# SUPREME COURT OF THE UNITED STATES

No. 03–750

GARY SHERWOOD SMALL, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April 26, 2005]

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

Gary Small, having recently emerged from three years in Japanese prison for illegally importing weapons into that country, bought a gun in the United States. This violated 18 U. S. C. §922(g)(1), which makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm in or affecting commerce. Yet the majority decides that Small's gun possession did not violate the statute, because his prior convictions occurred in a Japanese court rather than an American court. In concluding that "any" means not what it says, but rather "a subset of any," the Court distorts the plain meaning of the statute and departs from established principles of statutory construction. I respectfully dissent.

## I

In December 1992, Small shipped a 19-gallon electric water heater from the United States to Okinawa, Japan, ostensibly as a present for someone in Okinawa. App. to Brief for Appellant in No. 02–2785 (CA3), pp. 507a–510a, 530a–531a, 534a, 598a (hereinafter Appellant's App.). Small had sent two other water heaters to Japan that

same year. *Id.,* at 523a–527a. Thinking it unusual for a person to ship a water tank from overseas as a present, *id.,* at 599a, Japanese customs officials searched the heater and discovered 2 rifles, 8 semiautomatic pistols, and 410 rounds of ammunition. *Id.,* at 603a–604a; *id.,* at 262a, 267a, 277a.

The Japanese Government indicted Small on multiple counts of violating Japan's weapons-control and customs laws. *Id.,* at 261a–262a. Each offense was punishable by imprisonment for a term exceeding one year. 333 F. 3d 425, 426 (CA3 2003). Small was tried before a three-judge court in Naha, Japan, Appellant's App. 554a, convicted on all counts on April 14, 1994, 333 F. 3d, at 426, and sentenced to 5 years' imprisonment with credit for 320 days served, *id*., at 426, n. 1; Government's Brief in Support of Detention in Crim. No. 00–160 (WD Pa.), pp. 3–4. He was paroled on November 22, 1996, and his parole terminated on May 26, 1998. 333 F. 3d, at 426, n. 1.

A week after completing parole for his Japanese convictions, on June 2, 1998, Small purchased a 9-millimeter SWD Cobray pistol from a firearms dealer in Pennsylvania. Appellant's App. 48a, 98a. Some time later, a search of his residence, business premises, and automobile revealed a .380 caliber Browning pistol and more than 300 rounds of ammunition. *Id.,* at 47a–51a, 98a–99a. This prosecution ensued.

## II

The plain terms of §922(g)(1) prohibit Small—a person "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"—from possessing a firearm in the United States. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales,* 520 U. S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976) (hereinafter Web-

ster's 3d)); see also *Department of Housing and Urban Development* v. *Rucker,* 535 U. S. 125, 130–131 (2002) (statute making "any" drug-related criminal activity cause for termination of public housing lease precludes requirement that tenant know of the activity); *Brogan* v. *United States,* 522 U. S. 398, 400–401 (1998) (statute criminalizing "any" false statement within the jurisdiction of a federal agency allows no exception for the mere denial of wrongdoing); *United States* v. *Alvarez-Sanchez,* 511 U. S. 350, 356, 358 (1994) (statute referring to "any" law-enforcement officer includes all law enforcement officers—federal, state, or local—capable of arresting for a federal crime). No exceptions appear on the face of the statute; "[n]o modifier is present, and nothing suggests any restriction," *Lewis* v. *United States,* 445 U. S. 55, 60 (1980), on the scope of the term "court." See *Gonzales*, *supra*, at 5 (statute referring to "'any other term of imprisonment'" includes no "language limiting the breadth of that word, and so we must read [the statute] as referring to all 'term[s] of imprisonment'"). The broad phrase "any court" unambiguously includes all judicial bodies[1] with jurisdiction to impose the requisite conviction—a conviction for a crime punishable by imprisonment for a term of more than a year. Indisputably, Small was convicted in a Japanese court of crimes punishable by a prison term exceeding one year. The clear terms of the statute prohibit him from possessing a gun in the United States.

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[1] See, *e.g.*, The Random House Dictionary of the English Language 335 (1966) (defining "court" as "a place where justice is administered," "a judicial tribunal duly constituted for the hearing and determination of cases," "a session of a judicial assembly"); The Concise Oxford Dictionary of Current English 282 (5th ed. 1964) (defining "court" as an"[a]ssembly of judges or other persons acting as tribunal"); Webster's 3d 522 (1961) (defining "court" as "the persons duly assembled under authority of law for the administration of justice," "an official assembly legally met together for the transaction of judicial business," "a judge or judges sitting for the hearing or trial of cases").

