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Small v. United States: Defining "Any" As A Subset of "Any"

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SMALL V. UNITED STATES: DEFINING "ANY" AS A SUBSET OF "ANY"

I. INTRODUCTION

"It shall be unlawful for any person . . . who has been convicted in *any court* of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition. . . ."[1] Although this statute, 18 U.S.C. § 922(g)(1), was enacted to keep firearms out of the hands of persons not entitled to possess them because of their criminal backgrounds,[2] the scope of this statute has been controversial. Specifically, the federal circuits have disagreed as to whether the phrase "any court" applies to foreign courts as well as to domestic ones.[3] Recently, in *Small v. United States*,[4] the Supreme Court settled the dispute and held that the phrase "'any court' refers only to domestic courts."[5]

The dissenting opinion, however, presents a more convincing argument than the majority opinion—that the text of the statute is unambiguous and the phrase "any court" should encompass convictions in foreign courts as well as domestic ones.[6] Moreover, the rationale followed by the majority ignores the plain meaning of the statute as written by Congress and supplants it with a

1. 18 U.S.C. § 922*g)(1) (2000) (emphasis added).

2. *See* S. REP. NO. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113.

3. *Compare* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989) (holding that the phrase "convicted in any court" includes convictions in foreign courts), *and* United States v. Winson, 793 F.2d 754, 759 (6th Cir. 1986) (holding that the phrase "convicted in any court" includes convictions in foreign courts), *with* United States v. Gayle, 342 F.3d 89, 95–96 (2d Cir. 2003) (holding that the phrase "convicted in any court" does not include convictions in foreign courts), *and* United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000) (holding that the phrase "convicted in any court" does not include convictions in foreign courts).

4. *See* Small v. United States, 125 S. Ct. 1752 (2005).

5. *Id.* at 1758.

6. *See id.* at 1760–61 (Thomas, J., dissenting).

novel canon of interpretation that frustrates the purpose of the statute and creates a dangerous precedent for future cases of statutory interpretation.[7] To restore the strength and purpose of American gun control legislation in the wake of *Small*, Congress should amend § 922(g)(1) to incorporate the language proposed in Senate Bill 954.[8]

Part II of this note presents the background of § 922(g)(1), including a brief legislative history and an examination of the split in federal circuit court decisions over the meaning of "any court." Part III discusses the factual and procedural background of *Small*. Part IV analyzes the majority and dissenting opinions in *Small* and argues that the dissent is more congruous with established principles of statutory interpretation. Finally, Part V examines the potentially dangerous impacts of the majority opinion on public safety and separation of powers and argues that Senate Bill 954 should be enacted to preserve the purpose of § 922(g)(1).

II. THE HISTORY OF 18 U.S.C. § 922(g)(1)

A. *The History of the Statute*

The current language in § 922(g)(1) has undergone a lengthy and confusing history. The original statute, the Omnibus Crime Control and Safe Streets Act of 1968,[9] contained two provisions relevant to the statutory language: Title IV, containing the predecessor to § 922(g)(1), and Title VII, containing § 1202(a)(1).[10]

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7. *See id.* at 1765–66 (Thomas, J., dissenting).

8. *See* Firearms Fairness and Security Act, S. 954, 109th Cong. (2005).

9. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 922(c), 82 Stat. 197, 230 (codified as amended at 18 U.S.C. § 922(g)(1)).

10. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 was intended to "aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. REP. NO. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113. That Title contained the original provision that "made it unlawful for a felon, fugitive, or one under indictment to receive a firearm or ammunition which has been shipped or transported in interstate or foreign commerce." H.R. REP. NO. 90-1577, at 15 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4421. Prior to adopting the final language of the statute, Congress considered language contained in a Senate Judiciary Committee Report that "[t]he definition of the term 'felony,' as added by the committee is a new provision. It means a Federal crime punishable by a term of imprisonment exceeding 1 year and in the case of State law, an offense determined by the laws of the State to be a felony." *Gayle*, 342 F.3d at, 94 (quoting S. REP. NO. 90-1501, at 31 (1968)). When both houses agreed upon the final language of the stat-

Later that year, the Gun Control Act of 1968[11] amended § 922(g)(1) to include the language "any court" and prohibit additional classes of persons from receiving a firearm or ammunition shipped in interstate or foreign commerce.[12] Subsequently, the Firearm Owners' Protection Act of 1986[13] repealed Title VII, containing § 1202(a)(1), and modified § 922(g)(1) to prohibit possession as well as transport of firearms.[14] Unfortunately, despite a lengthy record detailing these various amendments, the record gives no express indication as to Congress's intent to include or exclude foreign convictions in the current version of § 922(g)(1).[15]

B. *The Circuit Split*

The controversy surrounding the meaning of the phrase "any court" can be more thoroughly examined through an investigation of the federal courts' varying interpretations of the phrase.[16] *United States v. Winson* was the first decision to address this question and held that § 922(g)(1) includes convictions in foreign courts.[17] Finding legislative history unhelpful,[18] the Sixth Circuit

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ute, however, they adopted the version of the House of Representatives which contained the non-limiting language "'crime punishable by imprisonment for a term exceeding 1 year.'" *Id.* at 95 (quoting H.R. CONF. REP. NO. 90-1956, at 4, 8, 28–29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428). Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 contained conflicting language of § 1202(a)(1), that prior convictions must be from "a court of the United States or of a State." 18 U.S.C. app. § 1202(a)(1) (1970 & Supp. III 1985) (repealed 1986). Title VII, however, was not intended to conflict with the non-limiting Title IV language. Senator Long, sponsor of Title VII, stated that § 1202 would "take nothing from" but merely "add to" Title IV. 114 CONG. REC. 14,774 (1968).

11. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

12. *See* H.R. REP. NO. 90-1577, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4421 (adding anyone who is an "unlawful user of or addicted to marijuana, any depressant or stimulant drug . . . or a narcotic drug . . . or has been adjudicated in any court as a mental defective or has been committed under a court order to any mental institution"). The Gun Control Act of 1968 did not prohibit possession per se, but referred only to the transport and receipt of a firearm. *See* Recent Cases, 117 HARV. L. REV. 1267, 1269 n.25 (2004).

13. 18 U.S.C. § 922(g) (2000).

14. *See* H.R. REP. NO. 99-495, at 22–23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1348–49; Recent Cases, *supra* note 12, at 1269 n.25.

15. *See* Tracey A. Basler, Note, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147, 177 (2002).

16. *See supra* note 3 and accompanying text.

17. *See Winson*, 793 F.2d at 759. Winson was convicted by an Argentinean court in 1970 of possessing counterfeit United States currency and by a Swiss court in 1976 of fraud. *See id.* at 756. Back in the United States, he was found in possession of a .460 caliber Weatherby MKV rifle, a .20 gauge Browning shotgun, and a .243 caliber Colt rifle. *See*

compared the text of § 922(g)(1) with that in § 1202(a),[19] which included specific language regarding the courts to which the statute applies.[20] By concluding that Congress intentionally used limiting language in the text of § 1202(a) but not in § 922(g)(1), the court found the "any court" language in § 922(g)(1) unambiguous.[21]

Winson next examined the potential inequity flowing from the inclusion of foreign convictions as predicate offenses in § 922(g)(1).[22] The court found, however, that there is "no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States."[23] Moreover, Congress avoided such injustice by allowing the Secretary of the Treasury to grant relief when an applicant's record displays

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id. at 755–56. In *Winson*, the court refers to 18 U.S.C. § 922(h) throughout the decision. This section, however, is an appropriate substitute for analyzing 18 U.S.C. § 922(g). *See* Basler, *supra* note 15, at 152 n.39.

