

COMMENT

The Fundamental (Un)Fairness of Foreign Convictions as Predicate Felonies

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INTRODUCTION

"[T]he protection of individual rights, especially an accused individual, is the cornerstone of our system of justice."

— Representative Celler¹

"[I]n our zeal to support individual rights, we have too often confused the rights of the criminal with the rights of the public."

— Representative Kelly²

A licensed firearms dealer, Thomas Bean, drove from the gun show he was working in Texas across the border to Mexico for dinner.³ He inadvertently left a box of ammunition in his car, and when the Mexican border agents discovered it, they immediately arrested him.⁴ After Bean signed a confession written in Spanish, a language he did not understand, without assistance of counsel, a Mexican court sentenced

¹ 114 CONG. REC. 16,066 (1968) (statement of June 5, 1968 during debate on Safe Streets Act).

² 114 CONG. REC. 160,237 (1968) (statement of June 6, 1968 during debate on Safe Streets Act).

³ *Bean v. United States*, 89 F. Supp. 2d 828, 829 (E.D. Tex. 2000).

⁴ *Id.*

him to five years in prison.⁵ Public outcry over the severity of Bean's punishment spurred the Mexican government to quickly reclassify the offense as a misdemeanor.⁶ Due to the conviction, however, Bean could no longer continue his livelihood as a gun dealer because of his status as a felon under the Safe Streets Act.⁷

Section 922 of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act") essentially bans convicted felons from possessing firearms.⁸ It reads: "It shall be unlawful for any person — (1) who has been convicted in *any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition."⁹ A federal circuit court split questions whether Congress intended the Act to include foreign, or just domestic, courts within the meaning of "any court."¹⁰

Strictly interpreting the Act, some courts argue that the statute only includes felony convictions resulting from domestic courts.¹¹ These courts are referred to as "domestic use" courts. On the other hand, the majority of courts favor a more expansive interpretation and allow foreign felony convictions to count as predicate offenses.¹² These are called "foreign use" courts. The conflicting interpretations focus on the meaning of "any court" as used in the Act.

⁵ *Id.* at 837.

⁶ *Id.* at 838.

⁷ *Id.* at 829-30.

⁸ 18 U.S.C. § 922(g)(1) (2000).

⁹ *Id.* (emphasis added). The full text reads:

It shall be unlawful for any person — (1) 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.

¹⁰ The Third, Fourth, and Sixth Circuits have interpreted section 922(g) to allow foreign convictions while the Fifth and Tenth Circuits allow only domestic convictions. See *infra* Part II.A-B.

¹¹ See, e.g., *United States v. Gayle*, 342 F.3d 89, 95 (2d Cir. 2003); *United States v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000); *Bean*, 89 F. Supp. 2d at 838.

¹² "Predicate offenses" refers to the defendant's prior offenses, which trigger the application of the Act. See, e.g., *United States v. Atkins*, 872 F.2d 94, 95 (4th Cir. 1989); *United States v. Winson*, 793 F.2d 754, 757 (6th Cir. 1986); *United States v. Chant*, Nos. CR 94-1149 (SBA), CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997). See generally 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 (2002) (arguing that foreign convictions should be allowed as predicate offenses).

Unfortunately, the statutory interpretation of the Act is not straightforward. Textual ambiguities, legislative history, and fairness concerns cast doubt on whether Congress intended to include foreign convictions. Furthermore, when a criminal statute is ambiguous, courts apply the rule of lenity, which requires courts to resolve the ambiguity in favor of the defendant.¹³ The Supreme Court holds that the rule of lenity is justified because a defendant deserves fair warning of what the law intends to do.¹⁴ Thus, under the rule, foreign convictions should not serve as predicate offenses if the scope of the statute is unclear.

A proper interpretation of the scope of the Act would be consistent with its underlying purpose: to reduce crime and ensure public safety in part by disarming dangerous criminals.¹⁵ This goal should not be attained, however, at the expense of individual liberties.¹⁶ The potential for unfairness in the Act necessitates a resolution as to its proper interpretation.

This Comment argues that Congress did not intend to include foreign convictions as predicate offenses under section 922(g). Part I summarizes the history of the statute. Part II describes the current split among the "foreign use" and "domestic use" courts. Part III explores the majority courts' flawed reasoning that allows the use of foreign convictions. Part III also highlights fairness concerns and legal principles that support the minority courts' more narrow interpretation of the Act. This Comment concludes by arguing that section 922 cannot be read to include foreign convictions because doing so is not sound statutory interpretation and would be inequitable.

I. BACKGROUND: THE SAFE STREETS ACT OF 1968

Because the language of the Act does not explicitly include or exclude foreign convictions, the Act's history is essential to understanding Congress' intent. The 1968 Congressional reports, although sparse, illuminate Congress' reasoning behind the language it adopted. Another

¹³ See *United States v. Bass*, 404 U.S. 336, 347 (1971) (describing rule of lenity); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); *United States v. Diaz*, 989 F.2d 391, 393 (10th Cir. 1993) ("[W]e will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.").

¹⁴ *Bass*, 404 U.S. at 348.

¹⁵ See H.R. REP. NO. 1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410; 114 CONG. REC. 16,071-16,319 (1968) (debating passage of Safe Streets Act).

¹⁶ 114 CONG. REC. 16,066 (1968) (statement of Rep. Celler); 114 CONG. REC. 16,283 (1968) (statement of Rep. Kastenmeier).

section of the Act, section 1202, further highlights Congress' approach to gun control legislation — legislation that Congress promulgated intending to broaden section 922.

A. *The Act's Historical Setting*

Following the assassinations of President John F. Kennedy in 1963 and Dr. Martin Luther King, Jr. in 1968, public demand for tougher gun control grew intense.¹⁷ President Johnson first proposed firearms legislation to Congress on February 6, 1967.¹⁸ On several occasions during the following year, he urged Congress to take action on the bill.¹⁹ While some members of Congress pushed to enact the Safe Streets Act during the first half of 1968, many members argued that the bill, not a model of clarity, needed further examination.²⁰ The next day, news of Senator Robert Kennedy's assassination shocked the House.²¹

Incited by such high profile gun-related murders, Congress hurriedly passed the Safe Streets Act.²² Consequently, Congress had little opportunity to express its reasons for adopting or changing the language of the proposed legislation, resulting in a sparse legislative history.²³ Moreover, Congress enacted an unclear statute. However, the few Congressional reports that exist, when analyzed with the resulting statute, shed light on Congress' intent.

¹⁷ H.R. REP. NO. 1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4413 (referring to assassinations and need for gun control legislation).

¹⁸ H.R. REP. NO. 1577, *reprinted in* 1968 U.S.C.C.A.N. 4410 (referencing message from President of United States in "National Crime Commission Report").

¹⁹ 114 CONG. REC. 16,301 (1968) (including letter from President Johnson in Congressional record mentioning previous appeals to Congress to pass legislation).

²⁰ *See* 114 CONG. REC. 16,071-16,319 (1968) (debating passage of Safe Streets Act). For example, Rep. Poff stated that "[t]his bill is no perfect piece of legislative craftsmanship." 114 CONG. REC. 16,072 (1968). Rep. Kelly declared that "despite the weaknesses in the anti-crime bill before us today, we must stop stalling and act now." 114 CONG. REC. 16,238 (1968).

²¹ 114 CONG. REC. 16,300 (1968).

²² On June 6, 1968, Congress approved an unexpected call for a vote on the Safe Streets Act. 114 CONG. REC. 16,299 (1968). The day before, Congress had debated the bill, but had indicated that it was not ready for a vote. 114 CONG. REC. 16,071-16,319 (1968).

