

STATUTORY MISINTERPRETATION: SMALL V. UNITED STATES DARKENS THE ALREADY MURKY WATERS OF STATUTORY INTERPRETATION

I. INTRODUCTION

In 1968 Congress passed The Gun Control Act in part to prevent firearms from getting into the hands of dangerous individuals.¹ Congress determined that a prior conviction for crimes punishable by imprisonment for more than one year was an indication that an individual was potentially dangerous.² Therefore, the Gun Control Act restricted the ownership, possession, and use of firearms by individuals with such prior convictions.³ The current version of this statute, 18 U.S.C. § 922(g)(1), provides that it is unlawful for an individual “who has been convicted in *any court* of a crime punishable by imprisonment for a term exceeding one year” to possess a firearm.⁴

In the case of *Small v. United States*,⁵ the Supreme Court granted certiorari to resolve a circuit split over the proper interpretation of § 922(g)(1).⁶ The circuits had split over whether the proper interpretation of the terms “convicted in any court” included convictions from foreign courts.⁷ The Third, Fourth, and Sixth Circuits all held that foreign

1. Omnibus Crime Control and Safe Streets Act of 1968 § 901, Pub. L. 90-351, 82 Stat. 197, 225 (codified as amended at 18 U.S.C. § 922 (2006)). Congress was careful to point out that the purpose of the law was not to restrict or place an undue burden on law abiding citizens on the acquisition, possession, or use of firearms for lawful purposes. § 901(b); *see infra* notes 27-38 and accompanying text (discussing of the history of the Gun Control Act); *infra* notes 155-163 and accompanying text (discussing the legislative purpose of the Gun Control Act); *see also* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999) (describing the Gun Control Act as “the legal core of national gun policy in the United States”).

2. *See infra* notes 155-163 and accompanying text (discussing the purpose of 18 U.S.C. § 922(g)(1)).

3. Omnibus Crime Control and Safe Streets Act § 922(e); *see infra* notes 27-38 and accompanying text (discussing the background of the Gun Control Act).

4. 18 U.S.C. § 922(g)(1) (2006) (emphasis added). *See infra* note 31 for the full text of this statute.

5. 544 U.S. 385 (2005).

6. *Id.* at 387.

7. *See United States v. Gayle*, 342 F.3d 89, 90 (2d. Cir. 2004) (holding 18 U.S.C. § 922 did not encompass foreign convictions); *United States v. Small*, 333 F.3d 425, 428 (3d Cir. 2003),

convictions could be used as a predicate offense under § 922(g)(1).⁸ The Second and Tenth Circuits both interpreted § 922(g)(1) to not allow foreign convictions to be used as a predicate offense.⁹

In *Small v. United States*, Gary Small had been convicted of possession of a firearm under § 922(g)(1) based on a prior conviction from a Japanese court for which he was sentenced to a five year prison term.¹⁰ Small argued that the term “any court” in § 922(g)(1) applied only to domestic convictions,¹¹ while the government argued that the proper interpretation allowed the use of foreign convictions.¹² While the government’s argument prevailed before the Third Circuit, a Supreme Court majority agreed with Small and followed the Second and Tenth Circuits, which interpreted the terms of § 922(g)(1) narrowly to include only domestic convictions.¹³

The Court’s decision in *Small v. United States* is notable, not only because of the dangerous loophole it has provided convicted felons,¹⁴ but also because it highlights the ongoing debate over the methods courts employ to interpret statutes.¹⁵ The majority opinion is an example of the corruption that can occur to the plain meaning of a statute when a court looks too far beyond the text of the statute.¹⁶ The result in this case is a tortured interpretation of the term “any court” and the creation of a new

rev’d, 544 U.S. 385 (2005) (holding § 922 could encompass foreign convictions); *United States v. Concha*, 233 F.3d 1249, 1250-51 (10th Cir. 2000) (holding § 922 did not encompass foreign judgments); *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989) (holding a foreign conviction could properly be used as a predicate offense); *United States v. Winson*, 793 F.2d 754, 757 (6th Cir. 1986) (holding the term “any court” applied to foreign convictions); *see also* *Bean v. United States*, 89 F. Supp. 2d 828, 837 (E.D. Tex. 2000), *aff’d*, 253 F.3d 234 (5th Cir. 2001), *rev’d*, 537 U.S. 71 (2002) (holding that foreign convictions do not automatically qualify as predicate offenses).

8. *See Small*, 333 F.3d at 428; *Atkins*, 872 F.2d at 96; *Winson*, 793 F.2d at 757.

9. *See Gayle*, 342 F.3d at 90; *Concha*, 233 F.3d at 1250-51.

10. 544 U.S. at 387.

11. *Id.*

12. *See id.* at 388.

13. *Id.* at 387; *see also infra* notes 104-111 and accompanying text (discussing the majority opinion in *Small*).

14. *See infra* notes 137 and accompanying text (discussing the dangers presented by the majority’s interpretation of 18 U.S.C. § 922(g)(1) (2006)).

15. *See infra* notes 123-130 and accompanying text (discussing the application of the plain meaning doctrine in *Small v. United States*); *infra* notes 131-140 and accompanying text (discussing the application of the canon against absurdities); *infra* notes 141-154 and accompanying text (discussing the use of legislative history in interpreting § 922(g)(1)); *infra* notes 155-163 and accompanying text (discussing of the legislative purpose of § 922(g)(1)); *infra* notes 164-195 and accompanying text (discussing the application of the presumption against extraterritorial application to *Small v. United States*).

16. *See infra* notes 119-195 and accompanying text (analyzing the majority’s misuse of various methods of statutory interpretation in construing § 922(g)(1)).

canon of construction by the majority.¹⁷ The majority derived this new canon of an “assumption about the reach of domestically oriented statutes” from the longstanding canon against extraterritorial application.¹⁸ This new canon imposes a clear statement restriction on Congress with regard to statutes which regulate activities within the borders of the United States, but may include foreign facts.¹⁹ The correct interpretation of § 922(g)(1), when properly applying methods of statutory interpretation, is that the words “convicted in any court” include convictions in “any court” — including foreign courts.²⁰

Part II of this Note will examine the background of this issue by exploring the history and purpose of the Gun Control Act of 1968 and the circuit split arising over the interpretation of the words “any court” under § 922(g)(1).²¹ Part III will focus on *Small v. United States* in detail, including the underlying facts, procedural history, and majority and dissenting opinions.²² Part IV will analyze this decision and argue that the majority misused canons of statutory interpretation to reach an interpretation that is contrary to the plain meaning of the statute.²³ The section will also discuss the majority’s “assumption about the reach of domestically oriented statutes” and explore the implications of this opinion on future legislation and cases.²⁴ Part V concludes that this case is part of a larger problem of courts relying too heavily on outside sources when interpreting a statute, which causes them to stray too far from the text of the statute.²⁵ It also concludes that to prevent continued misinterpretations of statutes a more consistent approach to statutory interpretation is needed with a stronger adherence to the plain meaning of the statute, less reliance on outside sources, and a disciplined application of canons of construction.²⁶

17. See *infra* notes 119-195 and accompanying text (discussing the majority and dissent’s interpretation of the words “any court”).

18. *Small*, 544 U.S. at 399 (Thomas, J., dissenting).

19. See *infra* notes 164-195 and accompanying text (discussing the majority’s application of the canon against extraterritorial application); *infra* notes 196-213 and accompanying text (exploring the potential implications of the *Small* decision).

20. See *infra* notes 123-195 and accompanying text.

21. See *infra* notes 27-70 and accompanying text.

22. See *infra* notes 71-118 and accompanying text.

23. See *infra* notes 123-163 and accompanying text.

24. See *infra* notes 164-195 and accompanying text.

25. See *infra* notes 215-222 and accompanying text.

26. See *infra* notes 215-222 and accompanying text.

II. BACKGROUND

A. *History of the Gun Control Act*

Congress passed the Gun Control Act of 1968 in response to concerns over an increase in gun violence in the United States.²⁷ The Act sought to prevent crime by restricting the availability of firearms to individuals deemed unfit to possess them because of age, criminal background, or incompetency.²⁸ Congress enacted the statute as a series of amendments to the Safe Streets Act,²⁹ and it was superseded in 1986 by the current version of the statute, 18 U.S.C. §§ 921 and 922.³⁰

The current version of § 922(g)(1) specifically prohibits firearm possession by individuals with certain criminal backgrounds.³¹ The provision makes it unlawful for a person “convicted in any court of a crime punishable by more than one year imprisonment” to possess a firearm.³² The proper interpretation of the scope of this provision caused a split among the United States Courts of Appeals.³³ The Circuit Courts disagreed on the proper interpretation of the term “convicted in any court” as used in 18 U.S.C. § 921(g)(1) and, more specifically, whether this language applied to individuals whose criminal backgrounds are

27. See *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (discussing Congress’s purpose behind passing the Gun Control Act of 1968 as a means of reducing “the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest” (quoting Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968) (repealed 1986))). Senator Thomas Dodd, a major proponent of the Gun Control Act, began studying firearm issues as Chairman of the Juvenile Justice Subcommittee of the Senate Judiciary Committee in 1961. Vizzard, *supra* note 1, at 80. However, the issue did not receive sufficient support from Congress or from the American public until the assassinations of Dr. Martin Luther King and United States Senator Robert Kennedy highlighted the need for greater regulation to reduce gun violence. *Id.* at 80-85; see *infra* notes 155-163 and accompanying text (discussing the purpose of the Gun Control Act of 1968).

28. *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 90-1501, at 22 (1968)); see also *supra* note 27 (discussing the historical reasons for the Gun Control Act).

29. See *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002, 1006 (D. Vt. 1971); Vizzard, *supra* note 1, at 83-85.

30. 18 U.S.C. §§ 921, 922 (2006).

31. 18 U.S.C. § 922(g)(1). This provision states:

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; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id.

32. 18 U.S.C. § 922(g)(1).

33. See *supra* note 7 and accompanying text (analyzing the circuit split over the use of foreign convictions as predicate offenses).

made up of convictions from foreign courts.³⁴

The Circuit Courts and the United States Supreme Court have employed various methods of statutory interpretation to discern the intent of Congress in passing § 921(g)(1).³⁵ Although there is a great deal in the way of legislative history for these statutes, the history does not specifically address whether Congress intended to include foreign convictions when it used the words “convicted in any court” in the statute.³⁶ In resolving the Circuit split, the Supreme Court in *Small v. United States* ultimately decided that the term referred only to domestic courts and precluded use of foreign convictions as a predicate offense under the statute.³⁷ In response to *Small*, the House and Senate have proposed amendments to § 922 which would include foreign convictions as predicate offenses.³⁸

34. *Small v. United States*, 544 U.S. 385, 387 (2005).

35. *See id.* at 388 (using various canons of interpretation and looking to the legislative history of § 922(g)(1)); *United States v. Gayle*, 342 F.3d 89, 90 (2003) (discussing the plain meaning doctrine and reliance on legislative history); *United States v. Small*, 333 F.3d 425, 428 (3d Cir. 2003), *rev'd*, 544 U.S. 385 (rejecting parties’ arguments as to the proper interpretation of “any court” and holding generally that foreign convictions can count as predicate offenses); *United States v. Concha*, 233 F.3d 1249, 1250-51 (10th Cir. 2000) (discussing the legislative history, related statutory provisions, and the rule of lenity); *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989) (discussing legislative history, similar statutory provisions, and the rule of lenity); *United States v. Winson*, 793 F.2d 754, 756-57 (6th Cir. 1986) (discussing legislative history and the rule of lenity).

36. *See* S. Rep. No. 90-1501, at 31 (1968) (defining predicate crimes as Federal crimes punishable by a term of imprisonment exceeding one year); H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., pp 28-29 (1968) (adopting language “convicted in any court of a crime punishable by a term of imprisonment exceeding one year”); *see also infra* notes 141-154 (analyzing the legislative history of § 922(g)(1)).

37. 544 U.S. at 394.

38. S. 954, 109th Cong. (2005); HR 1168, 110th Cong. (2007). The amendment proposed by S. 954, 109th Cong. (2005) would have included the following language:

Sec. 2 Prohibition of Firearms Sales to Person Convicted of a Felony in a Foreign Court.

Section 922 of title 18, United States Code, is amended . . .

(2) in subsection (g) by amending paragraph (1) to read as follows:

“(1) 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 anti-trust 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 one year had such conduct occurred within the United States;”.

Id. HR 1168, 110th Cong. (2007) would amend § 922(g)(1) “by striking ‘court of,’ and inserting ‘court, including any foreign court’”

B. Circuit Split

A brief overview of the Circuit split illustrates the various arguments made in the debate between various interpretations of § 922.

The first court that addressed the issue of whether a foreign conviction qualifies as a predicate offense under § 922(h)(1) was the Sixth Circuit in *United States v. Winson*.³⁹ In *Winson*, the defendant was indicted under § 922(h)(1) on the basis of two prior criminal convictions, one in Argentina for possessing counterfeit currency and one in Switzerland for fraud.⁴⁰ The district court dismissed the indictment, relying on the rule of lenity.⁴¹ The lower court also found persuasive a similar firearms statute, 18 U.S.C. § 1202, which applied by its explicit terms only to convictions “by a court of the United States or of a State or any political subdivision thereof . . .”⁴²

The Court of Appeals for the Sixth Circuit reversed the district court.⁴³ The court found the statute unambiguous.⁴⁴ In addition, the

39. 793 F.2d 754.

