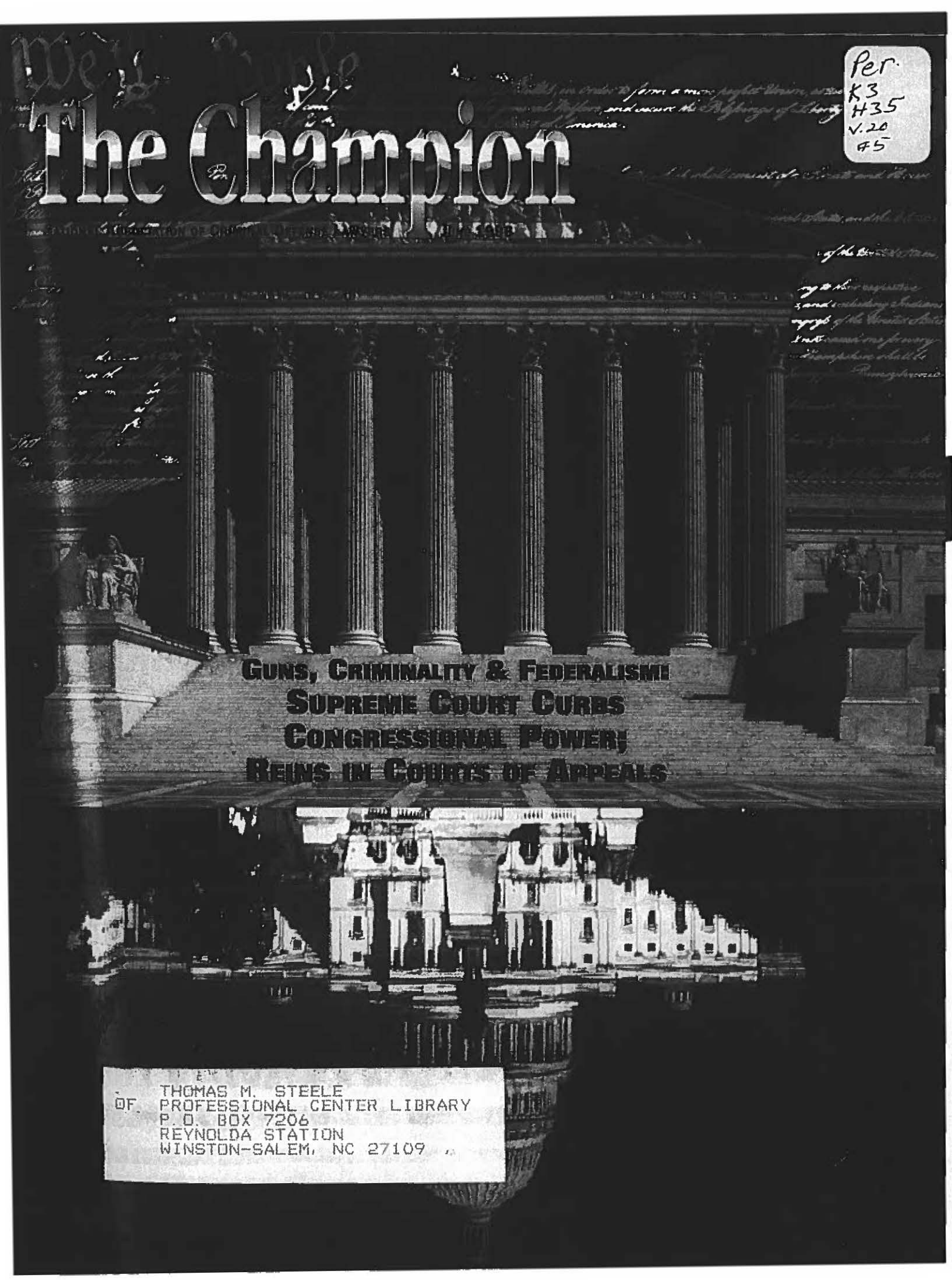
Per.
K3
H35
v.20
#5

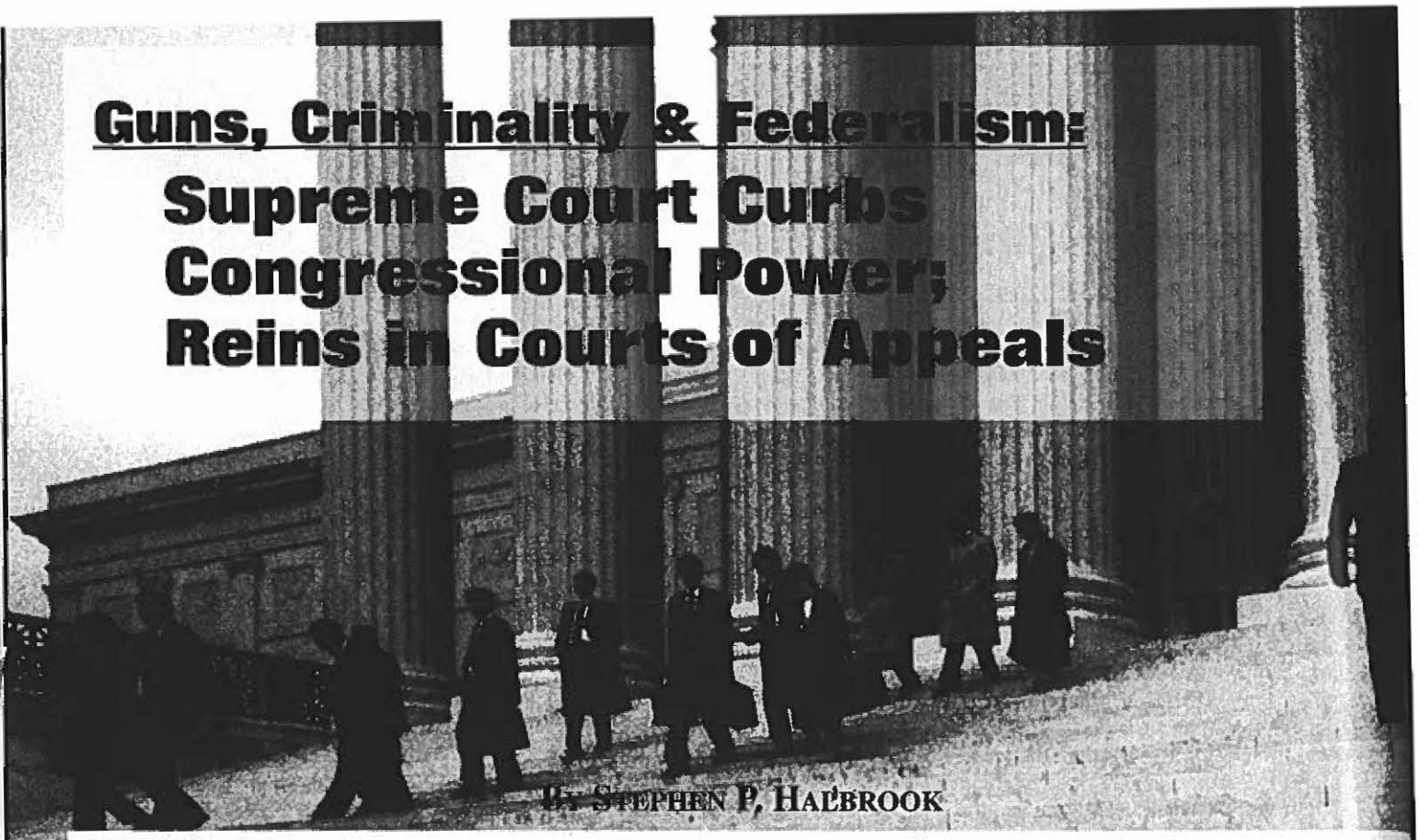
The Champion



Guns, Criminality & Federalism: Supreme Court Curbs Congressional Power; Reins in Courts of Appeals

THOMAS M. STEELE
OF PROFESSIONAL CENTER LIBRARY
P.O. BOX 7206
REYNOLDA STATION
WINSTON-SALEM, NC 27109

Guns, Criminality & Federalism: Supreme Court Curbs Congressional Power; Reins in Courts of Appeals



By Stephen P. Halbrook

In a recent trend of revolutionary proportions, the United States Supreme Court has reined in overly expansive interpretations by the courts of appeals of congressional power to enact a criminal code and the meaning of such enactments. While the focal point of this trend has been the federal Gun Control Act,[1] the Supreme Court's rulings have far broader implications.

