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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

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|---|---|
| EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al.,<br><br>Plaintiffs,<br><br>v.<br><br>STATE OF CALIFORNIA; WILLIAM LOCKYER, Attorney General of the State of California, et. al.,<br><br>Defendants. | CASE NO. 01CECG03182<br><br>**NOTICE OF LODGING AND LODGING OF FEDERAL AUTHORITIES**<br><br>Date: April 10, 2002<br>Time: 3:00 p.m.<br>Dept.: 98A |

Plaintiffs hereby lodges the following federal authorities cited in our Reply to Defendants' Opposition for Preliminary Injunction:

1. *Crandon v. United States* (1990) 494 US 152 [110 S.Ct. 997, 108 L.Ed.2d 132].
2. *Davis v. Erdmann* (10th Cir. 1979) 607 F.2d 917.
3. *Evans v. U.S. Parole Com'n* (7th Cir. 1996) 78 F.3d 262.
4. *F.J. Vollmer Co., Inc. v. Higgins* (D.C.Cir. 1994) 23 F.3d 448 [306 U.S.App.D.C. 140].

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5. *F.J. Vollmer Co., Inc. v. Magaw* (D.C.Cir. 1996) 102 F.3d 591 [322 U.S.App.D.C. 193].

6. *Lynch v. Household Finance Corp.* (1972) 405 U.S. 540, 544 [92 S.Ct. 1113, 31 L.Ed.2d 424].

7. *North Georgia Finishing v. Di-Chem* (1985) 419 U.S. 601, 606-08 [95 S.Ct. 719, 42 L. Ed. 2d 751].

8. *Pennell v. City of San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849, 99 L.Ed.2d 1].

9. *Peoples Rights Organization, Inc.* v. *City of Columbus* (6th Cir. 1998) 152 F.3d 522.

10. *San Jacinto Savings & Loan v. Kacal* (5th Cir. 1991) 928 F.2d 697.

11. *United States v. Brady* (D.Colo. 1989) 710 F.Supp. 290.

12. *United States v. Seven Miscellaneous Firearms* (D.D.C. 1980) 503 F.Supp. 565.

13. *United States v. Thompson/Center Arms* (1992) 504 U.S. 505 [112 S.Ct. 2102, 119 L.Ed.2d 308].

Date: April 3 , 2002

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110 S.Ct. 997
108 L.Ed.2d 132, 58 USLW 4234, 36 Cont.Cas.Fed. (CCH) P 75,795
**(Cite as: 494 U.S. 152, 110 S.Ct. 997)**

Supreme Court of the United States

Lawrence H. CRANDON, et al., Petitioners,
v.
UNITED STATES.
BOEING COMPANY, INC., Petitioner,
v.
UNITED STATES.

**Nos. 88-931, 88-938.**

Argued Nov. 6, 1989.
Decided Feb. 27, 1990.

Government brought action against former employees who had received lump-sum payments from their private employer upon leaving to enter into government service and brought action against the private employer to recover the amounts paid. The United States District Court for the Eastern District of Virginia, Claude M. Hilton, J., 653 F.Supp. 1381, entered judgment for employer and employees, and Government appealed. The Court of Appeals for the Fourth Circuit, 845 F.2d 476, affirmed in part and reversed in part. The Supreme Court, Justice Stevens, held that employment status at the time that payment is made is an element of the offense of receipt of supplemental salary by a government employee from an outside source or payment of the supplemental salary by the outside source.

Reversed.

Justice Scalia filed an opinion concurring in the judgment in which Justices O'Connor and Kennedy joined.

West Headnotes

[1] **Statutes** 184
361k184 Most Cited Cases

[1] **Statutes** 205
361k205 Most Cited Cases

In determining the meaning of a statute, court looks not only to the particular statutory language but to the design of the statute as a whole and to its object and policy.

[2] **Statutes** 241(1)
361k241(1) Most Cited Cases

Where governing standard in civil action is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.

[3] **Statutes** 241(1)
361k241(1) Most Cited Cases

Rule of lenity serves to ensure both that there is fair warning of the boundaries of the criminal conduct and that legislatures, not the courts, define criminal liability.

[4] **United States** 50.10(1)
393k50.10(1) Most Cited Cases

Violation of statute prohibiting payment of salary of government employee by someone else or receipt of supplemental salary by government employee from an outside source either is, or is not, committed at the time that payment is made. 18 U.S.C.A. § 209(a).

[5] **United States** 50.10(1)
393k50.10(1) Most Cited Cases

[5] **United States** 52
393k52 Most Cited Cases

Employment status is an element of the offenses of receipt by a government employee of supplemental salary from an outside source and payment of supplemental salary by an outside source to a government employee. 18 U.S.C.A. § 209(a).

[6] **Statutes** 241(1)
361k241(1) Most Cited Cases

Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of the statute broader than that clearly warranted by the text.

[7] **United States** 50.10(1)
393k50.10(1) Most Cited Cases

[7] **United States** 52
393k52 Most Cited Cases

Congress may appropriately enact prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States; legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service and neither good faith, nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment. 18 U.S.C.A. § 209(a).

**998 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*152 When the individual petitioners terminated their employment with petitioner Boeing Company to accept important positions in the Executive Branch of the Federal Government, Boeing made to each, before he became a Government employee, an unconditional lump-sum payment to mitigate the substantial loss each expected to suffer by reason of his change in employment. Subsequently, the United States filed a civil complaint in the District Court, seeking damages from Boeing and the imposition of a constructive trust on the moneys received by the individual petitioners. The complaint alleged that the payments had been made to supplement the individual petitioners' compensation as federal employees, and that they created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty owed by the individual petitioners to the Government, as measured by, *inter alia,* 18 U.S.C. § 209(a), which makes it a crime for a private party to pay, and a Government employee to receive, supplemental compensation for the employee's Government service. The court held, among other things, that § 209(a) had not been violated because the payments were made before the recipients had become Government employees and were not intended to compensate them for Government service. The Court of Appeals reversed, holding, *inter alia,* that employment status at the time of payment is not an element of a § 209(a) violation, and that the finding that the payments were not intended to be supplemental compensation for Government service was clearly erroneous.

*Held:* Section 209(a) does not apply to a severance payment that is made to encourage the payee to accept Government employment, but is made before the payee becomes a Government employee. Pp. 1001-1007.

(a) Section 209(a)'s text indicates that employment status is an element of the offense. Neither of its two prohibitions--the one directed to every person who "receives" any salary supplement "as compensation for his services as an officer or employee" and the other directed to every person who "pays," or makes any contribution to the salary of, "any officer or employee"--directly specifies when a payment must be made or *153 received. However, a literal reading of the second prohibition supports the conclusion that the payee must be a Government employee at the time the payment is made, and the prohibitions appear to be coextensive **999 in their coverage of both sides of a single transaction. P. 1002.

(b) The legislative history of § 209(a), the language of §§ 209(b) and (c)--which obviously focus on certain other payments that are made while the recipient is a Government employee--and the unambiguous language covering preemployment payments that Congress used in its contemporaneous revision of other bribery and conflicts provisions indicate that Congress did not intend to change the substance of § 209(a)'s predecessor statute when it eliminated language that had unquestionably required a recipient of a payment to be a Government employee at the time the payment was made. Pp. 1003-1005.

(c) A literal reading of § 209(a) serves one of the conflicting policies that motivated the enactment of the statute--the public interest in recruiting personnel of the highest quality and capacity--since it allows corporations to encourage qualified employees to make their special skills available to the Government. While the other policy justifications for § 209(a)--concerns that the private paymaster will have an economic hold over the employee, that the payment will engender bitterness among fellow employees, and that the employee might tend to favor his former employer--are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements. Pp. 1005-1007.

(d) To the extent that any ambiguity over the temporal scope of § 209(a) remains, the rule of lenity requires that it should be resolved in petitioners' favor unless and until Congress plainly states that its intent has been

misconstrued. P. 1007.

845 F.2d 476 (CA4 1988), reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which O'CONNOR and KENNEDY, JJ., joined, post, p. 1007.

*Philip A. Lacovara* argued the cause for petitioners in No. 88-931. With him on the briefs were *William R. Stein, Gerald F. Treanor, Jr., Robert Plotkin,* and E. Lawrence Barcella. Benjamin S. Sharp *argued the cause for petitioner in No. 88-938. With him on the briefs were* Hilary Harp, Robert S. Bennett, *and* Alan Kriegel.

***154** *Edwin S. Kneedler* argued the cause for the United States. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Wallace, Michael F. Hertz,* and *Douglas Letter.*

Justice STEVENS delivered the opinion of the Court.

In 1981 and 1982, five executives of The Boeing Company, Inc. (Boeing), resigned or took early retirement to accept important positions in the Executive Branch of the Federal Government. Upon termination of employment by Boeing, and shortly before formation of an employment relationship with the Government, Boeing made a lumpsum payment to each in an amount that was intended to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment. The question we must decide is whether these payments violated a provision of the Criminal Code that prohibits private parties from paying, and Government employees from receiving, supplemental compensation for the employee's Government service. [FN1]

FN1. "Salary of Government officials and employees payable only by United States
"(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
"Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection--
"Shall be fined not more than $5,000 or imprisoned not more than one year, or both." 18 U.S.C. § 209(a) (enacted as Act of Oct. 23, 1962, Pub.L. 87-849, § 1(a), 76 Stat. 1125).

****1000** The essential facts are not disputed. Each employee resigned because he planned to accept a specific federal position. These shifts required forgoing the higher salaries that each employee would have earned at Boeing and also ***155** severing all financial connection with the company. Thus, petitioner Paisley, who took early retirement to become Assistant Secretary of the Navy for Research, Engineering and Systems--an office that requires confirmation by the United States Senate--estimated that the financial cost to him of separating from Boeing would be approximately $825,000, including approximately $77,000 in lost stock options and $250,000 in lost retirement benefits. [FN2] Boeing's severance payment to Paisley amounted to $183,000. [FN3] The comparable estimate of petitioner Crandon, who resigned to become a computer scientist for the North Atlantic Treaty Organization, was $150,000; his severance payment was $40,000. [FN4] The other three individual petitioners' payments were higher than Crandon's but lower than Paisley's. [FN5] Boeing paid the five departing employees a total of $485,000. [FN6]

FN2. Joint Stipulations of Uncontested Facts ¶ 41, App. 27.

FN3. 845 F.2d 476, 478 (CA4 1988).

FN4. Joint Stipulations of Uncontested Facts ¶ 87, App. 33; 845 F.2d, at 478.

FN5. Petitioner Jones, who resigned to become Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces,

requested $176,000 as the cost of severance and received $132,000. Petitioner Reynolds, who resigned to become a consultant and then Deputy Director of Space and Intelligence Policy, requested $195,000 and received $80,000. Petitioner Kitson, who took early retirement to become Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence, requested $180,000 and received $50,000. Joint Stipulations of Uncontested Facts ¶ 25, App. 26; *id.*, ¶ 55, App. 29; *id.*, ¶¶ 71-72, App. 31; 845 F.2d, at 478. The employees submitted estimates to Boeing that included their expected reduction in salary and benefits and the value of accumulated, but unvested, company benefits. A separate payment, standard to all departing Boeing employees, cashed out the employees' interests in vested benefits. *Ibid.*

FN6. Boeing's internal accounting procedure for calculating severance pay for employees departing for Government positions used four factors: (1) the loss of salary for the duration of anticipated Government employment, which was assumed to be the remainder of the Presidential term, or the period prior to the employee's 65th birthday, whichever was shorter; (2) the loss of Boeing's contributions to the employee's retirement plan; (3) relocation costs; and (4) a supplement to cover the difference between living costs in Seattle and in Washington, D.C. An alternative procedure considered the employee's salary and years of service at Boeing and the duration of anticipated Government employment. App. 281-283. Boeing staff estimated payments for petitioners Kitson and Crandon using both procedures and for petitioners Jones, Paisley, and Reynolds using solely the first procedure.

Each petitioner's anticipated length of Government service was thus a component of the calculation of his final payment. Final amounts were approved by Boeing's chief executive. 845 F.2d, at 478.

***156** None of the five individual petitioners was a Government employee at the time he received his severance payment. [FN7] Moreover, each payment was made unconditionally. None of the employees promised to return to Boeing at a later date nor did Boeing make any commitment to rehire them. After entering Government service, none of the individual petitioners provided Boeing with any favored treatment or, indeed, participated in any source selection or procurement decision that affected Boeing. It is stipulated that all five were competent and faithful Government servants. Apart from the fact of the payments themselves, there is no charge in this case of any misconduct by any of the petitioners.

FN7. *Ibid.*

In 1986 the United States filed a civil complaint alleging that the payments had been made "to supplement each individual defendant's compensation as a federal employee" and that they "created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty [which] each individual defendant owed to the United States, as measured by ****100118** U.S.C. § 209 and/or the common law." App. 12. The complaint sought relief from Boeing in the aggregate amount of the payments made and the imposition of a constructive trust on the moneys received by each of the individual petitioners.

After a full trial, the District Court ruled against the Government on several alternative grounds. 653 F.Supp. 1381 (ED Va.1987). First, it held that § 209(a) had not been violated ***157** because the payments were made before the recipients had become Government employees and were not intended to compensate them for Government service. Second, it held that there was no violation of any fiduciary standard of conduct established by common-law principles of agency because the payments were disclosed to responsible Government officials and because they did not "tend to subvert the loyalty of the individual defendants to the United States government." *Id.*, at 1387. Finally, the District Court concluded that the payments "created neither the appearance of nor an actual conflict of interest," and that the Government had not been injured by the payments and was therefore not, in any event, entitled to recover damages. *Ibid.*

A divided panel of the Court of Appeals reversed. 845 F.2d 476 (CA4 1988). It held that employment status at the time of payment is not an element of a § 209(a) violation and that the District Court's finding that the payments were not intended to be supplemental compensation for services as employees of the United States was clearly erroneous. *Id.*, at 480. It further held that the prophylactic character of the conflict of

interest laws made it unnecessary for the Government to prove any actual injury and that the defendants' disclosure of the payments did not constitute a defense to an action for their recovery. It therefore concluded that both the individual defendants and Boeing were liable, "although double recovery by the government is not permitted." *Id.*, at 482. [FN8]

> FN8. The Court of Appeals also held that the statute of limitations barred all of the Government's tort claims against Boeing, except Boeing's payment to Kitson. *Id.*, at 481-482.

We granted certiorari to review the Court of Appeals' construction of this important statute. 490 U.S. 1003, 109 S.Ct. 1636, 104 L.Ed.2d 152 (1989).

I

At the outset, we note that Congress has not created an express civil remedy for violations of § 209(a). The Government ***158** does not, in so many words, argue that the enactment of the statute implicitly created a damages remedy. Rather, the Government begins with the common-law rule that an agent who secretly profits from a breach of a fiduciary obligation to his principal must disgorge his ill-gotten gains. It then replaces the common-law definition of fiduciary obligation with the stricter standard of § 209(a), arguing that because concealment of a payment is not an element of the statutory offense, disclosure of payments is no defense. Regardless of whether the Government's amalgamation of common-law and statutory concepts describes a tenable theory of recovery, it is at least clear that the Government must prove a violation of § 209(a) to prevail in these cases. We proceed therefore to consider whether § 209(a) applies to a severance payment that is made to encourage the payee to accept Government employment, but that is made before the payee becomes a Government employee.

[1][2][3] In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1818, 100 L.Ed.2d 313 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987). Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of § 209 ****1002** is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985); see also *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971).

II

Section 209 is one of almost two dozen statutory provisions addressing bribery, graft, and conflicts of interest that were revised and compiled at Chapter 11 of the Criminal Code in ***159** 1962. 18 U.S.C. §§ 201-224. While some sections focus on bribes or compensation offered as a *quid pro quo* for Government acts, and apply to persons before and after commencing Government service, § 209 is a prophylactic rule that aims at the source of Government employees' compensation. [FN9]

> FN9. See 18 U.S.C. § 201 ("Bribery of public officials and witnesses"); 18 U.S.C. § 203 ("Compensation to Members of Congress, officers, and others in matters affecting the Government"). Some preemployment payments--and the mere offering or seeking thereof--thus are criminal under the provisions of § 203.

[4][5] Section 209(a) contains two prohibitions, neither of which directly specifies when a payment must be made or received. The first paragraph is directed to every person who "receives" any salary supplement "as compensation for his services as an officer or employee" of an executive agency of the Government. The second paragraph is directed to every person who "pays," or makes any contribution or supplement to the salary of, "any such officer or employee" under circumstances that would make the receipt of the contribution a violation of the subsection. A literal reading of the second paragraph--particularly the use of the term "any such officer or employee"--supports the conclusion that the payee must be a Government employee at the time the payment is made. Similarly, the paragraph's additional prohibitions on one who "makes any contribution to, or in any way supplements the salary of," also refer to "any such officer or employee." Indeed, since the prohibited conduct is merely the receipt or the payment of the salary supplement, it follows that a violation of § 209(a) either is, or is not, committed at the time the

payment is made. Despite the awkward drafting of the paragraphs, they appear to be coextensive in their coverage of both sides of a single transaction. The text of § 209(a) thus indicates that employment status is an element of the offense. [FN10]

FN10. Justice SCALIA's grammatical analysis, *post,* at 1007-1008, misses the point. It does not matter whether the payment is made *to* "any such officer," or to supplement the salary *of* "any such officer." In either event, the recipient of the payment must be "any such officer."

[6] ***160** The Court of Appeals rejected this reading of the statute for two reasons. First, it noted that prior to its codification as § 209(a) of the Criminal Code in 1962, the plain language of the predecessor statute at 18 U.S.C. § 1914 (1958 ed.) was unambiguously limited to whoever, "being a Government official or employee," received any salary. [FN11] The Court of Appeals inferred that the deletion of this phrase meant that the payment no longer need occur during federal employment, and thus preemployment payments could violate § 209(a). 845 F.2d, at 480. Second, it felt that the public policy underlying "§ 209 and the conflict of interest laws in general also support a broad interpretation of its coverage." *Ibid.* Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute ****1003** broader than that clearly warranted by the text. In this case, each of these sources indicates that our reading of the statutory language is consistent with congressional intent.

FN11. The first paragraph of § 1914 was:
"Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality...." 18 U.S.C. § 1914 (1958 ed.).

III

The predecessor of § 209(a) was enacted in 1917 as an amendment to the Bureau of Education's legislative appropriation and provided that "no Government official or employee shall receive any salary in connection with his services" from a non-Government source. [FN12] The phrase "*being a* ***161** Government official or employee" did not appear until 1948, when the provision was transferred from 5 U.S.C. § 66 to 18 U.S.C. § 1914 in the reorganization of Title 18. [FN13] As the Court of Appeals recognized, this wording of § 1914 unquestionably required a recipient of a payment to be a Government employee at the time the payment was made. This ***162** reading neither changed the original scope of the statute nor engendered any controversy; in the entire period between 1917 and 1962, criticism focused instead on the vagueness of the reference to payments made "in connection with" the employee's service. [FN14] The fact that the legislative history of § 209(a) explains the narrowing consequence of the elimination of these words, but is silent on the reason for eliminating "being a Government official or employee," is inconsistent with the view that Congress intended the latter change to broaden the coverage of the section. [FN15] The Senate and ****1004** House Judiciary Committees and the Attorney General all maintained that § 209(a) made no substantive change in the law. Rather, the deletion of "Government official or employee" and use of the phrase "officer or employee of the executive ***163** branch" seemed only to enhance clarity and consistency with the other new conflicts statutes. [FN16]

FN12. The legislation arose from a desire to halt the Bureau of Education's practice of allowing private organizations, such as the Rockefeller Foundation and universities, to pay the real salaries of employees whom the Bureau would pay the nominal salary of one dollar a year. Decrying the "activities that have been indulged in through the Bureau of Education by agencies which seem to me to be inimical to the education of the youth of this country," Senator Chamberlain of Oregon proposed the following addition to the fiscal year 1918 appropriations bill:
"That no part of the appropriations made for the Bureau of Education, whether for salaries or expenses or any other purpose connected therewith, shall be used in connection with any money contributed or tendered by the General Education Board or any corporate or other organization or individual in any way associated with it, either directly or indirectly, or contributed or tendered by any corporation or individual other than such as may be contributed by State, county, or municipal agencies; nor shall the Bureau of Education

receive any moneys for salaries...." 54 Cong.Rec. 2039 (1917).
The proviso that passed, although still located in the section addressing the Bureau of Education's appropriations, contained much broader language: "[N]o Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States...." Act of Mar. 3, 1917, ch. 163, § 1, 39 Stat. 1106.
See *International R. Co. v. Davidson*, 257 U.S. 506, 515, 42 S.Ct. 179, 182, 66 L.Ed. 341 (1922) (reading § 1 of the uncodified statute independently). This language was codified in 1934 at 5 U.S.C. § 66 (1934 ed.).
For a legislative history, see Hearings on H.R. 1900 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2d Sess., 738-740 (1960) (Memorandum for the Attorney General Re: Conflict of Interest Statutes (1956)).

FN13. Act of June 25, 1948, ch. 645, § 1, 62 Stat. 793. The Reviser's Note to the official Code explains three specific changes from the wording of 5 U.S.C. § 66, but does not mention this addition. The change appears to be encompassed in the Reviser's conclusion that "[m]inor changes were made in phraseology." 18 U.S.C. § 1914 (1946 ed., Supp. IV).

FN14. See, *e.g.*, H.R.Rep. No. 748, 87th Cong., 1st Sess., 13 (1961); Association of the Bar of the City of New York, Conflict of Interest and Federal Service 212-216 (1960).

FN15. See S.Rep. No. 2213, 87th Cong., 2d Sess., 14 (1962); H.R.Rep. No. 748, *supra*, at 24-25, U.S.Code Cong. & Admin.News 1962, p. 3852. Attorney General Kennedy's summary Memorandum Regarding Conflict of Interest Provisions of Public Law 87-849, 28 Fed.Reg. 988 (1963), reported that subsection (a) "uses much of the language of the former 18 U.S.C. 1914 and does not vary from that statute in substance."
Deletion of the phrase "being a Government official or employee" had been suggested at least once before in a proposed amendment that the House Antitrust Subcommittee considered in 1958, but that did not pass. The Subcommittee staff had found the phrase did not clearly cover Members of Congress or the Judiciary, and had recommended that the section be revised to address "[w]hoever receives any salary, or any contribution to or supplementation of salary, for or in connection with his services as a Member of or Delegate to Congress or a Resident Commissioner, or an officer, agent, or employee of the United States in the executive, legislative, or judicial branch...." House Committee on the Judiciary, Federal Conflict of Interest Legislation, 85th Cong., 2d Sess., 45, 61, 82 (Comm. Print 1958). Like § 209(a), this proposed amendment dropped the "being a Government official" clause and left the unqualified "[w]hoever receives" subject, yet its drafters did not contemplate any effect on persons not yet employed by the Government.

FN16. One purpose of the 1962 bill was to eliminate inconsistency and overlap in the conflicts provisions. Section 1914 was the only predecessor statute containing the phrase "Government official or employee." In the new §§ 207, 208, and 209, the 1962 bill replaced this phrase and the different terms previously used in §§ 281, 283, 284, and 434 with the uniform phrase "officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia." H.R.Rep. No. 748, *supra*, at 41-45.

We attach greater significance to two other changes that Congress made when it revised the bribery and conflict laws in 1962. In § 201 it added language extending the prohibition against bribery of a public official to a "person who has been selected to be a public official," which it defined as "any person who has been nominated or appointed to be a public official,

or has been officially informed he will be so nominated or appointed." [FN17] In § 203, which prohibits outside compensation for the performance of public service, Congress expressly covered advance requests or offers of compensation for services to be "rendered ... at a time when [the recipient] is an officer or employee of the United States." [FN18] In both of these provisions Congress used unambiguous language to cover preemployment payments; the absence of comparable language in § 209(a) indicates that Congress did ***164** not intend to broaden the pre-existing coverage of that provision.

FN17. Act of Oct. 23, 1962, Pub.L. 87-849, 1(a), 76 Stat. 1119. The phrase was "included in order to set forth the point at which a prospective public official comes within the statutory coverage." H.R.Rep. No. 748, *supra,* at 18.

FN18. 76 Stat. 1121. The present statute is even more specific, covering services "rendered or to be rendered either personally or by another--(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or (B) at a time when such person is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia." 18 U.S.C. § 203(a)(1).

Further evidence confirming that § 209(a) requires employment status at the time of payment is found in subsections (b) and (c) of § 209. [FN19] The former expressly authorizes federal employees to continue to receive payments from a bona fide pension, health, or other benefit plan maintained by a former employer, and the latter makes § 209 inapplicable to certain types of Government employees. Both of the provisions obviously focus on payments that are made while the recipient is a Government employee. The addition of these two exemptions in 1962, like ****1005** the careful draftsmanship of §§ 201 and 203, is consistent with Attorney General Kennedy's contemporaneous opinion that § 209(a) did not change the substance of the former 18 U.S.C. § 1914. See n. 14, *supra.*

FN19. Those subsections provide:

"(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

"(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such." 18 U.S.C. §§ 209(b), (c).

IV

[7] Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States. Section 209(a) is such a rule. Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's ***165** confidence in the integrity of the federal service. [FN20] Neither good faith, nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment. It is nevertheless appropriate, in a case that raises questions about the scope of the prohibition, to identify the specific policies that the provision serves as well as those that counsel against reading it too broadly. See *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).

FN20. Conflict of interest legislation is "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.,* 364 U.S. 520, 562, 81 S.Ct. 294, 315, 5 L.Ed.2d 268 (1961).

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laws of the Association of the Bar of the City of New York prepared a scholarly report in 1960 that the Government and the petitioners agree accurately describes the policies implemented by § 209(a). The report stated:

"The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government." Association of the ***166** Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960).

It is noteworthy that this report characterized the relevant rule as one "prohibiting two payrolls and two paymasters for the same employee on the same job." At least two of the three policy justifications for the rule--the concern that the private paymaster will have an economic hold over the employee and the concern about bitterness among fellow employees--apply to ongoing payments but have little or no application to an unconditional preemployment severance payment. Of course, the concern that the employee might tend to favor his former employer would be enhanced by a generous payment, but the absence of any ongoing relationship may mitigate that concern, particularly if other rules disqualify the employee from participating in any matter involving a former employer. Thus, although the policy justifications for § 209(a) are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements.

An important countervailing consideration also cannot be ignored. As President Kennedy ****1006** recognized in 1961 when he sent his message to Congress calling for a wholesale revision of the conflict of interest laws:

"Such regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity. Today's Government needs men and women with a broad range of experience, knowledge, and ability. It needs increasing numbers of people with top-flight executive talent. It needs hundreds of occasional and intermittent consultants and part-time experts to help deal with problems of increasing complexity and technical difficulty. In short, we need to draw upon America's entire reservoir of talent and skill to help conduct ***167** our generation's most important business--the public business." Message from the President of the United States Relative to Ethical Conduct in the Government, H.R. Doc. No. 145, 87th Cong., 1st Sess., 2 (1961).

The President described some of the statutes that were then on the books as wholly inadequate, while others "create[d] wholly unnecessary obstacles to recruiting qualified people for Government service." *Id.,* at 3.

Attorney General Kennedy commented on this same concern in his memorandum on the 1962 legislation. After explaining that one of the "main purposes of the new legislation" was "to help the Government obtain the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government," he predicted that the new legislation would "lead to a significant expansion of the pool of talent on which the departments and agencies can draw for their special needs." [FN21] The substantive additions of §§ 209(b) and 209(c) to allow continuing participation in pension and benefits plans and to exempt certain employees from the prohibitions of § 209(a) is wholly consistent with the Attorney General's outlook. In contrast, an expansion of § 209(a) to encompass preemployment payments would run counter to this interest. [FN22]

FN21. Office of the Attorney General, Memorandum Regarding Conflict of Interest Provisions of Public Law 87-849, 28 Fed.Reg. 985 (1963).

FN22. The reach of § 1914 had long been recognized as "a serious obstacle to recruitment of men for government office at an age when they are apt to be most vigorous and productive." Association of the Bar of the City of New York, Conflict of Interest and Federal Service 158 (1960). See also Hearings on H.R. 1900 et al., *supra,* n. 12, at 750 (Memorandum for the Attorney General Re: Conflict of Interest Statutes (1956)) ("It

appears that the only significant problem respecting section 1914 is whether it discourages recruitment of executives from private industry").

The severance payments made to the petitioners in this case have a somewhat nebulous character. On the one hand, as the Government correctly argues, they give rise to a possible appearance of impropriety that is certainly one of the concerns ***168** of § 209(a). On the other hand, allowing corporations to encourage qualified employees to make their special skills available to the Government serves the public interest identified by both the President and the Attorney General when § 209(a) was enacted. It is not our function to express either approval or disapproval of this kind of unconditional severance payment. We note only that a literal reading of the statute--which places a pre-Government service severance payment outside of the coverage of § 209(a)--is consistent with one of the policies that motivated the enactment of the statute. Because the language Congress used in § 209(a) is thus in "harmony with what is thought to be the spirit and purpose of the act," this case presents none of the "rare and exceptional circumstances" that may justify a departure from statutory language. *Crooks v. Harrelson*, 282 U.S. 55, 59- 60, 51 S.Ct. 49, 50-51, 75 L.Ed. 156 (1930); accord, *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

****1007** Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of § 209(a) remains, it should be resolved in the petitioners' favor unless and until Congress plainly states that we have misconstrued its intent.

The judgment of the Court of Appeals is accordingly reversed.

*It is so ordered.*

Justice SCALIA, with whom Justice O'CONNOR and Justice KENNEDY join, concurring in the judgment.

I agree with the Court that the Government has failed to prove that any of the petitioners violated 18 U.S.C. § 209(a), and that its claim to a common-law remedy premised upon such a violation accordingly must fail. My reasons, however, are somewhat different. I do not think that payments which are made before or after the term of federal employment are necessarily excluded from § 209(a); but I do think that payments which are neither made periodically during ***169** the term of federal service, nor calculated with reference to periodic compensation, are excluded.

I

Subsection (a) of § 209 makes criminally liable:

> "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government ... from any source other than the Government of the United States[; and]
>
> "Whoever ... pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection...."

I agree with the Court that these two clauses are "coextensive in their coverage of both sides of a single transaction," *ante,* at 1002, so that if the phrase "such officer or employee" in the second clause implies a requirement that the payment be made *while* the recipient was an officer or employee, such a requirement must have been meant in the first clause as well. Surely, however, the evidence of such an implication should be fairly clear before one concludes that Congress has slipped in an additional requirement in such an unusual fashion, importing it retroactively into the earlier clause from a provision that is otherwise only the mirror image of what preceded. To my mind the evidence is not only not fairly clear; it is nonexistent. The Court is led astray, I think, by its perception that the statute "is directed to every person who 'pays' ... 'any such officer or employee,' " *ibid.*--which leads to the reasonable enough contention that unless the recipient is an officer or employee at the time of payment the provision is not violated. But in order to make "any such officer or employee" the object of the verb "pays," the clause must be rendered ungrammatical, reading "[w]hoever pays ... any such officer or employee under circumstances which ***170** would make its receipt a violation of this subsection."

The pronoun "its" has no antecedent (or more precisely, I suppose, the phrase "under circumstances which would make its receipt a violation of this subsection" has no application to "[w]hoever pays"). It seems to me quite clear that the object of "pays" must be, not "any such officer or employee," but rather "*the salary of,* any such officer or employee," so that the later phrase "its receipt" refers to the receipt of the salary. Substance as well as grammar dictates this

result, because only in this fashion does the second clause of subsection (a) achieve the apparent purpose of mirroring the first. The first clause does not apply to "whoever receives any payment, or any contribution to or supplementation of salary," but rather to "[w]hoever receives any *salary,* or any contribution to or supplementation of salary." One would therefore expect the second clause to cover whoever *pays* any salary, or any contribution to or supplementation of ****1008** salary. I acknowledge that this interpretation of the second clause means that the comma after the phrase "the salary of" should instead have been placed after the word "supplements." But a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism, both leading to the peculiar introduction of a condition in the second clause which one would surely have expected to find in the first.

The Court apparently concedes that when the first clause of subsection (a) refers to someone who "receives any salary, or any contribution to or supplementation of salary, as compensation for ... services as an officer or employee of the executive branch of the United States," it does not imply that the recipient must be an officer or employee at the time of receipt. There is no *more* reason to think that the second clause imports such a requirement when it refers to someone who "pays, or makes any contribution to, or in any way supplements, the salary of any such officer or employee." Perhaps it is not possible to pay an officer when he is not an officer; ***171** but it is surely possible to pay, to contribute to, or to supplement *the salary of an officer* (just as it is possible to receive payment, contribution to, or supplementation of such salary) either before or after the service to which the salary pertains has been completed.

For a different reason, unaddressed by the Court, I agree that the payment in the present case is not covered by § 209(a).

II

It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect. In seeking to hold the present petitioners liable, the Government treats § 209(a) as though it read "[w]hoever receives compensation for his services as an officer or employee of the executive branch of the United States Government ... from any source other than the Government of the United States." But it does not read that way. Another of the ethics statutes, 18 U.S.C. § 203, *does* read that way, covering the receipt or payment of "any compensation" for services as a Government employee relating to a particular matter. Subsection 209(a), however, does not refer to "whoever receives compensation," but to "whoever receives *any salary, or any contribution to or supplementation of salary, as* compensation." The second clause, as we have seen, is likewise entirely tied to *salary.* It would be bad construction to ignore this language (if it can be given reasonable meaning) in the interpretation of any statute; but it is particularly bad construction to ignore it in a criminal statute, where the rule of lenity applies. See *Adamo Wrecking Co. v. United States,* 434 U.S. 275, 284-285, 98 S.Ct. 566, 572-573, 54 L.Ed.2d 538 (1978).

Salary is not the same as compensation, but is one species of that genus. It is "[t]he recompense or consideration paid, or stipulated to be paid, to a person *at regular intervals* for services ...; fixed compensation *regularly paid,* as by the year, quarter, month, or week." Webster's Second New International ***172** Dictionary 2203 (1957) (emphasis added). See also *Benedict v. United States,* 176 U.S. 357, 360, 20 S.Ct. 458, 459, 44 L.Ed. 503 (1900) ("The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered"). To "receive salary as compensation" is to receive periodic payments as compensation. And in the context of the present statute it must reasonably be thought that to "receive contribution to or supplementation of salary as compensation" is to receive contribution to or supplementation of periodic payments, in the sense that the contribution or supplementation itself must be periodic. To read it differently--to regard any single payment from a nongovernment ****1009** source as a "contribution to or supplementation of salary"--is to render all the references to salary superfluous, so that the statute might as well have prohibited (like § 203) all "compensation." [FN1]It is significant that when the Office of Personnel Management sought to embody the substance of § 209(a) in its ethics regulations, in a fashion that would be understood to mean what the Government thinks it means, it revised the references to contribution and supplementation of salary, as follows:

> FN1. Under such an interpretation, the one possible effect of the "salary" language would be to allow an unsalaried Government officer or employee to receive a lump-sum payment for his services from a private source. That

would result because the lump-sum payment would not be a "salary," nor could it be a "contribution to or supplementation of salary," since no salary exists to be supplemented or contributed to. But even that effect (strangely contrived as it is) is largely if not completely eliminated by subsection (c), which entirely excludes from the section's coverage special Government employees, as defined in 18 U.S.C. § 202, and uncompensated Government officers and employees. The only class that remains as a possible recipient of lump-sum payments so obscurely validated by the otherwise pointless "salary" language consists of Government officers and employees who are not special employees and who are compensated in some manner other than by payment of salary. I am not aware that such a class exists.

***173** "An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U.S.C. 209)." 5 CFR § 735.203(b) (1989).

Under the original version of § 209(a), enacted in 1917, it was even clearer that "contribution to" or "supplementation of" salary envisioned regular, salary-like payments. That read in relevant part as follows:

"[N]o Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, ... and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for Government of the United States." Act of Mar. 3, 1917, 39 Stat. 1106.

Even when Congress amended the provision in 1948, it left the structure substantially the same, making criminally liable:

"Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, ... or

"Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States...." 62 Stat. 793.

In each of these versions, if one interpreted the phrase "make(s) any contribution to, or in any way supplement(s) the salary of" to include not only periodic payments but also lump-sum payments, then the prohibitions upon payor and payee would not match: the Government official who received a lump-sum payment would be guiltless (since he did not "receive ***174** any salary") whereas the payor would be criminally liable. This obviously was not intended. At both ends, *salary* was the object of the prohibition. The Government does not rely upon any change in the meaning of the statute effected by the 1962 revision and recodification, but to the contrary acknowledges--indeed boasts--that its position was "firmly established" under the earlier versions. Nor would it be appropriate to regard the 1962 legislation as congressional approval and ratification of the prior interpretation. That would in any circumstance be a doubtful basis for disregarding the text of a criminal statute, but is particularly unjustified when, as I shall discuss in Part III below, the interpretation in question was not that of the courts or of an agency that had primary responsibility for administering ****1010** the law, and was full of inconsistencies to boot.

I must acknowledge that subsections (d) and (e) of § 209 exclude from the coverage of subsection (a) some payments that are not periodic payments, so that the interpretation I have described is no more successful than the Government's in giving effect to all the language of the section. But superfluous exceptions (to "make assurance doubly sure") are a more common phenomenon than the insertion of utterly pointless language at the very center of the substantive restriction. Moreover, since (as I shall discuss in Part III below) the Government is not so foolish as to apply literally its interpretation that all lump-sum payments as compensation are covered, subsections (d) and (e) turn out to be largely superfluous under its view of the statute as well. See May 31, 1961, Memorandum of Office of Legal Counsel (OLC) (advising that the proposed subsection (d) would be "a clarification of existing law" rather than "an exemption" from 18 U.S.C. § 1914 (1958 ed.)); 33 Op.Atty.Gen. 273 (1922); 42 Op.Atty.Gen. 111, 125 (1962). In any case, granting that the only reasonable *implication* of subsections (d) and (e) is that subsection (a) applies to payments in addition to periodic payments, it remains true that the only reasonable *meaning* of subsection ***175** a) itself is that it applies exclusively to periodic payments. Even if one does not think that a meaning trumps an implication, at most we have an ambiguity--and since this is a criminal statute the rule of lenity demands that it be resolved in favor of the more narrow criminal liability.

It may seem strange nowadays that Congress should think of categorically criminalizing only periodic

payments (salary or supplementation of salary), rather than all payments, to Government employees. But it would not have seemed strange in 1917, when the substance of subsection (a) was originally enacted. There existed at that time, in apparently more than one Government agency, a regular practice of hiring, at nominal salary, individuals whose real compensation would be paid by private organizations. 54 Cong.Rec. 2039-2047, 4011-4013; B. Manning, Federal Conflict of Interest Law 148-149 (1964). Cf. 31 Op.Atty.Gen. 470 (1919); 2 Comp.Gen. 775 (1923). Apart from the fact that Congress often acts only "one step at a time" to eliminate one abuse that has become the focus of its attention but not all allied abuses, there are good practical reasons why the payment or supplementation of salary would have been singled out. Surely receipt of a regular salary from a private source poses the *greatest* risk of corruption; one commonly characterizes the corrupt official by saying that "he is on someone's payroll." Moreover, the payment or supplementation of salary can be categorically eliminated (as lump-sum payments cannot) without criminalizing a large number of harmless, perfectly innocent, and often desirable, arrangements. For example: It is rare, I think, for well-to-do parents to make periodic, salary-like payments to their child so that he might continue in a low-paying Government job that they are proud of his performing and wish him to continue. I suspect it is not at all rare, however, for such parents to make occasional gifts to the child, or to leave a particularly generous bequest, with precisely that end in mind. Under the interpretation of § 209 adopted by the Government, each such act of generosity, ***176** if rendered and accepted with that objective, would seemingly violate the law. That alone, I should think, would be reason enough not to criminalize all "supplementation of salary" in the sense the Government would have us understand the term.

III

I must address at some length what seems to me the strongest argument against interpreting § 209(a) to mean what it says: the fact that it has long been interpreted differently. On analysis, that proves to be a weaker consideration than one might suppose. Indeed, the long and unsatisfactory experience with a countertextual interpretation is ****1011** one of the prime reasons for adhering to what Congress enacted.

Two points must be made clear at the outset: First, the substantial history of interpretation that exists is not a history of *judicial* interpretation. In the more than 70 years that § 209 and its predecessors have been in existence, this Court has discussed them, in passing, only three times, see *Muschany v. United States*, 324 U.S. 49, 67, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945); *United States v. Myers*, 320 U.S. 561, 567, 64 S.Ct. 337, 341, 88 L.Ed. 312, 88 L.Ed. 1051 (1944); *International R. Co. v. Davidson*, 257 U.S. 506, 515, 42 S.Ct. 179, 182, 66 L.Ed. 341 (1922). Prior to the present litigation, the Courts of Appeals have discussed them only three times, see *United States v. Oberhardt*, 887 F.2d 790, 793-794 (CA7 1989); *United States v. Raborn*, 575 F.2d 688, 691-692 (CA9 1978); *United States v. Muntain*, 198 U.S.App.D.C. 22, 27-28, 610 F.2d 964, 969-970 (1979), and the District Courts only four times, see *United States v. Pezzello*, 474 F.Supp. 462, 463 (ND Tex.1979); *Exchange National Bank of Chicago v. Abramson*, 295 F.Supp. 87, 89-91 (Minn.1969); *United States v. Gerdel*, 103 F.Supp. 635, 638-639 (ED Mo.1952); *United States v. Morse*, 292 F. 273, 276-277 (SDNY 1922). Only one of these scarce judicial references, a 1952 District Court opinion, explicitly discusses the issue of salary *versus* lump-sum payment, agreeing with the Government's position here; that discussion, moreover, was by its own admission "gratuitous," ***177** since the statute was in no way at issue. See *Gerdel, supra*, at 638. And in only two of these cases--one from a District Court, one from a Court of Appeals, and both relatively recent--was the (unchallenged) assumption that lump-sum payments were covered apparently necessary to the court's holding. See *United States v. Oberhardt, supra; United States v. Pezzello, supra.* In sum, the Government's position is not supported by a long, or even appreciable, body of judicial interpretation.

Second, the vast body of *administrative* interpretation that exists-- innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies--is not an administrative interpretation that is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful--just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide

when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

Besides being unentitled to what might be called ex officio deference under *Chevron*, this expansive administrative interpretation of § 209(a) is not even deserving of any persuasive effect. Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously ***178** err in the direction of inclusion rather than exclusion--assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, to give persuasive effect ****1012** to the Government's expansive advice- giving interpretation of § 209(a) would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

The body of administrative interpretation is nonetheless useful in the present case, for one purpose: It demonstrates beyond question the unmanageable problems that arise when § 209(a) is *not* interpreted as it was written,limited to the payment or supplementation of salary. The administrative history of § 209(a) is a record of poignant attempts by the Attorney General and the OLC to derive reasonable results from the rigid and undiscriminating criminal statute they have invented. To follow their logic is to glimpse behind the looking glass.

An example is employee receipt of cash awards from nonprofit organizations for meritorious public service. Unless one believes that the statutory term "as compensation" (or its predecessor term "in connection with") imports the commonlaw requirement of bargained-for consideration--which no one contends--it is difficult to imagine any lump-sum payments more clearly covered by § 209(a) than cash grants conferred specifically to reward the work of Government officials. But the Justice Department has approved them. The first OLC opinion doing so, rendered on June 26, 1959, exemplifies the benign if unpredictable discretion that has guided the administrative interpretation of this criminal statute. The opinion quotes a 1922 Attorney General's opinion to make the obvious point that the " 'object of the provision ... ***179** was that no Government official or employee shall serve two masters to the prejudice of his unbiased devotion to the interests of the United States.' " June 26, 1959, Memorandum of OLC 4 (quoting 33 Op.Atty.Gen., at 275). It then continues: "When such a conflict has not been present, the statute has been liberally construed not to apply in situations in which, strictly construed, it might have been held to be applicable but in which there appeared to be no violation of the spirit of the statute." June 26, 1959, Memorandum, at 4. It is of course absurd to interpret a *criminal statute* on the basis of one's perception as to whether its "spirit" has been violated; and doubly absurd to interpret a *prophylactic measure* on the basis of whether the evil against which the prophylaxis was directed in fact exists. The OLC opinion also finds that the award in the subject case is "not based upon the 'master- servant' relationship between the payor and the payee which usually attends or may be expected to attend application of the statute," *id.*, at 5--a principle which, as far as I can tell, has no basis in law and which the Government assuredly does not apply to the statute in other contexts. On the basis of such reasoning, and because "[i]n short, a conflict of interest such as the legislative history of the statute indicates that it was designed to prevent would not be created," *ibid.*, the opinion approves receipt of the Rockefeller Public Service Awards, established under a grant from John D. Rockefeller III. [FN2]

FN2. The OLC opinion notes, but apparently misses the delicious irony in, the fact that the sponsor of the original version of § 209(a) "objected particularly to the employment of persons whose actual salary was paid by the Rockefeller and Carnegie Foundations." June 26, 1959, Memorandum of OLC 3. It is interesting to note that three years before this OLC opinion the Comptroller General had given the advice that receipt of the Rockefeller Public Service Awards *would* violate § 1914. 36 Comp.Gen. 155 (1956). At that time the grants were not lump-sum cash gifts, but continuing grants for tuition, travel, and living expenses at educational facilities. It is hard to see why, on the Government's theory, that should have made any difference.

***180** Later OLC opinions and memoranda continue this essentially catch-as-catch-can approach to public-service awards, unified mostly by the extraordinary principle that this criminal statute is violated if and when its purposes seem to be offended. "[A]n award of this kind is so far removed from the ****1013** purposes of the statutory prohibition as not to

be covered by it." July 31, 1974, Memorandum of OLC 1.

"[Title] 18 U.S.C. § 209(a) prohibits only those payments made or received with the intent that they reward past government services or compensate for future ones.... Intent is to be inferred from the circumstances, particularly the past and prospective connection between the employee and the payor and the ability of the employee to benefit the payor in the performance of his official duties.

"This office has advised that [the Rockefeller Public Service Awards] were not prohibited by the statute because they were not intended to and did not in fact give rise to the sort of dual loyalty which it was designed to prevent. The same would appear to be true here. [The payor] is a non-profit educational institution. The ... Prize is a one-time-only payment, based on your achievements before you entered the government. While no one factor is determinative, it is our opinion, based on our understanding of the situation, that your receipt of the award is not prohibited by 18 U.S.C. § 209(a)." April 7, 1977, Memorandum of OLC 2-3.

There would certainly be no objection to this "we'll - look - at - all - the - circumstances - and - see - if - it - looks - dangerous" approach if it were applied in the exercise of the President's discretion-laden power to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301. But it is an unprecedented way of interpreting the criminal law.

***181** There are many other areas besides "meritorious public-service awards" in which the unworkability of the Government's interpretation has led to what can charitably be called convoluted reasoning. I will mention only two. In 1922 the Attorney General opined that it would not violate the predecessor of § 209(a) for an employee of the Department of Commerce, dispatched on official business for a speech before a business organization, to accept from that organization reimbursement of the travel expenses and hotel bills that he would otherwise have to bear personally. The extent of the reasoning was as follows:

"Where, as in the arrangement proposed to you, the officer or employee concerned does not personally benefit by the payments from outside sources, any more than he would if he paid his own traveling expenses, the statute is not violated. Literally there may be said to be a 'contribution to' the officer or employee for services performed by him for the Government, but in reality the contribution is to the Government itself, and is in furtherance, not prejudice, of its interests." 33 Op.Atty.Gen., at 275.

Of course the same could have been said of the private payment of the salaries of federal employees that was prevalent in 1917, see *supra,* at 1010, so long as the amounts were no more than necessary to induce the employees to continue in their federal jobs, and (in combination with their federal salary) no more than they could have earned elsewhere.

Finally, I may mention the 1940 opinion from Attorney General Robert Jackson to President Roosevelt, advising that the predecessor of § 209(a) did not prohibit universities from granting leave with pay to faculty members serving as consultants to the Government--not as part of a regular sabbatical program, but only to enable the rendering of consulting services to the United States during the wartime emergency. That opinion is genuinely devoid of analysis, unless one gives that name to the *ipse dixit* that "[t]he payments in ***182** such circumstances are made with respect to the former employment and incidental to the leave granted; they are not made 'in connection with' the services of the individual as an official or employee of the United States within the contemplation of the statute." 39 Op.Atty.Gen. 501, 503. I mention that opinion because it demonstrates that the "spirit-of-the-matter" approach to § 209(a), necessitated by the interpretation that expands it beyond its language, ultimately (and quite predictably) will affect ****1014** even the *proper* applications of the statute. The consultants with salaries paid by universities in 1940 were almost the precise equivalent of the employees with salaries paid by foundations in 1917. [FN3]

FN3. While I have limited my discussion in text to Justice Department opinions, those of the Comptroller General are no more rational. Consider, for example, the following:

"Donations of cash to employees by private sources are, therefore, prohibited, even though the money is to be used to purchase transportation tickets or hotel accommodations. However, where the services are furnished in kind, we believe a different conclusion is justifiable." 36 Comp.Gen. 268, 270 (1956).

As the last example shows, the liberties that the Government has taken with its interpretation of § 209(a), to the extent they appeal to anything more concrete than the "spirit" of the statute, rely upon the phrase "as compensation for" (or its predecessor, "in connection with"). The proper interpretation of § 209(a) will not eliminate that troublesome phrase, but

it will eliminate most of the temptation to give it something other than a clear and constant meaning. If § 209(a) covers only the payment of salary, there would be little difficulty in following the principle that the statute is violated when the reason for paying the salary is, in whole or in part, the recipient's status as, or work that the recipient has performed or will perform as, a federal officer or employee. But one balks at applying such a clear principle to, for example, the reimbursement of transportation and lodging for a ***183** federal employee who gives a speech, see 33 Op.Atty.Gen. 273 (1922), meritorious public-service awards, see Memorandum of June 26, 1959, reduced-price registration fees for federal employees at American Bar Association meetings, reduced-price entertainment tickets for members of the armed services, or many other situations one can envision. Until a criminal statute reasonable enough to be accorded a clear interpretation can be enacted, lump-sum payments that do not consist of bribes (which are already covered by 18 U.S.C. § 201) or of compensation for services *in a particular matter* (which are already covered by 18 U.S.C. § 203) are better handled by administrative prohibition, through Executive Order under the President's authority and pursuant to 5 U.S.C. § 7301, see Exec. Order No. 11222, 3 CFR 306 (1964-1965 Comp.), and by agency regulations adopted under delegation of that authority. Operating in that manner, the Executive can make, and can experiment with, all sorts of reasonable distinctions that § 209(a), if interpreted to cover lump-sum payments, cannot honestly be said to permit--according special treatment, for example, to privately paid compensation that consists of cash reimbursement for travel and subsistence expenses, see 3 CFR § 100.735-15(d)(1) (1989), and to compensation that consists of awards, but only if conferred by a nonprofit organization, see 3 CFR § 100.735-15(d)(3) (1989); 5 CFR § 735.203(e)(3) (1989).

IV

I come, finally, to applying § 209(a) as I think it must be interpreted to the facts of the present case: The payments to all the recipients here were in lump sums. Perhaps there is room for argument that they would nonetheless fall within the statute if their existence and their amounts were strictly tied to a period of federal service--that is, if they had been computed on the basis of so much per month or so much per year that each recipient promised to serve. But even this argument is eliminated by the District Court's finding that ***184** "[t]he severance payments ... were not contingent upon the individuals [*sic* ] entering into federal government service, [or] their remaining in government service for any stated period of time...." 653 F.Supp. 1381, 1384 (ED Va.1987). There is, in short, no basis for holding that what transpired here was the receipt of "salary, or any contribution to or supplementation of salary" within the meaning of § 209(a). I therefore agree with the Court ****1015** that the judgment of the Court of Appeals must be reversed.