18. *See Winson*, 793 F.2d at 757.

19. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a), 82 Stat. 197, 236 (repealed 1986). This section includes sentencing guidelines for "any person who has . . . been convicted by a court of the United States or of a State or [a]ny political subdivision thereof of a felony." *Id. Winson* was argued and decided before § 1202(a) was repealed. *See* Basler, *supra* note 15, at 152.

20. *See Winson*, 793 F.2d at 756. Although several Supreme Court decisions have compared § 922 and § 1202, none suggested that the two sections were intended to mean the same thing. *See id.* at 757. The sponsor of the amendment, Senator Long, stated that § 1202 "would 'take nothing from' but merely 'add to' Title IV." *Id.* (quoting 114 CONG. REC. 14,774 (1968)). Further, it is unquestionably within the power of Congress to choose whether a statute should sweep "broadly or narrowly." *Id.* (quoting United States v. Rodgers, 466 U.S. 475, 484 (1984)).

21. *See Winson*, 793 F.2d at 757. The court recognized the principle that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* at 756 (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). There is no ambiguity in § 922(g)(1), *see id.* at 757, and the statute does not warrant the application of this principle.

22. *See Winson*, 793 F.2d at 757–58. Winson contended that the Bureau of Alcohol, Tobacco and Firearms interpreted § 922 as being inapplicable to foreign convictions. *See id.* at 758. This interpretation exists in an internal memorandum addressed to the Chief of the Regulations and Procedures Division of the Bureau of Alcohol, Tobacco and Firearms dated May 7, 1974, in response to an inquiry dated January 11, 1974, asking whether foreign convictions preclude issuance of firearms permits. *See id.* at 758 n.4. This memorandum "does not have the effect of an administrative regulation or a published rule," and is not binding on the court. *See id.* Further, the Bureau of Alcohol, Tobacco and Firearms changed its position in another internal memorandum dated July 30, 1984, which stated that "the ATF should reverse its current position so as to acknowledge the Federal firearms and explosives disabilities of persons who have been convicted in foreign courts." *Id.* at 758. This policy change is explained in a memorandum from Steven Higgens, Director of Enforcement and Operations to the Assistant Secretary of the Treasury for Enforcement and Operations. *See id.* at 758 n.5.

23. *Winson*, 793 F.2d at 758.

that he or she will not act in a manner dangerous to public safety and when such a grant would not be contrary to the public interest.[24] The court finally noted that a categorical exemption, such as a wholesale exclusion of foreign convictions from the reaches of § 922(g)(1), is generally not favored by the American court system.[25]

The Fourth Circuit followed the *Winson* rationale in *United States v. Atkins*.[26] The court reaffirmed the conclusion that the "scant legislative history," the similar provision in § 1202(a), and cases construing § 922(g)(1) and § 1202(a) do not "inject any uncertainty into the subject language."[27] Further, the court examined separately the terms "any" and "court," first finding the term "any" to be unambiguous, "being all-inclusive in nature."[28] The court then turned to the word "court," finding that because English courts are similar to and based on the same legal system as American courts, a prior conviction in England was valid as a predicate conviction.[29]

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24. *See* 18 U.S.C. § 925(c) (2000); *Winson*, 793 F.2d at 758. This section has since been suspended due to lack of funding. *See* Treasury, Postal Service, and General Government Appropriations Act of 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992). Courts have subsequently considered whether the holding in *Winson* relied upon the statutory availability of relief and is now invalid. *See* United States v. Chant, Nos. CR 94-1149 (SBA), CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997) (holding that the primary focus of *Winson* was that the statutory language was unambiguous, not that statutory relief was available).

25. *See Winson*, 793 F.2d at 759 ("'[C]ategorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.'" (quoting Ala. Power Co. v. Costle, 636 F.2d 323, 358 (D.C. Cir. 1979))).

26. *See* United States v. Atkins, 872 F.2d 94 (4th Cir. 1989). Atkins was convicted by an English court in 1981 of "unlawful possession of a firearm with intent to endanger life." *See id.* at 95. In April 1987, Atkins fraudulently entered an Officers Club at Fort Myer, Virginia. *See id.* Suspicious, the Fort Myer Military Police searched him and found a .38 caliber Smith & Wesson pistol fastened to his ankle. *See id.*

27. *Id.* at 96. The court also followed the rationale from *Winson* that if the statutory language is unambiguous, then there is no application for the principle of lenity. *See id.* (citing United States v. Turkette, 452 U.S. 576, 587 n.10 (1981)).

28. *Id.*

29. *See id.* The court used the fact that English law, which provided the "origin and antecedent" of the jurisdictional system used by the United States, is similar enough in its system of common law and statutes refining it, that an English conviction is a fair predicate for conviction under 18 U.S.C. § 922(g)(1). *See id. But cf.* Basler, *supra* note 15, at 156 n.62 (proposing that there may be more differences between English and American law than *Atkins* suggests). Further, Atkins did not contend that his English conviction was a violation of his civil rights or of American constitutional law, or that the English offense would not constitute an offense of similar gravity under American law. *Atkins*, 872 F.2d at 96 n.1. By making the comparison between English and American law, *Atkins* seems to leave an opening for conviction in a foreign court with a markedly different legal system to

Ten years later, the Tenth Circuit in *United States v. Concha*[30] declined to follow the rationale of *Winson* and *Atkins* and held that the phrase "convicted in any court" does not include convictions in foreign courts.[31] The court first noted that if § 922(g)(1) were to include foreign convictions, an anomalous situation would result because fewer domestic crimes would be covered by the statute than foreign crimes.[32] This peculiar result suggests that Congress must have intended for § 922(g)(1) to only apply to federal and state crimes.[33] The court compared this textual anomaly with the opposing argument that "any" is unambiguous and all-inclusive, and concluded that they are comparable in strength.[34]

Concha then expressed concern that foreign criminal defendants are not given the same constitutional protections that are offered in the United States.[35] Of particular worry to the court was that persons convicted of felonies abroad had only a limited ability to challenge a sentence based upon that foreign convic-

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be improper as a predicate conviction under § 922(g)(1). *But see* Lewis v. United States, 445 U.S. 55, 65 (1980) (holding that "§ 1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds").

30. 233 F.3d 1249 (10th Cir. 2000).

31. *See id.* at 1256; *see also* Bean v. United States, 89 F. Supp. 2d 828, 838 (E.D. Tex. 2000) (holding that a foreign conviction cannot serve as a predicate offense for the purpose of restricting firearms possession). Concha had been convicted in the United Kingdom of three offenses. *See Concha*, 233 F.3d at 1250. One night, he was brought to a police station in Taos, New Mexico, in connection with a domestic dispute. *See id.* at 1251. Concha became verbally abusive and a scuffle ensued, during which he took possession of a police officer's loaded gun. *See id.* Concha was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *See id.* The government additionally sought to enhance his sentence under 18 U.S.C. § 924(e), which increases the penalty if the defendant has three previous convictions. *See id.* Section 924 refers to "three previous convictions by any court referred to in section 922(g)(1)" of the statute. 18 U.S.C. § 924(e) (2000). Thus, an analysis of the "any court" language in § 924(e) is analogous to that in § 922(g)(1).

