THE FEDERAL WAR ON GUNS: A STORY IN FOUR-AND-A-HALF ACTS

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"History is a jangle of accidents, blunders, surprises and absurdities, and so is our knowledge of it, but if we are to report it at all we must impose some order upon it."[1]

Beginning in the early 1990s, the Executive Branch took a novel approach to the enforcement of federal firearms offenses. It replaced traditional notions of restraint with a newfound willingness to exercise its power broadly, leading to a sharp increase in the number of federal firearms offenders that continues today. A recent development, however, threatens to dismantle the core of the federal firearms scheme. Decided in 2022, the effects of New York State Rifle & Pistol Association, Inc. v. Bruen are already being felt. Several courts, including one circuit court, have already struck down a potpourri of federal firearms statutes. This trend may continue to gain momentum, or it may be stopped in its tracks by a new Supreme Court decision that places limits on Bruen. But it is unlikely to fizzle out on its own.

This article seeks to understand these recent events as distinct modern phenomena. To do so, it creates a holistic, conceptual framework that situates the developments of the last thirty years within the broader, global history of the federal government's approach to firearms crime. The framework organizes the story of federal firearms policy into a series of conceptual narrative clusters—or acts—each with its own characters, conflicts, and shared views about the role of law in society. Through this framework, themes and trajectories emerge, shedding valuable light on our understanding not only of where we are and where we have been, but also of where we are going in our federal approach to firearms crime. As the first article that paints a comprehensive picture of federal firearms policy in this way, and as one of the first to address the emerging post-Bruen legislation, it will also add structure, focus, and energy to important ongoing scholarly discussions.

INTRODUCTION

In 2004, local police officers obtained a search warrant for the home of Mary Beth Looney in Wichita Falls, Texas.[2] Based on a series of undercover

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1 HENRY STEELE COMMAGER, THE NATURE AND THE STUDY OF HISTORY 86 (1965).

2 Order Den. Def. Mot. to Suppress Co-Def.'s Statements at 4, United States v. Looney, No. 7:05-CR-005-R(1), 2005 WL 2693003 (N.D. Tex. Oct. 18, 2005).

drug purchases and arrests, the officers suspected that she and her husband were dealing methamphetamine.[3] When the officers executed the warrant, they discovered over 200 grams of methamphetamine, drug paraphernalia, and four firearms.[4]

Rather than prosecuting Mary Beth Looney at the state level, the officers referred the case to the Bureau of Alcohol, Tobacco, and Firearms, which accepted it for federal prosecution.[5] A federal grand jury indicted her on four counts: two drug offenses—possession with the intent to distribute methamphetamine, and conspiracy to possess with the intent to distribute methamphetamine—and two firearms offenses, under 18 U.S.C. § 924(c), for possessing a firearm in furtherance of a drug trafficking crime.[6] She proceeded to trial and the jury returned a verdict of guilty of all counts.[7]

Despite the fact that Mary Beth Looney had no criminal convictions, and there was no evidence she had ever even laid a finger on the firearms,[8] she faced a mandatory minimum sentence of 40 years imprisonment—10 years on the drug counts, 30 years on the firearms counts.[9] Ultimately, the court imposed a sentence of 548 months imprisonment, which lay at the low-end of the advisory sentencing range.[10] Because of the government's charging decisions, the district court had no discretion to impose anything less than what was effectively a life sentence, leaving her eligible for release at 98 years old.[11]

Mary Beth Looney's case is a microcosm of the modern era of federal firearms enforcement. She was arrested by local authorities for traditionally state crimes, yet her case was funneled into the federal system. Once there, federal prosecutors sought to impose the harshest sentence that the facts would

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3 *Id.* at *1–4.

4 *Id.* at *4.

5 *Id.* at *4.

6 United States v. Looney, 532 F.3d 392, 393, 397 (5th Cir. 2008).

7 *Id.*

8 *Id.* at 396 ("Although thirty years of her sentence can be attributed to possessing guns in furtherance of her methamphetamine dealing, there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house.").

9 *Id.* at 395–96

10 *Id.* at 396.

11 *Id.* at 395 ("Yet, because she was 53 years old at the time of sentencing, she was given effectively a life sentence; if she can do her part and finish her sentence, she will be about ninety-eight years old when she is released to the unimprisoned world once again.").

support, including all available charges that carried a mandatory minimum.[12] And when it came time for sentencing, the district court's hands were tied by the prosecutor's charging decisions.[13]

Yet only fifteen years earlier, Mary Beth Looney's outcome would have been far different. State prosecutors would have handled her garden-variety drug trafficking case themselves. There was no organized state-to-federal referral pipeline, no ATF liaison, and no national policy of flagging firearms cases for federal review.[14] At the state level, a judge or jury would have enjoyed far more sentencing flexibility for an offender with no criminal record.[15] And even if the federal government did get involved, federal line prosecutors would have had the discretion to charge cases as they saw fit rather than operating under Main Justice directives to seek the maximum sentence available.[16]

The story of Mary Beth Looney is not an outlier. Beginning in the early 1990s, the federal government embraced a new approach to the enforcement of firearms crimes that has led to a marked increase in the number of convicted federal firearms offenders. Many, on both the political left and right, favor this modern approach. They point to rising gun-death rates as an urgent matter of public concern.[17] They point to the horrors of mass shooting incidents.[18] They point to violent gang activity that plagues our nation's largest

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12 Mem. on Charging Policy of Criminal Defendants from Att'y Gen. John Ashcroft to All Fed. Prosecutors (Dep't of Justice Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.html [https://perma.cc/5CCT-9PG7] (explaining that under the Attorney General guidance at the time of Mary Beth Looney's prosecution, federal prosecutors were required to "[C]harge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case….").

13 532 F.3d at 395 ("The judge, however, had little discretion in imposing this sentence.").

14 Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 UNIV. PA. L. REV. 637, 679 (2021) (describing Project Triggerlock (1991) as the formal beginning of the "modern federal-state-local collaboration").

15 Under Texas law, Mary Beth Looney could have been sentenced anywhere between ten and ninety-nine years in prison. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(e) (governing the manufacture or delivery of methamphetamine weighing 200 to 399 grams).

16 Prior to the 1989 Thornburgh Memo, federal prosecutors generally had wide discretion to handle their cases as they saw fit. *See* Alan Vinegrad, *Assessing DOJ's Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT'G REP. 3, 3–5 (2017).

17 *U.S. Gun Death Rates Hit Highest Levels in Decades, Study Says*, POLITICO (Nov. 29, 2022, 8:05 PM), https://www.politico.com/news/2022/11/29/gun-death-rates-highest-levels-00071285 [https://perma.cc/2HC2-HE4L].

18 Michael D. Shear, *'Enough, Enough': Biden Calls on Lawmakers to Pass Gun Legislation*, N.Y. TIMES (June 2, 2022), https://www.nytimes.com/2022/06/02/us/politics/biden-guns-speech.html [https://perma.cc/FL2X-P6ZD].

and most prosperous cities.[19] They worry about the interplay between drug trafficking and violent crime.[20] This has to stop at the source, they say, and one obvious source is criminals with guns.[21] Indeed, these are valid concerns and reasons for aggressive federal enforcement.

Others have favored a more cautious approach. They ask that we consider the costs that come with the aggressive federal enforcement of firearms. Historically, these voices have spoken in the name of federalism.[22] More recently, however, they do so in terms of mass incarceration,[23] race,[24] policing practices,[25] proportionality,[26] and mandatory minimums.[27] As the statutory firearms scheme has evolved to become broader and more harsh, and as more and more power has shifted to the Department of Justice, the current system,

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19 Stephen Sorace, *Chicago Weekend Gun Violence Sees 17 Wounded, 4 Killed*, FOX NEWS (Dec. 6, 2022, 8:56 AM), https://www.foxnews.com/us/chicago-weekend-gun-violence-sees-17-wounded-4-killed [https://perma.cc/G2U4-FEZ9].

