

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 96–1654 AND 96–8837

FRANK J. MUSCARELLO, PETITIONER
96–1654 v.
UNITED STATES

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

DONALD E. CLEVELAND AND ENRIQUE GRAY-
SANTANA, PETITIONERS
96–8837 v.
UNITED STATES

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

[June 8, 1998]

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE,
JUSTICE SCALIA, and JUSTICE SOUTER join, dissenting.

Section 924(c)(1) of Title 18, United States Code, is a punishment-enhancing provision; it imposes a mandatory five-year prison term when the defendant “during and in relation to any crime of violence or drug trafficking . . . uses or carries a firearm.” In *Bailey v. United States*, 516 U. S. 137 (1995), this Court held that the term “uses,” in the context of §924(c)(1), means “active employment” of the firearm. In today’s cases we confront a related question: What does the term “carries” mean in the context of §924(c)(1), the enhanced punishment prescription again at issue.

It is uncontested that §924(c)(1) applies when the defendant bears a firearm, *i.e.*, carries the weapon on or about his person “for the purpose of being armed and ready for

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offensive or defensive action in case of a conflict.” Black’s Law Dictionary 214 (6th ed. 1990) (defining the phrase “carry arms or weapons”); see *ante*, at 5. The Court holds that, in addition, “carries a firearm,” in the context of §924(c)(1), means personally transporting, possessing, or keeping a firearm in a vehicle, anyplace in a vehicle.

Without doubt, “carries” is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a ubiquitously necessary one. Nor, in my judgment, is it a proper construction of “carries” as the term appears in §924(c)(1). In line with *Bailey* and the principle of lenity the Court has long followed, I would confine “carries a firearm,” for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate not merely keeping arms on one’s premises or in one’s vehicle, but bearing them in such manner as to be ready for use as a weapon.

I

A

I note first what is at stake for petitioners. The question before the Court “is not *whether* possession of a gun [on the drug offender’s premises or in his car, during and in relation to commission of the offense,] means a longer sentence for a convicted drug dealer. It most certainly does. . . . Rather, the question concerns *which sentencing statute* governs the precise length of the extra term of punishment,” §924(c)(1)’s “blunt ‘mandatory minimum’” five-year sentence, or the more finely tuned “sentencing guideline statutes, under which extra punishment for drug-related gun possession varies with the seriousness of the drug crime.” *United States v. McFadden*, 13 F. 3d 463, 466 (CA1 1994) (Breyer, C. J., dissenting).

Accordingly, there would be no “gap,” see *ante*, at 12, no relevant conduct “ignore[d],” see *ante*, at 8, were the Court to reject the Government’s broad reading of §924(c)(1). To

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be more specific, as cogently explained on another day by today's opinion writer:

“The special ‘mandatory minimum’ sentencing statute says that anyone who ‘uses or carries’ a gun ‘during and in relation to any . . . drug trafficking crime’ must receive a mandatory five-year prison term added on to his drug crime sentence. 18 U. S. C. §924(c). At the same time, the Sentencing Guidelines, promulgated under the authority of a different statute, 28 U. S. C. §994, provide for a two-level (i.e., a 30% to 40%) sentence enhancement where a ‘firearm . . . was possessed’ by a drug offender, U. S. S. G. §2D1.1(b)(1), unless the possession clearly was not ‘connected with the [drug] offense.’” *McFadden*, 13 F. 3d, at 467 (Breyer, C. J., dissenting).

In Muscarello's case, for example, the underlying drug crimes involved the distribution of 3.6 kilograms of marijuana, and therefore carried a base offense level of 12. See United States Sentencing Commission, Guidelines Manual §2D1.1(a)(3) (Nov. 1995). After adjusting for Muscarello's acceptance of responsibility, see *id.*, §3E1.1(a), his final offense level was 10, placing him in the 6-to-12 month sentencing range. See *id.*, ch. 5, pt. A. The two-level enhancement for possessing a firearm, *id.*, §2D1.1(b)(1), would have increased his final offense level to 12 (a sentencing range of 10 to 16 months). In other words, the less rigid (tailored to “the seriousness of the drug crime,” *McFadden*, 13 F. 3d, at 466) Guidelines regime would have added four months to Muscarello's prison time, in contrast to the five-year minimum addition the Court's reading of §924(c)(1) mandates.¹

¹ The Sentencing Guidelines carry out “a major congressional effort to create a fairly sophisticated . . . system that distinguishes among different kinds of criminal behavior and punishes accordingly.” *United States v. McFadden*, 13 F. 3d, at 467–468 (Breyer, C. J., dissenting). A “mandatory minimum” statute deviates from the general regime Con-

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In sum, drug traffickers will receive significantly longer sentences if they are caught travelling in vehicles in which they have placed firearms. The question that divides the Court concerns the proper reference for enhancement in the cases at hand, the Guidelines or §924(c)(1).