40. *Id.* at 756. Winson was indicted on four counts: two counts of unlawful receipt of a firearm in violation of § 922(h)(1) and two counts of knowingly making a false statement to a dealer in violation of § 922(a)(6). *Id.* at 755-56.

41. *Id.* at 756. The rule of lenity provides that ambiguity concerning a criminal statute should be resolved in favor of the defendant. *Rewis v. United States*, 401 U.S. 808, 812 (1971) (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)); *see also Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980) (describing the concept of lenity as a “settled rule”). Two policies support the rule of lenity: first that defendants be given fair warning of prohibited conduct under the statute; and second, because criminal punishment is the moral condemnation of the community, it should be the legislature that defines conduct that deserves such condemnation, not the courts. *United States v. Bass*, 404 U.S. 336, 348 (1971).

42. *Winson*, 793 F.2d at 756. 18 U.S.C. app. § 1202 provided in relevant part:

Any person who—(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

Winson, 793 F.2d at 756 n.3 (quoting § 1202 (repealed 1986)). This statute was reenacted into the Firearm Owner’s Protection Act of 1986, which was passed to consolidate several separate statutes precluding different individuals from possessing firearms. 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, 175-76 (2002); *see* Firearm Owner’s Protection Act of 1986, Pub. L. No. 98-473, 98 Stat. 2185 (1984). A portion of the repealed § 1202 is now codified under § 922(g), while the remaining portion is codified under § 924(e). Basler, *supra*, at 175-76. Both §§ 922 and 924 use the broader “convicted in any court” language as opposed to the more specific “convicted by a court of the United States or of a State” from § 1202. *Id.* The legislative history does not contain any reference as to why the less specific language was adopted. *Id.*

43. *Winson*, 793 F.2d at 759.

44. *Id.* at 757.

Sixth Circuit did not find persuasive the reasoning of the district court comparing § 922(g)(1) with § 1202.⁴⁵ The court was not persuaded by the potential due process implications of basing federal criminal punishment in part on foreign convictions.⁴⁶ Instead, the court found that the object of the statute was to keep firearms out of the hands of persons with serious criminal records,⁴⁷ and this included individuals convicted of serious crimes abroad.⁴⁸ The court also relied on the fact that Congress provided relief from the disability imposed under § 922(g)(1)⁴⁹ under circumstances where the applicant was not likely to be a danger to public safety and granting relief would not be contrary to public interest.⁵⁰

45. *Id.* The Sixth Circuit noted several Supreme Court decisions discussing the tension between §§ 922 and 1202. *Id.* See *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 (1983); *Lewis v. United States*, 445 U.S. 55, 63-64 (1980); *United States v. Batchelder*, 442 U.S. 114, 119-21 (1979). In *Winson*, the Sixth Circuit specifically noted that in *Batchelder* the Supreme Court ruled Congress's intent was to give the two titles independent application. *Winson*, 793 F.2d at 757.

46. *Winson*, 793 F.2d at 757. The Sixth Circuit found the convictions in Argentina and Switzerland did not violate the defendant's civil rights and were not contrary to American constitutional law. *Id.*

47. *Id.* at 758.

48. *Id.*

49. *Id.* The court felt that this remedy safeguarded individuals whose foreign convictions may have been "constitutionally infirm." *Id.*

50. See 18 U.S.C. § 925(c). The statute states in relevant part:

A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial.

18 U.S.C. § 925(c) (2006).

Congress had delegated authority to the Bureau of Alcohol, Tobacco, and Firearms (ATF) to investigate applications for relief from disability under § 925(c), but since 1992 the ATF's annual appropriation has prohibited the ATF from using any funds to investigate such applications. *United States v. Bean*, 537 U.S. 71, 73 (2002). *Bean* argued that the ATF's failure to act on his application constituted a denial under § 925(c), which would allow for judicial review. *Id.* at 75. The Court held that the procedure set forth under the statute required an actual decision by the ATF before allowing for judicial review and did not give the district court "independent jurisdiction to act on an application." *Id.* at 76. The result of this appropriations bar is to deny relief from disability to any applicant either through the ATF review or through judicial review. *Id.* at 74-75.

Interestingly, *Bean*, a gun dealer from Texas, was seeking relief from disability based on a felony conviction from a Mexican court. *Id.* at 72-73. The Fifth Circuit and the Supreme Court did not address the issue of whether his Mexican conviction could serve as a predicate offense under § 922(g)(1). See *Bean v. Bureau of Alcohol Tobacco and Firearms*, 253 F.3d 234 (5th Cir. 2001),

The Fourth Circuit was the next circuit to tackle the issue in *United States v. Atkins*.⁵¹ The court agreed with the Sixth Circuit's reasoning in *Winson* that the legislative history of § 922(g)(1) did not offer any additional insight into Congress's intended meaning of the term "in any court," nor did consideration of the legislative history reveal any ambiguity in the term not evident from the face of the statute.⁵² The Fourth Circuit considered the plain meaning of § 922(g)(1) and found that Atkins's conviction satisfied the requirements of the statute.⁵³ The court also reasoned that any attack of the statute based on ambiguity should be directed on the term "court," rather than "any" because the term "any" was unambiguous, "being all-inclusive in nature."⁵⁴ However, without specifying whether the term "court" was ambiguous or not, the court went on to find that Atkins' conviction in an English court could properly be used as a predicate crime under § 922(g)(1) due to the similar legal systems under which the United States and England operate.⁵⁵

In *United States v. Concha*, the Tenth Circuit split from the Sixth and the Fourth Circuits and ruled that foreign convictions cannot be used as predicate convictions under § 922(g)(1).⁵⁶ The court found sufficient

rev'd, 537 U.S. 71; and *Bean*, 537 U.S. 71. The district court held that foreign convictions could not be a "de facto rule" used as predicate offenses under § 922(g)(1) and used issues raised over the fairness of Bean's Mexican conviction as a basis for allowing judicial relief under § 925(c). 89 F. Supp. 2d 828, 837 (E.D. Tex 2000), *aff'd*, 253 F.3d 234, *rev'd*, 537 U.S. 71.

51. *United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989). Atkins was charged under § 922(g)(1) with a predicate felony conviction from England. *Id.* at 95. He argued that the English conviction should not be used because "Congress, dealing with affairs in this country, do [sic] not, unless they explicitly so state, mean a reference to 'any court' to extend to the court of a foreign jurisdiction." *Id.* In addition, he argued that the statute was ambiguous and, therefore, the rule of lenity should apply. *Id.* at 96.

52. *Id.* After discussing the stipulated facts, the brief opinion first discusses the legislative history and then moves on to discuss the language of the statute:

[T]he scant legislative history of 18 U.S.C. § 922, as well as that of a similar provision in 18 U.S.C. App. § 1202, and the cases and materials construing the two statutes offer no illumination as to Congress' intended meaning nor serve to inject any uncertainty into the subject language Thus, considering the plain meaning of the subject language, Atkins' conviction appears to satisfy the requirements of the statute.

Id.; see *infra* notes 141-154 (discussing the proper use of legislative history).

53. *Atkins*, 872 F.2d at 96.

54. *Id.*

55. *Id.* The court pointed out that England provided the origin of the jurisdictional system in the United States and both used systems of common law and statute. *Id.*

56. 233 F.3d 1249, 1250-51 (10th Cir. 2000). Concha was arrested in connection with a domestic dispute. *Id.* at 1251. While at the Taos New Mexico police station, he entered into an altercation with police officers in which he took an officer's loaded gun and attempted to shoot the officer. *Id.* Concha was charged with, among other crimes, being a felon in possession of a firearm under § 922(g)(1). *Id.* Concha did not challenge the validity of his conviction under § 922(g)(1), as

ambiguity in the statutory language as to whether Congress intended to include foreign convictions and, therefore, invoked the rule of lenity to preclude use of predicate foreign convictions.⁵⁷

The Tenth Circuit also looked to another statutory provision, § 921(a)(20), to inform the meaning of the term “any court” as used in § 922(g)(1).⁵⁸ The court reasoned that, by excluding certain federal and state crimes in § 921(a)(20) without similar mention of foreign crimes, § 921 and by analogy § 922 were only meant to cover domestic crimes.⁵⁹ The court was also concerned that foreign criminal defendants were not afforded the same constitutional protections as domestic criminal defendants.⁶⁰ However, the court thought this concern would be compelling only if the defendant had no way to attack the validity of the foreign conviction.⁶¹ Under Supreme Court precedent, however, such a collateral attack is still possible through a habeas petition.⁶² Nevertheless, the court felt that this protection was insufficient to infer that Congress intended to include foreign convictions under the statute.⁶³

he had a prior felony conviction from California. *Id.* Rather, he argued against the use of three foreign convictions from the United Kingdom which were used to enhance his sentence under the Armed Career Criminal Act. *Id.*; see 18 U.S.C. § 924(e)(1) (2006). Section 924(e)(1) provides that if a person “has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, he must be imprisoned for a minimum of fifteen years.” *Id.*

57. *Concha*, 233 F.3d at 1250-51. The court found that the “plain language of § 922(g)(1) gives no more guidance than does § 924(e)(1) as to what constitutes ‘convictions by any court.’” *Id.* at 1253.

58. *Id.* Section 921(a)(20) provides an exception for convictions of certain business and anti-trust violations and states in relevant part:

The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include-(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraint 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 two years or less.

18 U.S.C. § 921(a)(20) (2006).

59. *Concha*, 233 F.3d at 1253-54. The court also felt that including foreign convictions would result in more foreign convictions being covered than domestic convictions, due to the exclusion of domestic anti-trust convictions. *Id.* at 1254. In addition, the court also looked to the United States Sentencing Guidelines, § 2K2.1, which provides for a sentence enhancement for being a felon in possession of a firearm, and noted that the definitions provided in the Guidelines are limited to offenses under federal or state law. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see *Custis v. United States*, 511 U.S. 485, 497 (1994) (holding that § 924 itself does not authorize collateral attacks on predicate convictions, but leaving intact the possibility of challenging the predicate conviction through a separate habeas petition); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir. 1990) (holding a defendant may bring a habeas petition against a current sentence when it has been enhanced by a prior unconstitutional conviction).

63. *Concha*, 233 F.3d at 1255. The court pointed out that a habeas petition could not be filed

The court acknowledged that there were policy reasons which supported a finding that Congress may have intended the use of foreign convictions as predicate offenses, such as the fact that foreign criminals are likely to be as dangerous as domestic criminals.⁶⁴ However, the court found equally persuasive the policy arguments against such an interpretation and, as a result, applied the rule of lenity, holding that foreign convictions could not be used as predicate offenses.⁶⁵

In *United States v. Gayle*, the Second Circuit also refused to allow foreign convictions as predicate convictions under § 922(g)(1).⁶⁶ The court began by looking at what it described as the plain text of the statute as a whole, not just the phrase “any court” in isolation.⁶⁷ The Second Circuit agreed with the Tenth Circuit’s rationale in *Concha*, that the definitions provided in § 921(20) created an ambiguity as to whether § 922(g)(1) included foreign convictions.⁶⁸ Finding the statute ambiguous, the Second Circuit consulted the legislative history of § 922(g)(1) to uncover Congress’s intended meaning.⁶⁹ The court went further than other circuits in construing the statutory history of § 922(g)(1), holding that the history clearly showed that Congress did not intend foreign convictions to be used as predicate offenses.⁷⁰

until after a defendant began serving his sentence, which could result in a defendant spending time in prison before an appeals court could review the conviction. *Id.* In addition, a defendant would bear the burden of proving deficiencies in the foreign conviction. *Id.* Such a burden could be difficult to prove using records of foreign judicial proceedings. *Id.*

64. *Id.* at 1256.

65. *Id.*

66. *United States v. Gayle*, 342 F.3d 89, 90 (2003). Defendant Ingram was arrested on suspicion of illegally entering the United States from Canada. *Id.* After his arrest, large quantities of firearms and ammunition were found in his hotel room. *Id.* Ingram was charged with several crimes, including a violation of § 922(g)(1) with a Canadian conviction as the predicate offense. *Id.*

67. *Id.* at 92-93 (“The text’s plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.” (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003))).

68. *Id.* at 93.

69. *Id.* The court stated they were justified in looking to “authoritative legislative history” because § 922(g)(1) was “susceptible to divergent understandings.” *Id.* at 94. The court went on to describe the conference committee report as the “most enlightening source of legislative history” and “the most authoritative and reliable materials of legislative history.” *Id.* (quoting *Disabled in Action of Metro. New York v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000)); see *infra* notes 141-154 (discussing the authority and reliability of legislative history).