20 *US Authorities Charge More than 100 with Gun, Drug Crimes*, U.S. NEWS & WORLD REP. (Jan. 11, 2023), https://www.usnews.com/news/best-states/georgia/articles/2023-01-11/us-authorities-charge-more-than-100-with-gun-drug-crimes.

21 Press Release, U.S. Dep't of Just., Off. of Pub. Aff., Federal, State, and Local Law Enforcement Join Forces to Disrupt Violent Crime, Firearms, and Drug Trafficking in Multiple Jurisdictions Across the Country (Jan. 11, 2023), https://www.justice.gov/opa/pr/federal-state-and-local-law-enforcement-join-forces-disrupt-violent-crime-firearms-and-drug [https://perma.cc/Q75B-MA5X].

22 *See* Linda Greenhouse, *Ease Load on Courts, Rehnquist Urges*, N.Y. TIMES (Jan. 1, 1992), https://www.nytimes.com/1992/01/01/us/ease-load-on-courts-rehnquist-urges.html [https://perma.cc/EGE2-QWUJ].

23 *See* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2213 (2016) ("Like criminal drug statutes, existing and proposed criminal gun possession statutes should also trigger skepticism from critics of mass incarceration.").

24 *See* Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 157, 159 (2018) (showing that facially race-neutral "felon in possession" statutes "disparately affect[] Black populations.").

25 *See generally* JENNIFER CARLSON, POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT, AND THE POLITICS OF RACE (2020) (ebook) (connecting the Violent Crime Control and Law Enforcement Act of 1994 to increased police funding).

26 Stephen R. Sady, *The Armed Career Criminal Act - What's Wrong with "Three Strikes, You're Out"?*, 7 FED. SENT'G REP. 69, 69 (1994) ("A penal statute's moral validity should be reflected in society's acceptance of both the prohibition and the punishment as generally applied. There are undoubtedly individuals who, merely by possessing a firearm, create an easily recognized danger to the community based on their prior convictions for crimes of violence. However, the ACCA is so loosely written that appropriate application is aberrational, rather than the norm.").

27 *See* Jennifer Seltzer Stitt, *Criminal Justice Policy Two Years After the Change Election*, 23 FED. SENT'G REP. 126, 129 (2010) (arguing that enhanced sentences "result[] in unduly severe sentences that do nothing to deter recidivists.").

the arguments go, may be too much to bear.[28] These are valid reasons for restraint.

This article takes neither position, nor rather assumes that both positions are reasonable. Instead, this article seeks to accomplish something more fundamental: to create a holistic framework for thinking about the modern federal approach to firearms by situating it, historically and conceptually, as a fundamentally distinct era within the larger story of federal firearms criminalization. This article takes a narrative approach to creating the historical-conceptual framework, seeking to extract themes and trends that will enrich ongoing discussions—and perhaps ones not yet had—about the wisdom of the federal firearms policies of the past, present, and future.

The story of federal firearms criminalization and enforcement takes place over four-and-a-half acts, each with its own heroes, villains, ironies, trends, and themes. The first three acts cover the traditional eras of federal firearms criminalization, spanning from 1919 to the mid-1980s. These traditional eras—the Interwar Period, the 1960s Reforms, and the Reagan Era—largely involved the efforts of reformers working to persuade Congress to develop a statutory firearms scheme to address specific events in new ways. Each of the traditional eras has its own unique characters and story arc, but the themes are fairly consistent, and the characters were often working off of shared assumptions about federalism and Executive Branch restraint. And whenever a character did buck the common assumptions—as with Homer Cummings in the Interwar Period, Thomas Dodd during the 1960s reforms, and Arlen Specter in the Reagan Era—they were more often met with resistance than celebration.

Beginning in the early 1990s, however, the trajectory of federal firearms enforcement changed radically. This fourth era—the Federal War on Guns—saw the Executive Branch abandon traditional notions of restraint and replace them with a new willingness to exercise federal power broadly against firearms offenders. The Executive Branch indulged its appetite with national law enforcement initiatives that funneled state offenders into the federal system[29]

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28 *See* Jacob Sullum, *A New Gun Law Reflects the Worst Instincts of Both Parties*, REASON (July 20, 2022, 12:01 AM), https://reason.com/2022/07/20/a-new-gun-law-reflects-the-worst-instincts-of-both-parties/ [https://perma.cc/HEK3-NCFV] (arguing that the Bipartisan Safer Communities Act of 2022 is "unlikely to have a meaningful impact on mass shootings" while "cancel[ing] the gun rights of adults based on juvenile records.").

29 William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1673–78 (2019).

and Department of Justice marching orders that required federal prosecutors to seek harsh mandatory minimums.[30] These escalations had enormous impacts on individual federal firearms offenders like Mary Beth Looney, and generated a never-before-seen increase in the number of federal firearms convictions and sentencing enhancements.[31] This era of enforcement—the Federal War on Guns—continues today and is truly a distinct phenomenon within the larger story of federal firearms policy.

The courts, however, may be in the process of drafting a fifth act, foreshadowing a twist ending with the potential to turn everything on its head. Since 2015, the Supreme Court has issued a variety of opinions demonstrating a willingness to push back on the federal government's unfettered ability to enforce its most potent and prevalent firearms laws. *Johnson v. United States*[32] and *United States v. Davis*[33] are the obvious examples, but there are many more. Yet the effects of these opinions have often been blunted by subsequent cases, softening their blow to the power of the federal government. There is one recent case, however, that could prove much more devastating to the federal firearms scheme than any case that has come before: *New York State Rifle & Pistol Association, Inc. v. Bruen*.[34]

Decided in 2022, *Bruen*'s early effects are already being felt. Under *Bruen*'s new framework for considering the constitutionality of firearms restrictions, federal district courts have already struck down a potpourri of federal firearms statutes.[35] As of the writing of this article, one federal circuit

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30 VINEGRAD, *supra* note 16, at 4.

31 *See* Bonita R. Gardner, *Separate and Unequal: Federal Tough-on-Guns Program Targets Minority Communities for Selective Enforcement*, 12 MICH. J. RACE & L. 305, 311 (2007) (crediting Project Safe Neighborhoods for a seventy-three percent increase in federal firearms prosecutions from 2000-2005).

32 Johnson v. United States, 576 U.S. 591, 606 (2015) (striking a portion of the Armed Career Criminal Act as unconstitutional).

33 United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (striking a portion of 18 U.S.C. § 924(c)'s definition of "crime of violence" as unconstitutional).

34 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (holding that states cannot prevent law-abiding citizens from publicly carrying handguns).

35 *E.g.*, United States v. Quiroz, 629 F.Supp.3d 511, 527 (W.D.Tex. 2022) (striking down § 922(n) as unconstitutional); United States v. Perez-Gallan, 640 F.Supp.3d 697, 716 (W.D. Tex. 2022) (striking down § 922(g)(8) as unconstitutional); United States v. Harrison, No. CR-22-00328, 2023 WL 1771138, at *25 (W.D. Okla. Feb. 3, 2023) (striking down § 922(g)(3) as unconstitutional); *see also* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. ___ (forthcoming 2023) (manuscript at 49–54) (synthesizing the results of lower federal court decisions applying *Bruen*).

has followed suit: the Fifth Circuit struck down 18 U.S.C. § 922(g)(8) in *United States v. Rahimi*[36] and 18 U.S.C. § 922(g)(3) in *United States v. Daniels*.[37] Additionally, the Third Circuit upheld an as-applied challenge to § 922(g)(1) for a non-violent felon on rehearing en banc in *Range v. Att'y. Gen. U. S.*.[38] This trend may continue to gain momentum, or it may be stopped in its tracks by a new Supreme Court opinion that places limits on *Bruen*.[39] But it is unlikely to fizzle out on its own. Either way, the courts are writing this fifth act—the *Bruen* Era—before our very eyes. And like a good thriller, each chapter seems to end with a cliffhanger, leaving readers nervous about what will happen next.