Of course, the phrase "any court," like all other statutory language, must be read in context. *E.g.*, *Deal* v. *United States,* 508 U. S. 129, 132 (1993). The context of §922(g)(1), however, suggests that there is no geographic limit on the scope of "any court."[2] By contrast to other parts of the firearms-control law that expressly mention only state or federal law, "any court" is not qualified by jurisdiction. See 18 U. S. C. §921(a)(20) (excluding certain "Federal or State offenses" from the definition of "crime punishable by imprisonment for a term exceeding one year"); §921(a)(33)(A)(i) (defining a "misdemeanor crime of domestic violence" by reference to "Federal or State law").[3] Congress' explicit use of "Federal" and "State" in other provisions shows that it specifies such restrictions when it wants to do so.

Counting foreign convictions, moreover, implicates no special federalism concerns or other clear statement rules that have justified construing "any" narrowly in the past.[4]

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[2] The Court's observation that "a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city," *ante*, at 2, therefore adds nothing to the analysis. The context of that statement implies that such a speaker, despite saying "any," often means only the subset of films within an accessible distance. Unlike the context of the film remark, the context of 18 U. S. C. §922(g)(1) implies no geographic restriction.

[3] See also §921(a)(15) (defining a "fugitive from justice," who is banned from possessing firearms under §922(g)(2), as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony"); §924(e)(2) (defining a "serious drug offense," which can trigger an enhanced sentence, by reference to particular federal laws or "State law").

[4] *Nixon* v. *Missouri Municipal League,* 541 U. S. 125 (2004), considered a federal statute authorizing preemption of state and local laws "prohibiting the ability of any entity" to provide telecommunications services. *Id.*, at 128 (internal quotation marks omitted). The Court held that the statute did not provide the clear statement required for the Federal Government to limit the States' ability to restrict delivery of such services by their own political subdivisions. *Id.,* at 140–141; see also *id.,* at 141 (SCALIA, J., concurring in judgment); *Raygor* v. *Regents of Univ. of Minn.,*

And it is eminently practical to put foreign convictions to the same use as domestic ones; foreign convictions indicate dangerousness just as reliably as domestic convictions. See Part III–B, *infra*. The expansive phrase "convicted in any court" straightforwardly encompasses Small's Japanese convictions.

III

Faced with the inescapably broad text, the Court narrows the statute by assuming that the text applies only to domestic convictions, *ante*, at 5; criticizing the accuracy of foreign convictions as a proxy for dangerousness, *ante,* at 3–5; finding that the broad, natural reading of the statute "creates anomalies," *ante,* at 5; and suggesting that Congress did not consider whether foreign convictions counted, *ante*, at 7–8. None of these arguments is persuasive.

A

The Court first invents a canon of statutory interpretation—what it terms "an ordinary assumption about the reach of domestically oriented statutes," *ante*, at 5—to cabin the statute's reach. This new "assumption" imposes a clear statement rule on Congress: Absent a clear statement, a statute refers to nothing outside the United States. The Court's denial that it has created a clear statement rule is implausible. *Ibid.* After today's ruling, the only way for Congress to ensure that courts will construe a law to refer to foreign facts or entities is to describe those facts or entities specifically as foreign. If this is not a "special burden of specificity," *ibid.*, I am not sure what is.

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534 U. S. 533, 540–541 (2002) ("any" in federal statute insufficiently clear statement to abrogate state sovereign immunity); *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 245–246 (1985) (same). No such clear statement rule is at work here.

The Court's innovation is baseless. The Court derives its assumption from the entirely different, and well-recognized, canon against extraterritorial application of federal statutes: "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244, 248 (1991) (internal quotation marks omitted). But the majority rightly concedes that the canon against extraterritoriality itself "does not apply directly to this case." *Ante*, at 3. Though foreign as well as domestic convictions trigger §922(g)(1)'s prohibition, the statute criminalizes gun possession in this country, not abroad. In prosecuting Small, the Government is enforcing a domestic criminal statute to punish domestic criminal conduct. *Pasquantino* v. *United States*, *ante*, at 20–21 (federal wire fraud statute covers a domestic scheme aimed at defrauding a foreign government of tax revenue).