Federalizing Regulation of Firearms

Like other local matters, firearms were traditionally not considered within the purview of federal power. However, prohibition-induced violence led Congress to enact, under its revenue power, the National Firearms Act (NFA) of 1934, which required the taxation and registration of machineguns and short-barreled shotguns.[2] Congress then passed the Federal Firearms Act of 1938 under its power to regulate interstate commerce.[3]

These enactments were expanded and reenacted as Titles I and II of the Gun Control Act (GCA) of 1968. After almost two decades of judicial expansion of GCA offenses into strict liability crimes, Congress interceded with the Firearms Owners' Protection Act (FOPA) of 1986,[4] which added "knowing" and "willful" requirements as elements of Title I offenses.[5]

Despite its restoration of due process and scienter, FOPA heralded the federalization of local firearms regulation — its ban on mere possession of machineguns[6] was followed by bans on firearms possession at schools,[7] on juvenile handgun possession,[8] on possession of "assault weapons" and high capacity magazines,[9] and on receipt of a firearm by a person subject to a restraining order in a domestic relations matter.[10] FOPA did not revise the NFA, which the courts continued to interpret as providing for strict liability crimes.

Congress' foray into local crime was fueled by the War on Drugs and the need to appear tough on crime. Prominent in that law-making explosion was the prohibition on using a firearm in drug trafficking or a federal crime of violence.[11] The courts escalated the crusade by interpreting that crime to include mere possession.

After a quarter of a century of legislative and judicial pushing of the constitutional and statutory envelopes, the Supreme Court has called a time out. In four recent cases, the Court restored a measure of balance to the Gun Control Act and, in so doing, signaled a return to due process and constitutional principles in regard to federal criminal law generally.

Thompson/Center Arms and the Rule of Lenity: Construing Ambiguities in the Definition of 'Firearm' Against the Government

The NFA imposes severe criminal penalties for violation of its registration and taxation requirements concerning certain "firearms."[12] Over the years, many courts deferred to opinions of the Bureau of Alcohol, Tobacco and Firearms (BATF) that unlikely items met the definition of "firearm."[13] Scrap that would require eight hours of work in a machine shop was held to be "readily restorable" into a machinegun.[14] Raw material and engineering drawings were a "combination of parts" from which a machinegun could be "assembled."[15] A single-shot pistol was "designed" as a machinegun.[16] The doctrine of deference to agency "expertise" led to the result that a semiautomatic was a machinegun.[17]

United States v. *Thompson/Center Arms Company*,[18] the only Supreme Court case ever to decide the nature of an NFA "firearm," considered whether a single-shot sport pistol and carbine kit was "made" into a "rifle" with a barrel less than 16 inches, which is an NFA "firearm."[19] The items were intended to be assembled as a pistol with a short barrel or as a rifle with a long barrel. As long as not actually assembled as a rifle with a short barrel, the Court held, the items were not an NFA firearm:

> 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. . . . 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.[20]

After decades of lower courts deferring to BATF opinions, this was virtually the first time any court had ever applied the rule of lenity to the definitions of "firearm" in the NFA. *Thompson/Center* makes clear that, because of the NFA's criminal nature, the rule of lenity applies to any NFA definition should an ambiguity arise. The rule of lenity "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language."[21]

BATF's opinion that an item is a "firearm" is not entitled to deference.[22] Due process requires that a criminal statute reasonably susceptible of two interpretations must be construed against the government and in favor of the citizen. While the rule of lenity is a long-standing interpretative rule, its application to NFA firearms reinforces that federal agencies may not, by claiming deference to their expertise, expand the application of criminal statutes.

