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Just a Soul Whose Intentions Are Good? The Relevance of a Defendant's Subjective Intent in Defining a “Destructive Device” Under the National Firearms Act

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**JUST A SOUL WHOSE INTENTIONS ARE GOOD?
THE RELEVANCE OF A DEFENDANT’S
SUBJECTIVE INTENT IN DEFINING A
“DESTRUCTIVE DEVICE” UNDER THE
NATIONAL FIREARMS ACT**

*Elliot Buckman**

This Note addresses the three-way circuit split among the U.S. Courts of Appeals over when, and to what extent, a court may consider a defendant’s subjective intent in defining a “destructive device” under the National Firearms Act. The circuit split centers on the Act’s ambiguous reference to intent in its definition of a destructive device, which is a statutorily prohibited firearm. After discussing the Act’s legislative history and development, this Note considers the role of mens rea in National Firearms Act cases. It next addresses the disagreement among the Courts of Appeals, first detailing three cases that give rise to the disagreement and then discussing additional cases which support each position. Finally, this Note argues that the U.S. Court of Appeals for the Second Circuit’s view, espousing a generally objective approach and eschewing a consideration of a defendant’s intent outside of a small range of cases, is most consistent with legislative history, statutory interpretation, and common sense.

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INTRODUCTION

Aaron Spoerke enjoyed detonating homemade pipe bombs underwater.¹ He did so not to injure anyone, but because he appreciated seeing “a flash underwater” and feeling “a concussion” that resulted from exploding these devices.² On the basis of his intention to use the pipe bombs for innocuous purposes, Spoerke challenged his conviction³ for making and possessing a destructive device under the National Firearms Act,⁴ which defines “destructive device” as:

1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term

1. *United States v. Spoerke*, 568 F.3d 1236, 1243 (11th Cir. 2009).

2. *Id.*

3. *See id.* at 1247.

4. 26 U.S.C. §§ 5801–72 (2006).

“destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon⁵

In its discussion of the possible import of Spoerke’s subjective intent in determining whether the device at hand was a statutorily “destructive” one, the U.S. Court of Appeals for the Eleventh Circuit noted a three-way circuit split on this issue.⁶ Much of the debate hinges on the appropriate interpretation of the statute’s use of the word “intended”;⁷ specifically, whether—and to what extent—a defendant’s subjective intent may inform the final determination as to whether a device is “destructive.” Though the views of the circuit courts are elucidated in far greater detail in Part II of this Note, a brief overview of the three opinions cited in *Spoerke*⁸ is presented now.

In *United States v. Oba*,⁹ the U.S. Court of Appeals for the Ninth Circuit afforded supreme weight to a defendant’s subjective intent, stating that “a device may be ‘converted’ into a destructive device as defined in subparagraphs (1) and (2) by way of ‘design or intent.’”¹⁰ According to the *Oba* court, even if the item in question would not, by virtue of its objective characteristics, come within the ambit of subparagraphs (1) or (2), a defendant’s intent to use that item for a destructive purpose¹¹ can effectively place it within the Act’s reach.¹²

In *United States v. Posnjak*,¹³ the U.S. Court of Appeals for the Second Circuit stated that generally speaking, a defendant’s subjective intent may not render “destructive” a device that otherwise would not fall under 26 U.S.C. § 5845(f).¹⁴ The court held that it is the objective nature of a device, and not its user’s intention, which determines whether or not the statute proscribes it.¹⁵ The *Posnjak* court did, however, allow for the defendant’s subjective intent to inform this determination in cases involving component parts which have objective characteristics that leave open the possibility of conversion into a proscribed or unproscribed device.¹⁶

Finally, in *United States v. Johnson*,¹⁷ the U.S. Court of Appeals for the Seventh Circuit took a stance largely similar, though not identical to, that of

5. *Id.* § 5845(f).

6. *Spoerke*, 568 F.3d at 1247–48.

7. *See* *United States v. Posnjak*, 457 F.2d 1110, 1119 (2d Cir. 1972).

8. *Spoerke*, 568 F.3d at 1247–48.

9. 448 F.2d 892 (9th Cir. 1971).

10. *Id.* at 894. Subparagraphs (1) and (2) discuss explosive devices and weapons, respectively. 26 U.S.C. § 5845(f).

11. “Destructive purpose” may be defined as using the item unlawfully or selling it to someone who would use it in that manner. *See Posnjak*, 457 F.2d at 1118; *see also* *United States v. Blackwell*, 946 F.2d 1049, 1053–54 (4th Cir. 1991) (stating that the malicious intent of a third party can suffice to provide the requisite intent of the defendant).

12. *See Oba*, 448 F.2d at 894.

13. 457 F.2d 1110 (2d Cir. 1972).

14. *See id.* at 1120.

15. *See id.* at 1116–18.

16. *Id.* at 1119.

17. 152 F.3d 618 (7th Cir. 1998).

the Second Circuit.¹⁸ It differed from *Posnjak* only in broadening the scope of the exception to the rule that excludes evidence of subjective intent. Namely, *Johnson* allowed for intent to be relevant both in cases of unassembled parts and fully assembled devices when the objective characteristics of such parts or devices do not compel a conclusion as to the legality of the devices' eventual use.¹⁹

In sum, the Ninth Circuit's opinion lies on one end of the spectrum, permitting a defendant's subjective intent to carry the day regardless of an item's objective characteristics.²⁰ The Second Circuit sits at the other end of the continuum, looking primarily to an item's objective nature and considering subjective intent only when dealing with unassembled parts which the defendant could combine to make either an illicit or a lawful device.²¹ The view of the Seventh Circuit—while practically sitting somewhere in the middle of the spectrum—is conceptually far closer to that of the Second Circuit. It adopts a similar preference for focusing on an item's objective nature. It allows, however, for a slightly wider exception in allowing a consideration of intent when the characteristics of unassembled parts or a fully assembled device do not dictate the purposes for which the item will ultimately be used.²²

As there exists a three-way circuit split on this issue, with two of the courts (the Second and the Seventh circuits) tendering fairly similar opinions, three illustrative hypotheticals may help to properly convey the precise stances of the three circuit courts.

First, consider a case in which all three courts would agree that the defendant's intentions are relevant in determining whether a destructive device is present. For example, a defendant found in possession of empty bottles and a can of gasoline may have stated that he intended to use these items to make fire bombs and Molotov cocktails to bomb a particular location.²³ Here, the items at issue are unassembled and could be combined to form either an innocuous or a destructive device.²⁴ Accordingly, all three courts, even the Second Circuit, would allow for the defendant's intentions to be a "central issue"²⁵ in such a case.²⁶

18. *Id.* at 627.

19. *See id.*

20. *See supra* notes 9–12 and accompanying text.

21. *See supra* notes 13–16 and accompanying text.

22. *See supra* notes 17–19 and accompanying text. One may alternatively approach this split through the following set of questions: first, do an item's objective characteristics point to its inclusion or exclusion under the National Firearms Act? If so, the U.S. Court of Appeals for the Ninth Circuit may consider the defendant's intentions, but the Second and Seventh would not. If not, the U.S. Court of Appeals for the Seventh Circuit (and surely the Ninth) would allow for such a consideration. The U.S. Court of Appeals for the Second Circuit, however, would then ask whether the item in question consisted of unassembled component parts or was a fully assembled device. If it is the former, the court may consider intent to be relevant; if the latter, it may not.

23. This hypothetical is based on the facts of *United States v. Davis*, 313 F. Supp. 710 (D. Conn. 1970), a case referenced by the *Posnjak* court as one in which the defendant's subjective intent was "a central issue." *Posnjak*, 457 F.2d at 1119.

24. *See Posnjak*, 457 F.2d at 1119.

25. *See id.*

The next case would involve a fully assembled device for which an objective inquiry is not dispositive in determining whether the device is statutorily destructive.²⁷ Here, the Second Circuit would hold that subjective intent is not relevant, since this is not a case of unassembled parts.²⁸ The Seventh and Ninth circuits, however, would hold that the court may consider the defendant's intent in determining whether the device is a statutorily destructive one.

Finally, there is the case where a defendant possessed commercial dynamite and professed his intentions to use it for harm. In these cases, the item lacks the objectively "destructive" characteristics;²⁹ accordingly, the Second and Seventh Circuits would exclude evidence of the defendant's intentions from their determinations of destructiveness. The Ninth Circuit, however, would allow the defendant's intent alone to render the item destructive, thereby placing it within the statute's reach.

Though the cases that produced this circuit split are decades old, this issue has immediate relevance for several reasons. Perhaps most obvious is the ease with which one can obtain both the materials and information needed to construct a destructive device. A recent Google search for "destructive devices for sale" returned over 75,000 hits.³⁰ A similar search for "how to build a homemade bomb" produced 575,000 results.³¹ The advent of BlackBerrys and smartphones have rendered the internet an increasingly powerful tool for obtaining and utilizing potentially dangerous information and materials. Accordingly, defining an accurate and effective legal standard in cases involving destructive devices is a critically important endeavor.

Also relevant is the recently proposed Firearm Licensing and Record of Sale Act of 2009.³² This bill seeks to amend certain parts of the U.S. Code

26. Each circuit court, regardless of its stance on the import of intent in more niche scenarios, would be bound by the statute to consider intent in this case. *See* 26 U.S.C. § 5845(f)(3) (2006) (including within the statute "any combination of parts . . . intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled")

27. The device at issue in *Spoerke*, a fully assembled one which could be used for destructive or nondestructive purposes, would likely fall under this category. *See supra* note 4.

28. According to the Second Circuit, therefore, possession of such an item would not result in a violation of § 5845.

29. Senator Thomas Dodd, the spearhead for the relevant gun control legislation of the 1960s, stated that he intended to "specifically exclude[]" from the statute's reach items such as commercial dynamite. 114 CONG. REC. 12448 (1968).

30. Destructive Devices for Sale, GOOGLE, <http://www.google.com/#hl=en&source=hp&q=destructive+devices+for+sale&aq=0&aqi=g2&oq=destructive+devices+&fp=cbc2f75bf9d43a8f> (last visited Oct. 23, 2010).

31. How to Build a Homemade Bomb, GOOGLE, <http://www.google.com/#hl=en&source=hp&q=how+to+build+a+homemade+bomb&aq=f&aqi=&oq=&fp=cbc2f75bf9d43a8fUS:official&client=firefox-a> (last visited Oct. 23, 2010).

32. H.R. 45, 111th Cong. (2009).

related to the present discussion.³³ Moreover, the professed purposes of the bill invoke the same public safety issues which underlie this issue.³⁴

Lastly, but perhaps most significantly, is President Barack Obama's recent withdrawal of American troops from Iraq in August of 2010³⁵ and similar plans to exit Afghanistan by the end of 2011.³⁶ Much of the initial gun control legislation discussed in this Note targeted the increase in imported firearms, many of which were post-World War I surplus,³⁷ and one may surmise that these military withdrawals will yield a similar surplus.

Part I.A of this Note discusses the development and legislative history of the National Firearms Act and other relevant legislation. Part I.B considers generally the role of mens rea in National Firearms Act cases.

Part II of this Note expounds on the aforementioned split between the Second, Seventh, and Ninth Circuits. Part II.A.1 discusses the rationale proffered by the Ninth Circuit, while Part II.A.2 presents other cases which comport conceptually with the Ninth Circuit's stance. Parts II.B and II.C follow identical structures for the Second and Seventh Circuits, respectively.

Part III argues that the approach adopted by the Second Circuit is most consistent with the wording of the statute as well as its legislative history, both of which indicate a preference toward limiting the statute's scope and excluding from it items with potentially lawful uses. It further argues that the Second Circuit's stance is more logical than those of the other two circuit courts.

33. *See id.*

34. One such purpose is "to restrict the availability of qualifying firearms to criminals, youths, and other persons prohibited by Federal law from receiving firearms." *Id.* § 2(c)(3). Another is "to protect the public against the unreasonable risk of injury and death associated with the unrecorded sale or transfer of qualifying firearms to criminals and youth." *Id.* § 2(c)(1).

35. *Facts and Figures on Drawdown in Iraq*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (August 2, 2010), <http://www.whitehouse.gov/the-press-office/facts-and-figures-drawdown-iraq>.

36. President Barack Obama, Address at United States Military Academy at West Point, New York (Dec. 1, 2009).

37. *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 (1999); *see also infra* notes 79–86 and accompanying text. *See generally* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 135 (1975).

I. LAYING THE FOUNDATION: A GENERAL HISTORY OF FEDERAL
FIREARMS REGULATION AND THE ROLE OF MENS REA IN NATIONAL
FIREARMS ACT CASES

A. *The Development of Early Federal Firearms Regulation*

Many of the cases which this Note discusses give considerable attention to the legislative history of the National Firearms Act.³⁸ Accordingly, a discussion of this legislative history is critical for grasping the arguments proffered by the circuit courts. Moreover, this Note's conclusion invokes much of this legislative history in developing its rationale. Consequently, Part I.A of this Note traces the legislative development of the National Firearms Act. Part I.A.1 discusses the original National Firearms Act of 1934, while Part I.A.2 focuses on the passage of the Gun Control Act of 1968, which amended the 1934 Act. Part I.A.3 then discusses the structure and professed purposes of the amended National Firearms Act.