32. *See Concha*, 233 F.3d at 1254. Section 921(a)(20) provides that

> [t]he term "crime punishable by imprisonment for a term exceeding one year" does not include . . . any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or . . . any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. § 921(a)(20) (2000). Thus, certain federal and state crimes are excluded from the definition of "crime," while the same offenses in foreign courts are not excluded. *See Concha*, 233 F.3d at 1254.

33. *See Concha*, 233 F.3d at 1254.

34. *See id.* at 1256; *see also Atkins*, 872 F.2d at 96 (holding that the word "any" is unambiguous).

35. *See Concha*, 233 F.3d at 1254.

tion.[36] The court then compared this policy argument with the opposing argument that foreign criminals are likely to be as dangerous as domestic criminals, and concluded that these arguments, too, are equal in strength.[37]

The court agreed with *Winson* that the legislative history is of no assistance in interpreting the phrase "any court."[38] The lack of clear legislative intent, combined with equally strong textual and policy arguments, was enough for the court to find the statute ambiguous.[39] As such, the court was guided by the rule of lenity, and refrained from "'interpret[ing] a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.'"[40]

The Second Circuit followed the *Concha* rationale in *United States v. Gayle*.[41] Agreeing with the *Concha* court that the peculiar result of including foreign convictions renders the statutory

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36. *See id.* The court here distinguishes the present case from *Winson* and *Atkins* because a subsequent decision had restricted the ability of a felon to attack a foreign conviction. *See id.* at 1255–56. In *Custis v. United States*, the Supreme Court held that collateral attacks on the predicate convictions were not allowed, except for jurisdictional attacks based on the total deprivation of right to counsel. *See* 511 U.S. 485, 490, 494–96 (1994). A person may still bring a habeas petition to challenge the predicate conviction. *See id.* at 512 (Souter, J., dissenting). A defendant may bring a habeas petition even after the previous sentence had been fully served because the current sentence has been enhanced by a "'prior, unconstitutional conviction.'" *Concha*, 233 F.3d at 1254 (quoting Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990)).

37. *See Concha*, 233 F.3d at 1256.

38. *See id.* The *Concha* court did look to the United States Sentencing Guidelines for sentence enhancements, which are limited to offenses under federal or state law. *See id.* at 1254 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2005)). In addition, the general approach of the Guidelines is to exclude foreign convictions from a defendant's criminal history. *See id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(h) (2005)).

39. *See Concha*, 233 F.3d at 1256.

40. *Id.* (quoting United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993) (citations omitted)); *see also* Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955). The rule of lenity, which is the well-established maxim that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," only applies to criminal statutes. *Rewis*, 401 U.S. at 812. This maxim is applied when a court is uncertain about a statute's meaning, but is not meant to be a tool to circumvent legislative intent. *See id.*; *see also* Perrin v. United States, 444 U.S. 37, 49 n.13 (1979) (citing United States v. Culbert, 435 U.S. 371, 379 (1978)).

41. 342 F.3d 89 (2d Cir. 2003). In 1996, the defendant in *Gayle* was convicted in Canada for using "a firearm in the commission of an indictable offense." *Id.* at 90. In 2001, United States authorities suspected that the defendant had illegally entered the United States from Canada. *See id.* Upon arresting him and searching his hotel room in Plattsburgh, New York, authorities discovered a large quantity of firearms stored in boxes in his hotel room. *See id.*

text ambiguous,[42] the court consulted the legislative history of the statute.[43] Although prior decisions had found the legislative history unhelpful,[44] *Gayle* found a Senate Committee Report and a Conference Report particularly enlightening and in support of excluding foreign convictions from § 922(g)(1).[45] Specifically, the court found that because the Conference Report did not expressly disagree with a Senate Report's limitation of predicate felonies to domestic convictions indicated that Congress intended to limit the applicability of § 922(g)(1) to domestic convictions.[46] The court then noted that, "had Congress contemplated extending the prohibition to persons having foreign convictions, it would in all likelihood have been troubled by the question whether the prohibition should apply to those convicted by procedures and methods that did not conform to minimum standards of justice."[47] With the federal circuits in disagreement as to whether foreign convictions are included within the scope of § 922(g)(1), the dispute was ripe for the Supreme Court to settle when it granted certiorari to *Small v. United States*.[48]

III. BACKGROUND OF THE *SMALL* CASE

In 1992, Gary Small shipped a nineteen-gallon electric water heater from the United States to Osaka, Japan, as a present to "his Papa-san in Okinawa."[49] Believing this to be an odd present,

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42. *See id.* at 90; *supra* notes 32–33 and accompanying text.

43. *See Gayle*, 342 F.3d at 90.

44. *See Concha*, 233 F.3d at 1256 ("The legislative history does not illuminate the meaning of 'convictions by any court'"). United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989) ("[T]he scant legislative history . . . offer[s] no illumination as to Congress' intended meaning nor serve[s] to inject any uncertainty into the subject language."); United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986) ("[A]n examination of the legislative history of Title IV reveals no discussion of the actual meaning of the phrase 'in any court.'").

45. *See Gayle*, 342 F.3d at 95; *supra* note 10.

46. *See Gayle*, 342 F.3d at 95. The use of legislative history in *Gayle* has been criticized for its "incomplete, decontextualized, and atemporal approach." Recent Cases, *supra* note 12, at 1267–68. Among other criticisms, it has been suggested that the legislative history used by the court was not the legislative history of the current statute because the court failed to recognize the legislative history of subsequent amendments such as the Firearms Owners' Protection Act of 1986. *See id.* at 1273.

47. *Gayle*, 342 F.3d at 95.

48. 541 U.S. 958 (2004).

49. Brief for the United States at 2, Small v. United States, 125 S. Ct. 1752 (2005) (No. 03-750) (citations omitted).

Japanese customs officials x-rayed the water heater and found firearms packaged inside.[50] When Small accepted delivery and confirmed the package was his,[51] the customs officials served him with a search warrant,[52] opened the water heater, and found 2 rifles, 8 pistols, and 410 ammunition shells.[53] Small was charged with violating Japan's Guns and Knives Control Law, the Explosives Control Law, and the Customs Law.[54] He was convicted by the Naha District Court on all counts[55] and was sentenced to imprisonment for a term of five years.[56]

Following his release from prison and return to the United States, Small bought a gun from a firearms dealer in Pennsylvania.[57] Small pleaded guilty to unlawful possession of a gun, but reserved the right to challenge the conviction on the ground that the predicate conviction was in a foreign court and was thus outside the scope of § 922(g)(1).[58] The United States District Court for the Western District of Pennsylvania rejected Small's argument and found him in violation of § 922(g)(1).[59] The United States Court of Appeals for the Third Circuit affirmed.[60] The Supreme Court then granted certiorari to resolve the circuit split.[61]

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50. *See id.*

51. *See id.* at 2–3.

52. *See id.* at 3.