Staples and Scienter: Requiring the Government to Prove Knowledge of the Character of the Weapon

For decades, the prosecution succeeded in convincing courts to instruct juries that the defendant need not know the character of the weapon possessed, even if the defendant believed it to be an ordinary firearm and not an NFA firearm. Until the Supreme Court's recent intervention, to be convicted of an NFA offense, one need not know that a gun — even if it appears to be an inoperable antique or an ordinary shotgun — is in BATF's opinion an NFA firearm.[23] Supreme Court precedent that one need not know that the law requires NFA firearms to be *registered* was misconstrued by most circuits to mean that one need not know the gun's character.[24]

The wall began to crack when the Fifth, Sixth, and Ninth Circuits decided that the prosecution must prove that the defendant knew the gun was a firearm of the type defined in the NFA.[25] However, the problem became exasperated in the other circuits as a result of a recurring "creative technique" by BATF to make cases. Agents would seize what appeared to be a legal semiautomatic rifle which had never fired more than one shot with a single trigger pull. Agents would remove or substitute parts and test fire the rifles with cartridges having overly-sensitive primers. If the rifle could be induced to malfunction and fire just two rounds with a single pull of the trigger, even if it then jammed, BATF would declare it to be a "machinegun" and prosecute the owner.[26]

The Supreme Court foiled such prosecutions in *Staples* v. *United States,* which held that the government must "prove beyond a reasonable doubt that [defendant] knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun."[27] With this holding, the prosecution and defense of otherwise law-abiding defendants under the NFA has radically changed.

Mr. Staples testified that his rifle was semiautomatic, which requires a separate pull of the trigger for each shot. BATF claimed it fired more than one shot per trigger pull, and thus was a machinegun.[28]

The government argued that a rifle is a dangerous device that should alert one to the probability of regulation. The Court responded that it would "avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[29] "There is a long tradition of widespread lawful gun ownership by private individuals in this country."[30] The Court continued:



STEPHEN P. HALBROOK, *a sole practitioner in Fairfax, Virginia, litigates across the United States. He is also the author of* Firearms Law Deskbook: Federal And State Criminal Practice *(Clark Boardman Callaghan 1995), and argued* United States v. Thompson/Center Arms Co., *504 U.S. 505 (1992) which held that any ambiguity in a criminal statute must be resolved by the rule of lenity,* i.e., *against the government and in favor of the person to whom the law may apply.*

> We question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort . . . .[31]

Accordingly, the prosecution must prove that a defendant knows the facts making his conduct unlawful, which in *Staples* meant that defendant knew that his rifle would fire automatically.[32] Congress did not intend "to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms."[33] On remand, the Tenth Circuit held that no rational juror could find Staples guilty beyond a reasonable doubt, and directed entry of a judgment of acquittal.[34]

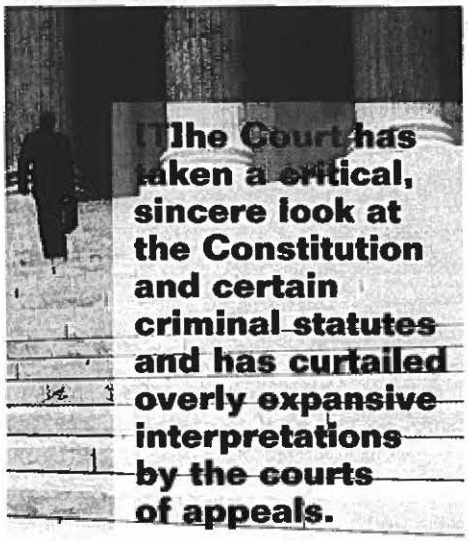
In light of *Staples*, the Supreme Court vacated a Seventh Circuit decision holding knowledge of the weapon's character not to be an element of the offense.[35] BATF had discovered over 50 registered firearms and an unregistered 1915 French machinegun with a plugged weld inside its chamber, rendering it unfireable. A BATF agent testified that the gun could be restored to firing condition "within several hours," while the defendant testified that he obtained it from his father and did not register it because he believed it was a replica, not a firearm.[36]

Failure of the trial court to give a knowledge instruction was prejudicial error, and the case was remanded for retrial.[37] It is unclear why BATF had pursued the case and why the district court had sentenced the defendant to imprisonment.[38] The judiciary's role in facilitating such prosecutions, by holding that one need not have knowledge and in sentencing unknowing persons to incarceration, was laid to rest by the Supreme Court in *Staples*. *Staples* restored reason to the jurisprudence of the vague NFA.

Returning Local Matters to the States: *Lopez* Holds Firearm Possession at School Not To Be Interstate Commerce

Congress has the constitutional power to regulate commerce among the states, but the powers not delegated to Congress are reserved to the states.[39] Congress has no general criminal jurisdiction, but the courts have upheld Gun Control Act provisions which regulate persons engaged in the business of dealing in firearms and which prohibit possession by felons of firearms which have been shipped in interstate commerce.