70. *Gayle*, 342 F.3d at 96. The Court cited the Senate Judiciary Committee Report on the Gun Control Act as “strongly suggest[ing] that Congress did not intend foreign convictions to serve as predicate offenses under the felony-in-possession statute.” *Id.* at 94 (citing S. Rep. No. 90-1501, at 3 (1968)). It relied on the Committee’s definition of the term felony, which was defined as a “Federal crime punishable by imprisonment of more than one year or a State law violation classified as a ‘felony.’” *Id.* (citing S. Rep. No. 90-1501). The Second Circuit saw this definition as clear evidence that the Senate only contemplated State or Federal convictions for purposes of the Gun

III. STATEMENT OF THE CASE

A. *Statement of Facts*

On June 2, 1998, Gary Sherwood Small purchased a gun from a Pennsylvania gun dealer and filled out the required ATF paperwork.⁷¹ In the paperwork, Small answered “no” to a question asking whether he had been convicted of a crime punishable by more than one year in prison.⁷² However, Small had in fact been convicted of crimes in Japan in 1994 for which he was sentenced to five years of imprisonment, followed by eighteen months of parole.⁷³ Small’s handgun, along with over 300 rounds of ammunition, was uncovered during a search of his apartment, which was conducted pursuant to a search warrant.⁷⁴

A federal grand jury subsequently indicted Small of violating 18 U.S.C. § 922(g)(1), using his conviction in Japan as the predicate offense.⁷⁵

B. *Procedural History*

In the district court for the Western District of Pennsylvania, Small

Control Act. *Id.* The court next looked to the House Conference Report, which contained § 922’s current language of “crime punishable by imprisonment for a term exceeding one year.” *Id.* at 94-95 (citing H.R. Rep. 90-1965, at 4, 8, 28-29 (1968)). Although the language differed, the court noted that the House Report did not explicitly disagree with the Senate Report limitation of felonies. *Id.* at 95. The court also pointed to a lack of discussion in the House and Senate reports of the concerns raised by using foreign convictions, discussion the court felt would in all likelihood have taken place had foreign convictions been considered. *Id.*

71. Petition for Writ of Certiorari at 2, *Small v. United States*, 544 U.S. 385 (2005) (No. 03-750), 2003 WL 22867724.

72. *Id.* The precise question to Small on this form was “[H]ave you ever been convicted in any court of a crime for which the judge could have imprisoned you for more than one year, even if the judge actually gave you a shorter sentence?” Brief for the United States at 4, *Small*, 544 U.S. 385 (No. 03-750), 2004 WL 1844488. Individuals are required to provide truthful background information before purchasing a firearm. See 18 U.S.C. § 922(s)(1)(A)(i)(I), (3)(B) (2006).

73. Brief for the United States, *supra* note 72, at 3. In December 1992, Small shipped via cargo plane a water heater from the United States to Osaka, Japan. *Id.* at 2. The shipment raised the suspicion of Customs officials as it was the third water heater Small had shipped to Japan that year, and the officials found it unusual that someone would “go out of his way to bring a water tank from the U.S.” *Id.* The shipment was x-rayed, and the officials discovered firearms packaged inside. *Id.* When Small arrived to pick up the shipment, he was served with a search warrant and the package was searched. *Id.* at 2-3. Custom officials found two rifles, eight pistols, and 410 ammunition shells. *Id.* at 3. He was subsequently indicted and convicted in a Japanese court on multiple violations of Japan’s Guns and Knives Control Law, the Explosives Control Law, and Customs Law. *Id.*

74. *Id.* at 4.

75. *Id.* at 3.

sought to have his indictment dismissed on the basis that 18 U.S.C. § 922(g)(1) banned only those persons convicted in domestic courts from possessing firearms.⁷⁶ The district court reviewed the decisions of the three prior Courts of Appeals that had addressed the issue⁷⁷ and followed the Fourth and Sixth Circuits which reasoned that a plain reading of the term “any court” in § 922(g)(1) included foreign convictions.⁷⁸ While Small also argued that his Japanese conviction was the result of a fundamentally unfair proceeding,⁷⁹ the district court rejected this contention, concluding that the conviction was consistent with concepts of fundamental fairness and the result of overwhelming evidence.⁸⁰ Small then entered a conditional guilty plea to violating 18 U.S.C. § 922(g)(1), pending the outcome of appeal, and was sentenced to eight months imprisonment followed by three years of supervised release.⁸¹

On appeal, the dispositive question for the Third Circuit was not whether the definition of “any court” in § 922(g)(1) included foreign courts, because the Third Circuit believed that foreign convictions could generally be used as predicate offenses under § 922(g)(1).⁸² Instead, the Third Circuit focused on whether, as a threshold matter, the district court properly recognized the Japanese conviction as being fundamentally fair

76. *United States v. Small*, 183 F. Supp. 2d 755, 757 (W.D. Pa. 2002), *aff'd*, 333 F.3d 425 (3d Cir. 2003), *rev'd*, 544 U.S. 385 (2005).

77. The Second Circuit did not decide *Gayle* until after both the district court and the Third Circuit ruled on *Small*. See *United States v. Gayle*, 342 F.3d 89, 89 (2d Cir. 2003); *United States v. Small*, 333 F.3d 425, *rev'd*, 544 U.S. 385.

78. *Small*, 183 F. Supp. 2d at 759-60 (“We agree with the findings of the Fourth and Sixth Circuit Courts of Appeals that the phrase ‘any court’ in Section 922 is not ambiguous and includes foreign courts. Accordingly the rule of lenity is not applicable.”). Compare *id.*, with *United States v. Concha*, 233 F.3d 1249, 1250-51 (10th Cir. 2000) (holding that § 922 is ambiguous and applying the rule of lenity to exclude foreign convictions). The rule of lenity is defined as “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.” BLACK’S LAW DICTIONARY 1069 (7th ed. 2000).

79. *Small*, 183 F. Supp. 2d at 757.

80. *Id.* at 770. “As the government accurately recites in its brief, the trial record indicates that the prosecution presented substantial evidence of Small’s guilt.” *Id.* at 769. “[W]e find based on our review of the trial record that Small’s Japanese conviction was sufficiently consistent with our concepts of fundamental fairness and that we may have confidence in the reliability of the fact-finding process which led to it.” *Id.* at 770.

81. *Small*, 333 F.3d at 426.

82. *Id.* at 427 n.2. The Third Circuit viewed the parties’s arguments over the definition of § 922’s “any court” as a “tempest in a teapot.” *Id.* The court went on to hold generally that foreign convictions could be counted as predicate offenses under § 922 for the reasons set forth in *United States v. Atkins*, 872 F.2d 94 (4th Cir. 1989), and *United States v. Winson*, 793 F.2d 754 (6th Cir. 1986). *Small*, 333 F.3d 427.

to be used as a predicate offense under § 922(g)(1).⁸³ The Third Circuit upheld the district court's decision that Small's conviction was fundamentally fair as required by the Due Process Clause⁸⁴ and, therefore, sufficient to satisfy the predicate offense requirement of § 922(g)(1).⁸⁵ The court also found that the district court did not abuse its discretion in refusing to hold an evidentiary hearing on the issue of the fundamental fairness of Small's foreign conviction.⁸⁶

Small petitioned for writ of certiorari to the United States Supreme Court on the issue of whether the term "convicted in any court" in § 922(g)(1) includes convictions in foreign courts.⁸⁷ As grounds for

83. *Small*, 333 F.3d at 427.

84. *Id.* at 428. The Due Process Clause provides in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

U.S. CONST. amend. V, § 1.

85. *Small*, 333 F.3d at 428. In finding fundamental fairness, the Third Circuit relied upon the framework found in the *Restatement (Third) of Foreign Relations Law of the United States* for determining when a court may not recognize a foreign conviction. *Id.* at 427. These guidelines include the following mandatory and permissive factors:

(1) A court in the United States may not recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
 (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
 (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
 (c) the judgment was obtained by fraud;
 (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition;
 or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987). *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 (2005) (criticizing the restatement approach due to the potential of inconsistent results).

86. *Small*, 333 F.3d at 428.

87. Petition for Writ of Certiorari, *supra* note 71, at 2; *see supra* notes 39-66 for a discussion

granting certiorari, Small pointed to the conflict among the Circuit Courts over the proper interpretation of the statute.⁸⁸ The United States supported the petition for writ of certiorari to resolve the conflict among the Circuit Courts and to provide uniform administration of federal firearms laws.⁸⁹ The United States Supreme Court granted certiorari on the issue.⁹⁰

C. Competing Arguments

Small argued that reading § 922(g)(1) to include foreign convictions is contrary to the plain text of the statute as a whole and would result in an “anomalous situation where fewer domestic crimes would be covered than would foreign crimes.”⁹¹ Small also argued that related statutory provisions support reading § 922(g)(1) as excluding foreign convictions.⁹² In addition, he argued that policy considerations indicate that Congress did not intend foreign convictions to be included as predicate convictions under the statute.⁹³ Further, Small argued that the statutory history confirmed “any court” meant Federal or State Court.⁹⁴ Small concluded that at the very least these considerations mandated that the rule of lenity apply to exclude foreign convictions.⁹⁵

The United States argued that the plain meaning of “any court” includes foreign courts based upon the use of an “all-encompassing and deliberately inclusive word.”⁹⁶ The United States also looked at related statutory provisions as supporting an interpretation that § 922(g)(1)

of the circuit split.

88. Petition for Writ of Certiorari, *supra* note 71, at 4.

89. Brief for the United States for Writ of Certiorari at 7, *Small v. United States*, 544 U.S. 385 (2005) (No. 03-750), 2004 WL 349912.

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

91. Brief for Petitioner at 15, *Small*, 544 U.S. 385 (No. 03-750), 2004 WL 1346664 (discussing 18 U.S.C. § 921(a)(20) which defines the term “crime punishable by imprisonment for a term exceeding one year” to exclude certain Federal and State anti-trust violations). This exclusion is silent as to foreign crimes. *Id.*; see 18 U.S.C. § 921(a)(20) (2006).

92. Brief for Petitioner, *supra* note 91, at 23. Small argued specifically that the “Lautenberg Amendment,” codified at § 922(g)(9), supports a reading of § 922(g)(1) as including only Federal and State convictions. *Id.* Section 922(g)(9) makes it a crime for any person “convicted in any court of a misdemeanor crime of domestic violence” to possess a firearm. *Id.* “Misdemeanor crime of domestic violence” is defined as “an offense that is a misdemeanor under Federal or State law” 18 U.S.C. § 921(a)(33)(A). Small argued that this definition makes it clear that the term “convicted in any court” means any court in the United States only for purposes of § 922. Brief for Petitioner, *supra* note, at 24.

93. Brief for Petitioner, *supra* note 91, at 26.

94. *Id.* at 31.

95. *Id.* at 41.

96. Brief for the United States, *supra* note 72, at 10.

included foreign convictions because in related sections Congress used more specific language where only Federal and State convictions were intended.⁹⁷

The United States also argued including foreign convictions was necessary to advance the purpose of § 922(g)(1) which was to keep firearms out of the hands of potentially dangerous persons.⁹⁸ Further, the United States argued that Congress intended to take into account the conduct of persons abroad, which is consistent with considering foreign convictions under the statute.⁹⁹

In addressing the potential inconsistencies that could arise under its proposed interpretation, the United States argued that the limited exclusion of certain Federal and State anti-trust crimes under the statute confirmed that the rest of the statute had a larger scope than just Federal

97. *Id.* at 12-13. The United States pointed to several statutes, including 18 U.S.C. § 921(a)(15), which defines a fugitive from justice as “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony;” 18 U.S.C. § 921(a)(20), which excludes certain “Federal or State offenses” under § 922(g)(1); 18 U.S.C. § 921(a)(33)(A) which defines a “misdemeanor crime of domestic violence” by referring to “State or Federal law;” and 18 U.S.C. § 924(e)(2), which defines a “serious drug offense” by reference to particular Federal law or State law. Brief for the United States, *supra* note 72, at 13.

98. Brief for the United States, *supra* note 72, at 15-16.

The prohibition of firearms possession by persons who have been convicted of serious crimes abroad directly advances Congress’s legislative effort to stem the “general availability [of firearms] to those whose possession thereof was contrary to the public interest” and to keep “these lethal weapons out of the hands of criminals . . . and other persons whose possession of them is too high a price in danger to us all to allow.”

Id. at 17 (quoting *Huddleston v. United States*, 415 U.S. 814, 824-25 (1974)) (alteration in original). *Id.* at 17. The United States also relied on *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983), which held that a criminal conviction for a felony, whether in a foreign or domestic court, is a reasonable indication that the person is too much of a risk to be allowed firearm privileges. Brief for the United States, *supra* note 72, at 17.