B

Unlike the Court, I do not think dictionaries,² surveys of press reports,³ or the Bible⁴ tell us, dispositively, what

gress installed. “Given the importance (to Congress) of the Guidelines system, . . . courts should take care not to interpret [with unnecessary breadth] . . . deviations from the basic congressionally-directed effort to rationalize sentencing.” *Id.*, at 468.

²I note, however, that the only legal dictionary the Court cites, Black’s Law Dictionary, defines “carry arms or weapons” restrictively. See *ante*, at 5; *supra*, at 1–2.

³Many newspapers, the New York Times among them, have published stories using “transport,” rather than “carry,” to describe gun placements resembling petitioners’. See, e.g., Atlanta Constitution, Feb. 27, 1998, p. 9D, col. 2 (“House members last week expanded gun laws by allowing weapons to be *carried into restaurants or transported anywhere in cars.*”); Chicago Tribune, June 12, 1997, sports section, p. 13 (“Disabled hunters with permission to hunt from a standing vehicle would be able to *transport a shotgun in an all-terrain vehicle* as long as the gun is unloaded and the breech is open.”); Colorado Springs Gazette Telegraph, Aug. 4, 1996, p. C10 (British gun laws require “locked steel cases bolted onto a car for *transporting guns from home to shooting range.*”); Detroit News, Oct. 26, 1997, p. D14 (“It is unlawful to *carry afield or transport a rifle . . . or shotgun* if you have buckshot, slug, ball loads, or cut shells in possession except while traveling directly to deer camp or target range with firearm not readily available to vehicle occupants.”); N. Y. Times, July 4, 1993, p. A21, col. 2 (“[T]he gun is supposed to be *transported unloaded*, in a locked box in the trunk.”); Santa Rosa Press Democrat, Sept. 28, 1996, p. B1 (“Police and volunteers ask that participants . . . *transport [their guns] to the fairgrounds* in the trunks of their cars.”); Worcester Telegram & Gazette, July 16, 1996, p. B3 (“Only one gun can be turned in per person. *Guns transported in a vehicle* should be locked in the trunk.”) (emphasis added in all quotations).

⁴The translator of the Good Book, it appears, bore responsibility for determining whether the servants of Ahaziah “carried” his corpse to Jerusalem. Compare *ante*, at 3–4, with, e.g., The New English Bible, 2

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“carries” means embedded in §924(c)(1). On definitions, “carry” in legal formulations could mean, *inter alia*, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one’s person.⁵ At issue here is not “carries” at large but “carries a firearm.” The Court’s computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning “perhaps more than one third” of the time. *Ante*, at 4. One is left to wonder what meaning showed up some two thirds of the time. Surely a most familiar meaning is, as the Constitution’s Second Amendment (“keep and *bear* Arms”) (emphasis added) and Black’s Law Dictionary, at 214, indicate: “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”

On lessons from literature, a scan of Bartlett’s and other quotation collections shows how highly selective the Court’s choices are. See *ante*, at 3–4. If “[t]he greatest of writers” have used “carry” to mean convey or transport in a vehicle, so have they used the hydra-headed word to mean, *inter alia*, carry in one’s hand, arms, head, heart, or soul, sans vehicle. Consider, among countless examples:

“[H]e shall gather the lambs with his arm, and carry them in his bosom.” The King James Bible, Isaiah

Kings 9:28 (“His servants *conveyed* his body to Jerusalem.”); Saint Joseph Edition of the New American Bible (“His servants *brought* him in a chariot to Jerusalem.”); Tanakh: The Holy Scriptures (“His servants *conveyed* him in a chariot to Jerusalem.”); see also *id.*, Isaiah 30:6 (“They *convey* their wealth on the backs of asses.”); The New Jerusalem Bible (“[T]hey *bear* their riches on donkeys’ backs.”) (emphasis added in all quotations).