The extraterritoriality cases cited by the Court, *ante*, at 3, do not support its new assumption. They restrict federal statutes from applying outside the territorial jurisdiction of the United States. See *Smith* v. *United States,* 507 U. S. 197, 203–204 (1993) (Federal Tort Claims Act does not apply to claims arising in Antarctica); *Arabian American Oil Co., supra*, at 249–251 (Title VII of the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens abroad); *Foley Bros., Inc.* v. *Filardo,* 336 U. S. 281, 285–286 (1949) (federal labor statute does not apply to a contract between the United States and a private contractor for construction work done in a foreign country); *United States* v. *Palmer,* 3 Wheat. 610, 630–634 (1818) (statute punishing piracy on the high seas does not apply to robbery committed on the high seas by a noncitizen on board a ship belonging exclusively to subjects of a foreign state). These straightforward applications of the extraterritorial-

ity canon, restricting federal statutes from reaching conduct *beyond U. S. borders*, lend no support to the Court's unprecedented rule restricting a federal statute from reaching conduct *within U. S. borders*.

We have, it is true, recognized that the presumption against extraterritorial application of federal statutes is rooted in part in the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith, supra*, at 204, n. 5. But my reading of §922(g)(1) is entirely true to that notion: Gun possession in this country is surely a "domestic concern." We have also consistently grounded the canon in the risk that extraterritorially applicable U. S. laws could conflict with foreign laws, for example, by subjecting individuals to conflicting obligations. *Arabian American Oil Co., supra*, at 248. That risk is completely absent in applying §922(g)(1) to Small's conduct. Quite the opposite, §922(g)(1) takes foreign law as it finds it. Aside from the extraterritoriality canon, which the Court properly concedes does not apply, I know of no principle of statutory construction justifying the result the Court reaches. Its concession that the canon is inapposite should therefore end this case.

Rather than stopping there, the Court introduces its new "assumption about the reach of domestically oriented statutes" *sua sponte*, without briefing or argument on the point,[5] and without providing guidance on what constitutes a "domestically oriented statut[e]." *Ante*, at 5. The majority suggests that it means all statutes except those dealing with subjects like "immigration or terrorism," *ibid.*, apparently reversing our previous rule that the extraterritoriality canon "has special force" in statutes

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[5] Neither party mentions the quasi-extraterritoriality principle that the Court fashions. The briefs barely discuss the extraterritoriality canon itself. The only reference to that canon is a footnote in the respondent's brief pointing out that it is inapposite. Brief for United States 44, n. 31.

"that may involve foreign and military affairs," *Sale* v. *Haitian Centers Council, Inc.,* 509 U. S. 155, 188 (1993) (provision of the Immigration and Nationality Act does not apply extraterritorially); cf. *Palmer*, *supra* (statute criminalizing piracy on the high seas does not apply to robbery by noncitizen on ship belonging to foreign subjects). The Court's creation threatens to wreak havoc with the established rules for applying the canon against extraterritoriality.[6]

B

In support of its narrow reading of the statute, the majority opines that the natural reading has inappropriate results. It points to differences between foreign and domestic convictions, primarily attacking the reliability of foreign convictions as a proxy for identifying dangerous individuals. *Ante*, at 3–5. Citing various foreign laws, the Court observes that, if interpreted to include foreign convictions, §922(g) would include convictions for business and speech activities "that [United States] laws would permit," *ante*, at 3; convictions "from a legal system that is inconsistent with an American understanding of fairness," *ante,* at 4; and convictions "for conduct that [United States] law punishes far less severely," *ibid.* The Court therefore concludes that foreign convictions cannot trigger §922(g)(1)'s prohibition on firearm possession.

The Court's claim that foreign convictions punishable by imprisonment for more than a year "somewhat less reliably identif[y] dangerous individuals" than domestic convictions, *ibid.*, is untenable. In compiling examples of foreign convictions that might trigger §922(g)(1), *ibid.*, the Court

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[6]The Court attempts to justify applying its new canon with the claim that "other indicia of intent are in approximate balance." *Ante*, at 5. This claim is false. Other indicia of intent are not in balance, so long as text counts as an indicium of intent. As I have explained, Part II, *supra*, the text of §922(g)(1) encompasses foreign convictions.