Recently, Congress prohibited, without any interstate commerce nexus, mere possession of nongrandfathered machineguns and "assault weapons," possession of firearms in school zones, and possession of handguns by juveniles, all subjects of traditional state criminal jurisdiction.[40] The Ninth Circuit upheld the machinegun ban and the school zone law under the theory that Congress found in 1968 that numerous people were killed "by" firearms and that "possession of firearms affects the national economy, if only through the insurance industry."[41] Driving while intoxicated, shoplifting, and other state law crimes probably affect insurance rates far more.



The 1968 "findings" referred to by the Ninth Circuit were only a committee report which addressed interstate commerce controls.[42] Formal findings on interstate commerce in firearms were enacted[43] and then repealed in 1968 before becoming effective.[44] Congress made no findings when it enacted the machinegun ban and the school zones law in 1986 and 1990 respectively.

The Gun Control Act of 1968 declared that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes," words reaffirmed in the Firearms Owners' Protection Act of 1986, which declared its purpose to be to protect the rights "to keep and bear arms under the Second Amendment," "to security against illegal and unreasonable searches and seizures under the Fourth Amendment," and "against unconstitutional exercise of authority under the Ninth and Tenth Amendments."[45]

A split in the circuits occurred when the Ninth Circuit upheld the school zones law and the Fifth Circuit declared it unconstitutional.[46] In *United States* v. *Lopez*, the Supreme Court invalidated the federal Gun Free School Zones Act because it prohibited mere possession of firearms with no nexus to interstate commerce. *Lopez* began:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U. S. Const., Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.[47]

Lopez found that Congress could regulate the use of the channels of interstate commerce, protect the instrumentalities of interstate commerce, and regulate activities having a substantial relation to interstate commerce.[48] "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." It thus exceeded Congress' power under the interstate commerce clause.[49]

Lopez rejected the reliance on findings of a prior Congress to justify a later enactment, and disagreed with the Ninth Circuit opinion upholding the machinegun prohibition under the insurance theory:

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . . If we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.[50]

Nor was the Court willing to uphold the law on the basis that countless repetitions of the prohibited possession substantially affected interstate commerce. Such speculation would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[51]

Lopez rejected the government's argument that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody)."[52] This perhaps calls into question the GCA provision which makes it a felony for a person subject to a restraining order in a domestic relations dispute to possess a firearm which has been transported in interstate commerce.[53] While a commerce nexus exists as an element of the offense, the nexus may be attenuated.[54]

The Constitution explicitly requires state consent for federal protection from "domestic violence,"[55] which is inconsistent with

the extension of federal authority to run-of-the-mill local crime. Elbridge Gerry explained in the Constitutional Convention that he "was against letting loose the myrmidons of the United States on a state, without its own consent."[56]

While it did not mention the domestic-violence clause,[57] *Lopez* is a milestone in reining in the federal "myrmidons" that have been let loose on the states as a result of the wars against drugs, violence, and every other social evil that is not within Congress' enumerated powers. The Supreme Court will no longer simply rubberstamp any and every law passed by Congress, no matter how local and non-commercial the activity criminalized, as a valid exercise of the interstate commerce power.

Using or Carrying a Firearm While Asleep? *Bailey* Just Says 'No'

While most GCA crimes are victimless, 18 U.S.C. § 924(c)(1) punishes "whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm." The appellate courts expanded this drug war law beyond recognition.

A sage might wonder if the defendant was sleep walking or dreaming when the Fifth Circuit held it "obvious" that firearms "seized from a locked bedroom in which Appellant was sleeping" were being used or carried in a drug trafficking crime.[58] The District of Columbia Circuit *en banc* found firearm "use" where cocaine was in a car's passenger compartment and a pistol in the trunk, and also where cocaine and an unloaded derringer were in a locked trunk in a bedroom closet. In *Bailey* v. *United States*, [59] the Supreme Court reversed the D.C. Circuit opinion.