⁵The dictionary to which this Court referred in *Bailey v. United States*, 516 U.S. 137, 145 (1995), contains 32 discrete definitions of “carry,” including “[t]o make good or valid,” “to bear the aspect of,” and even “[t]o bear (a hawk) on the fist.” See Webster’s New International Dictionary of English Language 412 (2d ed. 1949).

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40:11.

“And still they gaz’d, and still the wonder grew,
That one small head could carry all he knew.”

O. Goldsmith, *The Deserted Village*, ll. 215–216, in *The Poetical Works of Oliver Goldsmith* 30 (A. Dobson ed. 1949).

“There’s a Legion that never was ’listed,
That carries no colours or crest.”

R. Kipling, *The Lost Legion*, st. 1, in *Rudyard Kipling’s Verse, 1885–1918*, p. 222 (1920).

“There is a homely adage which runs, ‘Speak softly and carry a big stick; you will go far.’” T. Roosevelt, *Speech at Minnesota State Fair, Sept. 2, 1901*, in J. Bartlett, *Familiar Quotations* 575:16 (J. Kaplan ed. 1992).⁶

These and the Court’s lexicological sources demonstrate vividly that “carry” is a word commonly used to convey various messages. Such references, given their variety, are not reliable indicators of what Congress meant, in §924(c)(1), by “carries a firearm.”

⁶Popular films and television productions provide corroborative illustrations. In “*The Magnificent Seven*,” for example, O’Reilly (played by Charles Bronson) says: “You think I am brave because I carry a gun; well, your fathers are much braver because they carry responsibility, for you, your brothers, your sisters, and your mothers.” See http://us.imdb.com/M/search_quotes?for=carry. And in the television series “*M*A*S*H*,” Hawkeye Pierce (played by Alan Alda) presciently proclaims: “I will not carry a gun. . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even ‘harr-kari’ if you show me how, but I will not carry a gun!” See <http://www.geocities.com/Hollywood/8915/mashquotes.html>.

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C

Noting the paradoxical statement, “I use a gun to protect my house, but I’ve never had to use it,” the Court in *Bailey*, 516 U. S., at 143, emphasized the importance of context— the statutory context. Just as “uses” was read to mean not simply “possession,” but “active employment,” so “carries,” correspondingly, is properly read to signal the most dangerous cases— the gun at hand, ready for use as a weapon.⁷ It is reasonable to comprehend Congress as having provided mandatory minimums for the most life-jeopardizing gun-connection cases (guns in or at the defendant’s hand when committing an offense), leaving other, less imminently threatening, situations for the more flexible guidelines regime.⁸ As the Ninth Circuit suggested, it is not apparent why possession of a gun in a drug dealer’s moving vehicle would be thought more dangerous than gun possession on premises where drugs are sold: “A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence. A gun in a bag under a tarp in a truck bed [or in a bedroom closet] poses substantially less risk.” *United States v. Foster*, 133 F. 3d 704, 707 (CA9 1998) (en banc).⁹

⁷In my view, the Government would carry its burden by proving a firearm was kept so close to the person as to approximate placement in a pocket or holster, *e.g.*, guns carried at one’s side in a briefcase or handbag, or strapped to the saddle of a horse. See *ante*, at 5.

⁸The Court reports that the Courts of Appeals “have unanimously concluded that ‘carry’ is not limited to the carrying of weapons directly on the person.” *Ante*, at 6–7. In *Bailey*, however, the Government’s argument based on a similar observation did not carry the day. See Brief for United States in *Bailey v. United States*, O. T. 1995, Nos. 94–7448 and 94–7492, p. 16, n. 4. No Court of Appeals had previously adopted an “active employment” construction of “uses . . . a firearm” in §924(c)(1), yet this Court did exactly that. See 516 U. S., at 144.