99. Brief for the United States, *supra* note 72, at 18-19. To support this contention, the United States pointed to § 922(g)(5) and (7) which prohibits illegal aliens, individuals in the United States on non-immigrant visas, and individuals who have renounced their United States citizenship from possessing, receiving, or transporting firearms. *Id.* at 18. The United States also highlighted repeated references to “foreign commerce” and “importer” within § 922. *Id.* at 19 n.10. In addition, the United States argued that Congress’s definition of terrorism under 18 U.S.C. § 921(a)(22) takes into consideration conduct of individuals abroad. *Id.* at 19. The statute provides:

[A]ctivity, directed against the United States, which—

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended-

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

18 U.S.C. § 921(a)(22).

and State convictions.¹⁰⁰ The United States also argued that more serious anomalies would result under a reading of the statute that excluded foreign convictions than would occur under a reading that included them.¹⁰¹

In addition, the United States argued that earlier versions of gun control legislation included language referring only to State and Federal convictions, indicating the amendments excluding this limitation intended to broaden the scope of the statute.¹⁰² The United States also argued that concern about the potential unfairness of procedures used in foreign courts was not a sufficient basis to foreclose the use of any foreign conviction.¹⁰³

D. United States Supreme Court Decision

1. Majority

The United States Supreme Court held in a five to three decision¹⁰⁴ that the phrase “convicted in any court” applied only to domestic and not foreign convictions.¹⁰⁵ The Court reasoned that the word “any” as used in § 922(g)(1) should not be given the broad scope for which the United States had argued.¹⁰⁶ In considering the scope of the phrase, the Court

100. Brief for the United States, *supra* note 72, at 22-23. “That Congress considered it necessary to restrict the exceptions to ‘Federal’ and ‘State’ offenses therefore confirms rather than undermines the conclusion that [§] 922(g)(1) starts with an even larger universe of convictions.” *Id.* at 23. In addition, at the same time § 922(g)(1) was enacted, Congress provided a mechanism whereby individuals could apply to the Attorney General for relief from the prohibition of possessing firearms. *Id.* at 24 n.16. However, since 1992, Congress has forbidden that any funds be expended to act upon such applications. *Id.* The United States argued that the fact that this provision was included is relevant to Congress’s intent in enacting § 922(g)(1) and the subsequent prohibition on funding is of no consequence to determining whether Congress intended to include foreign convictions. *Id.*; see *supra* note 50 (discussing the status of the waiver of disability under § 922(g)(1)).

101. Brief for the United States, *supra* note 72, at 26 (“If foreign convictions are entirely excluded, then those convicted of murder, rape, armed robbery, and terrorism overseas could freely possess, receive, ship and transport firearms within the United States, while a person convicted of domestically tampering with a vehicle identification number . . . could be barred for life from possessing firearms.”).

102. *Id.* at 29.

103. *Id.* at 36.

104. *Small v. United States*, 544 U.S. 385, 386 (2005). Justice Breyer delivered the opinion of the Court in which Justices Stevens, O’Connor, Souter, and Ginsburg joined. *Id.* Justice Thomas filed a dissenting opinion in which Justices Scalia and Kennedy joined. *Id.* Chief Justice Rehnquist took no part in the decision. *Id.*

105. *Id.* at 387.

106. *Id.* at 388.

pointed out that Congress ordinarily intends its statutes to have domestic rather than foreign application.¹⁰⁷

The Court was also concerned with the statute allowing as predicate offenses foreign convictions for conduct that domestic laws would permit or might punish less severely.¹⁰⁸ The Court further reasoned that it was inconsistent with the statutory text to read the language in a manner that required consideration of foreign convictions.¹⁰⁹ These concerns led the Court to assume Congress intended a domestic rather than foreign reach in the term “convicted in any court” unless the “statutory language, context, history, or purpose” indicated otherwise.¹¹⁰ The Court found no indication in these factors that Congress intended the phrase “convicted in any court” to include anything other than domestic convictions.¹¹¹

2. Dissent

The dissent reasoned that the plain language of § 922(g)(1) includes foreign convictions because the term “any” has an expansive meaning.¹¹² In addition, by contrasting § 922(g)(1) with other sections of the Gun

107. *Id.*

108. *Id.* at 389-90. The Court set forth examples such as Russian laws which criminalized “Private Entrepreneurial Activity,” Cuban laws which prohibit propaganda, and a Singapore law punishing acts of vandalism with three years in prison as illustrating the pitfalls of trying to identify dangerous persons through the use of foreign convictions. *Id.* at 389.

109. *Id.*

To somehow weed out inappropriate foreign convictions that meet the statutory definition is not consistent with the statute’s language; it is not easy for those not versed in foreign laws to accomplish; and it would leave those previously convicted in a foreign court (say of economic crimes) uncertain about their legal obligations.

Id. at 390.

110. *Id.* “[W]e should apply an ordinary assumption about the reach of domestically oriented statutes here - an assumption that helps us determine Congress’ intent where Congress did not likely consider the matter . . .” *Id.*

111. *Id.* at 391-92. The Court looked at the language of the statute and found no language suggesting anything other than a domestic intention. *Id.* at 391. The Court considered the anomalies that could result if the language was read to include foreign convictions such as a person convicted of domestic anti-trust or regulatory violation being allowed to possess a firearm, while someone convicted abroad of such a violation being prohibited from possessing a firearm. *Id.* The Court also considered the legislative history and found that Congress did not consider whether foreign convictions were within the scope of the statute. *Id.* at 390-91. The only indication that the Court felt supported a reading to include foreign convictions was the purpose of the statute, which is to keep guns out of the hands of those that may be a threat to society, and a foreign conviction may identify such an individual. *Id.* at 393-94. However, the Court felt that this argument was weak due to the small number of foreign convictions which have been used as a predicate offense. *Id.* at 394.

112. *Small*, 544 U.S. at 396 (Thomas, J., dissenting). Justice Thomas reasoned that the broad phrase “any court” was unambiguous. *Id.* at 397.

Control Act where State or Federal convictions were specified as predicate offenses, Justice Thomas reasoned that the context of § 922(g)(1) suggested no geographic limitation.¹¹³ Justice Thomas argued that including foreign convictions under § 922(g)(1) was a practical means to identify dangerous persons whom Congress intended to include within the scope of the statute.¹¹⁴ Moreover, Justice Thomas criticized the Court for creating a new canon of statutory interpretation in its assumption that, absent a clear statement from Congress, a statute refers only to domestic matters.¹¹⁵

The dissent had little concern for the potential anomalies pointed to by the majority, but was concerned with the more dangerous anomalies that could result from the majority's interpretation of § 922(g)(1), such as the fact that those convicted overseas of violent crimes such as murder, rape, and assault would be permitted to possess a firearm in the United States.¹¹⁶ Justice Thomas also disagreed with the Court's determination that the legislative history was silent.¹¹⁷ Noting that earlier versions of the bill specified as predicate felonies only State and Federal convictions, but that this language was subsequently changed in the final statute to refer to "conviction in any court," Justice Thomas argued that the changes indicated an intent of Congress not to limit the scope of the statute to only domestic convictions.¹¹⁸

IV. ANALYSIS

The majority in *Small* ignored the plain meaning of the terms of

113. *Id.*

114. *Id.* at 398.

115. *Id.* at 399. Justice Thomas recognized the longstanding canon against extraterritorial application of federal statutes, but reasoned that it did not apply in this case because in including foreign convictions under § 922(g)(1) "the Government is enforcing a domestic criminal statute to punish domestic criminal conduct." *Id.* Justice Thomas criticized the use of the cases cited by the Court as lending no support to "its new assumption" because the cases dealt with the application of federal statutes outside the territorial jurisdiction of the United States. *Id.* at 399-400.

116. *Id.* at 405. The dissent called the examples compiled by the Court "a parade of horrors" and "egregious examples unlikely to correlate with dangerousness." *Id.* at 402.

117. *Id.* at 406. Justice Thomas has often criticized the use of legislative history in interpreting statutes, and this case was no exception. See *infra* notes 141-154 for a discussion of the application of statutory history of § 922(g)(1). Before addressing the majority's specific arguments based on the legislative history, Justice Thomas took the opportunity to point out that the "task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider this particular case," but the eminently more manageable one of following the ordinary meaning of the text enacted." *Small*, 544 U.S. at 406 (Thomas, J., dissenting) (quoting *Beecham v. United States*, 511 U.S. 368, 374 (1994)) (alterations omitted).

118. *Id.* at 401 ("The elimination of the limiting reference suggests that not *only* federal and state convictions were meant to be covered.").

§ 922(g)(1), misused canons of construction,¹¹⁹ and used less reliable sources in interpreting this statute.¹²⁰ In addition, the Court imposed a burden on Congress to make a clear statement of any intent to use the conduct of individuals while outside the United States in regulating activities within the borders of the United States.¹²¹ The correct interpretation of § 922(g)(1), consistent with Congressional intent, is that the words “convicted in any court” include convictions in foreign courts.¹²²

A. Plain Meaning Doctrine

The Court held that the broad language of the statute only applied to domestic convictions.¹²³ More legitimate, however, was the dissent’s argument that the phrase “convicted in any court” should be given its natural, expansive meaning.¹²⁴ The plain meaning doctrine, as enunciated and followed by countless Supreme Court decisions, dictates that if the meaning of the statute can be gleaned from the language of the

119. Canons of construction are defined as “rule[s] used in construing legal instruments, esp. contracts and statutes Although a few states have codified the canons of construction . . . most jurisdictions treat the canons as mere customs not having the force of law.” BLACK’S LAW DICTIONARY, 163 (7th ed. 2000).

120. See *Small*, 544 U.S. at 393-94; see also, Lee G. Lester, Note, *Small v. United States: Defining “Any” as a Subset of “Any,”* 40 U. RICH. L. REV. 631, 650 (2006) (criticizing the majority’s rationale as dangerous to the future of Congressional power); *infra* notes 123-195 and accompanying text.

121. *Small*, 544 U.S. at 399 (Thomas, J., dissenting); see *infra* notes 164-203 and accompanying text (discussing the use of the canon against extraterritorial application and the implications of the majority’s interpretation).

122. See *infra* notes 123-195 and accompanying text; see also Anthony L. Engel, Note, *Questionable Uses of Canons of Statutory Interpretation: Why the Supreme Court Erred When it Decided “Any” Only Means “Some,”* 96 J. CRIM. L. & CRIMINOLOGY 877, 877 (2006) (criticizing the Court’s decision as wrongly decided and a departure from the plain meaning of the statute); Anwar K. Malik, Note, *Implications of the Small v. United States Decision*, 94 KY. L.J. 715, 716 (2006) (arguing that § 922(g)(1) should include foreign convictions as predicate offenses). But see Jonathan D. Estreich, Note, *“If We Took Congress Seriously, We Would be Worrying All the Time”: Foreign Convictions as Predicate Offenses Under the “Any Court” Language of 18 U.S.C. § 922(g)*, 33 AM. J. CRIM. L. 73, 74 (2006) (concluding that the Supreme Court correctly decided *Small*, despite a reliance on a flawed analysis of the legislative history).

123. *Small*, 544 U.S. at 394 (majority). The majority relied on various theories to limit § 922. See *supra* notes 104-111 and accompanying text for a discussion of the majority opinion; see also Estaver, *supra* note 85, at 218 (supporting an interpretation that would limit the scope of the statute to only domestic convictions). But see Lester, *supra* note 120, at 646-48 (criticizing the majority opinion in *Small* for excluding foreign convictions).

124. *Small*, 544 U.S. at 396 (Thomas, J., dissenting); see also Lester, *supra* note 120, at 645 (arguing that the dissent in *Small* correctly interpreted § 922(g)(1) to include foreign convictions); Malik, *supra* note 122, at 721 (arguing that § 922(g)(1) is unambiguous and should be given its literal meaning, which would include foreign convictions).

statute itself the court should enforce it according to its plain terms.¹²⁵ However, this doctrine has at least two exceptions. First, it allows a court to look to other materials when application of the plain meaning of the statute in a given case would lead to absurd results.¹²⁶ Second, it gives way if application of the plain meaning of the statute would be inconsistent with the legislative intent or purpose of the statute.¹²⁷

125. *E.g.*, *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (rejecting an argument that the conduct for which the defendants had been convicted, although covered by the literal terms of the statute, should be interpreted against the history and purposes of the statute). The Court pointed out in *Caminetti* that there is no duty of interpretation if the language does not admit to more than one meaning. *Id.* The plain meaning rule is defined as precluding the use of extrinsic evidence and limiting the inquiry to the writing itself if the writing appears unambiguous on its face. BLACK'S LAW DICTIONARY 938 (7th ed. 2000); *see also* *Tennessee Valley Auth. v. Hill*, 437 U.S.153, 194 (1978) (relying on the plain meaning of the Endangered Species Act and reinforcing that if the meaning of an act is clear and is within the constitutional power of Congress the judicial inquiry ends with the statute). *But see* *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (finding that the act of the corporation was within the conduct prohibited by the statute, but holding that although it was "within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."); *United Steel Workers of Am. v. Kaiser Aluminum & Chem. Corp.*, 443 U.S. 193, 201 (1979) (rejecting an argument based upon a literal interpretation of language contained in Title VII and quoting language from *Holy Trinity* to support using legislative history to interpret portions of the statute).

126. *See, e.g.*, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-11 (1989) (applying the "absurd result" canon to interpret the scope of Federal Rule of Evidence 609(a)(1) as applied to civil plaintiffs). The canon against absurdities applies as an exception to the plain meaning rule and allows the use of materials outside the language of a statute if applying the plain meaning would lead to absurd results. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 10 (1997). The authors define an absurd result as one that "would be so illogical or contrary to reason (statutory absurdity) that the application constructively could not reflect the will of the enacting legislature." *Id.* The authors contend that such a result would be rare. *Id.*; *see also* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.12 (6th ed. 2000) (describing the canon against absurdities as an allowable departure from the plain meaning of the statute when the literal interpretation would produce an absurd and unjust result or it is clearly inconsistent with the act's policy and purpose); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-49 (1992) (advocating the use of legislative history to interpret a statute when following the literal meaning would lead to an absurd result and pointing out that it is the least controversial circumstance under which a court can look to legislative history).