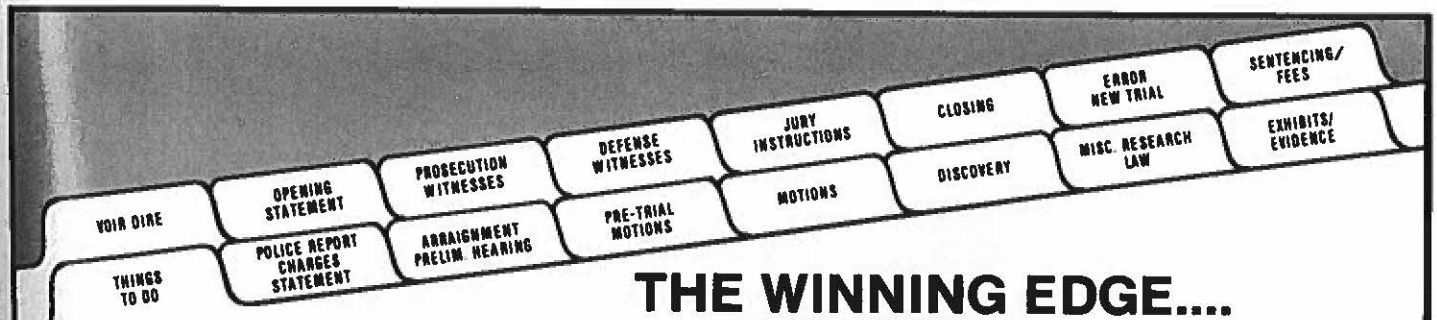
The Court began with the proposition that "use" cannot mean mere "possession," a broader term appearing elsewhere in the GCA.[60] The Court rejected the government's test that "use" includes any facilitation of a drug offense where the elements of proximity and accessibility exist.[61] Active employment must be shown; putting a firearm into place to protect drugs or to embolden oneself, the "fortress" theory, is insufficient.[62] The Court explained:

> While a broad reading of "use" undermines virtually any function for "carry," a more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge. . . . A firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, e.g., when an offender keeps a gun hidden in his clothing throughout a drug transaction.[63]

The term "use" is also more narrow than "intended to be used," a term Congress employed in the firearms forfeiture provision. "Liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later if necessary."[64]

The Court specified that the following do *not* constitute "use" of a firearm: storage of a gun in a nearby closet for retrieval in case a drug deal goes sour,[65] mere presence of a firearm which emboldens or protects its owner,[66] mere possession of a firearm and its availability for intimidation at the scene of a drug crime,[67] and concealment of a gun nearby for an imminent confrontation.[68] The following instances of active employment *do* constitute "use:" brandishing, displaying, bartering, striking with, and firing or attempting to fire a firearm. "Use" might exist where a person refers to a firearm in

(Continued on page 34.)



THE WINNING EDGE....

CRIMINAL LAW NOTEBOOK TABS

- ORGANIZE YOUR RECORDS AND GET THAT WINNING EDGE
- 16 WHITE MYLAR-REINFORCED SHEETS WITH MULTI-COLORED MYLAR TABS PRINTED AS SHOWN ■ DURABLE ■ WILL NOT TEAR
- ALL SHEETS ARE PRE-PUNCHED TO FIT THREE RING BINDERS OR TWO HOLE FOLDERS ■ TWO RING BINDER PUNCHED UPON REQUEST

LEGAL DIMENSIONS ©1992 MAKER OF COURTFOLIO TABS®

$3.50 PER SET SHIPPING INCLUDED

1-800-535-7753 For Fast Service Call Today!

Criminal Law Tabs packaged in sets of 5. Total minimum - 10 sets. *(CA residents add 7.75% sales tax. Hawaii, Alaska, Puerto Rico add $5.00 per 10 sets)*

☐ 10 sets $35.00 ☐ 15 sets $52.50 ☐ 20 sets $70.00 ☐ 50 sets $175.00 **Price Break** ☐ 100 sets $315.00

C

Firm Name _____ Attn. _____ Phone (____) _____

Address (no P.O. Box, please) _____

City _____ State _____ Zip _____ ☐ Check enclosed ☐ C.O.D. ($4.00 charge)

☐ VISA ☐ MasterCard Card # _____ Exp. Date _____ Signature _____

☐ Send me a brochure of Legal Dimensions products - Pleading Organizers, Exhibit Guides, Trial Notebook Organizer, etc.