1. The 1934 National Firearms Act's Historical Background and
Legislative History

State and local attempts to regulate firearms date back to the early nineteenth century.³⁹ Substantial legislative activity occurred between 1880 and 1915, but due to a lack of external pressure, the federal government made no attempts at regulation.⁴⁰ The first federal action pertaining to gun control was a federal excise tax on firearms and ammunition,⁴¹ first imposed in 1919.⁴²

Following World War I, concern with urban crime and handgun use began to develop, producing further local firearms regulation and fueling the fires of debate regarding federal regulation.⁴³ In 1927, Congress passed the Mailing of Firearms Act,⁴⁴ prohibiting the sale of firearms through the mail.⁴⁵ Though this legislative activity seems to evince a particular concern for gun control, there is little evidence that this was a visible public issue at the time.⁴⁶ Rather, the main public concern was curtailing crime and

38. See, e.g., *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989); *United States v. Peterson*, 475 F.2d 806, 811 (9th Cir. 1973); *United States v. Oba*, 448 F.2d 892, 900–01 (9th Cir. 1971).

39. Zimring, *supra* note 37, at 135.

40. *Id.*

41. I.R.C. § 4181 (2006).

42. ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 103 (Chatham House Publishers, 2d ed. 1998). Though this tax was primarily fiscally motivated, its legislative history does imply a concern for gun regulation. See Zimring, *supra* note 37, at 135.

43. Zimring, *supra* note 37, at 135.

44. 18 U.S.C. § 1715 (1927).

45. See *id.* This prohibition's general ineffectiveness eventually culminated in the 1968 Gun Control Act's near-total ban on transactions of this sort. See 18 U.S.C. §§ 921–31; Zimring, *supra* note 37, at 136.

46. See Zimring, *supra* note 37, at 136.

incarcerating criminals.⁴⁷ The general public viewed firearm regulation as one small component of the much larger issue of crime.⁴⁸

By the early 1930s gangsterism had become a prevalent problem in America.⁴⁹ Public concern had shifted to the “machine-gun-toting interstate gangster personified by John Dillinger.”⁵⁰ The submachine gun had taken on a prominent role in the public eye and had become “a natural candidate for public fear and legislative wrath.”⁵¹

President Franklin D. Roosevelt’s first Attorney General, Homer Cummings, blazed the path of gun control legislation.⁵² His efforts culminated in two pieces of federal legislation, the National Firearms Act of 1934 (the National Act)⁵³ and the Federal Firearms Act of 1938 (the Federal Act),⁵⁴ both of which served to establish a federal role in firearms regulation.⁵⁵

The National Firearms Act regulated civilian ownership of numerous devices that had gained reputations as gangster weapons.⁵⁶ Its form derived from the Harrison Narcotics Act,⁵⁷ and the source of its power was the tax it imposed on traffic in weapons.⁵⁸ The National Act was not intended to be an outright ban on firearms.⁵⁹ For fear that the U.S. Supreme Court would strike down such a ban as unconstitutional, Congress took a narrower approach, opting instead to merely require registration of certain firearms.⁶⁰

47. *Id.*

48. *Id.*

49. SPITZER, *supra* note 42, at 104.

50. Zimring, *supra* note 37, at 137.

51. *Id.* at 137.

52. *Id.* at 138.

53. 26 U.S.C. §§ 5801–5872 (2006).

54. Pub. L. No. 75-850, 52 Stat. 1250 (2006).

55. These acts also laid the groundwork for the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

56. Zimring, *supra* note 37, at 138. The National Firearms Act served as a forerunner to the Gun Control Act in two significant ways. It put the government in the business of overseeing firearms licensing and manufacturing, and it used the taxing power to center enforcement responsibility in the Department of the Treasury. *Id.* at 139.

57. Pub. L. No. 223, 38 Stat. 785 (1914).

58. Zimring, *supra* note 37, at 138. This also explains why the Act is located in the Internal Revenue Code. Martin Lefevour, 26 *U.S.C. § 5861(d) Requires Mens Rea as to the Physical Characteristics of the Weapon*, 85 *J. CRIM. L. & CRIMINOLOGY* 1136, 1138 n.17 (1995).

59. David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 *CUMB. L. REV.* 585, 590–91 (1987).

60. *Id.* at 592 n.34. Attorney General Homer Cummings’s specific concern was the Act’s lack of connection with revenue or interstate commerce. *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong. 6 (1934). This fact affected Congress’s decision to model the Act after the Harrison Narcotic Act, Pub. L. No. 223, 38 Stat. 785 (1914), which had already been upheld as constitutional. See *United States v. Doremus*, 249 U.S. 86, 94–95 (1919); *Hearings on H.R. 9066 Before the Comm. on Ways and Means*, 73d Cong. 4, 6 (1934) (statement of Attorney General Cummings); Hardy, *supra* note 59, at 591; see also *United States v. Homa*, 441 F. Supp. 330, 332 (D. Colo. 1977) (“What must be registered [under the National Firearms Act] are those devices which are of such a nature that they are inherently inimical to the public safety if they are freely possessed by private persons in an open society.”).

Records indicate that the Act was fairly effective; there were fewer incidents involving submachine guns after its passage than there were prior to it.⁶¹ However, the available data to support this conclusion is limited.⁶² Moreover, it is possible that the use of these weapons reached an unnatural peak right before the Act's passage and would have abated even without it.⁶³

The Federal Act, Attorney General Cummings's other major legislative effort, served to "spread a thin coat of regulation over all firearms and many classes of ammunition suitable for handguns."⁶⁴ The Federal Act aimed to prevent what was widely considered society's "criminal class" from obtaining firearms, but was generally ineffective in accomplishing its professed goals.⁶⁵ Two loopholes in the Federal Act are particularly salient as they eventually determined the shape of the Gun Control Act.⁶⁶ One was the relative ease with which citizens could obtain dealer's licenses.⁶⁷ The other was the ability for citizens who lived in a state which required licenses to simply purchase firearms in a state with no license requirement.⁶⁸

Further hindering the Act's effectiveness was the minimal policing of dealer compliance and the lack of a serial number requirement on firearms.⁶⁹ Additionally, dealers continued to enjoy immunity from prosecution because they did not have to verify their customers' eligibility to purchase guns.⁷⁰

Moreover, the government expended considerably few resources in enforcing the newly enacted legislation.⁷¹ The statistics paint an overwhelmingly clear picture: in 1938, the government invested a total of thirty-five man-years to enforce the two acts.⁷² Between the late 1930s and early 1960s, it made less than one hundred arrests per year on the basis of this legislation.⁷³

Yet despite these practical shortcomings, Congress accomplished much of what it wanted with these acts: "a symbolic denunciation of firearms in the hands of criminals . . . [and a] regulatory scheme that did not inconvenience the American firearms industry or its customers."⁷⁴ After Attorney General Cummings's departure in 1939, attempts to expand the existing legislation faded.⁷⁵ Violent crime rates had been in decline since

61. Zimring, *supra* note 37, at 139.

62. *Id.*

63. *Id.*

64. *Id.* at 140.

65. *Id.*

66. *Id.*

67. *Id.* at 140–41.

68. *Id.* at 141.

69. *Id.*

70. *Id.*

71. *Id.* at 142.

72. *Id.*

73. SPITZER, *supra* note 42, at 105.

74. Zimring, *supra* note 37, at 143.

75. *Id.*

the mid-1930s, and issues such as war and the post-Depression economic recovery occupied much of the public's attention.⁷⁶

Between 1938 and 1957, Congress displayed almost no interest in enacting new gun control legislation.⁷⁷ Most of the attempts at regulation of firearms during this period came from the Executive Branch and the general public, and were largely unsuccessful.⁷⁸

2. Time for a Change: The Gun Control Act of 1968

The first indication that the federal government would further regulate firearms came in the mid-1950s.⁷⁹ Inexpensive imported firearms, mostly military surplus, began to enter the American firearms market.⁸⁰ Between 1955 and 1958, the number of imported rifles available for domestic sale rose from 15,000 to 200,000.⁸¹ In response, then-Senator John F. Kennedy proposed legislation to curb the importation of surplus military weapons.⁸² Congress's ban, however, only reached previously exported military firearms.⁸³ Fueled largely by surplus World War II firearms, the flood of imported guns continued.⁸⁴

Once again, the statistics are extremely compelling: 1955 brought about the import for sale of 67,000 handguns to American civilians.⁸⁵ This figure rose to 130,000 in 1959, 500,000 in 1966, and 1,000,000 by 1968.⁸⁶ This dramatic increase notwithstanding, the imported handgun was particularly vulnerable to legislative regulation.⁸⁷ The imported handgun was cheap and thus widely available, not used for sport or law enforcement—and thus had no redeeming social value—and its importers had far less political sway than did domestic gun manufacturers.⁸⁸

Perhaps the most influential gun control advocate of this era was Senator Thomas Dodd of Connecticut.⁸⁹ Upon being named Chairman of the Juvenile Justice Committee of the Senate Judiciary Center in 1961, Senator Dodd ordered a study of mail order sales of firearms.⁹⁰ Armed with this study, Senator Dodd introduced his first gun control bill in 1963⁹¹ and initiated hearings to generate public interest.⁹² Following the assassination of President Kennedy in late 1963, Senator Dodd amended his bill to

76. *Id.*

77. *Id.*

78. SPITZER, *supra* note 42, at 104.

79. Zimring, *supra* note 37, at 144.

80. *Id.*

81. *Id.*

82. S. 3714, 85th Cong. (1958); *see also* Vizzard, *supra* note 37, at 79.

83. *Id.*

84. *Id.*; *see also supra* notes 32–34 and accompanying text.

85. Zimring, *supra* note 37, at 144.

86. *Id.*

87. *Id.* at 145.

88. *Id.*

89. *Id.* Notably, Connecticut was a major gun-producing state. *Id.*

90. Vizzard, *supra* note 37, at 80.

91. S. 1975, 87th Cong. (1963).

92. Vizzard, *supra* note 37, at 80.

include mail order traffic in rifles and shotguns.⁹³ The bill died on the Senate floor in 1964.⁹⁴

In 1965, following a message sent by President Lyndon B. Johnson that requested Congress take an increased role in federal firearms regulation, the Treasury staff drafted Senate Bill 1592.⁹⁵ Truly a predecessor for upcoming legislation, the bill contained many of the key elements of the Gun Control Act of 1968.⁹⁶ Senator Dodd introduced a similar bill⁹⁷ in January of 1967. In response to administration proposals, this bill underwent a series of amendments and became known as Amendment 90 to Senate Bill 1.⁹⁸ It extended the prohibition on interstate mail order sales and prohibited all interstate transactions between individuals.⁹⁹ A companion bill proposed by Senator Roman Hruska placed destructive devices under the National Firearms Act as requiring registration and tax payment.¹⁰⁰

Though the bill passed in the Senate less than one month later,¹⁰¹ passage in the House of Representatives remained an obstacle.¹⁰² The June 5, 1968 assassination of Senator Robert Kennedy, however, assured House passage.¹⁰³ Surprisingly, this Act never became effective because, in the aftermath of Senator Kennedy's assassination, Congress replaced it with the more comprehensive Gun Control Act.¹⁰⁴

The Gun Control Act amended the National Firearms Act to broaden the class of restricted items to cover destructive devices.¹⁰⁵ It also extended interstate restrictions to all firearms and brought ammunition under the Gun Control Act's coverage.¹⁰⁶ While Title IV contained the immediately relevant section of the Act,¹⁰⁷ the rest of the Act was similarly aimed towards helping local law enforcement curb incidents of crime.¹⁰⁸ To this end, the other four sections pertained to crime control means such as law

93. THOMAS DODD, REPORT OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE SUBCOMMITTEE TO INVESTIGATE JUVENILE DELINQUENCY PURSUANT TO S. RES. 63, S. REP. NO. 88-1608 (1968).

94. Zimring, *supra* note 37, at 146.

95. *Id.* The proposed bill was S. 1592, 89th Cong. (1st Sess. 1965).

96. Zimring, *supra* note 37, at 146.

97. S. 1, 90th Cong. (1st Sess. 1967).

98. Vizzard, *supra* note 37, at 82.

99. Amend. 90 to S. 1, 90th Cong. (1st Sess. 1967) (as intended to be proposed by Sen. Dodd, 1967).

100. S. 1854, 90th Cong. (1st Sess. 1967).

101. Title IV contained the immediately relevant section of the Act. Like Title IV, the rest of the Act was aimed towards helping local law enforcement curb incidents of crime. S. REP. NO. 90-1097, at 1-2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. To this end, the other four sections pertained to crime control means such as law enforcement assistance, admissibility of confessions, and wiretapping. *See id.*

102. Vizzard, *supra* note 37, at 83.

103. *Id.*

104. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

105. *Id.*; *see also* H.R. REP. NO. 90-1956, at 14-15 (1968) (Conf. Rep.), *reprinted in* 1968 U.S.C.C.A.N. 4426.

106. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

107. *See* S. REP. NO. 10-1097, at 183 (1968).