53. Small v. United States, 125 S. Ct. 1752, 1759 (2005) (Thomas, J., dissenting); Brief for the United States at 3, *Small*, 125 S. Ct. 1752 (No. 03-750).

54. *See* Brief for the United States at 3, *Small,* 125 S. Ct. 1752 (No. 03-750).

55. *See id.*

56. *See Small*, 125 S. Ct. at 1754.

57. *See id.* The gun that Small purchased was an SWD Cobray nine-millimeter handgun, which he purchased within a week of completing his eighteen month parole following his prison sentence for the Japanese convictions. *See* Brief for the United States at 3, *Small*, 125 S. Ct. 1752 (2005) (No. 03-750). In a subsequent search of Small's apartment, authorities, acting pursuant to a warrant, discovered a Browning .380 caliber pistol and in excess of 300 rounds of ammunition. *See id.* at 4.

58. *See Small*, 125 S. Ct. at 1754.

59. *See* United States v. Small, 183 F. Supp. 2d 755 (W.D. Pa. 2002).

60. *See* United States v. Small, 333 F.3d 425 (3d Cir. 2003).

61. *See* Small v. United States, 541 U.S. 958 (2004).

IV. ANALYSIS

A. *The Majority Opinion*

Justice Stephen Breyer delivered the opinion of the Court, writing for a five-justice majority.[62] The majority first concluded that it was necessary to look past the word "any" to determine the meaning of § 922(g)(1).[63] In doing so, the majority relied upon an initial assumption against extraterritoriality and presupposed that Congress intended the phrase "any court" to apply domestically.[64] The majority recognized that the presumption against extraterritorial application did not apply directly[65] but was useful in considering the scope of the present statute.[66] The majority justified this assumption by pointing out the significant differences between foreign and domestic convictions.[67] First, foreign courts might define convictions punishable by a term of imprisonment exceeding one year differently than American courts; these foreign courts might convict persons for actions that American courts would permit because of different understandings of fairness or might convict persons for conduct that American courts punish far less severely.[68] Second, including foreign convictions within the scope of § 922(g)(1) would require judges to make a difficult determination of which foreign convictions are appropriate for recognition by the American legal system and would thus

62. *See Small*, 125 S. Ct. at 1753. Justices Stevens, O'Connor, Souter, and Ginsberg joined the majority. *Id.* Chief Justice Rehnquist did not participate in the decision. *Id.*

63. *See id.* at 1754–55.

64. *See id.* at 1755; *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

65. *See Small*, 125 S. Ct. at 1755. The majority notes that the presumption against extraterritorial application would most directly apply to a consideration of unlawful gun possession abroad versus domestically. *See id.* Section 922(g)(1) is a domestic criminal statute that punishes gun possession in this country. *See id.* at 1761 (Thomas, J., dissenting).

66. *See id.* at 1755.

67. *See id.* at 1755–56.

68. *See id.* at 1755–56. The majority cites several foreign statutes that punish actions that would not necessarily be illegal in the United States. *See id.*; *see also* Criminal Code of the former Russian Soviet Federated Socialist Republic art. 153, *in* SOVIET CRIMINAL LAW AND PROCEDURE 171–72 (H. Berman & J. Spindler trans., 2d ed. 1972) (criminalizing "private entrepreneurial activity" and "speculation").

leave persons convicted in foreign courts uncertain of their legal status in the United States.[69]

Relying upon the assumption that the phrase "convicted in any court" applies domestically, the majority then looked for evidence to the contrary in the statutory language, context, history, and purpose of § 922(g)(1).[70] In direct contrast to federal circuits that found the language unambiguous and all-inclusive,[71] the majority found that, "[t]he statute's language does not suggest any intent to reach beyond domestic convictions."[72] Further, the majority reaffirmed the *Concha* approach by interpreting the statutory context that anomalous results would follow from including foreign convictions within the scope of § 922(g)(1).[73]

The majority also reaffirmed the *Gayle* approach of interpreting the legislative history of the statute.[74] The Court noted that Congress's failure to explicitly address whether "any court" includes foreign courts renders the legislative history of the statute a neutral factor, confirming that Congress did not consider the issue.[75] The majority conceded that the statute's purpose supported the inclusion of foreign convictions because Congress sought to "'keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.'"[76] Further, the majority conceded that a person convicted of a foreign crime might be just as dangerous as one convicted of a domestic crime.[77] Notwithstanding those concessions, the majority dismissed these concerns by stating that persons with prior foreign convictions have been tried very rarely under § 922(g)(1).[78] Because the majority could not find conclusive

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69. *See Small*, 125 S. Ct. at 1756.

70. *See id.*

71. *See* United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000) (citing United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989)).

72. *Small*, 125 S. Ct. at 1756.

73. *See id.*; *see also* United States v. Gayle, 342 F.3d 89, 93 (2d Cir. 2003); *Concha*, 233 F.3d at 1253–54; *supra* text accompanying notes 32–33, 42.

74. *See Small*, 125 S. Ct. at 1757; *see also Gayle*, 342 F.3d at 95; *supra* text accompanying notes 45–47.

75. *See Small*, 125 S. Ct. at 1757.

76. *See id.* at 1758 (quoting Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 112 (1983)).

77. *See id.*

78. *See id.* "[S]ince 1968, there have probably been no more than '10 to a dozen' instances in which such a foreign conviction has served as a predicate [conviction under § 922(g)(1)]." *Id.* This statistic suggests that, because persons with prior foreign convictions

evidence that the language, context, history, or purpose of the statute suggested a congressional intent to include foreign convictions under the scope of § 922(g)(1), the majority concluded that its initial assumption disfavoring extraterritorial application was valid.[79]

B. *The Dissenting Opinion*

Justice Clarence Thomas, writing for the dissent,[80] began his opinion by stating that by restricting the term "any" to mean "a subset of any," the majority distorted the plain meaning of the statute and departed from established principles of statutory construction.[81] Read naturally, the plain terms of § 922(g)(1) have an expansive meaning.[82] No modifiers or exceptions are present in the statutory language to restrict their application.[83] In addition, the dissent compared § 922(g)(1) with the more restrictive language in § 921(a)(20), which expressly mentions "Federal or State offenses."[84] Specifically, "Congress' explicit use of 'Federal' and 'State' in other provisions shows that it specifies such restrictions when it wants to do so."[85] Although concluding that the plain text of § 922(g)(1) is "inescapably broad," the dissent continued to find each argument in the majority's rationale unpersuasive.[86]

The dissent first argued that the majority invented a canon of statutory interpretation by assuming that, absent a clear indication from Congress, "a statute refers to nothing outside the

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are rarely tried for illegal possession of firearms, such persons are perhaps not dangerous or do not pose a great collective threat to American society.

79. *See id.*

80. *See id.* (Thomas, J., dissenting). Justices Scalia and Kennedy joined. *See id.*

81. *See id.* (Thomas, J., dissenting).

82. *See id.* at 1759 (Thomas, J., dissenting) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997).

83. *See id.* (Thomas, J., dissenting) (quoting Lewis v. United States, 445 U.S. 55, 60 (1980)).

84. *See id.* at 1760 (Thomas, J., dissenting) (construing 18 U.S.C. § 921(a)(20) (2000)). *But see Gayle*, 342 F.3d 93; *Concha*, 233 F.3d at, 1253–54; *supra* text accompanying notes 32–33, 42, 73.