This article will proceed in three parts. Part II tells the story of the three traditional eras of federal firearms criminalization—the Interwar Period, the 1960s Reforms, and the Reagan Era—as largely written by Congress. Part III tells the story of the fourth era—the Federal War on Guns—the Executive Branch's modern enforcement strategy and its effects. Part IV tells of the beginnings of a fifth era—the *Bruen* Era—as it is written by the courts.

To understand where we are and where we're going is to understand where we've been. If successful, this article will contribute structure, insight, and terminology to the evolving discussions around federal firearms policy. Ultimately, however, the reader will sit as the final judge of the story's success. The author only asks that the reader not punish the story's mistakes any more harshly than what their level of offense requires.[40]

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36 United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (concluding that the statute's ban on possession of firearms is unconstitutional).

37 United States v. Daniels, 77 F.4th 337, 340 (5th Cir. 2023) (reversing convictions under § 922(g)(3)).

38 Range v. Att'y Gen. U.S., 69 F.4th 96, 106 (3rd Cir. 2023) ("We will reverse the judgment of the District Court and remand so the Court can enter a declaratory judgment in favor of Range, enjoin enforcement of § 922(g)(1) against him, and conduct any further proceedings consistent with this opinion.").

39 *See* United States v. Rahimi, Supreme Court No. 22-915 (cert granted on June 30, 2023), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-915.html [https://perma.cc/UB3C-UTLN].

40 *See* 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with [the statutory sentencing factors].").

I. THE THREE TRADITIONAL ERAS OF FEDERAL FIREARMS CRIMINALIZATION

For most of our nation's history, Congress has declined to grant the government the ability to prosecute firearms offenses.[41] While serious, such offenses were generally interpersonal and street-level, not the sort of thing that would elicit interventions at the federal level.

That changed during the period between World War I and World War II, when, in response to prohibition-era organized crime, Congress grew willing to regulate firearms. But Congress was uncertain about the extent of its power in this area, reflected by its initial use of taxing power to make modest incursions into traditionally state affairs. When Congress finally did use its commerce clause power after the close of the *Lochner* era, its focus was narrow, targeting only on the shipping and receipt of firearms by fugitives of justice and violent offenders.

During the 1960s reforms, Congress's appetite for firearms criminalization increased, and status-based prohibitions on the mere possession of a firearm became the dish of choice. In response to a series of high-profile, public assassinations, Congress expanded its prohibited-person list significantly, to include many non-violent offenders. Congress also began to flirt with small mandatory minimum sentences. By the end of 1968, the number of federal firearms crimes had grown more robust, stretching upward and expanding its canopy within the United States Code.

During the Reagan era, perhaps desensitized by a growing body of anti-drug legislation,[42] Congress became comfortable with harsh mandatory minimum firearms statutes and recidivism enhancements. Each bill gave more and more power to the Executive Branch to bind the courts with the federal prosecutors' charging decisions.[43] Still, Congress did not envision the harshest statutes to apply except against the worst of offenders. Instead, their core

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41 Because there is no federal common law of crimes, the federal government's ability to prosecute an offender can only come from Congress. United States v. Harrelson, 766 F.2d 186, 189 (5th Cir. 1985) ("There are no federal common-law crimes, only statutory ones."); *see also* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812) (concluding that common-law crimes are not implied powers of federal courts).

42 *E.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (strengthening federal efforts of illicit drug eradication).

43 *E.g.*, Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185 (Oct. 1984) (imposing a 15-year mandatory minimum on certain firearms offenders).

function was simply to exist as an incentive to plead to state charges.[44] Meanwhile, the debate over the role of the federal government in state crime policy had taken center stage, foreshadowing an ideological shift in the 1990s that would bookend the three traditional eras of federal firearms criminalization.[45]

A. ACT ONE: THE INTERWAR PERIOD (1919-1938)

The Interwar Period of federal firearms legislation began in 1919 as a modest attempt to raise revenue to defray the costs of World War I and ended in 1938 with a new criminal firearms scheme that leveraged enhanced federal power over firearms offenders. Framed against the backdrop of a prohibition-era crime panic, the story of this period has a cinematic quality. It follows the dogged determination of Homer Cummings, President Roosevelt's first Attorney General, to bring whatever power he could muster from Congress down on John Dillinger and all of the organized street criminals he represented. It is the first of many such stories, of a noble protagonist doing what was necessary to punish a deserving wrongdoer. But it began a recurring problem: each story cycle did not end when the bad guy was captured or killed. Instead, a new, side-story progressed: the story of the federal government itself, absorbing and accumulating new power each cycle, and retaining it long after Homer Cummings and John Dillinger were no more than heroes and villains of the past.

The federal government's first flirtations with firearms regulation were not primarily motivated by crime but by a need for revenue. In 1919, in an effort to defray the costs of the U.S. involvement in World War I,[46] Congress created the Firearms and Ammunition Excise Tax (FAET), using its taxing and spending power to impose a ten-percent excise tax on the first-time sale of

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44 *See Armed Career Criminal Act: Hearings on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 98th Cong., 10, 17-18, 31, 64 (1984) [hereinafter *Hearings on H.R. 1627 and S. 52*] (statement of Sen. Specter) (limiting punishment to the most dangerous and habitual offenders).

45 *See* Arlen Specter & Paul R. Michel, *The Need for a New Federalism in Criminal Justice*, 462 ANNALS AM. ACAD. POL. & SOC. SCI. 59, 64–65 (1982) (arguing for new levels of federal involvement in local crime efforts).

46 JANE G. GRAVELLE, CONG. RSCH. SERV., IF12173, FIREARMS AND AMMUNITION EXCISE TAX (FAET) 1 (2022), https://crsreports.congress.gov/product/pdf/IF/IF12173/2; Serv. Armament Co. v. United States, 215 Ct. Cl. 199, 207 (1977) ("An excise tax on firearms was first enacted in the Revenue Act of 1918 (40 Stat. 1122) to raise revenues to defray war expenses.").

firearms and ammunition.[47] Congress appeared initially uncomfortable with the idea of regulating firearms at the federal level. Some lawmakers, for example, criticized the FAET, concerned with its market effects and suspicious of an ulterior law-enforcement motive.[48] Even lawmakers who supported the FAET wanted to ensure that it was temporary, lasting only as long as necessary to serve its intended purpose. Accordingly, as the financial sting of the war effort began to fade, Congress began to phase out the FAET in 1926[49] and ultimately eliminated it altogether in 1928.[50] The federal government seemed, for a blinking interval, to be moving away from the business of regulating firearms.

