to go into effect, which I think just underscores what was evident all along: The reason why you want a ghost gun is specifically because it's unserialized and can't be traced.

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Apparently, based on General Prelogar's prejudice that personally manufactured firearms have no purpose other than to commit crimes, she believes that the ATF's rule was cracking down on crime. I guess the idea that law-abiding citizens, with no thought or intention of committing a crime, would not want to take a chance on crossing an ATF that has a reputation for vigorous and heavily armed response to perceived violations of their rules.

And more fundamentally, if there is a market for these kits for hobbyists, they can be sold to hobbyists. You just have to comply with the requirements of the Gun Control Act. Someone who is lawfully allowed to possess a firearm and wants to build it can purchase that kit if they undergo a background check. And so, if there is a market for these products, they can operate under the statute.

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Where in the Constitution does it say that the government needs to know about all of the arms held in private hands? Nowhere. In fact, by telling someone they cannot exercise their right to keep and bear arms without the government knowing about it is not only a violation of the Second Amendment, but of the Fourth and Fifth Amendments as well.

For a third reason, that means that this is a standard that is familiar in the law and familiar to industry. I think it's really notable here that we don't have the major gun

manufacturers suing us about this Final Rule, and the reason for that is because this “readily converted” standard is the one that has governed their conduct ever since the Gun Control Act was enacted.

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I wonder, General Prelogar, just how many “major gun manufacturers” were selling unfinished frame or receiver kits? Could it be that’s why they didn’t sue? After all, why would the major gun manufactures want to support their competition?

Conclusion

One thing I noted is how often the justices described completing one of these kits as “drilling a hole or two” or “clipping off a plastic part.” I admit that I haven’t built a firearm this way, but from what I know of the process, it’s not like putting a child’s Christmas toy together.

It’s quite apparent the government’s main concern is the access to firearms of which it is unaware. Why else would they focus on serialization and record keeping? Why claim that the sole purpose for these devices is combat when that’s patently untrue? And why else point to the use of these firearms for criminal activity and not compare it to their lawful uses?

Let’s face it, government today wants to be in control of everything, especially when it might give the people the power to oppose government. Which raises an interesting question from history:

“Are we at last brought to such a humiliating and debasing degradation, that we cannot be trusted with arms for our own defense?” –Patrick Henry

Apparently, at least in the mind of the federal government today, the answer is yes. Otherwise they would pay more attention to the actions of criminals and not the property of

law abiding citizens.

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