85. *Small*, 125 S. Ct. at 1760 (Thomas, J., dissenting).

86. *See id.* at 1760–61 (Thomas, J., dissenting). The dissent criticizes four conclusions made by the majority: the assumption that the text applies only to domestic convictions; the condemnation of the accuracy of foreign convictions as a proxy for dangerousness; the finding of anomalies created in other sections of the statute by the inclusion of foreign convictions in § 922(g)(1); and the suggestion that Congress did not consider foreign convictions when enacting the statute. *See id.*

United States."[87] The majority recognized that the presumption against extraterritorial application of federal statutes does not directly pertain to § 922(g)(1) but nonetheless applied it, thereby extending the presumption well past the established maxim that "'Congress generally legislates with domestic concerns in mind.'"[88] The dissent found the majority's approach troublesome because it restricted a federal statute from reaching conduct within the borders of the United States and not from reaching actions in foreign lands; gun possession in the United States is clearly a domestic concern.[89]

According to the dissent, the majority's argument that there are significant differences between foreign and domestic convictions is baseless because "it cherry-picks a few egregious examples of convictions unlikely to correlate with dangerousness, inconsistent with American intuitions of fairness, or punishable more severely in this country."[90] The majority ignored, however, the "countless other foreign convictions" that do serve as accurate proxies for dangerousness and culpability within the United States, as well as the facts of this case, in which Small, very shortly after completing his sentence for international gunrunning, purchased another firearm.[91] Citing the "worst-of-the-worst"

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87. *See id.* at 1761 (Thomas, J., dissenting).

88. *Id.* at 1761–62 (Thomas, J., dissenting) (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

89. *See id.* at 1761–62 (Thomas, J., dissenting). *But see supra* text accompanying notes 64–69. The dissent argued that the applications of the presumption against extraterritorial application cited by the majority do not lend support to the majority's adoption of the rule in the present case. *See Small*, 125 S. Ct. at 1761 (Thomas, J., dissenting) (distinguishing EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (holding that the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens in foreign countries); Foley Bros. v. Filardo, 336 U.S. 281 (1949) (holding that a federal labor statute does not apply to a contract between the United States and another for work done in a foreign country); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (holding that a statute does not apply to robbery committed on the high seas by a noncitizen aboard a ship owned by persons of a foreign country).

90. *Small*, 125 S. Ct. at 1763 (Thomas, J., dissenting).

91. *See id.* (Thomas, J., dissenting). To counter the foreign statutes which punish actions that would not necessarily be illegal in the United States, the dissent cited several foreign statutes that *would* serve as a proxy for dangerousness and culpability in the United States. *See id.*; *see also* Criminal Code of Canada, R.S.C., ch. C-46, § 244(b) (1985) (Can.) (criminalizing the discharge of a firearm at a person with intent to endanger life); CÓDIGO PENAL FEDERAL [L.P.F.] [FEDERAL CRIMINAL CODE], *as amended*, Diario Oficial de la Federación [D.O.], (A de Agosto de 1931 (Mex.)) (prohibiting terrorism by explosives, toxic substances, firearms, fire, flooding, or other violent means). *But see supra* note 68 and accompanying text. The dissent further criticizes the majority's view that the scarcity of convictions using predicate foreign convictions weakens the usefulness of foreign convic-

undermined the usefulness of identifying truly dangerous persons based on foreign convictions.[92]

In response to the majority's invocation of the canon against absurdities resulting from the anomalies created by the inclusion of foreign convictions,[93] the dissent argued that the anomalies cited by the majority fall short of an "absurd" result.[94] Further, what the majority classified as an anomaly actually seemed rational to the dissent.[95] For example, "Congress might have decided to proceed incrementally and exempt only antitrust offenses with which it was familiar, namely, domestic ones."[96] Moreover, the dissent was concerned that the majority's reading created an even more dangerous anomaly by permitting persons convicted of violent crimes abroad to possess firearms freely in the United States.[97]

Finally, the dissent argued that the majority misapplied the legislative intent of the statute.[98] First, the dissent suggested that the majority sought to guess what Congress had actually intended by the phrase "any court." The Court's task, however, "'is *not* the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to con-

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tions as a proxy for dangerousness. *Small*, 125 S. Ct. at 1762–63 (Thomas, J., dissenting). The dissent argues that the rarity of such prosecutions supports the idea that including foreign convictions in the scope of § 922(g)(1) will *not* result in a "parade of horribles." *See id.* (Thomas, J., dissenting).

92. *See Small*, 125 S. Ct. at 1763 (Thomas, J., dissenting).

93. *See supra* text accompanying notes 32–33, 42, 73, 84.

94. *See Small*, 125 S. Ct. at 1764 (Thomas, J., dissenting) (citing Pub. Citizen v. DOJ, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment) (arguing that the canon against absurdities should be employed only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone"); Nixon v. Mo. Mun. League, 541 U.S. 125, 141 (2004) (Scalia, J., concurring in judgment) (stating that the "avoidance of unhappy consequences" is not an adequate basis for textual interpretations).

95. *See id.* (Thomas, J., dissenting).

96. *Id.* (Thomas, J., dissenting). The dissent criticized the majority's use of the canon against absurdities with strong language: "[A]s with the extraterritoriality canon, the Court applies a mutant version of a recognized canon when the recognized canon is itself inapposite. . . . [Canons] are useless when modified in ways that Congress could never have imagined in enacting § 922(g)(1)." *Id.* (Thomas, J., dissenting).

97. *See id.* (Thomas, J., dissenting). The dissent gives an example of the incongruity that would result from the majority's opinion: A person who is convicted domestically of tampering with a vehicle identification number is barred from possessing firearms, while a person who is convicted overseas of murder, rape, assault, kidnapping, or terrorism is allowed to possess firearms in the United States. *See id.* (Thomas, J., dissenting).

98. *See id.* at 1764–65.

sider [this] particular cas[e],'"[99] but is adhering to the ordinary meaning of the statute that they actually enacted.[100] Second, the majority committed an even more dangerous error by relying upon legislative silence as a means to derive its conclusion.[101] Third, the dissent argued that the legislative history was not silent, but included the significant fact that in the final draft of the statute, the language limiting the application of the section to federal and state crimes was replaced with the current language.[102] This modification in the text of § 922(g)(1) indicated Congress's intent to expand the scope of the statute past what was originally contained in the Senate Report.[103]

C. *The Merits of the Dissenting Opinion*

The rationale of the dissenting opinion has a sound basis both in precedent and in policy. The Supreme Court has previously suggested that "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself."[104] The dissent applied this precedent by citing prior decisions that have found the term "any," when used in statutory language, to have an expansive meaning.[105] The text of § 922(g)(1) is not limited in any way.[106]

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99. *Id.* at 1765 (Thomas, J., dissenting) (quoting Beecham v. United States, 511 U.S. 368, 374 (1994)) (emphasis added).

100. *See id.* (Thomas, J., dissenting).

101. *See id.* (Thomas, J., dissenting). Justice Scalia has also criticized the use of the "Canon of Canine Silence." *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 125 S. Ct. 460, 474–75 (2004) (Scalia, J., dissenting).