1. From Taxation to Criminalization

A prohibition-era crime surge, led by organized gangs that crossed state lines to evade prosecution, made Congress reconsider its abstention.[51] Firearms were the weapons of choice for these gangsters, particularly concealable pistols and the Tommy Gun, a new lightweight submachine gun capable of discharging fifty .45-caliber rounds in 3.7 seconds.[52] Although the states had been regulating firearms for decades, a state-only regulation scheme had an Achilles' heel: without uniform state firearms laws, it was easy for criminals to traffic firearms through states with lenient laws to later cross into

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47 The tax only applied to sales "by the manufacturer, producer, or importer." Revenue Act of 1918, ch. 18, § 900(10), 40 Stat. 1057, 1122 (1919). The FAET also included an exception for firearms and ammunition sold for use by the United States in war. *Id.*

48 An earlier draft of the FAET taxed pistols and revolvers—tools of prohibition-era criminals—at a higher rate of twenty-five percent. Representative Augustine Lonergan of Connecticut, a critic of the earlier draft of the FAET, remarked: "A measure designed primarily as a police measure should not, of its very nature, be incorporated in a measure to provide revenue. The proper place for such propositions is in the legislative bodies of the several States. The constant carrying of concealed weapons is undesirable and is limited in substantially all civilized States. But the purchase of revolvers by respectable citizens is desirable and rarely limited in civilized States. It is the best protection of the home against marauders. It trains the citizenry in the accurate use of arms should a national emergency arise." 56 CONG. REC. 612–13 (1918) (statement of Rep. Augustine Lonergan).

49 Revenue Act of 1926, ch. 27, § 600(2), 44 Stat. 9, 93 (phasing out the Firearms and Ammunition Excise Tax).

50 *See* Revenue Act of 1928, ch. 852, §§ 421-425, 45 Stat. 791, 865–67 (eliminating the Federal and Ammunition Excise Tax); GRAVELLE, *supra* note 46.

51 *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 701 (2009) (describing the rise in crime during the Prohibition era).

52 MARTIN PEGLER, THE THOMPSON MACHINE GUN: FROM PROHIBITION CHICAGO TO WORLD WAR II 23 (2010) (describing the Thompson shotgun).

a stricter state undetected.[53] And while the National Conference of Commissioners on Uniform State Laws attempted a state-centered approach, only eleven jurisdictions ever adopted its Uniform Firearms Act, leaving the United States a patchwork quilt of firearms laws.[54]

Meanwhile, a new National Crime Commission[55]—assembled to study crime as a nationwide phenomenon—began to call for more federal involvement in firearms crime policy.[56] Congress's first purely criminal firearms law—the Mailing of Firearms Act[57]—was a small step toward blunting the movement of firearms across state lines.[58] Rather than supplanting state law, Congress intended the Act to supplement and support state firearms regulations, which remained the primary arbiters of crime and firearms policy.[59] But like an unfinished fence, it was comically flawed: it only applied to firearms mailed through the U.S. Postal Service.[60]

A few years later, in 1932, Congress resurrected the FAET, this time to address the economic black hole of the Great Depression and to fund the

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53 Senator Gilbert Hitchcock of Nebraska explained: "I think there ought to be some attempt made by the National Government to bring the sale of firearms at retail under some sort of regulation. It may be said that this is a State matter, and many States have endeavored to deal with it; but the trouble is that a State can only regulate or control the sale within its own borders. As it is now, an evil-disposed person can buy a firearm in one town, cross a river or cross a State boundary and be a dangerous factor in another community." 61 CONG. REC. 7161 (1921) (statement of Sen. Gilbert Hitchcock); *see also* Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 48, 49 (1981) ("This upsurge of federal activism was in large part a response to problems encountered in the enforcement of state legislation.").

54 Marshall, *supra* note 52, at 705–06 (listing jurisdictions that adopted firearm policies).

55 Organized by prominent businessmen and politicians, the NCC sought to compile and study crime data across the country in order to understand post-war crime as a national phenomenon. John Bakeless, *Policemen in Mufti: A Year of the National Crime Commission*, 117 INDEP. 436, 437 (1926) (forming the National Crime Commission in response to crime increase).

56 Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 136 (1975) (describing a law prohibiting the mailing of concealable firearms to individuals).

57 Under the Act, "pistols, revolvers, and other firearms capable of being concealed on the person" were "nonmailable" through the U.S. Postal Service. A violation subjected the offender to imprisonment of up to two years. Mailing of Firearms Act, ch. 75, § 1, 44 Stat. 1059, 1059-60 (1927).

58 Zimring, *supra* note 56, at 136 (stating that the Mailing of Firearms Act helped control interstate firearm trafficking).

59 *See id.* (describing the Act as "[d]irected against the undermining of state and municipal firearms control statutes through out-of-state handgun sources").

60 *Id.*; Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 560 (2008) ("The ban could be avoided simply by shipping the handguns through a private package delivery company such as United Parcel Service.").

ambitious policies of the New Deal.[61] The next year, one of the most important figures in the history of federal firearms policy emerged: Homer Cummings. President Roosevelt's first attorney general, Cummings, more than anyone, was determined to convince Congress to break new ground in federal firearms regulation.[62]

On April 16, 1934, Attorney General Cummings testified before the House Ways and Means Committee about a "crime situation" that had developed "far beyond the power of control of merely local authorities."[63] His testimony painted a grim picture of organized "gangs" composed of "very well instructed, very skillful, and highly intelligent criminals" that operated unencumbered in the "twilight zone between State and Federal power."[64] His gaze was fixed on prohibition-era organized crime, speaking while such events as the 1929 Valentine's Day Massacre and the 1933 attempted assassination of president-elect Roosevelt lay fresh in the collective memory of the committee.[65] The embodiment of the new criminal element was John Dillinger, a Midwest gang leader with an affinity for the Tommy Gun, whom Attorney General Cummings and the members of the committee—across several days of hearings—invoked frequently as the prime exemplar of the modern, roving criminal.[66] In Cummings's estimate, there were 500,000 members of this "underworld" criminal element, each armed with up to a dozen firearms.[67]

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61 *See* GRAVELLE, *supra* note 50, at 1.

62 Leff & Leff, *supra* note 53, at 53 (characterizing Attorney General Cummings as "perhaps the most vehement public advocate of federal gun registration in U.S. history").

63 *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 4 (1934) [hereinafter *Hearings on H.R. 9066*] (statement of Homer Cummings, Att'y Gen. of the United States).

64 *Id.* at 4 (statement of Att'y Gen. Cummings).

65 Michael Busch, Comment, *Is the Second Amendment an Individual or a Collective Right:* United States v. Emerson*'s Revolutionary Interpretation of the Right to Bear Arms,* 77 ST. JOHN'S L. REV. 345, 363 n.113 (2003); *see also* Gun Owners of Am. v. Barr, 363 F. Supp. 3d 823, 827 (W.D. Mich. 2019) ("In 1929, Tommy guns were used in the infamous St. Valentine's Day Massacre, an incident where members of one Chicago gang dressed like police officers killed seven members of a rival gang.").

66 *E.g.*, *Hearings on H.R. 9066*, *supra* note 62, at 107-08 (statement of Maj. Gen. Milton A. Reckord) ("It has been the thought of our [National Rifle] Association that effective legislation must be aimed directly at the criminal. It is the desire of all of us to apply the maximum pressure on people like Dillinger.").

67 *See Hearings on H.R. 9066*, *supra* note 63, at 4, 9 (statement of Att'y Gen. Cummings).

The fruit of these hearings was the National Firearms Act of 1934 (NFA), the first comprehensive federal foray into firearms regulation.[68] Concerned that any outright ban on firearms would be vulnerable to a constitutional challenge,[69] Congress used its taxing power[70] to impose a registration requirement on certain firearms associated with gangsterism.[71] Congress modeled the legislation on the Al Capone style of federal law enforcement: instead of catching criminals in a traditional bad act, the NFA imposed a technical requirement that they could not comply with for risk of being caught, and then punished violations harshly. A short exchange between Attorney General Cummings and Representatives Fuller and Lewis explains the strategy:

> Cummings: Now, you say that it is easy for criminals to get weapons. I know it; but I want to make it easy to convict them when they have the weapons. That is the point of it. I do not expect criminals to comply with this law; I do not expect the underworld to be going around giving their fingerprints and getting permits to carry these weapons, but I want to be in a position, when I find such a person, to convict him because he has not complied.
>
> Fuller: Of carrying the pistol or weapon, instead of the offense with which he is charged?
>
> Lewis: General, you were compelled, in the case of one outlaw, which the Department has convicted to resort to prosecution under the income-tax law?
>
> Cummings: That is Capone.