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607 F.2d 917
**(Cite as: 607 F.2d 917)**

C

United States Court of Appeals,
Tenth Circuit.

Kenneth W. DAVIS, Jr., Plaintiff-Appellant,
v.
Ernst ERDMANN, Port Director, (Port of Tulsa, Oklahoma) Bureau of Customs, Department of the Treasury, and Rex D. Davis, Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Defendants-Appellees.

**No. 79-1382.**

Submitted Aug. 20, 1979.
Decided Oct. 15, 1979.

Action was brought to review the refusal of the Director of the Bureau of Alcohol, Tobacco and Tax to grant an application for a permit to import a device or weapon described as a "knife-pistol." The United States District Court for the Northern District of Oklahoma, Tulsa Division, H. Dale Cook, Chief Judge, sustained objections to a magistrate's report recommending that the relief prayed for be granted, and plaintiff appealed. The Court of Appeals, Pickett, Circuit Judge, held that the Bureau's refusal to grant the application was a classic example of agency "nitpicking" and an arbitrary and capricious action.

Reversed and remanded.

West Headnotes

**Weapons** ⚿3
406k3 Most Cited Cases

Bureau of Alcohol, Tobacco and Tax engaged in classic example of agency "nitpicking" and in arbitrary and capricious action when it refused to issue permit for importation of a device described as "knife-pistol" on ground that it could be used as weapon. 26 U.S.C.A. (I.R.C.1954) §§ 5801 et seq., 5844, 5845, 5845(a, e); 18 U.S.C.A. §§ 921 et seq., 921(a)(3), 925(d)(2).

*917 Robert S. Travis and Ralph H. Duggins, III, of Cantey, Hanger, Gooch, Munn & Collins, Fort Worth, Tex., for plaintiff-appellant.

Hubert H. Bryant, U. S. Atty., George Carrasquillo, Asst. U. S. Atty., Tulsa, Okl., and Ronald E. Williams, Washington, D. C., Bureau of Alcohol, Tobacco and Firearms, for defendants-appellees.

Before PICKETT, McWILLIAMS and BARRETT, Circuit Judges.

PICKETT, Circuit Judge.

This action was brought to review the refusal of the Director of the Bureau of Alcohol, Tobacco and Tax, an agency of the United States Treasury Department, to grant the application of Kenneth W. Davis, Jr., for a permit to import from England a device or weapon described as a "knife-pistol." The complaint alleges that the device is a curio or museum piece, primarily a collector's item, and not likely to be used as a weapon. It is also alleged that Davis had fully complied with all of the statutes and regulations permitting the lawful importation of the device, and that the Director's action in denying the application was arbitrary, capricious, and an abuse of discretion. These allegations were denied. By agreement of the parties, the matter was tried by a court magistrate, without a jury, who found that the action of the Director was arbitrary, capricious, and an abuse of discretion. The magistrate recommended to the court that the relief prayed for be granted. The Director filed objections to the findings, alleging that his action was lawful and within his statutory authority. In sustaining the objections, the district court held that the "knife-pistol" was a weapon within the meaning of 26 U.S.C. s 5845, and that the Director's determination that the device was not primarily a collector's item and would likely be used as a weapon was not arbitrary, capricious, or an abuse of discretion. The disposition of these issues is to be determined by the provisions of the National Firearms Act, 26 U.S.C. s 5801, et seq., the Gun Control Act of 1968, 18 U.S.C. s 921, et seq., and a review of the evidence.

*918 In 1968, the United States was confronted with a rapid increase in major crimes throughout the country, including those committed by the use of firearms, particularly hand guns. For the purpose of assisting state and local governments in reducing the incidence of crime and to strengthen federal control over interstate and foreign commerce in firearms,

Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968. The Act included amendments to the National Firearms Act and the enactment of the Gun Control Act of 1968. Each of these acts in somewhat different language recognized the interest of many citizens in antique and unusual firearms. Provision was made to exempt such firearms from the acts. 2 U.S.Code Cong. & Admin.News p. 2197, 3 U.S.Code Cong. & Admin.News p. 4410 (1968). The Gun Control Act (1968) specifically stated that it was not the purpose of the act "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity . . . ." Section 101, P.L. 90-618, quoted following 18 U.S.C. s 921. The 1968 legislation was intended to control widespread traffic in firearms and their availability to those whose possession was contrary to the public interest. Barrett v. United States, 423 U.S. 212, 218, 96 S.Ct. 498, 46 L.Ed.2d 450 (1976); Huddleston v. United States, 415 U.S. 814, 824, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974).

Section 5845 of the National Firearms Act defines firearms and includes this provision: "The term 'any other weapon' means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive . . .." 26 U.S.C. s 5845(e); see also 18 U.S.C. s 921(a)(3). Section 5845(a) also provides:

> . . . The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Section 5844 prohibits the importation of firearms except under conditions which do not exist here. 18 U.S.C. s 925(d)(2) authorizes the Secretary to permit the importation of a firearm "as a curio or museum piece."

Congress has delegated the administration of the National Firearms Act and the Gun Control Act of 1968 to the Department of the Treasury of the United States, which acts through the Bureau of Alcohol, Tobacco and Firearms. The scope of court review of Bureau decisions is a narrow one. Generally, it is limited to determining whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not inaccordance with law." Although, under the statutory standard, the court cannot substitute its judgment for that of the agency, it should make a searching and careful inquiry to determine if the agency decision is based on a consideration of all relevant facts and is not a clear error in judgment. Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 195 S.Ct. 438, 42 L.Ed.2d 447 (1974); [FN1] ***919**Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); National Beef Packing Company v. Secretary of Agriculture and United States of America, 605 F.2d 1167 (10th Cir.), filed September 13, 1979; Sabin v. Butz, 515 F.2d 1061 (10th Cir. 1975).

> FN1. In Bowman, the Court said, 419 U.S. at 285, 286, 95 S.Ct. at 442:
> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, supra, (401 U.S.) at 416, (91 S.Ct. 814). The agency must articulate a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168, (83 S.Ct. 239, 9 L.Ed.2d 207) (1962). While we may not supply a reasoned basis for the agency's action that the agency itself has not given, SEC v. Chenery Corp., 332 U.S. 194, 196 (, 67 S.Ct. 1575, 91 L.Ed. 1995) (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (, 65 S.Ct. 829, 89 L.Ed. 1206) (1945). . . .

Davis concedes that the knife-pistol was designed as a weapon and was within the "any other weapon" provision of Section 5845(e), but contends that it is primarily a collector's item not likely to be used as a weapon, and therefore not included in the Section 5845(a) definition of a firearm. Throughout the trial the Director admitted that the device is primarily a collector's item and a curio relic, but urged, as he does here, that it is not excluded from the provisions of the National Firearms Act because it is likely to be used as

a weapon. Under this state of the record, there remains only the narrow question of whether there is any basis for the Director's finding that this particular knife-pistol is likely to be used as a weapon.

A review of the evidence discloses that Davis, a business executive and resident of Tulsa, Oklahoma, was a licensed dealer and collector of unique, odd or curiosity-type firearms. He was not engaged in the business of buying and selling such firearms, but collected them for his own satisfaction and the entertainment of others. He does not hunt and has not discharged a firearm since World War II. In 1973, his offer to purchase a "knife-pistol" for sale in England was accepted. This device is generally recognized as an odd and curious weapon. After payment of the purchase price of approximately $200.00, the device was shipped to Davis in Tulsa and received at the United States Customs House there. His application for a permit to import the article was denied by representatives of the Bureau of Alcohol, Tax and Firearms for numerous irrelevant reasons and because it was found to be a weapon within the meaning of Section 5845(e) and likely to be used as such. There followed a long period of negotiations and proposals by Davis, one of which was to make the device unserviceable, but the Bureau stood firm. Davis was as sure of his position as was the Bureau, so, six years later, the case is here.

The knife-pistol in question was manufactured in 1917 by the U. S. Small Arms Company of Chicago, Illinois, and a small and undisclosed number were marketed. There was some indication in the record that the principal operations of the manufacturer were in New York, and that the corporation was dissolved in 1921. The device has the appearance of an ordinary pocket knife less than four inches in length. It is so constructed that a small steel tube approximately one-and-a-quarter inches in length fits into the handle, with one end pointing outward from the end of the knife. The construction is such that the inner end of the tube or barrel can be sufficiently elevated to permit the insertion of a .22 short caliber cartridge. The tube may then be returned to the knife handle in which there is some sort of breach block and a firing pin mechanism. The knife is equipped with a small lever which, after being elevated and squeezed shut, will activate the firing pin with sufficient force to detonate the cartridge.

The evidence is undisputed that this particular type of knife-pistol was known to leading collectors, museum officials and other knowledgeable persons, as rare and unique, and primarily a collector's item. There was no evidence that a knife-pistol of this make was in the possession of anyone except collectors and museums, including the Smithsonian Institute.[FN2] There was no evidence that such a device had been used in the commission of a crime. Experts testifying on behalf of the Director admitted that they knew of no instance where a knife-pistol had been used as a weapon. Officials of the New York City and Los Angeles police departments testified that ***920** they knew of no instance where such a device had been used in the commission of crimes. Such weapons were considered by them to be impractical for use in the commission of crimes in view of the availability of conventional and concealable small arms at low cost. Although Bureau experts were of the opinion that the knife-pistol would be used in the commission of a crime, there was a total lack of evidence to support this view, and they knew of no instance where one had been so used. No witness testified that he had undertaken to fire one of them. No claim was made, and there is not a scintilla of evidence, that this particular weapon in the possession of Davis would likely be used as a weapon. The evidence is to the contrary. Previously, the Bureau had allowed Davis to import a Nazi-German army belt buckle of much later manufacture in which was concealed a small barrel, similar to that of the knife-pistol, capable of detonating a cartridge. The issue is not whether the knife-pistol could be used as a weapon, but whether it is "primarily a collector's item and not likely to be used as a weapon," or is "a curio or museum piece." The knife-pistol is within either definition.

> FN2. An agent of the A.T.F. testified that there were three in the Bureau's gun library, but it was not shown when or from whom they were acquired.

From this record and the law, it is difficult to understand the unrelenting opposition of agents of the Bureau, including the Director, to the granting of this permit to import a so-called weapon which for all practical purposes was a useless gadget. Over the long period of controversy, agents of the Bureau gave many reasons for the refusal, most of which were irrelevant to the issue. The Director's office later admitted in writing that some of those reasons were false or without factual basis. Denial of the permit appears to be a classic example of agency "nitpicking," and an arbitrary and capricious action.

The judgment is reversed and the case remanded with instructions to enter judgment requiring the issuance of the necessary permit to require immediate delivery of

the "knife-pistol" to Plaintiff-Appellant Davis.

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78 F.3d 262
**(Cite as: 78 F.3d 262)**

▷

United States Court of Appeals,
Seventh Circuit.

Kent EVANS, Petitioner-Appellant,
v.
UNITED STATES PAROLE COMMISSION,
Respondent-Appellee.
Jay VAN RUSSELL, Petitioner-Appellant,
v.
UNITED STATES PAROLE COMMISSION,
Respondent-Appellee.

**Nos. 95-2489, 95-2490.**

Argued Jan. 17, 1996.
Decided Feb. 13, 1996.

Petitioner sought writ of habeas corpus on grounds that Parole Commission was not authorized to impose new terms of special parole after revocation of first terms of special parole. The United States District Court for the Northern District of Illinois, James B. Zagel, J., denied petitions, 889 F.Supp. 327, and petitioners appealed. The Court of Appeals, Easterbrook, J., held that under predecessor of Sentencing Reform Act, release from imprisonment following revocation of special parole was not a new term of special parole.

Reversed and remanded with directions.

West Headnotes

[1] **Habeas Corpus** ⚿**252**
197k252 Most Cited Cases

Federal prisoners satisfied "custody" requirement for seeking writ of habeas corpus. 28 U.S.C.A. § 2241.

[2] **Habeas Corpus** ⚿**279**
197k279 Most Cited Cases

Court of Appeals would not invoke exhaustion rule against petitioner seeking writ of habeas corpus against Parole Commission, absent request by Parole Commission to apply the rule. 28 U.S.C.A. § 2241.

[3] **Drugs and Narcotics** ⚿**133**
138k133 Most Cited Cases

Under predecessor of Sentencing Reform Act, release from imprisonment following revocation of special parole was not a new term of special parole, but, rather, first revocation turned special parole into regular imprisonment, release from which was normal parole, in light of statutory language stating that "original" term of imprisonment could be increased by special parole term; "original" term could be augmented only once and, after that, would not be "original." Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(c), 21 U.S.C.(1982 Ed.) § 841(c).

[4] **Statutes** ⚿**219(2)**
361k219(2) Most Cited Cases

Court accepts agency's views only when there is statutory gap or ambiguity.

[5] **Statutes** ⚿**212.5**
361k212.5 Most Cited Cases

Change in statutory language or implementation of new statutory section does not imply that exegesis of prior law was mistaken.

[6] **Constitutional Law** ⚿**186**
92k186 Most Cited Cases

[6] **Statutes** ⚿**263**
361k263 Most Cited Cases

Changes in the law are retroactive only if Congress makes them so expressly, a principle which applies with special force in criminal cases given ex post facto clause of the Constitution. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1.

***262** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, Nos. 95 C 1508, 95 C 2102; James B. Zagel, Judge.

Daniel J. Hesler (argued), Office of the Federal Defender Program, Chicago, IL, for Kent Evans.

Luis M. Galvan, Daniel J. Hesler (argued), Office of the Federal Defender Program, Chicago, IL, for Jay Van Russell.

Thomas P. Walsh, Ramune R. Kelecius (argued), Office of the United States Attorney, Civil Division, Chicago, IL, for U.S. Parole Commission.

***263** Before BAUER, EASTERBROOK, and MANION, Circuit Judges.

EASTERBROOK, Circuit Judge.

More than eight years ago, Kent Evans was sentenced to two years in prison. He is still confined, and other convictions do not account for the extension; his conviction in 1987 for distributing 1.5 grams of marijuana is the only one on Evans' record. Jay Van Russell received a three-year sentence in 1982; like Evans, he is still in prison despite the lack of additional convictions.

What keeps these men behind bars is the term of special parole that followed their sentences, coupled with the Parole Commission's belief that any release following revocation creates a new term of special parole. Until the Sentencing Reform Act of 1984, which in this respect applies to crimes committed after October 27, 1986, drug offenders received terms of special parole. Three things are "special" about special parole: first, special parole follows the term of imprisonment, while regular parole entails release before the end of the term; second, special parole was imposed, and its length selected, by the district judge rather than by the Parole Commission; third, when special parole is revoked, its full length becomes a term of imprisonment. In other words, "street time" does not count toward completion of special parole; as a rule, however, persons serving parole are returned to prison only for the remainder of their term, for the clock runs continuously. This third difference is a consequence of 21 U.S.C. (1982 ed.) § 841(c), which remains applicable to persons whose crimes predated its repeal:

> A special parole term imposed under this section or [three other sections] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or [three other sections] shall be in addition to, and not in lieu of, any other parole provided for by law.

Evans wassentenced in 1987 to two years' imprisonment, to be followed by four years' special parole. On May 2, 1988, Evans was paroled from his principal sentence. On September 3, 1989, that sentence expired and the term of special parole began, only to be revoked on June 11, 1991. (Evans does not deny that he violated the terms of his release.) Under former § 841(c) the original term of imprisonment was increased by four years--until June 11, 1995. The Parole Commission was entitled to order Evans to "serve all or part of the remainder of the new term of imprisonment." It ordered him to serve 14 months and released him on June 16, 1992 (with credit for two months' good time). What were the terms of this release? Evans believes that he was on regular parole, as if from a single six-year term of imprisonment scheduled to end in June 1995; the Commission, though, treated him as serving a renewed, 34-month term of special parole (the original 48 months, less the 14 months already served or reduced by good time). See 28 C.F.R. § 2.57(c). The difference became important when, at the end of October 1992, the Parole Commission found Evans in violation a second time. Did he receive credit for the 4 1/2 months between his release and the second revocation? If Evans was on regular parole, the answer is yes--for parolees get credit for "street time" unless they are convicted of new offenses or fail to respond to a summons or warrant, see 28 C.F.R. § 2.52(c), none of which occurred. See also 18 U.S.C. § 4210(b) (1982 ed.) (repealed): "Except as otherwise provided ..., the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced". But if Evans was on special parole, then October 1992 marked the beginning of a new 34-month term. This cycle of release and revocation has been repeated twice more. Evans has spent approximately 38 months in custody since June 1991. By the Commission's reckoning, he has 10 months to go; by his own, all detention after June 11, 1995, is ***264** unlawful. Van Russell, who received a 15-year term of special parole, has experienced a similar series of releases and revocations.

[1][2] Both petitioners satisfy the "custody" requirement of 28 U.S.C. § 2241. Van Russell will remain in custody even if he prevails, but he seeks to reduce its term, which is an appropriate use of § 2241. See *Garlotte v. Fordice*, 515 U.S. 39, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995). Although the arguments on which petitioners seek relief are statutory rather than constitutional, § 2241(c)(3) authorizes relief for any person "in custody in violation of the Constitution or laws or treaties of the United States". Compare *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), with *White v. Henman*, 977 F.2d 292 (7th Cir.1992), and *Kramer v. Jenkins*, 803 F.2d

896 (7th Cir.), on rehearing, 806 F.2d 140 (1986). And although it is unclear whether Evans and Van Russell have presented their claims to the Parole Commission in administrative proceedings, the Commission does not invoke the exhaustion rule, and we are not disposed to do so unbidden, see *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), given that petitioners' argument does not depend on factual nuances. Nothing the Commission could do, short of repealing 28 C.F.R. § 2.57(c), would aid the petitioners, but the process would require them to spend additional time in prison.

[3] The district court ruled against both petitioners on the merits. 889 F.Supp. 327 (N.D.Ill.1995). Following *Parole Commission v. Williams*, 54 F.3d 820 (D.C.Cir.1995), the district court held that release from imprisonment that follows the revocation of special parole is a new term of special parole. Impelled in part by *United States v. McGee*, 981 F.2d 271 (7th Cir.1992), and in part by the language of former § 841(c), we reach a different conclusion: the first revocation turns special parole into regular imprisonment, release from which is normal parole. Accord, *Artuso v. Hall*, 74 F.3d 68 (5th Cir.1996).

Special parole was a short-lived instrument of federal criminal justice. The Sentencing Reform Act replaced special parole (first introduced in 1970, see 84 Stat. 1260) with "supervised release," a similar institution but administered by the judicial branch. See generally *Gozlon-Peretz v. United States*, 498 U.S. 395, 111 S.Ct. 840, 112 L.Ed.2d 919 (1991). Congress made the change by substituting the words "supervised release" for "special parole" throughout the United States Code and adding new provisions governing the termination of supervised release by district courts. The revocation rule, in 18 U.S.C. § 3583(e), says that a judge may:

> (1) terminate a term of supervised release ...
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and ... modify, reduce, or enlarge the conditions of supervised release ...
> (3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision ... or
> (4) order the person to remain at his place of residence....

Subsection 3583(e)(3) is quite similar to § 841(c). The question in *McGee* was whether a judge could revoke a term of supervised release and require the person to serve part of that term in prison, to be followed by supervised release for the remainder. We held not, concluding that a term once "revoked" is extinguished and converted to regular imprisonment. See also *United States v. Eicke*, 52 F.3d 165 (7th Cir.1995). The same understanding, applied to § 841(c), means that the term of special parole is replaced by a normal term of imprisonment. The Parole Commission cannot impose a new term of special parole, any more than the district judge could fashion a new term of supervised release. There is only a term of imprisonment, and release before its end is therefore normal parole.

The D.C. Circuit concluded that former § 841(c) differs from § 3583(e)(3) because, although § 3583(e)(3) allows the district court to require the defendant to serve "all or part" of the term, § 841(c) "mandates a new prison term equal to the term of special parole. The term of imprisonment under ***265** § 841(c) for special parole violations is thus set by statute; the only open issue is whether the parolee must serve all of that term behind bars, or may serve the term through a combination of incarceration and special parole." 54 F.3d at 824. This way of putting things builds the answer into the question: the only options the D.C. Circuit considered are (a) no re-release, and (b) re-release on special parole. Having excluded option (a), *Williams* thought that it was driven to (b). This is a false dichotomy. Option (a) is inconsistent with § 841(c); the Parole Commission has express authority to release the person again. The genuine options therefore are (b) re-release on special parole, and (c) re-release on regular parole. The D.C. Circuit did not explain why (b) is superior to (c) as an understanding of the statute. Like the fifth circuit in *Artuso*, we think that § 841(c) itself chooses between these options. When a term of special parole is revoked, "the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole." After the revocation, the defendant has a single, longer, but ordinary, term of imprisonment. Evans started with a two-year term; after revocation, he had a six-year term, only two years of which had been satisfied. The Parole Commission was free to award parole from that six-year sentence, but there is no statutory basis for calling the parole "special" or applying the forfeiture rule of § 841(c) on a successive return to prison.

Section § 841(c) said that "the *original* term of imprisonment shall be increased by the period of the special parole term" (emphasis added). An "original" term can be augmented only once; after that, it is not

original. What is more, § 841(c) spoke of revoking a "special parole term imposed under this section"--that is, by a judge as part of the sentence--rather than revoking a special parole term created by operation of regulation after release from a prior revocation. The Parole Commission cannot "impose" a term of special parole any more than it can "sentence" a defendant to prison.

[4] Against this the Commission musters three arguments. First, it submits, we should defer to its regulation providing that re-release reinstated special rather than ordinary parole. Now we have substantial doubt that the Judicial Branch owes any deference to the Executive Branch when the question concerns the maximum term of imprisonment; certainly judges do not defer to the Attorney General's interpretation of Title 18. No matter; under *Chevron* a court accepts the agency's views only when there is a statutory gap or ambiguity; we perceive none in former § 841(c), just as *McGee* saw no ambiguity in § 3853(e)(3). Second, the Commission argues, its interpretation is superior because a longer period of supervision will help it to penalize and rehabilitate persons who cannot follow the terms of their release. This is a doubtful proposition--for judges rather than the Commission set the length of special parole--but is at all events irrelevant. Whether terms of supervision (and the maximum time in prison) should be long or short does not alter the meaning of the statute. Our job is to determine the extent of the Commission's *power*. When parole supervision ends, incorrigible offenders may be prosecuted and convicted for their new crimes.

Finally, the Commission observes that *McGee* is not the last word on the supervised release question. After this court (and eight other circuits) held that district judges may not prescribe new terms of supervised release after revoking the original ones, Congress amended the statute to give judges that power. Pub.L. 103-322, § 110505, 108 Stat. 2017 (1994), codified at 18 U.S.C. § 3583(h). This new subsection reads:

> When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment ***266** that was imposed upon revocation of the supervised release.

District judges thus have been authorized to reinstate supervised release in the same way the Parole Commission reinstated special parole for Evans and Van Russell. This shows, the Commission insists, that our interpretation of § 3583(e)(3) in *McGee* was mistaken and should not be applied to § 841(c).

[5][6] What a surprising argument for the Executive Branch to advance so soon after *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, ---- - ----, 114 S.Ct. 1510, 1515-16, 128 L.Ed.2d 274 (1994), rejected the contention that amendment of a statute "corrects" the judicial construction of the law. The legislative and judicial branches play different roles. A change in statutory language--or, in this case, a new statutory section--does not imply that the exegesis of the prior law was mistaken. *Mojica v. Gannett Co.*, 7 F.3d 552, 562-64 (7th Cir.1993) (en banc) (concurring opinion). The members of Congress legislating in 1994 lacked special insight into the meaning of § 3583, which was enacted in 1984, let alone of § 841(c), enacted in 1970.

Congress acts by legislating rather than by reinterpreting laws already on the books. That is why *Rivers* held that the Civil Rights Act of 1991 applies prospectively. Changes in the law are retroactive only if Congress makes them so expressly--a principle with special force in criminal cases, given the Ex Post Facto Clause of the Constitution. We need not decide whether Congress could apply new rules to violations of the terms of release that occur after the change in the law. See *United States v. Reese*, 71 F.3d 582 (6th Cir.1995). Congress did not change former § 841(c), and it did not make the new § 3583(h) retroactive. The 1994 amendment is irrelevant to our task, and we hold that once special parole has been revoked, any further release-and-revocation cycle uses the rules for ordinary parole.

Petitioners are entitled to the relief they seek. The judgments are reversed, and the cases are remanded for the issuance of appropriate writs. Although we will issue our mandate on the regular schedule to give the Commission time to seek rehearing or to petition for certiorari, Evans must be released on bail immediately, on his own recognizance.

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23 F.3d 448
**(Cite as: 23 F.3d 448, 306 U.S.App.D.C. 140)**

**H**

United States Court of Appeals,
District of Columbia Circuit.

F.J. VOLLMER COMPANY, INC., Appellant,
v.
Stephen E. HIGGINS, Director, Bureau of Alcohol, Tobacco and Firearms,
Appellee.

**No. 92-5365.**

Argued March 4, 1994.
Decided May 17, 1994.

Licensed manufacturer of firearms sued for judicial review of decision of Bureau of Alcohol, Tobacco and Firearms denying application for transfer. The United States District Court for the District of Columbia, Norma Holloway Johnson, J., granted summary judgment in favor of Bureau and appeal was taken. The Court of Appeals, Randolf, Circuit Judge, held that: (1) Bureau properly denied transfer as to semiautomatic rifle with modified receiver and installed machine gun conversion kit, and (2) Bureau erred in treating machine gun in which modified receiver had been remodified and returned to its original state as a postcutoff date and thus illegal machine gun.

Affirmed in part and reversed in part.

West Headnotes

[1] **Weapons** 4
406k4 Most Cited Cases

Denial of transfer application filed by licensed manufacturer of firearms with Bureau of Alcohol, Tobacco and Firearms for semiautomatic rifle with modified receiver and installed machine gun conversion kit, on ground that modified receiver fell within definition of machine gun, complied with statute and regulation. 18 U.S.C.A. § 922(*o*); 26 U.S.C.A. § 5812(a).

[2] **Weapons** 4
406k4 Most Cited Cases

Letter from Bureau of Alcohol, Tobacco and Firearms to licensed manufacturer of firearms advising manufacturer that it could legally reconfigure receivers for semiautomatic rifle did not estop Bureau from denying transfer application for rifle with modified receiver and installed machine gun conversion kit; letter did not represent sort of affirmative misconduct required to estop government from enforcing its laws. 18 U.S.C.A. § 922(*o*); 26 U.S.C.A. § 5812(a).

[3] **Weapons** 4
406k4 Most Cited Cases

Licensed manufacturer of firearms which had performed receiver modification on semiautomatic rifle after cutoff date established by Bureau of Alcohol, Tobacco and Firearms did not fall under good faith or innocent owner exceptions provided by Bureau for innocent buyers who were eligible for continued conditional registration. 18 U.S.C.A. § 922(*o*); 26 U.S.C.A. § 5812(a).

[4] **Weapons** 4
406k4 Most Cited Cases

Bureau of Alcohol, Tobacco and Firearms erred in treating licensed firearms manufacturer's machine gun with remodified receiver as postcutoff and thus an illegal machine gun. 18 U.S.C.A. § 922(*o*).

***448 **140** Appeal from the United States District Court for the District of Columbia (89cv3341).

Stephen P. Halbrook, argued the cause and filed the briefs for appellant.

Fred E. Haynes, Asst. U.S. Atty., argued the cause for appellee. With him on the brief were Eric H. Holder, Jr., U.S. Atty., ***449 **141** John D. Bates and R. Craig Lawrence, Asst. U.S. Attys.

Before: EDWARDS, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

It is a federal criminal offense "to transfer or possess a machinegun," unless the person lawfully possessed

the machinegun before May 19, 1986, or the weapon is transferred "to or by, or possess[ed] by or under the authority of, the United States or any department or agency thereof...." 18 U.S.C. § 922(o). The Secretary of the Treasury, through the Bureau of Alcohol, Tobacco and Firearms, is authorized to approve or deny transfers. 26 U.S.C. § 5812(a); 27 C.F.R. pt. 179. The Bureau must deny an application for a transfer if it "would place the transferee in violation of the law." 26 U.S.C. § 5812(a).

F.J. Vollmer Company, Inc., a licensed manufacturer of firearms, filed two transfer applications with the Bureau. The first related to a weapon consisting of a machinegun conversion kit, manufactured and registered before May 19, 1986, and a semiautomatic receiver Vollmer had reconfigured after that date. The second related to a weapon also containing a machinegun conversion kit, but having a receiver Vollmer had restored to its original condition after reconfiguring it. Upon receipt of a letter from the Bureau in effect denying Vollmer's applications, the company sued for judicial review. The district court granted summary judgment in favor of the Bureau and this appeal followed. [FN1]

FN1. Vollmer also sought a writ of mandamus, which the district court denied. Vollmer has presented no argument against this aspect of the court's judgment, and it is therefore affirmed. *See Rollins Environmental Servs., Inc. v. EPA*, 937 F.2d 649, 652 n. 2 (D.C.Cir.1991); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.).

I

[1] Vollmer's first application related to a machinegun identical to 174 others in its possession--a Heckler and Koch Model 94 (HK 94) semiautomatic rifle with a modified receiver and installed machinegun conversion kit. Machinegun conversion kits are, according to the Bureau, "used to convert semiautomatic weapons into automatic weapons without the use of a machinegun receiver." Brief for Appellee at 2. Such a conversion kit is itself a "machinegun" under 18 U.S.C. § 921(a)(23), which incorporates the National Firearms Act's definition of the term in 26 U.S.C. § 5845(b):

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

According to previous Bureau rulings, machinegun conversion kits manufactured and registered before May 19, 1986, may be installed on rifles after that date without running afoul of § 922(o)'s prohibition. [FN2] Vollmer could not take advantage of the grandfather clause in § 922(o)(2)(B), however, because in the Bureau's view Vollmer manufactured machineguns after the cutoff date by modifying the receivers. A receiver is "that part of a firearm which provides housing for the hammer, bolt or breechblock and firing mechanism, and which is usually threaded at its forward position to receive the barrel." 27 C.F.R. § 179.11. Vollmer removed from each rifle receiver an attachment block and drilled a hole in the magazine housing. As the Bureau saw it, these modifications--although not necessary to install the machinegun***450 **142** conversion kit--removed the only two physical differences between the HK 94 semiautomatic rifle receiver and a machinegun receiver made by the same company (an HK MP5). [FN3]

FN2. This is because a conversion kit is considered a machinegun under the statute. So long as the kit was lawfully possessed prior to the cutoff date, combining the kit with other, non-machinegun parts after that date does not alter its lawful status.

FN3. Vollmer said it made the changes for cosmetic reasons.

The Bureau's reasoning is sound. Vollmer legally possessed the machinegun conversion kits and it therefore could legally transfer them even if it attached them to rifles made after May 19, 1986. But modified receivers falling within § 921(a)(23)'s definition of a "machinegun," as these did, may not be transferred. It is difficult to understand how combining a legal conversion kit with a time-barred receiver could transform the illegal receiver into a legal one. Vollmer's argument is that each of its 174 weapons is simply one machinegun. Modifying the receiver, in other words, still left Vollmer with one operational

machinegun, whereas the Bureau's position leads to the conclusion that Vollmer possessed two machineguns, one consisting of the conversion kit and the other consisting of the receiver, both of which had to be taxed and registered separately.

But the Bureau did not determine that one machinegun is two for taxing or registration purposes. It merely said that anything meeting the statute's definition of machinegun and made after the cutoff date cannot be transferred or possessed even if combined with an otherwise lawfully possessed machinegun. In defining machineguns to include receivers, Congress did not distinguish between receivers integrated into an operable weapon and receivers sitting in a box, awaiting installation. Vollmer conceded that if the company's modified receivers stood alone, it could not transfer them. *See* United States v. Evans, 712 F.Supp. 1435, 1438-39 (D.Mont.1989), *aff'd*, 928 F.2d 858 (9th Cir.1991); *United States v. Goff*, 677 F.Supp. 1526, 1543-46 (D.Utah 1987). There is nothing in the statute to suggest that installing the illegally possessed receivers into otherwise lawfully possessed machineguns would make a difference.

[2] In an argument based on an estoppel theory, Vollmer claims to have relied upon a letter from the Bureau advising the company that it could legally reconfigure the receivers. The argument goes nowhere. The letter did not directly mention receiver modifications. Even if we interpreted the Bureau's general statements to comprehend that subject, the letter by no means represents the sort of affirmative misconduct required to estop the government from enforcing its laws. *See* Heckler v. Community Health Servs. of Crawford County, 467 U.S. 51, 60-61, 104 S.Ct. 2218, 2224-25, 81 L.Ed.2d 42 (1984); *INS v. Miranda*, 459 U.S. 14, 19, 103 S.Ct. 281, 283-84, 74 L.Ed.2d 12 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973) (per curiam).

[3] Vollmer's final point regarding its 174 machineguns is that the Bureau is acting inconsistently since it has allowed others to possess machineguns having receivers modified after the cutoff date. The Bureau's position is rather more refined than Vollmer represents. After Congress passed legislation banning machineguns, but before the legislation became effective, manufacturers seeking to register machineguns prior to the cutoff date flooded the Bureau with applications. The Bureau wound up registering almost 16,000 conversion kits. As the Bureau discovered later, many of these conversion kits would not function unless the receivers were modified by various milling operations, operations which constituted the manufacture of a machinegun. The Bureau therefore did not regard these so-called conversion kits as eligible for registration as machineguns prior to May 19, 1986. Several manufacturers, after installing the non-qualifying conversion kits on rifles with modified receivers, transferred the assembled machineguns to unsuspecting individuals. Between May 19, 1986, and January 1988, the Bureau approved many such transfers. In late 1987, when the Bureau became aware of the problem, it began inspecting firearms manufacturers to determine whether certain conversion kits were registrable items. On January 14, 1988, the Bureau implemented a policy to deal with the situation. It allowed innocent buyers of the problem machineguns to remain eligible for continued conditional registration; and it granted conditional exceptions to individuals ***451 **143** or dealers who in good faith had installed conversion kits on receivers modified after the cutoff date. The Bureau made clear, however, that it would not approve transfers requested by manufacturers who had performed the receiver modifications. Vollmer is such a manufacturer, and it does not fall under the good faith or innocent owner exceptions.

For the reasons given, the district court correctly granted the Bureau's motion for summary judgment in regard to the 174 machineguns with receivers Vollmer had modified after May 19, 1986.

II

[4] Vollmer's second transfer application related to a machinegun in which the modified HK 94 receiver had been remodified and returned to its original state. Presumably, Vollmer accomplished this by filling the hole in the magazine and refitting the attachment block, so that the receiver once again duplicated an HK 94 semiautomatic receiver. The Bureau refused to approve a transfer because "[i]t is not possible for a receiver which was modified to permit automatic fire to be modified back into a semiautomatic firearm and removed from the purview of the National Firearms Act." According to the Bureau, only destroying the receiver can remove it from § 922(*o*)'s proscription.

The administrative record does not contain the reasoning behind the Bureau's interpretation. Counsel for the agency tells us that it rests on the National Firearms Act. The Act regulates "firearms," which are a specific category of weapons defined in 26 U.S.C. § 5845(a). A machinegun is a firearm. *Id.* Under the Act, anything that can be "readily restored to shoot, automatically more than one shot, without manual

reloading, by a single function of the trigger" is a machinegun. 26 U.S.C. § 5845(b). Bureau counsel asserts that the receiver at issue is "potentially restorable," but the Bureau made no findings of fact and offered no reasoned explanation on the subject. [FN4] This alone would warrant setting aside the agency's action and remanding the case. 5 U.S.C. § 706(2)(A); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 2680, 110 L.Ed.2d 579 (1990); *National Treasury Employees Union v. Horner*, 854 F.2d 490, 498-99 (D.C.Cir.1988); *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1326 (D.C.Cir.1988), *cert. denied*, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989). We believe it appropriate, however, to consider the other questions raised by the Bureau's decision. Vollmer is entitled to a decision on these questions now. Violation of 18 U.S.C. § 922(*o*) is a criminal offense, punishable by fine and imprisonment. 18 U.S.C. § 924(a)(2). Failing to pay taxes on and failing to register a machinegun are violations of the National Firearms Act, punishable by fine and imprisonment. 26 U.S.C. § 5871.

> FN4. On at least two previous occasions, during a prosecution, the Bureau has presented evidence that the machinegun could be restored in two minutes, *United States v. Woodlan*, 527 F.2d 608, 609 (6th Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 75, 50 L.Ed.2d 85 (1976), or in an eight- hour working day in a properly equipped machine shop. *United States v. Smith*, 477 F.2d 399, 400-01 (8th Cir.1973).

It is true that the National Firearms Act covers machineguns, as well as short-barrelled rifles and shotguns, even if they have been modified, so long as they can be "readily restored." 26 U.S.C. § 5845(b), (c), & (d). [FN5] Neither the Act nor the Bureau's regulations, however, define "readily restored." *See* 26 U.S.C. § 5845; 27 C.F.R. § 179.11. We do know that, in the Bureau's view, "firearms" subject to the Act may be excluded from coverage if they are "[a]lter[ed] by removing the feature or features that cause[d] the weapon to be classified as an NFA firearm." FIREARMS ENFORCEMENT PROGRAM, ATF Order 3310.4B ¶ 83(e)(2), at 43 (Feb. 8, 1989). Alterations of this sort include welding an extension onto a rifle or shotgun barrel; and welding closed a slot on certain handguns to ***452 **144** prevent the attachment of a shoulder stock. *Id.* ¶ 83(f)(2) & (4), at 43. The Bureau must believe that if welding removes a critical feature, the firearm cannot be "readily restored" and it therefore can be removed from the firearm classification. In the case of the modified HK receiver, the critical features were the lack of the attachment block and the presence of a hole. Vollmer's welding the attachment block back onto the magazine and filling the hole it had drilled do not appear to be significantly different from the operations the Bureau describes as sufficient to remove a short-barrelled rifle or shotgun from the category of "firearm." It would seem to follow that Vollmer's operations thus removed the HK receiver from the category of machinegun.

> FN5. As originally enacted in 1934, the National Firearms Act defined machinegun as "any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot without manual reloading, by a single function of the trigger." 26 U.S.C. § 2733(b) (1940). The Gun Control Act of 1968, Pub.L. No. 90-618, 82 Stat. 1213, altered the definition to include the phrase "readily restored to shoot."

The Bureau's contrary conclusion raises a related problem. From all that appears, it is just as easy to turn a brand new HK 94 semiautomatic rifle receiver into a machinegun receiver as it is to do the same to a formerly- modified-but-later-restored receiver such as the one Vollmer now possesses. Yet it is incredible to suppose that every HK 94 semiautomatic rifle receiver made since May 19, 1986, must therefore be considered readily restorable and illegal under 18 U.S.C. § 922(*o*). [FN6]

> FN6. One might contend that a new, unaltered receiver never achieved the status of machinegun and therefore cannot be "restored." The Bureau, however, believes that the phrase "readily restored" applies even to weapons that have never been assembled. *See United States v. Drasen*, 845 F.2d 731, 735-37 (7th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988).

The district court upheld the Bureau's action on a rationale not yet discussed: "Since the statute authorizes ATF toregulate machine guns that are inoperable and unlikely to become operable, the statute clearly authorizes the Agency to regulate machineguns that remain operable." [FN7] This is unpersuasive. Vollmer's machinegun remains subject to regulation,

just as an inoperable firearm remains subject to regulation. Vollmer thus must obtain the Bureau's permission before transferring the weapon. The question is not whether the machinegun assembled from the conversion kit and the receiver will be regulated, but whether the restored HK receiver is itself a machinegun and is thus illegal to possess. Even if we were less certain that the restored receiver is not itself a machinegun, we must resolve the ambiguity in Vollmer's favor, as the Supreme Court instructed in *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, ---- n. 9, 112 S.Ct. 2102, 2110 & n. 9, 119 L.Ed.2d 308 (1992). Accordingly, the Bureau erred in treating Vollmer's restored receiver as a post cutoff date (and thus illegal) machinegun.

> FN7. Machineguns and other firearms that become "unserviceable"--that is, incapable of firing and incapable of being readily restored to a firing condition, 26 U.S.C. § 5845(h)--"may be transferred as a curio or ornament," 26 U.S.C. § 5852(e).

*Affirmed in part and reversed in part.*

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102 F.3d 591
**(Cite as: 102 F.3d 591, 322 U.S.App.D.C. 193)**

**H**

United States Court of Appeals,
District of Columbia Circuit.

F.J. VOLLMER COMPANY, INC., Appellant,
v.
John W. MAGAW, Director, Bureau of Alcohol, Tobacco & Firearms, U.S. Department of the Treasury, Appellee.

**No. 95-5187.**

Argued Oct. 15, 1996.
Decided Dec. 24, 1996.

Licensed firearms manufacturer sought judicial review of decision of Bureau of Alcohol, Tobacco and Firearms (ATF) denying applications for transfer of weapons. After grant of summary judgment to Bureau of Alcohol, Tobacco, and Firearms (ATF) was reversed in part, 23 F.3d 448, manufacturer sought reimbursement for fees and expenses under Equal Access to Justice Act (EAJA). The United States District Court for the District of Columbia, Norma Holloway Johnson, J., rejected claim for fees and expenses, and manufacturer appealed. The Court of Appeals, Tatel, Circuit Judge, held that: (1) interpretation by ATF of Gun Control Act of 1986 was not substantially justified for purposes of EAJA; (2) attorney for manufacturer was not entitled to fee enhancement based on expertise; and (3) attorney was entitled to be reimbursed for 70% of time spent on case.

So ordered.

West Headnotes

[1] **United States 147(9)**
393k147(9) Most Cited Cases

Party is "prevailing party" in action against United States not sounding in tort, and may potentially recover fees and expenses under Equal Access to Justice Act (EAJA), when actual relief on merits of his claim materially alters legal relationship between parties by modifying defendant's behavior in way that directly benefits plaintiff. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[2] **United States 147(10)**
393k147(10) Most Cited Cases

Including both government agency's action and arguments defending that action in court, government's position in action against United States not sounding in tort is "substantially justified," so that government is not required to pay fees and expenses of prevailing party under Equal Access to Justice Act (EAJA), if it is justified in substance or in the main, or is justified to degree that could satisfy reasonable person, which is no different from having reasonable basis both in law and fact. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[3] **United States 147(10)**
393k147(10) Most Cited Cases

Government bears burden of establishing that its position in action brought against United States not sounding in tort was substantially justified, so that it may not be required to fees and expenses under Equal Access to Justice Act (EAJA). 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[4] **United States 147(10)**
393k147(10) Most Cited Cases

Inquiry into reasonableness of government's position for purposes of Equal Access to Justice Act (EAJA) may not be collapsed into antecedent evaluation of merits of action, as Act sets forth distinct legal standard. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[5] **United States 147(10)**
393k147(10) Most Cited Cases

Although inquiry into whether government's position was substantially justified, so that government will not be required to pay costs and fees of prevailing party in action against United States not sounding in tort under Equal Access to Justice Act (EAJA), differs from merits determination, court's merits reasoning may be quite relevant to resolution of substantial justification question, and in some cases, standard of review on merits is so close to reasonableness standard applicable to determining substantial justification that losing agency is unlikely to be able to show that its position was substantially justified. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[6] **United States 147(10)**
393k147(10) Most Cited Cases

Relevance of court's reasoning on merits in action against United States not sounding in tort in which plaintiff is prevailing party to reasonableness inquiry made in determining whether government's position was substantially justified under Equal Access to Justice Act (EAJA) so that government is not required to pay prevailing party's costs and fees depends on nature of case. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[7] **Federal Courts** 830
170Bk830 Most Cited Cases

Court of Appeals reviews for abuse of discretion district court's determination that position of government substantially justified, so that government will not be liable for costs and fees under Equal Access to Justice Act (EAJA), and uses two-step process; reviewing court first asks whether district court relied on proper legal standards, errors in which will necessarily give rise to abuse of discretion, and if no errors are made in setting forth legal standards, reviewing court examines application of standards to facts before district court. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[8] **Federal Courts** 878
170Bk878 Most Cited Cases

Deference granted to district court's determination of whether government's position was substantially justified for purposes of Equal Access to Justice Act (EAJA) does not exempt determination from appellate scrutiny, and reviewing court will reverse if decision rests on clearly erroneous factual findings or if it leaves court with definite and firm conviction that the court below committed clear error of judgment in conclusion it reached upon weighing of relevant factors. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[9] **United States** 147(11.1)
393k147(11.1) Most Cited Cases

Interpretation of Gun Control Act of 1986 by Bureau of Alcohol, Tobacco, and Firearms (ATF) as providing that semiautomatic receiver that has been modified into machine gun receiver and then restored to its original semiautomatic state may not be possessed or transferred, even though reconfiguration makes it indistinguishable from brand new semiautomatic, was not reasonable and was not substantially justified for purposes of Equal Access to Justice Act (EAJA), and thus, government was liable for costs and expenses of firearms manufacturer who successfully challenged interpretation; interpretation was wholly unsupported by text, legislative history, and underlying policy of statute. 5 U.S.C.A. § 504; 18 U.S.C.A. § 922(o); 28 U.S.C.A. § 2412.

[10] **United States** 147(4)
393k147(4) Most Cited Cases

Fee enhancement provision of Equal Access to Justice Act (EAJA) is available only for lawyers whose specialty requires technical or other education outside field of American law. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[11] **United States** 147(11.1)
393k147(11.1) Most Cited Cases

Attorney who represented firearms manufacturer in successful challenge to interpretation by Bureau of Alcohol, Tobacco, and Firearms (ATF) of provision of Gun Control Act of 1986 was not entitled to enhanced fee under Equal Access to Justice Act (EAJA) based on limited availability of qualified attorneys, and was reimbursed at regular statutory rate. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[12] **United States** 147(4)
393k147(4) Most Cited Cases

Product of reasonable hourly rate and number of hours reasonably expended on entire case by attorney for party who prevails in action against the United States only establishes a base for calculating amount of reimbursable fees under Equal Access to Justice Act (EAJA), and if prevailing party achieved less than complete success, court must reduce base to reflect degree of success achieved. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[13] **United States** 147(4)
393k147(4) Most Cited Cases

Court assesses degree of success of party who prevails in action against United States, for purposes of determining reimbursable fees under Equal Access to Justice Act (EAJA), by asking two questions: court asks first if party failed to prevail on claims that were unrelated to claims on which he succeeded, and second if party achieved level of success that makes hours reasonably expended satisfactory basis for making fee award. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[14] **United States** 147(4)
393k147(4) Most Cited Cases

Claims asserted by party who prevails in action against United States are related, for purposes of determining

reasonable legal fees which may be recovered by party under Equal Access to Justice Act (EAJA), if they involve common core of facts or are based on related legal theories. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[15] **United States ⚿147(11.1)**
393k147(11.1) Most Cited Cases

Attorney for firearms manufacturer who had successfully overturned denial by Bureau of Alcohol, Tobacco, and Firearms (ATF) of his second application for transfer of semiautomatic weapon was entitled to be reimbursed for 70% of hours claimed to have been spent in representation of dealer under Equal Access to Justice Act (EAJA); attorney had failed to overturn denial of first application for transfer, which reduced significance of overall relief obtained. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

[16] **United States ⚿147(4)**
393k147(4) Most Cited Cases

Even in cases where multiple claims asserted by party who prevails in action against United States are interrelated, courts in determining proper amount of attorney fees recoverable by party under Equal Access to Justice Act (EAJA) should proportion fees to significance of overall relief obtained by plaintiff in relation to hours reasonably expended on litigation. 5 U.S.C.A. § 504; 28 U.S.C.A. § 2412.

***593 **195** Appeal from the United States District Court for the District of Columbia (No. 89cv03341).

Stephen P. Halbrook, Fairfax, VA, argued the cause and filed the briefs for appellant.

Fred E. Haynes, Assistant U.S. Attorney, Washington, DC, argued the cause for appellee. With him on the brief were Eric H. Holder, Jr., U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney.

Before: WILLIAMS, ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

This case presents a recurring question under the Equal Access to Justice Act: In evaluating a claim for fees under the Act, what standard of reasonableness should a court use to determine whether an agency's action was "substantially justified"? In the case before us, this court previously overturned a decision by the Bureau of Alcohol, Tobacco and Firearms, holding the Bureau's action was inconsistent with the governing statute and would have produced an "incredible" result. The district court nonetheless found the agency's decision to have been substantially justified and thus denied petitioner reimbursement for fees and expenses. Reviewing the district court's ruling under the deferential abuse-of-discretion standard, we conclude that the agency's position was not substantially justified because it was wholly unsupported by the text, legislative history, and underlying policy of the governing statute. Although we thus grant petitioner's request for fees and expenses, we deny reimbursement at an enhanced rate and reduce the fee amount to reflect petitioner's less than complete success.

I

In an effort to restrict the availability of machineguns, Congress amended the Gun Control Act in 1986, making it illegal to possess or transfer any machinegun except one lawfully possessed before the amendment's May 19, 1986, effective date or one possessed or transferred "by or under the authority of, the United States ... or a State...." 18 U.S.C. § 922(*o*) (1994). The Gun Control Act takes its definition of "machinegun" from the National Firearms Act. *Id.* § 921(a)(23). According to that definition, machineguns include:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger[,] .... the frame or receiver of ***594 **196** any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. § 5845(b) (1994). A weapon's receiver is the frame "which provides housing for the hammer, bolt or breechblock and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 179.11 (1996). The group of parts used to convert a non-automatic weapon for automatic fire is called a machinegun conversion kit.

At the time Congress amended the Gun Control Act, petitioner, F.J. Vollmer Co., a firearms manufacturer, possessed 175 machinegun conversion kits. Under the

terms of the 1986 amendment, these kits were legally transferable machineguns. In order to determine which receivers the kits could be combined with for sale as complete weapons, Vollmer submitted two transfer applications to the Bureau. In both applications, Vollmer proposed combining machinegun conversion kits with semiautomatic receivers, i.e., receivers designed as parts of weapons that shoot only one shot with each pull of the trigger. The receivers in the two applications differed, however, in one crucial respect. The receiver in the first application had been converted into a machinegun receiver after May 19, 1986, the effective date of the Gun Control Act's machinegun prohibition. In the second application, Vollmer modified a similar receiver a second time, returning it to its original semiautomatic state. The Bureau denied the first application, concluding that the receiver qualified as a prohibited machinegun and that its combination with a legally possessed machinegun conversion kit could not alter its illegal status. Even though the receiver covered by the second application was physically indistinguishable from a brand new, perfectly legal semiautomatic receiver, the Bureau also treated it as a prohibited machinegun because Vollmer had converted it into a machinegun receiver after May 19, 1986. It thus denied Vollmer's second application as well.

The district court upheld the Bureau's denial of both applications. This court agreed with the district court concerning the denial of the first application, but reversed the district court and overturned the Bureau's denial of the second application for several reasons. *F.J. Vollmer Co. v. Higgins*, 23 F.3d 448 (D.C.Cir.1994). First, the Bureau offered no reasoning supporting its once-a-machinegun-always-a-machinegun reading of the National Firearms Act. *Id.* at 451. Second, although the Bureau asserted in court that its rejection of the application rested on its determination that the twice reconfigured semiautomatic receiver was "potentially restorable" to being a machinegun receiver, the Bureau made no findings of fact to support that claim. *Id.* Third, the Bureau's position conflicted with its own enforcement manual, which allowed exclusion of a weapon from Firearms Act coverage through removal of the feature that led to its classification as a firearm under the Act. *Id.* at 451-52. Finally, the Bureau's reading of the Firearms Act led to the "incredible" conclusion that every semiautomatic receiver manufactured after May 19, 1986, must be considered readily restorable to being a machinegun receiver and thus a prohibited machinegun under the Gun Control Act. *Id.* at 452.