108. *Id.* at 30.

enforcement assistance, admissibility of confessions, and wiretapping.¹⁰⁹ This was the last major gun control act to pass Congress until the 1986 Firearms Owners' Protection Act.¹¹⁰

3. A Deeper Look into the Amended National Firearms Act's Structure and Purposes

The Gun Control Act contains two distinct subdivisions, each located in different sections of the federal code. Title 18 of the United States Code contains Title I of the Gun Control Act, which regulates all firearms.¹¹¹ Title 26 of the Code contains Title II,¹¹² which incorporates the prior National Firearms Act while making minor additions; most notably, the inclusion of "destructive devices" within the definition of firearms.¹¹³ The amended National Firearms Act, though possessing clear criminal implications, remained a tax statute; hence its location in the Internal Revenue Code.¹¹⁴

Though clearly curbing the availability of firearms to American citizens, the Gun Control Act in fact reflects a compromise between two highly polarized camps.¹¹⁵ During the debates preceding the passage of the Act, two distinct gun control strategies emerged.¹¹⁶ One was the creation of federal jurisdiction and mandatory prison sentences for violent crimes committed with guns.¹¹⁷ The proponents of this approach were generally the opponents of gun control who were seeking a realistic alternative to stricter measures.¹¹⁸ A second approach called for a system of federal firearms owner registration or licensing.¹¹⁹ The final version of the Gun Control Act contains elements of each, and thus, like the Federal Firearms Act of 1938, represents a compromise position between those who supported further gun control and those who opposed it.¹²⁰

The preamble to the Gun Control Act provides that its purpose is to assist in the fight against crime and violence¹²¹ without placing any undue

109. *Id.* at 213–14.

110. Pub. L. No. 99-308, 100 Stat. 449 (1986).

111. *See* 18 U.S.C. §§ 922–30 (2006).

112. *See* 26 U.S.C. §§ 5801–72.

113. Vizzard, *supra* note 37, at 86.

114. *Id.*; *see also supra* notes 57–58 and accompanying text. The statute's location in the United States Code has practical ramifications pertaining to the extent to which courts apply the rule of lenity. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 (1992).

115. *See* Zimring, *supra* note 37, at 147.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. This concern notwithstanding, a National Firearms Act offense centers around the possession of a device, not its use, despite the fact that "danger from a pipe bomb comes not from the offense of possession, but from the added factor of *use*." *See United States v. Hull*, 456 F.3d 133, 139 (3d Cir. 2006). Mere possession of a pipe bomb does not necessarily include a substantial risk that the possessor will use it. *Id.* at 140; *see also United States v.*

burdens on law-abiding citizens.¹²² These ideals pervade the entire Act¹²³ as well as the policy discussion which surrounded it.¹²⁴

The Gun Control Act contains three specific objectives.¹²⁵ One is assisting local efforts to license, register, and restrict ownership of guns by eliminating the interstate traffic in firearms and ammunition.¹²⁶ A second is denying access to firearms to certain groups such as minors and felons.¹²⁷ Finally, the Act aims to end the importation of surplus military firearms.¹²⁸

Senator Dodd submitted a report in support of the Act¹²⁹ which further illuminated some of its underlying motivations. Senator Dodd stated that destructive devices “are primarily weapons of war which have no appropriate use”¹³⁰ He further declared as one of the principal purposes of the Act a desire to keep firearms out of the hands of those not entitled to possess them.¹³¹ Yet he clearly delineated that “[i]t is not the purpose of the act to place any undue or unnecessary restrictions or burdens on responsible law-abiding citizens with respect to . . . any . . . lawful activity.”¹³²

Senator Dodd also discussed the grave implications of *Haynes v. United States*,¹³³ which effectively rendered useless the section of the United States Code¹³⁴ which the government had previously used for National Firearms Act prosecutions.¹³⁵ In *Haynes*, the defendant pled guilty to possession of

Lane, 252 F.3d 905, 907 (7th Cir. 2001) (distinguishing a crime that increases the likelihood of violence from a crime of violence).

122. Pub. L. No. 90-618 § 101, 82 Stat. 1213 (1968) (“[T]his title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes”)

123. Vizzard, *supra* note 37, at 89.

124. *Id.* at 94 (stating that advocates repeatedly discussed the correlation between gun-related murder and crime rates, as well as that between crime rates and strong gun control laws in other countries).

125. Zimring, *supra* note 37, at 149.

126. See S. REP. NO. 90-1501, at 23 (1968), reprinted in 1968 U.S.C.C.A.N. 4426; H.R. REP. NO. 90-1556, at 1 (1968) (Conf. Rep.); see also Zimring, *supra* note 37, at 149.

127. See S. REP. NO. 90-1501, at 23; Zimring, *supra* note 37, at 149.

128. See S. REP. NO. 90-1501, at 24; Zimring, *supra* note 37, at 149.

129. S. REP. NO. 90-1501.

130. *Id.* at 1. Notably, Senator Dodd used this fact as a justification for regulation of destructive devices. *Id.* at 28 (“[D]estructive devices . . . are primarily weapons of war and have no appropriate sporting use . . . therefore, it is necessary to control all commerce in them.”).

131. *Id.* at 22.

132. *Id.*; see also Jay M. Zitter, *Validity, Construction, and Application of Provisions of National Firearms Act (26 U.S.C.S. § 5845(f)) and Omnibus Crime Control and Safe Streets Act (18 U.S.C.S. § 921(a)(4)) Defining “Destructive Device”*, 126 A.L.R. FED. 597 (1995).

133. 390 U.S. 85 (1968).

134. 26 U.S.C. § 5851 (2006).

135. S. REP. NO. 90-1501, at 26; see also 114 CONG. REC. 26715–17 (Sep. 12, 1968) (remarks of Sen. Dodd) (noting the inadequacy of former gun control regulation); H.R. REP. NO. 90-1577, at 7 (1968), reprinted in 1968 U.S.C.C.A.N. 4426 (“The subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate.”); SPITZER, *supra* note 42, at 105 (noting that between the 1930s and 1960s, fewer than one hundred arrests per year were made based on such legislation).

unregistered firearms under sections 5841 and 5851.¹³⁶ The Supreme Court found that these sections' firearms registration requirements were "directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements."¹³⁷ It noted that the requirement to register violations under sections 5841 and 5851 greatly increased the likelihood of prosecution.¹³⁸ The Court therefore concluded that "a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions" under sections 5841 and 5851.¹³⁹ Part of the Gun Control Act's purpose was to overcome the *Haynes* obstacle.¹⁴⁰

Congress also explicitly discussed destructive devices. Senator Roman Hruska noted that one of the major effects of the legislation would be placing destructive devices within the definition of firearms.¹⁴¹ Senator Dodd stated that there was no apparent rationale for precluding such devices from the National Firearms Act's definition.¹⁴² He proceeded to state that while he did not intend to proscribe legitimate articles of commerce, very few legitimate sportsmen own destructive devices such as antipersonnel tanks or bazookas.¹⁴³

B. *The Role of Mens Rea in National Firearms Act Cases*

As the circuit split speaks to the issue of a defendant's intent in National Firearms Act cases, the next step in properly evaluating the split is an analysis of the general mens rea requirement in such prosecutions.¹⁴⁴ This section lays the groundwork for the later discussion of subjective intent per 26 U.S.C. § 5845(f). Moreover, this analysis provides further illumination into the congressional motives which prompted the relevant legislation.

1. Pre-*Staples* Cases

In *United States v. Freed*,¹⁴⁵ the Supreme Court held that the National Firearms Act requires no specific intent¹⁴⁶ that firearms be unregistered.¹⁴⁷ The only knowledge required for a conviction was that the instrument was a

136. *Haynes*, 390 U.S. at 86.

137. *Id.* at 96.

138. *Id.* at 97.

139. *Id.* at 100.

140. S. REP. NO. 90-1501, at 26.

141. 114 CONG. REC. 26900 (1968).

142. *Id.* at 12448.

143. *Id.*; see *supra* note 29 and accompanying text.

144. Mens rea is defined as a guilty mind: "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime" BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).

145. 401 U.S. 601 (1971).

146. Specific intent is the intent to commit the specific criminal act with which one is later charged. BLACK'S LAW DICTIONARY 882 (9th ed. 2009).

147. *Freed*, 401 U.S. at 607; see also *United States v. Urban*, 140 F.3d 229, 231-34 (3d Cir. 1998) (rejecting a specific intent requirement, despite the statute's reference to "any combination of parts either designed or intended for use").

firearm.¹⁴⁸ The Court referred to the National Firearms Act as “a regulatory measure in the interest of the public safety, which may well be premised on the theory that . . . possession of hand grenades is not an innocent act.”¹⁴⁹

The Court equated the instant case with *United States v. Balint*,¹⁵⁰ in which the Court convicted the defendant of selling narcotics, despite his claims that he did not know that a federal act proscribed them.¹⁵¹ There, the Court noted that Congress compared the prospect of convicting an innocent seller against the evil of exposing innocent citizens to perils of drugs, and chose to avoid the latter.¹⁵² That the Court invoked this reasoning in *Freed* implies that it viewed the possibility of convicting individuals unaware that they are in possession of unregistered firearms as insignificant in light of the National Firearms Act’s aim of ensuring public safety.

Justice William J. Brennan, Jr. concurred in *Freed*¹⁵³ and elucidated the majority’s conclusions on this issue.¹⁵⁴ To convict a defendant under the National Firearms Act, the government must prove three things: that the defendant possessed certain items, that those items were firearms, and that the items were unregistered.¹⁵⁵ While the last provision requires no proof of intent, the first two do have such requirements, thus preventing the National Firearms Act from creating a crime of strict liability.¹⁵⁶

Justice Brennan’s comments speak to his opinion on the nature of the National Firearms Act. The Act is intended to cover “major” weapons such as sawed-off shotguns and machineguns.¹⁵⁷ Justice Brennan viewed the likelihood of regulation of these weapons as great enough to obviate the intent requirement as per the unregistered status element of the offense.¹⁵⁸

For twelve years after *Freed*, every federal court which encountered this question held that the only mens rea required in this context was that defendants had a “general sense” that they possessed a firearm.¹⁵⁹ The Ninth Circuit in *United States v. Herbert*¹⁶⁰ was the first court to break this trend, holding that the government must prove the defendants knew of internal characteristics that rendered a device a “firearm” when nothing

148. *Freed*, 401 U.S. at 607.

149. *Id.* at 609.

150. 258 U.S. 250 (1922).

151. *See id.*

152. *See id.* at 254. The *Balint* court felt that when a statute aims to promote public welfare, and proving intent would hinder prosecution, the government need not prove that defendants knew their activities were illegal. *Id.* at 252–53.

153. *Freed*, 401 U.S. at 610 (Brennan, J., concurring).

154. *See id.*

155. *See id.* at 612.

156. *Id.*

157. *Id.* at 616.

158. *See id.*

159. Lefevour, *supra* note 58, at 1140.

160. 698 F.2d 981 (9th Cir. 1983).

external would have alerted them to the likelihood of regulation.¹⁶¹ This decision precipitated a trend of circuit court splits on this issue.¹⁶²

The U.S. Court of Appeals for the Fifth Circuit addressed this issue in *United States v. Anderson*.¹⁶³ It held that the lack of an explicit mens rea requirement in the National Firearms Act does not translate into this requirement being disposed of as a precondition for National Firearms Act prosecutions.¹⁶⁴

The *Anderson* court discussed the contrast between the dictionary definition of a firearm and that proffered by the National Firearms Act.¹⁶⁵ It noted that there is only a narrow overlap between the colloquial and legal definitions of the term.¹⁶⁶ The court thus concluded that—in regards to devices that look like firearms as per the ordinary meaning of the word but not as per the Act, yet are indeed statutory “firearms,”—a conviction requires the defendant’s knowledge of the latter.¹⁶⁷ Consequently, if a defendant is in possession of a non-regulated firearm,¹⁶⁸ and unbeknownst to him, the weapon was modified or eroded into one which falls under the Act, the intent requirement of the Act would not be fulfilled.¹⁶⁹

While the majority’s opinion was largely based on its interpretation of *Freed*, the dissent read *Freed* as implying that the National Firearms Act does not require knowledge of a weapon’s characteristics.¹⁷⁰ It argued that a possessor’s knowledge “that a grenade is a grenade and is a highly dangerous weapon, the possession of which might be unlawful” would suffice for a conviction.¹⁷¹ The mere ownership of legal weapons requires knowledge of those weapons’ characteristics.¹⁷²

Judge Jerry Smith supported his dissent by noting that there are very few, if any, National Firearms Act cases which punish a truly “innocent” gun owner.¹⁷³ The Act typically comes into play in cases of gangsters and terrorists; as such, Judge Smith deemed the majority’s concern regarding

161. *Id.* at 987. The conviction in *Herbert* involved weapons which were designed as semi-automatic guns and subsequently converted to fully automatic ones. *Id.* at 983. The National Firearms Act covers fully automatic weapons—which fire multiple shots with only one trigger pull—but not semi-automatics. See *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

162. Lefevour, *supra* note 58, at 1140.

163. 885 F.2d 1248 (5th Cir. 1989).

164. *Id.* at 1253.

165. *Id.* at 1250–51 (noting that the Act’s definition serves to narrow the meaning of “firearm” in most respects, but to expand it in some regards as well).