While early drafts of the NFA would have imposed the registration requirement on all firearms,[72] the final version only regulated short-barrel rifles and shotguns, machine guns, silencers, and concealable firearms *other than* pistols and revolvers.[73] The NFA, like the Mailing of Firearms Act before it,

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68 National Firearms Act of 1934, ch. 757, §§ 1-18, 48 Stat. 1236, 1236-40.

69 As Attorney General Cummings explained:

> All these bills have been drafted with an eye to constitutional limitations, and have been kept within a scope which indicates that there is no desire upon the part of the Department of Justice, or of anyone else, so far as I know, to take over any powers, or exert any administrative functions beyond those absolutely necessary to deal with this situation.

Hearings on H.R. 9066, *supra* note 62, at 4 (statement of Att'y Gen. Cummings).

70 *See* Sonzinsky v. United States, 300 U.S. 506, 514 (1937) (affirming the constitutionality of the NFA under Congress's taxing power).

71 *See* Zimring, *supra* note 56, at 137–38.

72 David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 591–93 (1987) (describing the drafting history of the NFA).

73 National Firearms Act of 1934 § 1.

was a penal law; the penalty for failure to register an NFA firearm the strongest firearms sanction yet: imprisonment for up to five years.[74]

Attorney General Cummings, however, was not satisfied that the NFA had done enough to address gun crime.[75] The final version of the NFA had been watered-down by Congress's ultimate reluctance to exercise its Commerce Clause power[76] and the National Rifle Association ability, seemingly at will, to make changes to the legislation.[77] In the end, the NFA bore only a limited resemblance to what Cummings had pushed for in his committee testimony.[78] While gangster activity had decreased,[79] crime remained a matter of public concern and—perhaps more importantly—media fascination.[80] The very next year, in 1935, Cummings advocated for the Small Arms Act, which contained some of the provisions that had been removed from the NFA.[81] Despite the endorsement of the American Bar Association, the International Federation of Chiefs of Police, and organized labor, the Small Arms Act died in Congress without a vote.[82] Undeterred, Attorney General Cummings took a different tack: he gave the NRA a seat at the drafting table—not just the cutting room

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74 *Id.* § 14.

75 Leff & Leff, *supra* note 53, at 53–55.

76 *See Hearings on H.R. 9066*, *supra* note 62, at 86 (statement of Joseph B. Keenan, Assistant Att'y Gen. of the United States) (explaining that the National Firearms Act of 1934 removed references to Congress's Commerce Clause power).

77 Leff & Leff, *supra* note 53, at 54 ("By the time [the NFA] emerged from the law-making process, however, it had been gutted—stripped of its handgun clauses and revised in line with the objections of the National Rifle Association (NRA) and other interested parties.").

78 *Id.*

79 Franklin E. Zimring questions whether the decrease in gangster activity was actually caused by the NFA or was more the result of either state policing efforts or a natural decrease in such activity following its peak. He also notes incomplete criminal data prior to the NFA, expressing a reluctance to overstate the NFA's impact. *See* Zimring, *supra* note 57, at 139.

80 *See* Leff & Leff, *supra* note 53, at 52–53 (describing media coverage of the Lindberg baby killing, FBI incompetence, and the ruthlessness of gangsters).

81 *Id.* at 55, n.21.

82 In an interview with Rex Collier of the *Washington Evening Star* on April 25, 1938, Attorney General Cummings spoke of the Small Arms Act and its supporters. Interview by Rex Collier with Homer Cummings, Att'y Gen. of the United States, in Wash., D.C. (Apr. 25, 1938); *see also* Leff & Leff, *supra* note 53, at 55 n.21.

floor.[83] The result, three years later, was a new, more expansive piece of crime legislation: the Federal Firearms Act of 1938 (FFA).[84]

Spanning a mere three pages of text, the FFA's impact far exceeded its stature. While the FFA is most known for its licensing and recordkeeping requirements on firearms manufacturers and dealers,[85] it also imposed, for the first time, strict limitations on the shipment, transportation, and receipt of firearms.[86] Specifically, the FFA prohibited unlicensed manufacturers and dealers, persons under indictment, fugitives from justice, and felons convicted of a crime of violence from engaging in the firearms and ammunition trade.[87] Additionally, it prohibited the circulation of stolen firearms, and firearms with an altered, obliterated, or removed serial number.[88] As with the NFA's registration requirement, any violation of these new restrictions subjected the offender to imprisonment for up to five years.[89]

2. Theme and Legacy: The Era of Unease

The dominant theme of the Interwar Period is *unease*. Throughout the two decades of this first era, Congress seemed to lack confidence in the types of decisions it was making. Whenever it had the choice of a "safer" path—whether to use its taxing power instead of its commerce clause power, or to prohibit receipt instead of mere possession—that's the path it took. This sometimes led to poor decisions, like the ineffective Mailing of Firearms Act and the FFA's flawed presumption provision of receipt that the Supreme Court promptly struck down.[90]

There are a few ways of accounting for Congress's unease. First, federal firearms legislation was a new enterprise, and there was a discomfort over what role the government even could play. The automobile, however, helped to

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83 Leff & Leff, *supra* note 53, at 55 (describing the drafting committee as including not only the Department of Justice ("DOJ") and gun control advocates but also the NRA); *but see* Patrick J. Charles, VOTE GUN: HOW GUN RIGHTS BECAME POLITICIZED IN THE UNITED STATES 51-64 (Columbia Univ. Press 2023) (describing the complex and contentious relationship between the NRA and the Department of Justice in the leadup to the Federal Firearms Act of 1938).

84 Federal Firearms Act of 1938, ch. 850, §§ 1-9, 52 Stat. 1250, 1250-52.

85 *Id.* §§ 2(a)-(c), 3.

86 *Id.* § 2.

87 *Id.*

88 *Id.* § 2(g)-(i).

89 *Id.* § 5.

90 *See* Tot v. United States, 319 U.S. 463, 467–69 (1943) (holding the FFA § 2(f) presumption unconstitutional under the Due Process Clause of the Fifth and Fourteenth Amendments).

answer that question as it made interstate travel more commonplace and gave organized criminals a distinct advantage over purely local law enforcement.[91] Second, the Supreme Court's *Lochner* era perhaps made Congress gun-shy about expending what political capital it did have on crime efforts when New Deal social and economic policies took priority. It is noteworthy that Congress did not begin to use its commerce power to pass firearms crime legislation until after the *Lochner* era ended.[92] Third, Congress worked off of deep-seated, traditional views of crime federalism, under which the federal government should only play a small, supportive role in state and local crime.[93] While Attorney General Cummings challenged the orthodoxy of these views, he was met with resistance and never fully achieved the strong federal role in firearms that he desired.

Although also watered-down by the lawmaking process,[94] the FFA represented a much broader federal foray into firearms regulation than the NFA, in three salient respects. First, the FFA made use of Congress's Commerce Clause power, which was a novel federal approach to firearms regulation.[95] Only four years earlier, Congress had removed the Commerce Clause language from the NFA, favoring its taxing power as the more measured approach.[96] It cannot be a coincidence that Congress then used its

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91 *See* Marshall, *supra* note 51, at 701 ("Concern over such arms grew as automobile use—including in crime—expanded, prompting debate on how to apply or modify restrictions on carrying concealed weapons.").

92 *See* United States v. Ardoin, 19 F.3d 177, 182 (5th Cir. 1994) (Wiener, J., dissenting) (observation that prior to the New Deal's expansion of Congress's commerce clause power, certain firearms restrictions were only considered under Congress's taxing power).