²³ The call for a vote was unexpected. H.R. REP. NO. 1577, *reprinted in* 1968 U.S.C.C.A.N. 4410. Hence, the vote followed no further debate on the issue. Congress largely adopted the language drafted by the Senate. *Id.* Though Congress made some changes, it did not explain the reasoning behind many of them. *Id.*

B. The 1968 Congressional Reports

In its effort to pass the Safe Streets Act as quickly as possible, the House adopted most of the language drafted by the Senate.²⁴ Members of Congress recognized that the bill was far from perfect, but reasoned that it could be amended after its enactment.²⁵ The most instructive documents concerning the formation of section 922 are the Senate and House reports of 1968.

Initially, the senate report defined the required predicate offense as a crime of violence punishable as a felony.²⁶ The senate report then defined "felony" in terms of federal and state offenses.²⁷ It explained that a felony is a federal crime punishable by more than a year of imprisonment or any crime that has been deemed a felony under state law.²⁸ After the Senate sent this report to the House, the House limited a felony to "a crime punishable by imprisonment for more than one year."²⁹ The House, however, left the Senate's discussion of federal and state offenses undisturbed.³⁰ In sum, the House adopted the senate report free from significant disagreement with the Senate's definition of a felony.

Additionally, the reports provided that section 922 did not include all felonies.³¹ Congress made exceptions for state and federal business practice violations.³² Section 921(a) stated that these violations would not constitute predicate offenses under section 922, though otherwise qualified, because the scope of their punishments were more than one year of imprisonment.³³

²⁴ See *id.*; 114 CONG. REC. 16,071-16,319 (1968).

²⁵ See *supra* note 20.

²⁶ S. REP. NO. 90-1501, at 31 (1968).

²⁷ The Senate noted that the committee added the definition of "felony" as a new provision. *Id.* It defined "felony" as "a Federal crime punishable by a term of imprisonment exceeding one year and in the case of State law, an offense determined by the laws of the State to be a felony." *Id.*

²⁸ *Id.*

²⁹ H.R. REP. NO. 1577, reprinted in 1968 U.S.C.C.A.N. 4410.

³⁰ *Id.*

³¹ 18 U.S.C. § 921(a)(20)(A) (1968). Section 921 laid out exceptions, that offenses under the statute "shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, other similar offenses relating to the regulations of business practices as the Secretary may by regulation designate. . . ." *Id.*

³² *Id.*

³³ *Id.*

C. Section 1202 of the Safe Streets Act

Sections 1202 and 922 are related because Congress intended section 1202 to broaden the scope of section 922.³⁴ Importantly, the express language of section 1202 included only domestic, state, and federal offenses.³⁵ Because Congress considered these sections to be linked, both sections likely covered only domestic offenses.

Section 1202 of the Act, added after section 922, enlarged the class of persons who could not lawfully possess firearms.³⁶ Whereas section 922 required possession of a firearm and interstate commercial activity, section 1202 criminalized mere possession of a firearm by a felon.³⁷ Senator Long introduced the bill. When others commented that it appeared to overlap with section 922, he noted that the drafters intended the new law to be an expansive measure.³⁸

He did not, however, indicate exactly how section 1202 would expand section 922. Later analysis concluded that section 922 was limited to shipping or receiving guns in interstate commerce whereas section 1202 required nothing more than mere possession.³⁹ Congress has since repealed section 1202, and the Supreme Court ruled that the two sections were not intended to be read together.⁴⁰ The legislative history is

³⁴ See sources cited *infra* note 38.

³⁵ 18 U.S.C. app. § 1202(a)(1) (1968). Section 1202 stated: "Any person who — 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 . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both." *Id.* (emphasis added).

³⁶ *Id.*

³⁷ *Id.* "Any person who — 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 . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both." *Id.* (emphasis added); see sources cited *infra* note 38.

³⁸ *United States v. Winson*, 793 F.2d 754, 757 (6th Cir. 1986). Senator Long, section 1202's sponsor, stated that section 1202 would "take nothing from" but merely "add to" Title IV. *Id.* (quoting from 114 CONG. REC. 14,774 (1968)). Additionally, Rep. Machen commented that Title VII would "complement . . . the gun-control legislation contained in Title IV." *Id.* (quoting 114 CONG. REC. 16,286 (1968)).

³⁹ *United States v. Bass*, 404 U.S. 336, 347 (1971). For more on the connection between sections 922 and 1202, see Jerald J. Director, Annotation, *Validity, Construction, and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS Appx § 1202(a)(1)) Making it Federal Offense for Convicted Felon to Possess Firearm*, 13 A.L.R. FED. 103 (1972).

⁴⁰ Congress repealed section 1202 of the Omnibus Crime Control and Safe Streets Act on May 19, 1986 by enacting the Firearm Owners' Protection Act. See Basler, *supra* note 12, at 176 (referring to enactment of Firearm Owners' Protection Act, Pub. L. No. 99-308, 104(b), 100 Stat. 449, 459 (1986), reprinted in 1986 U.S.C.C.A.N.); see also *Bass*, 404 U.S. at 344 (holding that Congress intended sections 922 and 1202 to stand alone).

relevant to this analysis, however, because it shows that Congress considered both sections to be related measures. Because section 1202 expressly applied only to state and federal offenses, some conclude that section 922 must, therefore, similarly be limited to domestic offenses.

II. CIRCUIT COURT SPLIT

Federal circuit courts have split over the proper reading of the Act.⁴¹ The courts differ in their approaches to statutory interpretation. The courts use two canons of construction to interpret statutes: the "plain meaning" and the "social purpose" constructions.⁴² Under the plain meaning construction, a court will first analyze the literal interpretation of a statute's language.⁴³ If the meaning is plain, it will go no further.⁴⁴ However, under the social purpose canon, if the language is ambiguous, a court may then consult legislative history or other relevant documents to discern Congress' intent.⁴⁵ Furthermore, the Supreme Court has held that the words of a statute must be read in light of their place in the statutory scheme.⁴⁶ In applying these statutory canons, the "foreign use"

⁴¹ See *supra* note 10 and accompanying text.

⁴² MARGARET Z. JOHNS & REX R. PERSCHBACHER, *THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION* 105-07 (2002). For more on statutory interpretation, see Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (reviewing LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993)).

⁴³ See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (holding that plain meaning is beginning and ending point for statutory interpretation if language is clear and unambiguous); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances."); *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (holding that statutory language is conclusive).

⁴⁴ JOHNS & PERSCHBACHER, *supra* note 42, at 106-07 (defining plain meaning rule of statutory interpretation). In *Caminetti v. United States*, 242 U.S. 470, 485 (1917), the Supreme Court stated, "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion"

⁴⁵ Both canons resort to outside sources in the face of ambiguity. Under social purpose construction, courts require less ambiguity because they find that meaning is best understood in context. Plain language courts require significant ambiguity before they will look beyond the primary text. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989) (examining legislative history to interpret ambiguous statutory language); *Pierce v. Underwood*, 487 U.S. 552, 564 (1988) (consulting Committee report to shed light on statutory language); *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003) (citing Supreme Court cases as justification for consulting legislative history to interpret section 922).

⁴⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (noting that meaning of language may be best found when considered in context); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (holding that statutory language must be read in context and in light of statutory scheme);

courts determined “any court” to be unambiguous and applied a plain meaning construction. The “domestic use” courts, on the other hand, finding ambiguity, looked to the legislative history in interpreting the language and, therefore, applied a social purpose interpretation.