166. “[K]nowing or proving that a thing is a firearm in the ordinary sense of the term tells almost nothing about whether it is a ‘firearm’ for purposes of the Act . . .” *Id.* at 1251.

167. *Id.*

168. The court noted that the Act treats “conventionally manufactured” weapons as perfectly legal items. *Id.* at 1254.

169. See *id.*

170. *Id.* at 1256 (Smith, J., dissenting).

171. *Id.* at 1257.

172. *Id.*

173. *Id.* at 1261.

the prosecution of innocent citizens as misplaced.¹⁷⁴ Judge Smith also noted that the 1986 Firearms Owners' Protection Act¹⁷⁵ added scienter requirements to related statutes,¹⁷⁶ but did not do so in relation to the National Firearms Act.¹⁷⁷

2. *Staples v. United States*

The Supreme Court revisited the intent question in *Staples v. United States*.¹⁷⁸ There, the government charged the defendant with the possession of an unregistered machinegun¹⁷⁹ in violation of section 5861(d) of the National Firearms Act.¹⁸⁰ Staples claimed that the gun never fired automatically in his possession and that he was ignorant of this capability.¹⁸¹ He argued that his ignorance should protect him from criminal liability for failing to register the gun.¹⁸²

The Court noted the statute's failure to address mens rea.¹⁸³ Like the *Anderson* majority,¹⁸⁴ it refused to interpret this silence as disposing of a mens rea requirement.¹⁸⁵ It referred to the common law principle that requires some level of mens rea for a crime.¹⁸⁶ Only in cases involving "public welfare" or "regulatory" crimes—a category into which the government prosecutors claimed Staples' conviction fell—may the court construe congressional silence as eliminating a mens rea requirement.¹⁸⁷

174. *Id.* at 1261–62. The dissent also cited *Sipes v. United States*, 321 F.2d 174, 176 (8th Cir. 1963) which stated that the purpose of firearm regulation was to make it more difficult for gangsters to obtain weapons.

175. Pub. L. No. 99-308, 100 Stat. 449 (1986).

176. 18 U.S.C. §§ 922, 924 (2006).

177. 885 F.2d at 1261 n.7 (Smith, J., dissenting).

178. 511 U.S. 600 (1994). Before *Staples*, there was considerable conflict in federal courts on the issue of mens rea in this context. See Russell G. Donaldson, Annotation, *What Constitutes Actual or Constructive Possession of Unregistered or Otherwise Prohibited Firearm in Violation of 26 U.S.C.A. § 5861*, 133 A.L.R. FED. 347, 366 (1996). Cases such as *Freed* held that in order to uphold a conviction, the prosecution must merely show that the defendant had knowledge that the proscribed item exists, and that it was within his possession, but not that it required federal registration. Many others, meanwhile, held that the defendant must at least know of the general nature of the item possessed which places it under the statutory definition of a "firearm." See, e.g., *United States v. Smith*, 477 F.2d 399, 401 (8th Cir. 1973). Still, other courts required knowledge of particular features which render the device a statutory "firearm." See, e.g., *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992); see also *United States v. Poulos*, 895 F.2d 1113 (6th Cir. 1990) (holding that a conviction requires a defendant to have known that the item was likely to be subject to federal regulation).

179. The gun in question was a semi-automatic rifle which had been modified for fully automatic fire. See *Staples*, 511 U.S. at 603; *supra* notes 160–61.

180. *Staples*, 511 U.S. at 603.

181. *Id.*

182. *Id.*

183. *Id.* at 605.

184. See *supra* note 164 and accompanying text.

185. *Staples*, 511 U.S. at 605.

186. *Id.*

187. See *id.* at 606. In such situations, as long as a defendant knows he is dealing with a dangerous device that places him "in responsible relation to a public danger," he should be

The government supported its stance by citing *Freed*, in which the Court referred to the National Firearms Act as “a regulatory measure in the interest of the public safety.”¹⁸⁸ The *Staples* Court, however, refused to analogize *Staples* with *Freed*.¹⁸⁹ It stated that the analysis in *Freed*, a case involving hand grenades, was based on the assumption that the defendant knew he possessed a dangerous weapon—a weapon within the statutory definition of a “firearm,” the possession of which was not innocent.¹⁹⁰ In *Staples*, however, “the very question to be decided is *whether* the defendant must know of the particular characteristics that make his weapon a statutory firearm.”¹⁹¹

The *Staples* Court thus held that it could not analogize the instant case, one involving guns, to *Freed*.¹⁹² Rather, it compared *Staples* to *Liparota v. United States*,¹⁹³ a case involving the unlawful possession of food stamps.¹⁹⁴ There, the Court held that the statute required proof that the defendant knew his possession of food stamps was unauthorized.¹⁹⁵ The Court’s decision not to characterize the statute as a public welfare law rested on the fact that a “food stamp can hardly be compared to a hand grenade.”¹⁹⁶

The Court in *Staples* held that the same could be said of guns.¹⁹⁷ As opposed to hand grenades, there is a long history of lawful gun ownership in America.¹⁹⁸ The crux of the Court’s decision in *Freed*, that “one would hardly be surprised to learn that possession of hand grenades is not an innocent act,”¹⁹⁹ could not rightly be extended to *Staples*.¹⁹⁹ This extension in the *Staples* Court’s view, “is simply not supported by common experience.”²⁰⁰ The Court stated that unlike grenades, guns can be owned in perfect innocence.²⁰¹ It stated that roughly fifty percent of American homes contain at least one firearm.²⁰² In most states, buying a shotgun or rifle “would not alert a person to regulation any more than would buying a car.”²⁰³

“alerted to the probability of strict regulation” *Id.* at 607 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)).

188. *United States v. Freed*, 401 U.S. 601, 609 (1971).

189. *See Staples*, 511 U.S. at 609.

190. *Id.*

191. *Id.*

192. *See id.* at 610.

193. 471 U.S. 419 (1985).

194. *Staples*, 511 U.S. at 610.

195. *Id.*

196. *Liparota*, 471 U.S. at 433.

197. *Staples*, 511 U.S. at 610.

198. *Id.*

199. *See id.* (quoting *United States v. Freed*, 401 U.S. 601, 609 (1971)).

200. *Id.*; *see also id.* at 621–22 (Ginsburg, J., concurring) (stating that the generally dangerous nature of guns does not suffice to give defendants cause to inquire about registration requirements).

201. *Id.* at 611.

202. *Id.* at 613–14.

203. *Id.* at 614.

Turning to the case at hand, the Court concluded that it was reluctant to ease the prosecution's path to conviction of persons such as Staples whose conduct would not alert them to the probability of strict regulation under section 5861(d).²⁰⁴ It further supported its stance by citing the penalty of up to ten years imprisonment attached to such convictions.²⁰⁵ The Court relied on the principle that penalties can inform whether a statute should be construed as dispensing with mens rea requirements.²⁰⁶ It stated that public welfare offenses, which usually carried much lighter penalties, logically complement the absence of a mens rea requirement.²⁰⁷ Conversely, offenses punishable by long imprisonment generally do require mens rea.²⁰⁸ The Court thus supported the application of the common law rule favoring a mens rea requirement in this case.²⁰⁹

Justice John Paul Stevens dissented in *Staples*. He argued that the statute's text does inform the mens rea issue.²¹⁰ He argued that the text contains no mens rea requirement, nor does it describe a common law crime.²¹¹ Rather, since the relevant offense was "entirely a creature of statute," the background rules of the common law which the majority cited did not apply.²¹² Justice Stevens concluded that here, congressional silence on the mens rea issue dictates that "Congress did not intend to require proof that the defendant knew all of the facts that made his conduct illegal."²¹³

Justice Stevens further stated that when Congress initially passed the statute in 1934, it limited the Act's coverage to the types of weapons characteristically used by gangsters.²¹⁴ Consequently, Congress could have assumed that those possessing such weapons intended to use them for criminal purposes; any likelihood of innocent possession was remote.²¹⁵ Moreover, the Supreme Court had previously interpreted the Harrison Narcotics Act,²¹⁶ after which the National Firearms Act was modeled,²¹⁷ not to require proof of all the facts that constitute an offense in order to reach a conviction.²¹⁸

Justice Stevens also disagreed with the majority's contention that the National Firearms Act is not a public welfare statute.²¹⁹ He quoted *Freed*, where the Court held the statute to be a "regulatory measure in the interest

204. *Id.* at 615–16.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 617.

209. *Id.* at 619.

210. *Id.* at 625 (Stevens, J., dissenting). Justice Stevens quoted the section of the Act which makes it "unlawful for any person . . . to receive or possess a firearm which is not registered to him." *Id.* (quoting 26 U.S.C. § 5861(d) (2006)).

211. *Id.*

212. *See id.*

213. *Id.* at 626.

214. *Id.*

215. *Id.* at 626–27.

216. Pub. L. No. 223, 38 Stat. 785 (1914).

217. *See supra* note 57 and accompanying text.

218. *Staples*, 511 U.S. at 626 (Stevens, J., dissenting).

219. *Id.* at 630.

of the public safety.”²²⁰ Justice Stevens thus rejected the majority’s “rather surprising” and “dubious” conclusion that guns are more analogous to food stamps than to hand grenades.²²¹

Justice Stevens then turned to the history of the National Firearms Act. He noted that for the first thirty years of the original Act’s existence, courts did not require knowledge of the characteristics of the weapon that brought it under the statute’s reach.²²² He cited *Sipes v. United States*,²²³ in which then Judge Harry Blackmun stated that a defendant’s knowledge that he possesses a gun is “all the scienter which the statute requires.”²²⁴

Finally, Justice Stevens’s dissent noted that both the 1968 and 1986 amendments to the Act added knowledge requirements to other sections of the statute.²²⁵ However, neither the text nor the history of either amendment indicates any intent to add such a requirement to the offense for possession of an unregistered firearm.²²⁶ Justice Stevens thus concluded that a finding that a defendant knowingly possessed a dangerous device that would alert him to the likelihood of regulation would suffice for a National Firearms Act conviction.²²⁷

II. DOES A DEFENDANT’S SUBJECTIVE INTENT MATTER? THE THREE-WAY CIRCUIT SPLIT

This part discusses the three subjective intent standards currently applied by the circuit courts. Each subsection first details the cases cited in *Spoerke*²²⁸ as giving rise to this split. The subsections then state arguments proffered by other courts which have reached similar conclusions in analogous cases. As many of these cases offer arguments that overlap with those of the three primary cases, such arguments are only discussed once.

A. *Subjective Intent Matters: Advocating for a Consideration of the Defendant’s Intentions*

1. *United States v. Oba*

In 1971, the government charged Richard Oba with possessing and transferring an unlawfully made firearm.²²⁹ His stated intent was to use dynamite to “dynamite the city of Eugene, Oregon and . . . to bomb and

220. *United States v. Freed*, 401 U.S. 601, 609 (1971); *see also supra* note 188 and accompanying text.

221. *Staples*, 511 U.S. at 631–32 (Stevens, J., dissenting).

222. *Id.* at 636.

223. 321 F.2d 174 (8th Cir. 1963).

224. *Id.* at 179.

225. *See* Pub. L. No. 99-308, 100 Stat. 449 (1986); Pub. L. No. 90-618, 82 Stat. 1213 (1968); *Staples*, 511 U.S. at 636 (Stevens, J., dissenting).

226. *Staples*, 511 U.S. at 636.

227. *Id.* at 640.

228. *United States v. Spoerke*, 568 F.3d 1236, 1247–48 (11th Cir. 2009).

229. *United States v. Oba*, 448 F.2d 892 (9th Cir. 1971). As described in the indictment, the object was “seven sticks of dynamite wrapped in copper wire and equipped with fuse and blasting caps.” *Id.* at 894.

destroy the property of others.”²³⁰ After being charged with violating 26 U.S.C. § 5861(c) and (e), Oba pled guilty.²³¹ He later appealed his conviction, arguing that the object in question was not a “destructive device” as per 26 U.S.C. § 5845(f).²³²

The *Oba* court stated that “a device may be ‘converted’ into a destructive device as defined in Subparagraphs (1) and (2) by way of ‘design or intent.’”²³³ In light of the characteristics of Oba’s device and its admitted purpose, the court said it would be “absurd” to question its qualification as a destructive device.²³⁴ Thus, the Ninth Circuit held that a defendant’s intent weighs heavily in the determination of whether a device is a “destructive device” under the National Firearms Act.²³⁵

2. Additional Cases Advocating a Subjective Standard

In *United States v. Peterson*,²³⁶ the district court convicted the defendants of possessing a destructive device under section 5845(f).²³⁷ The defendants stated that this device could be used for destroying haystacks, and provided a list of haystacks they intended to burn and the route they intended to take in doing so.²³⁸

Basing its conclusions on the National Firearms Act’s legislative history, the *Peterson* court stated that “Congress was well aware of the rampant destruction of property and dangers to life and limb faced by the public through . . . homemade instruments.”²³⁹ Therefore, the court felt that Congress intended to proscribe devices other than military type ordinance through its inclusion of “destructive devices” in the statute.²⁴⁰ The court noted that the explicit mention of a category of “similar” devices in addition to the items specifically named in subparagraph (1)(a)–(f) indicates that incendiary “destructive devices” are not limited to military weaponry.²⁴¹

That the statute’s wording and legislative history allow for the inclusion of homemade devices provided a necessary, but not sufficient, condition for

230. *Id.* at 894.