127. MIKVA & LANE, *supra* note 126, at 10-11. *Holy Trinity Church* is cited as the seminal case in using legislative history to determine Congressional intent when faced with an ambiguous statute. Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 901 (2000). In *Holy Trinity Church*, the Court was called upon to interpret a statute which prohibited the use of aliens to perform labor in the United States. *Holy Trinity Church*, 143 U.S. at 458. The question was whether the statute applied to an individual who had been a resident of England and moved to the United States after being hired as a pastor of Holy Trinity Church. *Id.* The Court found that the letter of the act covered the conduct in question, but concluded based on a review of the legislative history that Congress did not intend to cover such conduct in the scope of the statute. *Id.* at 472. The Court stated that "a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers." *Id.* at 459; *see* Chomsky, *supra*, at 901 (supporting the Court's

The majority misused both exceptions to the plain meaning doctrine in deciding *Small*.¹²⁸ The result is a tortured interpretation of the statute in which the majority strains to define the word “any” in a limited manner.¹²⁹ Had the majority properly used the plain meaning doctrine, there would have been no need for the court to look to less reliable sources, such as legislative history, to determine the meaning of the statute.¹³⁰

1. Canon Against Absurdities

The majority stopped short of saying that the plain language of the statute would lead to absurd results, but did give a lengthy analysis of what it described as “anomalies” that would result by applying the plain language of the statute.¹³¹ One such anomaly is that the plain language of the statute would exclude certain “Federal or State” antitrust and business regulatory crimes as predicate offenses, but would leave the

interpretation of the statute and arguing that it validates the practice of using legislative history to interpret statutes). *But see* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1837-39 (July, 1998) (arguing the legislative history at issue in *Holy Trinity* did not support the Court’s interpretation of the statute and proposing a rule that would bar judicial resort to legislative history); ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS 21 (1997) (“*Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent.”).

128. *See supra* notes 125-127; *see also* Engel, *supra* note 122 at 908 (criticizing the departure from the plain meaning of a statute “in a cases of mere anomaly,” such as *Small*, because it reduces both predictability in the legal system and public confidence in judicial decisions).

129. *See Small*, 544 U.S. at 38. In attempting to limit the definition of the word “any,” the majority reviewed several cases which limited the plain meaning of this word. *See, e.g.*, *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004) (“‘[A]ny’ can and does mean different things depending upon the setting.”); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (“any” must be considered within the rest of the statute); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (limiting the word “any” to only those objects to which the legislature intended the apply). Rather than support the majority’s narrow reading of the word “any,” these cases are more consistent with the plain reading set forth by the dissent in that the word “any” in § 922 is limited to the specific phrase “convicted in any court” and fits within the setting and statute as a whole. *Small*, 544 U.S. at 396 (Thomas, J., dissenting). Notwithstanding these limitations, “the word ‘any’ has an expansive meaning that is one or some indiscriminately of whatever kind.” *Id.* (quoting *United States v. Gonzalez*, 520 U.S. 1, 5 (1997)) (quotations omitted). The *Gonzalez* case cited by the dissent is more on point with *Small* in the interpretation of the word “any.” *Id.* Like the use of the word “any” in § 922(g)(1), the statute in question in *Gonzalez* contained no “language limiting the breadth of the word.” *See Gonzalez*, 520 U.S. at 5.

130. *See supra* note 125 and accompanying text (discussing the proper application of the plain meaning doctrine).

131. *Small*, 544 U.S. at 391 (majority).

same class of convictions from a foreign court within the scope of the statute.¹³² A similar inconsistency exists with convictions for domestic violence crimes—the statute forbids those convicted of such a crime under “Federal or State” law to possess a firearm, but leaves an individual convicted of such a crime in a foreign court free to possess a firearm.¹³³ Similar problems are faced with drug convictions, which allow for a sentence enhancement for certain Federal and State crimes.¹³⁴ In addition, the statute excludes misdemeanor convictions under state law with sentences of up to two years.¹³⁵

The dissent correctly pointed out that the majority could not invoke the canon against absurdities because the “anomalies” created by the plain reading of the statute “are, at most, odd” and in some cases “may even be rational.”¹³⁶ While conceding the plain meaning could in some

132. *Id.* The majority was referring to 18 U.S.C. § 921(a)(20)(A) which provides an exception under § 922(g)(1) for those convicted of “Federal or State” antitrust or business regulatory crimes. *Id.*; see 18 U.S.C. § 921(a)(20)(A) (2006). The majority pointed out that an individual convicted of an antitrust or business regulatory offense in New York would be legally permitted to possess a firearm, while an individual convicted of a similar offense in Canada would be prohibited under § 922(g)(1) from possessing a firearm. *Small*, 544 U.S. at 391.

133. *Id.* at 391-92. Section 922(g)(9) provides that a “misdemeanor crime of domestic violence” qualifies as a predicate offense. 18 U.S.C. § 922(g)(9). A “misdemeanor crime of domestic violence” is an offense under “Federal, State or Tribal law.” 18 U.S.C. § 921(a)(33)(A)(i). The majority opined that this created a “senseless distinction between (covered) domestic relations misdemeanors committed within the United States and (uncovered) domestic relations misdemeanors committed abroad.” *Small*, 544 U.S. at 392.

134. *Small*, 544 U.S. at 392. The majority was referring to 18 U.S.C. § 924(e)(1) which provides for a sentence enhancement under § 922(g)(1) if the individual has three or more predicate convictions for a “serious drug offense,” which is defined as an “offense under State law.” 18 U.S.C. § 924(e)(1) (2006); see also *supra* note 56 for a discussion of the application of § 924(e) in the *Concha* case.

135. *Small*, 544 U.S. at 392. The majority reasoned that this exception presumed those convicted of this class of misdemeanor crimes were less dangerous than those convicted of felonies. *Id.* The result of this exception would be to allow those convicted in the United States of such an offense to possess a firearm, while an individual convicted in a foreign court of such an offense would be prohibited from doing so. *Id.*; see 18 U.S.C. § 921(a)(20).

136. *Small*, 544 U.S. at 404. (Thomas, J., dissenting). Thomas referred to the majority’s application of the canon against absurdities as a “mutant version of a recognized canon.” *Id.* The dissent cited cases which illustrate the standard to be applied when invoking the canon against absurdities. *Id.* (citing *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring); *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring); *Sturges v. Crownshield*, 17 U.S. (4 Wheat.) 122, 203 (1819)). In *Public Citizen v. Department of Justice*, Justice Kennedy pointed out that the canon should be invoked where it is impossible that Congress intended the result and “where the alleged absurdity is so clear as to be obvious to most anyone.” *Public Citizen*, 491 U.S. at 471. In *Sturges v. Crownshield*, the Court stated:

[T]he plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying

situations bring about inconsistent results, the dissent argued that more dangerous anomalies would result from the majority's interpretation, such as an individual with a foreign conviction for murder being able to possess a firearm in the United States.¹³⁷ Such results strongly favor a plain reading of the statute rather than the narrow interpretation set forth by the majority.¹³⁸

Despite the fact that these "anomalies" were insufficient to invoke the canon against absurdities, the majority nevertheless used this as a basis to look past the plain meaning of the statute.¹³⁹ Abandoning this standard gives the judiciary the opportunity to ignore statutory language and look to less reliable sources to define the meaning of statutes.¹⁴⁰

2. Legislative History

In finding the plain meaning of the statute to be unclear, the majority looked to the legislative history of the statute to determine the Congressional intent regarding the inclusion of foreign convictions.¹⁴¹ The Court's analysis of the history of § 922(g)(1) reflects the limitations inherent in using legislative history to interpret statutes in order to

the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

17 U.S. (4 Wheat.) at 202-03.

137. *Small*, 544 U.S. at 405 (Thomas, J., dissenting). Justice Thomas pointed out that the majority's interpretation allowed "those convicted of overseas of murder, rape, assault, kidnapping, terrorism and other dangerous crimes to possess firearms freely in the United States . . . [m]eanwhile, a person convicted domestically of tampering with a vehicle identification number, 18 U.S.C. § 511(a)(1) (2006), is barred from possessing firearms." *Id.*

138. *See supra* note 136 and accompanying text; *see also* Robert A. Bracken, *Foreign Convictions are not Proper Predicate Offenses Under the Statutory Language "Convicted in Any Court"*: *Small v. United States*, 44 DUQ. L. REV. 383, 396 (2006) (criticizing the majority's argument that a plain reading of the statute produces anomalies and supporting the dissent's view that far more dangerous anomalies are created by the majority's narrow reading of the statute).

139. *Small*, 544 U.S. at 391-92.

140. *See infra* note 142 (discussing the limitation on the uses of legislative history).

141. *Small*, 544 U.S. at 393. Those that argue against using legislative history as a means of interpreting statutes are known as "textualists." Vermeule, *supra* note 127, at 1833. Those that are willing to consult legislative history in interpreting statutes are known as intentionalists or purposivists. *Id.* at 1834; *see also* John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 76 (2006) (distinguishing these two theories on the basis of how each theory emphasizes context, with textualists using semantic context and purposivists using policy context); J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 83 (2000) (dividing the various theories of statutory interpretation into four categories on the basis of each theory's reliance on non-textual sources). The four categories used by Kelso and Kelso are Formalism, Holumian, Natural Law, and Instrumental theories. *Id.* at 83. The authors identify Justice Thomas as following the Formalism approach which rejects the use of legislative history. *Id.* at 85-86. Justice Breyer, on the other hand, is classified as following the Natural Law Theory which looks to legislative history to determine Congressional intent. *Id.* at 88.

determine legislative intent.¹⁴²

142. There are several limitations to using legislative history over the text of a statute. One criticism is that legislative history is incomplete due to undocumented steps in the legislative process such as discussions in a political party caucus or conferences with a legislative leader. MIKVA & LANE, *supra* note 126, at 28. In addition, as the use of legislative history has become more prevalent in judicial decisions, the legislative record has become corrupted by statements which are planted in the legislative history with the sole purpose of influencing subsequent judicial interpretation. *Id.*; see also William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302-03 (1998) (addressing the problem of strategic use of legislative history and suggesting that a rule of total exclusion may be the only way to eliminate this practice). Another criticism centers on the role of compromise in passing legislation. MIKVA & LANE, *supra* note 126, at 33. The result of legislative compromise is that the intent of one legislator in passing a particular act is not necessarily the intent of another. *Id.* at 33. Eskridge also points out that the use of legislative history has caused inefficiencies for Congress and practitioners because legislators attempt to put as much information as possible in the legislative history, which results in practitioners having to spend time researching it. Eskridge, *supra*, at 1303. In addition to the limitations inherent in using legislative history, textualists also argue that consulting legislative history is unconstitutional because it violates bicameralism and presentment requirements to pass a statute. MIKVA & LANE, *supra* note 126, at 33; see also U.S. CONST. ART. I § 7. A second constitutional argument is that unelected individuals such as staff and lobbyists contribute to statutory history, and using this history as a source of interpreting law results in an unconstitutional delegation of legislative power. Breyer, *supra* note 126, at 862-63.

Justice Scalia has been a vocal critic over the use of legislative history because in his view the “objective indication of the words” of the statute passed by the legislature determines what the law is, not the legislative intent as inferred from legislative history. Scalia, *supra* note 127, at 29-31. As such, Scalia argues that legislative history should not be used as an authoritative source in determining the meaning of a statute. *Id.* at 29-30. Scalia offers several arguments to support his rejection of legislative history. See *id.* at 31-35. One argument is that the use of history has resulted in “a legal culture in which lawyers routinely . . . make no distinction between words in the text of the statute and words in its legislative history.” *Id.* at 31. He also believes that using legislative history is more likely to produce a “false or contrived legislative intent” rather than accurately portray the intent of the majority of the legislature that passed the law. *Id.* at 32. He argues that in most cases no legislative intent exists because Congress is concerned with the larger issues and not the detailed points that reach the courts for interpretation. *Id.* Scalia also points out that the information contained in floor debates and committee reports are not the views of a majority of Congress and in some instances are simply language which has been written by lawyer-lobbyists for insertion into the statutory history, which makes them an unacceptable source of reference. *Id.* at 32-34. In addition, Scalia contends that using committee reports to interpret a statute is improper because the Constitution vests legislative power in the House and Senate, not in committees. *Id.* at 35. He is also concerned with the ease in which a judge can use or dismiss a piece of legislative history due to a lack of rules governing the weight to be given to particular pieces of the history, which he argues allows a “willful judge” to manipulate the history to support their viewpoint. *Id.* at 36. In his view, the use of legislative history to determine legislative intent has resulted in judicial decisions based on a court’s policy preference rather than the law. *Id.* at 35.

Justice Breyer, on the other hand, supports the use of legislative history to interpret statutes. Breyer, *supra* note 126, at 847. Justice Breyer identifies five situations in which courts should consult legislative history when interpreting a statute. *Id.* at 860-61. These include: “(1) avoiding an absurd result; (2) preventing the law from turning on a drafting error; (3) understanding the meaning of specialized terms; (4) understanding the ‘reasonable purpose’ a provision might serve; and (5) choosing among several possible ‘reasonable purposes’ for language in a politically controversial law.” *Id.* at 860. In Justice Breyer’s opinion, “[t]he ‘problem’ of legislative history is its ‘abuse,’ not its ‘use.’” *Id.* at 874.