A. *A Majority of Circuits Are “Foreign Use” Courts and Allow Foreign Convictions*

“Foreign use” courts include the Third, Fourth, and Sixth Circuits.⁴⁷ Courts holding that Congress included foreign convictions in the “any court” language of section 922(g) find that the statute is unambiguous.⁴⁸ According to these courts, “any” means “all.”⁴⁹ They stop at this plain meaning interpretation.⁵⁰ Furthermore, they argue that legislative history creates no ambiguity, refusing to inject any confusion into a clearly-written statute.⁵¹

1. *The Sixth Circuit First Applied Foreign Convictions as Predicate Offenses in Winson*

In 1986, the Sixth Circuit was the first court to hold that a defendant’s foreign felony convictions qualified as predicate offenses under section 922(g) in *United States v. Winson*.⁵² Defendant Eric Winson violated the provisions of section 922(h) (now section 922(g)) by purchasing firearms

Gayle, 342 F.3d at 92-93 (looking to other parts of statute to interpret meaning of “any court”).

⁴⁷ See *United States v. Small*, 333 F.3d 425, 425 (3d Cir. 2003) (applying Japanese conviction under section 922); *United States v. Atkins*, 872 F.2d 94, 95 (4th Cir. 1989) (applying English conviction under section 922); *United States v. Winson*, 793 F.2d 754, 757 (6th Cir. 1986) (applying Argentinean and Swiss convictions under section 922); see also *United States v. Chant*, Nos. CR 94-1149 (SBA), CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997) (applying Canadian conviction under section 922).

⁴⁸ The District Court of Maine, in the First Circuit, also found the language of the statute to be unambiguous. *United States v. Jalbert*, 242 F. Supp. 2d 44, 47 (D. Me. 2003). In *Jalbert*, the court held that foreign convictions were allowed under the statute for this reason alone, refusing to inject ambiguity into a clear statute. *Id.* Defendant Michel Jalbert was arrested for illegally entering the United States from Canada. *Id.* at 45. Police found a shotgun and ammunition in his car. *Id.* His previous felonies came from 1990 Canadian convictions for breaking and entering and receipt of stolen goods. *Id.* The district court briefly noted the circuit split, then followed the majority of the circuits in finding that the language of the statute was unambiguous. *Id.* at 47.

⁴⁹ See cases cited *supra* note 47.

⁵⁰ See cases cited *supra* note 47.

⁵¹ See, e.g., *Small*, 183 F. Supp. 2d at 759-60 (declining to look to other parts of statute for meaning of section 922).

⁵² See *Winson*, 793 F.2d at 757.

without disclosing previous convictions.⁵³ His prior felonies included a 1970 Argentinean conviction for possessing counterfeit currency and a 1976 Swiss conviction for fraud.⁵⁴

The District Court for the Middle District of Tennessee dismissed the indictment in its entirety, holding that foreign convictions could not serve as predicate felonies under section 922 because the statute was ambiguous.⁵⁵ The court read section 922 in conjunction with section 1202.⁵⁶ The language in section 1202 expressly included only domestic courts.⁵⁷ The court held that the clear limits of section 1202 injected ambiguity into the inclusion of foreign felonies in section 922.⁵⁸ Because section 922 is ambiguous, the court invoked the rule of lenity and dismissed the charges.⁵⁹ The court also found compelling the possibility of an inequitable application of section 922.⁶⁰ It noted that including foreign convictions had the potential for recognition of adjudications that do not comport with American notions of fundamental fairness.⁶¹ For example, the decisions may require judicial recognition of questionable forums, such as military tribunals in Nicaragua and condemnations of political prisoners in Poland.⁶²

The Sixth Circuit Court of Appeals reversed. It held that the phrase "in any court" included foreign convictions.⁶³ According to the court, section 922's language was unambiguous because Congress intended for it to stand independent of section 1202.⁶⁴ The Sixth Circuit held that the

⁵³ *Id.* at 756. The language adopted in section 922(h) (1968) is essentially identical to section 922(g)(1) (2002). Section 922(h) stated:

It shall be unlawful for any person — who is under indictment or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; who is a fugitive from justice [to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce].

18 U.S.C. § 922(h) (1968). The definitions section, section 921(a)(15), defined "fugitive from justice" as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding." *Id.* § 921(a)(15) (1968).

⁵⁴ *Winson*, 793 F.2d at 756.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* See *supra* note 35 for the language of section 1202.

⁵⁸ *Winson*, 793 F.2d at 756.

⁵⁹ *Id.* See *supra* note 13 for rule of lenity.

⁶⁰ *Winson*, 793 F.2d at 756.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 757.

⁶⁴ *Id.* The Supreme Court reached this conclusion in *United States v. Bass*, 404 U.S. 336, 342 (1971) (holding that Congress intended sections 922 and 1202 to stand alone).

district court improperly interpreted section 922 as being conjoined with section 1202.⁶⁵ Standing alone, the “any court” provision in section 922 is unambiguous.⁶⁶

Moreover, unlike the district court, the Sixth Circuit was not concerned with the possible inequities of the statute.⁶⁷ In this case, the defendant had not challenged his previous convictions.⁶⁸ The court stated that its decision served the goals of the statute;⁶⁹ a defendant is no less dangerous because foreign courts convicted him.⁷⁰ Additionally, the court reasoned that Congress, by promulgating section 925(c), provided relief from the constraints of felony convictions that do not comport with the reasoning of the statute.⁷¹ Section 925(c) grants relief to those whose records and reputation show that they are not a danger to society by restoring their rights to buy and sell firearms.⁷²

2. The Fourth Circuit Followed the Sixth Circuit’s Reasoning that “Any Court” Means “All Courts” in *Atkins*

In *United States v. Atkins*, the Fourth Circuit followed *Winson*’s reasoning.⁷³ Military police arrested defendant William Atkins in 1987 for fraudulently gaining entry to Fort Myer in Virginia.⁷⁴ While searching him, the officers found a gun strapped to Atkins’s ankle.⁷⁵

Atkins faced a felon-in-possession charge under section 922(g).⁷⁶ His predicate offense was a 1981 violent felony conviction in England.⁷⁷ He entered a conditional guilty plea, reserving the question of whether the conviction in England satisfied the “any court” language of section 922.⁷⁸

⁶⁵ *Winson*, 793 F.2d at 757.

⁶⁶ *Id.*; see *United States v. Batchelder*, 442 U.S. 114, 118 (1971) (finding congressional intent to give each title independent construction).

⁶⁷ *Winson*, 793 F.2d at 757.

⁶⁸ *Id.*

⁶⁹ *Id.* at 758.

⁷⁰ *Id.*

⁷¹ Section 925(c) grants relief when “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.” 18 U.S.C. § 925(c) (2000).

⁷² *Id.*

⁷³ *United States v. Atkins*, 872 F.2d 94, 94-96 (4th Cir. 1989).

⁷⁴ *Id.* at 95.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* (describing 1981 conviction in England of “unlawful possession of a firearm with intent to endanger life”).