MAIL TO: Legal Dimensions, P.O. Box 1132, Laguna Beach, CA 92652 **FAX (714) 582-5058**

Supreme Court Curbs Congressional Power

(Continued from page 15.)

his possession in relation to the predicate offense or is present with a gun on a table with the apparent purpose of furthering the predicate offense.[69]

Other than bartering, the above are all common sense notions of the term "use." *Bailey* is yet another recent example in which the courts of appeals allowed Gun Control Act provisions to be stretched beyond recognition only to be reined in by the Supreme Court.

Five Lessons

It is not the thesis of this article that the Supreme Court always decides cases correctly. However, it is evident from the four precedents analyzed that the Court has taken a critical, sincere look at the Constitution and certain criminal statutes and has curtailed vague and overbroad statutes, as well as overly expansive interpretations of laws by the courts of appeal. This trend to return to fundamental principles can only serve the purposes of due process, limited federal police powers, and justice.

On a practical level, the following lessons may be gleaned from the above:

1. Is your client guilty under the prosecution's reading of an ambiguous statute but not under your equally reasonable reading? Call upon the rule of lenity. (*Thompson/Center*)

2. Study the entire statute to find broader terms which contrast with narrower terms in the provision under which your client is charged. The prosecution's theory often assumes the broader usage. (*Bailey*)

3. Creatively apply the latest Supreme Court precedents to analogous statutes. Federal mere possession prohibitions are obvious candidates. (*Lopez*)

4. Preserve error: move to dismiss or ask for a jury instruction even when circuit precedent is to the contrary. Decades-old circuit precedent sometimes gets reversed. (*Staples*)

5. When in doubt, read the Constitution. The authors of much of the ever expanding federal criminal code may not have done so.

NOTES

1. Title I of the Gun Control Act, 18 U.S.C. § 921 *et seq.*, regulates interstate commerce in firearms. Title II, 26 U.S.C. § 5801 *et seq.*, imposes stringent requirements on machineguns and other narrowly-defined firearms.

2. On the legislative history, *see* S. Halbrook, *Congress Interprets the Second Amendment*, 62 TENN. L. REV. 597, 601-14 (Spring 1995).

3. *See id.* at 614-15.

4. *See* D. Hardy, *The Firearms Owners' Protection Act*, 17 CUMBERLAND L. REV., No. 3, 585 (1986-1987).

5. 18 U.S.C. § 924(a).

6. 18 U.S.C. § 922(o).

7. 18 U.S.C. § 922(q).

8. 18 U.S.C. § 922(x).

9. 18 U.S.C. § 922(v), (w).

10. 18 U.S.C. § 922(g)(8).

11. 18 U.S.C. § 924(c).

12. 26 U.S.C. § 5861.

13. 26 U.S.C. § 5845.

14. United States v. Smith, 477 F.2d 399, 400 (8th Cir. 1973).

15. 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. Corso, 20 F.3d 521, 523 (2nd Cir. 1994); United States v. Goff, 677 F. Supp. 1526, 1546 (D.Utah 1987).

16. S.W. Daniel, Inc. v. United States, 831 F.2d 253, 254 (11th Cir. 1987).

17. York v. Secretary of Treasury, 774 F.2d 417, 419 (10th Cir. 1985).

18. United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992).

19. 26 U.S.C. § 5845(a)(3), (c), and (i).

20. 119 L. Ed. 2d at 319. *See id.* at 320 (Scalia, J., concurring) (NFA "sufficiently ambiguous to trigger the rule of lenity").

21. *Id.* at 320 n.10.

22. *Id.* at 313, 319 n.9.

23. *E.g.*, United States v. Thomas, 531 F.2d 419, 420 (9th Cir. 1976), *cert. denied* 425 U.S. 996 (1976); United States v. De Bartolo, 482 F.2d 312, 316 (1st Cir. 1973).

24. United States v. Freed, 401 U.S. 601, 607 (1971), which involved what was clearly a hand grenade, stated that "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm."

25. United States v. Anderson, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc); United States v. Williams, 872 F.2d 773, 777 (6th Cir. 1989); United States v. Herbert, 698 F.2d 981, 986 (9th Cir. 1983), *cert. denied* 464 U.S. 821 (1983).