231. *Id.* at 893.

232. *Id.*

233. *Id.* at 894.

234. *Id.* Consequently, the court upheld Oba’s conviction. *Id.* at 895.

235. *See id.* at 894–95.

236. 475 F.2d 806 (9th Cir. 1973).

237. *Id.* at 807. The device in question was a “three to four inch long casing and fuel segment of a fusee flare . . . from which a portion of the fuel material inside the casing segment was removed. The removed fuel material was mixed with an equal amount of gun powder.” This was inserted, along with a piece of cotton rope, into the casing. An explosive expert with the Treasury Department stated that this device was “highly effective” for use in destruction of property, and compared it to a Molotov cocktail. *Id.* at 809.

238. *Id.* at 809.

239. *Id.* at 810.

240. *Id.*

241. *Id.* at 810–11. *Contra* *United States v. Posnjak*, 457 F.2d 1110, 1116 (2d Cir. 1972) (stating that “[t]he last phrase must logically be taken to mean devices similar to the preceding enumerated items in that they are articles of military ordinance, not merely that they . . . are products with some explosive power”).

upholding Peterson's conviction. The court stated, however, that "Congress manifestly intended to proscribe friendly things when with evil intent they are combined or joined together to produce a hostile object or device."²⁴² It concluded that this was precisely what Peterson did.²⁴³ Consistent with its holding in *Oba*, the Ninth Circuit held that the nature of the device in question, coupled with the defendant's "evil intent," rendered the device "destructive" for purposes of the National Firearms Act.²⁴⁴

The U.S. Court of Appeals for the Fourth Circuit's opinion in *United States v. Morningstar*²⁴⁵ also supports a subjective intent inquiry. There, the prosecution charged the defendant with possession of a destructive device in violation of the National Firearms Act.²⁴⁶ The district court held that this device was not a destructive one for the purposes of the Act.²⁴⁷ The circuit court disagreed, holding that the defendant's intention was critical in answering the question of whether commercial explosives are covered by the Act.²⁴⁸ The court analyzed the third subsection of section 5845(f) in reaching this conclusion.²⁴⁹ It first mentioned the statute's design provision²⁵⁰ and noted that it serves to proscribe items such as "unassembled parts of a military fragmentation or incendiary bomb," regardless of their intended use.²⁵¹

The court noted that, had Congress wished to completely exclude commercial explosives from the Act's reach, it could have stopped at this point.²⁵² Yet Congress went on to include combinations of parts "intended for use in converting any device into a destructive device."²⁵³ According to the court, this provision compels two conclusions. First, Congress intended to proscribe more than just gangster-type weapons and military ordinance.²⁵⁴ Moreover, it dictates that for items falling under the intent provision, as opposed to those proscribed under the design provision, "the use for which these materials are intended determines whether they fall within the Act."²⁵⁵

The *Morningstar* court furthered its stance by referring to the Act's legislative history.²⁵⁶ It cited a House Report which stated that "this paragraph excludes certain devices from the definition of 'destructive

242. *Peterson*, 475 F.2d at 811.

243. *Id.*

244. *See id.*

245. 456 F.2d 278 (4th Cir. 1972).

246. *Id.* at 279. The device consisted of "black powder pellet explosive and blasting caps." *Id.*

247. *Id.*

248. *Id.* at 280 (stating that this issue "must be determined" by the defendant's intentions).

249. *Id.*

250. "[A]ny combination of parts . . . designed . . . for use in converting any device into a destructive device . . ." 26 U.S.C. § 5845(f)(3) (1968).

251. *Morningstar*, 456 F.2d at 280.

252. *Id.*

253. *Id.* (quoting 26 U.S.C. § 5845(f)(3) (1968)).

254. *Id.* at 280-81.

255. *Id.* at 280.

256. *Id.* at 281.

device.’ The devices excluded are those not designed or redesigned or used or intended for use as a weapon—e.g., construction tools using explosives when used for such purposes.”²⁵⁷ Thus, the relevant legislative history also establishes that the purpose for which destructive devices are used may determine whether they are covered by the National Firearms Act.²⁵⁸

In *United States v. Hammond*,²⁵⁹ a case from the Eleventh Circuit, the government charged the defendant with making an unregistered firearm.²⁶⁰ After the jury returned a guilty verdict, the defendant moved for a judgment of acquittal.²⁶¹ The district court granted the motion, stating that the evidence was inadequate to prove that the item was a “destructive device” under section 5845.²⁶²

The Eleventh Circuit stated that a device is not covered by the statute simply because it explodes.²⁶³ Rather, the court noted a distinct “plus factor;” namely, proof that the device was designed as a weapon.²⁶⁴ A device is statutorily destructive only if it was designed for use as a weapon.²⁶⁵

It thus appears that the Eleventh Circuit advocates a stance which looks beyond a device’s objective characteristics and considers a defendant’s subjective intent. Concededly, the *Hammond* court’s opinion centered on section 5845(f)(3)’s exemption of items not designed for use as a weapon;²⁶⁶ thus, its context is not identical to that of the other cases which focus on the statute’s inclusionary clauses.²⁶⁷ Nonetheless, *Hammond* repeatedly refers to a “plus factor” which entails looking beyond an item’s objective characteristics.²⁶⁸

B. The (Primarily) Objective Standard, with a Small Caveat

1. United States v. Posnjak

In 1969, Walter Posnjak contacted an undercover federal agent about the possibility of selling dynamite.²⁶⁹ The agent informed Posnjak that he was buying the dynamite on behalf of a Cuban revolutionary group which

257. *Id.* (quoting H.R. REP. NO. 1577 (1968)).

258. *See Morningstar*, 456 F.2d at 280–81.

259. 371 F.3d 776 (11th Cir. 2004).

260. *Id.* at 778. The firearm in question was a cardboard tube filled with pyrodex, an explosive powder, ground pyrodex, and gunpowder, with a fuse running from one end to the center of the device. *Id.*

261. *Id.* at 779.

262. *Id.*

263. *Id.* at 780.

264. *Id.*

265. *Id.*

266. *Id.* (“[T]he statute . . . excludes from coverage any explosive device not *designed* for use as a weapon.”).

267. Specifically, “design” will likely pertain to the mindset of the item’s maker, while “intent” will likely relate to that of the possessor.

268. *Hammond*, 371 F.3d at 780.

269. *United States v. Posnjak*, 457 F.2d 1110, 1112 (2d Cir. 1972).

intended to use it to “blow up buildings and people.”²⁷⁰ Over the next several days, Posnjak and his co-defendant sold 4100 unregistered sticks of dynamite, along with fuse and caps, to the agent.²⁷¹

The trial court instructed the jury to look at “the intent, the purpose, the design of the defendant,” adding that a finding that the device was intended for use as a bomb or other explosive would place it under the statutory definition of destructive device.²⁷² The jury found the defendants guilty on all counts.²⁷³ Posnjak appealed, arguing that the statute does not proscribe commercial dynamite, regardless of the dynamite’s purpose.²⁷⁴

The Second Circuit concluded that a defendant’s subjective intent could not render “destructive” a device that otherwise would not fall under 26 U.S.C. § 5845(f).²⁷⁵ It based its decision on the statutory language and legislative history of the 1934 National Firearms Act and Gun Control Act of 1968.²⁷⁶

The court inferred that the relevant provisions of the National Firearms Act “focus on the particularly dangerous weapons subject to special rules under the Gun Control Act.”²⁷⁷ It noted that section 5845(f)(1) lists several military-type devices, and then adds “similar devices.”²⁷⁸ The logical inference, the court noted, is that these other devices must not only be similar in their explosiveness, but must be articles of military ordinance as well.²⁷⁹

The court then addressed the government’s argument that 26 U.S.C. § 5845(f) proscribes commercial dynamite.²⁸⁰ It held that though that section includes combinations “of parts designed or intended for use in converting any device into a destructive device as defined in the earlier two subparagraphs and from which such a device may be readily assembled,” this section may not broaden the group of proscribed devices.²⁸¹ The components may only be subject to the law if the assembled device would be subject to it; this subparagraph “merely precludes evasion through possession of the unassembled components instead of the assembled item.”²⁸²

270. *Id.*

271. *Id.*

272. *Id.* at 1112–13.

273. *Id.* at 1113.

274. *Id.*

275. *Id.* at 1120. Accordingly, the court reversed the defendants’ conviction, as it was based upon the sale of commercial dynamite, which otherwise does not fall under the statute. *Id.* at 1116, 1121.

276. *Id.* at 1113.

277. *Id.*

278. *Id.* at 1116.

279. *Id.* *Contra* United States v. Peterson, 475 F.2d 806, 810 (9th Cir. 1973) (noting that Congress intended to proscribe military weapons as well as the “do-it-yourself type of similar devices”).

280. *Posnjak*, 457 F.2d at 1116.

281. *Id.*

282. *Id.* Moreover, subparagraph (3) initially covered “any combination of parts . . . for use in converting any device into a destructive device.” The phrase “as defined in

Furthermore, the court noted that “[t]he extensive legislative history confirms the fact that certain types of guns were the weapons Congress was most concerned to reach.”²⁸³ Its discussion included an excerpt from an exchange between Senators Dodd and Metcalf regarding the definition of “destructive device.”²⁸⁴ In this discussion, Senator Dodd stated that the provision at hand specifically excluded items that may be used in commercial construction or business activities.²⁸⁵ The *Posnjak* court interpreted the legislative history as evincing a congressional concern with clearly identifiable weapons which were the main cause of violent crime and which had no lawful uses.²⁸⁶ Because these weapons are per se dangerous, the intent of those using them is irrelevant.²⁸⁷

The Second Circuit thus concluded that an otherwise unproscribed item may not be transformed into a “destructive device” by way of intent.²⁸⁸ This would entail impermissibly importing into subparagraph (3) items not identified in subparagraphs (1) and (2).²⁸⁹ Moreover, the original version of the Gun Control Act excluded from the definition of “destructive device” items “neither designed nor redesigned nor used nor intended for use as a weapon.”²⁹⁰ That the final version of the Act’s exclusionary clause contained a design provision, but not one focused on intent, indicates a congressional desire for an objective standard.²⁹¹

To further bolster its conclusion, the *Posnjak* court made two points related to statutory interpretation. First, since the National Firearms Act is drafted in technical language,²⁹² it should be construed technically.²⁹³ More generally, “it is a well-established principle that criminal statutes are to be narrowly rather than expansively construed, in order to avoid subjecting to prosecution any activities and individuals the legislature did not mean to expose to liability.”²⁹⁴

Despite espousing an opinion which favored looking at a device’s objective features rather than its user’s subjective intent, the Second Circuit noted one significant caveat. Namely, when dealing with unassembled component parts which are capable of conversion into either a device

subparagraphs (1) and (2)” was added to clarify this very point. *Id.* (citing S. 1854, 90th Cong., 1st Sess. (1967)).

283. *Posnjak*, 457 F.2d at 1115.

284. *Id.* at 1115–16.

285. *Id.*; see *supra* notes 129–30.

286. *Posnjak*, 457 F.2d at 1116.

287. *Id.*

288. *Id.* at 1117.

289. *Id.*

290. H.R. REP. NO. 90-1577, at 22 (1968).

291. *Posnjak*, 457 F.2d at 1117–18; see also *United States v. Dalpiaz*, 527 F.2d 548, 551 (6th Cir. 1975) (holding that when an item, by its objective nature, is excluded from the statute under the ‘neither designed nor redesigned’ exception, “for purposes of determining whether the device comes within the statutory exclusion, [the defendant’s] purpose is irrelevant”).

292. *Posnjak*, 457 F.2d at 1118 (citing *United States v. Collier*, 381 F.2d 616, 618–19 (6th Cir. 1967)).

293. *Id.* at 1118 (citing *United States v. Lamb*, 294 F. Supp. 419 (E.D. Tenn. 1968)).

294. *Id.* at 1118; *United States v. Bass*, 404 U.S. 336 (1971)).

covered by the statute or one not covered, intent may be important.²⁹⁵ *Posnjak* itself, however, was not one such case because no combination of the components in question could have rendered a device discussed in subparagraphs (1) or (2).²⁹⁶

2. Additional Cases Adopting the *Posnjak* Standard

Judge Browning's dissenting opinion in *Oba* bears a striking resemblance to the Second Circuit's holding in *Posnjak*.²⁹⁷ In his opinion, Judge Browning cites *United States v. Schofer*,²⁹⁸ in which the court held that the statute was not intended to reach ordinary materials through intent alone.²⁹⁹

Like the *Posnjak* court, Judge Browning relied on both the Act's statutory language and its legislative history in reaching his conclusion. As for the former, he discussed the National Firearms Act's imposition of taxes on firearms, concluding that it is designed to discourage dealing in those devices.³⁰⁰ As such, it applies only to two narrow groups of highly dangerous weapons worthy of strict regulation.³⁰¹

Additionally, prior to the 1968 amendments, the Act was commonly known as the "Machine Gun Act."³⁰² It was intended to reach "carefully identified weapons" used by those engaging in illegal activities.³⁰³ It was only after an influx of surplus military weapons which had no legitimate social use and threatened public safety that the Act added to its definition of firearms "destructive devices."³⁰⁴ Committee hearings, committee reports, and congressional discourse refer to the destructive devices which the Act covers as "military-type weapons," or "primarily weapons of war," which have no legitimate social use.³⁰⁵

295. *Id.* at 1119; see also STEPHEN D. HALBROOK, FIREARMS LAW DESKBOOK § 6:11 (2010) (stating that the statute refers specifically to a "combination of parts" rather than simply "parts;" therefore, the unassembled parts need not even be in proximity to one another. Additionally, raw materials which may form a machine gun do not qualify as a "combination of parts" under the statute).