constructs a parade of horribles. Citing laws of the Russian Soviet Federated Socialist Republic, Cuba, and Singapore, it cherry-picks a few egregious examples of convictions unlikely to correlate with dangerousness, inconsistent with American intuitions of fairness, or punishable more severely than in this country. *Ibid.* This ignores countless other foreign convictions punishable by more than a year that serve as excellent proxies for dangerousness and culpability.[7] Surely a "reasonable human being" drafting this language would have considered whether foreign convictions are, on average and as a whole, accurate at gauging dangerousness and culpability, not whether the worst-of-the-worst are. Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 854 (1992). The Court also ignores the facts of this very case: A week after completing his sentence for shipping two rifles, eight semiautomatic pistols, and hundreds of rounds of ammunition into Japan, Small bought a gun in this country. It was eminently reasonable for Congress to use convictions punishable by imprisonment for more than a year—foreign no less than domestic—as a proxy for dangerousness.

Contrary to the majority's assertion, it makes sense to

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[7] Brottsbalk (Swedish Criminal Code), SFS 1962:700, ch. 3, §1 (murder); Criminal Code of Canada, R. S. C. ch. C–46, §244(b) (1985), as amended (discharging firearm at a person with intent to endanger life); §102(2) (making an automatic weapon); Laws of the State of Israel, Penal Law §345(b)(2) (rape by threat of firearm or cutting weapon); Penal Code of Egypt Art. 143 (giving weapons to a detained person in order to help him escape); Federal Penal Code of Mexico Art. 139 (terrorism by explosives, toxic substances, firearms, fire, flooding, or other violent means); Art. 163 (kidnaping); Firearms Offenses Act 1968 (United Kingdom), ch. 27, §18(1) (carrying firearm with intent to commit an indictable offense or to resist arrest); 7 L. Rep. of Zambia Cap. 87, ch. 19, §§200–201 (1995) (murder); ch. 24, §248 (assault occasioning actual bodily harm); ch. 25, §§251–262 (kidnaping, abduction, and buying or selling slaves).

bar people convicted overseas from possessing guns in the United States. The Court casually dismisses this point with the observation that only "'10 to a dozen'" prosecutions under the statute have involved foreign convictions as predicate convictions. *Ante*, at 8 (quoting Tr. of Oral Arg. 32). The rarity of such prosecutions, however, only refutes the Court's simultaneous claim, *ante*, at 3–5, that a parade of horribles will result if foreign convictions count. Moreover, the Court does not claim that any of these few prosecutions has been based on a foreign conviction inconsistent with American law. As far as anyone is aware, the handful of prosecutions thus far rested on foreign convictions perfectly consonant with American law, like Small's conviction for international gunrunning. The Court has no answer for why including foreign convictions is unwise, let alone irrational.

C

The majority worries that reading §922(g)(1) to include foreign convictions "creates anomalies" under other firearms control provisions. *Ante*, at 5–7. It is true, as the majority notes, that the natural reading of §922(g)(1) affords domestic offenders more lenient treatment than foreign ones in some respects: A domestic antitrust or business regulatory offender could possess a gun, while a similar foreign offender could not; the perpetrator of a state misdemeanor punishable by two years or less in prison could possess a gun, while an analogous foreign offender could not. *Ibid.* In other respects, domestic offenders would receive harsher treatment than their foreign counterparts: One who committed a misdemeanor crime of domestic violence in the United States could not possess a gun, while a similar foreign offender could; and a domestic drug offender could receive a 15-year mandatory minimum sentence for unlawful gun possession, while a foreign drug offender could not. *Ante*, at 6–7.

These outcomes cause the Court undue concern. They certainly present no occasion to employ, nor does the Court invoke, the canon against absurdities. We should employ that canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *Department of Justice,* 491 U. S. 440, 470–471 (1989) (KENNEDY, J., concurring in judgment); *Nixon* v. *Missouri Municipal League*, 541 U. S. 125, 141 (2004) (SCALIA, J., concurring in judgment) ("avoidance of unhappy consequences" is inadequate basis for interpreting a text); cf. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 203 (1819) (before disregarding the plain meaning of a constitutional provision, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application").

Here, the "anomalies" to which the Court points are not absurd. They are, at most, odd; they may even be rational. For example, it is not senseless to bar a Canadian antitrust offender from possessing a gun in this country, while exempting a domestic antitrust offender from the ban. Congress might have decided to proceed incrementally and exempt only antitrust offenses with which it was familiar, namely, domestic ones. In any event, the majority abandons the statute's plain meaning based on results that are at most incongruous and certainly not absurd. As with the extraterritoriality canon, the Court applies a mutant version of a recognized canon when the recognized canon is itself inapposite. Whatever the utility of canons as guides to congressional intent, they are useless when modified in ways that Congress could never have imagined in enacting §922(g)(1).