⁹The “Firearms” statutes indicate that Congress, unlike the Court, *ante*, at 8, recognizes that a gun in the hand is indeed more dangerous than a gun in the trunk. See, *e.g.*, 18 U. S. C. §926A (permitting the

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For indicators from Congress itself, it is appropriate to consider word usage in other provisions of Title 18's chapter on "Firearms." See *Bailey*, 516 U. S., at 143, 146 (interpreting §924(c)(1) in light of 18 U. S. C. §§922(g), 922(j), 922(k), 922(o)(1), 924(d)(1), 930(a), 930(b)). The Court, however, does not derive from the statutory complex at issue its thesis that "[c]arry' implies personal agency and some degree of possession, whereas 'transport' does not have such a limited connotation and, in addition, implies the movement of goods in bulk over great distances." *Ante*, at 9. Looking to provisions Congress enacted, one finds that the Legislature did not acknowledge or routinely adhere to the distinction the Court advances today; instead, Congress sometimes employed "transports" when, according to the Court, "carries" was the right word to use.

Section 925(a)(2)(B), for example, provides that no criminal sanction shall attend "the transportation of [a] firearm or ammunition carried out to enable a person, who lawfully received such firearm or ammunition from the Secretary of the Army, to engage in military training or in competitions." The full text of §926A, rather than the truncated version the Court presents, see *ante*, at 9, is also telling:

"Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry

transportation of firearms in a vehicle, but only if "neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle"); see *infra*, at 8–9.

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such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided*, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console."

In describing when and how a person may travel in a vehicle that contains his firearm without violating the law, §§925(a)(2)(B) and 926A use "transport," not "carry," to "impl[y] personal agency and some degree of possession." See *ante*, at 9.¹⁰

Reading "carries" in §924(c)(1) to mean "on or about [one's] person" is fully compatible with these and other "Firearms" statutes.¹¹ For example, under §925(a)(2)(B),

¹⁰ The Court asserts that "'transport' is a broader category that includes 'carry' but encompasses other activity." *Ante*, at 10. "Carry," however, is not merely a subset of "transport." A person seated at a desk with a gun in hand or pocket is carrying the gun, but is not transporting it. Yes, the words "carry" and "transport" often can be employed interchangeably, as can the words "carry" and "use." But in *Bailey*, this Court settled on constructions that gave "carry" and "use" independent meanings. See *Bailey*, 516 U. S., at 145–146. Without doubt, Congress is alert to the discrete meanings of "transport" and "carry" in the context of vehicles, as the Legislature's placement of each word in §926A illustrates. The narrower reading of "carry" preserves discrete meanings for the two words, while in the context of vehicles the Court's interpretation of "carry" is altogether synonymous with "transport." Tellingly, when referring to firearms traveling in vehicles, the "Firearms" statutes routinely use a form of "transport"; they never use a form of "carry."

¹¹ See *infra*, at 11–12, nn. 13, 14. The Government points to numerous federal statutes that authorize law enforcement officers to "carry firearms" and notes that, in those authorizing provisions, "carry" of course means "both on the person and in a vehicle." Brief for United States 31–32, and n. 18. Quite right. But as viewers of "Sesame

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one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets. Under the conditions of §926A, one could transport her gun in a car, but under no circumstances could the gun be readily accessible while she travels in the car. “[C]ourts normally try to read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense.” *McFadden*, 13 F. 3d, at 467 (Breyer, C. J., dissenting). So reading the “Firearms” statutes, I would not extend the word “carries” in §924(c)(1) to mean transports out of hand’s reach in a vehicle.¹²

Street” will quickly recognize, “one of these things [a statute *authorizing* conduct] is not like the other [a statute *criminalizing* conduct].” The authorizing statutes in question are properly accorded a construction compatible with the clear purpose of the legislation to aid federal law enforcers in the performance of their official duties. It is fundamental, however, that a penal statute is not to be construed generously in the Government’s favor. See, e.g., *United States v. Bass*, 404 U. S. 336, 348 (1971).

¹²The Court places undue reliance on Representative Poff’s statement that §924(c)(1) seeks “to persuade the man who is tempted to commit a Federal felony to leave his gun at home.” See *ante*, at 7 (quoting 114 Cong. Rec. 22231 (1968)). As the Government argued in its brief to this Court in *Bailey*:

“In making that statement, Representative Poff was not referring to the ‘carries’ prong of the original Section 924(c). As originally enacted, the ‘carries’ prong of the statute prohibited only the ‘unlawful’ carrying of a firearm while committing an offense. The statute would thus not have applied to an individual who, for instance, had a permit for carrying a gun and carried it with him when committing an offense, and it would have had no force in ‘persuading’ such an individual ‘to leave his gun at home.’ Instead, Representative Poff was referring to the ‘uses’ prong of the original Section 924(c).” Brief for United States in *Bailey v. United States*, O. T. 1995, Nos. 94–7448 and 94–7492, p. 28.