296. *Posnjak*, 457 F.2d at 1120.

297. See *supra* Part II.B.1.

298. 310 F. Supp. 1292 (E.D.N.Y. 1970).

299. *Id.* at 1297-98. The *Schofer* court equated the potential for conversion into a dangerous device with that of a parked car which can be made into "a lethal weapon by perversion of its purpose." *Id.* at 1297. The National Firearms Act, however, is aimed at "evil articles," not the evil usage of innocuous ones. *Id.* But see *United States v. Peterson*, 475 F.2d 806, 811 (9th Cir. 1973) (stating that "Congress manifestly intended to proscribe friendly things when with evil intent they are combined or joined together to produce a hostile object or device through the language used in subsection[] . . . (f)(3)").

300. *United States v. Oba*, 448 F.2d 892, 896-97 (9th Cir. 1971) (Browning, J., dissenting).

301. *Id.* at 897.

302. *Id.*

303. *Id.* The Act was particularly concerned with making it difficult for gangsters to obtain weapons. *Id.*

304. *Id.*

305. *Id.*; see also S. REP. NO. 90-1501, at 28 (1968).

Finally, Judge Browning noted the untenable expansion of the Act which would result from the majority's reading of it.³⁰⁶ Such a reading, he argued, would "bring within the Act any combination of parts which, "when combined . . . could have been used destructively."³⁰⁷ More specifically, a miner or lumberjack who used dynamite in his normal course of business would have to register those devices and pay the appropriate taxes under section 5845(f).³⁰⁸ In light of the above, as well as other arguments previously discussed in Part I.A.1, Judge Browning concluded that the National Firearms Act was not intended to reach ordinary commercial blasting materials such as those at issue in *Oba*.³⁰⁹

In *United States v. Fredman*,³¹⁰ the defendant appealed a conviction of possession of unregistered firearms in violation of 26 U.S.C. § 5861(d).³¹¹ Here, the court considered specifically the issue of commercial dynamite.³¹² It held that commercial dynamite, absent some proof of intent for use as a weapon, cannot qualify as a destructive device under section 5845(f).³¹³ Thus, the court must produce some proof of intent to establish that such items are destructive devices.³¹⁴ The court even went so far as to say that, absent proof of design or redesign as a weapon, intent is a "necessary element."³¹⁵

The foregoing *Fredman* analysis appears capable of placing the case in the *Oba* camp, as the *Fredman* court seemed to afford substantial weight to the defendant's intentions in determining whether the devices at issue were statutorily destructive. Two further points offered by the court in reaching its conclusion, however, dictate that *Fredman* comports with *Posnjak*'s stance.

First, the court stressed the lack of evidence that the defendants intended to use their devices as weapons.³¹⁶ The court specifically distinguished *Fredman* from cases such as *Oba* and *Peterson*, stating that in *Fredman*, "[t]here is simply insufficient evidence . . . to support . . . the conclusion

306. *Oba*, 448 F.2d at 901 (Browning, J., dissenting).

307. *Id.* Such an interpretation would result in the sum of the parts exceeding the whole. *Id.*

308. *Id.*

309. *Id.* at 898. Namely, the Act's focus on uniquely dangerous weapons, as opposed to commonplace items, and the problem of unjustifiably broadening the Act's scope. *See supra*

310. 833 F.2d 837 (9th Cir. 1987).

311. *Id.* at 838. The devices in question were a commercial detonator cord, commercial detonator fuses, and commercial igniters. *Id.* at 837–38.

312. *Id.* at 838–40.

313. *Id.* at 839. *But see* *United States v. Price*, 877 F.2d 334, 335–36 (5th Cir. 1989) (holding that a homemade device is proscribed even though all of its components may be possessed legally); *United States v. Wilson*, 546 F.2d 1175, 1177 (5th Cir. 1977) (clarifying that a homemade bomb is proscribed even though its explosive power is derived from commercial dynamite); *United States v. Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975) (stating that a homemade time bomb constitutes a "destructive device" even though its source of power was commercial dynamite).

314. *Fredman*, 833 F.2d at 839.

315. *Id.*

316. *Id.* ("[T]hey were not accompanied by any other indicia of intent to use as a weapon . . .").

that the commercial explosive components . . . were originally ‘designed or redesigned for use as a weapon’³¹⁷ This analysis implies that intent is relevant specifically because the device’s objective nature did not indicate for what type of use the defendant intended it.³¹⁸

The *Fredman* court further distinguished *Oba* and *Peterson* on the basis of Fredman’s device. Unlike those in *Oba* and *Peterson*, it consisted of unassembled component parts.³¹⁹ That the court explicitly makes this distinction in reaching its conclusion implies that the parts’ unassembled state was a critical factor in its reasoning. As the distinguishing characteristic between *Johnson* and *Posnjak* is that the latter allows for subjective intent analysis only in cases of unassembled parts, *Fredman* appears to conform conceptually with the Second Circuit’s view.³²⁰

*United States v. Malone*³²¹ involved the conviction of a defendant for possession of an unregistered firearm under section 5861(d).³²² Despite possessing materials that could be assembled into a destructive device, Malone did not have any explosive material necessary to complete such a device.³²³ The Fifth Circuit held that, although the device had no legitimate social use, the defendant could not be found guilty because he did not possess all of the parts needed to create a destructive device.³²⁴

Though the *Malone* court explicitly declined to define what constitutes a destructive device, its holding implies an inclination for an objective standard. Namely, Malone’s device had no legitimate social value. Accordingly, if the court would have afforded any considerable weight to the import of his subjective intent, it may have concluded that the device was a statutorily destructive one. That it refused to do so due to the device’s incompleteness implies that it is only a device’s objective characteristics, not its possessor’s intentions, that are a significant consideration.³²⁵

In *United States v. Ragusa*,³²⁶ the district court convicted the defendant for possession of a destructive device under section 5845(f).³²⁷ The court noted the National Firearms Act’s emphasis on the possession, rather than

317. *Id.* at 840 (quoting 26 U.S.C § 5845 (2006)).

318. This conclusion runs directly counter to *Oba*, which seemed to allow for consideration of subjective intent even when a device’s objective characteristics may be dispositive. *See supra* Part II.A.1.

319. *Fredman*, 833 F.2d at 839.

320. *See supra* Part II.B.1.

321. 546 F.2d 1182 (5th Cir. 1977).

322. *Id.* at 1183.

323. *Id.*

324. *Id.* at 1184; *cf.* *United States v. Simmons*, 83 F.3d 686 (4th Cir. 1996). *Simmons* held that a Molotov cocktail is a destructive device even in the absence of a match needed to light it because a Molotov cocktail’s design and purpose is to cause injury or destroy property. *Id.* at 688.

325. *See also* *United States v. Markley*, 567 F.2d 523, 527 (1st Cir. 1977) (holding that devices with no legitimate social uses are “destructive devices” irrespective of their intended purpose).

326. 664 F.2d 696 (8th Cir. 1981).

327. *Id.* at 698. The device in question was a collection of garbage bags holding containers of gasoline, and connected by paper towels. *Id.* at 697.

use, of a firearm.³²⁸ It interpreted this to suggest that a defendant need not use a firearm in a criminal manner to be in violation of the statute.³²⁹

This analysis may be taken one step further. Logically, possession may relate to a device's objective nature. Use, on the other hand, pertains to a defendant's subjective intentions with respect to the device. That the *Ragusa* court held the statute focuses on the former and not the latter³³⁰ indicates that it favored an objective approach.

Moreover, the court went on to state that although Congress aimed the term "destructive device" at proscribing military-type weapons, the phrase may also embrace homemade devices.³³¹ The court's example for the latter category was a Molotov cocktail,³³² a device which, simply by virtue of its objective characteristics, falls within the Act's reach.³³³

In *United States v. Urban*,³³⁴ the government charged the defendant with possession of an unregistered destructive device.³³⁵ Along with instructional books and pamphlets on manufacturing various weapons and explosives, Urban possessed such items as an illegal firearm silencer, a partially filled container of smokeless gunpowder, a homemade detonator, and three fuse assemblies.³³⁶ After the district court found Urban guilty, he appealed his conviction.³³⁷

The first intimation that *Urban* supports the Second Circuit's view stems from a somewhat puzzling statement in its opinion. Immediately after citing *Oba*'s holding that "a device may be 'converted' into a destructive device as defined in Subparagraphs (1) and (2) by way of 'design or intent,'"³³⁸ the court stated that "looking solely at the plain meaning of the words used by Congress, a person may be found guilty of a violation of § 5861(d) if he or she is in possession of a combination of parts."³³⁹ Presumably, this rules out an adherence to *Johnson*, which did not distinguish between assembled devices and unassembled combinations of parts.³⁴⁰

Particularly in light of its specific mention of *Oba*, it may seem logical to read *Urban* as supporting the Ninth Circuit's holding. Yet a deeper analysis

328. *Id.* at 699.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 700.

333. *See, e.g.,* *United States v. Cruz*, 492 F.2d 217, 219 (2d Cir. 1974); *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972). The *Ross* court stated that section 5845(f)'s list of proscribed devices is descriptive, not exhaustive. The common denominator of the devices listed is usage limited to anti-social purposes; thus, a Molotov cocktail, though not mentioned by name, qualifies as a similar device, "as it has no purpose apart from criminal activities." *Ross*, 458 F.2d at 1145-46.

334. 140 F.3d 229 (3d Cir. 1998).

335. *Id.* at 231.

336. *Id.*

337. *Id.*

338. *Id.* at 232 (citing *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971)).

339. *Id.* The court appears to have gone out of its way to limit a subjective intent inquiry to cases involving component parts, even though *Oba* made no such distinction.

340. *United States v. Johnson*, 152 F.3d 618, 623 (7th Cir. 1998).

indicates otherwise. The court distinguished *Urban* from *Fredman* and *Morningstar* on the basis of the lack of ambiguity as to the nature of Urban's device.³⁴¹ Whereas *Oba* appeared to allow for a subjective intent inquiry even when an objective inquiry may identify whether an item is statutorily destructive or not,³⁴² *Urban* explicitly refused to do so.³⁴³ Finally, the *Urban* court plainly stated that it agreed with *Posnjak*'s construction of section 5845(f)(3).³⁴⁴

In *United States v. Copus*,³⁴⁵ the government charged the defendant with manufacturing unregistered destructive devices.³⁴⁶ The authorities found, among other items, a number of homemade detonators which the defendant stated he used to blow up stumps.³⁴⁷ Appealing to the text of the National Firearms Act, *Copus* argued that there was insufficient evidence to prove that he intended to use his detonators as weapons.³⁴⁸

The court conceded that in the Seventh Circuit, it is "undisputed" that a defendant's intent is relevant in determining whether a combination of parts may be labeled a destructive device.³⁴⁹ It noted, however, that *Copus*'s detonators were fully assembled devices.³⁵⁰ It thus applied section 5845(f)(1), which covers "bomb[s]" or "similar device[s]" and which does not contain an intent provision, rather than section 5845(f)(3).³⁵¹ The *Copus* holding is thus most consistent with *Posnjak*, allowing for subjective intent analysis in cases of component parts, but not when dealing with fully assembled devices.

Copus addressed another relevant question: assuming subjective intent is relevant, what is the extent of its import in yielding a National Firearms Act conviction?³⁵² The *Copus* court, citing *United States v. Worstine*,³⁵³ stated that the government is not required to prove the defendant intended to use the device as a weapon.³⁵⁴ Rather, "where the objective purpose of a device is not clear, the trier of fact *may* look to the defendant's subjective intent, as one element of the totality of the circumstances, to decide whether the device qualifies as a "destructive device."³⁵⁵

341. *Urban*, 140 F.3d at 233.

342. *See supra* Part II.A.1.

343. *Urban*, 140 F.3d at 234 ("Intent to use the components as a weapon (to assemble them into a device to be used as a weapon) is irrelevant when the parts are clearly designed to be used in constructing a device which is specifically regulated by § 5845 (f)(1) or (2).").

344. *Id.*

345. 93 F.3d 269 (7th Cir. 1996).

346. *Id.* at 271.

347. *Id.*

348. *Id.* at 272.

349. *Id.*

350. *Id.*

351. *See id.*

352. *See id.* at 273.

353. 808 F. Supp. 663 (N.D. Ind. 1992).

354. *Copus*, 93 F.3d at 273.