102. *See Small*, 124 S. Ct. at 1765 (Thomas, J., dissenting).

103. *See id.* (Thomas, J., dissenting) (construing H.R. CONF. REP. NO. 90-1956, at 4, 8, 28–29 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4426, 4428); *supra* note 10; *see also* Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466, 2479 (2004) (stating that when Congress amends a statute, the court should presume that it intends its amendment to have a real and substantial effect). *But see* United States v. Gayle, 342 F.3d 89, 95 (2d Cir. 2003).

104. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989); *see also* Lewis v. United States, 445 U.S. 55, 60 (1980).

105. *See Small*, 125 S. Ct. at 1759 (Thomas, J., dissenting) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)); *see also* Brogan v. United States, 522 U.S. 398, 400–01 (1998) (stating "any" false statement is a false statement "of whatever kind") (quoting Gonzales, 420 U.S. at 5); United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994) ("If a person is arrested and held on a federal charge by 'any' law enforcement officer—federal, state, or local—that person is under 'arrest or other detention' for purposes of [the statute]. . . ."). The phrase "any court" is not limited to the boundaries of traditional Article III courts and has been extended to include military courts. *See* United States v. Martinez,

Reading the statute in context, the dissent's interpretation of § 922(g)(1) in light of the more constricting language in § 921(a)(20) is supported by the established maxim that "where Congress includes particular language in one section of a statute but omits it in another," it can be presumed that Congress had intended the disparity.[107] Thus, a plain reading of the term "any court" unmistakably results in a broad construction that includes convictions in domestic and foreign courts.[108] The dissent's argument would be convincing if it ended here.[109] "'The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[110] There is no evidence that reading § 922(g)(1) to include foreign convictions would produce such a result; nonetheless, the majority ignored these established maxims and instead invented an unprecedented canon of statutory interpretation to circumvent the plain meaning of the statute.

Instead of beginning its analysis with the plain meaning of the statute, the majority began its analysis with the assumption "that the phrase 'convicted in any court' applies domestically, not extraterritorially."[111] Although this assumption was presumably

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122 F.3d 421, 424 (7th Cir. 1997); United States v. MacDonald, 992 F.2d 967, 970 (9th Cir. 1993); United States v. Lee, 428 F.2d 917, 920 (6th Cir. 1970).

106. *See Small*, 125 S. Ct. at 1759 (Thomas, J., dissenting) (quoting *Gonzales*, 520 U.S. at 5); *Lewis*, 445 U.S. at 60 ("No modifier is present, and nothing suggests any restriction. . . .").

107. *See* Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)); *see also Gonzales*, 520 U.S. at 5; Custis v. United States, 511 U.S. 485, 492 (1994); Barrett v. United States, 423 U.S. 212, 217 (1976).

108. *But see* Aron J. Estaver, Note, *Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968*, 38 VAND. J. TRANSNAT'L L. 215, 249 (2005) ("Because of the significant possibility that courts might infringe on the constitutional rights of both potential and existing gun owners, the U.S. Supreme Court should determine that there is ambiguity in whether section 922(g)(1) of the Gun Control Act should extent to foreign felonies when it hears *Small*.").

109. *Ron Pair Enters.*, 489 U.S. at 241 ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))); *see also* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 n.7 (2001) ("Because federal courts interpret, rather than author, the federal [law], we are not at liberty to rewrite it."). There is no need to "resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994).

110. *Ron Pair Enters.*, 489 U.S. at 242 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

111. *Small*, 125 S. Ct. at 1756.

based on the principle against extraterritorial application of the law, the dissent correctly points out that the majority makes a baseless extension of this canon.[112] By making this assumption, the majority looked to statutory language, context, history, and purpose not for the established purpose of supplementing ambiguous language, but for contradicting an assumption notwithstanding the plain meaning of the statutory language.[113] This approach is fatal from the outset. The dissent, however, followed the established maxims of statutory interpretation by fully examining what the statute says.[114]

The dissent was also convincing in criticizing the majority's finding of a significant distinction between domestic and foreign crimes, discussion of contextual anomalies created by the inclusion of foreign convictions, and use of legislative history.[115] The dissent stressed that persons convicted in foreign courts are equally culpable and dangerous as those convicted domestically.[116] This approach is supported by the principle theory of retribution, which rationalizes punishment and the "severity of punishment on the gravity of the act committed."[117] A criminal should not be able to erase a criminal past by entering the United States.[118] Further, subsequent crimes committed in the United States *should* be punished more severely because the person has had the chance to start anew, but has not reformed despite being punished for the prior offense.[119]

According to the dissent, the contextual anomaly—that fewer domestic crimes than foreign crimes would be covered by the statute—could actually have been the intention of Congress.[120] This interpretation is supported by the Bureau of Alcohol, To-

112. *See id.* at 1761 (Thomas, J., dissenting).

113. *See id.* at 1765–66 (Thomas, J., dissenting).

114. *See id.* at 1759–60 (Thomas, J., dissenting). *See generally* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

115. *See Small*, 125 S. Ct. at 1763–65 (Thomas, J., dissenting).

116. *See id.* at 1762–63 (Thomas, J., dissenting).

117. Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 156 (1994).

118. *See id.*

119. *See id.*

120. *See Small*, 125 S. Ct. at 1764 (Thomas, J., dissenting); *Gayle*, 342 F.3d at 93 (admitting that, depending on the crime, Congress might intend to include foreign convictions); Concha, 233 F.3d at 1253–54; *supra* text accompanying notes 32–33, 42, 73, 84, 93.

bacco Firearms, and Explosives' promulgation that a "[c]rime punishable by imprisonment for a term exceeding 1 year," includes "[a]ny Federal, State or foreign offense."[121] Perhaps more importantly, the definition then mentions that several federal and state court offenses are exempt under § 921(a)(20).[122] In doing so, the Bureau of Alcohol, Tobacco, Firearms, and Explosives confirmed that foreign convictions are included as predicate crimes, and recognized that domestic economic crimes and misdemeanors are excluded.[123]

Finally, the majority made another error in statutory interpretation by following a novel canon of interpretation,[124] disparagingly referred to as the "Canon of Canine Silence."[125] While the use of legislative history has been criticized even when there is a written record of the statements by members of Congress,[126] the use of congressional *silence* is even more disturbing.[127] Altering the plain meaning of the written language and justifying it with Congress's silence is indeed a slippery slope.[128]

V. IMPACT OF THE MAJORITY'S DECISION

A. *Weakening Gun Control and National Security*

The original Omnibus Crime Control and Safe Streets Act of 1968 was enacted to "aid in curbing the problem of gun abuse

121. Bureau of Alcohol, Tobacco Products, Firearms, and Explosives, DOJ, 27 C.F.R. § 478.11 (2005).

122. *See id.* ("The term shall not include (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices or (b) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less.").

123. *See id.*

124. *See Small*, 125 S. Ct. at 1765 (Thomas, J., dissenting).

125. *See Koons Buick Pontiac GMC*, 125 S. Ct. at 474 (Scalia, J., dissenting) ("The Canon of Canine Silence that the Court invokes today introduces a reverse—and at least equally dangerous—phenomenon, under which courts may refuse to believe Congress's *own* words unless they can see the lips of others moving in unison.").