The Court stated that the history of § 922(g)(1) is silent as to whether foreign convictions were intended to be included in the scope of the statute and initially referred to this legislative silence as a “neutral factor” in their analysis.¹⁴³ However, the Court used this “neutral factor”

Concerns over the use of statutory history have been the subject of debate for many years. *See supra* note 127 and accompanying text (discussing *Holy Trinity Church*). Justice Robert H. Jackson raised concerns over his own use of legislative history in an address to the American Law Institute meeting on Federal Rules Decisions in 1948. Honorable Mr. Justice Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 124 (1948).

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes’ statement, made, however, before he joined the Supreme Court, that “We do not inquire what the legislature meant, we ask only what the statute means.”

And, after all, should a statute mean to a court what was in the minds but not put into words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?

Id.

143. *Small*, 544 U.S. at 393. The majority did reference a Senate bill which contained language that would have restricted predicate crimes to domestic offenses. *Id.* This bill was ultimately rejected by the Conference Committee, and the language “convicted in any court” was adopted in the final version. *Id.* The majority opined that this change did not reflect the intent of the drafters. *Id.* *But see* Scalia, *supra* note 127, at 32 (criticizing the use of committee reports in construing legislative history).

The use of legislative silence to infer intent has been referred to as the theory of the “dog that didn’t bark” and as the “Canon of Canine Silence.” *See* *Church of Scientology v. I.R.S.*, 484 U.S. 9, 17-18 (1987) (reasoning that if Congress intended to amend the purpose of a draft bill in a significant way there would have been reference to this change in the legislative history). The court opined that:

All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s “dog that didn’t bark,” that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor and not nearly as readily accepted by the floor manager of the bill.

Id. The Court was referencing a Sherlock Holmes tale in which Holmes is investigating the disappearance of a racehorse Silver Blaze. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX L. REV. 339, 387 n. 236 (2005) (citing ARTHUR CONAN DOYLE, *SILVER BLAZE, THE COMPLETE SHERLOCK HOLMES* 336, 346-47 (Doubleday 1930) (1894)). In his investigation, Holmes learns that the horse was being guarded by a dog at the time of the disappearance, yet the dog did not bark the night the horse went missing. *Id.* In other words, there was significance to the dog’s silence because he did not bark when one would assume he would have. *Id.*; *see also* SINGER, *supra* note 126, at § 45:12 (describing this canon of statutory interpretation as one in which courts should not presume that the legislature intended to “overthrow long-established principles of law” unless they clearly express their intention to do so). *But see* *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73-74 (2004) (Scalia, J. dissenting) (criticizing the majority’s use of the “Canon of Canine Silence,” which in his opinion allows courts to ignore the words of the statute on the basis of a lack of legislative history).

in a manner that was anything but neutral by relying on it to support the conclusion that the language “convicted in any court” applies only to domestic convictions.¹⁴⁴

The dissent criticized the majority’s reliance on the legislative silence¹⁴⁵ and countered that the history was not as silent as the majority contended.¹⁴⁶ The dissent pointed to the specification of particular “Federal or State offenses” and crimes of domestic violence as an indication that Congress limited certain predicate crimes by jurisdiction when it felt it was necessary.¹⁴⁷ Justice Thomas also pointed out that the

144. *Small*, 544 U.S. at 394; *see supra* note 143 and accompanying text (discussing the theory of the “dog that didn’t bark”).

145. *Small*, 544 U.S. at 406 (Thomas, J., dissenting). The dissent was critical of using even explicit statements in statutory history to aid in interpreting the statute and found the majority’s reliance on the silence of the statutory history to be even more troubling than using explicit statements. *Id.* Justice Thomas and Justice Scalia are known as strict textualists in interpreting statutes. *See supra* note 141 and accompanying text discussing the distinctions between textualists and intentionalists, or purposivists. Justice Scalia has argued vigorously against using legislative history to interpret statutes. *See* Michael H. Koby, *The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique*, 36 HARV. J. ON LEGIS. 369, 369 (arguing that Scalia’s criticism of the use of legislative history has been a factor in the decline in its use by the Supreme Court since his appointment in 1987). Koby’s article provides an example of Scalia’s criticism of legislative history contained in his concurring opinion in *Blanchard v. Bergeron*:

That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use legislative history has attained . . . [A]nyone familiar with modern-day drafting of a congressional committee report is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

Koby, *supra*, at 377-78 (quoting *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia, J., concurring)).

Likewise, Justice Thomas focuses on the text of a statute and rejects the use of legislative history unless the “text is so ambiguous that Congress likely had no intent regarding the matter.” Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365, 375 (1999-2000). However, Justice Thomas has been willing to consider legislative history in limited circumstances as opposed to Justice Scalia’s complete rejection of its use. *Id.*; *see also* Eskridge, *supra* note 142, at 1307 (pointing out that Justice Thomas “often but not always joined Scalia’s attacks on statutory legislative history.”).

146. *Small*, 544 U.S. at 406-07 (Thomas, J., dissenting). Note that the majority refers to the statute’s “lengthy legislative history,” while the dissent refers only to one piece of the history, part of which is reflected in the text of the statute, the other portion in a previous version of the bill. *Id.* at 406. In addition, this discussion is prefaced by Justice Thomas stating, “Reliance on explicit statements in the history . . . would be problematic enough.” *Id.*

147. *Id.*; *see* 18 U.S.C. § 921(a)(20) (2006) (exempting Federal or State anti-trust violations);

legislative history included a version of the bill that limited convictions to “Federal” and “State” convictions, yet the final bill adopted did not contain this limitation.¹⁴⁸

Although the legislative history did not contain an explicit statement regarding the inclusion or exclusion of foreign convictions, it is clear that a more expansive definition of “any court” was chosen over a definition limited to only Federal and State convictions.¹⁴⁹ The majority misused statutory history in its analysis by ignoring relevant history that sheds light on the intended meaning of the statute.¹⁵⁰

After ignoring relevant history, the Court further misused legislative history by inferring from this “silence” that Congress must not have intended the use of foreign convictions as predicate offenses.¹⁵¹ This assumption is flawed for two reasons. First, it assumes that every step in the creation of a law will be contained in the legislative history.¹⁵² Second, even statutory history that speaks explicitly to a particular issue is not necessarily a reliable indicator of Congressional intent,¹⁵³ making a silent history an even less reliable indicator of intent.¹⁵⁴

3. Legislative Purpose

The purpose of the Gun Control Act is to reduce violent crime by outlawing the possession of firearms by persons that Congress deemed

Id. § 921(a)(33)(A)(i) (defining certain misdemeanor crimes of domestic violence covered under the statute).

148. *Small*, 544 U.S. at 406-07 (Thomas, J., dissenting).

149. *Id.* Compare S. Rep. No. 1501, at 31 (1968) (defining predicate crimes as in terms of “Federal” or “State” convictions), with H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 28-29 (1968) (adopting language “convicted in any court of a crime punishable by a term of imprisonment exceeding one year). For a detailed analysis of the legislative history of the Gun Control Act see Estreich, *supra* note 122.

150. See *supra* notes 141-146 and accompanying text (discussing the application of legislative history in the *Small* case); see also Bracken *supra* note 138, at 397 (concluding that the legislative history supports the inclusion of foreign convictions).

151. *Small*, 544 U.S. at 394; see *supra* note 143 and accompanying text (discussing the use of legislative silence in interpreting statutes).

152. See *supra* note 142 and accompanying text (discussing the limitations of referring to legislative history).

153. See *supra* note 142 and accompanying text; see also Scalia, *supra* note 127, 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.”).

154. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting).

to be dangerous.¹⁵⁵ Congress used prior convictions for serious crimes as an indicator of whether a person was dangerous and should be prohibited from possessing a firearm.¹⁵⁶ The majority conceded that this purpose,¹⁵⁷ which was clearly set out in the original enactment of the Gun Control Act, did offer support for interpreting “any court” to include foreign convictions.¹⁵⁸ However, the majority chose to ignore this express piece of legislative history and instead used the less reliable and more speculative legislative silence to reach a conclusion contrary to the statute’s stated purpose.¹⁵⁹

Although the legislative history does not explicitly address foreign convictions,¹⁶⁰ not including foreign convictions as predicate offenses under the statute results in an application that is inconsistent with the statutory purpose.¹⁶¹ This interpretation allows an individual convicted of a dangerous crime abroad such as rape or murder to possess a firearm

155. Congress made the following findings and declarations in passing the Gun Control Act:

(a) The Congress hereby finds and declares—

(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States

Omnibus Crime Control and Safe Streets Act of 1968 § 901, Pub. L. 90-351, 82 Stat. 197, 225 (codified as amended at 18 U.S.C. § 922(2006)); *see also supra* notes 27-38 and accompanying text (discussing the history and background of the Gun Control Act).

Initially, there was some question as to whether simple possession of a firearm by a felon was prohibited under the statute. *See Vizzard, supra* note 1, at 88. The Supreme Court first held in *United States v. Bass* that in prosecuting such an offense the government had to show that the possession was “in commerce or affecting commerce.” 404 U.S. 336, 351 (1971). Later the Court held that the nexus between the possession and the element of “in or affecting commerce” was minimal, with prior movement in interstate commerce satisfying this requirement. *Scarborough v. United States*, 431 U.S. 563, 578 (1977).

156. *See supra* note 155 and accompanying text (discussing the findings and declarations in passing the Gun Control Act).

157. Note that courts may use “legislative intent” and “legislative purpose” interchangeably to refer to statutory meaning. *MIKVA & LANE, supra* note 126, at 8.

158. *Small v. United States*, 544 U.S. 385, 393 (2005) (“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.’” (quoting *Dickerson v. New Banner Inst., Inc.* 460 U.S. 103, 122 (1983))).

159. *Id.* at 394.

160. *See supra* notes 141-154 and accompanying text.

161. *See supra* note 155 and accompanying text (discussing the legislative purpose of the Gun Control Act).

in the United States, while an individual convicted of any felony domestically, regardless of whether it is a crime of violence, would be prohibited from possessing a firearm.¹⁶² Rather than addressing this inconsistency, the majority dismisses it on the grounds that foreign convictions have rarely been used as predicate offenses in felon-in-possession prosecutions.¹⁶³ The fact that foreign convictions are rarely used as predicate offenses does not support a finding inconsistent with the statutory purpose of § 922(g)(1).

B. Assumption of Domestically Oriented Statutes

1. The Reach of Domestic Statutes

While conceding that the presumption against the extraterritorial application of laws did not directly apply to the facts of this case,¹⁶⁴ the majority nonetheless invoked this canon by analogy to argue against the use of foreign convictions as predicate offenses under § 922(g)(1).¹⁶⁵

162. *Small*, 544 U.S. at 405 (Thomas, J., dissenting) (pointing out that the majority's interpretation allows those convicted of murder, rape, assault, kidnapping, and terrorism in other countries to possess firearms freely in this country); see also Bracken, *supra* note 138, at 398 (finding the purpose of the statute is unambiguously to keep guns out of the hands of dangerous individuals whether convicted domestically or abroad); Basler, *supra* note 42, at 182 (analyzing the circuit split and arguing that individuals with foreign convictions are equally as dangerous as those with domestic convictions); Lester, *supra* note 120, at 655 (arguing that not including foreign convictions under § 922 frustrates the purpose of the statute to prevent gun abuse); Dionna K. Taylor, Comment, *The Tempest in a Teapot: Foreign Convictions as Predicate Offenses Under the Federal Felon in Possession Statute [United States v. Gayle, 342 F.3d 89 (2d Cir. 2003)]*, 43 WASHBURN L.J. 763, 787 (2004) (concluding that the exclusion of foreign convictions as predicate offenses under § 922 would lead to absurd results). *But see* Estaver, *supra* note 85, at 232 (arguing that the purpose of the Gun Control Act only includes foreign convictions "[i]f read at its broadest level of abstraction").

163. *Small*, 544 U.S. at 394.

164. *Small*, 544 U.S. at 389.