355. *Id.*

This is in stark contrast with the Ninth Circuit's opinion in *United States v. Lussier*.³⁵⁶ There, the court interpreted Ninth Circuit precedent to dictate that if devices fall under the statute's "combination of parts" subsection, "the Government was required to prove either that the devices were designed for use, or that Lussier intended to use the devices, 'in converting any device into a destructive device.'"³⁵⁷ The court held that the combination of parts subsection "explicitly requires proof" of design or intent for use in converting a device into a destructive device.³⁵⁸

By contrast, the first subsection does not contain an intent provision; a court may therefore deem a device "destructive" even in the absence of proof of the defendant's intent.³⁵⁹ Nonetheless, the court stated that while it has "sometimes looked to a possessor's intent" in cases that charge defendants under this subsection, a showing of intent is generally a necessary component of an action under subsection (C).³⁶⁰ The court supported this distinction by stating that "since 'parts' are not necessarily 'weapons,' subsection (C) requires a showing of either design or intent to 'convert' the devices into a weapon."³⁶¹ By contrast, when dealing with devices charged under the first two subsections, there is no dispute that such are fully assembled weapons.³⁶² Accordingly, no proof of intent is required.³⁶³ This line of reasoning provides further logical support for *Oba*'s distinction between assembled devices and component parts.

C. The Objective Standard, with a Slightly Larger Caveat

1. *United States v. Johnson*

In 1996, David Johnson was working at a Shopko store.³⁶⁴ On August 4 of that year, he directed an assistant store manager to a bag with a protruding fuse.³⁶⁵ The police arrived, and upon discovering that the fuse ran into a plastic pipe device, they evacuated the store and found another similar device.³⁶⁶ Two days later, Johnson agreed to a search of his house, which produced several components of the devices found at the store including nails, plastic tubing, candles, and a hacksaw.³⁶⁷ Johnson

356. 128 F.3d 1312 (9th Cir. 1997).

357. *Id.* at 1314 (quoting 18 U.S.C. § 921(a)(4) (2006)).

358. *Id.* at 1314–15. Thus, whereas *Copus* merely allows for evidence of illicit intent to contribute to proving that a device is destructive, *Lussier* effectively renders a showing to this extent a necessary element of the prosecution's action.

359. *Id.* at 1315.

360. *Id.* at 1316–17.

361. *Id.* at 1317.

362. *See id.* at 1315.

363. *Id.* It thus appears that *Lussier*'s view on evidence of intent in cases of fully assembled parts corresponds to *Copus*'s stance thereof in cases on unassembled components; namely, that use of such evidence is permissive, but not mandatory.

364. *United States v. Johnson*, 152 F.3d 618, 620 (7th Cir. 1998).

365. *Id.*

366. *Id.*

367. *Id.* at 621.

confessed to constructing the devices, but asserted that he did so not to use them as weapons, but to “play the hero” in locating them.³⁶⁸

The district court excluded evidence of Johnson’s subjective intent since the devices had objective characteristics which sufficed to bring them under the ambit of section 5845(f).³⁶⁹ The jury found him guilty of possession of an unlicensed firearm in violation of the National Firearms Act.³⁷⁰

On appeal, Johnson argued that in cases of component parts, intent is relevant because a defendant may possess such parts with or without the intention to build a weapon.³⁷¹ The appellate court’s reasoning centered on legislative history and statutory interpretation. It noted that while the legislative history demonstrated a specific concern with commercial weapons, courts have read this concern as extending to homemade devices.³⁷²

The opinion proceeded to state a critical distinction derived from the court’s prior holdings. Namely, when a device is susceptible only to a destructive use, it is automatically proscribed; intent is therefore irrelevant.³⁷³ When a defendant possesses parts susceptible to either a destructive or legitimate use, however, scrutiny into the possessor’s intent is necessary.³⁷⁴

Perhaps the most significant aspect of *Johnson*’s analysis pertains to the extent of this distinction between assembled devices and component parts. The court began with the aforementioned conclusion that intent may be relevant in cases of component parts.³⁷⁵ It then discussed intent only in the context of unassembled parts,³⁷⁶ implying that *Johnson* adopts *Oba*’s view. The court further stated explicitly that when a device is completely assembled, the correct course is to proceed under section 5845 (f)(1),³⁷⁷ while unassembled parts compel a section 5845 (f)(3) analysis.³⁷⁸ Thus, to the extent that an objective inquiry compels either inclusion or exclusion under the statute, *Johnson* seems to agree with *Oba*’s distinction.

Johnson proceeded to state, however, that subparagraph (3) covers—along with unassembled parts—fully assembled parts that are “less clearly within the ambit of subpart (1).”³⁷⁹ When “the objective design inquiry is not dispositive because the assembled device or unassembled parts may form an object with both a legitimate and an illegitimate use, then

368. *Id.*

369. *Id.*

370. *Id.* at 620.

371. *Id.* at 622.

372. *Id.* at 624; *see, e.g.*, *United States v. Copus*, 93 F.3d 269, 273–74 (7th Cir. 1996).

373. *Johnson*, 152 F.3d at 624; *see also* *United States v. Thomas*, 111 F.3d 426, 428 (6th Cir. 1997) (stating that items with no legitimate social use are classified as section 5845(f)(1) devices, and that for such devices, an intent inquiry is irrelevant).

374. *Johnson*, 152 F.3d at 624.

375. *Id.*

376. *Id.* at 624–25.

377. *Id.* at 627.

378. *Id.*

379. *Id.*

subjective intent is an appropriate consideration.”³⁸⁰ Thus, whereas *Posnjak* chose to consider subjective intent when an objective inquiry is inconclusive only when dealing with unassembled parts, *Johnson* conflates parts and fully assembled devices for the purpose of this analysis.

In its analysis, the *Johnson* court invoked the language of section 5845(f)(3), noting that the words ““designed”” and ““intended”” are separated by the disjunctive word ““or.””³⁸¹ This suggests that the words have separate meanings; accordingly, conversion into a destructive device may occur via either the device’s objective design or the defendant’s intent.³⁸² The court also cited *United States v. Morningstar*,³⁸³ which stated that subparagraph (3) shows that Congress was concerned with more than just gangster and military weapons.³⁸⁴

The Seventh Circuit thus concluded that when the destructive nature of a device is obvious, intent is irrelevant.³⁸⁵ When dealing with devices or component parts that can serve either a destructive or legitimate purpose, however, an intent inquiry is appropriate.³⁸⁶ According to the *Johnson* court, Congress intended for section 5845(f) to “operate in a precise but flexible manner.”³⁸⁷ In the instant case, therefore, intent was not relevant, as “the objective characteristics of these devices indicated that they were useful only as weapons.”³⁸⁸ The court therefore excluded evidence as to *Johnson*’s intent and affirmed his conviction.³⁸⁹

2. Additional Case Adopting the *Johnson* Standard

In *United States v. Tankersley*,³⁹⁰ the government charged the defendants with possession of a destructive device.³⁹¹ The prosecution argued that the defendants intended on affixing an M-80 to paint remover and exploding

380. *Id.* at 628.

381. *Id.* at 625.

382. *Id.*; see also *United States v. La Cock*, 366 F.3d 883, 888 (10th Cir. 2004) (quoting *TRW, Inc. v. Andrews*, 534 U.S. 18, 31 (2001)) (stating that “a statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”).

383. 456 F.2d 278 (4th Cir. 1972).

384. *Id.* at 280–81.

385. *Johnson*, 152 F.3d at 627.

386. *Id.* Notably, the *Johnson* court referred to the question of whether a device has a legitimate social use as “[t]he ultimate issue in this inquiry.” *Id.* at 626. *But see* *United States v. Dalpiaz*, 527 F.2d 548, 551 (6th Cir. 1975) (stating that the critical issue is whether the device in question is excluded by the statutory language; if it is, the social value test is unnecessary). Additionally, *Johnson* stated that when dealing with a fully assembled device, the appropriate course is to proceed under subparagraph (1), which does not include an intent provision. *Johnson*, 152 F.3d at 627. Only if that approach is inconclusive may the court consider intent. *See id.* at 628.

387. *Johnson*, 152 F.3d at 627.

388. *Id.* at 628.

389. *Id.* at 631.

390. 492 F.2d 962 (7th Cir. 1974).

391. *Id.* at 964. The device comprised a flammable liquid contained in a breakable container, a detonator, and a fuse. The police observed the defendants in possession of the device outside the home of a schoolteacher who had recently angered his colleagues by electing to cross picket lines and report to work during a teacher’s strike. *Id.* at 965.

them together.³⁹² The defendants maintained that they intended to write on the teacher's car with the paint remover and explode the M-80 separately.³⁹³

The court began its analysis with the text of section 5845(f).³⁹⁴ After quoting the statute, it wrote, "[t]herefore, a combination of certain materials, coupled with the requisite intent, can be sufficient to constitute a destructive device."³⁹⁵ That constituted the extent of the court's analysis in connecting its conclusion with the statute's text³⁹⁶ implies that it understood the clear language of the statute to mean that subjective intent can be relevant in defining a destructive device.

The *Tankersley* court noted the conflict between the *Oba* and *Posnjak* courts.³⁹⁷ It stated that resolving this split was not necessary, as resort to intention was proper under either approach, since this was a case of components which could have been converted into either a proscribed or unproscribed device.³⁹⁸ Accordingly, an attempt to classify this case under the three established standards is inevitably somewhat tenuous.

Yet the opinion offers some subtle clues as to where on the "subjective intent spectrum" it lies. First, it underplays the significance of the indictment's silence as to whether the device was assembled or not.³⁹⁹ This appears to rule out the Second Circuit's distinction between assembled devices and unassembled components.

Next, the court concluded that "a combination of certain materials, coupled with the requisite intent, can be sufficient to constitute a destructive device."⁴⁰⁰ One may properly infer that, contrary to the Ninth Circuit's view,⁴⁰¹ intent alone does not suffice to beget a destructive device. It thus appears that the *Tankersley* court's holding supports that of the Seventh Circuit in *Johnson*.

III. THE SECOND CIRCUIT'S STANDARD IS MOST CONGRUENT WITH THE RELEVANT LEGISLATIVE HISTORY, STATUTORY TEXT, AND COMMON SENSE

The opinions of the *Oba*, *Posnjak* and *Johnson* courts—as well as those of the other courts discussed above—invoke arguments pertaining to the National Firearms Act's statutory language, its legislative history, and notions of common sense in reaching their conclusions. Part III now considers each category of arguments in turn.

392. *Id.*

393. *Id.*

394. *Id.* at 965–66.

395. *Id.* at 966.

396. *See id.*

397. *Id.*

398. *Id.*

399. *See id.* at 964 n.1.

400. *Id.* at 966.

401. *United States v. Oba*, 448 F.2d 892, 894 (9th Cir. 1971).

This Note does not, however, undertake this approach for mere conceptual convenience. Rather, this Note reaches its final conclusion through a three-step process. Part III.A, which discusses the Act's legislative history, serves to eliminate the Ninth Circuit's approach from consideration, while Part III.B, invoking statutory interpretation, primarily accomplishes the same for that of the Seventh Circuit. Part III.C offers further support for the Second Circuit's stance being not only more sound based on the legislative history and statutory language than those courts discussed above, but standing on its own as the most logical and practically favorable approach to the question at hand.

A. *Legislative History*

Throughout the development of the National Firearms Act, evidence abounds as to a specific congressional concern with proscribing objectively identifiable weapons to the exclusion of devices whose destructiveness depends on their owners' intentions. This history runs directly counter to the Ninth Circuit's stance in *Oba*, where the court stated that a device, though in an objective sense not necessarily statutorily destructive, may be rendered a "destructive device" by way of the defendant's subjective intent.⁴⁰² Thus, a review of the Act's legislative history serves to remove the *Oba* approach from consideration.

The initial impetus for early gun control legislation was urban crime and handgun use,⁴⁰³ and the resulting 1927 legislation specifically targeted crime and criminals.⁴⁰⁴ These motivations pervaded the initial National Firearms Act itself as well, as throughout the 1930s Congress committed itself to combat the particular issue of gangsterism, which the wide availability of machine guns helped to facilitate.⁴⁰⁵

The resulting legislation reflected this congressional focus. The National Firearms Act aimed to proscribe those weapons which had gained reputations as gangster weapons;⁴⁰⁶ consequently, it targeted those items which were considered "inherently inimical to public safety."⁴⁰⁷ Similarly, the Federal Firearms Act aimed to prevent a certain "criminal class" from obtaining firearms.⁴⁰⁸ The early gun control legislation's implications are thus clear: Congress sought to target particular individuals and objectively identifiable weapons in its effort to ensure public safety.

Similar themes also pervaded the second wave of gun control legislation. The post-World War II import of military weaponry played a large role in

402. *See supra* note 233 and accompanying text.

403. *See supra* note 43 and accompanying text.

404. *See supra* notes 47, 131 and accompanying text.

405. *See supra* notes 49–51 and accompanying text.

406. *See supra* note 56 and accompanying text.

407. *See supra* note 60.

408. *See supra* note 65 and accompanying text.

spurring the gun control legislation of the 1960s,⁴⁰⁹ and the Gun Control Act specifically aimed to curb the availability of such weapons.⁴¹⁰

The 1968 amendment's broader context is telling as well. Along with its inclusion of destructive devices within the definition of firearms,⁴¹¹ Congress amended the Act to provide for interstate firearms dealing regulation⁴¹² and to bring ammunition under the Act's coverage.⁴¹³ Congress thus undertook to proscribe destructive devices in conjunction with other provisions which point to a broad congressional concern for prohibiting crime and outlawing objectively dangerous weapons.