126. *See* Scalia, *supra* note 114, at 32 ("It is much more likely to produce a false or contrived legislative intent than a genuine one.").

127. *See Small*, 125 S. Ct. at 1765 (Thomas, J., dissenting) (citing *Koons Buick Pontiac GMC*, 125 S. Ct. at 474 (Scalia, J., dissenting)).

128. *See Koons Buick Pontiac GMC*, 125 S. Ct. at 474 (Scalia, J., dissenting).

that exists in the United States."[129] By allowing persons who have been convicted for violent offenses in foreign countries to freely possess guns in the United States,[130] the clear policy behind the statute is immediately weakened.[131] Dangerous persons who were convicted of violent crimes while abroad or who moved to the United States following such a conviction are allowed to possess firearms, despite the fact that those persons are as dangerous as their counterparts who were convicted of similar crimes in the United States.[132]

The implications of weakened gun control regulation are even more critical in the wake of the September 11, 2001 attacks and the current terrorist activity in Iraq. In the National Strategy for Homeland Security of July 2002, the White House stated that its major goals include facilitating the apprehension of potential terrorists.[133] The national focus on identifying and removing terrorists from our society supports the contention that there is a significant policy rationale behind using predicate foreign convictions to prevent potential terrorists from possessing firearms within the United States. These potential terrorists pose a

129. S. REP. NO. 90-1097, at 76 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2164.

130. *See Small*, 125 S. Ct. at 1763–64 (Thomas, J., dissenting).

131. *See* Caron v. United States, 524 U.S. 308, 316 (1998) (stating that "the Federal Government has an interest in a single, national, protective policy" with regard to the possession of weapons).

132. *But cf.* S. REP. NO. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113 ("The principal purposes of title IV are to aid in making it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency. . . .").

133. *See* THE NATIONAL STRATEGY FOR HOMELAND SECURITY 26 (2002), *available at* http://www.whitehouse.gov/homeland/book/index.html (last visited Oct. 24, 2005). ("We will . . . focus on the prevention of all terrorist acts within the United States, whether international or domestic in origin. We will use all legal means . . . to identify, halt, and, where appropriate, prosecute terrorists in the United States. We will . . . utilize the full range of our legal authorities."). The strategy also outlines the use of an electronic database to utilize "risk modeling algorithms, link analysis, historic review of past patterns of behavior, and other factors to distinguish persons who may pose a risk of terrorism from those who do not." *Id.* at 27. In conjunction with this strategy, the President stated that "[t]he need for homeland security is tied to our enduring vulnerability. Terrorists wish to attack us and exploit our vulnerabilities because of the freedoms we hold dear." Letter from the President on the National Strategy for Homeland Security (July 16, 2002), *available at* 2002 WL 1532381 (White House). The United States is presumably due to vulnerable the freedoms that Americans enjoy; they are at risk because foreigners may take advantage of the same freedoms. The majority's concern with providing Americans with an equitable judicial process is an example of such a freedom; it comes, however, at the expense of protection. That freedom allows persons who have committed egregious acts in foreign lands the opportunity of a clean slate to commit those acts in the United States.

threat to this country but have merely been fortunate enough to avoid previous convictions within the United States's borders.

B. *Violating the Separation of Powers*

The second implication of *Small* does not directly or immediately threaten the physical safety of Americans, but instead poses a long-range threat to the principles upon which our government was founded and the Constitution was written. With the decision in *Small*, the Supreme Court decreased the power of Congress, and in so doing, increased the power of the judiciary. Traditionally, it has been Congress's power to author federal laws, and the courts' power to interpret them.[134] This separation of powers has been achieved by placing the limit on courts that they are required to look at what language has actually been promulgated, instead of imparting their own guesswork as to what the lawmaker might have meant.[135] The fact that the court might have drawn the line differently is not a matter for judicial, but for legislative action.[136] In the wake of *Small*, however, future courts may usurp the power of Congress by following the majority rationale and loosely construing or even inventing new canons of statutory interpretation instead of following the law as it has been codified.[137] Thus, *Small* sets a dangerous precedent that allows courts to impart their own guesswork as to what Congress intended, under the guise of following congressional intent, and in so doing ignore what Congress has *actually said*, thereby removing the lawmaking power from Congress and placing it

134. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 n.7 (2001) (noting that the court does not have the liberty to rewrite the law). For this reason, the plain language of the law is the starting point for any investigation into statutory interpretation. *See supra* text accompanying note 104.

135. See Scalia, *supra* note 114, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.").

136. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993).

137. A future court might claim that, in following the *Small* rationale, it is not removing power from the legislature because the legislature can and is required to speak more clearly. *See Gayle*, 342 F.3d at 96 ("Congress may seek to enact gun control legislation that criminalizes firearm possession by individuals with foreign felony convictions. If Congress were to do so, however, it would need to speak more clearly than it has in § 922(g)(1)."). Congress, however, did speak clearly in § 922(g)(1). *See* Barrett v. United States, 423 U.S. 212, 217 (1976) ("Congress knew the significance and meaning of the language it employed" in § 922(g)); Scarborough v. United States, 431 U.S. 563, 570 (1977) (finding that the language employed in the statute was "chosen with care" and represented "a carefully constructed package of gun control legislation").

within the judiciary. Congress no longer has the power to promulgate the law that it intends, for at some level every statute can be considered ambiguous,[138] and courts can now turn to their own interpretation through a novel canon, legislative history, or even legislative *silence*, to obtain the result that each desires.[139]

C. *Legislative Amendment*

Although Congress does not have the immediate ability to restore the lawmaking power that was lost to the judiciary in *Small*, it may take action to amend § 922(g) to serve its original purpose to reduce gun abuse.[140] The Senate has already begun this process.[141] On April 28, 2005, two days after the *Small* decision, United States Senator Mike DeWine introduced legislation "[t]o amend title 18, United States Code, to prohibit the sale of a firearm to a person who has been convicted of a felony in a foreign court."[142] The proposed amendment to § 922(g)(1) prohibits possession of a firearm by a person:

> who has been convicted—(A) in any court within the United States, of a crime punishable by a term of imprisonment exceeding 1 year; or (B) in any court outside the United States, of a crime punishable by a term of imprisonment exceeding 1 year (except for any crime involving the violation of an antitrust law), if the conduct giving rise to the conviction would be punishable in any court within the United States by a term of imprisonment exceeding 1 year had such conduct occurred within the United States.[143]

The bill was referred to the Committee on the Judiciary,[144] but has not yet progressed beyond the initial committee referral.[145]

Upon introducing the bill, Senator DeWine stated that "we must act to keep guns from the hands of criminals and this bill

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138. *See* Scalia, *supra* note 114, at 28.

139. Justice Scalia has deemed government by unexpressed intent "tyrannical" and considers it to be the "*practical* threat" of nontextual statutory interpretation. *See id.* at 17–18 ("[U]nder the guise of or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

140. S. REP. NO. 90-1097 at 76–77 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2164.

141. *See* S. 954, 109th Cong. (2005).