26. *See* S. Halbrook, FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE §§ 6.5, 9.4 (Clark Boardman Callaghan (1995)). Yet in the Waco criminal appeals, the United States argued that BATF used "standard" weapons, including "MP-5 shoulder weapons that fired in two-round bursts . . . . None of the agents had fully automatic weapons." Brief for the United States, United States v. Branch et al., No. 94-50437, 5th Cir., at 90 n.9.

27. Staples v. United States, 114 S. Ct. 1793, 1795 (1994).

28. 114 S. Ct. at 1796. "The weapon did not, however, have an auto-sear. The sole function of that part is to permit automatic fire." United States v. Staples, 971 F.2d 608, 609 (10th Cir. 1992). BATF agents oiled the rifle, inserted an M16 bolt carrier, loaded the rifle with "soft-primer" ammunition, and made it fire more than one shot with a single pull of the trigger. *Id.*

29. 114 S.Ct. at 1798.

30. 32. *Id.* at 1798-99.

31. *Id.* at 1800-01.

32. *Id.* at 1803-04.

33. *Id.* at 1804.

34. United States v. Staples, 30 F.3d 108 (10th Cir. 1994).

35. Ross v. United States, 114 S. Ct. 2129 (1994), *on remand* 40 F.3d 144 (7th Cir. 1994).

36. 40 F.3d at 145.

37. *Id.* at 146.

38. *Id.* at 145.

39. U.S. Const., Art. I, §8; Amendment X.

40. *Supra* notes 7-11 and accompanying text.

41. United States v. Edwards, 13 F.2d 291, 293 (9th Cir. 1993) (schools); United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991) (machineguns).

42. House Judiciary Rept. No. 1577, 1968 U.S. CODE CONG. & ADMIN. NEWS at 4412-13.

43. Omnibus Crime Control and Safe Streets Act, Title IV, §901(a), 82 Stat. 197, 225 (1968).

44. Gun Control Act, P.L. 90-618, 82 Stat. 1213 (1968).

45. § 1, P.L. 99-308, 100 Stat. 449 (1986).

46. United States v. Edwards, 13 F.2d 291, 293 (9th Cir. 1993), *vacated*, 131 L. Ed. 2d 741 (1995), *reversed* 55 F.3d 428 (9th Cir. 1995) (in light of Supreme Court decision in *Lopez*); United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993).

47. United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).

48. *Id.* at 1629-30.

49. *Id.* at 1626.

50. 115 S.Ct. at 1632 (citing *Evans*, *supra*). The majority opinion "threatens legal uncertainty" regarding "statutes that contain no jurisdictional language at all, see, e.g., 18 U.S.C. §922(o)(1) (possession of machine guns)." *Id.* at 1664 (Breyer, J., dissenting).

51. *Id.* at 1634.

52. *Id.* at 1632.

53. 18 U.S.C. § 922(g)(8).

54. "Congress's power to regulate articles or goods in commerce may not permit it to regulate an item for eternity simply because it has once passed state lines." United States v. Pappadopoulos, 64 F.3d 522, *amended opinion* 1995 U.S. App. Lexis 31809, *13 (9th Cir. 1995) (federal arson statute unconstitutional under *Lopez*).

55. "The United States shall . . . protect each of them [the States] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U.S. Const., Art. IV, §4.

56. J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 438 (1845).

57. However, *United States* v. *Cruikshank*, 92 U.S. 542, 556 (1876) noted long ago:

> Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may upon the call of the Executive, when the legislature cannot be convened, lend their assistance for that purpose.

58. United States v. Tolliver, 61 F.3d 1189, 1218 (5th Cir. 1995).

59. Bailey v. United States, 36 F.3d 106 (D.C.Cir. 1994), *reversed* 116 S. Ct. 501 (1995).

60. 116 S. Ct. at 506.

61. *Id.*

62. *Id.* at 507.

63. *Id.* The reference to "use" as including bartering stems from the previous holding that "petitioner 'used' his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine." Smith v. United States, 124 L. Ed. 2d 138, 148 (1993). However, "to use an instrumentality ordinarily means to use it for its intended purpose." *Id.* at 157 (Scalia, J., dissenting).

64. 116 S. Ct. at 507.

65. *Id.*

66. *Id.* at 508.

67. *Id.*

68. *Id.*

69. *Id.*