[1][2][3] Vollmer then sought reimbursement for fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504; 28 U.S.C. § 2412 (1994). The EAJA provides that a "prevailing party" in civil suits against the United States not sounding in tort is entitled to fees and expenses unless the Government's position was "substantially justified" or "special circumstances make an award unjust." *Id.* § 2412(d)(1)(A). A party prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992); *see also Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C.Cir.1994). Including both the agency's action and the arguments defending that action in court, ****197*595**28 U.S.C. § 2412(d)(2)(D) (1994), the Government's position is substantially justified if it is "justified in substance or in the main--that is, justified to a degree that could satisfy a reasonable person. That is no different from ... [having] a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988) (internal quotation marks and citation omitted). The Government bears theburden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C.Cir.1992) (citing *Jones v. Lujan*, 887 F.2d 1096, 1098 (D.C.Cir.1989)).

Although the district court found that Vollmer was a prevailing party, it rejected Vollmer's claim for fees and expenses, concluding that the Bureau's denial of the company's second application had been substantially justified. Vollmer now appeals.

II

[4] Both parties agree that Vollmer is a "prevailing party" under the EAJA. Both parties also agree, as do we, that the district court properly found that this court's previous rejection of the Bureau's interpretation of the Firearms Act does not settle the question we face today: whether the Government's position was substantially justified within the meaning of the EAJA.

The inquiry into the reasonableness of the Government's position under the EAJA "may not be collapsed into our antecedent evaluation of the merits, for the EAJA sets forth a 'distinct legal standard.' " *Cooper*, 24 F.3d at 1416 (quoting *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C.Cir.1986)).

[5][6] Although the substantial justification inquiry differs from the merits determination, the court's merits reasoning may be quite relevant to the resolution of the

substantial justification question. In some cases, the standard of review on the merits is so close to the reasonableness standard applicable to determining substantial justification that a losing agency is unlikely to be able to show that its position was substantially justified. *See* United States v. One Parcel of Real Property, 960 F.2d 200, 209 (1st Cir.1992); *see also* Gregory C. Sisk, The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part Two), 56 LA. L.REV. 1, 23-42 (1995). Thus we have held that where an agency's decision was overturned as unsupported by substantial evidence, the agency's position was not substantially justified because it "lacked a reasonable factual basis." Cooper, 24 F.3d at 1417 (emphasis omitted). In contrast, whether agency action invalidated as arbitrary and capricious might nevertheless have been substantially justified depends on what precisely the court meant by "arbitrary and capricious." For example, a determination that an agency acted arbitrarily and capriciously because it failed to provide an adequate explanation or failed to consider some relevant factor in reaching a decision "may not warrant a finding that [the] agency's action lacked substantial justification." Wilkett v. ICC, 844 F.2d 867, 871 (D.C.Cir.1988) (citing Rose, 806 F.2d at 1087-89). However, "a finding that an agency acted arbitrarily and capriciously by denying equal treatment to similarly situated parties"--we would say *clearly* similarly situated--or by failing to enforce a rule where it plainly applied "renders it much more likely that the Government's action was not substantially justified." *Id.* (citing Rose, 806 F.2d at 1089). Moreover, because "unreasonable" may have different meanings in different contexts, even the presence of that term or one of its synonyms in the merits decision does not necessarily suggest that the Government will have a difficult time establishing that its position was substantially justified. *See, e.g.,* United States v. $19,047.00 in United States Currency, 95 F.3d 248, 251-52 (2d Cir.1996) (explaining why search found unreasonable under Fourth Amendment may be reasonable for EAJA purposes). Likewise, the absence of the word "unreasonable" does not necessarily suggest that the Government's position was substantially justified. The relevance of a court's reasoning on the merits to the reasonableness inquiry under the EAJA thus depends on the nature of the case.

***596 **198** [7] In this case, whether the Bureau's position was substantially justified turns on the reasonableness of the once-a-machinegun-always-a-machinegun reading of the Firearms Act that informed the Bureau's rejection of Vollmer's second application. Whether the Bureau's position was substantially justified, however, is not an issue we review de novo. We limit our inquiry to determining whether the district court abused its discretion in finding the once-a-machinegun-always-a-machinegun interpretation reasonable. Pierce, 487 U.S. at 563, 108 S.Ct. at 2549. In the EAJA context, abuse-of-discretion review involves two steps. We first ask whether the district court relied on the proper legal standards. Did it, for example, define substantial justification in terms of reasonableness? Did it recognize that the Government's position includes both the agency's action and the arguments offered in court in defense of that action? Errors in these and other purely legal determinations necessarily constitute abuses of discretion. *See, e.g.,* Koon v. United States, 518 U.S. 81, ----, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990).

[8] If, as in this case, the district court made no errors in setting forth the legal standards under the EAJA, we then proceed to the second step, examining the district court's application of those standards to the facts before it. In some EAJA cases, that determination turns largely on an assessment of the strength of the evidence supporting the Government's stance; in other cases, it may turn on a judgment about the reasonableness of the Government's interpretation of statutes or regulations. Although in either case we give substantial deference to the district court's decision, Pierce, 487 U.S. at 560-61, 108 S.Ct. at 2547-48; *see also* Cooter & Gell, 496 U.S. at 403, 110 S.Ct. at 2459 (describing "unitary abuse-of-discretion standard" established by Pierce); Trahan v. Brady, 907 F.2d 1215, 1217 (D.C.Cir.1990) (applying abuse-of-discretion standard to purely legal substantial-justification determination), our deference does not exempt the district court's substantial justification determination from appellate scrutiny. We will reverse the district court if its decision rests on clearly erroneous factual findings or if it leaves us with " 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.' " De Allende v. Baker, 891 F.2d 7, 11 n. 7 (1st Cir.1989) (quoting In re Josephson, 218 F.2d 174, 182 (1st Cir.1954)); *see also* Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 127 (3d Cir.1993) (relying on same definition of abuse of discretion in reviewing EAJA decision).

[9] Applying these standards, we conclude that the district court's decision in this case reflected an error of judgment amounting to an abuse of discretion. Simply repeating arguments made by the Bureau before the

merits panel without offering any explanation why those arguments showed the Bureau's position was reasonable, the district court largely failed to grapple with the reasoning underlying this court's merits decision and its conclusion that the Bureau's position was not merely incorrect but unreasonable. While the merits panel did not use the word "unreasonable," it highlighted the fundamental unreasonableness of the Bureau's position by pointing out that the Bureau's approach required treating identical weapons in completely different ways. Although a brand new semiautomatic receiver may legally be possessed and transferred, under the Bureau's interpretation of the Firearms Act, a semiautomatic receiver that has been modified into a machinegun receiver and then restored to its original semiautomatic state may not be possessed or transferred, even though its reconfiguration makes it indistinguishable from a brand new semiautomatic. "[I]ncredible" was the word this court used to describe that result. *F.J. Vollmer Co.*, 23 F.3d at 452.

In support of its argument that its distinction between new and remodified semiautomatic receivers, although rejected by the merits panel, was nevertheless reasonable, the agency points out that the Firearms Act treats machineguns differently from other firearms. The agency is certainly correct that, unlike in the case of other weapons, the ***597 **199** Firearms Act includes machinegun receivers and machinegun conversion kits as machineguns in their own right. 26 U.S.C. § 5845(b) (1994). The agency offers no convincing explanation, however, why this difference should lead to different procedures for removing machineguns as opposed to all other weapons from Firearms Act coverage. According to the agency, for weapons other than machineguns, removal of the features that led to the weapon's classification as a firearm suffices to remove the weapon from the Act's coverage. FIREARMS ENFORCEMENT PROGRAM, ATF Order 3310.4B ¶ 83(e)(2). For machinegun receivers, however, removal of the features causing their classification as machineguns does not remove them from Firearms Act coverage, and thus the Gun Control Act's prohibition. Under the agency's once-a-machinegun-always-a-machinegun policy, only complete destruction can remove machinegun receivers from the Firearms Act's coverage. We can find nothing in the text of the Firearms Act to support this difference in treatment.

Defending its once-a-machinegun-always-a-machinegun policy, the Bureau also argues that Congress expected it to interpret the definition of machineguns as broadly as possible. The Senate report on the 1968 amendment to the Gun Control Act that broadened the definition of machineguns to include receivers and conversion kits, however, does not support the Bureau's argument. The report simply shows that Congress intended to treat machinegun receivers and conversion kits as machineguns in their own right and that the same standards for ready restorability and unserviceableness would apply to machinegun receivers and to complete machineguns. *See* S.REP. NO. 90-1501 at 45-46 (1968). Indeed, we think the Bureau's broad definition of machineguns may actually be inconsistent with Congressional intent. When Congress broadened the definition of machineguns in 1968, as well as when it enacted the prohibition on machinegun possession or transfer in 1986, it left the Firearms Act's definition of semiautomatic rifles unchanged, choosing not to restrict the possession or transfer of any semiautomatics. Not until 1994, acting through a separate amendment to the Gun Control Act, did Congress ban some semiautomatics, i.e., semiautomatic assault rifles. Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, § 110102, 108 Stat. 1796, 1996-98 (1994) (codified at 18 U.S.C. § 922(v)). Because the Bureau's position in this case would have prohibited the transfer of one group of semiautomatics--those whose receivers have been modified into machinegun receivers and then reconfigured to their original state--it arguably would have conflicted with Congress's intention until 1994 to permit the transfer of all semiautomatics, subject, of course, to the Firearms Act's general registration and taxation provisions.

The Bureau argues that the reasonableness of its rejection of Vollmer's second application also finds support in the Firearms Act's coverage of both unserviceable and serviceable firearms. *See* 26 U.S.C. § 5845(h) (1994). Unserviceable firearms are incapable both of shooting and of being readily restored to firing condition. *Id.* According to the Bureau, the guns at issue in this case--semiautomatic receivers that had once been converted into machinegun receivers--are actually more similar to serviceable machinegun receivers than are unserviceable receivers because, unlike unserviceable receivers, they can be readily restored to serviceable machinegun receivers. Therefore, the Bureau contends, treating unserviceable machinegun receivers as machineguns--as the Firearms Act does--yet excluding remodified semiautomatic receivers from the definition of machineguns is illogical.

One problem with this argument is that the Bureau did not rely on it in rejecting Vollmer's second application. As its counsel acknowledged at oral argument, the

Bureau's decision relied solely on the fact that after May 19, 1986, the receiver had been modified into a machinegun receiver. Although the Bureau did raise this argument before the district court, we do not see how it supports the reasonableness of the government's position. The Firearms Act's provision covering unserviceable firearms applies to all firearms; it does not distinguish between machineguns and other weapons, nor between complete weapons and receivers. 26 U.S.C. § 5845(h). The Bureau's insistence that machineguns,, ***598 **200** unlike all other firearms, must be destroyed in order to be removed from the Act's coverage thus cannot rest on the Act's coverage of unserviceable firearms.

Having examined the Bureau's arguments from text, structure, legislative history, and underlying policy, we find no reasonable basis for its once-a-machinegun-always-a-machinegun interpretation of the Firearms Act. Nor are we persuaded by the district court's own explanations of why the Bureau's position was nonetheless substantially justified. Although, as the district court observed, the Bureau had followed its interpretation of the Firearms Act since at least the early 1980s, we do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation. Like the Bureau, the district court also found support for the Bureau's interpretation in *United States v. Whalen*, 337 F.Supp. 1012 (S.D.N.Y.1972). But *Whalen* simply notes that the Firearms Act's registration provisions cover unserviceable as well as serviceable firearms and that unserviceable machineguns therefore are machineguns under the Act. *Id.* at 1016-17. *Whalen* does not address the status of receivers of any sort, whether machinegun receivers, semiautomatic receivers, or receivers converted from one form to another.

Finally, the district court pointed out that the enforcement manual the merits panel relied on to demonstrate the inconsistency of the Bureau's stance did not cover machineguns. Yet the first example in the relevant section of the manual concerns the reconfiguration of a semiautomatic that had been converted into a machinegun. FIREARMS ENFORCEMENT PROGRAM, ATF Order 3310.4B ¶ 83(f)(1). According to the manual, removal of the parts that converted the semiautomatic into a machinegun would suffice to remove the weapon from coverage by the Firearms Act's definition of machineguns. Although the example does not address machinegun receivers in particular, we think it undercuts the district court's assertion that the manual does not cover weapons that have been converted into machineguns.

III

Having determined that the agency's position was not "substantially justified" and that Vollmer is thus entitled to recover fees and expenses, we next address the appropriate amount of reimbursement. This requires that we resolve two questions: Is Vollmer entitled to reimbursement of attorney's fees at an enhanced rate? Is the company entitled to reimbursement for all the hours its attorney spent on the case even though it succeeded in overturning only the Bureau's denial of its second transfer application?

[10] In support of its request for reimbursement at an elevated rate, Vollmer cites the EAJA's provision for higher rates in cases involving "a special factor, such as the limited availability of qualified attorneys for the proceedings involved." 28 U.S.C. § 2412(d)(2)(A)(ii) (1994). Interpreting this clause narrowly, the Supreme Court has held that it refers to "attorneys having some distinctive knowledge or specialized skill." *Pierce*, 487 U.S. at 572, 108 S.Ct. at 2554. As examples, the Court has referred to "an identifiable practice specialty such as patent law, or knowledge of foreign law or language." *Id.* We have interpreted this to mean that fee enhancement is available only for lawyers whose specialty "requir[es] technical or other education outside the field of American law." *Waterman Steamship Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119, 1124 (D.C.Cir.1990) (emphasis omitted).

[11] Although Vollmer's attorney performed ably in this case, we think his specialization in firearms law does not require the sort of expertise Congress contemplated when it authorized higher fees in special circumstances. To be sure, lawyers practicing administrative law typically develop expertise in a particular regulated industry, whether energy, communications, railroads, or firearms. But they usually gain this expertise from experience, not from the specialized training justifying fee enhancement. If expertise acquired through practice justified higher reimbursement rates, then all lawyers practicing administrative law in technical fields would be entitled to fee enhancements. Because nothing in the EAJA or ***599** its legislative****201** history, *see* H.R.Rep. No.. 99-120 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132; H.R.Rep. No. 96-1418 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993-94, indicates that Congress intended this result, we conclude that Vollmer's attorney is entitled to reimbursement at the regular statutory rate of $75 per hour adjusted for the increase in the cost of living.

[12][13] Turning to the second issue, we begin by noting that the product of a reasonable hourly rate and the number of hours reasonably expended on the entire case only establishes a base for calculating the amount of reimbursable fees. If the prevailing party achieved less than complete success, we must reduce that base to reflect the degree of success achieved. *Farrar*, 506 U.S. at 114, 113 S.Ct. at 574-75; *Commissioner, INS v. Jean*, 496 U.S. 154, 161, 110 S.Ct. 2316, 2320, 110 L.Ed.2d 134 (1990). As required by the Supreme Court, we assess a party's degree of success by asking two questions: "First, did the [party] fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the [party] achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983); *see also Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1568 (D.C.Cir.1993).

[14][15] Claims are related if they "involve a common core of facts or [are] based on related legal theories." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Under this standard, Vollmer's claims were closely related. The weapon covered by its second application was a modified version of the weapon submitted with its first application. Vollmer's challenges to the denial of both applications rested on similar arguments about the reach of the Firearms Act's inclusion of machinegun receivers within the definition of machineguns.

Proceeding to the second *Hensley* question, we "compute the appropriate fee as a function of degree of success." *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1537 (D.C.Cir.1992) (citing *Hensley*, 461 U.S. at 434-35, 103 S.Ct. at 1939-40). The Bureau urges us to reduce Vollmer's fee significantly, arguing that the market value of the remodified semiautomatic receivers Vollmer was able to sell was much less than the market value of the receivers it could have sold if the denial of its first application had been overturned. Comparing the prices of the guns Vollmer could have sold if its first transfer application had been approved to those of the weapons it was able to sell, the Bureau claims that Vollmer is entitled to only 19% of the fees requested. Because the Bureau's approach is just the sort of formulaic method disapproved in *Hensley*, 461 U.S. at 435-36 & n. 11, 103 S.Ct. at 1940-41 & n. 11, we would not adopt its reasoning even if we could substantiate the Bureau's claims about firearm prices. If this court had sustained the Bureau's denial of Vollmer's second application, the company would have been unable to sell any of its weapons. But because Vollmer successfully challenged the denial of that application, it was able to sell the weapons, although presumably for less than it might have had it prevailed on the first application. *See* Compl. ¶ 8 (alleging that company modified receivers to machinegun configuration in order to "enhance the value of the firearms"). Vollmer's attorney thus achieved a significant, though less than complete, victory for his client.

[16] Although we reject the Government's formulaic approach, we do think some reduction is appropriate to account for Vollmer's failure to overturn the denial of its first transfer application. Even in cases where claims are interrelated, courts should proportion fees to the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435, 103 S.Ct. at 1940. Had Vollmer's failure to set aside the Bureau's denial of its first application been only a minor defeat, we would most likely approve its full request. But because Vollmer's failure to overturn the denial of its first application reduced the "significance of the overall relief obtained," *id.*; *cf. Goos v. National Ass'n of Realtors*, 68 F.3d 1380, 1387 & n. 12 (D.C.Cir.1995), *reh'g denied*, 74 F.3d 300, 302 (D.C.Cir.1996), and because Vollmer's attorney no doubt devoted some portion of his time to that claim, we think a ***600 **202** reduction is appropriate. The magistrate judge who reviewed Vollmer's fee petition concluded that reimbursement for 70% of the hours claimed equitably reflects the degree of success achieved by the company, and Vollmer acknowledges as much. Reply Br. at 11. Agreeing with the magistrate judge's assessment, we award Vollmer $29,272.84.

*So ordered.*

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92 S.Ct. 1113
31 L.Ed.2d 424
**(Cite as: 405 U.S. 538, 92 S.Ct. 1113)**

Supreme Court of the United States

Dorothy LYNCH et al., Appellants,
v.
HOUSEHOLD FINANCE CORPORATION, et al.

**No. 70--5058.**

Argued Dec. 7, 1971.
Decided March 23, 1972.
Rehearing Denied April 24, 1972.

See 406 U.S. 911, 92 S.Ct. 1611.

Class actions by owners of savings and checking accounts seeking declaratory and injunctive relief on ground that their constitutional rights are impaired by Connecticut prejudgment attachment and garnishment statutes. A Three-Judge District Court, 318 F.Supp. 1111, dismissed the complaints and appeals were taken. The Supreme Court, Mr. Justice Stewart, held that neither statute giving federal court jurisdiction of civil action to redress deprivation, under color of law, of equal rights nor antiinjunction statute warranted dismissal of action against sheriffs and creditors who invoked state prejudgment garnishment statute.

Reversed and remanded.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of case.

Mr. Justice White dissented and filed opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.

West Headnotes

[1] **Federal Courts** 474.1
170Bk474.1 Most Cited Cases
(Formerly 170Bk474, 106k385(1))

Fact that three-judge district court dismissed action for lack of subject matter jurisdiction did not preclude Supreme Court's direct appellate jurisdiction. 28 U.S.C.A. §§ 1253, 1343(3), 2281, 2283; 42 U.S.C.A. § 1983.

[2] **Federal Courts** 474.1
170Bk474.1 Most Cited Cases
(Formerly 170Bk474, 106k385(1))

Whether direct appeal to Supreme Court from three-judge court will lie depends on whether three-judge court was properly convened. 28 U.S.C.A. §§ 1343(3), 2281, 2284.

[3] **Federal Courts** 998
170Bk998 Most Cited Cases
(Formerly 106k101.5(4))

Action challenging constitutionality of state statute permitting prejudgment garnishment raised substantial questions and met requirements for convening three-judge court. 28 U.S.C.A. §§ 1343(3), 2281, 2284; C.G.S.A. § 52-329.

[4] **Civil Rights** 192
78k192 Most Cited Cases
(Formerly 78k13.1)

[4] **Federal Courts** 192
170Bk192 Most Cited Cases

Neither statute giving federal court jurisdiction of civil action to redress deprivation, under color of law, of equal rights nor antiinjunction statute warranted dismissal of action seeking declaratory and injunctive relief against sheriffs and creditors who invoked state prejudgment garnishment statute. 28 U.S.C.A. §§ 1343(3), 2283; C.G.S.A. § 52-329.

[5] **Federal Courts** 223
170Bk223 Most Cited Cases
(Formerly 106k284(4))

For purposes of statute giving federal courts jurisdiction of civil action to redress deprivation, under color of law, of equal rights, there is no distinction between personal liberties and proprietary rights. 28 U.S.C.A. § 1343(3).

[6] **Federal Courts** 333
170Bk333 Most Cited Cases
(Formerly 106k326)

There is no conflict between statute giving federal courts jurisdiction of civil action to redress deprivation, under color of law, of equal rights and statute setting

jurisdictional amount for federal courts. 28 U.S.C.A. §§ 1341, 1343(3).

[7] **Constitutional Law** ⚿**87**
92k87 Most Cited Cases

The right to enjoy property without unlawful deprivation, no less than right to speak or right to travel, is, in truth, a personal right, whether property in question be welfare check, home or savings account. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

[8] **Civil Rights** ⚿**130**
78k130 Most Cited Cases
(Formerly 78k1)

Rights in property are basic civil rights. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

[9] **Courts** ⚿**508(2.1)**
106k508(2.1) Most Cited Cases
(Formerly 106k508(2))

Where state statute permitted summary prejudicial garnishment at behest of attorneys for alleged creditors, and levy of garnishment did not confer jurisdiction onstate courts and could occur prior to commencement of suit, garnishment was not a proceeding in state court within antiinjunction statute. 28 U.S.C.A. § 2283; C.G.S.A. § 52-329.

****1114 *538** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellee Household Finance Corp. sued appellant Lynch in state court alleging nonpayment of a promissory note, and, prior to serving her with process, garnished her savings account under Connecticut law authorizing summary pre- judicial garnishment. Appellant challenged the validity of the state statutes ****1115** under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and sought declaratory and injunctive relief under 42 U.S.C. s 1983 and its jurisdictional counterpart, 28 U.S.C. s 1343(3). The District Court dismissed the complaint on the grounds (1) that it lacked jurisdiction under s 1343(3), as that section applies only if 'personal' rights, as opposed to 'property' rights, are impaired, and (2) that relief was barred by 28 U.S.C. s 2283, proscribing injunctions against state court proceedings. Held:

1. There is no distinction between personal liberties and proprietary rights with respect to jurisdiction under 28 U.S.C. s 1343(3). Pp. 1116--1122.

(a) Neither the language nor the legislative history of that section distinguishes between personal and property rights. Pp. 1117--1119.

(b) There is no conflict between that section and 28 U.S.C. s 1331, and the legislative history of s 1331 does not provide any basis for narrowing the scope of s 1343(3) jurisdiction. Pp. 1119--1121.

(c) It would be virtually impossible to apply a 'personal liberties' limitation on s 1343(3) as there is no real dichotomy between personal liberties and property rights. It has long been recognized that rights in property are basic civil rights. Pp. 1121--1122.

2. Prejudgment garnishment under the Connecticut statutes is levied and maintained without the participation of the state courts, and thus an injunction against such action is not barred by the provisions of 28 U.S.C. s 2283. Pp. 1122--1124.

318 F.Supp. 1111, reversed and remanded.

***539** David M. Lesser, New Haven, Conn., for appellants.

Richard G. Bell, New Haven, Conn., for appellees.

Mr. Justice STEWART delivered the opinion of the Court.

In 1968, the appellant, Mrs. Dorothy Lynch, a resident of New Haven, Connecticut, directed her employer to deposit $10 of her $69 weekly wage in a credit union savings account. In 1969, appellee Household Finance Corp. sued Mrs. Lynch for $525 in a state court, alleging nonpayment of a promissory note. Before she was served with process, the appellee corporation garnished her savings account under the provisions of Connecticut law that authorize summary pre-judicial garnishment at the behest of attorneys for alleged creditors. [FN1]

FN1. The garnishment was levied pursuant to Conn.Gen.Stat.Rev. s 52-- 329. For a further description of Connecticut's statutory garnishment scheme, see Part II of this opinion, infra.

The appellant then brought this class action in a federal district court against Connecticut sheriffs who levy on bank accounts and against creditors who invoke ***540** the garnishment statute. [FN2] Mrs. Lynch alleged that she had no prior notice of the garnishment and no opportunity to be heard. She claimed that the state statutes were invalid under the Equal Protection and Due Process Clauses ****1116** of the Fourteenth Amendment, and sought declaratory and injunctive relief pursuant to 42 U.S.C. s 1983 [FN3] and its jurisdictional counterpart, 28 U.S.C. s 1343(3). [FN4] A district court of three judges was convened to hear the claim under 28 U.S.C. ss 2281 and 2284.

FN2. The second named appellant, Norma Toro, had her checking account garnished by her former landlord, one Eugene Composano. Subsequently Composano released the garnishment. An issue of mootness--which was not resolved by the District Court--is thus presented. We do not, however, reach this issue. Appellant Lynch had a savings account garnished, appellant Toro a checking account. The considerations applicable to one type of account seem identical to those applicable to the other. In this opinion, therefore, we shall only refer to the case of appellant Lynch.
An issue is also raised as to the propriety of the classes purported to be represented by the appellants and appellees. In view of our disposition of the case, we leave this issue for consideration by the District Court upon remand.

FN3. The statute provides: 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

FN4. The statute states in relevant part:
'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
'(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . .'

***541** [1][2][3] The District Court did not reach the merits of the case. It dismissed the complaint without an evidentiary hearing on the grounds that it lacked jurisdiction under s 1343(3) and that relief was barred by the statute prohibiting injunctions against state court proceedings, 28 U.S.C. s 2283. 318 F.Supp. 1111. We noted probable jurisdiction, pursuant to 28 U.S.C. s 1253, [FN5] to consider the jurisdictional issues presented. 401 U.S. 935, 91 S.Ct. 962, 28 L.Ed.2d 214.

FN5. The appellees argue that we have no jurisdiction to consider this case on direct appeal from the three-judge District Court, 28 U.S.C. s 1253, because the court did not reach the merits of the appellant's claim for an injunction but dismissed for lack of subject matter jurisdiction.
But whether a direct appeal will lie depends on 'whether the three-judge (court was) property convened.' Moody v. Flowers, 387 U.S. 97, 99, 87 S.Ct. 1544, 1546, 18 L.Ed.2d 643. This action challenges the constitutionality of a state statute and seeks to enjoin its enforcement. The questions it raises are substantial. It, therefore, meets the requirements for convening a three-judge court. 28 U.S.C. s 2281; Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 1296, 8 L.Ed.2d 794. This case may, therefore, be distinguished from Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701, upon which the appellees rely. In that case, we had no power to consider the merits of an appeal because the ordinance in question was neither a state statute nor of statewide application. Perez, supra, at 89, 91 S.Ct., at 679 (concurring opinion). When a state statute is challenged and injunctive relief sought, we have granted direct review pursuant to s 1253 although three-judge courts

dismissed for lack of subject-matter jurisdiction, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 71 L.Ed.2d 663; Abernathy v. Carpenter, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409; Doud v. Hodge, 350 U.S. 485, 76 S.Ct. 491, 100 L.Ed. 577; Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568, or because relief was thought to be barred by 28 U.S.C. s 2283, Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182.

The appellees also note that s 1253 permits appeals to this Court only from orders 'granting or denying . . . an interlocutory or permanent injunction . . .' They argue that since the three-judge court never considered whether an injunction should be granted an appeal should lie to the Court of Appeals. The three-judge court, however, entered a judgment 'denying all relief sought by plaintiffs.' We therefore have jurisdiction to consider the claims presented.

***542** [4] We hold, for the reasons that follow, that neither s 1343(3) nor s 2283 warranted dismissal of the appellant's complaint. Accordingly, we remand the case to the District Court for consideration of the remaining issues in this litigation.

I

In dismissing the appellant's complaint, the District Court held that ****1117**s 1343(3) applies only if 'personal' rights, as opposed to 'property' rights, are allegedly impaired. The court relied on the decision of the Court of Appeals for the Second Circuit in Eisen v. Eastman, 421 F.2d 560, 563, which rested, in turn, on Mr. Justice Stone's well-known opinion a generation ago in Hague v. CIO, 307 U.S. 496, 531, 59 S.Ct. 954, 971, 83 L.Ed. 1423. See also, e.g., Weddle v. Director, 4 Cir., 436 F.2d 342; Bussie v. Long, 5 Cir., 383 F.2d 766; Howard v. Higgins, 10 Cir., 379 F.2d 227.

[5] This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of s 1343(3) jurisdiction. [FN6] Today we expressly reject that distinction.

FN6. The appellees cite three cases decided by this Court before Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, that, they say, support the limitation of s 1343(3) jurisdiction to claims deprivation of personal liberties. Carter v. Greenhow, 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202; Pleasants v. Greenhow, 114 U.S. 323, 5 S.Ct. 931, 29 L.Ed. 204; Holt v. Indiana Mfg. Co., 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374. The appellees also rely on two recent affirmances, without opinion, of decisions by three-judge district courts dismissing s 1343(3) suits on the ground that the rights allegedly infringed were proprietary. Hornbeak v. Hamm, 393 U.S. 9, 89 S.Ct. 47, 21 L.Ed.2d 14, aff'g 283 F.Supp. 549 (MD Ala.1968); Abernathy v. Carpenter, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed.2d 409, aff'g 208 F.Supp. 793 (WD Mo.1962).

All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly:

'The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' 28 U.S.C. s 1341.

We have repeatedly barred anticipatory federal adjudication of the validity of state tax laws. Dows v. City of Chicago, 11 Wall. 108, 20 L.Ed. 65; Matthews v. Rodgers, 284 U.S. 521, 52 S.Ct. 217, 76 L.Ed. 447; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407; see also Perez v. Ledesma, 401 U.S., at 126--127, n. 17, 91 S.Ct., at 697--698 (opinion of Brennan, J.). The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy.

***543** A

Neither the words of s 1343(3) nor the legislative history of that provision distinguishes between personal and property rights. In fact, the Congress that enacted the predecessor of ss 1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law.

This Court has traced the origin of s 1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. Adickes v. S. H. Kress & Co., 398 U.S. 144, 162--163, 90 S.Ct. 1598, 1611--1612, 26

L.Ed.2d 142; Monroe v. Pape, 365 U.S. 167, 171, 183--185, 81 S.Ct. 473, 475, 481--483, 5 L.Ed.2d 492. [FN7] That Act **1118 guaranteed 'broad and sweeping . . .protection' *544 to basic civil rights. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386. Acquisition, enjoyment, and alienation of property were among those rights. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432, 88 S.Ct. 2186, 2199, 20 L.Ed.2d 1189. [FN8]

FN7. Section 2 of the 1866 Act was the model for s 1 of the Civil Rights Act of 1871, 17 Stat. 13. See n. 9, infra. Sections 1983 and 1343(3) are direct descendants of s 1 of the Act of 1871. In 1874, Congress consolidated the various federal statutes at large under separate titles in the Revised Statutes in order to codify existing law. In the process, the substantive provision of s 1 of the 1871 Act became separated from its jurisdictional counterpart. Rev.Stat. s 1979. Although the original substantive provision had protected rights, privileges, or immunities secured by the Constitution, the provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well.
Originally, suits under s 1 of the 1871 Act could be brought in either circuit or district court. After codification in 1874, the jurisdictional grant to the district courts was identical in scope with the expanded substantive provision, Rev.Stat. s 563(12). Circuit court jurisdiction was limited to claimed deprivations of rights, privileges, or immunities secured by the Constitution or by any Act of Congress 'providing for equal rights.' Rev.Stat. s 629(16). In 1911, when Congress abolished the circuit courts' original jurisdiction and merged the two jurisdictional sections into what is now s 1343(3), the 'equal rights' limitation was retained in the revised jurisdictional grant. Act of Mar. 3, 1911, 36 Stat. 1087. Despite the different wording of the substantive and jurisdictional provisions, when the s 1983 claim alleges constitutional violations, s 1343(3) provides jurisdiction and both sections are construed identically. Douglas v. City of Jeannette, 319 U.S. 157, 161, 63 S.Ct. 877, 880, 87 L.Ed. 1324.

FN8. See generally Report of C. Shurz, S.Exec.Doc.No.2, 39th Cong., 1st Sess. (1865); Cong.Globe, 39th Cong., 1st Sess., 3034--3035 and App. 219 (1866); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951); Frank & Munro, The Original Understanding of 'Equal Protection of the Laws,' 50 Col.L.Rev. 131, 144--145 (1950).

The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. Monroe, supra, 365 U.S., at 171, 81 S.Ct., at 1475; Hague, supra, 307 U.S. at 509--510, 59 S.Ct. at 961--962. 'It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.' Shelley v. Kraemer, 334 U.S. 1, 10, 68 S.Ct. 836, 841, 92 L.Ed. 1161. See also, Buchanan v. Warley, 245 U.S. 60, 74--79, 38 S.Ct. 16, 18--20, 62 L.Ed. 149; H. Flack, The Adoption of the Fourteenth Amendment 75--78, 81, 90--97 (1908); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951).

*545 The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of s 1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of ss 1983 and 1343(3). Not only was s 1 of the 1871 Act derived from s 2 of the 1866 Act, [FN9] but the 1871 Act was passed for the express purpose of 'enforc(ing) the Provisions of the Fourteenth Amendment.' 17 Stat. 13. And the rights that Congress sought to protect in the Act of 1871 were described by the chairman of the House Select Committee that drafted the legislation as 'the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.' Cong.Globe, 42d Cong., 1st Sess., App. 69 (1871) (Rep. Shellabarger, **1119 quoting from Corfield v. Coryell, 6 Fed.Cas. pp. 546, 551--552, No. 3,230 (CCED Pa.)). *546 That the protection of property as well as personal rights was intended is also confirmed by President Grant's message to Congress urging passage of the legislation, [FN10] and by the remarks of many members of Congress during the legislative debates. [FN11]

FN9. Section 2 of the 1866 Civil Rights Act, 14 Stat. 27, currently codified in slightly

different form as 18 U.S.C. s 242, read in pertinent part: '(A)ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State . . . to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . shall be deemed guilty of a misdemeanor . . .' (Emphasis supplied.)

Section 2 provided criminal penalties for any violation of s 1 of the 1866 Act. Screws v. United States, 325 U.S. 91, 98--100, 65 S.Ct. 1031, 1033--1035, 89 L.Ed. 1495. The latter section enumerated the rights the Act protected, including, inter alia, the right 'to make and enforce contracts, to sue . . . to inherit, purchase, lease, sell, hold, and convey real and personal property. . . .'

Representative Shellabarger, chairman of the House Select Committee which drafted the Civil Rights Act of 1871, stated that

'The model for (s 1 of the 1871 Act) will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceedings in identically the same case as this one provides a civil remedy . . .' Cong.Globe, 42d Cong., 1st Sess., App. 68 (1871).

FN10. The President, in a message dated March 23, 1871, stated: FC 'A condition of affairs now exists in some States of the Union rendering life and property insecure * * * I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.' Cong.Globe, 42d Cong., 1st Sess., 244.

FN11. See, e.g., Cong.Globe, 42d Cong., 1st Sess., 332--334 (Rep. Hoar); 369--370 (Rep. Monroe); 375--376 (Rep. Lowe); 429 (Rep. Beatty); 448 (Rep. Butler); 459--461 (Rep. Coburn); 475--476 (Rep. Dawes); 501 (Sen. Frelinghuysen); 568 (Sen. Edmunds); 577 (Sen. Carpenter); 607 (Sen. Pool); 650--651 (Sen. Sumner); 653 (Sen. Osborn); 666 (Sen. Spencer).

See also S.Rep.No.1, 42d Cong., 1st Sess. (1871). Several months before the passage of the Civil Rights Act of 1871, a Senate Committee was formed to investigate conditions in the Southern States. One purpose of the investigation was to 'ascertain . . . whether persons and property are secure. . . .' Id., at II.

B

In 1875, Congress granted the federal courts jurisdiction of 'all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States.' 18 Stat. 470. Unlike s 1343(3), this general federal-question provisions, the forerunner of 28 U.S.C. s 1331, required that a minimum amount in controversy be alleged and proved. [FN12] Mr. Justice Stone's opinion in Hague, supra, as well as the federal court decisions that followed it, e.g., Eisen v. Eastman, 421 F.2d 560, reflect the view that there is an apparent ***547** conflict between ss 1343(3) and 1331, [FN13] i.e., that a broad reading of s 1343(3) to include all rights secured by the Constitution would render s 1331, and its amount-in- controversy requirement, superfluous. These opinions sought to harmonize the two jurisdictional provisions by construing s 1343(3) as conferring federal jurisdiction of suits brought under s 1983 only when the right asserted is personal, not proprietary.

FN12. The jurisdictional amount was increased from $500 to $2,000 by the Act of Mar. 3, 1887, 24 Stat. 552; to $3,000 by the Act of Mar. 3, 1911, 36 Stat. 1091; and to $10,000 by the Act of July 25, 1958, 72 Stat. 415.

FN13. The plaintiffs in Hague brought suit in a federal district court to enjoin enforcement of city ordinances prohibiting the distribution of printed matter and the holding of public meetings without a permit. They alleged that the ordinances violated the union members' right of free speech and assembly. Both the District Court and the Court of Appeals found jurisdiction under ss 1331 and 1343(3). This Court reversed as to jurisdiction under s 1331, since the plaintiffs had failed to establish the requisite amount in controversy. Although no opinion commanded a majority, jurisdiction under s 1343(3) was upheld. Mr. Justice Roberts, writing the lead opinion, expressed

the view that the reference in s 1343 to 'any right, privilege or immunity secured by the Constitution' should be interpreted to cover only alleged violations of the Privileges and Immunities Clause of the Fourteenth Amendment. In Monroe v. Pape, 365 U.S. 167, 170--171, 81 S.Ct. 473, 475--476, 5 L.Ed.2d 492, we rejected such a narrow reading of similar language in s 1983.

[6] The initial failure of this reasoning is that the supposed conflict between ss 1343(3) and 1331 simply does not exist. Section 1343(3) applies only to alleged infringements of rights under 'color of . . . State law,' whereas s 1331 contains no such requirement. Thus, for example, in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction. See Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402; Bivens v. Six **1120 Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619.

But the more fundamental point to be made is that any such contraction of s 1343(3) jurisdiction is not *548 supported by the legislative history of s 1331. The 1875 Act giving the federal courts power to hear suits arising under Art. III, s 2, of the Constitution was, like the Act of 1871, an expansion of national authority over matters that, before the Civil War, had been left to the States. F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928); Zwickler v. Koota, 389 U.S.241, 245--248, 88 S.Ct. 391, 393--395, 19 L.Ed.2d 444; Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U.Pa.L.Rev. 639, 645 (1942). The Act therefore, is 'clearly . . . part of, rather than an exception to, the trend of legislation which preceded it.' Chadbourn & Levin, supra, at 645; Zwickler, supra. There was very little discussion of the measure before its enactment, in contrast to the extensive congressional debate that attended the passage of the Act of 1871. [FN14] And there is, as a result, no indication whatsoever that Congress, in a rather hastily passed measure, intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation. [FN15]

FN14. '(A) study of the history of the bill as revealed by the Congressional Record yields no reason for its enactment at that time, and may even be said to raise a strong presumption that it was 'sneak' legislation. It was originally introduced in the House of Representatives in the form of a bill to amend the removal statute.' Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U.Pa.L.Rev. 639, 642-- 643 (1942). Nonetheless, the passage of the Act, despite the lack of debate, has been regarded as the 'culmination of a movement . . . to strengthen the Federal Government against the states.' F. Frankfurter & J. Landis, The Business of the Supreme Court 65 n. 34 (1928). See also Maury, The Late Civil War, Its Effect on Jurisdiction, and on Civil Remedies Generally, 23 Am.L.Reg. 129 (1875).

FN15. As noted, Congress in 1875 also enlarged the scope of s 1983's predecessor to protect rights secured by federal law as well as rights secured by the Constitution. See n. 7, supra. Moreover, when Congress increased the amount-in-controversy requirement to $3,000 in 1911, 36 Stat. 1091, there was no indication that jurisdiction under what is now s 1343(3) was to be reduced. In fact, the legislation explicitly preserved the exemption of action brought under s 1343(3)'s predecessor from the amount-in-controversy requirement.

*549 The 'cardinal rule . . . that repeals by implication are not favored,' Posadas v. National City Bank, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351; Jones v. Alfred H. Mayer Co. 392 U.S., at 437, 88 S.Ct., at 2202; thus counsels a refusal to pare down s 1343(3) jurisdiction--and the substantive scope of s 1983--by means of the distinction between personal liberties and property rights, or in any other way. The statutory descendents of s 1 of the Civil Rights Act of 1871 must be given the meaning and sweep that their origins and their language dictate. [FN16]

FN16. In United States v. Price, 383 U.S. 787, 797, 86 S.Ct. 1152, 1158, 16 L.Ed.2d 267, we interpreted the phrase 'rights, privileges, or immunities secured . . . by the Constitution or laws of the United States,' contained in 18 U.S.C. s 242, to embrace 'all of the Constitution and laws of the United States.' The similar language in ss 1983 and 1343(3) was originally modeled on s 242's predecessor, s 2 of the Civil Rights Act of 1866. See n. 9, supra. In Price, supra, we said

that '(w)e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the scope that its language and origins require. Id., at 801, 86 S.Ct., at 1160.

Moreover, although the purpose of the amount-in-controversy requirement is to reduce congestion in the federal courts, S.Rep.No.1830, 85th Cong., 2d Sess. (1958), U.S.Code Cong. & Admin.News, p. 3099, Congress has substantially lessened its importance with respect to s 1331 by passing many statutes that confer federal-question jurisdiction without an amount-in-controversy requirement. [FN17] **1121 So it was that *550 when Congress increased the jurisdictional amount from $3,000 to $10,000, Act of July 25, 1958, 72 Stat. 415, it made clear that its primary concern was to reduce the federal judiciary's workload with regard to cases arising under federal diversity jurisdiction, 28 U.S.C. s 1332, not under s 1331. [FN18]

FN17. A series of particular statutes grant jurisdiction, without regard to the amount in controversy, in virtually all areas that otherwise would fall under the general federal-question statute. Such special statutes cover: admiralty, maritime, and price cases, 28 U.S.C. s 1333; bankruptcy matters and proceedings, 28 U.S.C. s 1334; review of orders of the Interstate Commerce Commission, 28 U.S.C. s 1336; cases arising under any Act of Congress regulating commerce, 28 U.S.C. s 1337; patent, copyright, and trademark cases, 28 U.S.C. s 1338; postal matters, 28 U.S.C. s 1339; internal revenue and custom duties actions, 28 U.S.C. s 1340; election disputes, 28 U.S.C. s 1344; cases in which the United States is a party, 28 U.S.C. ss 1345, 1346, 1347, 1348, 1349, 1358, and 1361; certain tort actions by aliens, 28 U.S.C. s 1350; actions on bonds executed under Federal law, 28 U.S.C. s 1352; cases involving Indian allotments, 28 U.S.C. s 1353; and injuries under federal law, 28 U.S.C. s 1357.

FN18. 'While this bill applies the $10,000 minimum limitation to cases involving Federal questions, its effect will be greater on diversity cases since many of the so-called Federal question cases will be exempt from its provisions.' S.Rep.No. 1830, 85th Cong., 2d Sess., 6 (1958). The Senate report was echoing the finding of the Judicial Conference's Committee on Jurisdiction and Venue that raising the jurisdictional amount would 'have significant effect mainly upon diversity cases.' Id., at 22.
Recent studies have demonstrated that the amount-in-controversy requirement still has 'relatively little impact on the volume of federal question litigation.' American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 172, 489--492 (1969). See also, Warren, Address to the American Law Institute, 1960, 25 F.R.D. 213; C. Wright, Law of Federal Courts 107 (2d ed. 1970). Information from the Administrative Office of the United States Courts shows that a majority of private federal-question cases involve less than $10,000. American Law Institute, supra, at 491.
Although litigation involving federal civil rights is increasing, such actions constituted only 4.6% of the suits instituted in district courts during the 1970 fiscal year. Administrative Office of the United States Courts, 1970 Report, II--31.

A final, compelling reason for rejecting a 'personal liberties' limitation upon s 1343(3) is the virtual impossibility *551 of applying it. [FN19] The federal courts have been particularly bedeviled by 'mixed' cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. [FN20] The case *552 before us presents a good example of the conceptual difficulties created by the test. [FN21]

FN19. As noted above, we have never adopted the property rights- personal liberties test for s 1343(3) jurisdiction. In Eisen v. Eastman, 421 F.2d 560, the Court of Appeals for the Second Circuit said that application of the test would bar many welfare claims. Id., 421 F.2d at 566 n. 10. We have, however, continually found s 1343(3) jurisdiction in such cases. See, e.g., California Department of Human Resources Development v. Java, 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666; Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442; King v. Smith, 392

U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118; Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491; Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647.
See also Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577; Swarb v. Lennox, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138; Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36. These cases, arguably, involved only deprivations of property, but we found s 1343(3) jurisdiction nonetheless.

FN20. Difficulty in application has been one source of the commentators' dissatisfaction with the 'personal liberties' limitation. See generally Note, 24 Vand.L.Rev. 990 (1971); Laufer, Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction--A Reappraisal, 19 Buff.L.Rev. 547 (1970); Note, 1970 Duke L.J. 819; Note, 43 N.Y.U.L.Rev. 1208 (1968); Note, 66 Harv.L.Rev. 1285 (1953).
The federal courts have produced inconsistent results regarding s 1343(3) jurisdiction of welfare claims. Compare Roberts v. Harder, 2 Cir., 440 F.2d 1229, with Alvarado v. Schmidt, D.C., 317 F.Supp. 1027. See also n. 19, supra. Yet, without always explaining why such interests are 'personal' rather than 'proprietary,' courts have consistently found civil rights jurisdiction over suits alleging discrimination in the issuance of business licenses. See, e.g., Barnes v. Merritt, 5 Cir., 376 F.2d 8; Glicker v. Michigan Liquor Control Comm'n, 6 Cir., 160 F.2d 96. Similarly, claims involving discrimination in employment, e.g., Birnbaum v. Trussell, 2 Cir., 371 F.2d 672, or termination of leases in public housing projects, e.g., Escalera v. New York City Housing Authority, 2 Cir., 425 F.2d 853, are often found cognizable under s 1343(3). How such 'personal' interests are to be distinguished from the 'property' interest in wages deposited in a savings account, as in this case, is not readily discernible. Compare this case with Santiago v. McElroy, D.C., 319 F.Supp. 284.

FN21. The District Court found that access to funds held in a savings account was indistinguishable from simple ownership of money. Thus garnishment of that account did not infringe personal rights. Mrs. Lynch, however, alleged that because of the garnishment she was unable to pay her rent on time and encountered difficulty maintaining her family on a minimally adequate diet. If these allegations are true, Mrs. Lynch's personal liberty could be profoundly affected by garnishment of her savings.

**1122 [7][8] Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82--85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-- 132 (1942); 1 W. Blackstone, Commentaries, *138--140. Congress recognized these rights in 1871 when it enacted the predecessor of ss 1983 and 1343(3). We do no more than reaffirm the judgment of Congress today.

II

[9] Under 28 U.S.C. s 2283, a federal court may not 'grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.' The District Court relied upon this statute as an alternative ground for the dismissal *553 of the appellant's complaint. The appellant contends that s 2283 is inapplicable to this case because prejudgment garnishment under Conn.Gen.Stat.Rev. s 52--329 [FN22] is not a proceeding in state court. We agree. [FN23]

FN22. The statute provides:
'When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to

such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.'

FN23. Cf. Roudebush v. Hartke, 405 U.S. 15, 92 S.Ct. 804, 31 L.Ed.2d 1.

**1123 In Connecticut, garnishment is instituted without judicial order. Ibid.; 1 E. Stephenson, Connecticut Civil Procedure 151 (2d ed. 1970). [FN24] The levy of garnishment--usually effected by a deputy sheriff--does not confer jurisdiction on state courts and may, in fact, *554 occur prior to commencement of an alleged creditor's suit. Young v. Margiotta, 136 Conn. 429, 433, 71 A.2d 924, 926. Despite the state court's control over the plaintiff's docketed case, garnishment is 'distinct from and independent of that action.' Potter v. Appleby, 136 Conn. 641, 643, 73 A.2d 819, 820. The garnished property is secured, not under authority of the court, but merely in the hands of the garnishee. Conn.Gen.Stat.Rev. s 52--329. Prejudgment garnishment is thus levied and maintained without the participation of the state courts.

FN24. Garnishment occurs at the beginning of the suit upon the direction of the plaintiff's lawyer, acting as a Commissioner of the Superior Court. Conn.Gen.Stat.Rev. ss 51--85, 52--89. 'The plaintiff or his attorney merely includes in his writ of summons a direction to the sheriff to make an attachment or serve garnishment process.' 1 E. Stephenson, Connecticut Civil Procedure 151 (2d ed. 1970).

In this case, the appellant sought to enjoin garnishment proceedings, not the finance company's suit on the promissory note. The District Court noted that 'garnishment may be separated from the underlying in personam action,' but held that s 2283 was a bar because the interference with existing creditors' suits caused by such an injunction 'probably would be substantial.' 318 F.Supp., at 1115. According to the appellees, interference would occur because garnishment is necessary to make any eventual judgment in the pending state suit effective. Hill v. Martin, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293.

This argument is not persuasive in the context of the Connecticut prejudgment garnishment scheme. Garnishment might serve to make a subsequent judgment effective. Cf. Hill, supra; Manufacturers Record Publishing Co. v. Lauer, 5 Cir., 268 F.2d 187, cert. denied, 361 U.S. 913, 80 S.Ct. 258, 4 L.Ed.2d 184; Furnish v. Board of Medical Examiners of California, 257 F.2d 520, cert. denied, 358 U.S. 882, 79 S.Ct. 123, 3 L.Ed.2d 111. But the garnishment was, in this case, an action taken by private parties who were not proceeding under a court's supervision [FN25] and who were using, as agents, *555 state officials who were themselves not acting pursuant to a court order or under a court's authority.

FN25. The fact that the plaintiffs' attorneys are, formally, officers of the court does not convert the Connecticut garnishment process into a state court proceeding for s 2283 purposes, since the attorneys have complete discretion to issue a writ. See n. 24, supra; Sharkiewicz v. Smith, 142 Conn. 410, 114 A.2d 691; Sachs v. Nussenbaum, 92 Conn. 682, 104 A. 393.

In Hill, supra, we said that the 'proceeding' that a federal court is forbidden to enjoin 'includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.' Id., 296 U.S., at 403, 56 S.Ct., at 282 (emphasis supplied). In this case, the garnishment occurred before the appellee corporation had served the appellant with process.

More important, the state court and its officers are insulated from control over the garnishment. Connecticut appears to be one of the few States authorizing an attorney for an alleged creditor to garnish or attach property without any participation by a judge or clerk of the court. Stephenson, supra, at 230. A person whose account has been seized can get only minimal relief at best. [FN26] **1124 The state courts have held that they cannot enjoin a garnishment on the ground that it was levied unconstitutionally. Michael's Jewelers v. Handy, 6 Conn.Cir. 103, 266 A.2d 904; Harris v. Barone, 147 Conn. 233, 158 A.2d 855. One assumption underlying s 2283 is that state courts will vindicate constitutional claims as fairly and efficiently as federal courts. But this assumption cannot obtain when the doors of the *556 state courts are effectively closed to a person seeking to enjoin a garnishment on constitutional grounds.