Even assuming that my reading of the statute generates

anomalies, the majority's reading creates ones even more dangerous. As explained above, the majority's interpretation permits those convicted overseas of murder, rape, assault, kidnaping, terrorism, and other dangerous crimes to possess firearms freely in the United States. *Supra*, at 9, and n. 7. Meanwhile, a person convicted domestically of tampering with a vehicle identification number, 18 U. S. C. §511(a)(1), is barred from possessing firearms. The majority's concern with anomalies provides no principled basis for choosing its interpretation of the statute over mine.

D

The Court hypothesizes "that Congress did not consider whether the generic phrase 'convicted in any court' applies to domestic as well as foreign convictions," *ante*, at 7, and takes that as license to restrict the clear breadth of the text. Whether the Court's empirical assumption is correct is anyone's guess. Regardless, we have properly rejected this method of guesswork-as-interpretation. In *Beecham* v. *United States,* 511 U. S. 368 (1994), we interpreted other provisions of the federal firearms laws to mean that a person convicted of a federal crime is not relieved of the firearms disability unless his civil rights have been restored under federal (as opposed to state) law. We acknowledged the possibility "that the phrases on which our reading of the statute turns . . . were accidents of statutory drafting," *id.,* at 374; and we observed that some legislators might have read the phrases differently from the Court's reading, "or, more likely, . . . never considered the matter at all," *ibid.* We nonetheless adhered to the unambiguous meaning of the statute. *Ibid.;* cf. *National Organization for Women, Inc.* v. *Scheidler,* 510 U. S. 249, 262 (1994) ("The fact that [the Racketeer Influenced and Corrupt Organizations Act] has been applied in situations not expressly anticipated by Congress does not demonstrate

ambiguity. It demonstrates breadth" (internal quotation marks and brackets omitted)). Here, as in *Beecham*, "our 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 cas[e]," 511 U. S., at 374, but the eminently more manageable one of following the ordinary meaning of the text they enacted. That meaning includes foreign convictions.

The Court's reliance on the absence of any discussion of foreign convictions in the legislative history is equally unconvincing. *Ante*, at 7–8. Reliance on explicit statements in the history, if they existed, would be problematic enough. Reliance on silence in the history is a new and even more dangerous phenomenon. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. ___, ___ (2004) (slip op., at 5) (SCALIA, J., dissenting) (criticizing the Court's novel "Canon of Canine Silence").

I do not even agree, moreover, that the legislative history is silent. As the Court describes, the Senate bill that formed the basis for this legislation was amended in Conference, to change the predicate offenses from "'Federal' crimes" punishable by more than one year's imprisonment and "crimes 'determined by the laws of a State to be a felony'" to conviction "'in any court, of a crime punishable by a term of imprisonment exceeding one year.'" *Ante*, at 7. The Court seeks to explain this change by saying that "the enacted version is simpler and . . . avoids potential difficulties arising out of the fact that States may define the term 'felony' differently." *Ante*, at 8. But that does not explain why all limiting reference to "Federal" and "State" was eliminated. The revised provision would have been just as simple, and would just as well have avoided the potential difficulties, if it read "convicted in any Federal or State court of a crime punishable by a term of imprisonment exceeding one year." Surely that would have been the natural change if expansion beyond federal and state

convictions were not intended. The elimination of the limiting references suggests that not *only* federal and state convictions were meant to be covered.

Some, of course, do not believe that any statement or text that has not been approved by both Houses of Congress and the President (if he signed the bill) is an appropriate source of statutory interpretation. But for those who do, this committee change ought to be strong confirmation of the fact that "any" means not "any Federal or State," but simply "any."

## IV

The Court never convincingly explains its departure from the natural meaning of §922(g)(1). Instead, it institutes the troubling rule that "any" does not really mean "any," but may mean "some subset of 'any,'" even if nothing in the context so indicates; it distorts the established canons against extraterritoriality and absurdity; it faults without reason Congress' use of foreign convictions to gauge dangerousness and culpability; and it employs discredited methods of determining congressional intent. I respectfully dissent.