⁷⁸ *Id.*

The District Court for the Eastern District of Virginia held that it did and found him guilty.⁷⁹

The Fourth Circuit affirmed, holding that the statute was unambiguous.⁸⁰ The court reasoned that any ambiguity would derive from the word "court," not from the word "any."⁸¹ Because England provided the basis for the American legal system, there was no question that the English conviction came from a "court" as described in the statute.⁸² The Fourth Circuit did not indicate how it would judge the validity of convictions by courts in countries other than England.⁸³

3. The Third Circuit Agreed with *Winson* and *Atkins* and Also Discussed the Fairness of the Foreign Conviction

Most recently, the Third Circuit joined the majority's side of the circuit split with its decision in *United States v. Small*.⁸⁴ In 2000, the District Court for Pennsylvania indicted Gary Small for possessing a firearm in violation of section 922(g).⁸⁵ Small's prior felony was a 1994 Japanese conviction for smuggling firearms and ammunition.⁸⁶ Small filed a conditional guilty plea in the district court.⁸⁷ He argued that his previous convictions in Japan could not be used to satisfy the predicate felony requirement under section 922.⁸⁸ The court considered two issues: whether it could include foreign convictions under section 922, and if so, which ones would qualify as predicate offenses.⁸⁹

First, the district court addressed the circuit split over whether section 922 included foreign convictions.⁹⁰ It agreed with the Fourth and Sixth Circuits, holding that the language of the statute is unambiguous.⁹¹ Next, the court rejected the Tenth Circuit's reasoning that the definitions

⁷⁹ *Id.* at 96.

⁸⁰ *Id.*

⁸¹ *Id.* (noting that "any" is hardly ambiguous, being all-inclusive in nature).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *United States v. Small*, 333 F.3d 425 (3d Cir. 2003).

⁸⁵ *Id.* at 426. In June 1998, he purchased and subsequently possessed a firearm in violation of the statute due to previous felony convictions. *United States v. Small*, 183 F. Supp. 2d 755, 756 (W.D. Penn. 2002).

⁸⁶ *Small*, 183 F. Supp. 2d at 762 n.9.

⁸⁷ *Id.* at 757.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

section casts doubt on the meaning of section 922(g).⁹² The court would not allow other sections of the statute to render section 922 latently ambiguous.⁹³

Second, the district court considered which foreign convictions could qualify.⁹⁴ It acknowledged that fairness concerns would not allow courts to apply every foreign conviction.⁹⁵ This court was the first to entertain a constitutional challenge to a prior foreign conviction.⁹⁶ It used the Supreme Court's decision in *Custis v. United States* to find that the predicate conviction in section 922(g) must be constitutionally valid.⁹⁷ In *Custis*, the defendant challenged the use of foreign convictions to enhance his sentence under section 924(e).⁹⁸ He argued that the convictions were constitutionally invalid for the following reasons: he had been denied effective assistance of counsel, his guilty plea was not knowing and intelligent, and he was not adequately advised of his rights at trial.⁹⁹ On appeal, the Supreme Court held that judges should determine whether the foreign conviction comported with American concepts of fundamental fairness before it could be applied.¹⁰⁰ Using the Supreme Court's logic in *Custis*, the district court addressed Small's objections to the fundamental fairness of the conviction and found that the Japanese trial and subsequent finding of guilt were constitutionally valid.¹⁰¹ Specifically, the court rejected Small's challenges to his conviction: that the Japanese courts denied him a jury trial and counsel

⁹² *Id.* at 759-60; see *infra* Part II.B.2 (discussing *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000)).

⁹³ *Small*, 183 F. Supp. 2d at 759.

⁹⁴ *Id.* at 760.

⁹⁵ *Id.* at 761.

⁹⁶ *Id.*

⁹⁷ *Id.* at 763. In *Custis*, the Supreme Court held that the use of predicate offenses under section 924(e) may be challenged if the defendant shows that those convictions are constitutionally invalid. *Custis v. United States*, 511 U.S. 485, 494-95 (1994); *Small*, 183 F. Supp. 2d at 760. Section 924(e) allows for sentence enhancement if the defendant has three prior convictions. 18 U.S.C. § 924(e) (2000). The *Custis* court held that section 924(e) "focuses on the fact of the conviction" only. *Custis*, 511 U.S. at 495. However, it recognized an exception for convictions where the defendant did not have counsel. *Id.* A defendant's Sixth Amendment right to counsel provided the reason for this exception. *Id.* at 494. The District Court in *Small* noted that the *Custis* court had not considered foreign convictions in its analysis; it expanded the exception for failure to appoint counsel to general constitutional infirmities. *Small*, 183 F. Supp. 2d at 761.

⁹⁸ *Custis*, 511 U.S. at 495.

⁹⁹ *Id.*

¹⁰⁰ *Small*, 183 F. Supp. 2d at 765.

¹⁰¹ *Id.* at 770.

at crucial stages of the proceedings, as well as other rights.¹⁰² These rights, guaranteed by the Fifth and Sixth Amendments, are not necessarily excluded from the Japanese Constitution.¹⁰³

On appeal, the Third Circuit only examined whether the district court had properly applied the foreign conviction.¹⁰⁴ It did not question the district court's holding that section 922(g) unambiguously included foreign convictions.¹⁰⁵ The court adopted the approach of the Restatement (Third) of Foreign Relations Law as a procedural safeguard to ensure fair use of foreign convictions.¹⁰⁶ The Restatement sets forth two mandatory and six discretionary grounds for nonrecognition of foreign judgments.¹⁰⁷ Applying those guidelines, the Third Circuit held that the district court properly found that there were no grounds for nonrecognition.¹⁰⁸ Though the district court had not explicitly conducted its analysis under the Restatement, the Third Circuit determined that the district court had complied with the requirements of the Restatement by examining the Japanese trial record.¹⁰⁹

¹⁰² *Id.* at 765-66. Small made eleven challenges to the conviction: (1) "[H]e was denied the right to bail"; (2) "[H]e was interrogated for 25 consecutive days"; (3) "[H]e was denied the right to a speedy trial"; (4) "[O]ne of the judges who decided his case was substituted with a new judge during the trial"; (5) "[T]he trial transcript contains prejudicial hearsay"; (6) "[H]e was denied any appeal or appellate rights"; (7) "[T]he testimony by the prosecution's handwriting expert would not be admissible in an American court"; (8) "[H]e was denied the right to a jury trial"; (9) "[H]e was denied the right to remain silent"; (10) "[H]e was denied the right to confront his accusers"; and (11) "[H]e was denied the right to counsel or effective counsel at various crucial stages of the proceedings." *Id.* at 766.

¹⁰³ U.S. CONST. amends. V, VI; *Small*, 183 F. Supp. 2d at 766.

¹⁰⁴ *United States v. Small*, 333 F.3d 425, 427 (3d Cir. 2003).

¹⁰⁵ *Id.* In a footnote, the court agreed with the Fourth and Sixth Circuits and held that foreign convictions can satisfy the predicate felony requirement under section 922(g)(1). *Id.* at 427 n.2.

¹⁰⁶ *Id.* at 428. Like the district court, the Third Circuit rejected the idea that any conviction "no matter how unfair, offensive, or absurd, can be a predicate offense for a section 922 conviction." *Id.* at 427.

¹⁰⁷ *Id.* at 428. The two mandatory grounds are: (1) if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law;" or (2) if the court that rendered the judgment did not have valid jurisdiction over the defendant. *Id.* The six discretionary grounds for nonrecognition include: (1) the court did not have subject matter jurisdiction; (2) the defendant did not receive timely notice; (3) the judgment was fraudulently obtained; (4) the cause of action is repugnant to the public policy of the United States; (5) the judgment conflicts with another final judgment; and (6) the parties had a contrary agreement to decide the controversy in another forum. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987)).

¹⁰⁸ *Id.* at 428.