93 *See Hearings on H.R. 9066*, *supra* note 62, at 8 (testimony of Att'y Gen. Cummings) ("[O]f course, we have no inherent police powers to go into certain localities and deal with local crime. It is only when we can reach those things under the interstate commerce provision, or under the use of the mails, or by the power of taxation, that we can act.").

94 *See* Leff & Leff, *supra* note 53, at 55–56 (describing how the legislative process had weakened certain crucial provisions of the FFA, including the prosecution of shippers and manufacturers whose guns were possessed by "fugitives or criminals convicted of crimes of violence").

95 *See* Karen A. Michalson, Note, *Is 18 U.S.C. 922(o)(1) Constitutional? Mere Possession of Self-Created Objects and the Reach of the Commerce Clause*, 28 W. NEW ENG. L. REV. 133, 139 (2005) ("The first federal gun control legislation to be enacted under Congress's Commerce Clause authority was the Federal Firearms Act of 1938 (FFA).").

96 *See Hearings on H.R. 9066*, *supra* note 62, at 86 (statement of Assistant Att'y Joseph B. Keenan) ("Before going into the details of the changes of the bill, I would like to make a statement of what I consider to be the essential changes. As you will recall, the bill as originally drafted exercised two powers, one under the taxation clause and the other under the commerce clause. Under the bill as now submitted, it follows the theory of taxation all the way through[.]).

Commerce Clause power to enact the FFA only one year after the U.S. Supreme Court decided *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which brought an end to the Commerce Clause restraints of the *Lochner* era and foreshadowed a much deeper well of authority than Congress's taxing power.[97] From that point forward, the Commerce Clause became the go-to authority for all major firearms laws and the extent of that power endures today as a topic of dispute among litigants, both civil and criminal.[98]

Second, the FFA expanded the definition of "firearm" to include pistols and revolvers.[99] This was a significant departure from the NFA—which excluded small arms—and a legislative victory for Attorney General Cummings, who had been campaigning to close the NFA's small-arms loophole ever since the NFA's passage in 1934.[100]

Third, and most significantly, the FFA took a big step toward prohibiting the mere possession of a firearm based solely on an offender's status—foreshadowing the most prominent pillar of the modern criminal firearms scheme.[101] Prior to the FFA, the events that triggered criminal sanctions all had to do with unlawful characteristics associated with a firearm (e.g., an unregistered firearm) or an offender's misuse of a firearm (e.g., mailing a firearm through the USPS). While the FFA extended both of these traditional types of regulation, it also imposed criminal sanctions based on the *status* of a person who possessed a firearm, irrespective of the firearm's characteristics or how it was used. These statuses—fugitives from justice, persons under indictment, and persons with a prior conviction for a "crime of violence"[102]—

97 *See* Matthew A. Melone, *The Pundits Doth Protest Too Much:* National Federation of Independent Business v. Sebelius *and the Future of the Taxing Power*, 2012 Mich. St. L. Rev. 1189, 1227-28 n.208. "The Lochner era survived until the Court took a more expansive view of the commerce power during the New Deal era." *Id.* (citing W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)). "This case marked a turning point in the Court's Commerce Clause jurisprudence and was followed by several cases that effectively eviscerated the Commerce Clause as a barrier to federal action." *Id.*

98 *See, e.g.*, United States v. Alcantar, 733 F.3d 143, 145–47 (5th Cir. 2013) (upholding the constitutionality of the federal felon-in-possession statute in light of the Supreme Court's decision in National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)).

99 Federal Firearms Act of 1938, ch. 850, § 1(3), 52 Stat. 1250, 1250.

100 *See* Leff & Leff, *supra* note 53, at 55, 55 n.21.

101 18 U.S.C. § 922(g).

102 The enumerated list of "crimes of violence" consisted of murder; manslaughter; rape; mayhem; kidnapping; burglary; housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon; or assault with intent to commit any offense punishable by imprisonment for more than a year. *See* Federal Firearms Act of 1938 § 1(6).

created a new class of offender: the prohibited person.[103] And although the FFA did not yet directly criminalize the mere possession of a firearm by a prohibited person, it was only a matter of time.[104]

In hindsight, the two biggest breakthrough moments of the Interwar Period were (1) Congress's embrace of its Commerce Clause power, and (2) Congress's move toward status-based prohibitions, even if not yet for the mere possession of a firearm. Congress would do much more with both these tools during the 1960s reforms.

B. ACT TWO: THE 1960S REFORMS (1961-1968)

Federal firearms laws remained virtually unchanged from 1938 to the 1960s.[105] Congress's institutional memory of roving gangs and John Dillinger's Tommy Gun had begun to fade. Homer Cummings had passed away on September 11, 1956, and while his New York Times obituary briefly mentioned his approach to crime, what had come to define his legacy was his role in developing Roosevelt's court packing plan. The obituary even spent more words noting Cummings's four marriages than his years of fighting for new firearms legislation.[106]

The 1960s was a novel time in firearms legislation, filled with new concerns, new protagonists, and new villains. A watershed decade for both law and culture, the 1960s saw growing rates of gun crime, increases in the importation of cheap international firearms, general civil unrest, and specific violent acts of national importance.[107] All of this contributed to a fresh willingness, and the perceived public need, for new levels of firearms

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103 Charles & Garrett, *supra* note 14, at 649 (describing "the creation of a class of prohibited persons who could not receive, ship, or transport weapons" as one of the FFA's "main accomplishments").

104 The FFA *effectively* prohibited possession by creating a rebuttable presumption that the possessor had committed the misuse crime of unlawful shipment, transport, or receipt. Federal Firearms Act of 1938 § 2(f). This presumption, however, was short-lived: the Supreme Court invalidated it on due process grounds in 1943. *See* 319 U.S. 463, *supra* note 91.

105 Zimring, *supra* note 56, at 143 ("The period from 1939 (when the initial regulations under the F.F.A. were issued) through 1957 (when new regulations were proposed) was almost completely uneventful in relation to federal firearms control. There was also very little legislative activity on the state and local level."); Charles & Garrett, *supra* note 12, at 652 ("There were no major federal gun laws in the three decades between 1938 and 1968.").

106 *See Homer Cummings, Ex-U.S. Aide, Dies*, N.Y. TIMES, Sept. 11, 1956, at 35, https://www.nytimes.com/1956/09/11/archives/homer-cummings-exus-aide-dies-attorney-general-193339-under.html [https://perma.cc/MUJ2-3WGM].

107 *See* Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 178 (2001.)

criminalization that would have lasting effects in the decades to come.[108] And true to any worthwhile second act, the story of the 1960s reforms includes more tragedy and higher stakes than anything that came before.

1. Building Toward the Felon-in-Possession Prohibition

One of the biggest 1960s reforms was the quietest, neither the product of extended debate nor part of a high-profile comprehensive bill. In 1961, Congress broadened the reach of the FFA's prohibited-person statute by replacing its predicate offense—"crime of violence"—with "crime punishable by imprisonment for a term exceeding one year."[109] This small change expanded the scope of the status-based prohibited person from only a few types of offenders [110] to all felons [111] and created the first federal felon firearms disability.[112] From 1961 forward, even non-violent felons were prohibited from shipping and receiving a firearm, and any infraction was punishable under the same statutory sentencing range as violent felons.[113]

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108 *See id.* ("It was not until the mid-1960s that some Americans began to question the wisdom of this laissez-faire attitude toward firearms. The rapid increase in violent crimes in the 1960s combined with the series of riots in America's cities convinced many people on both sides of the political spectrum that unhindered access to firearms is not always the best policy for preserving public order[.]").