165. *Id.* The canon against extraterritorial application is described as 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.'" William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85 (1998) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). In his article, Professor Dodge presents what the canon of extraterritorial application means using the views of three scholars - Justice Holmes, Judge Bork and Judge Mikva. *Id.* at 88-89. Under Justice Holmes' view, the presumption is "that acts of Congress apply only to conduct within the United States and not to conduct abroad even if that conduct causes effects in the United States." *Id.* at 89. Judge Bork's view is "that acts of Congress should apply only to conduct that has effects within the United States." *Id.* at 89-90. He describes Judge Mikva's view as one considering that "acts of Congress apply to conduct that occurs within or has effects within the United States." *Id.* at 90. Professor Dodge favors Judge Bork's view and argues that the only legitimate basis for the presumption against extraterritoriality is the presumption that Congress generally legislates with domestic concerns in mind. *Id.* at 90. Section

One indication of the majority's flawed reasoning is that the cases it relies upon in applying the presumption against extraterritorial application to § 922(g)(1) do not involve the use of foreign judgments in domestic courts, but instead deal with the application of domestic laws to regulate conduct *outside* the borders of the United States.¹⁶⁶ These cases illustrate the correct application of this presumption, which is to generally limit the application of laws to within the geographic borders of the United States.¹⁶⁷

The canon against extraterritorial application is not relevant where a statute seeks to regulate conduct domestically.¹⁶⁸ Applying this doctrine in *Small* is incorrect because § 922(g)(1) does not seek to regulate conduct outside of the United States.¹⁶⁹ Section 922(g)(1) and Gary Small's prosecution in particular are directed at conduct within the United States, specifically gun possession by dangerous individuals in this country.¹⁷⁰ Allowing the use of a foreign conviction as a predicate offense does not change the reach of the statute from domestic to

922(g)(1) does not fit under any of the three approaches to the use of the canon against extraterritorial application set forth by Professor Dodge because both the conduct and effects of the conduct at issue in *Small* occur within the territory of the United States. *Id.* 89-90. The majority correctly points out that the presumption would apply if the Court were to consider whether the statute applied to gun possession in a foreign country. *Small*, 125 U.S. at 389. Despite the presumption being inapplicable, the majority believed "a similar assumption" was appropriate in interpreting § 922(g)(1). *Id.*

166. *Small*, 544 U.S. at 389; see *Smith v. United States*, 507 U.S. 197, 203-04 (1993) (holding that the Federal Tort Claims Act did not apply to a tort claim arising from conduct in Antarctica in part based the presumption against extraterritorial application); *Arabian Am. Oil Co.*, 499 U.S. 244, 250-51 (1991) (holding that Title VII did not apply to a United States citizen working outside of the United States); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (holding that the Eight Hour Law did not apply to work in foreign countries).

167. *Small*, 544 U.S. at 399 (Thomas, J., dissenting). In each of the cases cited by the majority to support its use of the presumption against extraterritorial application, the conduct being regulated by the statutes in question occurred outside the territorial boundaries of the United States. See *supra* note 166 (setting forth the holdings for the cases cited by the majority). In *Smith*, the plaintiff sought to have the Federal Torts Claims Act apply to a negligence claim against the United States for the death of her husband while he was employed by a construction company in Antarctica. 507 U.S. at 199. In *Foley*, the Plaintiff sought to have the Federal Eight Hour law apply to work that he performed for his employer in Iraq and Iran. 336 U.S. at 283. In *Arabian American Oil Co.*, the Plaintiff brought suit under Title VII against his employer, an American company, for discrimination which he claimed occurred while working in Saudi Arabia. 499 U.S. at 247. As these cases illustrate, the precedent for applying the presumption against extraterritorial application is where the conduct or effect of the conduct is outside the territorial boundaries of the United States. As Justice Thomas pointed out in his dissent, the use of this presumption for a statute that applies to domestic conduct is unprecedented. *Small*, 544 U.S. at 399 (Thomas, J., dissenting).

168. See *supra* notes 165-167 and accompanying text.

169. See 18 U.S.C. § 922(g)(1) (2006); see also Engel, *supra* note 122, at 905 (arguing the majority's use of the canon against extraterritorial application is inconsistent with precedent).

170. See *Small*, 544 U.S. at 400 (Thomas, J., dissenting); 18 U.S.C. § 922(g)(1).

foreign.¹⁷¹

In an attempt to cure this defect in rationale, the majority turned their argument to the difference between convictions obtained in domestic and foreign courts.¹⁷² While there are legitimate concerns with using a foreign conviction as a predicate offense,¹⁷³ these concerns do not change the fact that § 922(g)(1) is a domestic statute that is being applied domestically.¹⁷⁴ As such, the canon of construction against extraterritorial application has no use in this case.¹⁷⁵

In a further attempt to justify the use of the canon against extraterritorial application, the majority forms a new canon out of the “ordinary assumption about the reach of domestically oriented statutes.”¹⁷⁶ This assumption in the past has been used to justify the use

171. See *supra* notes 165-167 and accompanying text.

172. *Small*, 544 U.S. at 389-90

173. See *infra* notes 179-195 and accompanying text (discussing the application of § 922(g)(1) to foreign convictions). The district courts also explored the potential problems in using a conviction from a court which may not have the same due process requirements and evidentiary standards. See *United States v. Gayle*, 342 F.3d 89, 95 (2003) (questioning whether Congress intended to include foreign convictions in the absence of any discussion of whether to include convictions of courts not meeting what would be considered the minimum standards of justice in the United States); *United States v. Concha*, 233 F.3d 1249, 1254 (10th Cir. 2000) (citing concerns over the potential lack of constitutional protections in foreign convictions as reason to exclude them as predicate offenses under the statute). *But see* *United States v. Atkins*, 872 F.2d 94, 95 (4th Cir. 1989) (concluding that a predicate conviction from England was proper under the statute because of the similarities between the justice systems of England and the United States); *United States v. Winson*, 793 F.2d 754, 757-58 (6th Cir. 1986) (holding that there was no showing that convictions obtained in Argentina and Switzerland violated the defendant’s constitutional rights).

174. See *supra* notes 165-167 and accompanying text (discussing the proper use of the canon against extraterritorial application).

175. See *supra* notes 165-167 and accompanying text.

176. *Small*, 544 U.S. at 399 (Thomas, J., dissenting) (describing the “ordinary assumption about the reach of domestically oriented statutes” as an invention of the majority derived from the longstanding principle against extraterritorial application (quoting *Small*, 544 U.S. at 390 (majority))); see also *Malik*, *supra* note 122, at 728 (pointing out that the new canon may affect the interpretation of other statutes which contain “convicted in any court” language). *But see* *Bracken* *supra* note 138, at 396 (supporting the creation of this new canon for providing notice to Congress to legislate with more specificity).

See also *Dodge*, *supra* note 165, at 90. Professor Dodge presents six reasons given to support the application against extraterritoriality. *Id.* He lists the five justifications given by Professor Bradley, which include:

- (1) international law limitations on extraterritoriality, which Congress should be assumed to have observed;
- (2) consistency with domestic conflict-of-laws rules;
- (3) the need “to protect against unintended clashes between our laws and those of other nations which could result in international discord;”
- (4) “the commonsense notion that Congress generally legislates with domestic concerns in mind” and
- (5) separation-of-powers concerns—i.e. “that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary.”

of the canon against extraterritorial application, but has not itself been used as a canon of construction.¹⁷⁷ In essence, the majority creates a new canon and seeks to legitimize this creation by using justifications from a long held canon of construction which has no application to the facts of this case.¹⁷⁸

2. Application of § 922(g)(1) to Foreign Convictions

The majority raised several concerns over the use of foreign convictions as predicate offenses.¹⁷⁹ One issue was the use of a foreign conviction where that conviction was for conduct prohibited in the foreign country, but legal in the United States.¹⁸⁰ The majority was also concerned about the procedures under which foreign convictions might be obtained and whether those procedures would be consistent with American standards of due process and fundamental fairness.¹⁸¹

Id. (footnotes omitted). He also looked at a sixth justification given by Professor Eskridge, which is “that it provides legislators with a clear background rule which allows them to predict the application of their statutes.” *Id.*

177. See *supra* note 176 and accompanying text.

178. See *supra* notes 164-177 and accompanying text.

179. *Small*, 544 U.S. at 390. *But see* Basler, *supra* note 42, at 180 (arguing that concerns over an unconstitutional conviction being used as a predicate offense “should not be a matter of controversy” because the writ of habeas corpus could effectively deal with such a claim).

180. *Small*, 544 U.S. at 391.

181. *Id.* at 389. The Supreme Court did not specifically address the fundamental fairness of Small’s Japanese conviction. However, the issue was addressed by the district court and the Third Circuit, with both courts finding that the Japanese conviction met United States standards of fundamental fairness. *United States v. Small*, 333 F.3d 425, 428 (3d Cir. 2003), *rev’d*, 544 U.S. 385 (2005). However, Small did point to many procedural issues present in his Japanese conviction that would be contrary to procedural protections he would have received in an American court. *United States v. Small*, 183 F. Supp. 2d 755, 765-66 (W.D. Pa. 2002), *aff’d*, 333 F.3d 425, *rev’d*, 544 U.S. 385. For example, he was denied bail, interrogated for 25 days, denied the right to a jury trial, denied the right to effective counsel at stages in his proceedings, denied the right to an appeal, and was denied the right to remain silent. *Id.* at 766. However, relying on the transcript from the Japanese trial and the similarities between the rights protected under both the Japanese Constitution and United States Constitution, the district court found that the defects Small complained of did not render the conviction fundamentally unfair. *Id.* at 765-70. The Third Circuit applied the standards set forth in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW to find that Small’s Japanese conviction comported with United States standards of fundamental fairness. *Small*, 333 F.3d at 428; see also *supra* note 85 (setting forth the Restatement approach to determining the fundamental fairness of a foreign conviction); Estreich, *supra* note 122, at 87-88 (arguing the use of foreign convictions as predicate offenses is “constitutionally suspect”). *But see* Taylor, *supra* note 162, at 789 (recognizing potential due process concerns in using foreign convictions, but arguing that the issues could be adequately addressed at the trial level by determining whether a foreign conviction meets constitutional standards); Engel, *supra* note 122, at 897-98 (stating that the trial court could make a determination as to the fairness of the underlying foreign conviction).

There are significant procedural differences between the United States and Japanese legal systems. See David T. Johnson, *American Law in Japanese Perspective*, 28 LAW & SOC. INQUIRY

Furthermore, differences in criminal sentences in foreign countries also presented a problem as some conduct may be punished more harshly under a foreign legal system, which would make the standard of “crime punishable by imprisonment for a term exceeding one year” a less reliable indicator of the dangerousness of an individual.¹⁸²

While potentially important, the concerns raised by the majority over differences between foreign and domestic convictions do not justify limiting § 922(g)(1) to only domestic convictions.¹⁸³ The result of this limitation is to allow dangerous individuals to possess firearms, which is contrary to the intent and purpose of the Gun Control Act.¹⁸⁴ Rather than completely eliminating foreign convictions as predicate offenses, the majority could have addressed its concerns by limiting the use of foreign convictions under § 922(g)(1) to only those convictions that are consistent with laws of the United States and comply with American

771, 779 (2003) (discussing the prohibition on plea bargaining in criminal cases under Japanese law and the use of coercive means to obtain confessions such as prolonged interrogations without counsel and the denial of bail for the majority of defendants that do not confess); *see also* Crane Stephen Landis, Comment, *Human Rights Violations in Japan: A Contemporary Survey*, 5 J. INT'L L. & PRAC. 53, 56-59 (2006) (examining the Japanese legal system in light of international human rights laws and pointing out the practices under this system of coerced confessions, incidents of police brutality and limited access to counsel); David A. Suess, Note, *Paternalism Versus Pugnacity: The Right to Counsel In Japan and the United States*, 72 IND. L.J. 291, 291 (1996) (comparing the right to counsel under both the Japanese and American legal system and arguing that despite sharing similar constitutions, the two systems interpret them in different ways). *But see* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 317-19 (1992) (describing the Japanese legal system as highly efficient, giving lenient criminal sentences, and with a strong focus on rehabilitation and reintegration of suspects). In addition, the United States criminal justice system is not without its critics. *See* David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 455-57 (2001) (describing the United States as “leader of the ‘free world’ and of the incarcerated world,” and arguing that the criminal justice system discriminates against minorities); Terry D. Johnson, Note, *Unbridled Discretion and Color Consciousness: Violating International Human Rights in the United States Criminal Justice System*, 56 RUTGERS L. REV. 231, 233 (2004) (arguing that discrimination against blacks in the United States criminal justice system violates the International Convention on the Elimination of all Forms of Racial Discrimination). A comparison of these two systems of law illustrates the difficulties in reconciling convictions under two different complex legal systems and the need for a standard which will apply United States standards of due process.

182. *Small*, 544 U.S. at 390. *But see* Alex Glashauser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 156-57 (1994) (arguing that the fact that an individual commits crimes in two countries is a strong indication of individual fault on the part of the offender, rather than the environment).

183. *See supra* note 173 and accompanying text (discussing how the various circuit courts addressed the due process concerns of using foreign convictions); *supra* note 181 and accompanying text (discussing the procedural difficulties in determining whether a foreign conviction meets the standards of fundamental fairness).

184. *See supra* notes 137 and accompanying text (discussing the dangers posed by the majority’s interpretation).

standards of due process and fundamental fairness.¹⁸⁵

The Restatement standard used by the Third Circuit¹⁸⁶ would provide such a framework because it requires a judgment to be rendered under a system that provides “impartial tribunals or procedures compatible with due process of law.”¹⁸⁷ In addition, it provides the court with several discretionary factors which would provide additional protection to defendants, while preventing the potential unjust results pointed out by the majority.¹⁸⁸ This limitation would lessen the concerns over the use of foreign convictions and provide workable guidelines to courts.¹⁸⁹ It would also prevent the dangerous result that occurs under the majority’s application, which allows clearly dangerous individuals the opportunity to possess a firearm.¹⁹⁰

The Supreme Court has previously shown disfavor for allowing a defendant to collaterally attack predicate convictions under other provisions of the Gun Control Act.¹⁹¹ The Court has pointed to a need to promote finality in judgments and to the administrative difficulties of reviewing predicate offenses at the trial level.¹⁹² However, these

185. See Taylor, *supra* note 162, at 789 (advocating a case by case approach in which the validity of a foreign conviction as a predicate offense would be determined at the trial level); Engel, *supra* note 122, at 897-98 (arguing that the Court’s fairness concerns were overstated and could be addressed by a trial court determination of whether a foreign conviction meets American standards of legality). *But see* Estaver, *supra* note 85, at 242 (arguing that a case by case approach would lead to inconsistent rulings as to when a foreign conviction would be recognized by a court as a predicate offense); Glashausser *supra* note 182, at 161-62 (arguing for the use of a “reliability of conviction” standard rather than the fundamental fairness standard).