¹⁰⁹ *Id.*

4. The Ninth Circuit Cited *Winson* and *Atkins* with Approval

The Ninth Circuit has not yet held that a foreign conviction can serve as a predicate offense under section 922. It has, however, held that a conviction from a military tribunal does.¹¹⁰ In *United States v. MacDonald*, the Ninth Circuit applied the reasoning from *Winson* and *Atkins* to include a court-martial as a “court” within the meaning of section 922.¹¹¹ The Ninth Circuit held that MacDonald’s military offenses qualified him as a convicted felon under section 922 and thus prevented him from working as a firearms dealer.¹¹²

In *United States v. Chant*, the District Court for the Northern District of California held that a foreign conviction may count as a predicate offense under section 922.¹¹³ In 1997, defendant Peter Chant faced conspiracy and drug charges.¹¹⁴ He also faced a felon-in-possession charge due to Canadian convictions for drug trafficking and drug and weapon possession.¹¹⁵ The court rejected both of Chant’s arguments against including foreign convictions.¹¹⁶

First, Chant argued that circumstances had changed since *Winson* and *Atkins* because 18 U.S.C. § 925(c) no longer provided relief from the statute.¹¹⁷ The change in circumstances resulted because the federal government no longer authorized the Bureau of Alcohol, Tobacco, and Firearms (“BATF”) to spend money processing applications for relief.¹¹⁸ The *Winson* court had applied the relief provision to support its conclusion that using foreign convictions was not inequitable.¹¹⁹ The district court, however, found that the *Winson* court based its overall holding on the unambiguous language of the statute.¹²⁰

Second, Chant argued that the United States Sentencing Guidelines indicated that Congress did not intend courts to rely on foreign convictions when imposing criminal punishment.¹²¹ The Guidelines

¹¹⁰ See *United States v. MacDonald*, 992 F.2d 967, 968 (9th Cir. 1993).

¹¹¹ *Id.* at 969 (reasoning that because *Winson* and *Atkins* applied foreign convictions under section 922(g), military convictions also qualified).

¹¹² *Id.* at 970.

¹¹³ *United States v. Chant*, Nos. CR 94-1149 (SBA), CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997).

¹¹⁴ *Id.* at *1.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *2-3.

¹¹⁷ *Id.* at *2; see *supra* note 71 (discussing section 925(c)).

¹¹⁸ *Chant*, 1997 WL 231105, at *2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at *3.

state, in section 4A1.2(h), that foreign convictions may not be used in computing a defendant's criminal history.¹²² The district court rejected this argument, finding that the same section of the Guidelines allows the use of foreign convictions in departing from the sentencing range.¹²³ The Ninth Circuit affirmed the district court's decision in an unpublished opinion, possibly indicating its position as a "foreign use" court.¹²⁴ Meanwhile, other circuits have taken the opposing position, aligning themselves as "domestic use" courts.

B. A Minority of Circuits Are "Domestic Use" and Only Allow Domestic Convictions

The Second and Tenth Circuits, joined by a district court in the Fifth Circuit, have held that Congress did not intend to include foreign convictions under section 922.¹²⁵ According to these courts, the statute is ambiguous. Due to this ambiguity, these courts apply the rule of lenity against using foreign convictions as predicate offenses under section 922(g).¹²⁶ These "domestic use" courts support their position by analyzing other sections of the statute, legislative history, and fairness concerns.

1. The Tenth Circuit Has Held that Including Foreign Convictions Could Lead to Absurd Results

In *United States v. Concha*, the Tenth Circuit declined to allow foreign convictions as predicate offenses under section 922(g).¹²⁷ In December 1997, police brought defendant Joseph Concha to the police station after a domestic dispute.¹²⁸ At the station, Concha fought with an officer, grabbed the officer's gun, and threatened him.¹²⁹ A jury convicted

¹²² *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(h) (2002).

¹²³ *Chant*, 1997 WL 231105, at *3; U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(h) (2002). Other circumstances include enhanced penalties if the defendant has prior felony drug offenses, including those committed outside the United States. See 21 U.S.C. § 802(44) (2000) ("[T]he term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country.").

¹²⁴ *United States v. Chant*, 201 F.3d 445, 1999 WL 1021460 (9th Cir. Nov. 9, 1999) (unpublished opinion).

¹²⁵ See cases cited *supra* note 11.

¹²⁶ See *supra* note 13 (describing rule of lenity).

¹²⁷ *United States v. Concha*, 233 F.3d 1249 (10th Cir. 2000).

¹²⁸ *Id.* at 1251.

¹²⁹ *Id.*

Concha of assault and of being a felon in possession of a firearm.¹³⁰ The District Court for the District of New Mexico relied on his four previous felony convictions to enhance his sentence under section 924(e).¹³¹ This section requires a minimum sentence of 180 months in prison if the defendant has three prior violent felonies.¹³² Concha had three convictions from the United Kingdom: two for burglary in 1970 and 1976, and one for arson in 1975.¹³³ Concha also had a violent felony conviction from the United States in 1980.¹³⁴ Because Concha had a domestic felony to satisfy the felon-in-possession charge under section 922(g), the court relied on the foreign felonies only for sentence enhancement under section 924(e).¹³⁵ Section 924(e) is satisfied by “three previous convictions by any court referred to in section 922(g)(1).”¹³⁶ Therefore, the main issue was the “any court” language of section 922(g).¹³⁷ The district court held that “any court” included foreign courts and used Concha’s foreign convictions to enhance his sentence.¹³⁸

The Tenth Circuit reversed the sentence enhancement.¹³⁹ Finding the “any court” language of section 922(g) ambiguous, it invoked the rule of lenity¹⁴⁰ and concluded that foreign convictions cannot be applied under the statute.¹⁴¹ The court then discussed the definitions section, the Sentencing Guidelines, and due process concerns.

¹³⁰ *Id.*

¹³¹ *Id.* Section 924(e) is also known as the Armed Career Criminals Act. Section 924(e)(1) states:

In the case of a person who violates section 922(g) of this title and 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, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1) (2000).

¹³² 18 U.S.C. § 924(e)(1); *Concha*, 233 F.3d at 1251.

¹³³ *Concha*, 233 F.3d at 1251.

¹³⁴ *Id.* (listing Concha’s California conviction for “Lewd and Lascivious Act Involving Child Under 14”).

¹³⁵ *Id.*

¹³⁶ 18 U.S.C. § 924(e)(1); *Concha*, 233 F.3d at 1253.

¹³⁷ 18 U.S.C. § 924(e)(1); *Concha*, 233 F.3d at 1253.

¹³⁸ *Concha*, 233 F.3d at 1251.

¹³⁹ *Id.* at 1257.

¹⁴⁰ *Id.* at 1256; *see supra* note 13 (describing rule of lenity).

¹⁴¹ *Concha*, 233 F.3d at 1256.

First, the court looked to the statutory definitions in section 921(a).¹⁴² Congress intended the definitions section to apply to all sections of the title.¹⁴³ Most notably, section 921(a) contains language excluding certain federal and state offenses, such as antitrust violations, from consideration as predicate offenses.¹⁴⁴ The court stated that because the exception only mentions federal and state offenses, Congress did not intend to include foreign offenses.¹⁴⁵ The court noted that reading the statute to include foreign offenses could lead to absurd results.¹⁴⁶ For example, identical domestic and foreign antitrust convictions would be treated differently under the statute.¹⁴⁷

Second, the court recognized that the United States Sentencing Guidelines generally do not allow courts to use foreign convictions to enhance a defendant's criminal punishment.¹⁴⁸ Specifically, the Guidelines limit "both 'crime of violence' and 'controlled substance offense' to offenses 'under federal or state law.'"¹⁴⁹ The court concluded that interpreting the statute to include foreign convictions would be contrary to the usual practice in criminal cases.¹⁵⁰

Finally, the Tenth Circuit discussed due process concerns.¹⁵¹ It recognized that foreign courts do not always offer the same constitutional protections available in the United States.¹⁵² Additionally, domestic review of foreign convictions is difficult, if not impossible.¹⁵³ As a consequence, a defendant could serve time for improper

¹⁴² *Id.* at 1253-54; see 18 U.S.C. § 921(a)(20) (2000) (setting forth definitions applying to rest of title). Section 921(a)(20) 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, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. § 921(a)(20) (2000).