FN26. The courts have no authority to inquire into the probable validity of the creditor's claim, or whether special circumstances warrant provisional security for an alleged creditor. Sachs v. Nussenbaum, 92 Conn., at 689, 104 A., at 395. Prior to the termination of the litigation, a garnishment may be reduced or dissolved only upon a showing that the garnishment is excessive--i.e., in excess of the creditor's apparent claim--or upon substitution of a bond with surety. Conn.Gen.Stat.Rev. ss 52--302 and 52--304. Black Watch Farms v. Dick, D.C., 323 F.Supp. 100, 101--102. This involvement has been termed 'meager.' Stephenson, supra, at 154.

Because of the extrajudicial nature of Connecticut garnishment, an injunction against its maintenance is not, therefore, barred by the terms of s 2283. In light of this conclusion, we need not decide whether s 1983 is an exception to s 2283 'expressly authorized by Act of Congress.' We have explicitly left that question open in other decisions. [FN27] And we may put it to one side in this case because the state act that the federal court was asked to enjoin was not a proceeding 'in a State court' within the meaning of s 2283.

FN27. See Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2, 85 S.Ct. 1116, 1119, 14 L.Ed.2d 22; Cameron v. Johnson, 390 U.S., at 613, n. 3, 88 S.Ct., at 1337, 20 L.Ed.2d 182; Younger v. Harris, 401 U.S. 37, 54, 91 S.Ct. 746, 755, 27 L.Ed.2d 669. The circuits have divided on the question. Cf., e.g., Cooper v. Hutchinson, 3 Cir., 184 F.2d 119, and Baines v. City of Danville, 4 Cir., 337 F.2d 579.

We conclude, therefore, that the District Court had jurisdiction to entertain the appellant's suit for an injunction under s 1983. Accordingly, the judgment before us is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Judgment reversed and case remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

I agree with the Court that federal jurisdiction under 28 U.S.C. s 1343 is not limited to the adjudication of personal rights and if the disposition of this case turned solely on that issue I would without reservation join in the majority opinion. But I cannot agree either with the approach that the majority takes to the anti-*557 injunction statute, 28 U.S.C. s 2283, or its conclusion that the statute does not bar this suit. I do not mean to suggest that appellants' due process attack on the Connecticut garnishment statute is not substantial. It obviously is. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Nevertheless, in my view, appellants should be required to press their constitutional attack in the state courts.

In Connecticut, garnishment or attachment is one method of beginning a lawsuit. Conn.Gen.Stat.Rev. s 52--329; 1 E. Stephenson, Connecticut Civil Procedure 156--157, 232--237 (2d ed. 1970). Of course, the requisite personal service upon a defendant is necessary to obtain in personam jurisdiction, Conn.Gen.Stat.Rev. s 52--54, as well as to secure an effective garnishment, Stephenson, supra, at 244, but as a matter of right in certain kinds of civil actions a plaintiff may simultaneously garnish a defendant's bank account and serve a summons upon the defendant, together with a complaint stating the nature of the

underlying action. Conn.Gen.Stat.Rev. s 52--329. A state court obtains jurisdiction of the action and of questions concerning the garnishment when return of process is made to that court. Stephenson, supra, at 67. Garnishment is 'ancillary to the main action for damages and cannot exist without such action.' Id., at 143. Its purpose, as the majority notes, is to secure property that will thus be made available for the satisfaction of a judgment. Ibid. A writ of garnishment may be issued by a judge of the court of jurisdiction, Conn.Gen.Stat.Rev. s 52--89 (Supp.1969), but because garnishment **1125 in Connecticut, unlike most other States, is a matter of right and requires no prior judicial determination, the writ may also be issued by a court clerk or licensed attorney. Conn.Gen.Stat.Rev. s 51--85. In either *558 case, the matter is accomplished simply by completing a form.

Appellant Lynch brought this federal action to enjoin the garnishment more than seven months after the writ had been executed, the summons and complaint served, process returned, and the case docketed in Connecticut court. At the earliest moment that a federal injunction could have issued the state court proceeding was well under way. Despite this, the majority purports to sever the garnishment from the action that underlies it. The Court reasons that Connecticut garnishment is not a proceeding in state court because it is carried out by private parties not acting pursuant to a court order. Ante, at 1123.

If the majority means that garnishment is a severable matter, independent of the main suit and for that reason outside of s 2283, then I would suppose it permissible for a federal court to enjoin any garnishment or attachment, whether obtained at the inception of a lawsuit, while it is in progress, or after judgment and for the purpose of execution. This approach to the anti-injunction statute, articulated in Simon v. Southern R. Co., 236 U.S. 115, 124--125, 35 S.Ct. 255, 258--259, 59 L.Ed. 492 (1915), was, I thought, laid to rest in Hill v. Martin, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293 (1935), where the Court construed 'proceedings in any court of a State' comprehensively and as embracing

> 'all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary *559 taken with a view to making the suit or judgment effective.' (Footnotes omitted.)

The Court today embarks on quite a different course and rejects not only Hill v. Martin but also a substantial body of federal court of appeals law to the effect that s 2283 bars federal court interference with executions on state court judgments. E.g., Manufacturers Record Publishing Co. v. Lauer, 268 F.2d 187 (CA5), cert. denied, 361 U.S. 913, 80 S.Ct. 258, 4 L.Ed.2d 184 (1959); Furnish v. Board of Medical Examiners of California, 257 F.2d 520 (CA9), cert. denied, 358 U.S. 882, 79 S.Ct. 123, 3 L.Ed.2d 111 (1958); Norwood v. Parenteau, 228 F.2d 148 (CA8 1955), cert. denied, 351 U.S. 955, 76 S.Ct. 852, 100 L.Ed. 1478 (1956). [FN1]

> FN1. Some confusion persists whether a federal court may, consistently with s 2283, enjoin the operation of a state court judgment procured by fraud. See C. Wright, Law of Federal Courts 179--181 (2d ed. 1970). That question is not presented here.

The Court also suggests that s 2283 is inapplicable here because no Connecticut court authorized the garnishment. Its view apparently is that a federal injunction would therefore not interfere with state court processes. Until now, however, it has been reasonably clear that s 2283 cannot be avoided by the simple expedient of enjoining parties instead of judges. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 537 (1940). Moreover, the Court's rationale proves too much. Contrary to the views expressed in Hill v. Martin, supra, state court ministerial officers could be enjoined at any time and for any purpose in the course of a litigation and without regard to s 2283. In addition, parties to state court litigation could be enjoined from performing any one or all of the tasks essential to the orderly progress of litigation so long as the acts in question are not carried out pursuant to court order. Depositions of parties and **1126 witnesses, interrogatories to parties, and subpoenas for witnesses are commonly pursued *560 without resort to a judge. Are these and other functions not performed under court order now subject to attack in federal court at the option of the offended state court litigant?

Today's decision will, I fear, create confusion by making the applicability of s 2283 turn on rules that are difficult to apply. The potential for conflict between state and federal courts will increase and the price for judicial errors will be paid by litigants and courts alike. The common sense of the matter, it seems to me, is that

the garnishment at issue here is part and parcel of a state court proceeding now under way. Garnishment in Connecticut may be characterized as separate from the underlying action, but it is nonetheless a proceeding and derives its legitimacy from the suit it accompanies. At the time this federal action was brought, return of process had long since been completed and the state court had acquired jurisdiction of a straightforward cause of action, including questions of the legitimacy and constitutionality of the garnishment.

It also seems to me that, quite apart from s 2283, today's holding departs from such cases as Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), and Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), which counsel against atomizing state litigation by enjoining, for example, the introduction of illegally obtained evidence, as well as from the more general admonitions of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); and Perez v. Ledesma, supra, against improvident exercise of a federal court's equitable powers to frustrate or interfere with the operations of state courts by adjudicating federal questions that are involved in state court litigation and which can be adjudicated there. As the Court said in Stefanelli, if such interventions were to be permitted, '(e)very question of procedural due process ***561** of law--with its far-flung and undefined range--would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue.' 342 U.S., at 123, 72 S.Ct., at 122. Such resort, if permitted, 'would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts.' Id., at 123--124, 72 S.Ct., at 122.

Appellee Barrett invokes Younger and companion cases as a ground for affirming the judgment of the District Court. Of course, those cases involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable where state civil litigation is in progress, as is here the case. [FN2]

FN2. I thus would affirm whether or not 42 U.S.C. s 1983 is an exception to the bar of s 2283. That question is at issue in Mitchum v. Foster, No. 70--27, now sub judice.

I would affirm the judgment of the court below.

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95 S.Ct. 719
42 L.Ed.2d 751
**(Cite as: 419 U.S. 601, 95 S.Ct. 719)**

Supreme Court of the United States

NORTH GEORGIA FINISHING, INC., Petitioner,
v.
DI-CHEM, INC.

**No. 73--1121.**

Argued Nov. 18, 1974.
Decided Jan. 22, 1975.

Defendant filed motion to dismiss writ of garnishment and to discharge bond which it had filed to dissolve garnishment and asserted that Georgia garnishment statute was unconstitutional. The Superior Court, Whitfield County, Georgia, overruled the motion and the defendant appealed. The Supreme Court of Georgia, 231 Ga. 260, 201 S.E.2d 321, affirmed and certiorari was granted. The Supreme Court, Mr. Justice White, held that Georgia garnishment statute which permitted writ of garnishment to be issued in pending suits by court clerk without participation by judge on an affidavit of plaintiff or his attorney containing only conclusory allegations, which prescribed filing of bond as only method of dissolving garnishment, which deprived defendant of use of property in garnishee's hands pending litigation and which made no provision for early hearing denied due process.

Reversed and remanded.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice Powell concurred in judgment and filed opinion.

Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Rehnquist joined and in one portion of which Mr. Chief Justice Burger joined.

West Headnotes

[1] **Constitutional Law** 312(2)
92k312(2) Most Cited Cases
(Formerly 92k312)

[1] **Garnishment** 2
189k2 Most Cited Cases

Georgia garnishment statute which permitted writ of garnishment to be issued in pending suits by court clerk without participation by judge on affidavit of plaintiff or his attorney containing only conclusory allegations, which prescribed filing of bond as only method of dissolving garnishment, which deprived defendant of use of property in garnishee's hands pending litigation and which made no provision for early hearing denied due process, even though statute required that plaintiff garnishor give bond in amount equal to double the amount sworn to be due. Code Ga. §§ 46-101 to 46-104; U.S.C.A.Const. Amend. 14.

[2] **Constitutional Law** 312(2)
92k312(2) Most Cited Cases
(Formerly 92k312)

Fact that property garnished was sizeable bank account of corporation rather than household necessities of consumer was immaterial to determination of whether statute authorizing garnishment denied due process. Code Ga., §§ 46-101 to 46-104; U.S.C.A.Const. Amend. 14.

[3] **Constitutional Law** 277(1)
92k277(1) Most Cited Cases

Different kinds of property will not be distinguished in applying the due process clause. U.S.C.A.Const. Amend. 14.

****719 *601** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Georgia statutes permitting a writ of garnishment to be issued by an officer authorized to issue an attachment or a court clerk in pending suits on an affidavit of the plaintiff or his attorney containing only conclusory allegations, prescribing filing of a bond as the only method of dissolving the garnishment, which deprives the defendant of the use of the property in the garnishee's hands pending the litigation and making no provision for an early hearing, violate the Due Process Clause of the Fourteenth Amendment, Sniadach v.

Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; **720Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, distinguished. That this case involved garnishment of a corporation's sizable bank account, rather than a consumer's household necessities, is immaterial, since the probability of irreparable injury if the garnishment proves unjustified is sufficiently great to require some procedure to guard against initial error. Pp. 721--723.

231 Ga. 260, 201 S.E.2d 321, reversed and remanded.

Warren N. Coppedge, Jr., Dalton, Ga., for petitioner.

L. Hugh Kemp, Dalton, Ga., for respondent.

Mr. Justice WHITE delivered the opinion of the Court.

Under the statutes of the State of Georgia, plaintiffs in pending suits are 'entitled to the process of garnishment.' *602 Ga.Code Ann. s 46--101. [FN1] To employ **721 the process, plaintiff or his attorney must make an affidavit before 'some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action . . . and that he has reason to apprehend the loss of the same *603 or some part thereof unless process of garnishment shall issue.' s 46-- 102. To protect defendant against loss or damage in the event plaintiff fails to recover, that section also requires plaintiff to file a bond in a sum double the amount sworn to be due. Section 46--401 permits the defendant to dissolve the garnishment by filing a bond 'conditioned for the payment of any judgment that shall be rendered on said garnishment.' Whether these provisions satisfy the Due Process Clause of the Fourteenth Amendment is the issue before us in this case.

FN1. The relevant provisions of the Georgia Code Annotated are as follows:
s 46--101
'Right to writ; wages exempt until after final judgment
'In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled tothe process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly or monthly wages of any person residing in this State until after final judgment shall have been had against said defendant: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained.'
s 46--102
'Affidavit; necessity and contents. Bond
'The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond, with good security, in a sum at least equal to double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the plaintiff shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment. No person shall be taken as security on the bond who is an attorney for the plaintiff or a nonresident unless the nonresident is possessed of real estate in the county where the garnishment issues of the value of the amount of such bond.'
s 46--103
'Affidavit by agent or attorney
'When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief, and may sign the name of the plaintiff to the bond, who shall be bound thereby in the same manner as though he had signed it himself.'
s 46--104 'Affidavit and bond by one of firm, etc.
'When the debt for recovery of which the garnishment is sought shall be due to partners or several persons jointly, any one of said partners or joint creditors may make the

affidavit and give bond in the name of the plaintiff, as prescribed in cases of attachment.' s 46--401

'Dissolution of garnishments; bond; judgment on bond

'When garnishment shall have been issued, the defendant may dissolve such garnishment upon filing in the clerk's office of the court, or with the justice of the peace, where suit is pending or judgment was obtained, a bond with good security, payable to the plaintiff, condition for the payment of any judgment that shall be rendered on said garnishment. The plaintiff may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal, whenever said plaintiff shall obtain the judgment of the court against the property or funds against which garnishment shall have been issued.'

On August 20, 1971, respondent filed suit against petitioner in the Superior Court of Whitfield County, ***604** Ga., alleging an indebtedness due and owing from petitioner for goods sold and delivered in the amount of $51,279.17. Simultaneously with the filing of the complaint and prior to its service on petitioner, respondent filed affidavit and bond for process of garnishment, naming the First National Bank of Dalton as garnishee. The affidavit asserted the debt and 'reason to apprehend the loss of said sum or some part thereof unless process of Garnishment issues.' [FN2] The clerk of the Superior Court forthwith issued summons of garnishment to the bank, which was served that day. On August 23, petitioner filed a bond in the Superior Court conditioned to pay any final judgment in the main action up to the amount claimed, and the judge of that court thereupon discharged the bank as garnishee. On September 15, petitioner filed a motion to dismiss the writ of garnishment and to discharge its bond, asserting, among other things, that the statutory garnishment procedure was unconstitutional in that it violated 'defendant's due process and equal protection rights guaranteed him by the Constitution of the ***605** United States and the Constitution of the State of Georgia.' App. 11. The motion was heard and overruled on November 29. The Georgia Supreme Court, [FN3] finding that the issue of the constitutionality of the statutory garnishment procedure was properly before it, sustained the statute and rejected petitioner's claims that the statute was invalid for failure to provide notice and hearing in connection with the issuance of the writ of garnishment. 231 Ga. 260, 201 S.E.2d 321 (1973). [FN4] We granted certiorari. ****722** 417 U.S. 907, 94 S.Ct. 2601, 41 L.Ed.2d 210 (1974). We reverse.

FN2. The affidavit in its entirety was as follows:

'SUPERIOR COURT OF Whitfield COUNTY GEORGIA, Whitfield COUNTY.

'Personally appeared R. L. Foster, President of Di-Chem, Inc., who on oath says that he is President of DiChem, Inc., plaintiff herein and that North Georgia Finishing, Inc., defendant, is indebted to said plaintiff in the sum of $51,279.17 DOLLARS, principal, $....., interest, $..... attorney's fees, and $..... cost and that said plaintiff has--a suit pending-- returnable to the Superior Court of Whitfield County, and that affiant has reason to apprehend the loss of said sum or some part thereof unless process of Garnishment issues.

'Sworn to and subscribed before me, this August 20, 1971.

'/s/ Dual Broadrick, Clerk

'/s/ R. L. Foster, Affiant.

'Superior Court of Whitfield County.' App. 3--4.

FN3. Appeal was taken in the first instance to the Georgia Supreme Court. That court, without opinion, transferred the case to the Georgia Court of Appeals. The latter court issued an opinion, 127 Ga.App. 593, 194 S.E.2d 508 (1972). The Georgia Supreme Court then issued certiorari, 230 Ga. 623, 198 S.E.2d 284 (1973).

FN4. Subsequent to the Georgia Supreme Court's decision in this case, a three-judge federal court, sitting in the Northern District of Georgia declared these same statutory provisions unconstitutional. Morrow Electric Co. v. Cruse, 370 F.Supp. 639 (ND Ga.1974).

The Georgia court recognized that Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), had invalidated a statute permitting the garnishment of wages without notice and opportunity for hearing, but considered that case to have done nothing more than to carve out an exception, in favor of wage earners, 'to the general rule of legality of garnishment statutes.' 231 Ga., at 264, 201 S.E.2d, at 323. The garnishment of other assets or properties pending the outcome of the main action, although the

effect was to "impound (them) in the hands of the garnishee," id., at 263, 201 S.E.2d, at 323, was apparently thought not to implicate the Due Process Clause.

This approach failed to take account of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), a case decided by this Court *606 more than a year prior to the Georgia court's decision. There the Court held invalid the Florida and Pennsylvania replevin statutes which permitted a secured installment seller to reposses the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the clerk of the court at the behest of the seller. That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. 'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' Id., at 86, 92 S.Ct., at 1997. Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort. Because the official seizures had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession they were held to be in violation of the Fourteenth Amendment.

[1] The Georgia statute is vulnerable for the same reasons. Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.

Nor is the statute saved by the more recent decision in Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). That case upheld the Louisiana sequestration statute which permitted *607 the seller-creditor holding a vendor's lien to secure a writ of sequestration and, having filed a bond, to cause the sheriff to take possession of the property at issue. The writ, however, was issuable only by a judge upon the filing of an affidavit going beyond mere conclusory allegations and clearly setting out the facts entitling the creditor to sequestration. The Louisiana law also expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.

The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. s 46--103. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk, without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee. Here a sizable bank account was frozen, and the only **723 method discernible on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment. Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained, whatever the grounds may be. [FN5]

FN5. Petitioner so asserts, relying on Jackson v. Barksdale, 17 Ga.App. 461, 87 S.E. 691 (1916); Powell v. Powell, 95 Ga.App. 122, 97 S.E.2d 193 (1957). Respondent, without citation of authority states that '(c)ounsel could have attacked the garnishment in other ways either in the State or Federal Courts. . . .' Brief for Respondent 5.

[2][3] *608 Respondent also argues that neither Fuentes nor Mitchell is apposite here because each of those cases dealt with the application of due process protections to consumers who are victims of contracts of adhesion and who might be irreparably damaged by temporary deprivation of household necessities, whereas this case deals with its application in the commercial setting to a case involving parties of equal bargaining power. See also Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). It is asserted in addition that the double bond posted here gives assurance to petitioner that it will be made whole in the event the garnishment turns out to be unjustified. It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. We are no more inclined now than we have been in the

past to distinguish among different kinds of property in applying the Due Process Clause. Fuentes v. Shevin, 407 U.S., at 89--90, 92 S.Ct., at 1998-- 1999.

Enough has been said, we think, to require the reversal of the judgment of the Georgia Supreme Court. The case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

Judgment reversed and case remanded.

Mr. Justice STEWART, concurring.

It is gratifying to note that my report of the demise of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, see Mitchell v. W. T. Grant Co., 416 U.S. 600, 629--636, 94 S.Ct. 1895, 1910--1914, 40 L.Ed.2d 406 (dissenting opinion) seems to have been greatly exaggerated. Cf. s. Clemens, cable from Europe to the Associated Press, quoted in 2 A. Paine, Mark Twain: A Biography 1039 (1912).

***609** Mr. Justice POWELL, concurring in the judgment.

I join in the Court's judgment, but I cannot concur in the opinion as I think it sweeps more broadly than is necessary and appears to resuscitate Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Only last term in Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), the Court significantly narrowed the precedential scope of Fuentes. In my concurrence in Mitchell, I noted:

> 'The Court's decision today withdraws significantly from the full reach of (Fuentes') principle, and to this extent I think it fair to say that the Fuentes opinion is overruled.' 416 U.S., at 623, 94 S.Ct., at 1908 (Powell, J., concurring).

Three dissenting Justices, including the author of Fuentes, went further in their description of the impact of Mitchell:

> '(T)he Court today has unmistakably overruled a considered decision of this Court that is barely two years old, ****724** without pointing to any change . . . that might justify this total disregard of stare decisis.' 416 U.S., at 635, 94 S.Ct., at 1913 (Stewart, J., joined by Douglas and Marshall, JJ., dissenting).

The Court's opinion in this case, relying substantially on Fuentes, suggests that that decision will again be read as calling into question much of the previously settled law governing commercial transactions. I continue to doubt whether Fuentes strikes a proper balance, especially in cases where the creditor's interest in the property may be as significant or even greater than that of the debtor. Nor do I find it necessary to relegate Mitchell to its narrow factual setting in order to determine that the Georgia garnishment statutes fail to satisfy the requirements of procedural due process.

As we observed in Mitchell, the traditional view of procedural due process had been that "(w)here only ***610** property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." Id., at 611, 94 S.Ct., at 1902, quoting Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 596--597, 51 S.Ct. 608, 611-- 612, 75 L.Ed. 1289 (1931). Consistent with this view, the Court in the past unanimously approved prejudgment attachment liens similar to those at issue in this case. McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929); Coffin Bros v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768 (1928); Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921). See generally Mitchell, supra, 416 U.S., at 613--614, 94 S.Ct., at 1903. But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 263--266, 90 S.Ct. 1011, 1018--1019, 25 L.Ed.2d 287 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Under this analysis, the Georgia provisions cannot stand.

Garnishment and attachment remedies afford the actual or potential judgment creditor a means of assuring, under appropriate circumstances, that the debtor will not remove from the jurisdiction, encumber, or otherwise dispose of certain assets then available to satisfy the creditor's claim. [FN1] Garnishment may have a seriously adverse impact on the debtor, depriving him of the use of his assets during the period that it applies. But this fact alone does not give rise to constitutional objection. The State's legitimate interest in facilitating creditor recovery through the provision of garnishment remedies has never been seriously questioned.

FN1. Garnishment and attachment remedies also serve to insure that the State will retain

jurisdiction to adjudicate the underlying controversy. The advent of the more liberal interpretation of the States' power to exert jurisdiction over nonresidents who are not present in the State, International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), diminishes the importance of this function.

*611 Pregarnishment notice and a prior hearing have not been constitutionally mandated in the past. Despite the ambiguity engendered by the Court's reliance on Fuentes, I do not interpret its opinion today as imposing these requirements for the future. [FN2] Such restrictions, antithetical to the very purpose of **725 the remedy, would leave little efficacy to the garnishment and attachment laws of the 50 States.

FN2. The Court also cites Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), which established an exception for garnishment of an individual's wages. In such cases, the Due Process Clause requires notice and a hearing prior to application of the garnishment remedy. As the opinion itself indicates, however, the Sniadach rule is limited to wages, 'a specialized type of property presenting distinct problems in our economic system.' Id., at 340, 89 S.Ct., at 1822. The Court did not purport to impose requirements of pregarnishment notice and hearing in other instances. Ibid. I therefore do not consider Sniadach to be more than peripherally relevant to the present case.

In my view, procedural due process would be satisfied where state law requires that the garnishment be preceded by the garnishor's provision of adequate security and by his establishment before a neutral officer [FN3] of a factual basis of the need to resort to the remedy as a means of preventing removal or dissipation of assets required to satisfy the claim. Du process further requires that the State afford an opportunity for a prompt postgarnishment judicial hearing in which the garnishor has *612 the burden of showing probable cause to believe there is a need to continue the garnishment for a sufficient period of time to allow proof and satisfaction of the alleged debt. Since the garnished assets may bear no relation to the controversy giving rise to the alleged debt, the State also should provide the debtor an opportunity to free those assets by posting adequate security in their place.

FN3. I am not in accord with the Court's suggestion that the Due Process Clause might require that a judicial officer issue the writ of garnishment. The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge. Such a hearing affords an opportunity to rectify any error in the initial decision to issue the garnishment. When combined with the availability of the garnishor's bond to compensate for any harm caused, the possibility of prompt correction of possible error suffices to satisfy the requirements of procedural due process in this context. It thus should be sufficient for a clerk or other officer of the court to issue the original writ upon the filing of a proper affidavit.

The Georgia provisions fall short of these requirements. Garnishment may issue on the basis of a simple and conclusory affidavit that the garnishor has reason to apprehend the loss of money allegedly owed. See Ga.Code Ann. s 46--101, set forth in full in the Court's opinion, ante, at 720 n. 1. As shown by the affidavit filed in this case, see ante, at 721 n. 2, an unrevealing assertion of apprehension of loss suffices to invoke the issuance of garnishment. [FN4] This is insufficient to enable a neutral officer to make even the most superficial preliminary assessment of the creditor's asserted need. [FN5]

FN4. The Georgia courts have not amplified the statutory affidavit requirement through the process of judicial construction. See Wilson v. Fulton Metal Bed Mfg. Co., 88 Ga.App. 884, 886, 78 S.E.2d 360, 362 (1953).

FN5. Since garnishment can issue in Georgia only in cases in which suit is pending or judgment has been rendered, see Ga.Code Ann. s 46-- 101, the issuing officer need not preliminarily inquire into the allegation of the existence of a debt. Nor do I contemplate that the initial showing of probable inability to collect the debt absent the issuance of the garnishment need be elaborate.
The facts of this case serve to illustrate the point. From the record and oral argument, it appears that the respondent feared that the

only accessible and unencumbered assets of North Georgia Finishing were its bank accounts. At oral argument, counsel for petitioner indicated that North Georgia Finishing's holdings in real estate and tangible property in the State of Georgia were encumbered by mortgages and factoring contracts. It thus appears that respondent's apprehension of eventual inability to recover the debt may well have been entirely sufficient to justify the garnishment for the brief period required to conduct the postgarnishment hearing.

Bank accounts are readily susceptible to almost immediate transfer or dissipation, and this occurrence is often a likelihood where the debtor is a foreign corporation or a nonresident of the State. An affidavit in support of the garnishment or attachment of a nonresident's bank account would normally be sufficient for the writ if it averred that other less transitory assets were not available within the State to satisfy any prospective judgment.

***613** The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing. Under Georgia law, garnishment is a separate proceeding between the garnishor and the garnishee. The debtor is not a party and can intervene only by filing a dissolution bond and substituting himself for the garnishee. ****726**Leake v. Tyner, 112 Ga. 919, 38 S.E. 343 (1901); Powell v. Powell, 95 Ga.App. 122, 97 S.E.2d 193 (1957). As noted above, the issuance of the garnishment may impose serious hardship on the debtor. In this context, due process precludes imposing the additional burden of conditioning the debtor's ability to question the validity of its issuance or continuation on the filing of a bond. Moreover, the Georgia statute contains no provision enabling the debtor to obtain prompt dissolution of the garnishment upon a showing of fact, [FN6] nor any indication that the garnishor bears the burden of proving entitlement to the garnishment.

FN6. Petitioner asserts, without contradiction by the respondent, that Georgia law does not authorize the alleged debtor to question the facts contained in the garnishor's affidavit or to make a contrary submission of fact indicating that the garnishor's apprehension of possible loss is misconceived or is insufficient to warrant the continuation of the writ or garnishment.

I consider the combination of these deficiencies to be fatal to the Georgia statute. Quite simply, the Georgia ***614** provisions fail to afford fundamental fairness in their accommodation of the respective interests of creditor and debtor. For these reasons, I join in the judgment of the Court.

Mr. Justice BLACKMUN, with whom Mr. Justice REHNQUIST joins, dissenting.

The Court once again--for the third time in less than three years--struggles with what it regards as the due process aspects of a State's old and long- unattacked commercial statutes designed to afford a way for relief to a creditor against a delinquent debtor. On this third occasion, the Court, it seems to me, does little more than make very general and very sparse comparisons of the present case with Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), on the one hand, and with Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), on the other; concludes that this case resembles Fuentes more than it does Mitchell; and then strikes down the Georgia statutory structure as offensive to due process. One gains the impression, particularly from the final paragraph of its opinion, that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed. And, as a result, the corresponding commercial statutes of all other States, similar to but not exactly like those of Florida or Pennsylvania or Louisiana or Georgia, are left in questionable constitutional status, with little or no applicable standard by which to measure and determine their validity under the Fourteenth Amendment. This, it seems to me, is an undesirable state of affairs, and I dissent. I do so for a number of reasons:

1. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), mentioned in passing by the Court in its present opinion, ante, at 722, was correctly regarded by the ***615**Georgia Supreme Court, 231 Ga. 260, 263--264, 201 S.E. 2d 321, 323 (1973), as a case relating to the garnishment of wages. The opinion in Sniadach makes this emphasis:

'We deal here with wages--a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.' 395 U.S., at 340, 89 S.Ct., at 1822.

It goes on to speak of possible 'tremendous hardship on wage earners with families to support,' ibid., and the 'enormous' leverage of the creditor 'on the wage earner,' id., at 341, 89 S.Ct., at 1822. Sniadach should be allowed to remain in its natural environment--wages--and not be expanded to arm's-length relationships between business enterprises of such financial consequence as North Georgia Finishing and Di-I--Chem.

**727 2. The Court, ante, at 722, regards the narrow limitations of Sniadach as affected by Fuentes. It also bows to Morrow Electric Co. v. Cruse, 370 F.Supp. 639 (ND Ga.1974), and the three-judge holding there that the Georgia statutes before us are unconstitutional. Ante, at 721 n. 4. Indeed, perhaps Sniadach for a time was so expanded (somewhat surprisingly, I am sure, to the Sniadach Court) by the implications and overtones of Fuentes. But Mitchell came along and Morrow was more than three months pre-Mitchell. Sniadach's expansion was surely less under Mitchell than it might have appeared to be under Fuentes.

3. I would have thought that, whatever Fuentes may have stood for in this area of debtor-creditor commercial relationships, with its 4--3 vote by a bobtailed Court, it was substantially cut back by Mitchell. Certainly, Mr. Justice Stewart, the author of Fuentes and the writer of the dissenting opinion in Mitchell, thought so:

'The deprivation of property in this case is identical *616 to that at issue in Fuentes, and the Court does not say otherwise.' 416 U.S., at 631, 94 S.Ct., at 1911.

'In short, this case is constitutionally indistinguishable from Fuentes v. Shevin, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the Fuentes dissent.' Id., at 634, 94 S.Ct., at 1913.

'Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old . . .. The only perceivable change that has occurred since the Fuentes case is in the makeup of this Court.' Id., at 635, 94 S.Ct., at 1913.

Surely, Mr. Justice Brennan thought so when he asserted in dissent that he was 'in agreement that Fuentes . . . requires reversal' of the Louisiana judgment. Id., at 636, 94 S.Ct., at 1914. And surely, Mr. Justice Powell thought so, substantially, when, in his concurrence, he observed:

'The Court's decision today withdraws significantly from the full reach of (the Fuentes) principle, and to this extent I think it fair to say that the Fuentes opinion is overruled.' Id., at 623, 94 S.Ct., at 1908.

I accept the views of these dissenting and concurring Justice in Mitchell that Fuentes at least was severely limited by Mitchell, and I cannot regard Fuentes as of much influence or precedent for the present case.

4. Fuentes, a constitutional decision, obviously should not have been brought down and decided by a 4--3 vote when there were two vacancies on the Court at the time of argument. It particularly should not have been decided by a 4--3 vote when Justices filling the vacant seats had qualified and were on hand and available to participate on reargument. [FN1] Announcing the constitutional *617 decision, with a four-Justice majority of a seven-Justice shorthanded Court, did violence to Mr. Chief Justice Marshall's wise assurance, in Briscoe v. Commonwealth's Bank of Kentucky, 8 Pet. 118, 122, 9 L.Ed. 709 (1834), that the practice of the Court 'except in cases of absolute necessity' is not to decide a constitutional question unless there is a majority 'of the whole court.'

FN1. Fuentes was decided June 12, 1972. Mr. Justice Powell and Mr. Justice Rehnquist had taken their respective seats as Members of the Court five months before, on January 7. 404 U.S. xi--xvii. Fuentes had been argued November 9, 1971.

The Court encountered the same situation a century ago with respect to the Legal Tender Cases; mishandled the decisional process similarly; and came to regret the error. Originally, in Hepburn v. Griswold, 8 Wall. 603, 19 L.Ed. 513 (1870), [FN2] the Court, assertedly by a 5--3 vote, with one vacancy, held the Legal Tender Act of 1862, 12 Stat. 345, to **728 be unconstitutional with respect to prior debts. Mr. Justice Grier, who was in failing health, was noted as concurring. 8 Wall., at 626. It was stated that the case 'was decided in conference' on November 27, 1869, and the opinion 'directed to be read' on January 29, 1890. Ibid. Mr. Justice Grier, however, had submitted his resignation to the President in December 1869, effective February 1, 1870, and it had been accepted on December 15. The Justice last sat on January 31. 8 Wall., at vii-viii. The opinion and judgment in Hepburn actually were rendered on February 7, when Mr. Justice Grier was no longer on the bench.

FN2. See also Broderick's Executor v. Magraw, 8 Wall. 639, 19 L.Ed. 531 (1870).

A year later, with the two vacancies filled, the Court, by a 5--4 vote, overruled Hepburn and held the Legal Tender Act constitutional with respect to all debts. Legal Tender Cases, 12 Wall. 457, 20 L.Ed. 287 (1871). The Court said: 'That case (Hepburn v. Griswold) was decided by a divided court, and by a court having a less number of ***618** judges than the law then in existence provided this court shall have. . . . We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right (citing Briscoe v. Commonwealth's Bank of Kentucky). We are not accustomed to hear them in the absence of a full court, if it can be avoided.' Id., at 553--554.

The failure in Hepburn to recall or adhere to the practice announced by the Marshall Court resulted in confusion, prompt reversal of position, embarrassment, and recrimination. See the opinion of Mr. Chief Justice Chase in dissent. 12 Wall., at 572. [FN3]

FN3. Mr. Chief Justice Hughes described the result in the Legal Tender Cases as one of 'three notable instances (in which) the Court has suffered severely from self-inflicted wounds.' C. Hughes, The Supreme Court of the United States 50 (1928). The others he named were the Dred Scott decision, Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 (1857), and the Income Tax Case, Pollock v. Farmers' Loan & Trust Co., 157U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), on rehearing,158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895).

Later, Mr. Justice Burton called attention to this lapse and heartily endorsed the practice of withholding decision on a constitutional issue by less than a majority of a full Court, that is, today, by less than five votes when vacancies exist and are waiting to be filled or have been filled. Burton, The Legal Tender Cases: A Celebrated Supreme Court Reversal, 42 A.B.A.J. 231 (1956), reprinted as Chapter IX in The Occasional Papers of Mr. Justice Burton (E. Hudson ed. 1969). We allowed his advice, as well as well as that of the Marshall Court, to go unheeded when we permitted Fuentes to come down with only four supporting votes when a nine-Justice Court already was available on any reargument.

The admonition of the Great Chief Justice, in ny view, should override any natural, and perhaps understandable, eagerness to decide. Had we bowed to that wisdom when ***619** Fuentes was before us, and waited a brief time for reargument before a full Court, whatever its decision might have been, I venture to suggest that we would not be immersed in confusion, with Fuentes on way, Mitchell another, and now this case decided in a manner that leaves counsel and the commercial communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with a wavering tribunal off in Washington, D.C. This Court surely fails in its intended purpose when confusing results of this kind are forthcoming and are imposed upon those who owe and those who lend.

5. Neither do I conclude that, because this is a garnishment case, rather than a lien or vendor-vendee case, it is ****729** automatically controlled by Sniadach. Sniadach, as has been noted, concerned and reeks of wages. North Georgia Finishing is no wage earner. It is a corporation engaged in business. It was protected (a) by the fact that the garnishment procedure may be instituted in Georgia only after the primary suit has been filed or judgment obtained by the creditor, thus placing on the creditor the obligation to initiate the proceedings and the burden of proof, and assuring a full hearing to the debror; (b) by the respondent's statutorily required and deposited double bond; and (c) by the requirement of the respondent's affidavit of apprehension of loss. It was in a position to dissolve the garnishment by the filing of a single bond. These are transactions of a day-to-day type in the commercial world. They are not situations involving contracts of adhesion or basic unfairness, imbalance, or inequality. See D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972); Swarb v. Lennox, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972). The clerk-judge distinction, relied on by the Court, surely is of little significance so long as the court officer is not an agent of the creditor. The Georgia system, for me, affords commercial entities all the protection ***620** that is required by the Due Process Clause of the Fourteenth Amendment.

6. Despite its apparent disclaimer, the Court now has embarked on a case-by- case analysis (weighted heavily in favor of Fuentes and with little hope under Mitchell) of the respective state statutes in this area. That road is a long and unrewarding one, and provides no satisfactory answers to issues of constitutional magnitude.

I would affirm the judgment of the Supreme Court of Georgia.

Mr. Chief Justice BURGER dissents for the reasons stated in numbered paragraph 5 of the opinion of Mr. Justice BLACKMUN.

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108 S.Ct. 849
99 L.Ed.2d 1, 56 USLW 4168
**(Cite as: 485 U.S. 1, 108 S.Ct. 849)**

Supreme Court of the United States

Richard PENNELL and Tri-County Apartment House Owners Association, Appellants
v.
CITY OF SAN JOSE and City Council of San Jose.

**No. 86-753.**

Argued Nov. 10, 1987.
Decided Feb. 24, 1988.

Landlord and landlords' association brought action for declaratory and injunctive relief against city, attacking constitutionality of city rent control ordinance. The Superior Court, Santa Clara County, Bruce F. Allen, J., held that provision allowing hearing officer to consider "hardship to a tenant" when determining whether to approve rent increase proposed by landlord was unconstitutional, but upheld annual fee levied under ordinance on each rental unit, and both sides appealed. The Court of Appeal, 201 Cal.Rptr. 728, affirmed, and both sides appealed. The California Supreme Court, 42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111, reversed in part, determining that tenant hardship provision was not facially unconstitutional, and landlord and landlords' association appealed. The Supreme Court, Chief Justice Rehnquist, held that: (1) landlords had standing to challenge ordinance's constitutionality; (2) contention that application of ordinance's tenant hardship provisions violated takings clause was premature; and (3) ordinance did not on its face violate due process clause or equal protection clause.

Affirmed.

Justice Scalia filed opinion concurring in part and dissenting in part in which Justice O'Connor joined.

Justice Kennedy took no part in the consideration or decision of this case.

West Headnotes

[1] **Associations** ⚿**20(1)**
41k20(1) Most Cited Cases

"Associational or representational standing" requires actual injury redressable by court, that association's members would otherwise having standing to sue in their own right, that interests association seeks to protect are germane to association's purpose and that neither claim asserted nor relief requested requires participation of individual members in lawsuit. U.S.C.A. Const. Art. 3, § 1 et seq.

[2] **Constitutional Law** ⚿**42(1)**
92k42(1) Most Cited Cases

Application of constitutional standing requirement is not mechanical exercise. U.S.C.A. Const. Art. 3, § 1 et seq.

[3] **Federal Civil Procedure** ⚿**103.5**
170Ak103.5 Most Cited Cases

Upon challenge to standing on basis of pleadings, the Supreme Court of the United States accepts as true all material allegations of complaint and construes complaint in favor of complaining party. U.S.C.A. Const. Art. 3, § 1 et seq.

[4] **Municipal Corporations** ⚿**121**
268k121 Most Cited Cases

Landlord and landlords' association had standing to challenge constitutionality of city rent control ordinance allowing hearing officer to consider, among other factors "hardship to a tenant" when determining whether to approve rent increase proposed by landlord, even though complaint did not allege that landlords had "hardship tenants" who might trigger ordinance's hearing process or that they had been or would be aggrieved by hearing officer's determination that certain proposed rent increase was unreasonable on ground of tenant hardship; allegation that landlords' properties were subject to ordinance and statement at oral argument that association represented most of residential unit owners in city and had many hardship tenants raised likelihood of enforcement of ordinance, with concomitant probability that rent would be reduced below what landlord would otherwise be able to obtain, so as to sustain landlords' burden of demonstrating realistic danger of sustaining direct injury as result of ordinance's operation or enforcement. U.S.C.A. Const. Art. 3, § 1 et seq.

[5] **Federal Courts** ⚿**445**
170Bk445 Most Cited Cases

Parties litigating in the Supreme Court of the United States should take pains to supplement record in any manner necessary to enable Court to address with as much precision as possible any question of standing that may be raised. U.S.C.A. Const. Art. 3, § 1 et seq.

[6] **Eminent Domain** 2(1)
148k2(1) Most Cited Cases

Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by public as a whole. U.S.C.A. Const.Amend. 5.

[7] **Constitutional Law** 46(1)
92k46(1) Most Cited Cases

Constitutionality of statutes ought not be decided except in actual factual setting that makes such decision necessary, particularly in takings cases. U.S.C.A. Const.Amends. 5, 14.

[8] **Municipal Corporations** 121
268k121 Most Cited Cases

Landlords' contention that city rent control ordinance's tenant hardship provision violated takings clause, alleging that reducing, because of tenant hardship, what would otherwise be "reasonable" rent under other, objective factors specified in ordinance, relating to landlord's cost or rental market's condition, accomplished taking and transfer of landlord's property to individual hardship tenants, was premature, absent evidence that tenant hardship provision had in fact ever been relied upon by hearing officer to reduce rent as alleged, particularly where ordinance did not require that hearing officer in fact reduce proposed rent increase on grounds of tenant hardship, but rather, only required that tenant hardship be considered. U.S.C.A. Const.Amends. 5, 14.

[9] **Constitutional Law** 298(1)
92k298(1) Most Cited Cases

State price-control regulation that is arbitrary, discriminatory, or demonstrably irrelevant to policy that legislature is free to adopt violates Due Process Clause. U.S.C.A. Const.Amends. 5, 14.

[10] **Constitutional Law** 298(1)
92k298(1) Most Cited Cases

Government's intervention in marketplace to regulate rates or prices that are artificially inflated as result of monopoly or near monopoly does not violate Due Process Clause. U.S.C.A. Const.Amends. 5, 14.

[11] **Landlord and Tenant** 200.11
233k200.11 Most Cited Cases

City rent control ordinance's purpose of preventing unreasonable rent increases caused by city's housing shortage was legitimate exercise of city's police powers. U.S.C.A. Const.Amends. 5, 14.

[12] **Eminent Domain** 2(1.1)
148k2(1.1) Most Cited Cases

[12] **Landlord and Tenant** 200.10
233k200.10 Most Cited Cases

States have broad power to regulate housing conditions in general and landlord- tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. U.S.C.A. Const.Amends. 5, 14.

[13] **Eminent Domain** 2(1.1)
148k2(1.1) Most Cited Cases

Statutes regulating economic relations of landlords and tenants are not per se takings. U.S.C.A. Const.Amends. 5, 14.

[14] **Constitutional Law** 298(1)
92k298(1) Most Cited Cases

For purposes of due process analysis, protection of consumer welfare is legitimate and rational goal of price or rate regulation. U.S.C.A. Const.Amends. 5, 14.

[15] **Landlord and Tenant** 200.10
233k200.10 Most Cited Cases

Protection of tenants is primary purpose of rent control.

[16] **Constitutional Law** 278.3
92k278.3 Most Cited Cases

[16] **Landlord and Tenant** 200.11
233k200.11 Most Cited Cases

Provision in city rent control ordinance that hearing officer may consider tenant's hardship, among other factors, in finally fixing reasonable rent, did not render ordinance facially invalid under Fourteenth Amendment's due process clause; ordinance's scheme represented rational attempt to accommodate conflicting interests of protecting tenants from burdensome rent increases and from costs of

dislocation while at same time ensuring that landlords were guaranteed fair return on their investment. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law** 228.3
92k228.3 Most Cited Cases

In face of Equal Protection challenge to city rent control ordinance, city was only required to show that classification scheme embodied in ordinance was rationally related to legitimate state interest. U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law** 213.1(2)
92k213.1(2) Most Cited Cases

Statute that does not burden suspect class or fundamental interest will not be overturned on Equal Protection grounds unless varying treatment of different groups of persons is so unrelated to achievement of any combination of legitimate purposes as to compel conclusion that legislature's actions were irrational. U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law** 228.3
92k228.3 Most Cited Cases

[19] **Landlord and Tenant** 200.11
233k200.11 Most Cited Cases

City rent control ordinance allowing hearing officer to consider, among other factors, "hardship to a tenant" when determining whether to approve rent increase proposed by landlord did not, on its face, violate Equal Protection Clause; treating landlords differently on basis of whether they had hardship tenants was rationally related to legitimate purpose of protecting tenants. U.S.C.A. Const.Amend. 14.

***852** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***01** Under a San Jose, Cal., rent control ordinance (Ordinance), a landlord may automatically raise the annual rent of a tenant in possession by as much as eight percent, but if a tenant objects to a higher increase, a hearing is required to determine whether the landlord's proposed increase is "reasonable under the circumstances," and the hearing officer is directed to consider specified factors, including "the hardship to a tenant." Appellants, an individual landlord and Tri-County Apartment House Owners Association (Association), which represents owners and lessors of real property located in San Jose, filed a state-court action seeking a declaration that the Ordinance, particularly the "tenant hardship" provision, is facially invalid under the Federal Constitution. The court entered judgment on the pleadings in appellants' favor, and the California Court of Appeal affirmed. However, the California Supreme Court reversed, rejecting appellants' arguments under the Takings Clause of the Fifth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

*Held:*

1. Appellants have standing to challenge the Ordinance's constitutionality, even though they did not allege that either the individual appellant or appellant Association's members have "hardship tenants" who might trigger the Ordinance's hearing process, or that they have been or will be aggrieved by a hearing officer's determination that a certain proposed rent increase is unreasonable on the ground of tenant hardship. When standing is challenged on the basis of the pleadings, all material allegations of the complaint must be taken as true, and the complaint must be ***2** construed in favor of the complaining party. Appellants alleged that their properties are subject to the Ordinance, and stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants." Thus, the likelihood of enforcement of the Ordinance, with the concomitant probability that a rent will be reduced below what the landlord would otherwise be able to obtain, is a sufficient threat of actual injury to satisfy Art. III's requirement that a plaintiff who challenges a law must demonstrate a realistic danger of sustaining a direct injury as a result of the law's operation or enforcement. Pp. 854-855.

2. Appellants' contention that application of the Ordinance's tenant hardship provision violates the Takings Clause--since reducing, because of tenant hardship, what would otherwise be a "reasonable" rent under the other, objective factors specified in the Ordinance relating to the landlord's costs or the rental market's condition, accomplishes a taking and transfer of the landlord's property to individual hardship tenants--is premature. There is no evidence that the tenant hardship provision has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other specified factors. In addition, the Ordinance does not require that a hearing officer in fact reduce a

proposed rent increase on grounds of tenant hardship, but only makes it mandatory that tenant hardship be considered. In takings cases, the constitutionality of laws should not be decided except in an actual factual setting that makes such a decision necessary. Pp. 856-857.

3. The mere provision in the Ordinance that a hearing officer may consider the tenant's hardship in finally fixing a reasonable rent does not render the Ordinance facially invalid under the Due Process Clause. The Ordinance's purpose of preventing unreasonable rent increases **853 caused by the city's housing shortage is a legitimate exercise of appellees' police powers. Moreover, there is no merit to appellants' argument that it is arbitrary, discriminatory, or demonstrablyirrelevant for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low-income tenants by requiring that "hardship to a tenant" be considered in determining the amount of excess rent increase that is "reasonable under the circumstances." The protection of consumer welfare is a legitimate and rational goal of price or rate regulation. The Ordinance's scheme represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. Pp. 857-859.

4. The Ordinance, on its face, does not violate the Equal Protection Clause. Its classification scheme is rationally related to the legitimate *3 purpose of protecting tenants. It is not irrational for the Ordinance to treat landlords differently on the basis of whether or not they have hardship tenants. Pp. 858-859.

42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111 (1986), affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR, J., joined, *post,* p. ----. KENNEDY, J., took no part in the consideration or decision of the case.

*Harry D. Miller* argued the cause for appellants. With him on the briefs were *Burch Fitzpatrick* and *Gary E. Rosenberg.*

*Joan R. Gallo* argued the cause for appellees. With her on the brief was *George Rios.**

* Briefs of *amici curiae* urging reversal were filed for the California Association of Realtors by *William M. Pfeiffer;* for the National Apartment Association et al. by *Jon D. Smock, Wilbur H. Haines III,* and *Jeffrey J. Gale;* for the National Association of Realtors by *William D. North;* for the National Multi Housing Council by *Lawrence B. Simons* and *Michael E. Fine;* for the Rent Stabilization Association of New York City, Inc., et al. by *Erwin N. Griswold;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar,* and *Todd Natkin.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John A. Powell, Steven R. Shapiro, Helen Hershkoff, Paul L. Hoffman,* and *Mark Rosenbaum;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg* and *Laurence Gold;* for the Asian Law Alliance et al. by *Brenton Rogozen;* for the Center for Constitutional Rights by *Frank E. Deale;* for the National Housing Law Project by *David B. Bryson;* for the National Institute of Municipal Law Officers by *William I. Thornton, Jr., Roger F. Cutler, Roy D. Bates,* and *William H. Taube;* and for the U.S. Conference of Mayors et al. by *Benna Ruth Solomon* and *H. Bartow Farr III.*

Briefs of *amici curiae* were filed for the city of Santa Monica et al. by *Joseph Lawrence, Karl M. Manheim, Joel M. Levy, Hadassa K. Gilbert, Manuela Albuquerque, Raymond E. Ott, Mary Jo Levinger, Marc G. Hynes, Jayne W. Williams, K. Duane Lyders, Louise H. Renne, Roger T. Picquet, Steven A. Amerikaner, Mark G. Sellers,* and *John M. Powers;* for the Competitive Enterprise Institute by *Sam Kazman;* and for the National Association of Home Builders et al. by *Gus Bauman.*

*4 Chief Justice REHNQUIST delivered the opinion of the Court.

This case involves a challenge to a rent control ordinance enacted by the city of San Jose, California, that allows a hearing officer to consider, among other factors, the "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. Appellants Richard Pennell and the Tri-County Apartment House Owners Association sued in the Superior Court of Santa Clara County seeking a declaration that the ordinance, in particular the "tenant hardship" provisions, are "facially unconstitutional and therefore ... illegal and void." The Superior Court entered judgment on the pleadings in favor of appellants, sustaining their claim that the tenant hardship provisions violated the Takings Clause of the

Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. The California Court of Appeal affirmed this judgment, 154 Cal.App.3d 1019, 201 Cal.Rptr. 728 (1984), but the Supreme Court of California reversed, 42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111 (1986), each by a divided vote. The majority of the Supreme Court rejected appellants' arguments under the Takings Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the dissenters in that court thought that the tenant hardship provisions were a "forced subsidy imposed on the landlord" in violation of the Takings Clause. *Id.*, at 377, 228 Cal.Rptr., at 734, 721 P.2d, at 1119. On appellants' appeal to this Court we postponed consideration of the question of jurisdiction, 480 U.S. 905, 107 S.Ct. 1346, 94 L.Ed.2d 517 (1987), and now having heard oral argument we affirm the judgment of the Supreme Court of California.