109 An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, §§ 1-2, 75 Stat. 757 (1961).

110 *See supra* note 102 and accompanying text for an enumeration of "crimes of violence" defined under the FFA.

111 An Act to Strengthen the Federal Firearms Act, §§ 1-2. The Act does not use or define the terms "felon," but this article uses "felon" and "felony" to encompass the federal concept of felony: "crime punishable by imprisonment for a term exceeding one year." *Id.* § 2.

112 Marshall, *supra* note 51, at 698 (identifying the 1961 Act as the first instance of a federal "felon" firearms disability).

113 The specific rationale for Congress's decision to expand the breadth of its firearms policy in 1961 is hard to pinpoint in the Act's legislative history, although there are a few clues. In consideration of the Act, Senator Mansfield of Montana entered a portion of the committee report into the Congressional Record, which noted a recent "infiltration of racketeering into our society" and "an exploding crime rate" that had become "a cause for national concern." 107 CONG. REC. 10229 (1961). The report further suggested that the Attorney General requested the expansion to increase the FBI's "jurisdiction to assist local authorities in the common assault against crime" in order to "make it more difficult for the criminal elements of our society to obtain firearms." *Id.* Perhaps a more general explanation fits: Congress simply believed that the FFA was underinclusive. *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1614 (2022) ("Congress deliberately removed the 'crime of violence' limitation in 1961, presumably because it was underinclusive."). Regardless of whether the reason was specific or general, the felon disability would soon broaden further, reaching its final form in 1968.

The stirrings of what would become the momentous firearms legislation of 1968 began with economic concerns a decade earlier. In the late 1950s, an influx of foreign military surplus firearms, produced for World War II, entered the United States.[114] From 1955 to 1958, the number of imported rifles increased from 15,000 to 200,000; from 1955 to 1959, the number of imported handguns increased from 67,000 to 130,000.[115] These increases posed a significant economic threat to domestic firearms manufacturing.[116] As a protectionist measure, then-Senator John F. Kennedy proposed a bill to prohibit the importation of firearms manufactured for military purposes.[117] Although ultimately unsuccessful, Congress did enact a weaker version of his bill that prohibited the re-importation of U.S.-made weapons that had been shipped abroad for war.[118]

After the 1960 presidential election, Senator Thomas Dodd—of Connecticut, also a gun-producing state—took the protectionist baton from JFK and pressed for additional restrictions on mail-order firearms, this time with a new narrative: crime control.[119] Using his new authority as Chairman Senate Subcommittee on Juvenile Delinquency, Senator Dodd commissioned a series of studies in 1961 and 1962 looking into the relationship between mail-order firearms and crime.[120] In 1963, he began to hold public hearings with the goal of restricting the access of juveniles and felons to mail-order handguns.[121]

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114 *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 79 (1999) (describing Congressional efforts to legislate import controls on foreign firearms).

115 Zimring, *supra* note 56, at 144.

116 *See id.* at 144–45.

117 S. 3714, 85th Cong. (2d Sess. 1958); *see also* 104 CONG. REC. 7442 (1958) (remarks of Sen. Kennedy) ("The effect of the proposed amendment to the law would be to exclude from importation only arms or ammunition originally manufactured for military purposes. Ammunition and guns imported into the United States have helped spoil the domestic market and the market for imported guns which were originally manufactured for game purposes.").

118 Mutual Security Act of 1958, Pub. L. No. 85-477, § 205(k), 72 Stat. 261, 267.

119 Some have questioned whether economics or crime was the primary rationale for Dodd's positions because Dodd, like JFK, was a senator from a "major gun-producing state." *See* Zimring, *supra* note 56, at 145.

120 *Id.*

121 *Id.* at 145–46.

While some have questioned whether Senator Dodd's hearings were motivated primarily by economic protectionism or crime control[122]—and we may never know—there is no question that Senator Dodd had the capability and perhaps proclivity toward broad federal involvement in state criminal affairs. Although a Senator in the new era, Senator Dodd was from the old school, a hard-nosed former crime fighter who earned his stripes on the streets, quite literally chasing John Dillinger.[123] Then, after he turned in his badge, he worked under none other than Homer Cummings at the Justice Department.[124] So even if his proposals and hearings were, at first, protectionist, his background as a special agent and federal prosecutor instilled in him a switch that could be flipped to shift everything toward a federal solution to crime. And on November 22, 1963, an era-defining national tragedy flipped that switch.

As Senator Dodd's proposals were beginning to gain support, the assassination of President Kennedy shook the nation.[125] In a twist of fate, the firearm recovered from the sixth floor of the Texas School Book Depository was an Italian-made, military surplus rifle that Lee Harvey Oswald had mail-ordered from Klein's Sporting Goods in Chicago, Illinois.[126] Within days, Senator Dodd amended his proposals to include mail-order shotguns and rifles, and continued his advocacy.[127] In 1965, while Senator Dodd's efforts were stalling, President Johnson began to advocate for more federal

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122 *See id.* at 145 (noting some have suggested a connection between Senator Dodd's focus on limiting mail order gun sales and the fact that his representative state, Connecticut, was a major gun-producing state).

123 *See From G-man to Nuremburg Lawyer, Dodd Rose Quickly to Prominence*, STAMFORD ADVOC. (May 21, 2011), https://www.stamfordadvocate.com/local/article/From-G-man-to-Nuremburg-lawyer-Dodd-rose-quickly-1390038.php (recounting Dodd's participation in an FBI raid attempting to catch Dillinger) [https://perma.cc/RU5U-VWQ9].

124 *See Senator Christopher Dodd: Prosecuting the Peace of the World the Experiences of Thomas J. Dodd at Nuremberg*, 26 SUP. CT. HIST. SOC'Y Q. 1, 6 (2005), https://supremecourthistory.org/wp-content/uploads/2021/06/SCHS-Quarterly-2005-Volume-1.pdf ("From there, in 1938, he was recruited to Washington to become special assistant to U.S. Attorney General Homer S. Cummings—he of Connecticut, and Yale, and a mentor who had encouraged Dodd's FBI and NYA stints.").

125 *See* Zimring, *supra* note 56, at 145–46 (discussing Senator Dodd's amendments to his 1963 proposals restricting mail-order firearms following President Kennedy's assassination).

126 *JFK Assassination Records*, NAT'L ARCHIVES, https://www.archives.gov/research/jfk/warren-commission-report/chapter-4.html#purchase [https://perma.cc/9VWB-YGSZ] (last visited Feb. 27, 2023).

127 Zimring, *supra* note 56, at 146.

involvement in firearms.[128] Still, despite public hearings and Executive support, Congress was not ready to act.[129] In 1968, that changed.

Two national tragedies in 1968 spurred Congress not only to act but to go much further than even Senator Dodd had proposed. First, in April 1968, Martin Luther King, Jr. was assassinated by James Earl Ray, a convicted felon.[130] As a result, Senator Russell Long of Louisiana proposed, by voice vote, Title VII, an amendment to Senator Dodd's omnibus bill that would significantly expand the list of federal prohibited persons.[131] The circumstances surrounding its passage reflect a frenzied effort to simply do something—anything—about what our nation had witnessed, no matter how hasty.[132] Senator Long's statements on the Senate floor demonstrated that the heinous acts of Oswald and Ray had become the central driving motivator of his new proposals, inspiring him to step up as the hero of Act II:

> The reason I particularly wanted these categories covered is that this would make it apply to the gun Oswald had with which he killed John F. Kennedy. It would mean that Oswald, having been a man who was discharged from the service under conditions other than honorable—and that is one of the conditions set forth here—and a man who had renounced his citizenship, unless he had been restored by the President of the United States to the right to carry a rifle, would not have had the right to carry that gun or practice with it or do anything else with it.