¹⁴³ *Concha*, 233 F.3d at 1254.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2002).

¹⁵⁰ *Concha*, 233 F.3d at 1254.

¹⁵¹ *Id.* at 1255.

¹⁵² *Id.* at 1254.

¹⁵³ *Id.* at 1255.

convictions.¹⁵⁴ It held that because the statute is textually ambiguous, could lead to absurd results, and has the potential for unfair application, courts should not apply foreign convictions under section 922(g).¹⁵⁵

2. The Second Circuit Uncovered Significant Ambiguity in Legislative History

The Second Circuit, after examining the legislative history more thoroughly than any previous court, also declined to allow foreign convictions under section 922(g).¹⁵⁶ In *United States v. Gayle*, police arrested defendant Rohan Ingram in a New York hotel on charges of illegally entering the United States from Canada.¹⁵⁷ They found a large quantity of firearms in his hotel room.¹⁵⁸ Because of a previous Canadian felony conviction, Ingram was subject to a felon-in-possession charge.¹⁵⁹

Ingram moved to dismiss the felon-in-possession count.¹⁶⁰ He argued that the Canadian conviction could not qualify as a predicate felony within the meaning of section 922(g).¹⁶¹ The District Court for the Northern District of New York denied the motion.¹⁶² It held that the statutory language was unambiguous and “any court” included courts outside the United States.¹⁶³

The Second Circuit reversed, disallowing the Canadian convictions as predicate offenses.¹⁶⁴ It found that the Act was textually ambiguous.¹⁶⁵ Furthermore, the legislative history and the absence of procedural safeguards precluded the court from including foreign convictions.¹⁶⁶

¹⁵⁴ *Id.* A defendant cannot file a habeas petition until after he begins to serve his time. *Id.* The court stated the possibility that a defendant could serve time for improper convictions. *Id.* This could happen if all the predicate convictions were foreign convictions obtained in an improper manner and there were no other concurrent sentences. *Id.*

¹⁵⁵ *Id.* at 1256.

¹⁵⁶ *United States v. Gayle*, 342 F.3d 89 (2d Cir. 2003).

¹⁵⁷ *Id.* at 90.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Ingram’s previous felony came from a 1996 conviction in Canada for the use of a firearm in the commission of an indictable offense. *Id.* This crime carries a maximum imprisonment term of fourteen years. *Id.* at 91 n.2.

¹⁶⁰ *Id.* at 90-91.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 95.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 95-96.

The court found that the statutory scheme, when considered as a whole, was textually ambiguous.¹⁶⁷ It noted that the Act's statutory definitions section lists exceptions to predicate offenses under section 922.¹⁶⁸ The Second Circuit followed the Tenth Circuit's reasoning in *Concha*: because Congress mentioned only certain federal and state offenses as exceptions in section 921(a), it did not intend to include foreign convictions under section 922.¹⁶⁹

The Second Circuit, finding the phrase "any court" unclear, looked to legislative history to solve the ambiguity.¹⁷⁰ The court found both the senate report and the conference report enlightening.¹⁷¹ The senate report defined "felony" as any state or federal crime punishable by a year in prison.¹⁷² The conference report did not disagree with that definition of "felony," but chose the phrase "crime punishable by imprisonment for a term exceeding one year," over the word "felony."¹⁷³ Therefore, the court concluded that in drafting the language of section 922(g), Congress intended to include only domestic crimes.¹⁷⁴

Finally, the Second Circuit discussed the significance of Congress' silence on a procedure for admitting foreign convictions.¹⁷⁵ The court reasoned that if Congress had intended to include foreign convictions, it would have dealt with how to apply those convictions.¹⁷⁶ The court chose not to read into the statute a meaning not clearly indicated by Congress.¹⁷⁷ For these reasons, the Second Circuit rejected the idea that Congress intended "any court" to include foreign courts.¹⁷⁸

¹⁶⁷ *Id.* at 95.

¹⁶⁸ *Id.* at 93.

¹⁶⁹ *Id.* The court quoted the language of *Concha*, that "if 'in any court' were to include foreign courts, 'we would be left with the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes.'" *Id.* (quoting *Concha*, 233 F.3d at 1254). As an example of the textual ambiguity, the court explained that statutes mentioning "police officers" usually refer only to United States officers without specifically excluding foreign police officers. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 94.

¹⁷² *See id.*; *supra* note 27 and accompanying text.

¹⁷³ *Gayle*, 342 F.3d at 95.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 95-96 (reasoning that if Congress intended to extend law to foreign convictions, it would have considered whether law should apply when convictions were obtained by procedures and methods that do not conform to minimum standards of international justice). *Id.*

¹⁷⁶ *Id.* at 95.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 96.

3. A Fifth Circuit District Court Underscored the Unfairness in the Ambiguous Statute

In *Bean v. United States*, a Fifth Circuit district court held that section 922(g) is ambiguous.¹⁷⁹ In March 1998, defendant Thomas Bean was convicted of illegally importing ammunition into Mexico.¹⁸⁰ As discussed in the Introduction of this Comment, in a setting of questionable fairness, a Mexican court sentenced him to five years in prison.

Because section 922 prevents convicted felons from selling and possessing firearms and ammunition, Bean's Mexican conviction prevented him from continuing to work as a firearms dealer.¹⁸¹ He petitioned the BATF to reinstate his license.¹⁸² The BATF informed Bean that it would not consider his application; the agency was not authorized to fund the processing of relief petitions.¹⁸³ Bean sought judicial review of the BATF's decision.¹⁸⁴

The district court addressed whether a foreign conviction could be counted as a predicate felony under section 922(g).¹⁸⁵ It found that a foreign conviction cannot, as a de facto rule, serve as a predicate offense because of possible missing procedural safeguards in the foreign jurisdiction.¹⁸⁶ The court noted that an important problem with allowing foreign convictions is that crimes treated as felonies in one country may not be as seriously punished in another.¹⁸⁷ One goal of the Safe Streets Act — to keep guns out of the hands of serious criminals — would not be consistent with enhancing punishments of those who have not committed serious crimes.¹⁸⁸ Specifically, Bean was sentenced to five

¹⁷⁹ *Bean v. United States*, 89 F. Supp. 2d 828 (E.D. Tex. 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001), *rev'd on other grounds*, 537 U.S. 71 (2002).

¹⁸⁰ *Bean*, 89 F. Supp. 2d at 829.

¹⁸¹ *Id.* at 830. Under section 922(g)(1), he could not possess a firearm because of his status as a convicted felon. *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* Under 18 U.S.C. § 925(c) (2000), convicted felons can petition for relief from the status offense. They must make a showing that they are not dangerous felons. In 1992, Congress passed a bill that precluded the BATF from using any funds to investigate petitions for relief under section 925(c). See discussion *supra* note 71.

¹⁸⁴ *Bean*, 89 F. Supp. 2d at 829.

¹⁸⁵ *Id.* at 837.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The court explicitly disagreed with the *Winson* court's statement that people who commit crimes outside the United States are just as likely to be as dangerous as people who commit crimes within the United States. *United States v. Winson*, 793 F.2d 754, 758 (6th Cir. 1986).