Moreover, there is explicit reference throughout the Act's legislative history to its primary purposes. Its preamble provides that the Act was meant to aid the fight against crime and violence without placing an "undue burden" on America's law-abiding citizens.⁴¹⁴ This statement reflects a congressional intention to target specific weapons connected with crime and violence, to the exclusion of homemade devices which a possessor may use for either legitimate or harmful purposes.

Judge Browning's dissent in *Oba*⁴¹⁵ offers one example of an undue burden to which a primarily subjective standard would give rise. He stated that under the *Oba* approach, a miner or a lumberjack who used commercial devices legitimately could be required to register those devices, and face prosecution for his failure to do so.⁴¹⁶

Additionally, the statute focused particularly on the possession, as opposed to the use, of the proscribed items.⁴¹⁷ Whereas use requires some degree of a defendant's subjective intentions, possession exists on a solely objective plane; a defendant either possesses an item, or he does not.⁴¹⁸ That the statute focuses on the latter suggests its preference for an objective, rather than subjective, standard.⁴¹⁹

Perhaps most poignant are the remarks of Senator Thomas Dodd, the trailblazer of 1960s gun control legislation.⁴²⁰ Senator Dodd stated that he intended the Act to reach "things like hand grenades," while explicitly excluding from its scope "items which would be used in commercial construction or business activities."⁴²¹

Thus, throughout the development of both the initial and current incarnations of the National Firearms Act, the legislative history evinces a clear congressional concern with objectively identifiable items with

409. See *supra* notes 80–86 and accompanying text.

410. See *supra* notes 128–31 and accompanying text.

411. See *supra* note 105 and accompanying text.

412. See *supra* notes 106, 126 and accompanying text.

413. See *supra* note 106 and accompanying text.

414. See *supra* notes 121–22, 132 and accompanying text.

415. See *supra* notes 297–309 and accompanying text.

416. See *supra* note 308 and accompanying text.

417. See *supra* note 328 and accompanying text.

418. See *supra* note 328 and accompanying text.

419. See *supra* note 330 and accompanying text.

420. See *supra* note 89 and accompanying text.

421. See *supra* notes 283–87 and accompanying text.

characteristics that serve to connect these items with illicit activities such as gangsterism. Expanding the reach of this rule to cover additional items based merely on a defendant's intentions, as was suggested by the Ninth Circuit in *Oba*,⁴²² is plainly incongruent with the motivations that underlie the Act.

B. Statutory Text

At this point in the analysis, the stances of the Second Circuit in *Posnjak* and the Seventh Circuit in *Johnson* seem more consistent with the Act's legislative history than does that of the *Oba* court. This part of the Note primarily discusses notions of statutory interpretation to conclude that *Posnjak*'s reading of section 5845 (f) is more logical than that of the *Johnson* court. Before doing so, however, several points relating to statutory interpretation effectively serve as the death knell for a consideration of *Oba*'s stance.

The *Oba* line of cases appears to place the horse before the cart, focusing on selective terms within the statute in order to reach their respective conclusions. *Peterson* does so in its discussion of "similar devices" to broaden the Act's scope,⁴²³ while *Morningstar* does the same in its consideration of the statute's reference of a defendant's intent.⁴²⁴

These readings, however, ignore the broader context of the Act which allows for such considerations if they will convert a device into a destructive device "as defined in subparagraphs (1) and (2) . . ."⁴²⁵ This provision was in fact not even part of the original Act's wording, and was later added to eliminate the possibility of the Act being misconstrued in this exact fashion.⁴²⁶ Thus, contrary to the interpretations of these cases, a correct reading of the Act does not allow for considerations such as a defendant's intent to broaden the category of devices which the Act explicitly covers.

Additionally, this Note discussed previously the *Peterson* and *Posnjak* courts' directly opposing stances on interpreting the statute's use of the phrase "similar devices."⁴²⁷ The notion of *nonscitur a sociis* requires a court to interpret a general term to be similar to more specific terms in a series.⁴²⁸ Relatedly, *eiusdem generis* calls for an interpretation of a general term to reflect the class of objects reflected in more specific terms which accompany it.⁴²⁹ Thus, contrary to *Peterson*'s—and by logical extension, *Oba*'s—contentions, the "similar devices" phrase does not expand the Act's

422. See *supra* note 233 and accompanying text.

423. See *supra* notes 239–43 and accompanying text.

424. See *supra* notes 253–55 and accompanying text.

425. See 26 U.S.C. § 5845 (f)(3) (2006) (emphasis added).

426. See *supra* notes 290–91.

427. See *supra* notes 241, 278–79 and accompanying text.

428. See, e.g. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519–20 (1923). See also *BALLENTINE'S LAW DICTIONARY* 864 (3d ed. 1969).

429. See, e.g., *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994).

umbrella to reach items which are not proscribed by it based on the items' objective characteristics.

In addition to the actual words of the statute, further support for an objective approach exists in certain features not contained in the statutory wording itself. One is the fact that the original Act was known as the "Machine Gun Act,"⁴³⁰ a moniker that speaks to the Act's concern for weapons of war with no legitimate social use.⁴³¹ The very existence of the question as to whether a defendant will use a device for harm dictates that such an item is not one with which Congress was concerned. The subjective intent inquiry should end—not begin—the statutory liability analysis.

Finally, the words which the statute omits may be just as telling as those which it contains. The 1986 Firearms Owners' Protection Act added specific scienter requirements to statutes *related* to the National Firearms Act, but declined to do so for the National Firearms Act itself.⁴³² This omission further supports a congressional preference for an objective approach when considering National Firearms Act prosecutions.

Statutory interpretation further supports *Posnjak's* preference for distinguishing unassembled parts from fully assembled devices, allowing for a potential exception to a generally objective approach only in the former case.⁴³³ As noted by the *Posnjak* court, courts should construe statutes which are written in technical language, such as the National Firearms Act, technically.⁴³⁴ Similarly, courts should read criminal statutes, such as this, narrowly in order to limit the possibility of prosecuting individuals whom the legislature did not intend to subject to criminal liability.⁴³⁵

Two additional canons of statutory construction compel a similar conclusion. First, the plain meaning rule dictates that courts interpret legal text according to the text's plain meaning.⁴³⁶ Additionally, courts should not read statutes in a way that would render any of their provisions superfluous.⁴³⁷ Reading section 5845(f)(3) to cover either unassembled parts or fully assembled devices, as the *Johnson* court tries to do, is in direct violation of both of these principles.

Regarding the former, the plain meaning of "unassembled parts" is unassembled—not fully-assembled—devices. As for the latter, if both categories are to be placed on equal ground, there is no reason for the statute to go out of its way to introduce this subsection as referring to a "combination of parts." These principles of statutory construction thus dictate that the phrase "combination of parts" in subparagraph (3) should, as

430. See *supra* note 302 and accompanying text.

431. See *supra* notes 130, 305 and accompanying text.

432. See *supra* notes 175–77.

433. See *supra* note 166 and accompanying text.

434. See *supra* notes 292–94 and accompanying text.

435. See *supra* note 294 and accompanying text.

436. See, e.g., WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENTS 13, 19 (2008).

437. See, e.g., *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991).

posited by the *Posnjak* court, pertain exclusively to unassembled combinations of parts, and not to fully assembled devices.⁴³⁸

C. Additional Support for the Second Circuit's Stance

The remainder of this Note offers arguments which, while not necessarily based on legislative history or grounded in formal statutory construction canons, appeal to common sense in providing additional support for the *Posnjak* approach. These arguments illustrate that *Posnjak* not only provides a more sound opinion than *Oba* or *Johnson* in a theoretical sense, but it also represents the ideal stance for courts to apply in practical situations.

One such argument is based on the Federal Rules of Evidence. Rule 401 states that “[r]elevant evidence” means any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.⁴³⁹ Rule 402 provides that relevant evidence is generally admissible.⁴⁴⁰

A thorough analysis of the Federal Rules of Evidence is far beyond the scope of this Note. One may, however, effectively apply the above rules to the present issue. In cases involving unassembled combinations of parts whose objective characteristics do not conclusively denote a legitimate or harmful use, the defendant’s intent surely falls within the gambit of Rule 401⁴⁴¹. Accordingly, in such cases courts should consider evidence pertaining to the defendant’s subjective intent. This is precisely the conclusion for which *Posnjak* stands.

Similarly, an adoption of the *Johnson* opinion, which treats unassembled parts and assembled devices equally, overlooks a key point and yields flawed conclusions. The *Lussier* court observed that “‘parts’ are not necessarily ‘weapons.’”⁴⁴² Parts and devices are categorically, not incidentally, different. One may even argue that assembled devices, by their completed nature, inhere a certain degree of intent; there is obviously some rhyme or reason underlying these parts being assembled as they are. The eventual use of these parts will likely reflect this purpose. This element is lacking in cases of unassembled parts, however; a possessor may eventually use such parts for a range of purposes unrelated to the nature of the parts themselves.

Consequently, courts should view the two categories through completely different lenses. Allowing a consideration of intent when dealing with assembled devices not only runs counter to the statute’s wording, it may even run counter to the essence of the item at hand. *Johnson* noted that

438. This also conforms with the statutory canon of *expressio unius*; namely, that the expression of one thing suggests the exclusion of others. See, e.g., *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

439. FED. R. EVID. 401.

440. FED. R. EVID. 402.

441. FED. R. EVID. 401.

442. See *supra* note 361 and accompanying text.

when an objective inquiry indicates for what purposes an item will be used, a court should not consider subjective intent. It failed, however, to take the next logical step in its analysis: that this is *always* the case when dealing with fully assembled devices.

Johnson's failure to recognize this point, and therefore to place parts and devices on equal footing, has two potentially fatal results. One is a direct conflict with the court's own professed interpretation of the statute; the second is an overexpansion of the statute's reach to illegitimate items which should not be proscribed.

None of these obstacles besets *Posnjak*. It favors objective inquiries over considerations of those of subjective intent and forbids intent analysis whenever dealing with assembled devices, an approach which avoids the pitfalls which invalidated both *Oba* and *Johnson*.

Revisiting the hypotheticals which Part I of this Note discussed likely provides the strongest support for these contentions. The first hypothetical requires little discussion, as all three circuit courts would agree that intent is relevant when dealing with a defendant who possessed empty bottles and gasoline, and claimed he intended to use those unassembled parts to make Molotov cocktails.⁴⁴³

The next example⁴⁴⁴ discussed a case involving an item such as that at issue in *Spoerke*, one in which *Posnjak* would disagree with *Oba* and *Johnson*. There, the item was a homemade explosive made of polyvinyl chloride pipe capable of propelling shrapnel.⁴⁴⁵ Here, *Posnjak* alone would hold that intent is not relevant, as the device was fully assembled.⁴⁴⁶ This conclusion appears far more logical than one which considers intent; if a person is in possession of a homemade explosive such as this, which is capable of propelling shrapnel, it seems incongruent to fail to proscribe it outright under a statute which aims to cover destructive devices.

The final example involved a defendant in possession of commercial dynamite which he planned to use for harm.⁴⁴⁷ Here, *Posnjak* and *Johnson* would agree that intent should not be relevant, while *Oba* would hold that it is. Once again, *Posnjak* is on the correct side of the argument, as the Act's legislative history evinces a clear preference against proscribing commercial dynamite.⁴⁴⁸ Thus, not only is *Posnjak* the ideal approach in theory, comporting most highly with legislative history and statutory construction, it is the most logically unassailable approach when applied in practical scenarios as well.

443. See *supra* notes 23–26 and accompanying text.

444. See *supra* notes 27–28 and accompanying text.

445. See *supra* note 4.

446. See *supra* notes 13–15 and accompanying text.

447. See *supra* note 297 and accompanying text.

448. See *supra* notes 142–43, 285 and accompanying text.

CONCLUSION

The question of how much gravity—if any— a court may confer upon a defendant’s subjective intent in determining whether that defendant possessed a statutorily destructive device is complex and multifaceted. The circuit split which underlies this Note appeals to notions of statutory interpretation, legislative history, public safety concerns, and perhaps most significantly, a discerning degree of common sense in properly parsing the views of the Second, Seventh, and Ninth Circuits on this matter. Each opinion listed above invoked some combination of these and other factors in reaching its conclusion.

In light of all relevant factors and for the reasons set forth in Part III of this Note, the most sound approach is that of the Second Circuit in *Posnjak*, advocating a standard which looks primarily to an item’s objective characteristics, but allows for consideration of subjective intent, specifically in cases of unassembled parts when an objective inquiry leaves open the possibilities of conversion into either a proscribed or unproscribed device.⁴⁴⁹ Adherence to *Posnjak* assures uniformity with legislative intent, accuracy in statutory interpretation, and consistency with general notions of legality, logic, and public welfare. Therefore, this standard should prevail as courts continue to consider the question of subjective intent in National Firearms Act prosecutions.

449. See *supra* notes 13–16 and accompanying text.