The city of San Jose enacted its rent control ordinance (Ordinance) in 1979 with the stated purpose of

> "alleviat[ing] some of the more immediate needs created by San Jose's housing situation. These needs include but are not limited to the prevention of excessive and unreasonable rent increases, the alleviation of undue hardships ***5** upon individual tenants, and the assurance to landlords of a fair and reasonable return ****854** on the value of their property." San Jose Municipal Ordinance 19696, § 5701.2. [FN1]

> FN1. In order to be consistent with the decisions below, we refer throughout this opinion to the sections of the Ordinance as originally designated. We note, however, that the San Jose Municipal Code has recently been recodified and the Ordinance now appears at Chapter 17.23 of the new Code.

At the heart of the Ordinance is a mechanism for determining the amount by which landlords subject to its provisions may increase the annual rent which they charge their tenants. A landlord is automatically entitled to raise the rent of a tenant in possession [FN2] by as much as eight percent; if a tenant objects to an increase greater than eight percent, a hearing is required before a "Mediation Hearing Officer" to determine whether the landlord's proposed increase is "reasonable under the circumstances." The Ordinance sets forth a number of factors to be considered by the hearing officer in making this determination, including "the hardship to a tenant." § 5703.28(c)(7). Because appellants concentrate their attack on the consideration of this factor, we set forth the relevant provision of the Ordinance in full:

> FN2. Under § 5703.3, the Ordinance does not apply to rent or rent increases for new rental units first rented after the Ordinance takes effect, § 5703.3(a), to the rental of a unit that has been voluntarily vacated, § 5703.3(b)(1), or to the rental of a unit that is vacant as a result of eviction for certain specified acts, § 5703.3(b)(2).

> "5703.29. Hardship to Tenants. In the case of a rent increase or any portion thereof which exceeds the standard set in Section 5703.28(a) or (b), then with respect to such excess and whether or not to allow same to be part of the increase allowed under this Chapter, the Hearing Officer shall consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the Hearing Officer determines that the proposed increase ***6** constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the excess of the increase which is subject to consideration under subparagraph (c) of Section 5703.28, or any portion thereof, be disallowed. Any tenant whose household income and monthly housing expense meets [certain income requirements] shall be deemed to be suffering under financial and economic hardship which must be weighed in the Hearing Officer's determination. The burden of proof in establishing any other economic hardship shall be on the tenant."

If either a tenant or a landlord is dissatisfied with the decision of the hearing officer, the Ordinance provides for binding arbitration. A landlord who attempts to charge or who receives rent in excess of the maximum rent established as provided in the Ordinance is subject to criminal and civil penalties.

[1] Before we turn to the merits of appellants' contentions we consider the claim of appellees that appellants lack standing to challenge the constitutionality of the Ordinance. The original complaint in this action states that appellant Richard Pennell "is an owner and lessor of 109 rental units in the City of San Jose." Appellant Tri-County Apartment House Owners Association (Association) is said to be "an unincorporated association organized for the purpose of representing the interests of the owners and lessors of real property located in the City of San Jose." App. 2-3. The complaint also states that the real property owned by appellants is "subject to the terms of" the Ordinance. But, appellees point out, at

no time did appellants allege that either Pennell or any member of the Association has "hardship tenants" who might trigger the Ordinance's hearing process, nor did they specifically allege that they have been or will be aggrieved by the determination of a hearing officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship. As appellees put it, "[a]t **855 this point in time, it is speculative" *7 whether any of the Association's members will be injured in fact by the Ordinance's tenant hardship provisions. Thus, appellees contend, appellants lack standing under either the test for individual standing, see, *e.g., Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (individual standing requires an " 'actual injury redressable by the court' "), or the test for associational standing, see *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977) (anassociation has standing on behalf of its members only when "its members would otherwise have standing to sue in their own right"). [FN3]

FN3. Our cases also impose two additional requirements for associational or representational standing: the interests the organization seeks to protect must be "germane to the organization's purpose," *Hunt*, 432 U.S., at 343, 97 S.Ct., at 2441, and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *ibid.* See also *Automobile Workers v. Brock*, 477 U.S. 274, 281-282, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986). Both of these requirements are satisfied here. The Association was "organized for the purpose of representing the interests of the owners and lessors of real property" in San Jose in this lawsuit, App. 3, and the facial challenge that the Association makes to the Ordinance does not require the participation of individual landlords.

[2][3][4] We must keep in mind, however, that "application of the constitutional standing requirement [is not] a mechanical exercise," *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984), and that when standing is challenged on the basis of the pleadings, we "accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109, 99 S.Ct. 1601, 1612, 60 L.Ed.2d 66 (1979). Here, appellants specifically alleged in their complaint that appellants' properties are "subject to the terms of" the Ordinance, and they stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants," Tr. of Oral Arg. 42; see also *id.*, at 7; Reply Brief for Appellants 2. *8 Accepting the truth of these statements, which appellees do not contest, it is not "unadorned speculation," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450 (1976), to conclude that the Ordinance will be enforced against members of the Association. The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. Farm Workers*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979). [FN4]

FN4. Appellees also argue that Pennell lacks standing individually because in early 1987 he sold the properties he owned at the time the complaint in this action was filed. See Brief for Appellees 8. In a declaration submitted to the Court, Pennell admits that he sold these properties, but states that he recently repurchased and now owns one of the apartment buildings in San Jose that he formerly owned. Declaration of Richard Pennell ¶ 7. That property was and still is "subject to the Ordinance." *Id.*, ¶ 8. Because we conclude that the Association has standing and that therefore we have jurisdiction over this appeal, we find it unnecessary to decide whether Pennell's sale and repurchase of the property affects his standing here.

[5] This said, we recognize that the record in this case leaves much to be desired in terms of specificity for purposes of determining the standing of appellants to challenge this Ordinance. Undoubtedly this is at least in part a reflection of the fact that the case originated in a state court where Art. III's proscription against **856 advisory opinions may not apply. We strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to

enable us to address with as much precision as possible any question of standing that may be raised.

[6] Turning now to the merits, we first address appellants' contention that application of the Ordinance's tenant hardship provisions violates the Fifth and Fourteenth Amendments' ***9** prohibition against taking of private property for public use without just compensation. In essence, appellants' claim is as follows: § 5703.28 of the Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to § 5703.28(c)(7) and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents--that objective has already been accomplished by considering the first six factors--instead, it serves only the purpose of providing assistance to "hardship tenants." In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord's property to individual hardship tenants; the Ordinance forces private individuals to shoulder the "public" burden of subsidizing their poor tenants' housing. As appellants point out, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960)).

[7][8] We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever ***10** been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered--it states that "the Hearing Officer *shall* consider the economic hardship imposed on the present tenant"--but it then goes on to state that if "the proposed increase constitutes an unreasonably severe financial or economic hardship ... he *may* order that the excess of the increase" be disallowed. § 5703.29 (emphasis added). Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979), we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295, 101 S.Ct. 2352, 2369-2370, 69 L.Ed.2d 1 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U.S.C. § 1201 *et seq.*, was "premature," ****857**452 U.S., at 296, n. 37, 101 S.Ct., at 2370, n. 37, and "not ripe for judicial resolution," *id.*, at 297, 101 S.Ct., at 2371, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining. Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here. Cf. *CIO v. McAdory*, 325 U.S. 472, 475-476, 65 S.Ct. 1395, 1397, 89 L.Ed. 1741 (1945) (declining to consider the validity of a state statute when the record did not ***11** show that the statute would ever be applied to any of the petitioner's members). [FN5]

FN5. For this reason we also decline to address appellants' contention that application of § 5703.28(c)(7) to reduce an otherwise reasonable rent increase on the basis of tenant hardship violates the Fourteenth Amendment's due process and equal protection requirements. See *Hodel v. Indiana*, 452 U.S. 314, 335-336, 101 S.Ct. 2376, 2388-2389, 69 L.Ed.2d 40 (1981) (dismissing as "premature" a due process challenge to the civil penalty provision of the Surface Mining Act because "appellees have made no showing that they were ever assessed civil penalties under the Act, much less that the statutory prepayment requirement was ever applied to them or

caused them any injury").

Appellants and several *amici* also argue that the Ordinance's combination of lower rents for hardship tenants and restrictions on a landlord's power to evict a tenant amounts to a physical taking of the landlord's property. We decline to address this contention not only because it was raised for the first time in this Court, but also because it, too, is premised on a hearing officer's actually granting a lower rent to a hardship tenant.

[9][10][11][12][13][14][15][16] Appellants also urge that the mere provision in the Ordinance that a hearing officer may *consider* the hardship of the tenant in finally fixing a reasonable rent renders the Ordinance "facially invalid" under the Due Process and Equal Protection Clauses, even though no landlord ever has its rent diminished by as much as one dollar because of the application of this provision. The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well established: "Price control is 'unconstitutional ... if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt....' " *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770, 88 S.Ct. 1344, 1361, 20 L.Ed.2d 312 (1968) (quoting *Nebbia v. New York*, 291 U.S. 502, 539, 54 S.Ct. 505, 517, 78 L.Ed. 940 (1934)). In other contexts we have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, see, *e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 250-254, 107 S.Ct. 1107, 1111-1113, 94 L.Ed.2d 282 (1987) (approving limits on rates charged to cable companies for access to telephone poles); *FPC v. Texaco Inc.*, 417 U.S. 380, 397-398, 94 S.Ct. 2315, 2326-2327, 41 L.Ed.2d 141 (1974) (recognizing that federal regulation of the natural ***12** gas market was in response to the threat of monopoly pricing), or a discrepancy between supply and demand in the market for a certain product, see, *e.g., Nebbia v. New York, supra*, 291 U.S., at 530, 538, 54 S.Ct., at 513, 516 (allowing a minimum price for milk to offset a "flood of surplus milk"). Accordingly, appellants do not dispute that the Ordinance's asserted purpose of "prevent[ing] excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing in the City of San Jose," § 5701.2, is a legitimate exercise of appellees' police powers. [FN6] Cf. ****858*** *Block v. Hirsh*, 256 U.S. 135, 156, 41 S.Ct. 458, 459, 65 L.Ed. 865 (1921) (approving rent control in Washington, D.C., on the basis of Congress' finding that housing in the city was "monopolized"). They do argue, however, that it is "arbitrary, discriminatory, or demonstrably irrelevant," *Permian Basin Area Rate Cases, supra*, 390 U.S., at 769-770, 88 S.Ct. at 1361, for appellees to attempt to accomplish the additional goal of reducing the burden of housing costs on low- income tenants by requiring that "hardship to a tenant" be considered in determining the amount of excess rent increase that is "reasonable under the circumstances" pursuant to § 5703.28. [FN7] As appellants put it, "[t]he objective of alleviating individual tenant hardship is ... not a 'policy the legislature is free to adopt' in a rent control ordinance." Reply Brief for Appellants 16.

FN6. Appellants do not claim, as do some *amici*, that rent control is *per se* a taking. We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), that we have "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.*, at 440, 102 S.Ct., at 3178 (citing, *inter alia*, *Bowles v. Willingham*, 321 U.S. 503, 517-518, 64 S.Ct. 641, 648-649, 88 L.Ed. 892 (1944)). And in *FCC v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *Id.*, at 252, 107 S.Ct., at 1112. Despite *amici* 's urgings, we see no need to reconsider the constitutionality of rent control *per se*.

FN7. As we noted above, see n. 5, *supra*, to the extent that appellants' due process argument is based on the claim that the Ordinance forces landlords to subsidize individual tenants, that claim is premature and not presented by the facts before us.

***13** We reject this contention, however, because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare. See, *e.g., Permian Basin Area Rate Cases, supra*, 390 U.S., at 770, 88 S.Ct., at 1361; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610-612, 64 S.Ct. 281, 291-292, 88 L.Ed. 333 (1944) ("The primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies"). Indeed, a primary purpose of rent control is the protection of tenants. See, *e.g., Bowles*

*v. Willingham*, 321 U.S. 503, 513, n. 9, 64 S.Ct. 641, 646, n. 9, 88 L.Ed. 892 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners ... from undue impairment of their standard of living"). Here, the Ordinance establishes a scheme in which a hearing officer considers a number of factors in determining the reasonableness of a proposed rent increase which exceeds eight percent *and* which exceeds the amount deemed reasonable under either § 5703.28(a) or § 5703.28(b). The first six factors of § 5703.28(c) focus on the individual landlord--the hearing officer examines the history of the premises, the landlord's costs, and the market for comparable housing. Section 5703.28(c)(5) also allows the landlord to bring forth any other financial evidence--including presumably evidence regarding his own financial status--to be taken into account by the hearing officer. It is in only this context that the Ordinance allows tenant hardship to be considered and, under § 5703.29, "balance[d]" with the other factors set out in § 5703.28(c). Within this scheme, § 5703.28(c) represents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment. Cf. *Bowles v. Willingham, supra*, at 517, 64 S.Ct., at 648 (considering, but rejecting, the contention that rent control must be established "landlord by landlord, as in the fashion of utility rates"). We accordingly find that the Ordinance, which so carefully considers both the individual circumstances of the landlord and ***14** the tenant before determining whether to allow an *additional* increase in rent over and above certain amounts that are deemed reasonable, does not on its face violate the Fourteenth Amendment's Due Process Clause. [FN8]

> FN8. The consideration of tenant hardship also serves the additional purpose, not stated on the face of the Ordinance, of reducing the costs of dislocation that might otherwise result if landlords were to charge rents to tenants that they could not afford. Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe. By allowing tenant hardship to be considered under § 5703.28(c), the Ordinance enables appellees to "fine tune" their rent control to take into account the risk that a particular tenant will be forced to relocate as a result of a proposed rent increase.

****859** [17][18][19] We also find that the Ordinance does not violate the Amendment's Equal Protection Clause. Here again, the standard is deferential; appellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). As we stated in *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.*, at 97, 99 S.Ct., at 943. In light of our conclusion above that the Ordinance's tenant hardship provisions are designed to serve the legitimate purpose of protecting tenants, we can hardly conclude that it is irrational for the Ordinance to treat certain landlords differently on the basis of whether or not they have hardship tenants. The Ordinance distinguishes between landlords because doing so furthers the purpose of ensuring that individual tenants do not suffer "unreasonable" hardship; it would be inconsistent to state that hardship is a legitimate factor to be considered but then hold that appellees could not tailor the Ordinance so that only legitimate hardship cases are redressed. Cf. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 145, 68 S.Ct. 421, 425, 92 L.Ed. 596 (1948) ***15** Congress "need not control all rents or none. It can select those areas or those classes of property where the need seems the greatest"). We recognize, as appellants point out, that in general it is difficult to say that the landlord "causes" the tenant's hardship. But this is beside the point--if a landlord does have a hardship tenant, regardless of the reason why, it is rational for appellees to take that fact into consideration under § 5703.28 of the Ordinance when establishing a rent that is "reasonable under the circumstances."

For the foregoing reasons, we hold that it is premature to consider appellants' claim under the Takings Clause and we reject their facial challenge to the Ordinance under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The judgment of the Supreme Court of California is accordingly

*Affirmed.*

Justice KENNEDY took no part in the consideration or decision of this case.

Justice SCALIA, with whom Justice O'CONNOR

joins, concurring in part and dissenting in part.

I agree that the tenant hardship provision of the Ordinance does not, on its face, violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. I disagree, however, with the Court's conclusion that appellants' takings claim is premature. I would decide that claim on the merits, and would hold that the tenant hardship provision of the Ordinance effects a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments.

I

Appellants contend that any application of the tenant hardship provision of the San Jose Ordinance would effect an uncompensated taking of private property because that provision does not substantially advance legitimate state interests and because it improperly imposes a public burden on individual ***16** landlords. I can understand how such a claim--that a law applicable to the plaintiffs is, root and branch, invalid--can be readily rejected on the merits, ****860** by merely noting that at least some of its applications may be lawful. But I do not understand how such a claim can possibly be avoided by considering it "premature." Suppose, for example, that the feature of the rental ordinance under attack was a provision allowing a hearing officer to consider the race of the apartment owner in deciding whether to allow a rent increase. It is inconceivable that we would say judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs. There is no difference, it seems to me, when the facial, root-and-branch challenge rests upon the Takings Clause rather than the Equal Protection Clause.

The Court confuses the issue by relying on cases, and portions of cases, in which the Takings Clause challenge was not (as here) that the law in all its applications took property without just compensation, but was rather that the law's application in regulating the use of particular property so severely reduced the value of that property as to constitute a taking. It is in *that* context, and not (as the Court suggests) generally, that takings analysis involves an "essentially ad hoc, factual inquir[y]," *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979). We said as much less than a year ago, and it is surprising that we have so soon forgotten:

> "In addressing petitioners' claim we must not disregard the posture in which this case comes before us. The District Court granted summary judgment to respondents only on the facial challenge to the Subsidence Act. The court explained that '... *the only question before this court is whether the mere enactment of the statutes and regulations constitutes a taking.*' ...
> "The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and ***17** a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation. This point is illustrated by our decision in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264 [101 S.Ct. 2352, 69 L.Ed.2d 1] (1981), in which we rejected a preenforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977.... The Court [there] explained:
> " ' "Because appellees" taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking.... The test to be applied in considering this facial challenge is straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." ...'
> "Petitioners thus face an uphill battle in making a facial attack on the Act as a taking." *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 493-495, 107 S.Ct. 1232, 1246-1247, 94 L.Ed.2d 472 (1987).

While the battle was "uphill" in *Keystone,* we allowed it to be fought, and did not declare it "premature."

The same was true of the facial takings challenge in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra.* It is remarkable that the Court should point to that case in support of its position, describing the holding as follows:

> "In *Virginia Surface Mining,* for example, we found that a challenge to the Surface Mining Control and Reclamation Act ... was 'premature,' ... and 'not ripe for judicial ***18** resolution,' ... because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the ****861** Act's restrictions on surface mining." *Ante,* at 856-857.

But this holding in *Virginia Surface Mining* applied only to "the taking issue decided by the District Court,"

452 U.S., at 297, 101 S.Ct., at 2371, which was the issue of the statute's validity *as applied.* Having rejected that challenge as premature, the Court then continued (in the language we quoted in *Keystone* ):

"Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking." 452 U.S., at 295, 101 S.Ct., at 2370.

That issue was *not* rejected as premature, but was decided on its merits, *id.,* at 295-297, 101 S.Ct., at 2370-2371, just as it was in *Keystone,* and as it was before that in *Agins v. Tiburon,* 447 U.S. 255, 260-263, 100 S.Ct. 2138, 2141-2142, 65 L.Ed.2d 106 (1980).

In sum, it is entirely clear from our cases that a facial takings challenge is not premature even if it rests upon the ground that the ordinance deprives property owners of all economically viable use of their land--a ground that is, as we have said, easier to establish in an "as-applied" attack. It is, if possible, even more clear that the present facial challenge is not premature, because it does not rest upon a ground that would even profit from consideration in the context of particular application. As we said in *Agins,* a zoning law "effects a taking if the ordinance does not substantially advance legitimate state interests, ... or denies an owner economically viable use of his land." *Id.,* at 260, 100 S.Ct., at 2141. The present challenge is of the former sort. Appellants contend that providing financial assistance to impecunious renters is not a state interest that can legitimately be furthered by regulating the use of property. Knowing the nature and character of the ***19** particular property in question, or the degree of its economic impairment, will in no way assist this inquiry. Such factors are as irrelevant to the present claim as we have said they are to the claim that a law effects a taking by authorizing a permanent physical invasion of property. See *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). So even if we were explicitly to overrule cases such as *Agins, Virginia Surface Mining,* and *Keystone,* and to hold that a facial challenge will not lie where the issue can be more forcefully presented in an "as-applied" attack, there would still be no reason why the present challenge should not proceed.

Today's holding has no more basis in equity than it does in precedent. Since the San Jose Ordinance does not require any specification of how much reduction in rent is attributable to each of the various factors that the hearing officer is allowed to take into account, it is quite possible that none of the many landlords affected by the Ordinance will ever be able to meet the Court's requirement of a "showing in a particular case as to the consequences of [the hardship factor] in the ultimate determination of the rent." *Ante,* at 857. There is no reason thus to shield alleged constitutional injustice from judicial scrutiny. I would therefore consider appellants' takings claim on the merits.

II

The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides that "private property [shall not] be taken for public use, without just compensation." We have repeatedly observed that the purpose of this provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); see also *First English Evangelical Lutheran Church of* ***20***Glendale v. Los Angeles County,* 482 U.S. 304, 318-319, ****862**107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980); *Agins v. Tiburon, supra,* 447 U.S., at 260, 100 S.Ct. at 2141; *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325, 13 S.Ct. 622, 625, 37 L.Ed. 463 (1893).

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion. The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. Whether or not that is an accurate perception of the way a free-market economy operates, it is at least true that the owners reap unique benefits from the situation that produces the economic hardship, and in that respect singling

them out to relieve it may not be regarded as "unfair." That justification might apply to the rent regulation in the present case, apart from the single feature under attack here.

Appellants do not contest the validity of rent regulation in general. They acknowledge that the city may constitutionally set a "reasonable rent" according to the statutory minimum and the six other factors that must be considered by the hearing officer (cost of debt servicing, rental history of the unit, physical condition of the unit, changes in housing services,***21** other financial information provided by the landlord, and market value rents for similar units). San Jose Municipal Ordinance 19696, § 5703.28(c) (1979). Appellants' only claim is that a reduction of a rent increase below what would otherwise be a "reasonable rent" under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor--the hardship to the tenant as defined in § 5703.29. I think they are right.

Once the other six factors of the Ordinance have been applied to a landlord's property, so that he is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. The seventh factor, the "hardship" provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. And even if the neediness of renters could be regarded as a problem distinctively attributable to landlords in general, it is not remotely attributable to the *particular* landlords that the Ordinance singles out--namely, those who happen to have a "hardship" tenant at the present time, or who may happen to rent to a "hardship" tenant in the future, or whose current or future affluent tenants may happen to decline into the "hardship" category.

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for ****863** privately sold necessities--a problem caused by the society at large--has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to ***22** abandon the guiding principle of the Takings Clause that "public burdens ... should be borne by the public as a whole," *Armstrong*, 364 U.S., at 49, 80 S.Ct., at 1569, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals. Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants.

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called "regulation," at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of "hardship" tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as ***23** high as $32,400 a year--the generous maximum necessary to qualify automatically as a "hardship" tenant under the rental Ordinance. [FN*] The voters might well see other, more pressing, social priorities. And of course what $32,400-a-year renters can acquire through spurious "regulation," other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both

economic effects and competing priorities are more evident.

> FN* Under the San Jose Ordinance, "hardship" tenants include (though are not limited to) those whose "household income and monthly housing expense meets *[sic]* the criteria" for assistance under the existing housing provisions of § 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (1982 ed. and Supp. III). The United States Department of Housing and Urban Development currently limits assistance under these provisions for families of four in the San Jose area to those who earn $32,400 or less per year. Memorandum from U.S. Dept. of Housing and Urban Development, Assistant Secretary for Housing-Federal Housing Comm'r, Income Limits for Lower Income and Very Low-Income Families Under the Housing Act of 1937 (Jan. 15, 1988).

That fostering of an intelligent democratic process is one of the happy effects of the constitutional prescription--perhaps accidental, perhaps not. Its essence, however, is simply the unfairness of making one ****864** citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation. As the Supreme Court of New Jersey said in finding unconstitutional a scheme displaying, among other defects, the same vice I find dispositive here:

> "A legislative category of economically needy senior citizens is sound, proper and sustainable as a rational classification. But compelled subsidization by landlords ***24** or by tenants who happen to live in an apartment building with senior citizens is an improper and unconstitutional method of solving the problem." *Property Owners Assn. v. North Bergen,* 74 N.J. 327, 339, 378 A.2d 25, 31 (1977).

I would hold that the seventh factor in § 5703.28(c) of the San Jose Ordinance effects a taking of property without just compensation.

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United States Court of Appeals,
Sixth Circuit.

PEOPLES RIGHTS ORGANIZATION, INC., et al.,
Plaintiffs-Appellees/Cross-Appellants,
v.
CITY OF COLUMBUS, et al.,
Defendants-Appellants/Cross-Appellees.

**Nos. 96-3468, 96-3495.**

Argued June 3, 1997.
Decided July 15, 1998.

Individual gun owners and association brought pre-enforcement action challenging constitutionality of ordinance banning sale, transfer, acquisition, or possession of assault weapons. The United States District Court for the Southern District of Ohio at Columbus, Sandra S. Beckwith, J., 925 F.Supp. 1254, entered judgment declaring portions of ordinance unconstitutionally vague and enjoining its enforcement. City appealed. The Court of Appeals, Suhrheinrich, Circuit Judge, held that: (1) association and individual gun owners had standing to bring pre-enforcement action, and case was justiciable despite fact that owners had not been criminally charged under statute; (2) "grandfather" clause creating an exception for persons who had registered their weapons under a former assault weapons ordinance that was ruled unconstitutionally vague violated equal protection rights of owners who had not registered their weapons; (3) "grandfather" provision creating exception for any large capacity magazine which belonged to a firearm registered with federal authorities did not violate equal protection rights of individuals who had no firearms registered with federal government; and (4) all alternative definitions of "assault weapon" contained in ordinance were unconstitutionally vague.

Affirmed in part, reversed in part.

Merritt, J., Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] **Federal Courts** 5
170Bk5 Most Cited Cases

Power of the federal judiciary is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[2] **Federal Civil Procedure** 103.2
170Ak103.2 Most Cited Cases

[2] **Federal Civil Procedure** 103.3
170Ak103.3 Most Cited Cases

"Standing doctrine" requires that a litigant have suffered an injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

[3] **Declaratory Judgment** 61
118Ak61 Most Cited Cases

[3] **Declaratory Judgment** 68
118Ak68 Most Cited Cases

Declaratory judgment generally is sought before a completed injury-in-fact has occurred; nevertheless, when seeking declaratory or injunctive relief, plaintiff must demonstrate actual present harm or a significant possibility of future harm to justify pre-enforcement relief. 28 U.S.C.A. § 2201(a).

[4] **Injunction** 12
212k12 Most Cited Cases

For purposes of satisfying injury-in-fact requirement under standing doctrine, individual does not have to await the consummation of threatened injury to obtain preventive relief; rather, if the injury is certainly impending, that is sufficient.

[5] **Associations** 20(1)
41k20(1) Most Cited Cases

Association must satisfy three requirements to have standing to bring federal action as a representative of its members: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the

relief sought requires the participation of individual members in the lawsuit.

[6] **Federal Courts** 12.1
170Bk12.1 Most Cited Cases

Ripeness analysis focuses on the timing of the action rather than on the parties who bring the suit.

[7] **Federal Courts** 12.1
170Bk12.1 Most Cited Cases

In the context of a pre-enforcement challenge, a case is ripe for review only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

[8] **Federal Courts** 12.1
170Bk12.1 Most Cited Cases

Ripeness requirement aims to prevent the court from entangling itself in abstract disagreements.

[9] **Constitutional Law** 42.2(1)
92k42.2(1) Most Cited Cases

[9] **Constitutional Law** 42.2(2)
92k42.2(2) Most Cited Cases

Weapons owners who did not fit within grandfather clauses of ordinance banning assault weapons alleged injury in fact sufficient to give them standing to challenge constitutionality of ordinance on vagueness and equal protection grounds; owners alleged they were unable to discern whether their weapons fell within definition of "assault weapons," and therefore they faced Hobson's choice of continuing to possess their weapons in city, thereby risking prosecution, or storing them outside city, thereby depriving themselves of using them. U.S.C.A. Const.Amend. 14.

[10] **Constitutional Law** 42.3(1)
92k42.3(1) Most Cited Cases

Association had standing to bring, on behalf of its members, a pre-enforcement challenge to city ordinances banning assault weapons, on basis that ordinance was unconstitutionally vague and violated equal protection. U.S.C.A. Const.Amend. 14.

[11] **Federal Courts** 13.15
170Bk13.15 Most Cited Cases

Vagueness challenge by weapons owners and association to ordinance banning assault weapons was justiciable despite fact that owners had not been criminally charged under ordinance. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[12] **Constitutional Law** 213.1(2)
92k213.1(2) Most Cited Cases

If legislation does not burden a fundamental right or target a suspect classification, it will withstand scrutiny under Equal Protection Clause so long as it bears a rational relationship to a legitimate state interest. U.S.C.A. Const.Amend. 14.

[13] **Constitutional Law** 250.1(2)
92k250.1(2) Most Cited Cases

[13] **Weapons** 3
406k3 Most Cited Cases

"Grandfather" clause in city ordinance that prohibited possession of assault weapons, creating exception for persons who had registered their weapons under former city assault weapons ordinance that was ruled unconstitutionally vague in its definition of "assault weapons," violated equal protection rights of owners who had not registered their weapons under former ordinance; there was no rational basis for extending a benefit only to owners who had speculated that their weapons fell within purview of former ordinance and registered them. U.S.C.A. Const.Amend. 14.

[14] **Constitutional Law** 250.1(2)
92k250.1(2) Most Cited Cases

[14] **Weapons** 3
406k3 Most Cited Cases

"Grandfather" provision in city ordinance that banned assault weapons, creating exception for any large capacity magazine which belonged to a firearm, or was possessed by the owner of a firearm, registered with federal authorities under National Firearms Act did not violate equal protection rights of individuals who had no firearms registered with federal government; city could rationally choose to protect reliance interests of individuals who had registered firearms with federal government and legitimately expected that they were entitled to possession and use of those firearms. U.S.C.A. Const.Amend. 14.

[15] **Constitutional Law** 48(6)
92k48(6) Most Cited Cases

Legislation generally is presumed constitutional under

Equal Protection Clause despite the fact that, in practice, it may result in some inequality. U.S.C.A. Const.Amend. 14.

[16] **Statutes** 47
361k47 Most Cited Cases

Law is void-for-vagueness if its prohibitions are not clearly defined.

[17] **Statutes** 60
361k60 Most Cited Cases

Question of whether or not a statute impinges on constitutionally-protected activity is but the first inquiry in a court's examination of a statute challenged on vagueness grounds.

[18] **Weapons** 4
406k4 Most Cited Cases

Ordinance imposed strict liability on offenders by prohibiting any person from selling, offering or displaying for sale, giving, lending or transferring ownership of, acquiring or possessing any assault weapon; predecessor ordinances contained scienter requirement of "knowingly" committing prohibited acts, as did a current provision relating to large magazines, thus showing city's capability of including scienter requirement where one was desired.

[19] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[19] **Weapons** 3
406k3 Most Cited Cases

Ordinance banning assault weapons would receive relatively stringent review in void-for-vagueness challenge because ordinance imposed criminal penalties and contained no scienter requirement.

[20] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[20] **Weapons** 3
406k3 Most Cited Cases

City ordinance prohibiting sale, transfer, acquisition, or possession of assault weapons was unconstitutionally vague to the extent it defined assault weapon as any semiautomatic action, center fire rifle, or carbine that accepted a detachable magazine with a capacity of 20 rounds or more; since ordinance lacked scienter requirement, owner of rifle or carbine that accepted large capacity magazine would be subject to criminal penalties, even though owner did not own such a magazine and did not know that such a magazine existed.

[21] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[21] **Weapons** 3
406k3 Most Cited Cases

City ordinance prohibiting sale, transfer, acquisition, or possession of assault weapons was unconstitutionally vague to the extent it defined assault weapon as any semiautomatic shotgun with a magazine capacity of more than six rounds; since shotgun rounds were available in different lengths and rounds of short length could cause shotgun's magazine capacity to exceed six rounds, an owner could be criminally liable even if he did not know that shorter length rounds existed.

[22] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[22] **Weapons** 3
406k3 Most Cited Cases

City ordinance prohibiting sale, transfer, acquisition, or possession of assault weapons was unconstitutionally vague in its alternative definition of "assault weapon" as semiautomatic handguns which were a modification of an automatic firearm; average gun owner would not know whether or not his weapon was a modification of another weapon.

[23] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[23] **Weapons** 3
406k3 Most Cited Cases

City ordinance banning sale, transfer, acquisition, or possession of assault weapons was unconstitutionally vague to the extent it defined "assault weapon" as any firearm which "may be restored" to an operable assault weapon; phrase "may be restored" failed to provide sufficient guidance to person of ordinary intelligence as to what was prohibited.

[24] **Constitutional Law** 258(3.1)
92k258(3.1) Most Cited Cases

[24] **Weapons** 3
406k3 Most Cited Cases

City ordinance prohibiting sale, transfer, acquisition, or possession of assault weapons was unconstitutionally vague in its alternative definition of assault weapon as any combination of parts from which an assault weapon could be readily assembled; phrase "may be readily assembled" did not provide sufficient information to enable a person of average intelligence to determine whether a particular combination of parts was within ordinance's coverage.

[25] **Weapons** 1
406k1 Most Cited Cases

Federal Constitution does not provide a right to possess an assault weapon. U.S.C.A. Const.Amend. 2.

[26] **Weapons** 3
406k3 Most Cited Cases

Second Amendment was not applicable in action by gun owners and association to enjoin enforcement of city ordinance banning assault weapons, since restrictions of Second Amendment operated only upon Federal Government. U.S.C.A. Const.Amend. 2.

[27] **Constitutional Law** 251.4
92k251.4 Most Cited Cases

Due process protects citizens from vague legislation even when that legislation regulates conduct which otherwise does not enjoy constitutional protection. U.S.C.A. Const.Amend. 14.

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Before: MERRITT, CONTIE, and SUHRHEINRICH, Circuit Judges.

SUHRHEINRICH, J., delivered the opinion of the court, in which CONTIE, J., joined. MERRITT, J. (pp. 539-40), delivered a separate dissenting opinion.

SUHRHEINRICH, Circuit Judge.

In 1994, this circuit invalidated an ordinance of the City of Columbus (hereinafter referred to as Columbus or the City) that banned assault weapons. *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 254 (6th Cir.1994). The ordinance defined an "assault weapon" as any one of thirty-four specific rifles, three specific shotguns, nine specific pistols, or "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements." *Id.* at 251 (quoting former Columbus City Codes § 2323.01(I)(4)). We held that the ordinance was unconstitutionally vague. *Id.* We found that "the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* at 252. We concluded: "The ordinance purports to define 'assault weapons' but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections." *Id.*

Following this decision, Columbus amended its ordinance. Columbus City Codes (C.C.C.) section 2323.31(A) provides that "[n]o person shall sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess any assault weapon," and section 2323.32(A) provides that "[n]o person shall knowingly possess a large capacity magazine." [FN1] Section 2323.11(G) sets forth five definitions of an "assault weapon":

> FN1. Section 2323.11(F) defines a "large capacity magazine" as "a box, drum, clip or other container which holds more than twenty rounds of ammunition to be fed continuously into a semiautomatic firearm, except a magazine designed to hold only .22 caliber rimfire cartridges."

(1) any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more;
(2) any semiautomatic shotgun with a magazine capacity of more than six rounds;
***526** (3) any semiautomatic handgun that is:
(a) a modification of a rifle described in division (a)(1), [FN2] or a modification of an automatic

firearms [sic]; or

> FN2. Because section 2323.11 does not contain a subsection (a)(1), we assume that this is intended to refer to section 2323.11(G)(1).

(b) originally designed to accept a detachable magazine with a capacity of more than 20 rounds.
(4) any firearm which may be restored to an operable assault weapon as defined in divisions (G)(1), (2), or (3) of this section.
(5) any part, or combination of parts, designed or intended to convert a firearm into an assault weapon as defined in divisions (G)(1), (2), or (3) of this section, or any combination of parts from which an assault weapon as defined in (G)(1), (2) or (3) of this section, may be readily assembled if those parts are in the possession or under the control of the same person.

C.C.C. § 2323.11(G)(1)-(5).

The ordinance contains two grandfather clauses which exempt certain firearms and magazines from the ordinance's provisions. Section 2323.31(B)(3) exempts any "assault weapon" that was lawfully possessed and registered pursuant to former Columbus City Codes section 2323.05 in 1989. [FN3] Section 2323.32(B)(2) exempts a "large capacity magazine" which, among other things, belongs to or is possessed by the owner of a firearm that is registered under the National Firearms Act, 26 U.S.C. §§ 5801-71.

> FN3. Former Columbus City Code § 2323.05(B) provided:
> No person shall knowingly possess an assault weapon, unless that weapon is registered pursuant to paragraph (C) of this section. It is intended to ban possession of assault weapons, unless lawfully possessed prior to the effective date of this ordinance, in which case such assault weapons must be registered.
> Former section 2323.05(C), in turn, provided: "Any person who lawfully possesses an assault weapon prior to October 31, 1989 shall register that firearm with the Department of Public Safety, License Section, between November 1, 1989 and November 30, 1989."

The present case involves a challenge to the amended Columbus ordinance. Plaintiffs, Peoples Rights Organization, Inc. (P.R.O.) and two of its members, have brought a pre-enforcement action pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). P.R.O. has large numbers of members who reside in Columbus and who possess, display, sell, lend, or acquire semiautomatic rifles, handguns, shotguns, and parts. The complaint asserts that P.R.O.'s members are unable to determine whether such firearms and parts are "assault weapons" under the Columbus ordinance. Plaintiffs allege in their complaint that sections 2323.11, 2323.31, and 2323.32 are unconstitutionally vague, violate due process of law, are unreasonably discriminatory, and deny the equal protection of the laws, and they seek declaratory and injunctive relief.

The district court first determined that the case was justiciable. *See* *Peoples Rights Org. v. City of Columbus*, 925 F.Supp. 1254, 1259-60 (S.D.Ohio 1996). After proceeding to the merits, the district court upheld the two grandfather clauses, finding them to be "in some fashion relevant to the City's goal" of protecting the ownership interests of those owners who possessed their weapons prior to Columbus's first attempt to ban assault weapons in 1989. *Id.* at 1263. However, the court declared the definitions of "assault weapon" in section 2323.11(G)(1), (G)(3), (G)(4), and certain portions of (G)(5) to be unconstitutionally vague. *Id.* at 1270. Therefore, the court enjoined the enforcement of section 2323.31(A) as it applied to "assault weapons" defined in those sections.

We agree with the district court that the controversy is justiciable. With respect to the merits, we uphold the grandfather provision in section 2323.32(B)(2) with the exception of one clause and invalidate the grandfather provision in section 2323.31(B)(3). We also invalidate each of the definitions of "assault weapon" contained in section 2323.11(G)(1)-(5). Hence, we **AFFIRM IN PART AND REVERSE IN PART**.

## I.
## A.

[1] The Constitution confines the federal courts to the adjudication of actual "cases" ***527** and "controversies." U.S. Const. art. III, § 2. As the Supreme Court has explained, the power of the federal judiciary is limited to those disputes "which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *accord* *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 279 (6th Cir.1997).

[2][3][4] The standing doctrine, for instance, requires that a litigant have suffered an injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). In the present case, Plaintiffs have brought a pre-enforcement challenge pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). A declaratory judgment generally is sought before a completed injury-in-fact has occurred. *Magaw*, 132 F.3d at 279; *Pic-A- State Pa., Inc. v. Reno*, 76 F.3d 1294, 1298 (3d Cir.), *cert. denied*, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996). Nevertheless, when seeking declaratory or injunctive relief, the plaintiff must demonstrate actual present harm or a significant possibility of future harm to justify pre-enforcement relief. *Magaw*, 132 F.3d at 279; *Bras v. California Pub. Utilities Comm'n*, 59 F.3d 869, 873 (9th Cir.1995), *cert. denied*, 516 U.S. 1084, 116 S.Ct. 800, 133 L.Ed.2d 748 (1996). Still, it is clear that an individual does not have to await the consummation of threatened injury to obtain preventive relief. Rather, if the injury is certainly impending, that is sufficient. *Babbitt v. United Farm Workers Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979).

[5] An association, such as P.R.O., can have standing as a representative of its members. *American Fed'n of State, County & Mun. Employees v. Private Indus. Council*, 942 F.2d 376, 378 (6th Cir.1991). The association must satisfy three requirements to have standing: (1) Its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

[6][7][8] Another doctrine which "cluster[s] about Article III" is ripeness. *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C.Cir.1982) (Bork, J., concurring). Ripeness focuses on the timing of the action rather than on the parties who bring the suit. *Navegar, Inc. v. United States*, 103 F.3d 994, 998 (D.C.Cir.1997). In *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194-95 (6th Cir.1988), we outlined the factors that a court must weigh in deciding whether to address the issues presented for review; i.e., the hardship to the parties if judicial review is denied at the pre-enforcement stage, the likelihood that the injury alleged by the plaintiff will ever come to pass, and the fitness of the case for judicial resolution at this stage.[FN4] In the context of a pre-enforcement challenge, a case is ripe for review "only if the probability of the future event occurring is substantial and of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' " *Magaw*, 132 F.3d at 284 (quoting *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969)). Thus, the ripeness requirement aims to prevent the court from entangling itself in "abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985).

> FN4. This final criterion--the fitness of the case for judicial review--requires the court to determine whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the claims presented. *National Rifle Ass'n v. Magaw*, 132 F.3d 272, 284 (6th Cir.1997); *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 195 (6th Cir.1988).

We shall now analyze the instant case in light of the principles articulated above.

**B.**

[9][10] Pursuant to section 2323.31(A) of the Columbus City Codes, "[n]o person shall ***528** sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess any assault weapon." Violation of this ordinance by first-time offenders constitutes a first degree misdemeanor punishable by imprisonment for not more than six months and by a fine of not more than $1,000. C.C.C. § 2301.25.

The complaint alleges that P.R.O. has large numbers of members who lawfully possessed firearms and large capacity magazines in the City before October 31, 1989. According to the complaint, these members did not register such firearms between November 1, 1989, and November 30, 1989, because they were unsure of whether these firearms were "assault weapons" as defined under the prior Columbus ordinance. The complaint asserts that these individuals continue to own and possess (either within or outside of the City) large capacity magazines and firearms, many of which may be defined as "assault weapons" under current Columbus law. The City admits in its answer that it will prosecute individuals "for any known or perceived violations of §§ 2323.31 and 2323.32. These

prosecutions would be conducted by defendant Ronald J. O'Brien, in his capacity as the City Attorney."

Gerald Smolak and Paul Walker are the individual plaintiffs in this action. [FN5] Both are members of P.R.O. Plaintiff Smolak owns a Winchester, semiautomatic, center fire hunting rifle which accepts a detachable magazine. The magazine holds only four rounds. The complaint alleges that this is the only magazine ever produced for this rifle and that Smolak has never possessed or seen any other magazine that would fit this rifle. According to the complaint, Smolak cannot determine whether his rifle constitutes an "assault weapon" under the City's ordinance. In addition, although Smolak possessed this rifle before 1989, he did not register it pursuant to former section 2323.05, because he did not believe it to be an "assault weapon" under the former ordinance. The complaint alleges that numerous P.R.O. members own rifles similar to Smolak's and are in the same predicament.

FN5. Smolak was also a plaintiff in *Springfield Armory v. City of Columbus*, 29 F.3d 250 (6th Cir.1994).

Plaintiff Walker, meanwhile, owns an M1 carbine, semiautomatic rifle which accepts a detachable magazine. In a sworn affidavit, Walker states that the M1 carbine, as originally manufactured, "had a detachable magazine which held fifteen (15) cartridges. Later, a thirty-round magazine was manufactured, and five (5) round magazines are also available." The complaint alleges that Walker cannot determine whether his rifle, when possessed only with a five or fifteen round magazine, constitutes an "assault weapon" under the current Columbus ordinance.

Finally, the complaint alleges that numerous members of P.R.O., including Plaintiffs Smolak and Walker, own semiautomatic handguns. The complaint avers that these members have no information that these handguns are modifications or were originally designed from the types of firearms described in section 2323.11(G)(3). However, members have no means of determining the design history of these handguns and thus cannot determine whether they are, in fact, "assault weapons."

Based on the foregoing allegations, we are satisfied that Plaintiffs have standing to bring this action and that this case is ripe for a decision on the merits. It is clear from the complaint the predicament that Smolak and Walker, as well as other members of P.R.O., face. Smolak and Walker possessed their weapons before 1989 but failed to register them. Smolak and Walker contend that, since the former ordinance which purported to define "assault weapons" was unconstitutionally vague, they were not on notice that they should have registered their lawfully possessed firearms. [FN6] Nevertheless, current section 2323.31 contains no provision for theregistration of firearms which were lawfully possessed before 1989 but which were not ***529** registered under former section 2323.05. As a result, Plaintiffs Smolak, Walker, and other P.R.O. members who are similarly situated face a clear Hobson's choice. They can either possess their firearms in Columbus and risk prosecution under the City's law, or, alternatively, they can store their weapons outside the City, depriving themselves of the use and possession of the weapons. The City clearly states in its answer that it fully intends to prosecute anyone who violates the provisions of the ordinance.

FN6. The complaint also alleges that, since the current definition of "assault weapon" is far broader than the previous one, Plaintiffs whose firearms currently are, but previously were not, "assault weapons" had no opportunity to register the weapons in 1989.

[11] In the district court, the City argued that this matter was not justiciable, because Plaintiffs did not allege that they have been charged with a criminal violation of the ordinance, nor had P.R.O. made any claim that it was being prosecuted in some manner. This position is contrary to well- settled law and utterly inconsistent with the policies underlying the Declaratory Judgment Act. As the Supreme Court explained in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967):

> To require them [the petitioners] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

*Abbott Labs.*, 387 U.S. 136, 153, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

Our recent decision in *Magaw* is not to the contrary. *Magaw* involved a pre-enforcement challenge to the constitutionality of Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 (1994) (the "Crime Control Act"), which prohibited for a period of ten years the manufacture, transfer, or possession of semiautomatic weapons and the transfer or possession of large capacity ammunition feeding devices. 18 U.S.C. § 922(v)(1), (w)(1). We divided the plaintiffs in that case into three groups, because each group presented different concerns with respect to the requirements for standing and ripeness. The first group consisted of manufacturers and dealers of firearms. We found that this group had standing to challenge the constitutionality of the Crime Control Act and that its Commerce Clause and equal protection challenges were ripe for judicial review. *Magaw*, 132 F.3d at 295. [FN7] These manufacturers and dealers had alleged in their complaint that passage of the Crime Control Act has had a significant impact on the way they conduct their businesses and that compliance with this legislation causes them immediate economic harm. *Id.* at 281. We concluded that "the federal court is not asked to decide a case involving conjectural or hypothetical injury, but one that creates substantial economic hardship, which is direct and immediate, and will be compounded by a refusal of the court to intervene prior to enforcement of the statute." *Id.* at 287.

> FN7. However, we also found that the group's vagueness challenges to the Act were unfit for review. *Magaw*, 132 F.3d at 291-93; *see infra* at p. 530.

We held that the remaining two groups of plaintiffs--the individual plaintiffs and the nonprofit gun rights associations--lacked standing to challenge the Crime Control Act. We determined that the individual plaintiffs had failed to demonstrate a cognizable injury-in-fact sufficient to confer standing prior to actual enforcement of the Act against them. *Id.* at 293. We explained that " '[t]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III.' " *Id.* (quoting *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir.1983)).

The individual plaintiffs in *Magaw* alleged merely "that they 'desire' and 'wish' to engage in certain possibly prohibited activities, but are 'restrained' and 'inhibited' from doing so." *Id.* These plaintiffs contended that they were unable and unwilling, given the serious penalties involved, to obtain firearms and large capacity ammunition feeding devices ***530** prohibited under the statute. *Id.* [FN8] Hence, we concluded:

> FN8. Unlike the Columbus ordinance at issue here, the Crime Control Act contains a grandfather provision which permits the possession or transfer of *all* semiautomatic assault weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of enactment. 18 U.S.C. § 922(v)(2), (w)(2).

> Plaintiffs' allegations of fear of prosecution, which thwarts their desire to possess or transfer prohibited products, affects not only the named plaintiffs, but also anyone desiring to possess the products proscribed by the Crime Control Act. The Supreme Court has refrained from adjudicating "generalized grievances," pervasively shared. *Valley Forge Christian College [v. Americans United for Separation of Church & State, Inc.]*, 454 U.S. [464], 474- 75, 102 S.Ct. [752], 759-60 [70 L.Ed.2d 700 (1982)]. The individual plaintiffs' alleged harm amounts to no more than a " 'generalized grievance' shared in substantially equal measure by ... a large class of citizens," and thus does not warrant the exercise of jurisdiction. *Warth v. Seldin*, 422 U.S. [490], 499, 95 S.Ct. [2197], 2205 [45 L.Ed.2d 343 (1975)].

*Id.* at 294.

In the present case, in contrast, Plaintiffs Smolak and Walker and other similarly situated members of P.R.O. are "put ... in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Labs.*, 387 U.S. at 152, 87 S.Ct. 1507. Unlike the federal Crime Control Act, the Columbus ordinance contains an extremely narrow grandfather provision that Plaintiffs Smolak and Walker, as well as other P.R.O. members, have not utilized. Consequently, they risk prosecution and possible imprisonment if they possess their weapons within Columbus, as the City has assured us that it will prosecute those who violate its assault weapons ban. "[W]e believe a citizen should be allowed to prefer 'official adjudication to public disobedience.' " *Magaw*, 132 F.3d at 287 (quoting 13A, Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3532.5, at 183-84 (2d ed.1984)).

Finally, we recognize that *Magaw* held that the void-for-vagueness challenges of the manufacturers and dealers were not currently fit for judicial resolution. *See id.* at 291-92. The Crime Control Act at issue in *Magaw* delegated authority to the Secretary of the Treasury to make rules designating in greater specificity the requirements of the statute, and we found the plaintiffs' vagueness challenges to be premature due to the lack of any final agency action. *Id.* at 293. We explained that "a federal court should not intervene and determine whether a statute enacted by Congress is unconstitutionally vague on its face before the agency with rulemaking authority has had an opportunity to interpret the statute." *Id.*

*Magaw* does not affect our determination in this case that all of Plaintiffs' challenges to the Columbus ordinance (including the vagueness claims) are currently fit for review. In *Magaw*, we expressly distinguished our decision in *Springfield Armory* which had reached the merits of the plaintiffs' vagueness challenges to Columbus's previous assault weapons ordinance. [FN9] We noted in *Magaw* that the *Springfield Armory* "court was reviewing a city ordinance, not a federal statute enacted by Congress, and did not have to consider whether there had been 'final agency action' in regard to an interpretation of the provision alleged to be vague." *Id.* at 292. Like the City's prior assault weapons ordinance, the current law is not subject to any type of clarifying interpretation by a local administrative agency. Rather, the words of the ordinance provide the sole source of guidance for firearms' owners. Therefore, we conclude that Plaintiffs' vagueness challenges are fit for review.

FN9. We pointed out in *Magaw* that our opinion in *Springfield Armory* did not address the issue of justiciability. *See Magaw*, 132 F.3d at 292.

C.

For the above reasons, we hold that the district court correctly found that this matter presents a justiciable controversy under Article III. Plaintiffs Smolak and Walker have ***531** shown the significant possibility of future harm which is necessary to establish standing in a declaratory judgment action, *see Magaw*, 132 F.3d at 279, and Plaintiff P.R.O. has shown that it has associational standing in this case, *see Hunt*, 432 U.S. at 343, 97 S.Ct. 2434. In addition, the matter is currently ripe for judicial review. Plaintiffs Smolak and Walker have demonstrated the requisite hardship they and other similarly situated members of P.R.O. will suffer if judicial review is denied at the pre-enforcement stage, the likelihood that the harm alleged will come to pass, and the fitness of the issues raised for judicial review. *Magaw*, 132 F.3d at 284; *United Steelworkers*, 860 F.2d at 194-95.