¹⁸⁸ *Bean*, 89 F. Supp. 2d at 837-38 (noting that carrying box of ammunition is not serious

years in prison in Mexico for carrying a box of ammunition.¹⁸⁹ The court observed that the degree of punishment did not fit the crime.¹⁹⁰ Thus, the court would not allow foreign convictions because of inherent unfairness.¹⁹¹

On appeal, the Fifth Circuit decided the case on other grounds.¹⁹² It did not address whether foreign convictions could serve as predicate offenses under section 922(g).¹⁹³ It also gave no indication as to how it would decide this issue.¹⁹⁴

III. THE FLAWED REASONING OF THE "FOREIGN USE" COURTS

"Foreign use" courts have erroneously analyzed section 922(g). First, they do not follow the general rules of statutory construction. Both textual ambiguities and legislative history indicate that a plain meaning analysis is not sufficient.¹⁹⁵ Second, the absence of procedural safeguards for the application of foreign convictions creates the possibility that courts will apply the statute unfairly.¹⁹⁶ For these reasons, courts must invoke the rule of lenity and, therefore, not apply foreign convictions under the statute.¹⁹⁷

enough to take away one's right to possess firearm).

¹⁸⁹ *Id.* at 837.

¹⁹⁰ *Id.* (commenting on questionable nature of conviction because record indicated coercion of confession and also because of subsequent reduction in punishment for same offense).

¹⁹¹ *Id.* at 838 ("This case is a perfect illustration as to why the phrase 'any court' in 18 U.S.C. § 922(g)(1) cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the due process which the defendant was entitled during the defense of his case.'" (quoting Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 518-21 (1997))).

¹⁹² *Bean v. United States*, 253 F.3d 234 (5th Cir. 2001), *rev'd on other grounds*, 537 U.S. 71 (2002). The Fifth Circuit Court of Appeals and United States Supreme Court primarily addressed the issue of whether the trial court had jurisdiction to review Bean's application to the BATF for relief.

¹⁹³ *Id.* at 240.

¹⁹⁴ *Id.*

¹⁹⁵ See *United States v. Gayle*, 342 F.3d 89, 93 (2003) (agreeing with Tenth Circuit *Concha* court that statutory definitions section injected ambiguity); *United States v. Concha*, 233 F.3d 1249, 1253-54 (10th Cir. 2000) (noting ambiguity injected by statutory definition in section 921(a)(20)); see also *Gayle*, 342 F.3d at 95 ("[T]wo reliable portions of the Gun Control Act's legislative history — the Senate Report and the Conference Report — lead us to conclude that Congress did not intend foreign convictions to serve as a predicate offense for section 922(g)(1).").

¹⁹⁶ See *Gayle*, 342 F.3d at 95-96 (stating that silence on procedure creates ambiguity as to Congress's intent); *Concha*, 233 F.3d at 1255 (citing due process concerns).

¹⁹⁷ *Concha*, 233 F.3d at 1256 (invoking rule of lenity); see cases cited *supra* note 13

A. Textual Ambiguities Cast Doubt on Congress' Intent

The meaning of the text is not as clear as the "foreign use" courts maintain.¹⁹⁸ Those courts neglect to consider the statute in its entirety.¹⁹⁹ When read in conjunction with the definitions section of the Act, Congress' intent in section 922(g) becomes unclear.²⁰⁰

"Foreign use" courts argue that the plain and ordinary meaning of "any" is "all."²⁰¹ Therefore, "any court" includes foreign courts. Also, they point to an expansive use of "any court" in other contexts. Several courts have extended the application of "any court" not only to foreign courts, but to military courts as well.²⁰² Finally, "foreign use" courts argue that allowing foreign convictions as predicates is consistent with both the plain language and goals of the Safe Streets Act.²⁰³ Section 922(g)'s purpose is to prevent dangerous criminals from owning guns.²⁰⁴ By including foreign convictions, a greater number of convicted felons will remain unarmed.²⁰⁵

A meaningful reading of the statute, however, reveals that ambiguity is readily apparent. When read in light of the definitions section, the scope of "any court" is questionable.²⁰⁶ The exceptions listed in section

(explaining rule of lenity).

¹⁹⁸ See *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989) (stating that "any" is unambiguous, being all-inclusive in nature); see also *United States v. Small*, 183 F. Supp. 2d 755, 760 (W.D. Penn. 2002) (stating that "any" means "any" and nothing in section 922 indicates otherwise); *United States v. Chant*, 1997 WL 231105, at *2 (N.D. Cal. 1997) (agreeing with *Winson* and *Atkins* that statutory language is unambiguous).

¹⁹⁹ *Gayle*, 342 F.3d at 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 the statute.") (citing *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003)); see also *Small*, 183 F. Supp. 2d at 759 (refusing to consider statutory definitions section in section 921(a)(20)).

²⁰⁰ See *Gayle*, 342 F.3d at 93 (finding that section 921(a)(20) injects doubt as to whether Congress intended to include foreign convictions under section 922(g)(1)).

²⁰¹ See *Atkins*, 872 F.2d at 96; *Small*, 183 F. Supp. 2d at 760.

²⁰² *United States v. Stuckey*, 220 F.3d 976 (8th Cir. 2000); *United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997); *United States v. McDonald*, 992 F.2d 967 (9th Cir. 1993).

²⁰³ See *United States v. Winson*, 793 F.2d 754, 758 (6th Cir. 1986) (stating that "[s]ince the object of the statute is to prevent the possession of firearms by individuals with serious criminal records, . . . we can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States."); see also *Small*, 183 F. Supp. 2d at 758 (quoting *Winson*); *United States v. Chant*, 1997 WL 231105, at *1 (N.D. Cal. Apr. 4, 1997) (quoting *Winson*).

²⁰⁴ See *supra* Part I and note 203.

²⁰⁵ See *Winson*, 793 F.2d at 758 (quoting language included in *supra* note 203).

²⁰⁶ The Supreme Court has held that statutory language must be read in light of its place in the statutory scheme. See cases cited *supra* note 46.

921(a) mention only federal and state offenses.²⁰⁷ If Congress had intended to include foreign convictions under section 922, it presumably would have listed foreign offenses with the state and federal exceptions. As the *Concha* court noted, applying exceptions to domestic convictions, but not to identical foreign convictions, would lead to absurd results.²⁰⁸ The domestic offenses limitation of section 921(a) implies that Congress did not intend to include foreign convictions and casts doubt on an expansive reading of "any court."²⁰⁹

Applying a plain meaning interpretation, "foreign use" courts have rejected the argument that the definitions section casts doubt on the meaning of section 922(g).²¹⁰ This reasoning presents two problems. First, as mentioned, the statute should be read as a whole.²¹¹ Second, courts use the various sections of the statute to shed light on other sections.²¹² For example, section 924(e) requires that convictions be constitutionally valid. Courts have read this same requirement into section 922(g) of the same Act.²¹³ Courts can, and should, use the definitions in section 921(a) to interpret the rest of the Act, including section 922(g).

Furthermore, the rule of lenity requires courts to construe ambiguous criminal statutes in favor of the defendant.²¹⁴ As mentioned, one important justification for this rule is that the defendant deserves fair warning of what the law intends to do.²¹⁵ People cannot avoid breaking a law if they do not know what the law is. Thus, the language of section 922 does not make it clear that a defendant's foreign convictions are included under the statute; a defendant does not have fair warning that foreign convictions will be included to enhance his punishment.

²⁰⁷ 18 U.S.C. § 921(a)(20) (2000) (providing exceptions for certain business practice violations).

²⁰⁸ *United States v. Concha*, 233 F.3d 1249, 1253-54 (10th Cir. 2000).

²⁰⁹ *See Gayle*, 342 F.3d at 93; *Concha*, 233 F.3d at 1254.

²¹⁰ *United States v. Small*, 183 F. Supp. 2d 755, 759-60 (W.D. Penn. 2002).