142. *Id.*

143. *Id.*

144. *Id.*

145. [1 109th Congress] Cong. Index (CCH) 21,013 (Aug. 12, 2005).

closes the loophole in our laws, assisting in that goal."[146] Thus, the introduction of Senate Bill 954 is a clear indication that some members of Congress disagree with the Supreme Court's disregard for the plain text of § 922(g)(1). As a result, Senator DeWine and others are attempting to correct the mistake made by the Supreme Court and close the loophole created by *Small* to give the statute the meaning that Congress had originally intended.[147] By expressly including foreign convictions within the scope of § 922(g)(1), Senate Bill 954 would provide the necessary "convincing indication" that the majority believed was lacking in the current language of § 922(g)(1).[148]

The language proposed in Senate Bill 954 also alleviates the majority's concerns regarding potential injustices resulting from a broad construction of § 922(g)(1).[149] The majority cautions that including foreign convictions within the scope of the statute is dangerous on three accounts: (1) foreign convictions for crimes punishable by a term of imprisonment exceeding one year may include convictions for conduct that is permitted or punished less severely in the United States;[150] (2) persons with prior foreign convictions would be left uncertain about their legal status;[151] and (3) foreign convictions could include convictions that are "from a legal system that is inconsistent with an American understanding of fairness."[152] Senate Bill 954 eliminates the first two of these concerns,[153] while the third can be satisfied on the trial court level.[154]

By limiting the application of foreign convictions to those that result "if the conduct giving rise to the conviction would be punishable in any court within the United States by a term of impris-

146. Press Release, United States Senator Mike DeWine, DeWine Works to Keep Guns Out of the Hands of Criminals (Apr. 28, 2005), http://dewine.senate.gov/ (last visited Oct. 24, 2005).

147. Senator Dianne Feinstein is a co-sponsor of Senate Bill 954. *See* 151 CONG. REC. S7295 (daily ed. June 23, 2005).

148. *See* Small v. United States, 125 S. Ct. 1752, 1756 (2005).

149. *See id.* at 1755–56.

150. *See id.*

151. *See id.* at 1756.

152. *Id.*

153. *See supra* text accompanying notes 143.

154. *See* Dionna K. Taylor, Comment, *The Tempest in a Teapot: Foreign Convictions as Predicate Offenses Under the Federal Felon in Possession of a Firearm Statute [*United States v. Gayle, *342 F.3d 89 (2d Cir. 2003)]*, 43 WASHBURN L.J. 763, 789–95 (2004).

onment exceeding 1 year had such conduct occurred within the United States,"[155] Senate Bill 954 removes the concern that actions that would not be punished or would be punished less severely in the United States would prohibit future possession of firearms in the United States. Foreign convictions such as those cited by the majority[156] would clearly be outside the scope of the statute and would not, as the majority suggests, weaken courts' ability to identify dangerous individuals.[157]

In addition, because persons with prior convictions in foreign courts would only be subject to § 922(g)(1) if those convictions arose from activity that would be punishable by a term of imprisonment exceeding one year in domestic courts, those persons would be cognizant of their legal status upon their return to the United States.[158] While foreign convictions are potentially more difficult to apply to the United States legal system,[159] a person who has been convicted in a foreign court has the same knowledge of her own conduct and of the laws of the United States as a person who has been convicted in a domestic court. Gary Small, for example, was convicted of shipping firearms and ammunition into Japan and should be just as aware of his culpability as if he had been convicted of a similar crime in the United States.[160] By limiting the applicability of foreign convictions to those actions that would have been punished similarly in the United States, Senate Bill 954 removes this uncertainty of legal status.

Finally, the majority was concerned that foreign convictions could include convictions that are inconsistent with the understanding of fairness in the United States legal system.[161] A major concern in this respect is that foreign legal systems might not offer the same due process protections as the Constitution.[162] Although Senate Bill 954 does not guarantee these constitutional rights to persons who have been convicted in foreign courts,[163] the Restatement (Third) of Foreign Relations Law outlines a method

155. S. 954, 109th Cong. (2005).
156. *See supra* note 68 and accompanying text.
157. *See Small*, 125 S. Ct. at 1756.
158. *Cf. id.*
159. *See id.*
160. *See id.* at 1763 (Thomas, J., dissenting).
161. *See id.* at 1755–56.
162. *See* Gayle, 342 F.3d at 95–96.
163. *See* S. 954, 109th Cong. (2005).

that courts may use to ensure that foreign convictions were obtained in a manner consistent with the principles and protections of the United States legal system.[164] If a foreign conviction was obtained "under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law" or if the foreign court did not have jurisdiction over the defendant, domestic courts are prohibited from recognizing the foreign conviction.[165] In addition, a domestic court is allowed to disregard a foreign conviction after considering other potential factors, including whether the cause of action was "repugnant to the public policy of the United States or of the State where recognition is sought."[166] The Third Circuit followed this approach in *Small* and confirmed that the conviction in Japan did not violate these standards and should therefore be recognized by domestic courts.[167] Thus, the United States legal system ensures that its citizens will not be punished in this country for foreign convictions that are inconsistent with the American standards of justice. Because the inclusion of foreign convictions within the scope of § 922(g)(1) will promote the statute's purpose of prohibiting dangerous persons from possessing firearms without compromising their constitutional rights, the language of § 922(g)(1) should be amended to incorporate the changes proposed in Senate Bill 954.

VI. CONCLUSION

Gary Small was convicted of smuggling 2 rifles, 8 pistols, and 410 ammunition shells into Japan.[168] Within a week after completing his sentence, Small purchased a handgun in the United States.[169] Clearly, Small is a dangerous individual; nonetheless, he is permitted to possess a firearm in the United States because the Supreme Court ruled that the statute prohibiting persons

164. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

165. *Id.* § 482(1).

166. *Id.* § 482(2)(d).

167. *See* United States v. Small, 333 F.3d 425, 428 (3d Cir. 2003).

168. *See Small*, 125 S. Ct. at 1759 (Thomas, J., dissenting); Brief for the United States at 3, *Small*, 125 S. Ct. (2005) (No. 03-750).

169. *See Small*, 125 S. Ct. at 1763 (Thomas, J., dissenting).

who have been convicted in "any court" from possessing firearms only applies to domestic convictions.[170]

Although the decision in *Small v. United States* settled a dispute among the circuits that had been ongoing for almost twenty years,[171] the majority opinion violated established maxims of statutory construction[172] and contravened the public policy purpose underlying § 922(g)(1).[173] Instead of reading the plain meaning of a statute as Congress had written it,[174] the majority made a baseless extension of the presumption against extraterritorial application of the law[175] and then proceeded to apply the novel "Canon of Canine Silence" by relying upon legislative *silence* to support its presupposition.[176] Moreover, allowing dangerous persons to possess handguns merely because they have been convicted abroad frustrates the purpose of § 922(g)(1) to prevent gun abuse in the United States.[177] Thus, the decision in *Small v. United States* is a dangerous one both for the treatment of dangerous persons in the United States and for the future of congressional power.[178]

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170. *See id.* at 1758.
171. *See supra* note 3 and accompanying text.
172. *See supra* text accompanying notes 111–14.
173. *See supra* text accompanying notes 129–32.
174. *See supra* text accompanying notes 108–10.
175. *See supra* text accompanying notes 111–14.
176. *See supra* text accompanying notes 124–27.
177. *See supra* text accompanying notes 130–33.
178. *See supra* text accompanying notes 129–39.

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