We now proceed to consider the merits of Plaintiffs' claims. Plaintiffs challenge the grandfather provisions on equal protection grounds and the assault weapon prohibitions on vagueness grounds.

II.

As noted, there are two grandfather provisions at issue in this case. The district court upheld both provisions. We shall address each one in turn.

[12] The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction, the equal protection of the laws." In *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), the Supreme Court explained that "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." If legislation does not burden a fundamental right or target a suspect classification, it will withstand constitutional scrutiny so long as it bears a rational relationship to a legitimate state interest. *Vacco v. Quill*, 521 U.S. 793, ----, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997); *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

A.

[13] Section 2323.31(B)(3) contains an exception to the prohibition on assault weapons in section 2323.31(A). Section 2323.31(B)(3) exempts from prosecution "any person who lawfully possessed an assault weapon and who registered that assault weapon pursuant to former Columbus City Codes Section 2323.05 in 1989." Plaintiffs argue that "[t]his creates an irrational discrimination against plaintiffs and in favor of persons who did register their firearms because they speculated that their firearms were assault weapons ... capable of registration under the 1989 definitions."

The City contends that the objective of the provision is to protect the ownership interests of those persons who possessed proscribed weapons prior to Columbus's attempt to ban assault weapons in 1989. To be sure, the governmental interest at stake here is clearly legitimate. As the Seventh Circuit has explained:

"Governments enact laws which invite citizens to invest their money and time and to arrange their affairs in reliance upon those laws. Laws are not immutable, but we can see no reason to prohibit governments from protecting the interests of those who rely upon prior law." *Sklar v. Byrne*, 727 F.2d 633, 641-42 (7th Cir.1984). [FN10]

FN10. The Supreme Court has approved the legitimacy of reliance interests. *See City of New Orleans v. Dukes*, 427 U.S. 297, 305, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (upholding a grandfather clause which protected established businesses and eliminated newer competition).

The difficulty arises, however, in assessing whether the grandfather clause bears a rational relationship to this legitimate governmental interest. The benefits of this grandfather clause are available only to those persons who have registered their firearms as assault weapons under former section 2323.05. Section 2323.05 provided that "[a]ny person who lawfully possesses an assault weapon prior to October 31, 1989 shall register that firearm ... between November 1, 1989 and November 30, 1989." The problem is, of course, that our circuit found Columbus's former ordinance to be unconstitutionally vague on its face. *See Springfield Armory*, 29 F.3d at 251. Indeed, we concluded that "the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the ***532** sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* at 252. Thus, the City's grandfather provision is predicated upon an ordinance that we previously invalidated, precisely because it failed to place firearms' owners on notice as to whether or not their firearms were "assault weapons." Hence, it necessarily follows that firearms' owners were not given sufficient notice under the former ordinance of the need to register their weapons. This is to say nothing of the fact that the challenged ordinance is broader than its predecessor and presumably encompasses firearms which were not included under the prior law. These owners obviously would have had no reason to register their weapons in 1989. [FN11]

FN11. On the basis of the City's answers to interrogatories, we note that 119 individuals registered assault weapons in 1989. The answers indicate that "there were no specific regulations adopted by the Director of Public Safety," and "no weapons were refused the opportunity to be registered." Of course, our analysis is not affected by the fact that the City's director registered every weapon presented regardless of whether he believed it fell within the purview of the ordinance. It is the terms of the ordinance, rather than an unwritten policy, that controls.

Rational basis review, while deferential, is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). In *Evans*, the Supreme Court explained: "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." *Evans*, 517 U.S. at 632, 116 S.Ct. 1620. The rational basis test requires the court to ensure that the government has employed rational means to further its legitimate interest. *Quill*, 521 U.S. at ----, 117 S.Ct. at 2297. The grandfather provision at issue here "fails, indeed defies, even this conventional inquiry." *Evans*, 517 U.S. at 632, 116 S.Ct. 1620. There simply exists no rational distinction between the individual plaintiffs in this case and those persons who registered their firearms during a thirty day window in 1989 on the basis of little more than a hunch that their firearms might constitute "assault weapons" under the City's unconstitutionally vague ordinance. *See Quill*, 521 U.S. at ----, 117 S.Ct. at 2297 (the Equal Protection Clause "embodies a general rule that States must treat like cases alike"). Therefore, we hold that section 2323.31(B)(3) violates the Equal Protection Clause and is unconstitutional. [FN12]

FN12. In contrast, we note that the grandfather provision in the federal Crime Control Act permits the possession or transfer of all semiautomatic assault weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of the statute's enactment. *See* 18 U.S.C. § 922(v)(2), (w)(2). However, we do not suggest that only blanket provisions, such as those in the Crime Control Act, will pass constitutional muster.

**B.**

[14] The second grandfather provision exempts any large capacity magazine

> which belongs to a firearm or which is possessed by the owner of a firearm which is registered with federal authorities under the National Firearms Act (26 U.S.C.A. Secs. 5801-5871), or if the large capacity magazine belongs to or is part of an assault weapon which has been registered under Section 2323.05(C) or has been rendered totally inoperable or inert and the firearm cannot be readily rendered operable or activated and which is kept as a trophy, souvenir, curio or museum piece.

C.C.C. § 2323.32(B)(3). Of course, to the extent this provision grants an exemption "if the large capacity magazine belongs to or is part of an assault weapon which has been registered under Section 2323.05," it is invalid for the reasons stated in Part II-A of our opinion. With respect to the remainder of the provision, Plaintiffs contend that it allows individuals who have *any* firearm registered with federal authorities to possess an infinite number of magazines, even if those magazines are not designed for the registered weapon. According to Plaintiffs, this irrationality discriminates against individuals who have no firearms registered with the Federal Government. We disagree.

***533** [15] Individuals who have registered firearms with the Federal Government legitimately expect that they are entitled to the possession and use of those firearms, as well as any related components. In our view, the City could rationally choose to protect these reliance interests through the use of a grandfather provision like the instant one. Legislation generally is presumed constitutional despite the fact that, in practice, it may result in some inequality. *Nordlinger*, 505 U.S. at 10, 112 S.Ct. 2326; *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). This presumption is clearly warranted here, as the City has not drawn a distinction along any constitutionally suspect (e.g. racial or religious) lines. Rather, the City has reserved the benefits of its grandfather provision, in part, for those individuals who have a firearm registered with the Federal Government. This is perfectly acceptable. Thus, we concludethat section 2323.32(B)(2), with the exception of the clause which conditions exemption upon registration under the former ordinance, satisfies the requirements of the Equal Protection Clause and passes constitutional muster.

Having decided the equal protection challenges to the City's two grandfather provisions, we now turn to Plaintiffs' vagueness challenges to the definitions of "assault weapon" in section 2323.11(G). We begin with a discussion of the governing legal principles.

## III.
## A.

[16] It is a fundamental component of due process that a law is void-for- vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The Supreme Court has explained that vague laws offend several important values:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

*Id.* (footnotes omitted); *accord Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir.1997), *cert. denied*, 523 U.S. 1036, 118 S.Ct. 1347, 140 L.Ed.2d 496 (1998); *Springfield Armory*, 29 F.3d at 251.

[17] In *Springfield Armory*, this circuit noted that "[a]t times the [Supreme] Court has suggested that a statute that does not run the risk of chilling constitutional freedoms is void on its face only if it is impermissibly vague in all its applications, ... but at other times it has suggested that a criminal statute may be facially invalid even if it has some conceivable application." *Springfield Armory*, 29 F.3d at 251-52 (citing *Kolender v. Lawson*, 461 U.S. 352, 358-59 n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); and *Colautti v. Franklin*, 439 U.S. 379, 394-401, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). "We therefore must keep in mind that '[t]he degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment.' " *Women's Medical Professional Corp.*, 130 F.3d at 197 (quoting *Hoffman Estates*, 455 U.S. at 498, 102 S.Ct. 1186). [FN13] When criminal penalties are at stake, for instance, a relatively strict test is warranted. *Hoffman Estates*, 455 U.S. at 498-99, 102 S.Ct. 1186; *Women's Medical Professional Corp.*, 130 F.3d at 197; *Springfield Armory*, 29 F.3d at 252.

FN13. In *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), the Supreme Court stated that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." This concern is not present in this case. Nevertheless, as we made clear in *Springfield Armory*, 29 F.3d at 254, "the question of whether or not a statute impinges on constitutionally-protected activity is but the first inquiry in a court's examination of a statute challenged on vagueness grounds."

***534** [18] We also must consider whether the statute contains a scienter requirement or imposes strict liability. *Hoffman Estates*, 455 U.S. at 499, 102 S.Ct. 1186. Indeed, "[i]n the absence of a scienter requirement ... [a] statute is little more than 'a trap for those who act in good faith.' " *Colautti*, 439 U.S. at 395, 99 S.Ct. 675 (quoting *United States v. Ragen*, 314 U.S. 513, 524, 62 S.Ct. 374, 86 L.Ed. 383 (1942)). Section 2323.31(A) provides that "[n]o person shall sell, offer or display for sale, give, lend or transfer ownership of, acquire or possess any assault weapon." This provision clearly does not contain an explicit scienter requirement. Nevertheless, the City now relies, for the first time on appeal, upon a default scienter provision in section 2301.21(B). This provision provides:

> When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in such section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

C.C.C. § 2301.21(B). Section 2301.22 defines culpable mental states and provides, in relevant part:

> A person acts recklessly when with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

*Id.* § 2301.22(C). The City contends that this default rule is applicable here, because section 2323.31(A) neither specifies culpability nor plainly indicates a purpose to impose strict liability. We do not agree.

In our view, section 2323.31(A) "plainly indicates a purpose to impose strict liability." *Id.* § 2301.21(B). Several reasons support our conclusion. First, in 1989, the City enacted former Columbus City Codes sections 2305 and 2306. Section 2305 prohibited individuals from *knowingly* selling or possessing an assault weapon, *see* former C.C.C. § 2305(A)-(B), and section 2306 prohibited them from *knowingly* possessing a large capacity magazine, *see* former C.C.C. § 2306(A). After our decision in *Springfield Armory*, the City enacted section 2323.31(A), which contains no scienter requirement. At the same time, the City retained the scienter requirement for its prohibition on large capacity magazines. *See* C.C.C. § 2323.32(A) (re-codification of former section 2323.06(A)). Assuming the City intended to include a scienter requirement in section 2323.31(A), it presumably would have done so explicitly, as it did in the succeeding section. Indeed, it appears from a review of its ordinances that the City is perfectly capable of including a scienter requirement where one is desired. Compare C.C.C. § 2323.19(A) ("No person, in acquiring, possessing, carrying, or using any dangerous ordnance, shall negligently fail to take proper precautions."), and C.C.C. § 2323.12(A) ("No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon."), with § 2323.15(A) ("No person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance.").

[19] Given the criminal penalties available for violation of section 2323.31(A) and the absence of a scienter requirement, we conclude that a relatively stringent review of the City's assault weapons ban is necessary. [FN14]

FN14. In any event, we note that the application of the default rule would not affect our decision that a relatively strict review of section 2323.31(A) is necessary. "A person acts recklessly when with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." C.C.C. § 2323.22(C). In our view, the application of a recklessness scienter to section 2323.31(A) would not ameliorate the vagueness problems in this ordinance and would appear to be

inconsistent with the City's goal to ban all assault weapons with the exception of those firearms which fall within the City's grandfather's provisions. Indeed, under this vague ordinance, we question whether one could be found to have "perversely disregard[ed] a known risk," *id.*, that he possesses an "assault weapon" merely by virtue of possessing a firearm in the first place.

***535 B.**

Section 2323.11(G) defines "assault weapon" as

(1) any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more;
(2) any semiautomatic shotgun with a magazine capacity of more than six rounds;
(3) any semiautomatic handgun that is:
(a) a modification of a rifle described in division (a)(1), or a modification of an automatic firearms [sic]; or
(b) originally designed to accept a detachable magazine with a capacity of more than 20 rounds.
(4) any firearm which may be restored to an operable assault weapon as defined in divisions (G)(1), (2), or (3) of this section.
(5) any part, or combination of parts, designed or intended to convert a firearm into an assault weapon as defined in divisions (G)(1), (2), or (3) of this section, or any combination of parts from which an assault weapon as defined in (G)(1), (2) or (3) of this section, [sic] may be readily assembled if those parts are in the possession or under the control of the same person.

C.C.C. § 2323.11(G). The district court found the definitions in sections 2323.11(G)(1), (G)(3), (G)(4), and certain portions of (G)(5) to be unconstitutionally vague. The City appeals from this determination, and Plaintiffs cross-appeal with respect to those provisions upheld by the district court. For the reasons set forth below, we find all the definitions to be unconstitutionally vague.

**(1)**

[20] Plaintiffs contend that section 2323.11(G)(1) is unconstitutionally vague, because it fails to provide sufficient information to enable a person of average intelligence to determine whether a particular firearm is included within its prohibition. *See Springfield Armory*, 29 F.3d at 253. In particular, Plaintiffs challenge the phrase "that accepts a detachable magazine with a capacity of 20 rounds or more." Plaintiffs point out that the ordinance is unclear as to which of the following four alternatives is correct: (1) The owner must actually possess a detachable magazine with a twenty round capacity; (2) the weapon, as manufactured and sold, included a twenty round magazine; (3) the owner does not possess a twenty round magazine, but one is commercially available; or (4) a twenty round magazine is unavailable or does not exist, but one would fit the weapon if it existed. The City appears to concede in its brief that the twenty round magazine must exist, as it states that "it would seem next to impossible to ever prove someone guilty of violating the code without having the detachable magazine with a capacity of 20 rounds or more to fit a particular weapon."

The crux of the City's position is that the ordinance contains a scienter requirement, which the City describes as a "knowledge of recklessness" standard. We have already found that the ordinance imposes strict liability. In any event, the contours of the City's alleged scienter requirement are themselves unclear. On the one hand, the City states that: "if you possess any semiautomatic action, center fire rifle or carbine that accepts a detachable magazine with a capacity of twenty rounds and if the person has some knowledge of a magazine which qualifies under the definition then the weapon is an assault weapon." On the other hand, in the same paragraph of its brief, the City also states:

> One does not have to know that somewhere on this planet there may exist a detachable magazine which might fit the weapon in question to make it an assault weapon but one does have to have some knowledge that there exist detachable magazines which fit the weapon in question in order to have violated the ban on assault weapons.

Needless to say, this novel scienter provision would not help to cure the problems inherent in this provision.

As currently written, the provision is little more than a trap for the unwary. The record ***536** indicates that any semiautomatic rifle that accepts a detachable magazine will accept a detachable magazine of any capacity which might exist, as it is the magazine, and not the rifle, that determines capacity. Therefore, anyone who possesses a semiautomatic center fire rifle or carbine that accepts a detachable magazine is subject to prosecution so long as a magazine exists with a capacity of twenty rounds or more. Since the ordinance contains no scienter requirement, an owner's complete lack of knowledge as to the magazine's existence is of no consequence. Plaintiff Smolak is a

perfect example. Smolak states in an affidavit that he owns a hunting rifle that has a detachable magazine with a capacity of four rounds and that he has never possessed or seen any other magazine which would fit his rifle. However, Smolak also states that his rifle would accept a detachable magazine with a capacity of twenty rounds or more if one has ever been manufactured. Under the current ordinance, Smolak presumably would face criminal penalties in the event such a magazine is discovered. Due process demands more than this.

In addition, since the capacity of a detachable magazine is limited only by the availability of a large capacity magazine, all owners of semiautomatic center fire rifles and carbines with detachable magazines are in jeopardy of prosecution if a compatible large capacity magazine is discovered or manufactured. This presumably was not the intention of the Columbus City Council when it passed this ordinance. Indeed, if it had, the City simply could have banned the possession or transfer of any semiautomatic center fire rifle or carbine which accepts a detachable magazine.

In sum, the definition of "assault weapon" in section 2323.11(G)(1) is unconstitutionally vague.

(2)

[21] Section 2323.11(G)(2) defines "assault weapon" to include "any semiautomatic shotgun with a magazine capacity of more than six rounds." The district court upheld this definition, rejecting Plaintiffs' argument that the provision fails to define the length of round to be used in determining whether the weapon's magazine has a capacity of more than six rounds. The court concluded that an owner is warned that a semiautomatic shotgun with a magazine capacity of more than six rounds *of any length* is prohibited. *Peoples Rights Org.*, 925 F.Supp. at 1266. We disagree. Tellingly, the City's sole argument in defense of this provision is the existence of a scienter requirement, a position we have squarely rejected.

Shotgun rounds are available in different lengths. [FN15] Rounds of a short length may cause a shotgun's magazine capacity to exceed six rounds. Conversely, rounds of a longer length (which may be all the owner possesses or is aware of) will result in a capacity that is less than six rounds. This provision is a trap for the unwary. It imposes criminal liability regardless of whether a shotgun owner knows of the existence of shorter length rounds. Hence, we find this definition unconstitutionally vague.

FN15. For instance, the record indicates that 12 gauge shotgun shells are available in the following lengths: 2", 2 1/2 ", 2 3/4", 3", and 3 1/2 ". The drafters of the ordinance apparently recognized that rounds of other types are available in different lengths. *See* C.C.C. § 2323.11(E) ( " 'Automatic firearm' also means any semiautomatic firearm designed or specially adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.").

(3)

[22] Section 2323.11(G)(3) prohibits three classes of semiautomatic handguns. Subsection (G)(3)(a) defines an "assault weapon" as a semiautomatic handgun which is (i) a modification of a rifle described in subsection (G)(1), and (ii) a modification of an automatic firearm. [FN16] Subsection (G)(3)(b) defines an "assault weapon" as a semiautomatic handgun***537** originally designed to accept a detachable magazine with a capacity of more than twenty rounds. The district court held the entire provision invalid. The City did not address this particular provision in its brief.

FN16. Section 2323.11(E) provides:
"Automatic firearm" means any firearm designed or specifically adapted to fire a succession of cartridges with a single function of the trigger. "Automatic firearm" also means any semiautomatic firearm designed or specifically adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.

We agree with the district court that this provision is unconstitutional. The first and third definitions in subsection (G)(3) are, of course, constitutionally infirm for the same reasons that support our conclusion that section 2323.11(G)(1) is unconstitutional. *See supra* at pp. 534-35.

The second definition in section 2323.11(G)(3)(a) bans semiautomatic handguns which are a modification of an automatic firearm. The district court correctly held that the term "modification" is unduly vague. [FN17] This conclusion is consistent with our opinion in *Springfield Armory*, which explained that "[o]rdinary consumers cannot be expected to know the

developmental history of a particular weapon." *Springfield Armory*, 29 F.3d at 253. In that case, we stated:

> FN17. The district court noted, among other things, the affidavit of Plaintiffs' expert witness, which stated, in part:
> A reasonable person has no way to know whether a handgun is a modification of an "automatic firearms." Does this mean that a specific handgun was converted from an automatic firearm into a semiautomatic firearm? Does this mean that a manufacturer produced a type of automatic firearm, and then produced a modified version of it as a handgun?
> *Peoples Rights Org. v. City of Columbus*, 925 F.Supp. 1254, 1267 (S.D.Ohio 1996) (internal quotations omitted).

> Nothing in the ordinance provides sufficient information to enable a person of average intelligence to determine whether a weapon they wish to purchase has a design history of the sort which would bring it within this ordinance's coverage. *See Robertson v. City and County of Denver*, 874 P.2d 325, 335 (Colo.1994) (holding similar provision invalid because "ascertaining the design history and action design of a pistol is not something that can be expected of a person of common intelligence.") The record indicates that the average gun owner knows very little about how his gun operates or its design features.

*Id.* Similarly, the evidence in this case indicates that an average gun owner does not know whether or not his weapon is a modification of another weapon. *See Peoples Rights Org.*, 925 F.Supp. at 1268. The situation is compounded by the absence of a scienter requirement in section 2323.31(A). In short, the definitions of "assault weapon" in section 2323.11(G)(3) are unconstitutionally vague.

(4)

[23] Section 2323.11(G)(4) defines an "assault weapon" as "any firearm which may be restored to an operable assault weapon as defined in divisions (G)(1), (2), or (3) of this section." Since we have found the definitions of assault weapon in subsections (G)(1), (2), and (3) to be unconstitutionally vague, it follows that subsection (G)(4) is equally void- for-vagueness. In addition, like the district court, we find subsection (G)(4) to be unconstitutionally vague in its own right inasmuch as the phrase "may be restored" fails to provide sufficient guidance to a person of average intelligence as to what is prohibited. *See id.* The City contends that "[t]he phrase 'may be' means just what it says. If the weapon 'may be' or is capable of being restored to operate as an assault weapon, then it is an assault weapon. There is nothing confusing about that language." This reasoning begs the question, as the provision provides absolutely no guidance for interpreting the phrase "to be restored." *See id.* ("No standard is provided for what 'may be restored[ ]' [means,] such as may be restored by the person in possession, or may be restored by a master gunsmith using the facilities of a fully-equipped machine shop.") (internal quotations omitted). Therefore, we agree with the district court that the provision, which imposes strict liability, violates the constitutional requirement that a law give fair warning of that which it prohibits.

(5)

[24] Finally, section 2323.11(G)(5) defines an "assault weapon" as

> any part, or combination of parts, designed or intended to convert a firearm into an ***538** assault weapon as defined in divisions (G)(1), (2) or (3) of this section, or any combination of parts from which an assault weapon as defined in divisions (G)(1), (2) or (3) of this section, may be readily assembled if those parts are in the possession or under the control of the same person.

The district court upheld the first portion of this provision to the extent it defines an "assault weapon" to include any part or combination of parts that is designed or intended to convert a firearm into an "assault weapon" as defined in section 2323.11(G)(2). The court declared the remainder of the provision unconstitutionally vague.

Of course, since we have invalidated each of the definitions of "assault weapon" in section 2323.11(G)(1)-(3), it necessarily follows that the entire provision is invalid. Moreover, we agree with the district court for the reasons stated in its opinion that the second portion of subsection (G)(5) is unduly vague in its own right inasmuch as the phrase "may be readily assembled" does not provide sufficient information to enable a person of average intelligence to determine whether a particular combination of parts is within the ordinance's coverage. *See id.* at 1268-69.

For the foregoing reasons, section 2323.31(A) is unconstitutionally vague as applied to each of the definitions of "assault weapon" in section 2323.11(G).

C.

We also reject the City's argument that our decision in *Springfield Armory* necessarily approved of the assault weapons ordinance at issue here. In *Springfield Armory*, we invalidated on vagueness grounds the City's previous ordinance, which defined an "assault weapon" as any one of thirty-four specific rifles, three specific shotguns, nine specific pistols, or "[o]ther models by the same manufacturer with the same action design that have slight modifications or enhancements." *Springfield Armory*, 29 F.3d at 251 (quoting former C.C.C. § 2323.01(I)(4)). We stated in dicta that "[t]hese vagueness problems are not difficult to remedy. The subject matter does allow for more exactness. It is not a case in which greater specificity would interfere with practical administration." *Id.* at 253. We explained that the City had many options available for effectively pursuing its stated goals, and we noted that other gun control laws which seek to prohibit assault weapons provide a general definition of the type of weapon banned. *See id.* (citing Cleveland Ordinance No. 415-89 § 628.02; and H.R. 4296, 103rd Cong., 2d Sess., § 2 (1994)). Columbus points out that Cleveland's ordinance served as the model for the instant one and that the Ohio Supreme Court upheld the validity of Cleveland's ordinance in *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993).

[25][26][27] At the outset, we note that the above dicta from our opinion in *Springfield Armory* was not meant to sanction our approval of any particular piece of legislation, but instead was merely an attempt to illustrate the possibility of using generic definitions. In addition, as the City itself acknowledges, the Ohio Supreme Court in *Arnold* did not consider a vagueness challenge to the ordinance in question. Rather, the state supreme court rejected the argument that Cleveland's ordinance was an overly broad restriction on the plaintiffs' rights under the Ohio Constitution to bear arms and defend themselves, and the court upheld the ordinance as a proper exercise of the police power. *Id.* at 173. This is not inconsistent with our holding today. We agree with the district court that the City's ordinance does not violate the right of Plaintiffs to bear arms under the Ohio Constitution. *See Peoples Rights Org.*, 925 F.Supp. at 1269-70. Moreover, we note that the Federal Constitution does not provide a right to possess an assault weapon. *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729-30 (9th Cir.1992); *see also Stevens v. United States*, 440 F.2d 144, 149 (6th Cir.1971) ("there can be no serious claim to any express constitutional right of an individual to possess a firearm."), *disapproved on other grounds by United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). [FN18] Nevertheless, ***539** it is well established that due process protects our citizens from vague legislation even when that legislation regulates conduct which otherwise does not enjoy constitutional protection. *See Hoffman Estates*, 455 U.S. at 497-99, 102 S.Ct. 1186; *Springfield Armory*, 29 F.3d at 254. It is for this reason-- and not on the basis of any constitutional right to possess an assault weapon-- that the City's ordinance fails. [FN19]

FN18. This circuit has explained that "the Second Amendment guarantees a collective rather than an individual right." *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.1976); *see United States v. Miller*, 307 U.S. 174, 178, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) (the Second Amendment guarantees no right to keep and bear a firearm that does not have "some reasonable relationship to the preservation or efficiency of a well regulated militia"). In any event, we note that the Second Amendment could not apply to this case. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment; hence, the restrictions of the Second Amendment operate only upon the Federal Government. *Presser v. Illinois*, 116 U.S. 252, 264-65, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L.Ed. 588 (1875).

FN19. We also note that section 2 of H.R. 4296, which we cited in *Springfield Armory*, would have banned as "assault weapons" semiautomatic rifles, pistols, and shotguns that can accept magazines of more than five rounds and that have at least two of a number of different listed features. *See Springfield Armory*, 29 F.3d at 253. However, the legislation ultimately enacted bans semiautomatic rifles that have "an ability to attach a detachable magazine" and have at least two of five other specified characteristics. 18 U.S.C. § 921(a)(30)(B); *see Magaw*, 132 F.3d at 277. Thus, the phrase "that can accept magazines of more than five rounds" was deleted.

IV.

For the foregoing reasons, we **AFFIRM** the judgment of the district court upholding the constitutionality of the grandfather provision in Columbus City Codes section 2323.32(B)(2) (with the exception noted in our opinion); and **REVERSE** the court's judgment upholding the constitutionality of the grandfather provision in section 2323.31(B)(3). In addition, we **AFFIRM** the judgment of the district court holding section 2323.31(A) of the Columbus City Codes unconstitutionally vague as it applies to the definitions of "assault weapon" in section 2323.31(G)(1), (G)(3), (G)(4), and the designated portions of (G)(5); and **REVERSE** the court's judgment upholding the constitutionality of section 2323.31(A) as it applies to the definitions of "assault weapon" in section 2323.11(G)(2) and the designated portion of (G)(5). Hence, the district court's judgment is **AFFIRMED IN PART AND REVERSED IN PART.**

MERRITT, Circuit Judge, dissenting.

The City of Columbus has attempted to correct the incoherent provisions in its old gun control law that I said were unconstitutional in *Springfield Armory*, 29 F.3d 250 (6th Cir.1994). No longer does the ordinance simply and irrationally outlaw certain brand named guns, or any modifications thereof, leaving untouched the same type weapons with other brand names. Now the City has used generic definitions. That corrects the main problem I had with the earlier ordinance.

It is true, as the court says, that the new ordinance leaves a lot of questions concerning the scope of the ordinance up in the air. But the Ohio courts could correct most of those problems by imposing a scienter requirement and giving a narrow scope to the "accepts-a-detachable-magazine" provisions for example, by saying that such a magazine must be readily available for purchase. Neither do the grandfather provisions seem unfair to me. They are based on a gun owner's reliance on prior law, a rational distinguishing characteristic.

My main objection to the panel's decision is that I do not believe that the case is ripe for decision. We did not have the ripeness issue before us in *Springfield Armory*. There are some applications of the ordinance that could be unconstitutional, as the panel has noted, but that is true of many laws. I would wait until the statute is applied in an enforcement proceeding before making a judgment. In most of its applications, assuming a scienter requirement is imposed, the ordinance will be valid. The ordinance is therefore not invalid on its face, as was the earlier ordinance. It is clearly possible to narrow enforcement to assault weapons ***540** knowingly possessed. I would wait and see how the law is applied and not try to answer a host of hypothetical questions in a long opinion in a declaratory judgment case. I would wait for a real case. I believe the case law supports the proposition that we should not normally adjudicate void for vagueness claims in pre-enforcement, declaratory judgment actions when the statute is not invalid on its face but only in certain applications. That is what the Supreme Court seems to say in *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), and what our court says in *NRA v. Magaw*, 132 F.3d 272, 293 (6th Cir.1997).

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928 F.2d 697
**(Cite as: 928 F.2d 697)**

United States Court of Appeals,
Fifth Circuit.

SAN JACINTO SAVINGS & LOAN, et al.,
Plaintiffs,
v.
Kathy KACAL, Defendant-Third Party
Plaintiff-Appellant,
v.
Officer Tommy HALE and City of Waxahachie,
Texas, Third Party Defendants-
Appellees.

**No. 90-1572**
**Summary Calendar.**

April 15, 1991.

Landlord brought suit against tenant which operated an arcade and soda fountain business for breach of lease. Tenant asserted third-party claim against city and city police officer asserting civil rights claim under § 1983. Tenant alleged that city, acting under color of state law through its police department, unconstitutionally deprived her of property rights to her business profits and of her liberty to operate the business. After removal, the United States District Court for the Northern District of Texas, William F. Sanderson, Sr., United States Magistrate Judge, entered summary judgment in favor of third-party defendants, and tenant appealed. The Court of Appeals held that: (1) evidence of police harassment of business patrons raised genuine issue of material fact whether city and police officers sought to remove or significantly alter tenant's property and liberty interests in operating business, precluding summary judgment, and (2) defendant had no standing to assert Fourth Amendment rights of business patrons who might have been subjected to searches or seizures while on business premises.

Affirmed in part; reversed in part and remanded.

West Headnotes

[1] **Civil Rights** 193
78k193 Most Cited Cases

Section 1983 affords redress against a person who under color of state law deprives another person of any federal constitutional or statutory right; statute does not create substantive rights, but merely provides a remedy for deprivations of rights established elsewhere. 42 U.S.C.A. § 1983.

[2] **Civil Rights** 192
78k192 Most Cited Cases

To bring an action within purview of § 1983, claimant must first identify a protected life, liberty, or property interest, and then prove that government action resulted in a deprivation of that interest. 42 U.S.C.A. § 1983.

[3] **Civil Rights** 112
78k112 Most Cited Cases

Section 1983 does not provide a right to be free of injury whenever a government actor may be characterized as a tort-feasor. 42 U.S.C.A. § 1983.

[4] **Civil Rights** 115
78k115 Most Cited Cases

To establish a § 1983 claim based on injury to reputation, plaintiff must show a stigma plus an infringement of some other interest; to fulfill stigma aspect of test, plaintiff must prove that the stigma was caused by false communication; to establish "infringement" portion of test, plaintiff must establish that the state sought to remove or significantly alter a life, liberty or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been "incorporated." 42 U.S.C.A. § 1983.

[5] **Federal Civil Procedure** 2491.5
170Ak2491.5 Most Cited Cases

Evidence that city police officers repeatedly harassed patrons of soda fountain and arcade business, threatened to arrest patrons if they did not leave premises, prevented patrons from entering business parking lot, and stopped at least one vehicle en route to business telling its occupants they had to turn car around, was sufficient to raise genuine issue of material fact whether city and city police officers sought to remove or significantly alter plaintiff's property and liberty interests in operating her business, precluding summary judgment in § 1983 suit. 42 U.S.C.A. § 1983.

[6] **Searches and Seizures** ⚿161
349k161 Most Cited Cases

Right to be free from unreasonable searches and seizures is a personal right which cannot be asserted vicariously. U.S.C.A. Const.Amend. 4.

[7] **Searches and Seizures** ⚿164
349k164 Most Cited Cases

Owner of business had no standing to assert Fourth Amendment rights of third parties that might have been subjected to searches or seizures while on business premises. U.S.C.A. Const.Amend. 4.

***698** Lawrence D. Sharp, Dallas, Tex., for defendant-third party plaintiff-appellant.

Robert E. Luxeu, Craig B. Florence, Gardere & Wynne, Cole Halliburton, Dallas, Tex., for third party defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

***699** Before JOHNSON, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

The original plaintiff, San Jacinto Savings and Loan, [FN1] initiated this action by filing suit against Kathy Kacal, Defendant/Third-Party Plaintiff-Appellant (Kacal), in Texas state court for breach of a lease. Kacal asserted a third-party claim against the City of Waxahachie, Texas (the City) and a city police officer, Tommy Hale (Hale), collectively, the Third- Party Defendants-Appellees, for violation of 42 U.S.C. § 1983, the fourth, fifth, and fourteenth amendments of the United States Constitution, and the Texas Tort Claims Act. Hale and the City removed the case to the United States District Court for the Northern District of Texas. After removal, the trial court assigned this case to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) for all further proceedings. The Magistrate Judge [FN2] entered a Rule 54(b) judgment dismissing all of Kacal's federal law claims against Hale and the City and remanding to state court the remaining state law claims. Kacal timely appealed challenging the dismissal of her federal claims.

FN1. San Jacinto Savings and Loan is not a party to this appeal.

FN2. Hereinafter referred to as the district court.

## I.
## BACKGROUND

In September 1987, Kacal opened an arcade and soda fountain named "Visions" in Waxahachie, Texas. In general, Visions catered to minors. Because of greatly declined patronage and income, Kacal closed Visions fourteen months later. When the landlord, San Jacinto Savings and Loan, sued for nonpayment of rent on the Visions lease, Kacal responded by bringing a third-party action against the City and Hale on the ground that the decline in patronage and income was a direct result of their tortious and wrongful acts. In addition to state law claims under the Texas Tort Claims Act, Kacal pled an action under 42 U.S.C. § 1983 alleging that, acting under color of state law, the City through its police department unconstitutionally deprived her of property rights to her soda fountain business profits and of her liberty to operate the business. In her complaint, Kacal alleged that (1) the City's police officers implemented a plan to shut down Visions; (2) the plan included a campaign to harass customers with the specific intent to discourage patronage; (3) one officer, Hale, defamed Kacal before a public gathering, as part of the plan, by falsely suggesting that illegal drug activity was rife at Visions and that Kacal condoned such activity; (4) the plan was implemented by officers who were acting as agents of the City and of the State of Texas under color of state law; and (5) the plan was implemented as a municipal policy or custom, or with direct or ratified authority, or by recklessly hiring unfit persons.

For purposes of summary judgment, Kacal produced evidence that one of the Waxahachie police officers had said that the police needed to do something to shut down Visions. Kacal's own affidavit said that in 1987, Officer Hale had told her "[y]ou will be lucky to stay open six months; Waxahachie has never let a business like that stay open." That affidavit also asserted that it was known in Waxahachie that the police would shut down any new business that caters to teenagers, that an arcade called "Galaxie" had been forced to close under similar circumstances some years earlier, and that, while Visions was open, Waxahachie police officers had forced some of the customers en route to Visions to turn their cars around and leave. Kacal also produced several written statements by former patrons

and employees saying that they had never seen any drug activity or underage drinking at Visions, but that the Waxahachie police had, nevertheless, harassed customers. For example, in one written statement submitted as summary judgment evidence, a former patron said that his car, glove box, console, trunk, and person had been searched. He said that he "was told on several occasions to leave and not to ***700** return for any reason ever again," and that on one occasion, he and several friends were told to leave or be arrested on several separate charges. Another former patron wrote that he had witnessed Waxahachie police officers "not letting people on the parking lot leading to Visions."

The City and Hale moved for summary judgment on both the federal and the state claims. Finding that Kacal failed to produce any evidence that the City or Hale placed any legal barriers on her pursuit of business ventures, the district court ruled that, even if Kacal's allegations and summary judgment evidence are assumed to be true, the actions of the City and Hale were "insufficient to rise to the level of a constitutional deprivation." The court reasoned that Kacal remained free at all times to pursue her business and that she has not been prohibited from reopening Visions or any other business venture. The district court also granted the City's and Hale's motion for summary judgment on Kacal's fourth amendment claims, finding that Kacal had no standing to assert the fourth amendment rights of others. Because the district court dismissed all of Kacal's federal claims, it declined to exercise pendent jurisdiction over the remaining state law claims, remanding them to state court. Kacal timely appealed.

## II.
## DISCUSSION

### *A. Standard of Review*

This court reviews the grant of a summary judgment motion de novo, using the same criteria used by the district court in the first instance. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." *Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc.*, 804 F.2d 879, 881 (5th Cir.1986) (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 873 (5th Cir.1984)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." *Id.*

### *B. Section 1983*

[1][2][3] Section 1983 affords redress against a person who under color of state law deprives another person of any federal constitutional or statutory right. *Thibodeaux v. Bordelon*, 740 F.2d 329 (5th Cir.1984); *Phillips v. Vandygriff*, 711 F.2d 1217, 1221 (5th Cir.1983), *cert. denied*, 469 U.S. 821, 105 S.Ct. 94, 83 L.Ed.2d 40 (1984). Section 1983 does not create substantive rights; rather, it merely provides a remedy for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S.Ct. 2427, 2432, 85 L.Ed.2d 791 (1985). To bring an action within the purview of section 1983, a claimant must first identify a protected life, liberty, or property interest, and then prove that government action resulted in a deprivation of that interest. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979); *Mahone v. Addicks Utility Dist.*, 836 F.2d 921 (5th Cir.1988); *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir.1984). Section 1983 does not, however, provide a right to be free of injury whenever a government actor may be characterized as a tortfeasor. *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976).

In this case, the parties focus on whether Hale or the City violated Kacal's liberty and property interest in her business by allegedly defaming her and harassing her customers. In *Paul*, the Supreme Court said that there was no "constitutional doctrine converting every defamation by a public official into a deprivation of liberty ***701** within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Id.* at 702, 96 S.Ct. at 1161. The Court held that "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' nor 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701, 96 S.Ct. at 1161.

Section 1983 does, however, protect against the deprivation of a property interest "whenever the State seeks [FN3] to remove or significantly alter" the status of liberty or property interests recognized by state law. [FN4] *See id.* at 710-11, 96 S.Ct. at 1164-65. Additionally, "[t]here are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has

been 'incorporated' into the Fourteenth Amendment. Section 1983 makes a deprivation of such rights actionable independently of state law." *Id.* at 710 n. 5, 96 S.Ct. at 1165 n. 5 (citing *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)).

> FN3. In interpreting *Paul v. Davis*, the Seventh Circuit read *Paul* as "mak[ing] clear that to find the deprivation of a property interest [a claimant's] legal rights or status must have been removed or significantly altered." *Goulding v. Feinglass*, 811 F.2d 1099, 1102 (7th Cir.) (citing *Paul*, 424 U.S. at 710-11, 96 S.Ct. at 1164-65), *cert. denied*, 482 U.S. 929, 107 S.Ct. 3215, 96 L.Ed.2d 701 (1987).

> FN4. Violation of a state statute is not actionable under § 1983. *See Jones v. Diamond*, 594 F.2d 997, 1011 (5th Cir.1979). To determine whether a protectable property interest exists, however, the court must turn to state law. *Malcak v. Westchester Park Dist.*, 754 F.2d 239, 242 (7th Cir.1985).
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
> *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

*Paul* clarified the meaning of the Court's previous pronouncement, *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), on the relationship between reputation injuries and section 1983 claims. In *Constantineau*, the state of Wisconsin enacted a statute that empowered a sheriff to post notice prohibiting the sale of intoxicants to a person who was subject to specified conditions, such as being "dangerous to the peace." *Id.* at 434, 91 S.Ct. at 508. Pursuant to that statute, a Wisconsin sheriff then posted such a notice prohibiting the sale of intoxicants to Constantineau. The Supreme Court held that the statute violated the due process clause because it deprived Constantineau of a right previously held under state law--the right to purchase or obtain liquor--without notice or an opportunity to be heard. *See id.* at 437, 91 S.Ct. at 510 ("Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). " 'Posting,' therefore, significantly altered [Constantineau's] status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." *Paul*, 424 U.S. at 708-09, 96 S.Ct. at 1164.

[4] This circuit has consistently applied *Paul* by requiring that a section 1983 claimant show a stigma *plus* an infringement of some other interest. *See, e.g., Connelly v. Comptroller of the Currency*, 876 F.2d 1209, 1215 (5th Cir.1989); *Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir.1988); *Vandygriff*, 711 F.2d at 1221. To fulfill the stigma aspect of the equation, a claimant must "prove that the stigma was caused by a false communication." *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). This Court has found sufficient "stigma" only in concrete, false factual representations or assertions, by a state actor, of wrongdoing on the part of the claimant. *See Connelly*, 876 F.2d at 1215. To establish the "infringement" portion of the "stigma plus infringement" test, a claimant must establish that the state sought to remove or significantly alter a life, liberty, or property interest recognized ***702** and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been "incorporated." *See Paul*, 424 U.S. at 710-11 & n. 5, 96 S.Ct. at 1164-65 & n. 5.

[5] The City and Hale argue that Kacal failed to produce any summary judgment evidence to suggest that Hale or any City official made a false communication. The record contains evidence that the police officers of the City communicated that drugs were being bought and sold in the parking lot of Visions. Hale, in his affidavit, admits that he made a speech to his church congregation in which he said that on a typical Friday night, teenagers use narcotics and drink beer in the parking lot of Visions. Kacal, on the other hand, submitted several written statements by former employees and patrons all indicating that they had never seen drug or alcohol consumption at or near Visions.

Kacal also asserts that Hale's speech communicated that Kacal condoned the alleged drug and alcohol incidents. Although the district court did not reach this issue because it assumed, arguendo, that the allegations in Kacal's complaint were true, the record contains sufficient evidence to raise a genuine issue of material fact as to whether *widespread* drug and alcohol activity actually occurred on a *regular basis* at

or near Visions. The record does not contain, however, any evidence that the City or Hale made a concrete assertion that Kacal condoned the alleged alcohol and drug activity.

The City and Hale also argue that Kacal failed to establish that the state had deprived her of a right or benefit previously conferred by state law or guaranteed by one of the "incorporated" provisions of the Bill of Rights. But clearly, Kacal has asserted that the fifth and fourteenth amendments include the right to have property and the benefits from it, as well as the liberty to operate a legitimate business, free from arbitrary deprivation by local police acting under the color of state law. *See Vandygriff,* 711 F.2d at 1222 ("It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the freedom and opportunity that it was the purpose of the [fourteenth] Amendment to secure."), *clarified on rehearing,* 724 F.2d 490 (5th Cir.1983), *cert. denied,* 469 U.S. 821, 105 S.Ct. 94, 83 L.Ed.2d 40 (1984).

In efforts to refute Kacal's position, the district court, the City, and Hale rely heavily on the Seventh Circuit's opinion in *Goulding v. Feinglass,* 811 F.2d 1099 (7th Cir.), *cert. denied,* 482 U.S. 929, 107 S.Ct. 3215, 96 L.Ed.2d 701 (1987). In *Goulding,* the plaintiff alleged that Internal Revenue Service employees violated his constitutional rights by conspiring to destroy his tax law practice. The plaintiff also alleged that the defendants harassed and threatened him, and made defamatory statements about him to his clients, causing him to lose business. Noting that "the infliction by the government of a stigma on one's reputation, without more, does not infringe upon a liberty interest protected by the Constitution's due process safeguards," the Seventh Circuit held that the plaintiff's legal rights or status had not been altered because the plaintiff was still licensed to practice law and remained free to pursue his law practice. *Id.* at 1103.

Seeking to analogize the facts of the instant case to the facts of the *Goulding,* the City and Hale argue that Kacal cannot show that a legal right or status has been removed or significantly altered. They point out that Kacal remained free to pursue her business just as the plaintiff in *Goulding* remained free to practice law. In rejecting Kacal's section 1983 claim, the district court reasoned that because Kacal's business was not condemned, because she had not lost her operating license, because the City had not restricted her right to do business in the past, present, or future, and because Hale's remarks did not prohibit the public from patronizing Visions, the City had not deprived her of her continuing right to do business. [FN5]

> FN5. The City and Hale argue that Kacal is free to start her business again, so she has not been deprived of a protected right. But surely the law is not so perverse as to require that Kacal attempt to start her business anew in some other location when the future actions of the police are so predictable based upon their past action in this and other instances.

***703** We find this case factually distinguishable from *Goulding,* on which the district court, the City, and Hale rely. In this case, Kacal introduced summary judgment evidence indicating that the Waxahachie police repeatedly harassed Kacal's patrons at her place of business, [FN6] threatened to arrest patrons if they did not leave, prevented patrons from entering the Visions parking lot, and stopped at least one vehicle en route to Visions telling its occupants that they had to turn the car around. In *Goulding,* there is no indication that the IRS agents harassed the attorney's clients, nor any indication that the agents went to the attorney's office and physically blocked the entrance, or that they threatened to initiate audits or file charges on the clients who refused to discontinue retaining Goulding.

> FN6. It appears from the record that Visions was located in a building that had its own contiguous parking lot, so the defendants' actions in or on the parking lot were just as much at Kacal's place of business as they would have been if conducted within the four walls of the establishment.

The *Goulding* case is distinguishable for another reason. That case held that the government had not significantly altered or deprived the attorney of his liberty interest in practicing law or his property interests in the profits therefrom, because he was still able to practice law even if the government had caused him to lose some clients. In this case, there is evidence that the comprehensive, concerted actions of the police caused Kacal to lose so much of her business that she had to close her doors and default on her lease. There is a substantial difference between the actions of the governmental agents in *Goulding,* who only communicated remotely with sophisticated adults regarding the professional ability of a lawyer, and the actions of the uniformed Waxahachie police in marked

patrol cars confronting impressionable teenagers face to face and making remarks in the nature of authoritative commands at or immediately adjacent to Kacal's place of business. Another important distinction lies in the differences in the relationship of business to premises. A tax attorney conducts much of his business by mail and by telephone so that his office location may only be of secondary importance; Visions, on the other hand, was a retail entertainment business, so that the location and nature of the premises, and access to it, were of primary importance. Comfortable, and even inviting, ingress and egress, free of hassle and harassment, are key ingredients to the success of businesses such as Kacal's.

Relying on *Wade v. Goodwin,* 843 F.2d 1150 (8th Cir.), *cert. denied,* 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988), the City and Hale also argue that Kacal's section 1983 claim was properly dismissed because the decline in patronage resulted from the choices made by private citizens. In *Wade,* the state police director compiled a list of persons who posed threats to law enforcement personnel. Members of the news media filed a Freedom of Information Act request for the list. After the state police director released the list to the media, several state and local newspapers published it. *Id.* at 1151. The list included the plaintiff's name. The plaintiff filed a section 1983 action alleging that his reputation had been harmed and that, as a result of that harm, he would be unable to obtain future employment or credit. *Id.* at 1152. The Eighth Circuit held that the plaintiff's alleged inability to make a living did not implicate any action by the state beyond the alleged defamatory remarks: "Any such injury could arise only through the acts of private individuals as a result of [the plaintiff's] claimed reputational impairment." *Id.*

The City's reliance on *Wade* is misplaced. In this case, the record contains summary judgment evidence demonstrating that neither the alleged defamation alone nor the free choice of private citizens caused Kacal's decline in patronage. Instead, the record contains evidence that the police officers' continual harassment of Kacal's ***704** young and easily intimidated patrons caused the decline in patronage.

The City and Hale also urge that Kacal's interest in the profits [FN7] of her business does not rise to the level of a protectible property interest because the anticipated profits were too speculative in nature and because there is no constitutionally guaranteed interest or state conferred right to anticipated or desired profits. Again, we disagree. Kacal's property interest in her business is essentially her interest in the lost profits, which are sought merely as the measure of damages in this action. Kacal's property interest in the profits of her business and her liberty interest in operating her business do rise to the level of protectible interests. *See Vandygriff,* 711 F.2d at 1222.

> FN7. The City and Hale suggest that Kacal seeks to recover damages from loss of employment as an employee of Visions, and that as an employee, she has no protectible property interest in continued employment. Clearly, Kacal seeks compensatory damages from the loss of profit to her business, and thus, we do not address whether Kacal had a protectible property interest in continued employment as an employee of Visions.

The City's and Hale's emphasis on the alleged defamation of Kacal and her business is a red herring. Kacal need not prove defamation to prove a violation of section 1983 in this case. Kacal does not andneed not show that the alleged defamatory remarks actually caused the decline in patronage. Instead, it is sufficient to show that the officers' harassment of Kacal's patrons was, as the summary judgment evidence indicates, the direct cause of the failure of her business. Apart from any alleged defamation, Kacal can succeed in a section 1983 claim by showing that the officers, acting under color of state law, sought to remove or significantly alter her liberty and property interests in Visions without due process of law. [FN8]

> FN8. Section 1983 provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1982).

We find that the district court erred in holding that Kacal's summary judgment evidence was insufficient to support a genuine issue of material fact that the City and Hale sought to remove or significantly alter Kacal's property and liberty interests in operating her business.

*C. Fourth and Fourteenth Amendments*

710 F.Supp. 290
**(Cite as: 710 F.Supp. 290)**

United States District Court,
D. Colorado.

UNITED STATES of America, Plaintiff,
v.
Ora A. BRADY, Defendant.

**Crim. A. No. 88-CR-321.**

April 6, 1989.

Defendant was charged with possession of unregistered firearm and possession of firearm by a convicted felon. Following bench trial, the District Court, Matsch, J., held that: (1) "coyote getter" was not "any other weapon" within definition of firearms in federal criminal statutes, and (2) defendant's reliance upon advice given by state court judge that he could continue to possess weapons for hunting and trapping despite his felony convictions negated criminality of his act, so as to preclude conviction of felon in possession of firearm on due process grounds.

Not guilty.

West Headnotes

[1] **Internal Revenue** 5265
220k5265 Most Cited Cases

"Coyote getter," which was device used to kill coyotes by propelling cyanide into their mouths through short shell holder buried in ground when animals pulled on bait attached to shell holder, tripping firing mechanism, was not "any other weapon" within definition of a firearm in criminal statutes, where weapon was not capable of firing normal ammunition with likelihood that projectile, because of a short shell holder, would go in intended direction and not injure user of weapon; device would be so dangerous to user when used with normal ammunition because of risk of explosion that only "person bereft of reason" would consider using it as firearm. 26 U.S.C.A. § 5845(a, e).

[2] **Weapons** 4
406k4 Most Cited Cases

It is immaterial to conviction for possession of firearm by convicted felon whether defendant knew he was convicted felon. 18 U.S.C.A. § 922(g)(1).

[3] **Criminal Law** 32
110k32 Most Cited Cases

It is no defense to charge of possession of firearm by convicted felon that defendant did not know he was prohibited from possessing firearm. 18 U.S.C.A. § 922(g)(1).

[4] **Weapons** 4
406k4 Most Cited Cases

All that Government need prove to make prima facie case of convicted felon in possession of firearm is that defendant possessed firearm, that firearm travelled in interstate commerce and that defendant had previously been convicted of crime punishable by year or more. 18 U.S.C.A. § 922(g)(1).