²¹¹ *See cases cited supra* note 46.

²¹² *Small*, 183 F. Supp. 2d at 760.

²¹³ *Id.* Because the Supreme Court found an exception to convictions that may apply under section 924(e), the *Small* court assumed that this same exception would apply to convictions under section 922(g)(1). *Id.* In *Custis v. United States*, 511 U.S. 485 (1994), the Supreme Court held that section 924(e) focused on the fact of the prior conviction. Defendants may attack the prior conviction for potential constitutional errors. One exception is for failure to appoint counsel. The *Small* court expanded this exception to all violations of the fundamental fairness doctrine. *Small*, 183 F. Supp. 2d at 760-61.

²¹⁴ *See cases cited supra* note 13.

²¹⁵ *United States v. Bass*, 404 U.S. 336, 348 (1971).

B. Legislative History Indicates that Congress Did Not Intend to Include Foreign Convictions

The legislative history of section 922 indicates that Congress intended to include only domestic convictions.²¹⁶ As discussed in Part I, the congressional reports originally defined “felony” as a federal or state offense.²¹⁷ In adopting the senate report, the House did not oppose the Senate’s definition.²¹⁸ Had the House intended to include foreign convictions under the Act, it would have disagreed with the Senate’s definition of “felony” at that time.²¹⁹

Furthermore, the legislative history of section 1202 is revealing. Congress intended to expand the scope of section 922 when it passed section 1202.²²⁰ Because Congress limited section 1202’s scope to federal and state offenses, section 922 must have been likewise limited; otherwise, section 1202 would not have been an expansion.²²¹ If Congress intended to include foreign convictions under section 922, it would not have excluded these convictions from the section’s more expansive counterpart. Therefore, Congress’ silence in section 922, as opposed to its explicit language in sections 921(a) and 1202, limits predicate offenses to domestic convictions.

“Foreign use” courts may counter that section 1202 expanded a different aspect of section 922.²²² As mentioned, section 922 applied only to shipping or receiving guns in interstate commerce.²²³ Section 1202, on the other hand, outlawed mere possession.²²⁴ In this respect, section 1202 broadened the number of convicted felons who were prohibited from owning guns. This implies, however, that Congress intended the new “mere possession” law to apply to those convicted in the United States, but not to those convicted in foreign countries.

The interpretation applied by “foreign use” courts is flawed because it leads to absurd results. For example, an incompatible reading of sections 922 and 1202 could lead to the following situation: Section 922 would prohibit both person A, convicted of a felony in the United States, and

²¹⁶ See *supra* Part I.

²¹⁷ S. REP. NO. 90-1501, at 31 (1968); see *supra* note 27.

²¹⁸ See discussion *supra* Part I.

²¹⁹ See *Gayle*, 342 F.3d at 95.

²²⁰ See cases cited *supra* note 38 and accompanying text.

²²¹ *Id.*

²²² See *supra* Part I.C (noting that Congress did not explain exactly how section 1202 would expand section 922).

²²³ *Id.*

²²⁴ *Id.*

person B, convicted of the same felony in a foreign court, from shipping or receiving firearms in interstate commerce. At the same time, section 1202 would only have outlawed person A, not person B, from merely possessing a gun. Like the limitations in the definitions section, the limitations in section 1202 indicated that Congress intended to include only domestic convictions under section 922.

C. The Absence of Procedural Safeguards Creates the Possibility of Injustice

Fairness concerns also favor excluding foreign courts' convictions from section 922(g).²²⁵ Because Congress did not include guidelines for ensuring the fairness of applying foreign convictions under section 922, the statute lacks procedural safeguards.²²⁶ "Domestic use" courts interpret this silence to mean that Congress did not intend to include foreign convictions.²²⁷ It is unlikely that Congress intended to include foreign convictions without setting forth a procedure for their fair and just application.²²⁸

"Foreign use" courts may argue that guidelines from Congress are not necessary. Courts are able to address independently the fairness of applying foreign convictions.²²⁹ The Third Circuit, for example, responded to this concern in *Small* by adopting the Restatement's approach.²³⁰ After analyzing the transcript of the foreign proceeding, the court found no reasons for nonrecognition.²³¹ It held that the foreign conviction comported with due process concerns.²³² Though this approach is commendable, it is not mandatory and is thus an inadequate safeguard. Indeed, the mandates of the Restatement are not binding on courts.²³³

²²⁵ See *United States v. Concha*, 233 F.3d 1249, 1255-56 (10th Cir. 2000) (noting that unfair foreign convictions can be challenged with difficulty, if at all); see also *Gayle*, 342 F.3d at 95; *Bean v. United States*, 89 F. Supp. 2d 828, 837-39 (E.D. Tex. 2000).

²²⁶ Indeed, the statute is silent on whether foreign convictions may be allowed at all. See *Concha*, 233 F.3d at 1256 (discussing implications of Congress' silence on procedure for application of foreign convictions).

²²⁷ *Id.*

²²⁸ See *Gayle*, 342 F.3d at 95-96. "If Congress were [to include foreign convictions], it would need to speak more clearly than it has in section 922(g)(1) [W]e . . . choose not to write into a statute a meaning that seems contrary to what Congress intended." *Id.* at 96.

²²⁹ *United States v. Small*, 333 F.3d 425, 428 (3d Cir. 2003).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1176 (N.D. Cal. 2001) (stating that Restatement (Third) of Foreign Relations Law is not binding on federal court).

"Foreign use" courts may also argue that guidelines are not necessary because defendants can always challenge the constitutionality of the foreign conviction. This argument is not persuasive; many of the procedures applied in foreign courts differ from those in the United States without necessarily being unconstitutional.²³⁴ Absent guidance for determining the constitutional validity of foreign convictions, there is no guarantee that courts will apply foreign convictions fairly.²³⁵ Congress must adopt a set of standards into the felon-in-possession law if courts are to justly apply foreign convictions as predicate offenses. Until Congress enacts such legislation, courts should uniformly bar the use of foreign convictions under section 922.

CONCLUSION

We are often willing to give up individual rights in exchange for laws that benefit the public good. Our society attempts to balance these interests. The Safe Streets Act restricts the rights of those who have been convicted of a felony in order to create greater public safety.²³⁶ When the law is vague and inequitable, however, the balance may infringe too severely on some individual rights.

Courts should not interpret the felon-in-possession law to include foreign convictions as predicate offenses. The statute's ambiguity compels courts to adopt the rule of lenity and refuse to recognize convictions from foreign courts.²³⁷ The statutory definitions in section 921(a) and the legislative history do not indicate clear Congressional intent to include foreign convictions.²³⁸ Further, Congress' silence on how to apply foreign convictions and the possibility of absurd results indicate that Congress intended the statute to include convictions only

²³⁴ See generally Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 518-21 (1997) (discussing fairness concerns of applying foreign convictions as predicate offenses for sentence enhancements). For example, Kimes notes that not all jurisdictions guarantee criminal defendants the Sixth Amendment right to counsel or the Fifth Amendment protection against self-incrimination. Additionally, many civil law jurisdictions do not afford defendant the right to a jury trial, to cross-examine witnesses, or the right to remain silent. Civil law countries include "most European nations . . . all Latin American countries, Japan, China, Turkey." *Id.* at 525-26 n.123.

²³⁵ *Id.*

²³⁶ See *supra* note 9 for the text of section 922(g).

²³⁷ See discussion *supra* Part III.A.

²³⁸ See discussion *supra* Part III.B.

from domestic courts.²³⁹ Important fairness concerns support this as the only just and logical conclusion.²⁴⁰

²³⁹ See discussion *supra* Part III.C.

²⁴⁰ *Id.*