186. See *supra* notes 83-86 and accompanying text (discussing the Third Circuit’s application of the Restatement standards to Small’s Japanese conviction).

187. See Taylor, *supra* note 162, at 793 (supporting the Restatement approach to determine the constitutionality of foreign predicate convictions). *But see* Estaver, *supra* note 85, at 242 (criticizing the Restatement approach because of the likelihood that it will yield inconsistent recognition of foreign predicate convictions).

188. See *supra* notes 83-85 and accompanying text; see also *United States v. Small*, 333 F.3d 425, 428 (3d Cir. 2003), *rev’d*, 544 U.S. 385 (2005).

189. See *supra* notes 173-188 and accompanying text. *But see* Estreich, *supra* note 122, at 89 (arguing the Restatement approach is “not feasible because trial courts are neither willing nor able to research the particular facts of the conviction, survey a foreign system of justice and calculate the fairness of a foreign system”).

190. See *supra* notes 173-188 and accompanying text.

191. *Custis v. United States*, 511 U.S. 485, 497 (holding that defendants cannot use the federal sentencing forum to attack the validity of predicate offenses used to enhance a sentence under § 924(e) of the Gun Control Act). Section 924(e) provides for enhanced sentences for convictions under § 922(g)(1) where the defendant has three or more prior convictions for violent felony or serious drug offenses. *Id.* at 490; see also Glashausser, *supra* note 182, at 137 (arguing that foreign convictions should be used as predicate offenses for sentence enhancements under recidivist statutes).

192. *Custis*, 511 U.S. at 496-97.

policies do not support a similar ban on attacking the validity of predicate foreign convictions.¹⁹³ Reviewing a foreign conviction does not “undermine confidence in the integrity of our procedures,” nor does it “delay and impair the orderly administration of justice” as occurs in the review of domestic convictions.¹⁹⁴ In addition, the need to review the validity of foreign convictions as predicate offenses would be a relatively infrequent occurrence, which reduces the concern over administrative difficulties.¹⁹⁵

C. Looking Forward

1. Impact on Legislation

In response to the *Small* decision, the House and Senate have proposed amendments to modify the language of § 922(g)(1) to explicitly include foreign convictions.¹⁹⁶ If such an amendment was passed it would correct the misinterpretation of this statute by the Court.¹⁹⁷ However, it is unclear at this time whether any proposed amendment will be passed.¹⁹⁸

Whether or not § 922(g)(1) is amended, it will not correct the additional burden that the Court has placed on Congress.¹⁹⁹ This additional burden is an onerous level of specificity required of Congress to include reference to any potential foreign issues that may arise when drafting legislation that applies to domestic conduct.²⁰⁰ This clear

193. See, e.g., Glashausser, *supra* note 182, at 156-59 (arguing that failing to include foreign convictions as predicate offenses under recidivist statutes is contrary to the policies supporting such laws).

194. *Custis*, 511 U.S. at 497 (quoting *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979)).

195. See *id.* at 497; see also *Small v. United States*, 544 U.S. 385, 394 (2005) (pointing out the relative infrequency that foreign convictions are used as the predicate offense under § 922(g)(1)).

196. S. 954, 109th Cong. (2005); H.R. 1168, 110th Cong. (2007).

197. See *supra* note 38 and accompanying text for the wording of these proposed amendments.

198. See William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (concluding that Congressional overrides of Supreme Court statutory interpretation cases “are most likely when a Supreme Court interpretation reveals an ideologically fragmented Court, relies on the text’s plain meaning and ignores legislative signals, and/or rejects positions taken by federal, state, or local governments.”). These factors are present in *Small*, making it a more likely candidate for Congressional override. But see Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 452-53 (1992) (studying the response of Congress to the Supreme Court’s interpretations of federal statutes and concluding that in most cases Congress does not override decisions of the Court).

199. *Small*, 544 U.S. at 399 (Thomas, J., dissenting).

200. *Id.* The dissent criticized the majority’s interpretation as “impos[ing] a clear statement

statement requirement is unnecessary where Congress seeks to regulate conduct domestically.²⁰¹

The impact on future legislation will depend on whether Congress will take this burden into consideration when drafting legislation.²⁰² If Congress does heed this explicit statement requirement, it could make it more complicated to draft and pass legislation, but if it ignores this requirement, Congress runs the risk of creating legislative loopholes for criminals.²⁰³

2. Impact on Cases

A review of cases citing *Small v. United States* indicates that the decision is being cited for a variety of reasons.²⁰⁴ Several decisions, including two Supreme Court decisions, have used the same reasoning

rule on Congress: Absent a clear statement, a statute refers to nothing outside the United States.” *Id.*; see also *supra* notes 164-178 and accompanying text.

201. See *supra* notes 164-195 and accompanying text.

202. See *supra* notes 196-197 and accompanying text (discussing Congressional reaction to this decision).

203. *Small*, 125 U.S. at 1761. As Justice Thomas pointed out, the majority decision, requiring specific reference by Congress to foreign facts in order to give a statute plain meaning, will demand a high level of specificity in drafting legislation. *Id.*

204. See *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 458 (2005) (Thomas, J., concurring in part, dissenting in part) (citing his dissent in *Small* as it related to criticism of the use of legislative silence to infer intent); *Pasquantino v. United States*, 544 U.S. 349, 372 (2005) (citing *Small* for the proposition that Congress legislates with domestic concerns in mind); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 146 (2005) (Thomas, J., concurring in part, dissenting in part) (citing his criticism of the majority’s modification of canons of construction in *Small*); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7 (1st Cir. 2006) (citing *Small* as recognizing the presumption against extraterritorial application); *United States v. Clark*, 435 F.3d 1100, 1106 (9th Cir. 2006) (citing *Small* for the “legal presumption that Congress ordinarily intends federal statutes to have only domestic application”); *United States v. Gilbert*, 430 F.3d 215, 220 (4th Cir. 2005) (citing *Small*’s discussion of the purpose of § 922(g)(1)); *United States v. Strobehn*, 421 F.3d 1017, 1025 (9th Cir. 2005) (citing *Small*’s use of language, context, history and purpose in interpreting a statute); *ARC Ecology v. United States Department of the Air Force*, 411 F.3d 1092, 1097-98 (9th Cir. 2005) (citing the majority’s “commonsense notion that Congress generally legislates with domestic concerns in mind”); *Bankwest v. Baker*, 411 F.3d 1289, 1315 n.6 (11th Cir. 2005) (Carnes, J., dissenting) (citing *Small*’s ordinary presumption of domestic application); *SPGGC, Inc. v. Blumenthal*, 408 F. Supp. 2d 87, 99 (D. Conn. 2006) (citing *Small*’s recognition of the presumption against extraterritorial application); *Ofori-Tenkorang v. American International Group, Inc.*, 2005 WL 2280211, *5 (S.D.N.Y. 2005), *vacated on other grounds*, 460 F.3d 296 (2d Cir. 2006) (citing *Small* in support of the prohibition against extraterritorial application); *Parlak v. Baker*, 374 F. Supp. 2d 551, 560 n.10 (E.D. Mich. 2005) (citing *Small* as questioning the use of foreign convictions as predicate offenses); *Hubert Enters., Inc. v. Comm’r*, 125 T.C. 72, 103 (2005) (citing *Small*’s interpretation of the word “any” in context of the entire statute); *United States v. Martinelli*, 62 M.J. 52, 57 (2005) (citing *Small*’s use of the presumption against extraterritorial application); *Auer v. Commonwealth*, 621 S.E.2d 140, 146 n.3 (Va. Ct. App. 2005) (citing *Small*’s prohibition on the use of foreign convictions as predicate offenses under § 922(g)(1)).

as in *Small* to support various methods of statutory interpretation.²⁰⁵ The majority of cases citing the decision are using it to support the use of the canon against extraterritorial application.²⁰⁶ This is particularly troubling given the way in which the majority misused this particular canon.²⁰⁷

One case, *Parlak v. Baker*, cites *Small* for its application to foreign convictions.²⁰⁸ This case is significant because it involves the use of a foreign conviction to deport an individual for engaging in terrorist activity.²⁰⁹ In granting habeas relief, the district court for the Eastern District of Michigan questioned whether the foreign conviction, a 1990 separatism conviction in Turkey, could be used as a predicate conviction to support a terrorism charge.²¹⁰ This case in particular highlights the dangerous precedent set by the majority's erroneous interpretation of the statute in *Small*.²¹¹

These cases also draw attention to the need for a more consistent approach in interpreting statutes because under principles of stare decisis the misuse of a canon of statutory interpretation could allow that misuse by other courts.²¹² Allowing courts to pick and choose the sources and methods they will use to interpret statutes causes uncertainty for all involved including legislatures, courts, and the public.²¹³

V. CONCLUSION

The correct interpretation of § 922(g)(1), when properly applying methods of statutory interpretation, is that the words “convicted in any

205. See *Bates*, 544 U.S. at 458; *Spector*, 545 U.S. at 146; *Strobehn*, 421 F.3d at 1025; *Hubert Enters., Inc.*, 125 T.C. at 103.

206. See *Pasquantino*, 544 U.S. at 372; *Carnero*, 433 F.3d at 7; *Clark*, 435 F.3d at 1106; *ARC Ecology*, 411 F.3d at 1097-98; *Bankwest*, 411 F.3d at 1315 n. 6; *SPGGC, Inc.*, 408 F. Supp. 2d 87, 99; *Martinelli*, 62 M.J. at 57; *Ofori-Tenkorang*, 2005 WL 2280211, at *5.

207. See *supra* notes 164-195 and accompanying text (discussing the majority's use of the presumption against extraterritorial application).

208. *Parlak*, 374 F. Supp. 2d at 560 n.10.

209. *Id.*; see also Lester, *supra* note 120, at 649 (arguing that the majority's interpretation has resulted in a weakening of gun control regulations which has dangerous implications for national security).

210. *Parlak*, 374 F. Supp. 2d at 560.

211. See *supra* notes 114-197 and accompanying text (discussing the problems and dangers posed by the majority's interpretation).

212. See *supra* notes 204-211 and accompanying text.

213. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086-88 (2002) (proposing that Congress enact federal rules of statutory interpretation to improve legislative-judicial communication and provide consistency in statutory interpretation cases).

court” include convictions in foreign courts.²¹⁴

The majority opinion has created a dangerous loophole for criminals in its flawed interpretation of § 922(g)(1).²¹⁵ The result of the Court’s misinterpretation of § 922(g)(1) is to allow potentially dangerous persons to possess firearms within the borders of the United States, contrary to the purpose of § 922(g)(1).²¹⁶ Congress can correct the distortion of this specific statute by passing the proposed amendment to § 922.²¹⁷

However, the larger problem presented by *Small* is the distortion that results not only to individual statutes, but also to canons of construction when courts stray too far from the plain language of the law and misapply the canons.²¹⁸ This distortion is illustrated in the majority’s invention of an “assumption about the reach of domestically oriented statutes,” which it fashioned from a justification from the longstanding canon against extraterritorial application.²¹⁹

This problem will not be solved simply by amending § 922(g)(1).²²⁰ The solution to this problem lies in a more consistent approach to statutory interpretation.²²¹ The proper approach would include a stronger adherence to the plain meaning of the statute, less reliance on outside sources, and a disciplined application of canons of construction.²²²

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214. See *supra* notes 123-195 and accompanying text (discussing the proper interpretation of § 922(g)(1) in *Small*).

215. See *supra* notes 131-140 and accompanying text (discussing the “absurd results” canon and pointing out the dangers posed by not including foreign convictions as predicate offenses).

216. See *supra* notes 155-163 and accompanying text (exploring the legislative purpose behind the Gun Control Act).

217. See *supra* note 38 and accompanying text (setting forth the language of proposed amendments to § 922(g)(1); *supra* note 198 (analyzing potential Congressional action in regard to this amendment)).

218. See *supra* notes 123-195 and accompanying text (discussing various canon of statutory interpretation and criticizing the majority’s application of these canons in the *Small* decision).

219. See *supra* notes 164-195 and accompanying text (discussing the canon against extraterritorial application and arguing this canon was misapplied by the majority in *Small*).

220. See S. 954, 109th Cong. (2005); H.R. 1168, 110th Cong. (2007); see also *supra* notes 196-203 and accompanying text (discussing the potential impact on future legislation).

221. See *supra* notes 123-195 and accompanying text.

222. See *supra* notes 123-195 and accompanying text.