Representative Poff’s next sentence confirms that he was speaking of “uses,” not “carries”: “Any person should understand that if he *uses* his gun and is caught and convicted, he is going to jail.” 114 Cong. Rec., at 22231 (emphasis added).

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II

Section 924(c)(1), as the foregoing discussion details, is not decisively clear one way or another. The sharp division in the Court on the proper reading of the measure confirms, “[a]t the very least, . . . that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, ‘where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.’” *Adamo Wrecking Co. v. United States*, 434 U. S. 275, 284–285 (1978) (citation omitted); see *United States v. Granderson*, 511 U. S. 39, 54 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct— we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”). “Carry” bears many meanings, as the Court and the “Firearms” statutes demonstrate.¹³ The narrower “on or about [one’s] person” interpretation is hardly implausible nor at odds with an accepted meaning of “carries a firearm.”

Overlooking that there will be an enhanced sentence for the gun-possessing drug dealer in any event, see *supra*, at 2–4, the Court asks rhetorically: “How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for

¹³Any doubt on that score is dispelled by examining the provisions in the “Firearms” chapter, in addition to §924(c)(1), that include a form of the word “carry”: 18 U. S. C. §922(a)(5) (“*carry out* a bequest”); §§922(s)(6)(B)(ii), (iii) (“*carry out* this subsection”); §922(u) (“*carry away* [a firearm]”); 18 U. S. C. A. §924(a)(6)(B)(ii) (Supp. 1998) (“*carry* or otherwise possess or discharge or otherwise use [a] handgun”); 18 U. S. C. §924(e)(2)(B) (“*carrying* of a firearm”); §925(a)(2) (“*carried out* to enable a person”); §926(a) (“*carry out* the provisions of this chapter”); §926A (“lawfully possess and *carry* such firearm to any other place where he may lawfully possess and *carry* such firearm”); §929(a)(1) (“uses or *carries* a firearm and is in possession of armor piercing ammunition”); §930(d)(3) (“lawful *carrying* of firearms . . . in a Federal facility incident to hunting or other lawful purposes”) (emphasis added in all quotations).

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use) actually takes it from the trunk (or unlocks the glove compartment) of his car?” *Ante*, at 8. Correspondingly, the Court defines “carries a firearm” to cover “a person who knowingly possesses and conveys firearms [anyplace] in a vehicle . . . which the person accompanies.” *Ante*, at 1. Congress, however, hardly lacks competence to select the words “possesses” or “conveys” when that is what the Legislature means.¹⁴ Notably in view of the Legislature’s capacity to speak plainly, and of overriding concern, the Court’s inquiry pays scant attention to a core reason for the rule of lenity: “[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” *United States v. Bass*, 404 U. S. 336, 348 (1971) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967)).

* * *

The narrower “on or about [one’s] person” construction of “carries a firearm” is consistent with the Court’s construction of “uses” in *Bailey* to entail an immediacy element. It respects the Guidelines system by resisting overbroad readings of statutes that deviate from that system. See *McFadden*, 13 F. 3d, at 468 (Breyer, C. J., dissenting). It fits plausibly with other provisions of the “Firearms”

¹⁴See, e.g., 18 U. S. C. A. §924(a)(6)(B)(ii) (Supp. 1998) (“if the person sold . . . a handgun . . . to a juvenile knowing . . . that the juvenile intended to *carry or otherwise possess* . . . the handgun . . . in the commission of a crime of violence”); 18 U. S. C. §926A (“may lawfully *possess and carry* such firearm to any other place where he may lawfully *possess and carry* such firearm”); §929(a)(1) (“uses or *carries a firearm and is in possession* of armor piercing ammunition”); §2277 (“brings, *carries, or possesses* any dangerous weapon”) (emphasis added in all quotations).

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chapter, and it adheres to the principle that, given two readings of a penal provision, both consistent with the statutory text, we do not choose the harsher construction. The Court, in my view, should leave it to Congress to speak “in language that is clear and definite” if the Legislature wishes to impose the sterner penalty. *Bass*, 404 U. S., at 347 (quoting *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 222 (1952)). Accordingly, I would reverse the judgments of the First and Fifth Circuits.