[5] **Constitutional Law** 257
92k257 Most Cited Cases

[5] **Criminal Law** 37.20
110k37.20 Most Cited Cases

Conviction of defendant as felon in possession of firearm violated due process where defendant's conduct conformed to statement of law by state court judge who specifically told him that he could continue to possess firearm when hunting and trapping despite felony convictions; errors of judge, who had constitutional duty to interpret and apply federal law in advising defendant, did not vitiate effect of his advice. U.S.C.A. Const.Amend. 14; 18 U.S.C.A. § 922(g)(1).

[6] **Criminal Law** 37.20
110k37.20 Most Cited Cases

[6] **Constitutional Law** 257
92k257 Most Cited Cases

Due process defense of reliance upon judicial advice was available for crime of possession of firearm by a felon even though there was no requirement of proof that defendant knew he was committing crime; defense did not entirely negate intent, it negated criminality of act. U.S.C.A. Const.Amend. 14; 18 U.S.C.A. § 922(g)(1).

***291** Joseph Mackey, Asst. U.S. Atty., Denver, for plaintiff.

Sheldon Emeson, Denver, for defendant.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge.

The defendant is charged with two firearms violations. Count I charges possession of an unregistered firearm under 26 U.S.C. § 5861(d) and 26 U.S.C. § 5871. Count II charges possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Trial was held to the court after a waiver of jury.

FINDINGS OF FACT

The defendant, Ora A. Brady (Brady), is a 61-year-old tree trimmer and concrete worker who traps animals in the winter when the weather makes working his other jobs impossible. Brady has lived in Baca County, Colorado for the past 40 years. On December 28, 1987, Brady was found in possession of a number of "coyote getters" which he had set out as animal traps.

A coyote getter is a device used to kill coyotes by propelling cyanide into their mouths when they pull on the bait. A hollow tube of light metal, crimped at one end, holds a spring-loaded firing pin assembly which is cocked and held by a cross pin. Above it is a shell holder, slightly longer than an empty .38 caliber shell casing. The shell holder is made of soft metal. The coyote getter is designed for use with a special .38 caliber shell that consists of a normal .38 shell casing having only a primer, or a primer and a negligible quantity of gunpowder. The cartridge fires a plastic capsule filled with cyanide. The device is buried in the ground with just the shell holder above the surface. The shell holder is baited, animals are attracted to the bait and bite it, tripping the firing mechanism, which in turn explodes the primer and kills the animal by propelling the cyanide into the animal's mouth. Given that the shell holder is made of light, soft metal, it is obvious that the shell holder was not designed to contain the explosion of a normal round of ammunition, but rather, was intended to keep the cyanide cartridge in place, and hold the bait.

The coyote getters possessed by Brady were not registered as firearms in the National Firearm Registration and Transfer Record of the Treasury Department.

Brady pleaded guilty to an unrelated state offense in the District Court for Baca County in 1987 and was put on probation *292 for two years. He was told he could possess a firearm in connection with his work. In September, 1988, permission to possess a weapon was revoked by the court because it was learned that possession might be in violation of federal law. A hearing on the issue was held on October 3, 1988. After some discussion, Judge Norman Arends concluded that "Mr. Brady can utilize a firearm specifically for hunting and trapping within the confines of his occupation." The judge was aware of 18 U.S.C. § 922. Colorado law required that the judge inform himself about Brady's prior record before putting him on probation. *See* Colo.Rev.Stat. § 16-11-102 (requiring investigation of past criminal record upon a plea of guilty); *cf.* Colo.Rev.Stat. § 16-11-203(1)(d) (prior record is factor in probation determination). The judge's statement was incorrect because Brady had two prior felony convictions.

When he was arrested by Alcohol, Tobacco and Firearms (ATF) agents on November 29, 1988, Brady had a loaded .22 caliber revolver in a holster on his person. Brady was standing by a pickup truck which had a dead bobcat in the back. Brady's possession of the revolver was for the purpose of pursuing his trapping vocation. Brady shot the bobcat shortly before the arrest.

Richard Craze (Craze), a firearms enforcement officer for the ATF, tested one of the coyote getters with a primed shell casing and bullet, but no additional powder. The bullet travelled several feet, and penetrated a piece of cardboard. Craze testified that the device could be used as a handgun. However, he said that he was afraid to test the device with standard ammunition because it would be too dangerous.

Darrell Gretz (Gretz), a wildlife biologist and the Assistant Regional Director of the United States Department of Agriculture, also testified about the nature of the coyote getter. He agreed with Craze that the device would be extremely dangerous to use as a hand-held weapon firing standard ammunition because of the risk of explosion. If normal ammunition were put in a coyote getter, there is a probability that the cartridge would explode, disintegrating the shell holder, and distributing fragments. The shell holder is different from the barrel of a gun. The barrel of a gun contains the force of the exploding powder and gives direction to a bullet. The part of the coyote getter holding the cartridge is only slightly longer than the shell casing itself; therefore it would not effectively contain the gasses to propel the bullet and could not serve to direct the bullet.

CONCLUSIONS OF LAW

Count I.

[1] The controlling question is whether the government has proved that the coyote getter is a firearm. The definition of firearm in 26 U.S.C. § 5845(a) includes "any other weapon." Any other weapon includes "any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive." 26 U.S.C. § 5845(e). The government proposes an absolutely literal interpretation of the law. A coyote getter is concealable. A coyote getter can fire a shot through the energy of an explosive. However, application of the statutory definition without the limitation of common sense would criminalize the possession of a cigarette lighter and a pair of pliers, or a hammer and nail.

Two features of the coyote getter are convincing evidence that this device is not a firearm. First, the device does not materially increase the offensive usefulness of ammunition; that is, a user of the coyote getter does not have a substantially better weapon in the coyote getter than he would have with a cartridge by itself. Second, the device would be so dangerous to the user that only a person bereft of reason would consider using the coyote getter as a firearm.

Further, the testing procedures employed by Craze are an impressive example of actions speaking louder than words. Craze is an experienced firearms expert and testified that this device was a firearm. But while he was willing to test the device with a cartridge consisting only of a primer, and then only of a primer and a bullet ***293** but no powder, even with all the resources and equipment of the ATF's Washington D.C., laboratory available to him, he felt it was too dangerous to his personal safety to test it with an ordinary round of . 38 caliber ammunition. Without question many devices that are dangerous to the user are firearms, such as, perhaps, cheaply made "saturday night specials," or starter's pistols altered to accept and fire normal ammunition. But this device is so useless as a weapon, and so likely to cause injury to the user, that it cannot be readily distinguished from the variety of common items that could, as a purely theoretical matter, be used to fire ammunition, but that as a matter of practicality and common sense would never be used for that purpose by a sane person.

Every device that has been found to be any other weapon has been a weapon capable of firing normal ammunition with some likelihood that the projectile would go in the intended direction and not injure the user of the weapon. The Revenue Rulings cited by the government are instructive. In Revenue Ruling 56-47, for instance, a device made of "nickel-chrome plated steel" that was test fired "using .38 caliber, 146 grain wadcutter bullets and was found to perform satisfactorily with no structural damage to the device being incurred" was found to be a firearm. Similarly, in Revenue Ruling 56-597, it was held that a .38 caliber tear gas gun that could fire standard ammunition without structural damage was a firearm, as was a 20 gauge tear gas gun that could fire standard shotgun shells, again without "structural damage to the device evidenced as a result of the test." In *United States v. Decker*, 292 F.2d 89, 90 (6th Cir.), *cert. denied*, 368 U.S. 834, 82 S.Ct. 58, 7 L.Ed.2d 36 (1961) the court held that a tear gas gun that could fire commercial shotgun ammunition without rupturing the barrel or causing damage to the weapon was a firearm. *See also Davis v. Erdmann*, 607 F.2d 917, 919 (10th Cir.1979) (implicitly assuming that a combination knife/pistol that could fire a .22 short cartridge was within the definition of any other weapon); *United States v. Ordner*, 554 F.2d 24, 26 & n. 3 (2d Cir.) (a "pen gun," which it described as a device made from the triggering mechanism of a flare gun attached to a machined barrel, was "any other weapon"), *cert. denied*, 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed.2d 82 (1977); *United States v. Cheramie*, 520 F.2d 325, 333 (5th Cir.1975) (affirming a conviction based on possession of an unregistered pen gun); *Moore v. United States*, 512 F.2d 1255, 1256 (4th Cir.1975) (sawed off shotgun could be any other weapon); *United States v. Coston*, 469 F.2d 1153, 1153 (4th Cir.1972) (a flare gun capable of firing shotgun shells was any other weapon); *cf. United States v. Seven Misc. Firearms*, 503 F.Supp. 565, 579 (D.D.C.1980) (noting that "the items are not even designed and manufactured as weapons" in support of finding non-firing museum pieces were not firearms). Research has found no cases in which a court or administrative agency found that a device which was likely to explode if used with normal ammunition was any other weapon.

This court concludes that the coyote getter is not any other weapon, and so is not included within the definition of a firearm. Brady is acquitted of this Count because the government has failed to prove that he possessed a firearm. Accordingly, his other defenses are not considered.

Count II.

[2][3][4] Count II charges possession of a firearm by a convicted felon based on Brady's possession of the .22 caliber revolver. Counsel for the government correctly observes that the defenses to this charge are few. Under the law, it is immaterial whether Brady

knew he was a convicted felon. *See, e.g.,* United States v. Williams, 588 F.2d 92 (4th Cir.1978). It also is no defense that he did not know he was prohibited from possessing a firearm. *See, e.g.,* United States v. Shomo, 786 F.2d 981, 985 (10th Cir.1986); United States v. Laymon, 621 F.2d 1051, 1054 (10th Cir.1980); *but see* United States v. Rose, 695 F.2d 1356, 1358 (10th Cir.1982) (upholding conviction for possession of an unregistered firearm under 26 U.S.C. § 5861(d) on the ground that there was sufficient evidence of intent and notice of criminality of ***294** acts), *cert. denied,* 464 U.S. 836, 104 S.Ct. 123, 78 L.Ed.2d 121 (1983). All that the government needed to prove to make a prima facie case was that the defendant possessed a firearm, that the firearm travelled in interstate commerce, and that he had previously been convicted of a crime punishable by a year or more. *See, e.g.,* United States v. Martin, 706 F.2d 263 (8th Cir.1983) (decided under prior law).

[5] Brady argues that the fact that a state court judge told him he could possess a firearm in connection with his hunting and trapping precludes his conviction. Since specific intent is not an element of this offense, the fact that Brady may have reasonably believed that he was violating no law is not a defense.

However, this is not a situation where a defendant relied on nothing more than his own research or advice of counsel. Here, a judge with criminal jurisdiction over Brady specifically told him that he could continue to possess a firearm when hunting and trapping. There is a difference between merely acting reasonably and in good faith, and acting under the affirmative advice of a judge. In this case, it would violate due process to convict Brady of this offense in light of the fact that the defendant's conduct conformed to the judge's statement of law.

Two Supreme Court cases illustrate the principle. In Raley v. Ohio, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959) four people were convicted in state courts for refusing to answer questions of a legislative commission. They were told by the legislators that they could refuse to answer the questions because of the state privilege against self-incrimination. This was not in fact the law of Ohio because there was a statute giving the witnesses immunity. Nonetheless, the court held that the witnesses could not be convicted. To permit such a conviction, said the Court, "would be to sanction an indefensible sort of entrapment by the State--convicting a citizen for exercising a privilege which the State had clearly told him was available to him." 360 U.S. at 426, 79 S.Ct. at 1260.

Importantly, the Court did not conclude that the witnesses had been actually entrapped, that is, intentionally misled to entice them to commit a crime. "[T]here is no suggestion that the Commission had any intent to deceive the appellants." 360 U.S. at 438, 79 S.Ct. at 1266. The Court presumed that the violation of law was caused by the erroneous advice of the officials. In deciding to reverse, the Court stated that "[w]e cannot reach a contrary conclusion by [speculating] that some of the appellants might have behaved the same way regardless of what the Commission told them." 360 U.S. at 439, 79 S.Ct. at 1267.

Similarly, in Cox v. Louisiana, 379 U.S. 559, 570-71, 85 S.Ct. 476, 483-84, 13 L.Ed.2d 487 (1965) the Court reversed a conviction for violating a statute that prohibited demonstrations near a courthouse because the picketers had been told by the local police chief that they could lawfully protest across the street from the courthouse. Many other cases underscore the point. *See* United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 674, 93 S.Ct. 1804, 1816, 36 L.Ed.2d 567 (1973) ("traditional notions of fairness inherent in our system of criminal justice" prevent the government with proceeding with a prosecution under a statute when the defendant reasonably relied on regulations issued under authority of the statute permitting performance of the charged acts); United States v. Clegg, 846 F.2d 1221, 1223 (9th Cir.1988) (good faith reasonable reliance on the apparent authority of government officials is a defense); United States v. Durrani, 835 F.2d 410, 422 (2d Cir.1987) (legitimate reliance on an official interpretation of the law is a defense); United States v. Rosenthal, 793 F.2d 1214, 1235 (11th Cir.) (legitimate reliance on an official interpretation of the law is a defense), *modified on other grounds,* 801 F.2d 378 (11th Cir.), *cert. denied,* 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987); United States v. Duggan, 743 F.2d 59, 83 (2d Cir.1984) (although there are few exceptions to the rule that ignorance of the law is no excuse, there "is an exception for legitimate reliance on official interpretation of the law"); ***295** United States v. Barker, 546 F.2d 940 (D.C.Cir.1976); *see also* Marks v. United States, 430 U.S. 188, 196, 97 S.Ct. 990, 995, 51 L.Ed.2d 260 (1977) (it would be violative of due process to convict publishers based on an obscenity standard that came into existence after they disseminated their materials, they were entitled to rely on the previous standard); Model Penal Code § 2.04(3)(b) (1985) (reasonable reliance on an official statement of the law by an official responsible for interpretation, administration or enforcement of the law is a defense to criminal conduct).

The case for allowing the due process defense when the advice is given by a judge is even more compelling. Because of the unique role of the judiciary in interpreting the law, many courts have recognized that it "would be an act of 'intolerable injustice' to hold criminally liable a person who had engaged in certain conduct in reasonable reliance on a judicial opinion instructing that such conduct is legal." *Kratz v. Kratz*, 477 F.Supp. 463, 481 (E.D.Pa.1979) (footnotes omitted) (quoting *Wilson v. Goodin*, 163 S.W.2d 309, 313 (Ky.1942)). *Accord United States v. Albertini*, 830 F.2d 985, 989 (9th Cir.1987) ("The doctrine is applied most often when an individual acts in reliance on a statute or an express decision by a competent court of general jurisdiction ..."); *United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir.1978) ("Of course, one ought not be punished if one reasonably relies on a judicial decision later held to have been erroneous"); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir.1943) (while all persons are presumed to know the law, a layman is not expected to know more law than a judge); *United States v. Ehrlichman*, 376 F.Supp. 29, 35 (D.D.C.1974) ("Mistake of law may ... excuse an act if it resulted from good faith reliance upon a court order or decision") (citations omitted).

Judge Arends was constitutionally obligated to apply federal law when he gave advice to the defendant. *See* U.S. Const. Article VI, § 2 (stating that the Constitution, laws, and treaties of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby"); *Schlesinger v. Councilman*, 420 U.S. 738, 756, 95 S.Ct. 1300, 1312, 43 L.Ed.2d 591 (1975) ("federal courts are 'not at liberty ... to presume that the decision of the State court would be other than what is required by the fundamental law of the land ...' ") (citation omitted); *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 247-48, 73 S.Ct. 236, 242-43, 97 L.Ed. 291 (1952) ("State courts are bound equally with the federal courts by the Federal Constitution and laws"); *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947) (state courts are required to enforce federal laws); 28 U.S.C. § 1257 (describing appeal and certiorari of state court decisions involving validity and constitutionality of federal and state statutes); *see also* Colo.Const. Art. XII § 8 (requiring civil officers, including judges, to take oaths in support of United States Constitution). The state judge had more than mere authority to interpret and apply federal law, he had a constitutional duty to do so. Further, state judges have a role in regard to this particular statute because state convictions trigger the applicability of the law. The judge's errors, factually or legally, do not vitiate the effect of his advice.

An opinion of the Eleventh Circuit is to the contrary. In *United States v. Bruscantini*, 761 F.2d 640, 641-42 (11th Cir.), *cert. denied*, 474 U.S. 904, 106 S.Ct. 271, 88 L.Ed.2d 233 (1985) the court declined to apply *Raley* and *Cox* based on a state court judge's assertion that a nolo plea did not make the defendant a convicted felon. *Bruscantini* did not discuss the constitutional authority and duty of state courts to interpret federal law.

Further, the opinion focuses on agency and estoppel principles while *Cox* and *Raley* make clear that the purpose of the rule is to prevent fundamental unfairness and injustice. Though the defense recognized by *Raley* and *Cox* has been called "entrapment by estoppel" it is not an estoppel at all in any meaningful sense. Neither *Cox* nor *Raley* use the word "estoppel" even once. The doctrine stems from the due process clause, not from the common law of contract, equity or agency. Of course, it is settled that estoppel is not available ***296** against the United States on the same terms as it is against an ordinary litigant. *See, e.g., Heckler v. Community Health Services*, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *United States v. Browning*, 630 F.2d 694 (10th Cir.1980), *cert. denied*, 451 U.S. 988, 101 S.Ct. 2324, 68 L.Ed.2d 846 (1981). Further, even in criminal cases, the United States cannot be estopped from prosecuting acts occurring after the law is made clear to the defendant. In this case, for instance, the United States is not estopped from prosecuting Brady if he ever possesses a firearm in the future. Thus, though it is correct as *Bruscantini* suggests, that a state court judge has no agency authority to do an act that will create an estoppel against the United States, neither does a federal judge, or even the President of the United States. The better view is that the defense is not based on the government being bound by the conduct of its agents, but rather, the fundamental unfairness of punishing a defendant for conforming his conduct to an erroneous interpretation of the law by a judge having the power to confine him. Since the United States has given the state and federal courts a joint role in applying the Constitution and laws of the United States, a person is entitled to rely on a state court's views of federal law. Accordingly, this court declines to follow *Bruscantini*.

[6] The due process defense is available even for a crime like this where there is no requirement of proof that the defendant knew he was committing a crime. This defense does not merely negate intent, it negates the criminality of the act. Accordingly, in *United States v. Tallmadge*, 829 F.2d 767, 773- 75 (9th

Cir.1987) the court applied this principle to reverse a conviction under § 922. *See also United States v. Ehrlichman*, 376 F.Supp. 29, 35 (D.D.C.1974) (mistake of law defense available to negate intent element of specific intent crimes, or it may excuse an act based on reasonable reliance on a court order or decision).

Upon all of the foregoing, it is

ORDERED that Ora A. Brady is found not guilty of the offense charged in Count I of the indictment and it is

FURTHER ORDERED that Ora A. Brady is found not guilty of the offense charged in Count II of the indictment.

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503 F.Supp. 565
**(Cite as: 503 F.Supp. 565)**

United States District Court, District of Columbia.

UNITED STATES of America, Plaintiff,
v.
SEVEN MISCELLANEOUS FIREARMS, Defendants.

**Civ. A. No. 78-1358.**

Aug. 4, 1980.

A forfeiture action was instituted with respect to seven miscellaneous firearms. The District Court, Gasch, J., held that items which were seized from a recognized museum were not subject to forfeiture under National Firearms Act where evidence established that five of seven items were completely demilitarized or rendered incapable of firing by manufacturer or United States Government prior to being donated to museum, remaining two items failed to qualify either as a destructive device or any other weapon, and items in most instances had never been fired and were neither designed nor manufactured to fire.

Judgment for defendants.

West Headnotes

[1] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

Gyrojet pistols which were subject of forfeiture action did not constitute a "destructive device" within provisions of National Firearms Act where no gyrojet ammunition was found, pistols would not expel a projectile, and essential ingredients such as the missile, the projectile, and the explosive or other propellant were missing. 26 U.S.C.A. § 5845(f)(1-3).

[2] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

Where items which were subject of forfeiture action were not designed or manufactured to shoot, or could not be readily restored to shoot, automatically, they were not "firearms" within coverage of National Firearms Act. 26 U.S.C.A. § 5845(a, b).

[3] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

Term "frame or receiver," within provision of National Firearms Act defining a machine gun as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of trigger, including frame or receiver of any such weapon, is not contemplated in isolation but together with possession of additional parts from which machinegun could be assembled. 26 U.S.C.A. § 5845(b).

[4] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

Item which was subject of forfeiture action and which featured a cutaway barrel, designed or redesigned to demonstrate inner mechanism of item and not at any time designed to fire was an "unserviceable firearm" and, hence, was not subject to forfeiture. 26 U.S.C.A. § 5845(h).

[5] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

An item which cannot be readily restored to fire and cannot be readily converted to expel a projectile by action of an explosive is not subject to forfeiture under National Firearms Act as "any other weapon" or a "destructive device." 26 U.S.C.A. §§ 5845, 5845(e, f).

[6] **Internal Revenue** 5155
220k5155 Most Cited Cases
(Formerly 220k2261)

When items subject to forfeiture action do not qualify either as a "destructive device" or as "any other weapon," and do not qualify under any other definition, they are not "firearms" within National Firearms Act and, as a result, definition therein of an "unserviceable firearm" is inapplicable because it merely serves to carve out a transfer tax exemption for devices that otherwise constitute firearms. 26 U.S.C.A. § 5845(e, f, h).

[7] **Internal Revenue** 5155
220k5155 Most Cited Cases

(Formerly 220k2261)

Items which were seized from a recognized museum were not subject to forfeiture under National Firearms Act where evidence established that five of seven items were completely demilitarized or rendered incapable of firing by manufacturer or United States Government prior to being donated to museum, remaining two items failed to qualify either as a destructive device or as any other weapon, and items in most instances had never been fired and were neither designed nor manufactured to fire. 26 U.S.C.A. §§ 5845, 5845(e, f).

[8] **Internal Revenue ⚿5155**
220k5155 Most Cited Cases
(Formerly 220k2261)

Authority is vested in the Secretary of the Treasury to exempt certain devices that are primarily collectors' items even though they were originally designed as weapons. 26 U.S.C.A. § 5845(a, b).

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MEMORANDUM

GASCH, District Judge.

This is a forfeiture action filed by the United States pursuant to the provisions of 26 U.S.C. s 5801 et seq. against Seven Miscellaneous Firearms. The Court has jurisdiction under the provisions of 28 U.S.C. ss 1345, 1395 and 2461, et seq. The National Rifle Association filed a claim for the seven items at issue in this lawsuit and sought dismissal of the complaint or alternatively a more definite statement. Thereafter the United States filed a more definite statement and subsequently the Association withdrew its motion to dismiss or for a more definite statement and filed an answer to the complaint. The action was tried by the Court without jury. Upon consideration of the evidence adduced at trial, including the testimony, stipulations, and documents received in evidence,the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The National Rifle Association maintains offices, a museum containing approximately 1500 items both sporting and military, which have been made inoperable, illustrating the development of American firearms, some dating back 350 years, as well as firearms records at 1600 Rhode Island Avenue, N.W., Washington, D.C. The Bureau of Alcohol, Tobacco and Firearms is charged with the responsibility of administering and enforcing the provisions of the National Firearms Act of 1968. 26 U.S.C. s 5801 et seq. On November 7, 1975, January 31, 1977, and November 15, 16, 18 and 21, 1977, the Bureau conducted compliance inspections of firearms records of the Association. On March 9, 1978, the following items [FN1] were seized by representatives of the Bureau on the premises of the Association:

> FN1. Nomenclature is in dispute. The Bureau contends that proper terminology is firearm; the Association contends the proper term is display piece. The Court will hereafter use the term item.

1. Colt item, model AR-15, barrel length 211/2 inches, overall length 381/4 inches, caliber 5.56 mm, serial number 039849 (Government Exhibit 1);
2. Heckler and Koch item, model G-3, caliber 7.62 mm, barrel length 201/4 inches, overall length 401/4 inches, no serial number (Government Exhibit 2);
***567** 3. Springfield Armory item, model T-44-E4, caliber 7.62 mm, barrel length 25 inches, overall length 44 inches, serial number 1200 (Government Exhibit 3);
4. Harrington and Richardson item, caliber 7.62 mm, model T-48, barrel length 241/4 inches, overall length 441/2 inches, serial number 4142 (Government Exhibit 4);
5. Lee Enfield item, .303 caliber, barrel length 87/8 inches, overall length 277/8 inches, serial number 7446 (Government Exhibit 5);
6. MB Associates, Gyrojet item, 13 mm, serial number A-0029 (Government Exhibit 6);
7. MB Associates, Gyrojet item, 13 mm, serial number A-048 (Government Exhibit 7).

I.

The Seven Items.

Government Exhibit 1: This item is a prototype of the Colt AR-15. The ultimate design is described in Government Exhibit 23, prepared by the manufacturer, as follows: The AR-15 (M-16) rifle is gas operated, air cooled, magazine fed (20 or 30 rounds), semiautomatic or fully automatic shoulder weapon. The AR-15 is an earlier experimental version of what is now known as the M-16. The Association's curator described it as a milestone in the history of American firearms and an

appropriate museum display piece.

Government Exhibit 1 cannot be fired either automatically or semiautomatically or otherwise because of missing parts and a welded barrel. The pretrial stipulation by and between counsel further shows that this item was deactivated at the factory before being donated by the manufacturer to the Association's Museum and it has no bolt cam pin, firing pin, firing pin retaining pin or automatic sear. The rear of the chamber has been plugged for a distance of approximately two and one quarter inches and the locking recess in the back of the barrel has been completely filled. It is impossible to close and lock the chamber with the bolt in this item.

The government expert, Edward M. Owen, demonstrated how Government's Exhibit No. 1 could be altered so that it would shoot automatically. He accomplished this by installing the upper receiver assembly and barrel of a fully operational Colt AR-15, Government Exhibit No. 8, and by installing the complete bolt and carrier, the automatic sear assembly and its retaining pin in Government Exhibit No. 1. With these parts from an operational Colt AR-15, Government Exhibit No. 8, Mr. Owen testified that following this process, which included replacement of the welded barrel and the upper receiver assembly, and the addition of the automatic sear assembly and the retaining pin from Government Exhibit 8, that the altered item would shoot automatically more than one shot without manually reloading by a single function of the trigger. This addition of parts [FN2] took approximately three minutes in open Court.

> FN2. There was a dispute among the experts as to the availability of these parts. Mr. Owen testified they were available commercially. Col. Crossman testified they were available only from military sources. Because of the latter's more extensive experience in this field, I accept his opinion.

Government Exhibit 2: This item is a factory deactivated Heckler and Koch G-3, manufactured in West Germany for NATO forces. This particular item was donated to the Association by the manufacturer. Government Exhibit 25, a manual on the Heckler and Koch G-3, describes this generic type as follows: The automatic rifle G-3, caliber 7.62 mm by 5.1 NATO, is a weapon developed in accordance with the most modern production methods. It is used as a semiautomatic or full automatic weapon with or without bipod with fixed or retractable butt stock.

This particular item lacks a serial number and proof marks, which, according to the testimony, indicates that the item was not test fired and not sold for use as a firearm. The evidence was also undisputed that in its ***568** present condition, Government Exhibit 2, the Heckler and Koch G-3, cannot be fired either automatically or semiautomatically or otherwise because it has a plugged barrel and missing parts. Expert testimony was to the effect that if the plugged barrel were replaced with an operational barrel from another Heckler and Koch G-3, or an HK 91 sporter,[FN3] it would be operational. It was brought out on cross-examination that Heckler and Koch G-3 barrels are not available in this country. However, a Heckler and Koch G-3 automatic rifle of similar type might be imported and its barrel and parts missing from Government Exhibit 2 installed in Government Exhibit 2. If this were done, the item would be operational. In short, if an operational Heckler and Koch G-3 automatic rifle were imported and its operational parts transferred to Government Exhibit 2, one would have a single operational Heckler and Koch G-3. Testimony of the experts varied considerably as to difficulties one might encounter in replacing the barrel of a Heckler and Koch G-3. Specialized equipment not available in this country would be required, particularly to effectuate conversion to automatic fire.

> FN3. Even if the barrel from an HK 91 sporter could be fitted into the Heckler and Koch G-3, this operation would not make the Heckler and Koch G-3 an operable machinegun. The HK 91 sporter is a lighter semiautomatic. It does not contain the parts essential to automatic fire by Government Exhibit 2.

Government Exhibit 3: This is a Springfield Armory item, T-44-E4. It was donated by the U.S. Army's Springfield Armory to the Association's Museum following correspondence with the Office of Chief of Ordnance, Department of Army. It is an experimental model only about 500 of which were produced and was a developmental step in the production of the M-14 rifle, now the standard U.S. Army rifle. It is a very rare and much sought after item by museums. Neither the Smithsonian Firearms collection nor the Bureau's own collection contains such an item. The testimony indicated that after extensive field testing by the Army under combat conditions, most of these 500 T-44-E4 models were shot out, destroyed or cut apart for

experimental metallurgical testing. Since this factory demilitarized item is one of the few remaining T-44-E4's from which the current Army M-14 was developed, it is a particularly important item from a technological point of view. It was developed and tested by the United States Army following World War II as a replacement for the M-1 Garand rifle. The T-44 series and the T-44-E4 are similar in basic design of the type fire.

The basic manual for the M-14 FM 23-8, Government Exhibit 30, reads as follows: "The M-14 rifle is a 7.62 mm magazine fed, gas operated, air cooled, semiautomatic shoulder-type weapon. The M-14 is designed primarily for semiautomatic fire but can be converted to automatic fire by installing a selector." An article appearing in the American Rifleman, June 1957, entitled "New Service Rifle," Government Exhibit 29, contains the following: "The new U.S. Army rifle M-14 was known as T44 during development. It fires a 7.62 mm NATO cartridge and weighs 8.7 pounds unloaded against 9.6 pounds for the M-1 (Garand) ... magazine capacity is 20 rounds instead of 8 in the M-1, a change lever "A" gives choice between semi and full automatic fire." Expert testimony revealed that the M-14 and its predecessors, the T-44 and the T-44-E4, may be equipped with a change lever which allows the weapon to be fired semi or full automatic. They also may be equipped in such a manner as to prevent it from firing full automatic.

In its present condition Government Exhibit 3, the Springfield Army rifle T- 44-E4, cannot be fired automatically or semiautomatically or otherwise because it has a plugged barrel and is missing certain essential parts. Expert testimony revealed that the plugged barrel of Exhibit 3 can be replaced and that missing parts in Government Exhibit 3 can also be replaced. The standard military M-14 rifle can be the source of these parts as well as commercial parts dealers. Some expert testimony revealed, ***569** however, that replacing the plugged barrel of Government Exhibit 3 with a standard M-14 rifle barrel might involve a head space and alignment problem. This problem has safety aspects and the adjustment may be time consuming. The Government's expert disagreed with expert testimony adduced on behalf of the Association.

Government Exhibit 4: This item is a Harrington and Richardson Model T-48, the Americanized version of the Belgian FN/FAL selective fire rifle, the original of which was manufactured by Fabrique Nationale of Belgium. Expert testimony revealed that the Harrington and Richardson T-48 series was in competition with the T-44 rifle series to replace the U.S. Army M-1 Garand in the 1950's. The Association's American Riflemen, Government Exhibit 29, contained an article entitled "New Service Rifle" in the June 1957 issue. This article described the design of the T-48 as follows: "The T-48 final form of the contending rifles submitted by Fabrique Nationale of Belgium and adopted by several nations ... provision for semiautomatic and full automatic fire and flash hider are like those of the M-14 rifle." Mr. Owen, the Government's expert, testified that he had installed FN/FAL parts in a T-48 and then fired that T-48 fully automatic. His testimony further indicated that this operation could be accomplished probably in less than four hours.[FN*] A defense exhibit, NN, contains the following: The T-48 can be fired automatically when fitted with a change lever of the same design as the lever that is standard equipment with the T-48 E-1. It is noted, however, that the T-48 E-1 has a somewhat heavier barrel, a bipod and a hinge butt plate and an automatic change lever.

> FN* No one as knowledgeable as Mr. Owen would steal this item from the Museum knowing just where to find FN/FAL replacement parts for the presently unserviceable parts. Under these circumstances, replacing the parts would take much longer than four hours.

In its present condition Government Exhibit 4, the Harrington and Richardson item, Model T-48, cannot be fired either automatically or semiautomatically or otherwise because it has missing certain essential parts and has a pin welded to the side of the receiver which prevents theselector lever from rotating to the "A" (automatic) position. There is dispute whether Government Exhibit 4 can be converted to fire automatically if missing and altered parts are replaced. Also a piece of weld would have to be removed from the receiver of Government Exhibit 4. This could be done with a small "dremel" tool or hand-held power grinder. The necessary parts to convert Government Exhibit 4 to automatic fire could be obtained from a Belgian FN/FAL rifle or another T-48 or T-48 E-1 rifle. There was some expert testimonial dispute on this, however.

The U.S. Army's special text on the T-48 points out the difference between the T-48 which was designed for semiautomatic fire and the T-48 E-1 which was designed for automatic fire as well as semiautomatic fire. The T-48 has a lighter barrel and according to its

original designer, Fabrique Nationale of Belgium, is for semiautomatic firing only. The Court accepts the testimony of the Association's expert, Col. Crossman, to this effect. The selector lever rotated to only two of the three positions, F & S. A pin in the side of the receiver which was installed at the factory prevented motion of the selector lever to the "A" or automatic position. The selector lever itself was manufactured with a protruding shoulder which struck against the pin in the receiver and limited the motion of the selector lever. Government Exhibit 4 does not have the essential bolt which carries the firing pin, the extractor, and the ejector. The lower left rear corner of the bolt carrier has been ground down to prevent automatic fire. Government Exhibit 4 cannot be fired and is inoperable in its present condition. Government Exhibit 4 would not give automatic fire even if all the missing parts were present. In its present condition it was donated to the Association's museum by the U.S. Army Ordnance Corps.

Government Exhibit 5: This item is a Lee Enfield, .303 caliber, with a barrel length of *570 87/8 inches. In its present condition it cannot be fired and is inoperable. It is registered in the National Firearms and Transfer Record as an "unserviceable firearm." There is no issue in this case regarding the restorability of the Lee Enfield. Government Exhibit 5 has no sights and no provision for sights. It also has no forestock. The trigger magazine and magazine are completely exposed. In short, it is a cutaway item the sole purpose and use of which is to demonstrate visually the inside mechanism of the item. The receiver has a slot cut in the left side approximately one inch in length. The chamber has been welded closed. The depth of the plug in the barrel is approximately one-half inch and the barrel itself is welded to the receiver ring. Government Exhibit 5 cannot be fired and is inoperable in its present condition. It cannot be readily converted to fire a fixed cartridge. The evidence presented to the Court is that this item was designed and manufactured as a display or demonstration piece, and not as a firearm.

Government Exhibits 6 and 7: These items are called "gyrojet pistols." Both pistols have barrels which have a bore in excess of one-half inch in diameter. Both gyrojet pistols were originally designed to fire a small rocket projectile. In operation, the rocket assembly was placed in the receiver of the pistol on the top of a spring loaded magazine. The hammer of the pistol is rotated rearward, unlike the hammer on a conventional modern pistol. The protruding surface on the face of the hammer struck the projectile on the nose driving the projectile rearward where the primer struck a firing pin on the rear of the receiver. This action ignited the rocket and the projectile moved forward causing the hammer to rotate downward about its pivot where it could be caught by the trigger mechanism. Unlike conventional pistols, the gyrojets have no chamber to withstand the pressure of powder gas during firing. These items represent a new technology and as such are appropriate museum display pieces. They were manufactured in limited quantities as collectors' items.

The rocket projectile itself contained the pressure. Neither of the gyrojets is capable of firing a conventional cartridge. No gyrojet projectiles have been manufactured in recent years. No live gyrojet projectiles were found at the Museum when the gyrojets were seized by agents of the Bureau. At the time of seizure, both gyrojets were displayed free standing with a dummy nickel- plated gyrojet projectile which was not seized by Bureau Agents. Government Exhibit 6, gyrojet pistol numbered A029, when seized from the Association Museum, had no hammer, no firing pin, no sear, and none of the associated springs. It had a trigger but the trigger had no spring on it and was not connected to any other internal part. Government Exhibit 6 is not operable in its present condition. In its present condition it cannot fire a gyrojet projectile.

Government Exhibit 7, gyrojet pistol, numbered A048, when seized, had no sear, sear spring, trigger spring, hammer spring, firing pin, and none of the associated springs. It had a hammer but the protruding face on the hammer had been altered since manufacture to prevent the hammer from striking a gyrojet cartridge. Even if all other parts were present and special gyrojet ammunition available, Government Exhibit 7 gyrojet pistol numbered A048 could not be fired because of the alteration to the hammer. Government Exhibit 7, gyrojet pistol numbered A048, is not operable in its present condition. It cannot fire a gyrojet projectile.

The gyrojet pistol is approximately the same size as a military .45 caliber pistol. The barrel length is approximately five inches, the weight is approximately sixteen ounces, its overall length is 91/2 inches. It is capable of being concealed. Gyrojet pistols have not been manufactured in recent years. Prior to the passage of the National Firearms Act of 1968, the Bureau did not consider gyrojet pistols to be covered by the provisions of the prior Act; thus registration was not required at that time. After the passage of the 1968 Act, the "destructive device" category was added. Officially the Bureau took the position that gyrojet pistols were covered by the provisions of *571 the Act. A newer model gyrojet pistol with a slightly smaller

rifled bore was not covered by the definitions of "destructive device" and "any other weapon," thus clearly removing the newer pistols from inclusion within the provisions of the Act. No showing was made respecting the interchangeability of parts. Evidence was received from the Association that subsequent to the passage of the 1968 Act, one Timothy Dale Bixler attempted to register a gyrojet pistol identical to Government Exhibits 6 and 7, and was advised by the Bureau representative that registration was not required. See Defendants' Exhibit Q.

II.

The Statutory Scheme.

The National Firearms Act of 1968, 26 U.S.C. s 5801 et seq., is concerned primarily with the taxation, manufacture, dealing in, transfer, and registration of firearms. Registration provisions were redrawn in the 1968 Act to avoid the result reached by the Supreme Court in Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968). This required revision of prior registration procedures to avoid Fifth Amendment violations. Accordingly, the transferor of a firearm was given primary responsibility to register the firearm and to get authority from the Bureau to transfer it to the transferee. A generally inclusive definition of firearms is established. Sporting rifles and shotguns are exempted. (26 U.S.C. s 5845(f)). Congress focused on sawed-off shotguns and sawed-off rifles, machine guns and destructive devices. Antique firearms are also excluded. In addition, the Secretary is given authority to exclude certain devices which are not likely to be used as weapons or which the owner intends to use solely for sporting purposes.

26 U.S.C. s 5845 provides eight definitions of "firearm", each of which contains specific coverage criteria. Moreover, in order for a device to constitute a "firearm" under s 5845, it must be designed as a weapon. This is a common thread running throughout each of the definitions contained in s 5845. A device that otherwise appears to fall within one of the eight definitions of "firearm" may, in some cases, simply not be designed as a weapon. It may, for instance, be specifically designed by the manufacturer to serve as a museum display piece or military demonstration item.

Of particular relevance to this forfeiture action are the following definitions: "Firearm" means "(1) a shotgun having a barrel or barrels less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm ...; and (8) a destructive device." 26 U.S.C. s 5845(a). Antique weapons are excluded from coverage and the Secretary may also exclude collector's items not likely to be used as a weapon. Id.

Subsection (b) defines "machinegun" as follows: "... any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. s 5845(b) (emphasis added). Subsection (b) is of particular importance in this case since the Government contends that four of the seized items are machineguns. None of these four items shoots. Each of these four items was designed and manufactured not to shoot.

What the Government sought to show was that its experts believe that Government Exhibit 1, the Colt item, Exhibit 2, ***572** the Heckler and Koch item, Exhibit 3, the Springfield item, and Exhibit 4, the Harrington and Richardson item, can readily be restored to shoot automatically more than one shot by a single pull of the trigger. There was considerable difference of opinion among the experts as to whether these four items could be readily restored to shoot. That issue will be further discussed in a subsequent section. Each of the four items had either a welded barrel or a plugged barrel and there were essential parts missing. None of the experts concluded that the weld or plug could readily be removed from the barrel in question. The Government's experts testified that replacement barrels were available. Only in the case of Government Exhibit 3, the Springfield item, did the Government make a somewhat plausible demonstration of its position. Both the Colt item, Government Exhibit 1, and the Harrington and Richardson item, Government Exhibit 4, are rare experimental items. Replacement parts and barrels are not readily available and no satisfactory evidence of availability was offered. If one had a completely operational Colt AR-15, why would he wish to substitute its parts into such an item as Government 1. A suitable barrel and replacement parts for the Heckler and Koch item,

Government Exhibit 2, are not available in this country. Also of significance is the absence of any testimony that any conversion or replacement parts were found in the Association's museum.

The definition section, s 5845, also contains subsection (e) "Any other weapon," and subsection (f), "Destructive device." The government contends that these sections cover the gyrojet pistols, Government Exhibits 6 and 7. Subsection (e) reads as follows:

> The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or revolver having a rifled bore, or rifled bores, or weapons designed, made or intended to be fired from the shoulder and not capable of firing fixed ammunition.

26 U.S.C. s 5845(e). Essential to the applicability of this subsection to the gyrojet pistols is a showing that these pistols can discharge a shot or that they can be readily restored to fire a shot. The evidence is undisputed that in their present condition neither gyrojet can discharge a shot. Whether either can be readily restored to fire will be discussed in a subsequent section.

(1) Subsection (f) reads in pertinent part as follows:

> The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant [FN4] charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant,4 the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled.

FN4. May be spelled propellent or propellant according to Webster.

26 U.S.C. s 5845(f). This definition is in three basic parts. Only subpart (D) of subparagraph (1) is potentially applicable to *573 the gyrojet pistols insofar as this first category is concerned. The ammunition for a gyrojet pistol could be deemed to be a missile but since no gyrojet ammunition was found in the Association's museum, the gyrojet pistols cannot qualify under subparagraph (1). Subparagraph (2) is alleged to be applicable to the pistols. Again, in their present condition, there is no dispute in the evidence that the pistols will not expel a projectile. Whether they can be "readily converted" to expel a projectile will be discussed in a subsequent section. Subparagraph (3) contemplates any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2). There are essential ingredients missing here also: the "missile" specified in subparagraph (1), the projectile specified in subparagraph (2), and the explosive or other propellant specified under either subparagraph (1) or (2). Without these ingredients, the parts seized from the Association's museum do not constitute a "destructive device" as defined in subparagraph (3) of the statute.[FN5]

FN5. In United States v. Malone, 546 F.2d 1182 (5th Cir. 1977), the Fifth Circuit had occasion to reverse a conviction for possession of an unregistered firearm. The unregistered firearm was alleged to be a "destructive device" as defined by section 5845(f)(3) of Title 26, United States Code. The description of the device was that of a military MK2 fragmentation hand grenade. However, at no time did defendant have in his possession nor did the indictment charge possession of any explosive. The Fifth Circuit held: "What we do hold is that the complete absence of explosive material would prevent the component parts in defendant's possession from being a destructive device." 546 F.2d at 1184.

Readily Restored to Shoot.

(2) If Government Exhibits 1 through 4 were not designed or manufactured to shoot, or cannot be readily restored to shoot, automatically, they are not firearms

within the coverage of the Act. These words are not defined in the Act. Accordingly, the Court will apply the normal and usual meaning attributed to these words.[FN6] "Readily," according to Webster, means: without hesitation; without delay; quickly; without difficulty. While the testimony of the experts was in conflict as to how quickly or how difficult the operation might be to convert these items to a condition whereby they might be fired, the Court believes that the testimony offered by the Association has the more convincing force.[FN7] Government Exhibits 1 through 4 were designed and manufactured not to shoot. The barrels were welded and other incidental welds were placed in the items to prevent firing, either automatically, semiautomatically or otherwise. The experts were in agreement that to drill out these welds or barrel plugs would be both time consuming and impractical. Also it would damage or destroy the barrel. The experts agreed that if this procedure were elected, a shop in which the tools would cost approximately $65,000 would be required and expert gunsmith services would be necessary. This, it seems to the Court, clearly is not within the coverage reasonably anticipated by the key word "readily."

FN6. E. g., United States v. New Mexico, 536 F.2d 1324, 1327-1328 (10th Cir. 1976); see 2A C. Sands, Sutherland on Statutes and Statutory Construction ss 45.08, 47.28 (4th ed. 1973).

FN7. Col. Edward Crossman, a career Ordnance Corps officer in the U.S. Army specializing in the development of small arms, testified on behalf of the Association. He is the author of numerous articles in this field and after his retirement was selected as the consultant for a congressional committee investigating complaints concerning some of the items in this case. Exhibit JJ.

The Government sought to get around this obstacle by demonstrating through its expert that a barrel and receiver from an operable firearm, as well as other operable parts, might be substituted. In order to make the demonstration with respect to Government Exhibit 1, the Colt item, Mr. Owen removed the barrel and upper receiver as well as operable parts from Government Exhibit 8, which had been taken from the Bureau's museum and substituted these operable parts in Government Exhibit 1, the seized Colt item. Since this experimental item is a rare piece, it is highly unlikely ***574** that one seeking to convert Government Exhibit 1 might have access to an operable barrel upper receiver and spare parts of a Colt AR-15.[FN8] Accordingly, the Court is not satisfied that the Government has made the required demonstration that the Colt item is a firearm or that it is readily convertible to be a firearm.

FN8. See note 2 supra.

The term which Congress saw fit to use in the statute, "restorable", is defined by Webster "to bring back to a former or normal condition, as by repairing, rebuilding, altering, as to restore a building, painting, etc." It is obvious that when one is concerned with Government Exhibit 1, which was never in the first place designed to shoot but was on the other hand designed to be a museum display piece and shipped by Colt to the Association's museum for that purpose, one is not seeking to restore the item. One is seeking to demonstrate that the item can be converted into something this item was never designed to be in the first place. This is also true in the case of Government Exhibits 2, 3, 4, and 5.

With respect to the Heckler and Koch item, Government Exhibit 2, as previously pointed out, the manufacturer in West Germany shipped through customs an item designed and manufactured as a display piece. The manufacturer welded the barrel; Exhibit 2 has missing certain essential parts; it has never been fired; it was designed and manufactured solely as an exhibition piece for the Association's museum. No operable barrels are available in this country nor are the missing essential parts available. The Government's proof accordingly fails. The item was not designed or manufactured to shoot nor is it readily convertible to shoot, either automatically, semiautomatically or otherwise.

Government Exhibit 3, the Springfield T-44-E-4, is a transitional model of what subsequently has been developed into the M-14. As previously pointed out, this developmental model is a rare piece of interest primarily to a museum. There was conflict between the expert witnesses as to the substitution of a barrel from an M-14 respecting this item. The Government's expert saw no problem but the Association's expert pointed out the head space problem and others that might be encountered. Originally the Springfield Armory model T- 44-E-4 was designed as a lightweight, air cooled, gas operated, magazine fed, shoulder weapon, designed primarily for semiautomatic fire. To fire automatically

it must be converted. In its present condition Government Exhibit 3 is inoperable. Removing the obstruction from the barrel would require a barrel vise and certain expensive milling equipment not readily available even in a fully equipped gunsmith shop. The cost of a milling machine is about $2,000. Witnesses agreed that the removal of a barrel obstruction requires the skill and experience of an expert gunsmith. The removal of the barrel from a T-44-E-4 item requires a barrel vise and an action wrench, as well as the services of an expert gunsmith. There was no testimony at trial which indicated a source from which a T-44-E-4 barrel might be obtained. Even if an M-14 barrel might be obtained, no satisfactory showing was made that an M-14 barrel would thread into a T-44-E-4 receiver. Even if this could be done, a head space problem is likely to be encountered. A master gunsmith might check for the head space problem. If this were not corrected within the specified tolerances, the item might blow up and injure the shooter.

A master gunsmith working in a fully equipped shop with tools and equipment costing over $65,000 would require more than four hours to replace the barrel of the T-44-E-4 or attempt to salvage the existing barrel if no unforeseen problems were encountered. If the gunsmith sought to remove the obstruction and salvage the existing barrel, this salvage attempt might destroy the barrel. Obviously the rifling would be ruined, thereby destroying the accuracy of the item. Government Exhibit 3 cannot readily be converted to shoot automatically more than one shot without manual reloading by a single function of the*575 trigger. It was not designed to shoot automatically. Even if Government Exhibit 3, the Springfield Armory item T-44-E-4, were originally designed to render fully automatic fire, it was redesigned by the designer-manufacturer so that it presently is not designed to shoot automatically more than one shot without manual reloading by a single function of the trigger. In its present condition Government Exhibit 3 is not capable of firing automatically, semiautomatically or otherwise. It is designed and manufactured as a museum piece and not a firearm.

The Harrington and Richardson item, Government Exhibit 4, also is a rare experimental item donated to the Association's museum by the Ordnance Corps of the United States Army, by which it was completely demilitarized and redesigned as a museum piece. The Harrington and Richardson T-48 represents a developmental phase in which competing efforts were being made to replace the M-1 Garand rifle by an Americanized version of the Belgian-NATO rifle. Replacement of the barrel and missing parts was the subject of sharp conflict between the experts. The Court accepts the testimony of the Association's expert as the more logical and convincing for reasons previously set forth. When this item left the factory, it was not designed to shoot automatically more than one shot without manual reloading by a single function of the trigger. Expert testimony, which the Court accepts, was to the effect that an expert gunsmith working in a fully equipped gun shop with tools and equipment costing approximately $65,000 would require at least 30 hours to plan and achieve the conversion of this item to full automatic fire. In this connection it is noted that the parts of a Fabrique Nationale FN/FAL rifle are not fully interchangeable with the T-48 item and for this reason, the time required for a conversion of this item to one capable of fully automatic fire might take substantially longer than the 30 hours contemplated by the Association's expert. It is my finding that this Harrington and Richardson item is a museum piece, not a firearm, and that it is not readily convertible to shoot automatically.

(3) The Government contends that, regardless of missing essential parts and the welded or otherwise unserviceable condition of the barrels of Government Exhibits 1, 2, 3, and 4, they are nevertheless machineguns within the purview of 26 U.S.C. s 5845(b) for the reason that the frame or receiver [FN9] of each is intact and therefore, under the provisions of the second sentence of the definition, the frame or receiver units themselves are machineguns. Section 5845(b) reads as follows:

> FN9. These terms are interchangeable according to the testimony of Mr. Owen, the Government expert.

> Machinegun.-The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

26 U.S.C. s 5845(b) (emphasis added). It is clear that the interchangeable term "frame or receiver" is used in the conjunctive with conversion parts and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under

the control of a person. No evidence was offered with respect to the possession of these parts insofar as the Association is concerned. Since the Congress saw fit to phrase the second sentence of section 5845(b) in the conjunctive and not in the disjunctive, a reasonable reading of the statute would require the conclusion that the term "frame or receiver" is not contemplated in isolation but together with the possession of additional parts from which the machinegun could be assembled.

***576** The Government relies upon legislative history to demonstrate that Congress did not intend conjunctive use but on the other hand, meant disjunctive use. When the statute is clear and unambiguous on its face, no resort to legislative history is required or even justified.[FN10] Had Congress intended what the Government now advocates, the simple use of the word "or" instead of "and" in the second sentence would have achieved this result. It is noted that in the preceding sentence where disjunctive meaning was intended "or" was used. The Association, in disputing the Government's interpretation of the second sentence of the definition of machinegun, points out that the "frame or receiver" of the M-1 carbine (semiautomatic) is identical with the frame or receiver of the M-2 carbine (automatic). This testimony, which is undisputed, illustrates the fallacy of the Government's interpretation that "frame or receiver" means a machinegun (automatic).

FN10. Sea-Land Service, Inc. v. Federal Maritime Commission, 131 U.S.App.D.C. 246, 350, 404 F.2d 824, 828 (1968); United States v. Oregon, 366 U.S. 643, 648, 81 S.Ct. 1278, 1280, 6 L.Ed.2d 575 (1961).

The Government's contention that the frame or receiver of each of the following items-Government Exhibit 1, the Colt item; Government Exhibit 2, the Heckler and Koch item; Government Exhibit 3, the Springfield item; and Government Exhibit 4, the Harrington and Richardson item-are machineguns ignores the plain meaning of the second sentence of the definition of "machinegun." The Government contends, in short, that the frame or receiver is the machinegun. The language reads as follows: "The term shall also include the frame or receiver of any such weapon," which refers back to the first sentence and requires that the frame or receiver be the frame or receiver of any machinegun (1) which shoots, (2) is designed to shoot or (3) can be readily restored to shoot automatically more than one shot without manual reloading by a single function of the trigger. As previously demonstrated with respect to these four items, no one of them shoots, no one of them is designed to shoot, no one of them can be readily restored to shoot, automatically more than one shot without manual reloading by a single function of the trigger. These four items were designed and manufactured as display pieces, not as firearms, and as such, were donated to the Association's museum by the manufacturer or the United States Army prior to the effective date of the 1968 Act.

(4) The Lee Enfield item, Government Exhibit 5, with its cutaway barrel, designed or redesigned to demonstrate the inner mechanism of this item and not at anytime disclosed by the evidence designed to fire, is an item in which the Government's proof is inadequate to justify the conclusion that it is a firearm subject to forfeiture.[FN11] Government Exhibit 5 is a clear example of an item that was simply not designed as a weapon, but rather was designed as a military demonstration piece. Even if there were merit in the Government's contention that this is an "unserviceable firearm" within the meaning of section 5845(h),[FN12] it appears from the evidence that the former owner of the item, one Benjamin O. Coppess, did register it and did notify the Bureau that he was transferring it to the Association. The record is unclear as to whether he filled out and filed the papers required by the Bureau to authorize transfer to the Association. However, the Association offered extensive evidence in the form of reports of officials of the Bureau to demonstrate the incompleteness of the Bureau's records. It is my finding that Government Exhibit 5 is a demonstration item or display piece and not a firearm and further that the Government has failed to prove that the item is not registered.

FN11. See s 5845(a)(3), (c) ("rifle" definition).

FN12. For the same reasons set forth in the discussion below of Government Exhibits 6 and 7, Government Exhibit 5 cannot be classified as an "unserviceable firearm" because it is not a "firearm".

With respect to the gyrojet items, Government Exhibits 6 and 7, a somewhat different situation is presented. Unlike the ***577** other items, they were originally designed and manufactured to fire. But design is not the specified factor here. Sections 5845(e) and (f), on which the Bureau relies, refer respectively to devices

from which a shot can be discharged or which may be readily restored to fire, s 5845(e), and any type of weapon which will or which may be readily converted to expel a projectile, s 5845(f).

(5) There is no question but that when seized neither gyrojet item was operable. They could not discharge a shot or expel a projectile. The next question is whether either item can be "readily restored to fire" within the meaning of subsection (e), or "readily converted to expel a projectile," within the meaning of subsection (f). Replacement of the missing essential parts would require a master gunsmith working in a gun shop, the equipment and tools costing $65,000-133/4 hours in the case of gyrojet pistol A-029 (Government Exhibit 6) and 12 hours in the case of gyrojet pistol A-048 (Government Exhibit 7)-to fabricate the essential parts now missing. This is not readily restorable to shoot or readily convertible to expel a projectile. See, e. g., United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, 314 F.Supp. 179 (E.D.N.Y.1970), aff'd, 443 F.2d 463 (2d Cir.), 404 U.S. 983, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971) (less than 15 minutes held readily convertible). Moreover, this is clearly the fact since no gyrojet ammunition is available for these pieces. There is no known source from which gyrojet ammunition can be obtained for these items. The special ammunition required for a gyrojet pistol and without which it cannot be considered a weapon has not been manufactured for some years and none of the expert witnesses who testified knew where it could be procured. The Court concludes therefore, on the evidence presented, that Government Exhibits 6 and 7 cannot be readily restored to fire and cannot be readily converted to expel a projectile by the action of an explosive.

(6) The Government further contends that even if these items are unserviceable or incapable of being readily restored to a firing condition, they are nevertheless still firearms which are required to be registered under section 5845(h). The Government's reliance upon subsection (h), the "unserviceable firearm" provision, with respect to these gyrojets is misplaced. In determining whether the provisions of section 5845(h) are applicable, one must refer back to the definition of "firearm." Since the gyrojet pistols do not qualify either as a "destructive device" or as "any other weapon," and do not qualify under any other definition, they are not "firearms" within the meaning of s 5845(a). As a result, the "unserviceable firearm" definition, which merely serves to carve out a transfer tax exemption for devices that otherwise constitute firearms,[FN13] is inapplicable.

FN13. See 26 U.S.C. s 5852(e).

As previously pointed out, when one Timothy Dale Bixler sought to register an identical gyrojet pistol following the passage of the 1968 Act, he was told by a representative of the Bureau that registration was not required. If Mr. Bixler's gyrojet was identical to these gyrojets, he was correctly informed.

Forfeiture.

This is a highly unusual action. As far as this Court has been able to ascertain, this is the only instance in which the Government has seized items from a recognized museum. Practically all of the cases involve various violations or alleged violations of Title 26, section 5801 et seq. and its predecessor act. In many instances criminal cases were prosecuted. Here, the forfeiture which the Government seeks to impose rests solely on the proposition that the Government has no record of the registration of the items seized.

(7) The Court concludes that there is a failure of proof so far as the Government is concerned which would justify the forfeiture of these items. Five of the seven items were completely demilitarized or rendered incapable of firing by the manufacturer ***578** or the United States Government prior to being donated to the Association's museum. In most instances, so far as the evidence shows, the items have never been fired, were not designed or manufactured to fire, and hence are not firearms. The two gyrojet pistols are not destructive devices as that term is defined in the Act. Registration is the responsibility of the transferor. Considerable evidence was received that the Bureau's officials have for many years recognized the inadequacy and incompleteness of the Bureau's records. The Court is not required to pass judgment on this, however, because the Government has failed to show that these seven items are firearms.

In McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971), the Sixth Circuit emphasized that appellant was a law-abiding citizen who had placed his firearms in a collection with the continuing lawful purpose of maintaining valuable souvenirs or curios from his wartime service. Appellant had lawfully brought these souvenirs into this country and had held them for more than twenty years before seeking to register them, at which time he found himself under indictment and the subject of a forfeiture proceeding. The criminal charges were subsequently dismissed by the Government. The court pointed out that this forfeiture

action was not a typical in rem proceeding. The lack of any valid legislative, administrative or revenue purpose afforded the court a basis for conceiving of the action for certain constitutional purposes as an in personam action. The court pointed out that it was not creating a legal fiction but destroying one. That legal fiction is that the items themselves have violated the law. Among other things, the court emphasized the lawfulness of appellant's interest in possessing the firearms, the lack of any declared legislative policy that forfeiture under those circumstances would aid in enforcing criminal laws and the lack of any sound administrative or revenue purpose to justify the forfeiture. The instant case has much in common with the McKeehan case.

(8) The Court is clear that the Government's proof has failed to establish that the seized items are firearms as that term is defined in the statute for the reasons previously set forth. Furthermore, it notes that discretionary authority is conferred upon the Secretary to exempt certain firearms as collector's items or curios when they are not likely to be used as a weapon. By conferring authority on the Secretary to exempt certain devices that are primarily collector's items even though they were originally designed as weapons, section 5845(a) clearly contemplates that a given device may or may not be "designed as a weapon." It thus adds further support to the Court's conclusion that items such as Government Exhibits 1 through 5, which are primarily collector's items or museum pieces but which were not even designed as weapons, are not firearms within the meaning of the Act.

The Tenth Circuit in the recent case of Davis v. Erdmann, 607 F.2d 917 (10th Cir. 1979), had occasion to discuss the Secretary's discretionary authority under s 5845(a). Plaintiff filed application to import from England a device or weapon described as a "knife-pistol." The application was denied by the Director of the Bureau of Alcohol, Tobacco and Firearms. Thereafter there was a hearing by agreement before the Court magistrate, who found that the Director's action was arbitrary and capricious. The District Court sustained the Director's objections to the Magistrate's holding. The plaintiff appealed and the Court of Appeals reversed the District Court. The Court of Appeals discussed the purpose of the National Firearms Act and the Gun Control Act and stated that each of these acts in somewhat different language recognized the interest of citizens in antique and unusual firearms and concluded that it was not the purpose of Congress "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity ...." 607 F.2d at 918. The Court ***579** then said "the issue is not whether the knife-pistol could be used as a weapon but whether it is 'primarily a collector's item and not likely to be used as a weapon,' or is 'a curio or museum piece.' " The Court concluded that the knife-pistol was within either definition. The Court further concluded that the Director's denial of a permit appeared to be a classic example of agency "nitpicking" and was arbitrary and capricious. Id. at 920. In the instant case, the items are not even designed and manufactured as weapons.

Statutes imposing a forfeiture must be strictly construed.[FN14] The basis or justification for the imposition of a forfeiture is that the articles sought to be forfeited are guilty or are somehow involved in the commission of a crime. [FN15] Generally, forfeiture statutes are strictly construed against forfeiture and in favor of the person whose property rights are affected. Every element justifying the forfeiture must be clearly shown and the rules of procedure are to be construed so as to narrowly circumscribe the remedy of forfeiture.[FN16] Unless the property is used in violation of law, there is no justification for the forfeiture.

FN14. American Maritime Ass'n. v. Blumenthal, 590 F.2d 1156, 1165 (D.C.Cir.1978), cert. denied, 441 U.S. 943, 99 S.Ct. 2161, 60 L.Ed.2d 1045 (1979).

FN15. United States v. U.S. Coin & Currency, 401 U.S. 715, 719, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434 (1971).

FN16. E. g., Lowther v. United States, 480 F.2d 1031, 1034 (10th Cir. 1973); United States v. Goodson, 439 F.2d 1056 (5th Cir. 1971); United States v. 1954 Oldsmobile, 132 F.Supp. 688 (W.D.Ky.1955); Kane v. McDaniel, 407 F.Supp. 1239, 1242 (W.D.Ky.1975).

In this case, the right of the Bureau to check the contents of the Museum is not challenged. What must be strictly construed, however, is the justification for the seizure and the forfeiture. The Bureau seeks to accomplish this by attempting to show that Exhibits 1-4

are machineguns which shoot, are designed to shoot, or may be readily restored to shoot automatically. It is this statutory definition that must be strictly proven. The Bureau's proof has failed to show clearly that Exhibits 1-4 are machineguns as defined by the statute. They do not shoot; they were not designed by the manufacturer to shoot; and they may not be readily restored to shoot automatically more than one shot by a single function of the trigger.

Since the Government has not shown that Exhibits 1-4 are firearms (machineguns), they are not subject to the requirement of registration. No loss of revenue is involved. Failure to register is the only violation of law on which the Government depends in its effort to justify seizure and forfeiture. Its effort must fail.

Exhibit 5, the short barrel Lee Enfield item, was not designed or redesigned or made or remade and intended to be fired from the shoulder nor may it be readily restored to fire a fixed cartridge. The proof showed that it was designed as a demonstration piece with a cutaway section of the receiver, the function of which was to illustrate the inner mechanism of the piece. It is not a firearm. The prior owner did register it as an inoperable firearm and did notify the Bureau of its transfer to the Association. The record is unclear as to further action. The record does not justify the seizure and forfeiture of this item.

Government Exhibits 6 and 7, the gyrojet pistols, have not been shown to be destructive devices or any other weapons as the Government contends. Accordingly, they are not firearms requiring registration.

CONCLUSION

On the basis of the findings of fact and conclusions of law set forth above, the Court concludes that judgment should be entered in favor of defendants and against plaintiff and that each of the seized items should be returned to the Association's museum.

END OF DOCUMENT

112 S.Ct. 2102
119 L.Ed.2d 308, 60 USLW 4480, 69 A.F.T.R.2d 92-1493
**(Cite as: 504 U.S. 505, 112 S.Ct. 2102)**

Supreme Court of the United States

UNITED STATES, Petitioner
v.
THOMPSON/CENTER ARMS COMPANY.

**No. 91-164.**

Argued Jan. 13, 1992.
Decided June 8, 1992.

Arms manufacturer sued for refund of tax imposed under National Firearms Act. The United States Claims Court, Lawrence S. Margolis, J., 19 Cl.Ct. 725, held that pistol distributed in conjunction with kit allowing conversion into weapon fired from shoulder was "firearm" subject to special excise tax under Act. Manufacturer appealed. The Court of Appeals for the Federal Circuit, 924 F.2d 1041, reversed. Certiorari was granted. The Supreme Court, Justice Souter, held that: (1) statute was ambiguous as to whether it applied to a pistol distributed with additional parts, which could be assembled into a short-barreled rifle subject to the Act, or a long-barreled rifle not covered by Act, and (2) application of rule of lenity required that tax be found inapplicable.

Affirmed.

Justice Scalia concurred in judgment and filed opinion, in which Justice Thomas joined.

Justice White dissented and filed opinion in which Justices Blackmun, Stevens and Kennedy joined.

Justice Stevens dissented and filed opinion.

West Headnotes

[1] **Internal Revenue** ⚿**4332**
220k4332 Most Cited Cases

Term "making" as used in statute imposing tax on anyone "making" a firearm, covered more than final assembly of weapon and included some disassembled aggregation of parts. (Per Justice Souter, with The Chief Justice and one Justice concurring and two Justices concurring in judgment.) 26 U.S.C.A. § 5845(i).

[2] **Internal Revenue** ⚿**4332**
220k4332 Most Cited Cases

Definition of "rifle," included in statute imposing tax on anyone "making" firearm, which covered unit "intended to be fired from the shoulder" was satisfied by distribution of kit containing pistol and shoulder stock which could be attached to it. (Per Justice Souter, with The Chief Justice and one Justice concurring and two Justices concurring in judgment.) 26 U.S.C.A. § 5845(c).

[3] **Internal Revenue** ⚿**4332**
220k4332 Most Cited Cases

Definition of "machinegun" found in Gun Control Act, to include any combination of parts from which machinegun could be assembled, and definition of "silencer" under Firearm Owners' Protection Act, to include any combination of parts which could be used for assembling or fabricating silencer, did not establish that Congress, by not including similar reference to component parts in defining "firearm" for purposes of statute imposing tax on making of firearm did not intend for components to be included within definition. (Per Justice Souter, with The Chief Justice and one Justice concurring and two Justices concurring in judgment.) 18 U.S.C.A. § 921; 26 U.S.C.A. § 5845(a)(3, 7), (b).

[4] **Internal Revenue** ⚿**4332**
220k4332 Most Cited Cases

Statute imposing tax on "making" of "firearm" was ambiguous as applied to kit including pistol that could be converted either into short-barreled rifle to which tax applied if wooden stock were attached and pistol barrel left in place, or into a long-barreled rifle to which the tax did not apply if an alternate barrel were attached. (Per Justice Souter, with The Chief Justice and one Justice concurring and two Justices concurring in judgment.) 26 U.S.C.A. §§ 5821, 5821(a), 5845(a)(3).

[5] **Internal Revenue** ⚿**4332**
220k4332 Most Cited Cases

Rule of lenity required that statute which was ambiguous as to whether tax applied to a pistol

distributed in a kit with extra parts, would be construed so as to not apply; rule of lenity governed even though tax statute was involved, as there were criminal applications for failure to pay tax that carried no additional requirements of willfulness. 26 U.S.C.A. §§ 5821, 5821(a), 5845(a)(3), 5861, 5871.

[6] **Statutes ⇐241(1)**
361k241(1) Most Cited Cases

Rule of lenity is rule of statutory construction whose purpose is to help give authoritative meaning to statutory language; it is not rule of administration calling for courts to refrain in criminal case from applying statutory language that would have been held to apply if challenged in civil litigation.

****2103** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent manufactures the "Contender" pistol and, for a short time, also manufactured a kit that could be used to convert the Contender into a rifle with either a 21-inch or a 10-inch barrel. The Bureau of Alcohol, Tobacco and Firearms advised respondent that when the kit was possessed or distributed with the Contender, the unit constituted a "firearm" under the National Firearms Act (NFA or Act), 26 U.S.C. § 5845(a)(3), which defines that term to include a rifle with a barrel less than 16 inches long, known as a short-barreled rifle, but not a pistol or a rifle having a barrel 16 inches or more in length. Respondent paid the $200 tax levied by § 5821 upon anyone "making" a "firearm" and filed a claim for a refund. When its refund claim proved fruitless, respondent brought this suit under the Tucker Act. The Claims Court entered summary judgment for the Government, but the Court of Appeals reversed, holding that a short-barreled rifle "actually must be assembled" in order to be "made" within the NFA's meaning.

*Held:* The judgment is affirmed.

924 F.2d 1041 (Fed.1991), affirmed.

Justice SOUTER, joined by THE CHIEF JUSTICE and Justice O'CONNOR, concluded that the Contender and conversion kit when packaged together have not been "made" into a short-barreled rifle for NFA purposes. Pp. 2105-2110.

(a) The language of § 5845(i)--which provides that "[t]he term 'make', and [its] various derivatives ..., shall include manufacturing ..., putting together ..., or otherwise producing a firearm"--clearly demonstrates that the aggregation of separate parts that can be assembled only into a firearm, and the aggregation of a gun other than a firearm and parts that would have no use in association with the gun except to convert it into a firearm, constitute the "making" of a firearm. If, as the Court of Appeals held, a firearm were only made at the time of final assembly (the moment the firearm was "put together"), the statutory "manufacturing ... or otherwise producing" language would be redundant. Thus, Congress must have understood "making" to cover more than final assembly, and some disassembled aggregation of parts must be included. Pp. 2105-2107.

***506** (b) However, application of the ordinary rules of statutory construction shows that the Act is ambiguous as to whether, given the fact that the Contender can be converted into either an NFA-regulated firearm or an unregulated rifle, the mere possibility of its use with the kit to assemble the former renders their combined packaging "making". Pp. 2107-2109.

(c) The statutory ambiguity is properly resolved by applying the rule of lenity in respondent's favor. See, *e.g.*, ****2104**Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1007, 108 L.Ed.2d 132. Although it is a tax statute that is here construed in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. Making a firearm without approval may be subject to criminal sanction, as is possession of, or failure to pay the tax on, an unregistered firearm. Pp. 2109-2110.

Justice SCALIA, joined by Justice THOMAS, agreed that the rule of lenity prevents respondent's pistol and conversion kit from being covered by the NFA, but on the basis of different ambiguities: whether a firearm includes unassembled parts, and whether the requisite "inten[t] to be fired from the shoulder" existed as to the short-barrel component. Pp. 2110-2112.

SOUTER, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C.J., and O'CONNOR, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 2110. WHITE, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and KENNEDY, JJ., joined, *post*, p. 2112. STEVENS, J., filed a dissenting opinion, *post*, p. 2113.

*James A. Feldman* argued the cause for the United States. On the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Kent L. Jones, Gilbert S. Rothenberg,* and *Steven W. Parks.*

*Stephen P. Halbrook* argued the cause and filed a brief for respondent.*

* *Richard E. Gardiner* filed a brief for Senator Larry E. Craig et al. as *amici curiae* urging affirmance.

Justice SOUTER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice O'CONNOR join.

Section 5821 of the National Firearms Act (NFA or Act), see 26 U.S.C. § 5849, levies a tax of $200 per unit upon anyone "***507** making" a "firearm" as that term is defined in the Act. Neither pistols nor rifles with barrels 16 inches long or longer are firearms within the NFA definition, but rifles with barrels less than 16 inches long, known as short-barreled rifles, are. § 5845(a)(3). This case presents the question whether a gun manufacturer "makes" a short-barreled rifle when it packages as a unit a pistol together with a kit containing a shoulder stock and a 21-inch barrel, permitting the pistol's conversion into an unregulated long-barreled rifle, [FN1] or, if the pistol's barrel is left on the gun, a short-barreled rifle that is regulated. We hold that the statutory language may not be construed to require payment of the tax under these facts.

FN1. Unregulated, that is, under the NFA.

I

The word "firearm" is used as a term of art in the NFA. It means, among other things, "a rifle having a barrel or barrels of less than 16 inches in length...." § 5845(a)(3). "The term 'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge." § 5845(c).

The consequence of being the maker of a firearm are serious. Section 5821(a) imposes a tax of $200 "for each firearm made," which "shall be paid by the person making the firearm," § 5821(b). Before one may make a firearm, one must obtain the approval of the Secretary of the Treasury, § 5822, and § 5841 requires that the "manufacturer, importer, and maker ... register each firearm he manufactures, imports, or makes" in a central registry maintained by the Secretary of the Treasury. A maker who fails to comply with the NFA's provisions is subject to criminal penalties of up to 10 ***508** years' imprisonment and a fine of up to $10,000, or both, which may be imposed without proof of willfulness or knowledge. § 5871.

****2105** Respondent Thompson/Center Arms Company manufactures a single- shot pistol called the "Contender," designed so that its handle and barrel can be removed from its "receiver," the metal frame housing the trigger, hammer, and firing mechanism. See 27 CFR § 179.11 (1991) (definition of frame or receiver). For a short time in 1985, Thompson/Center also manufactured a carbine-conversion kit consisting of a 21-inch barrel, a rifle stock, and a wooden fore-end. If one joins the receiver with the conversion kit's rifle stock, the 21-inch barrel, and the rifle fore-end, the product is a carbine rifle with a 21-inch barrel. If, however, the shorter, pistol-length barrel is not removed from the receiver when the rifle stock is added, one is left with a 10-inch or "short-barreled" carbine rifle. The entire conversion, from pistol to long-barreled rifle takes only a few minutes; conversion to a short- barreled rifle takes even less time.

In 1985, the Bureau of Alcohol, Tobacco and Firearms advised Thompson/Center that when its conversion kit was possessed or distributed together with the Contender pistol, the unit constituted a firearm subject to the NFA. Thompson/Center responded by paying the $200 tax for a single such firearm, and submitting an application for permission under 26 U.S.C. § 5822 "to make, use, and segregate as a single unit" a package consisting of a serially numbered pistol, together with an attachable shoulder stock and a 21-inch barrel. Thompson/Center then filed a refund claim. After more than six months had elapsed without action on it, the company brought this suit in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491, arguing that the unit registered was not a firearm within the meaning of the NFA because Thompson/Center had not assembled a short-barreled rifle from its components. The Claims Court ***509** entered summary judgment for the Government, concluding that the Contender pistol together with its conversion kit is a firearm within the meaning of the NFA. 19 Cl.Ct. 725 (1990).

The Court of Appeals for the Federal Circuit reversed, holding that a short- barreled rifle "actually must be assembled" in order to be "made" within the meaning of the NFA. 924 F.2d 1041, 1043 (1991). The Court of Appeals expressly declined to follow the decision of the Court of Appeals for the Seventh Circuit in *United States v. Drasen*, 845 F.2d 731, cert. denied, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988), which had held that an unassembled "complete parts kit" for a short-barreled rifle was in fact a short-barreled rifle for purposes of the NFA. We granted certiorari to resolve this conflict. 502 U.S. 807, 112 S.Ct. 48, 116 L.Ed.2d 26 (1991).

II

The NFA provides that "[t]he term 'make', and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm." 26 U.S.C. § 5845(i). [FN2] But the provision does not expressly address the question whether a short- barreled rifle can be "made" by the aggregation of finished parts that can readily be assembled into one. The Government contends that assembly is not necessary; Thompson/Center argues that it is.

> FN2. The phrase "other than by one qualified to engage in such business under this chapter" apparently refers to those manufacturers who have sought and obtained qualification as a firearms manufacturer under 26 U.S.C. § 5801(a)(1), which requires payment of a $1,000 occupational tax. Rather than seek such qualification, Thompson/Center applied for permission to make a firearm as a nonqualified manufacturer under § 5822, which requires payment of the $200 per firearm "making tax" under § 5821(a).

A

The Government urges us to view the shipment of the pistol with the kit just as we would the shipment of a bicycle ***510** that requires ****2106** some home assembly. "The fact that a short-barrel rifle, or any other 'firearm,' is possessed or sold in a partially unassembled state does not remove it from regulation under the Act." Brief for United States 6.

The Government's analogy of the partially assembled bicycle to the packaged pistol and conversion kit is not, of course, exact. While each example includes some unassembled parts, the crated bicycle parts can be assembled into nothing but a bicycle, whereas the contents of Thompson/Center's package can constitute a pistol, a long-barreled rifle, or a short-barreled version. These distinctions, however, do define the issues raised by the Government's argument, the first of which is whether the aggregation and segregation of separate parts that can be assembled only into a short-barreled rifle and are sufficient for that purpose amount to "making" that firearm, or whether the firearm is not "made" until the moment of final assembly. This is the issue on which the Federal and Seventh Circuits are divided.

[1] We think the language of the statute provides a clear answer on this point. The definition of "make" includes not only "putting together," but also "manufacturing ... or otherwise producing a firearm." If as Thompson/Center submits, a firearm were only made at the time of final assembly (the moment the firearm was "put together"), the additional language would be redundant. Congress must, then, have understood "making" to cover more than final assembly, and some disassembled aggregation of parts must be included. Since the narrowest example of a combination of parts that might be included is a set of parts that could be used to make nothing but a short-barreled rifle, the aggregation of such a set of parts, at the very least, must fall within the definition of "making" such a rifle.

This is consistent with the holdings of every Court of Appeals, except the court below, to consider a combination of parts that could only be assembled into an NFA-regulated ***511** firearm, either under the definition of rifle at issue here or under similar statutory language. See *United States v. Drasen, supra; United States v. Endicott*, 803 F.2d 506, 508-509 (CA9 1986) (unassembled silencer is a silencer); *United States v. Luce*, 726 F.2d 47, 48-49 (CA1 1984) (same); *United States v. Lauchli*, 371 F.2d 303, 311-313 (CA7 1966) (unassembled machineguns are machineguns). [FN3] We thus reject the broad language of the Court of Appeals for the Federal Circuit to the extent that it would mean that a disassembled complete short-barreled rifle kit must be assembled before it has been "made" into a short-barreled rifle. The fact that the statute would serve almost no purpose if this were the rule only confirms the reading we have given it. [FN4]

> FN3. In *Drasen*, a complete-parts kit was sold

with a flash suppressor, which, if affixed to the rifle barrel, would have extended it beyond the regulated length. See *Drasen*, 845 F.2d, at 737. Because the *Drasen* court concluded that such a flash suppressor was not a part of the rifle's barrel, see *ibid.*, its holding is consistent with ours.

FN4. We do not accept the Government's suggestion, however, that complete-parts kits must be taxable because otherwise manufacturers will be able to "avoid the tax." Brief for United States 11. Rather, we conclude that such kits are within the definition of the taxable item. Failure to pay the tax on such a kit thus would amount to evasion, not avoidance. In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right. "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Commissioner v. Newman*, 159 F.2d 848, 850-851 (CA2) (L. Hand, J., dissenting), cert. denied, 331 U.S. 859, 67 S.Ct. 1755, 91 L.Ed. 1866 (1947).

We also think that a firearm is "made" on facts one step removed from the paradigm of the aggregated parts that can be used for nothing except assembling a firearm. Two courts to our knowledge have dealt in some way with claims that when a gun other than **2107 a firearm was placed together *512 with a further part or parts that would have had no use in association with the gun except to convert it into a firearm, a firearm was produced. See *United States v. Kokin*, 365 F.2d 595, 596 (CA3) (carbine together with all parts necessary to convert it into a machinegun is a machinegun), cert. denied, 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1966); see also *United States v. Zeidman*, 444 F.2d 1051, 1053 (CA7 1971) (pistol and attachable shoulder stock found "in different drawers of the same dresser" constitute a short-barreled rifle). Here it is true, of course, that some of the parts could be used without ever assembling a firearm, but the likelihood of that is belied by the utter uselessness of placing the converting parts with the others except for just such a conversion. Where the evidence in a given case supports a finding of such uselessness, the case falls within the fair intendment of "otherwise producing a firearm." See 26 U.S.C. § 5845(i). [FN5]

FN5. Contrary to Justice SCALIA's suggestion, see *post*, at 2112, our understanding of these aggregations of parts, shared by a majority of the Court (those who join this opinion and the four Members of the Court in dissent, see *post*, pp. 2112-2113 (WHITE, J., joined by BLACKMUN, STEVENS, and KENNEDY, JJ., dissenting) (*any* aggregation of parts necessary to assemble a firearm is a firearm)), applies to all the provisions of the Act, whether they regulate the "making" of a firearm, *e.g.*, 26 U.S.C. § 5821(a), or not, see, *e.g.*, § 5842(b) (possession of a firearm that has no serial number); § 5844 (importation of a firearm); § 5811 (transfer of a firearm). Since, as we conclude, such a combination of parts, or of a complete gun and an additional part or parts, is "made" into a firearm, it follows, in the absence of some reason to the contrary, that all portions of the Act that apply to "firearms" apply to such a combination. Justice SCALIA does not explain how we would be free to construe "firearm" in a different way for purposes of those provisions that do not contain the verb "to make." Our normal canons of construction caution us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute.

B

[2] Here, however, we are not dealing with an aggregation of parts that can serve no useful purpose except the assembly *513 of a firearm, or with an aggregation having no ostensible utility except to convert a gun into such a weapon. There is, to be sure, one resemblance to the latter example in the sale of the Contender with the converter kit, for packaging the two has no apparent object except to convert the pistol into something else at some point. But the resemblance ends with the fact that the unregulated Contender pistol can be converted not only into a short-barreled rifle, which is a regulated firearm, but also into a long-barreled rifle, which is not. The packaging of pistol and kit has an obvious utility for those who want both a pistol and a regular rifle, and the question is

whether the mere possibility of their use to assemble a regulated firearm is enough to place their combined packaging within the scope of "making" one. [FN6]

FN6. Thompson/Center suggests that further enquiry could be avoided when it contends that the Contender and carbine kit do not amount to a "rifle" of any kind because, until assembled into a rifle, they are not " 'made' and 'intended to be fired from the shoulder.' " Brief for Respondent 8. From what we have said thus far, however, it is apparent that, though disassembled, the parts included when the Contender and its carbine kit are packaged together have been "made" into a rifle. The inclusion of the rifle stock in the package brings the Contender and carbine kit within the "intended to be fired from the shoulder" language contained in the definition of rifle in the statute. See 26 U.S.C. § 5845(c). The only question is whether this combination of parts constitutes a short-barreled rifle. Surely Justice SCALIA's argument would take us over the line between lenity and credulity when he suggests that one who makes what would otherwise be a short-barreled rifle could escape liability by carving a warning into the shoulder stock. See *post,* at 2112 (SCALIA, J., concurring in judgment).

1

[3] Neither the statute's language nor its structure provides any definitive guidance. Thompson/Center suggests guidance may be found in some subsections of the statute governing **2108 other types of weapons by language that expressly covers combinations of parts. The definition of "machinegun," for example, was amended by the Gun Control Act of *514 1968 to read that "[t]he term shall also include ... any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. § 5845(b). [FN7] In 1986, the definition of "silencer" was amended by the Firearms Owners' Protection Act to "includ[e] any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer...." See 26 U.S.C. § 5845(a)(7); 18 U.S.C. § 921(a)(24).

FN7. At the same time, the definition of "destructive device" was amended to include "any combination of parts either designed or intended for use in converting any device into a destructive device ... and from which a destructive device may readily be assembled." 26 U.S.C. § 5845(f). This appears to envision by its terms only combinations of parts for converting something into a destructive device.

Thompson/Center stresses the contrast between these references to "any combination of parts" and the silence about parts in the definition of rifle in arguing that no aggregation of parts can suffice to make the regulated rifle. This argument is subject to a number of answers, however. First, it sweeps so broadly as to conflict with the statutory definition of "make," applicable to all firearms, which implies that a firearm may be "made" even where not fully "put together." If this were all, of course, the conflict might well be resolved in Thompson/Center's favor. We do not, however, read the machinegun and silencer definitions as contrasting with the definition of rifle in such a way as to raise a conflict with the broad concept of "making."

The definition of "silencer" is now included in the NFA only by reference, see 26 U.S.C. § 5845(a)(7), whereas its text appears only at 18 U.S.C. § 921(a)(24), in a statute that itself contains no definition of "make". Prior to 1986 the definition of "firearm" in the NFA included "a muffler or a silencer for any firearm whether or not such firearm is included within this definition." 26 U.S.C. § 5845(a)(7) (1982 ed.). Two Courts of Appeals held this language to include *515 unassembled silencers that could be readily and easily assembled. See *United States v. Endicott,* 803 F.2d, at 508-509; *United States v. Luce,* 726 F.2d, at 48-49.

In 1986, Congress replaced that language with "any silencer (as defined in section 921 of title 18, United States Code)." Pub.L. 99-308, § 109(b), 100 Stat. 449, 460. The language defining silencer that was added to 18 U.S.C. § 921 at that same time reads: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." Pub.L. 99-308, § 101, 100 Stat. 451.

Thompson/Center argues that if, even before the amendment, a combination of parts was already "made" into a firearm, the "any combination of parts" language

would be redundant. While such a conclusion of redundancy could suggest that Congress assumed that "make" in the NFA did not cover unassembled parts, the suggestion (and the implied conflict with our reading of "make") is proven false by evidence that Congress actually understood redundancy to result from its new silencer definition. Congress apparently assumed that the statute reached complete-parts kits even without the "combination" language and understood the net effect of the new definition as expanding the coverage of the Act beyond complete-parts kits. "The definition of silencer is amended to include any part designed or redesigned and intended to be used as a silencer for a firearm. This will help to control the sale of incomplete silencer kits that now circumvent the prohibition on selling complete kits." ****2109** H.R.Rep. No. 99-495, p. 21 (1986). Because the addition of the "combination of parts" language to the definition of silencer does not, therefore, bear the implication Thompson/Center ***516** would put on it, that definition cannot give us much guidance in answering the question before us. [FN8]

FN8. Justice SCALIA upbraids us for reliance on legislative history, his "St. Jude of the hagiology of statutory construction." *Post,* at 2111. The shrine, however, is well peopled (though it has room for one more) and its congregation has included such noted elders as Justice Frankfurter: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment--that to which it gave rise as well as that which gave rise to it--can yield its true meaning." *United States v. Monia,* 317 U.S. 424, 432, 63 S.Ct. 409, 413, 87 L.Ed. 376 (1943) (dissenting opinion).

We get no more help from analyzing the machinegun definition's reference to parts. It speaks of "any combination" of them in the possession or control of any one person. Here the definition sweeps broader than the aggregation of parts clearly covered by "making" a rifle. The machinegun parts need not even be in any particular proximity to each other. There is thus no conflict between definitions, but neither is much light shed on the limits of "making" a short-barreled rifle. We can only say that the notion of an unassembled machinegun is probably broader than that of an unassembled rifle. But just where the line is to be drawn on short-barreled rifles is not demonstrated by textual considerations.

2

Thompson/Center also looks for the answer in the purpose and history of the NFA, arguing that the congressional purpose behind the NFA, of regulating weapons useful for criminal purposes, should caution against drawing the line in such a way as to apply the Act to the Contender pistol and carbine kit. See H.R.Rep. No. 1337, 83d Cong., 2d Sess., A395 (1954) (the adoption of the original definition of rifle was intended to preclude coverage of antique guns held by collectors, "***517** in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters").

It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used. But when Thompson/Center urges us to recognize that "the Contender pistol and carbine kit is not a criminal-type weapon," Brief for Respondent 20, it does not really address the issue of where the line should be drawn in deciding what combinations of parts are "made" into short- barreled rifles. Its argument goes to the quite different issue whether the single-shot Contender should be treated as a firearm within the meaning of the Act even when assembled with a rifle stock.

Since Thompson/Center's observations on this extraneous issue shed no light on the limits of unassembled "making" under the Act, we will say no more about congressional purpose. Nor are we helped by the NFA's legislative history, in which we find nothing to support a conclusion one way or the other about the narrow issue presented here.

III

[4][5][6] After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of

willfulness. Cf. **2110*Cheek v. United States*, 498 U.S. 192, 200, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991) ("Congress has ... softened the impact of the common-law presumption [that ignorance of the law is no defense to criminal prosecution] by making specific intent to violate the law an element of certain federal criminal *518 tax offenses"); 26 U.S.C. §§ 7201, 7203 (criminalizing willful evasion of taxes and willful failure to file a return). Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U.S.C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor. See *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1007, 108 L.Ed.2d 132 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action); *Commissioner v. Acker*, 361 U.S. 87, 91, 80 S.Ct. 144, 147, 4 L.Ed.2d 127 (1959). [FN9] Accordingly, we conclude that the Contender pistol and carbine kit when packaged together by Thompson/Center have not been "made" into a short-barreled rifle for purposes of the NFA. [FN10] The judgment of the Court of Appeals is therefore

*Affirmed.*

FN9. The Government has urged us to defer to an agency interpretation contained in two longstanding Revenue Rulings. Even if they were entitled to deference, neither of the rulings, Rev.Rul. 61-45, 1961-1 Cum.Bull. 663, and Rev.Rul. 61-203, 1961-2 Cum.Bull. 224 (same), goes to the narrow question presented here, addressing rather the question whether pistols with short barrels and attachable shoulder stocks are short- barreled rifles. We do not read the Government to be relying upon Rev.Rul. 54-606, 1954-2 Cum.Bull. 33, which was repealed as obsolete in 1972, Rev.Rul. 72-178, 1972-1 Cum.Bull. 423, and which contained broader language that "possession or control of sufficient parts to assemble an operative firearm ... constitutes the possession of a firearm." Reply Brief for United States 10.

FN10. Justice STEVENS contends that lenity should not be applied because this is a " 'tax statute,' " *post*, at 2114, rather than a "criminal statute," see *post*, at 2113, n. 1, quoting *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1007, 108 L.Ed.2d 132 (1990). But this tax statute has criminal applications, and we know of no other basis for determining when the essential nature of a statute is "criminal." Surely, Justice STEVENS cannot mean to suggest that in order for the rule of lenity to apply, the statute must be contained in the Criminal Code. See, *e.g.*, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229, 97 L.Ed. 260 (1952) (construing the criminal provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 215, 216(a)). Justice STEVENS further suggests that lenity is inappropriate because we construe the statute today " 'in a civil setting,' " rather than a "criminal prosecution." *Post*, at 2114. The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.

**519 Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

I agree with the plurality that the application of the National Firearms Act (NFA) to Thompson/Center's pistol and conversion kit is sufficiently ambiguous to trigger the rule of lenity, leading to the conclusion that the kit is not covered. I disagree with the plurality, however, over where the ambiguity lies--a point that makes no difference to the outcome here, but will make considerable difference in future cases. The plurality thinks the ambiguity pertains to whether the making of a regulated firearm includes (i) the manufacture of parts kits that can possibly be used to assemble a regulated firearm, or rather includes only (ii) the manufacture of parts kits that serve no useful purpose except assembly of a regulated firearm. *Ante*, at 2107-2108, 2109-2110. I think the ambiguity pertains to the much more fundamental point of whether the making of a regulated firearm includes the manufacture, without assembly, of component parts where the definition of the particular firearm does not so indicate.

As Justice WHITE points out, the choice the plurality worries about is nowhere suggested by the language of the statute: § 5845 simply makes no reference to the " 'utility' " of aggregable parts. *Post*, at 2113 **2111

(dissenting opinion). It *does,* however, conspicuously combine references to "combination of parts" in the definitions of regulated silencers, machineguns, and destructive devices with the absence of any such reference in the definition of regulated rifles. This, rather than the utility or not of a given part in a given parts assemblage, convinces me that the provision does not encompass ***520** Thompson/Center's pistol and conversion kit, or at least does not do so unambiguously.

The plurality reaches its textually uncharted destination by determining that the statutory definition of "make," the derivative of which appears as an operative word in 26 U.S.C. § 5821 ("There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made"), covers the making of parts that, assembled, are firearms. Noting that the "definition of 'make' includes not only 'putting together,' but also 'manufacturing ... or otherwise producing a firearm,' " the plurality reasons that if "a firearm were only made at the time of final assembly (the moment the firearm was 'put together'), the additional language would be redundant." *Ante,* at 2106.

This reasoning seems to me mistaken. I do not think that if "making" requires "putting together," other language of the definition section ("manufacturing" and "otherwise producing") becomes redundant. "Manufacturing" is qualified by the parenthetical phrase "(other than by one qualified to engage in such business under this chapter)," whereas "putting together" is not. Thus, one who assembles a firearm *and also engages in the prior activity of producing the component parts* can be immunized from being considered to be making firearms by demonstrating the relevant qualification, whereas one who merely assembles parts manufactured by others cannot. Recognition of this distinction is alone enough to explain the separate inclusion of "putting together," even though "manufacturing" itself includes assembly. As for the phrase "otherwise producing," that may well be redundant, but such residual provisions often are. They are often meant for insurance, to cover anything the draftsman might inadvertently have omitted in the antecedent catalog; and if the draftsman is good enough, he will have omitted nothing at all. They are a prime example of provisions in which "iteration is obviously afoot," *Moskal v. United States,* 498 U.S. 103, 120, 111 S.Ct. 461, 471, 112 L.Ed.2d 449 (1990) (SCALIA, J., dissenting), and ***521** for which an inflexible rule of avoiding redundancy will produce disaster. In any event, the plurality's own interpretation (whereby "manufacturing" a firearm does not require assembling it, and "putting together" is an entirely separate category of "making") renders it not a bit easier to conceive of a nonredundant application for "otherwise producing."

The plurality struggles to explain why its interpretation ("making" does not require assembly of component parts) does not *itself* render redundant the "combination of parts" language found elsewhere in 26 U.S.C. § 5845, in the definitions of machinegun and destructive device, §§ 5845(b) and (f), and in the incorporated-by-reference definition of silencer, § 5845(a)(7) (referring to 18 U.S.C. § 921). See *ante,* at 2107-2109. I do not find its explanations persuasive, particularly that with respect to silencer, which resorts to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history. As I have said before, reliance on that source is particularly inappropriate in determining the meaning of a statute with criminal application. *United States v. R.L.C.,* 503 U.S. 291, 307, 112 S.Ct. 1329, 1339, 117 L.Ed.2d 559 (1992) (opinion, concurring in part and concurring in judgment).

There is another reason why the plurality's interpretation is incorrect: It determines what constitutes a regulated "firearm" via an operative provision of the NFA (here § 5821, the *making* tax) rather than by way of § 5845, which defines firearms covered by the chapter. With respect to the definitions ****2112** of machineguns, destructive devices, and silencers, for instance, the reference to "combination of parts" causes parts aggregations to be firearms *whenever* those nouns are used, and not just when they are used in conjunction with the verb "make" and its derivatives. Thus, the restrictions of § 5844, which regulate the importation of "firearm[s]" (a term defined to include "machinegun[s]," see § 5845(a)(6)), apply to a "combination of parts from which a machinegun can be assembled" (because that is part of the *definition* of ***522** machinegun) *even though* the word "make" and its derivatives do not appear in § 5844. This demonstrates, I say, the error of the plurality's interpretation, because it makes no sense to have the firearms regulated by the NFA bear one identity (which includes *components* of rifles and shotguns) when they are the object of the verb "make," and a different identity (excluding such components) when they are not. Section 5842(a), for example, requires anyone "making" a firearm to identify it with a serial number that may not be readily removed; § 5842(b) requires any person who "possesses" a firearm lacking the requisite serial number to identify it with one assigned by the Secretary of the Treasury. Under the plurality's interpretation, all the firearms covered by (a) are not

covered by (b), since a person who "possesses" the components for a rifle or shotgun does not possess a firearm, even though a person who "makes" the components for a rifle or shotgun makes a firearm. For similar reasons, the tax imposed on "the making of a firearm" by § 5821 would apply to the making of components for rifles and shotguns, but the tax imposed on "firearms transferred" by § 5811 would not apply to the transfer of such components. This cannot possibly be right. [FN*]

FN* The plurality, as I read its opinion, relies on the derivative of "make" that appears in § 5821, not that appearing (in a quite different context) in the definition of "rifle." See 26 U.S.C. § 5845(c) ("The term 'rifle' means a weapon designed or redesigned, made or remade..."). I think it would not be possible to rely upon the use of "made" in § 5845(c), where the context is obviously suggestive of assembled rather than unassembled rifles. But even if the plurality means to apply its interpretation of "make" to § 5845(c), it still does not entirely avoid the problem I have identified. The definition of "any other weapon," another in § 5845's arsenal of defined firearms, does not contain relevant uses of the verb "make" or any derivative thereof. See 26 U.S.C. § 5845(e). It necessarily follows that "any other weapon" will mean one thing when a making tax is at hand but something else when a transfer tax is.

Finally, even if it were the case that unassembled parts could constitute a rifle, I do not think it was established in ***523** this case that respondent manufactured (assembled or not) a rifle "having a barrel or barrels of less than 16 inches in length," which is what the definition of "firearm" requires, § 5845(a)(3). For the definition of "rifle" requires that it be "intended to be fired from the shoulder," § 5845(c), and the only combination of parts so intended, as far as respondent is concerned (and the record contains no indication of anyone else's intent), is the combination that forms a rifle with a 21-inch barrel. The kit's instructions emphasized that legal sanctions attached to the unauthorized making of a short-barreled rifle, and there was even carved into the shoulder stock itself the following: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES."

Since I agree (for a different reason) that the rule of lenity prevents these kits from being considered firearms within the meaning of the NFA, I concur in the judgment of the Court.

Justice WHITE, with whom Justice BLACKMUN, Justice STEVENS, and Justice KENNEDY join, dissenting.

The Court of Appeals for the Federal Circuit concluded that, to meet the definition of "firearm" under the National Firearms Act (NFA), 26 U.S.C. § 5845(a)(3), "a short-barreled rifle actually must be assembled." 924 F.2d 1041, 1043 (1991) (footnote omitted). I ****2113** agree with the plurality that this pinched interpretation of the statute would fail to accord the term "make" its full meaning as that term is defined, § 5845(i), and used in the definition of the term "rifle," § 5845(c). Because one "makes" a firearm not only in the actual "putting together" of the parts, but also by "manufacturing ... or otherwise producing a firearm," Congress clearly intended that the "making" include a "disassembled aggregation of parts," *ante,* at 2106, where the assemblage of such parts results in a firearm. In short, when the components necessary to assemble a rifle are produced and held in ***524** conjunction with one another, a "rifle" is, not surprisingly, the result.

This was the difficult issue presented by this case, and its resolution, for me, is dispositive, as respondent Thompson/Center concedes that it manufactures and distributes together a collection of parts that may be readily assembled into a short-barreled rifle. Indeed, Thompson/Center's argument concerning statutory construction, as well as its appeal to the rule of lenity, does not suggest, nor does any case brought to our attention, that one may escape the tax and registration requirements the NFA imposes on those who "make" regulated rifles simply by distributing as part of the package other interchangeable pieces of sufficient design to avoid the regulated definition. The plurality nevertheless draws an artificial line between, on the one hand, those parts that "can serve no useful purpose except the assembly of a firearm" or that have "no ostensible utility except to convert a gun into such a weapon," and, on the other hand, those parts that have "an obvious utility for those who want both a pistol and a regular rifle." *Ante,* at 2107.

I cannot agree. Certainly the statute makes no distinction based on the "utility" of the extra parts. While the plurality prefers to view this silence as

creating ambiguity, I find it only to signal that such distinctions are irrelevant. To conclude otherwise is to resort to " 'ingenuity to create ambiguity' " that simply does not exist in this statute. *United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986), quoting *Rothschild v. United States*, 179 U.S. 463, 465, 21 S.Ct. 197, 198, 45 L.Ed. 277 (1900). As noted by the Government, when a weapon comes within the scope of the "firearm" definition, the fact that it may also have a nonregulated form provides no basis for failing to comply with the requirements of the NFA. Brief for United States 13-14.

The plurality today thus closes one loophole--one cannot circumvent the NFA simply by offering an unassembled collection of parts--only to open another of equal dimension--one ***525** can circumvent the NFA by offering a collection of parts that can be made either into a "firearm" or an unregulated rifle. I respectfully dissent.

Justice STEVENS, dissenting.

If this were a criminal case in which the defendant did not have adequate notice of the Government's interpretation of an ambiguous statute, then it would be entirely appropriate to apply the rule of lenity. [FN1] I am persuaded, however, that the Court has misapplied that rule to this quite different case.

> FN1. See, *e.g.*, *Crandon v. United States*, 494 U.S. 152, 168, 110 S.Ct. 997, 1007, 108 L.Ed.2d 132 (1990) ("Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of [18 U.S.C.] § 209(a) remains, it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent"); *Commissioner v. Acker*, 361 U.S. 87, 91, 80 S.Ct. 144, 147, 4 L.Ed.2d 127 (1959) ("The law is settled that 'penal statutes are to be construed strictly,' ... and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it' ") (citations omitted).

I agree with Justice WHITE, see *ante*, at 2112-2113, and also with the plurality, see *ante*, at 2106, that respondent has made a firearm even though it has not assembled its constituent parts. I also agree with Justice WHITE that that should be the end of the ****2114** case, see *ante*, at 2113, and therefore, I join his opinion. I add this comment, however, because I am persuaded that the Government should prevail even if the statute were ambiguous.

The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law. [FN2] The ***526** risk that this respondent would be the victim of such unfairness, is, however, extremely remote. In 1985, the Government properly advised respondent of its reading of the statute and gave it ample opportunity to challenge that reading in litigation in which nothing more than tax liability of $200 was at stake. See 924 F.2d 1041, 1042-1043 (CA Fed.1991). Moreover, a proper construction of the statute in this case would entirely remove the risk of criminal liability in the future.

> FN2. Ambiguity in a *criminal* statute is resolved in favor of the defendant because " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' " and because "of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, [and therefore] legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

The Court, after acknowledging that this case involves "a tax statute" and its construction "in a civil setting," *ante*, at 2109, nevertheless proceeds to treat the case as though it were a criminal prosecution. In my view, the Court should approach this case like any other civil case testing the Government's interpretation of an important regulatory statute. This statute serves the critical objective of regulating the manufacture and distribution of concealable firearms--dangerous weapons that are a leading cause of countless crimes that occur every day throughout the Nation. This is a field that has long been subject to pervasive governmental regulation because of the dangerous nature of the product and the public interest in having that danger controlled. [FN3] The public interest in carrying out the purposes that motivated the enactment of this statute is, in my judgment and on this record, far

more compelling than a mechanical application of the rule of lenity.

FN3. See, *e.g.*, Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.;* Arms Export Control Act, as amended Pub.L. 94-329, 90 Stat. 744, 22 U.S.C. § 2778; *United States v. Biswell,* 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972) (acknowledging that the sale of firearms is a "pervasively regulated business").

Accordingly, for this reason, as well as for the reasons stated by Justice WHITE, I respectfully dissent.

END OF DOCUMENT

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, am employed in the City of San Pedro, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 407 North Harbor Boulevard, San Pedro, California 90731.

On April 3, 2002, I served the foregoing document(s) described as

**NOTICE OF LODGING AND LODGING OF FEDERAL AUTHORITIES**

on the interested parties in this action by placing
[ ] **the original**
[X] **a true and correct copy**
thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Pedro, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on April , 2002, at San Pedro, California.

X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.

Executed on April 3, 2002, at San Pedro, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_ (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.

HAYDEE VILLEGAS