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128 *Id.*

129 *See* Vizzard, *supra* note 114, at 84–85. The new momentum generated by the Robert Kennedy assassination continued to alter the political dynamics of the gun control issue through the summer and fall of 1968. In earlier years, congressional mail, dominated by gun control opponents, generated fear even among many liberal members of supporting significant legislation. Although opinion polls reflected broad-based support for stricter controls on firearms, this support failed to translate into constituent demand. After the 1968 assassinations of Robert Kennedy and Martin Luther King a groundswell of visible support for more decisive federal action temporarily materialized.

130 Lawrence Van Gelder, *James Earl Ray, 70, Killer of Dr. King, Dies in Nashville*, N.Y. TIMES (Apr. 24, 1998), https://www.nytimes.com/1998/04/24/us/james-earl-ray-70-killer-of-dr-king-dies-in-nashville.html [https://perma.cc/6GC6-EM3F] ("Long before the act that made him a figure of worldwide infamy, the man imprisoned for killing Martin Luther King had become a drifter prone to inept holdups and burglaries that had caused him to serve more than [thirteen] years in penitentiaries where he became notorious for bizarre and sometimes successful escape attempts.").

131 Vizzard, *supra* note 114, at 84.

132 In *United States v. Bass*, the U.S. Supreme Court examined the enactment history of Title VII of the Omnibus Act and observed that it was "hastily passed, with little discussion, no hearings, and no report." United States v. Bass, 404 U.S. 336, 344 (1971).

> Assuming that the statistics of the Federal Bureau of Investigation are correct and that this man Galt[133]—a loser many times over, a felon, and an habitual criminal—was the man who killed Martin Luther King, this provision would have applied to him, too.[134]

Senator Long sought to include four new prohibited statuses, in addition to felons: (1) persons discharged from the military other than honorably; (2) persons adjudicated mentally incompetent by a government body; (3) persons who have renounced their U.S. citizenship; and (4) noncitizens illegally in the United States.[135] He also wanted, for the first time, to criminalize their *mere possession*—as opposed to the traditional restrictions on transportation, shipping and receipt—of a firearm, even in the face of commonly shared Constitutional concerns:

> It has been said that Congress lacks the power to outlaw mere possession of weapons. The argument apparently stems from the fact that our founding fathers did not expressly delegate police powers to the Federal Government. And that being the case, it is said that such powers are reserved to the States under the 10th Amendment to the Constitution.
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> However, that argument overlooks the fact that Congress for years has controlled the possession of gangster-type weapons such as machine guns, sawed-off shotguns and fire-arms silencers. This controlling legislation was enacted under the Federal taxing power and its validity was upheld by the Supreme Court. The important point is that this legislation demonstrates that possession of a deadly weapon by the wrong people can be controlled by Congress, without regard to where the police power resides under the Constitution.
>
> Without question, the Federal Government does have power to control possession of weapons where such possession could become a threat to interstate commerce, or to the protection of the Constitutional rights of free speech and the free exercise of religion or to the insurance of the continued orderly operation of the Government of the United States. The Federal Government also has a responsibility under the 4th [A]mendment to the Constitution to guarantee to each State a republican form of government. Similarly, the Federal government now has a statutory obligation to protect the life of the President of the United States and of the Vice President.[136]

After Senator Long made these remarks, some Senators expressed skepticism. Concerned that prohibiting the possession of a firearm "may go

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133 Eric Starvo Galt was the alias of James Earl Ray, Martin Luther King, Jr.'s assassin. Fred P. Graham, *F.B.I. Says 'Galt' Is an Escaped Convict*, N.Y. TIMES (Apr. 20, 1968).

134 114 CONG. REC. 14773 (1968).

135 Omnibus Crime Control and Safe Streets Act of 1968, 5 U.S.C. § 1202(a).

136 114 CONG. REC. 14773-74 (1968).

too far," Senator John McClellan asked, "Can we, under the Constitution, deny a man the right to keep a gun in his home?"[137] Other Senators, even those sympathetic to Title VII, only agreed that the issue should be studied further in committee.[138] What happened next is remarkable. Inexplicably, the Congressional Record reveals that a group of senators began yelling "Vote! Vote!" and the Title VII amendment was suddenly passed without further discussion.[139]

Title VII's noncitizen ban proved eerily prescient. On June 5, 1968, twelve days after Senator Long's remarks, and while the legislation was under consideration in the House, another national tragedy occurred: Robert F. Kennedy was assassinated by Sirhan Sirhan, a Jordanian citizen.[140] The very next day—and the same day that Robert Kennedy was pronounced dead—the House agreed to the Senate amendments, including Title VII.[141] President Johnson signed the bill into law less than two weeks later, on June 19, 1968. The newly enacted Title VII of the Omnibus Act punished offenders with up to two years imprisonment, up to a $10,000 fine, or both.[142]

In October 1968, just months after the Omnibus Act, Congress enacted the Gun Control Act of 1968 ("GCA"), which amended and largely reenacted both Chapter 44 and Title VII of the Omnibus Act.[143] Some changes were minor, seeking to work out the definitional kinks of the Omnibus Act. For example, as to the Title VII prohibited persons, the GCA narrowed slightly the definition of "felony" to exclude non-firearms misdemeanors punishable by up to two years imprisonment and replaced "other than honorably discharged" with "discharged under dishonorable conditions."[144]

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137 *Id.* at 14774.

138 *See, e.g.*, *Id.* (remark by Sen. Dodd) ("My own feeling is that I am a little uneasy about it, but I believe that the Senator from Arkansas has stated the situation the way it should be stated, and we will study it. I do not believe that it would do any harm.").

139 *Id.* at 14775.

140 Nicholas Bogel-Burroughs, *Parole Board Recommends Release of Sirhan Sirhan, Robert F. Kennedy's Assassin*, N.Y. TIMES (last updated Sep. 1, 2021), https://www.nytimes.com/2021/08/27/us/sirhan-sirhan-parole-rfk.html [https://perma.cc/CR6L-5UUE] (noting Sirhan Sirhan's Jordanian citizenship).

141 Roll Call Vote: To Pass H. Res. 1197, Providing for Agreeing to the Senate Amendment to H.R. 5037, the Omnibus Crime Bill, GOVTRACK (last visited Sep. 8, 2023), https://www.govtrack.us/congress/votes/90-1968/h339 [https://perma.cc/L87G-3R2H].

142 Omnibus Crime Control and Safe Streets Act, 5 U.S.C. § 1202(a).

143 Gun Control Act of 1968, Pub. L. No. 90-618, §§ 102–301, 82 Stat. 1213, 1214–36.

144 *Id.* § 301.

Other changes were more significant. The GCA added two new classes to the prohibited persons laundry list. First, it added "fugitive from justice,"[145] which included not just offenders but also suspects and material witnesses: "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding."[146] Second, the GCA prohibited an unlawful user or addict of "marihuana or any depressant or stimulant drug" from receiving a firearm.[147] The laundry list, now consisting of seven prohibited statuses, would remain virtually the same until the Clinton-era reforms of the 1990s.[148]

One final change, however, was monumental. The GCA created a new gun crime that carried a mandatory minimum and an accompanying repeat-offender enhancement, both of which were novel (at the time) to federal firearms legislation. This new crime—later colloquially referred to by its statutory location: § 924(c)—imposed mandatory minimum penalties whenever a person either (1) used a firearm to commit a felony, or (2) carried a firearm during the commission of a federal felony.[149] A first offense carried a mandatory minimum of one year imprisonment, up to ten years, and any "second or subsequent" offense was punishable by a minimum of five years up to twenty-five years imprisonment.[150] The sentencing court, moreover, did not have the discretion to impose a suspended sentence or probation.[151] [152]

Even though Congress codified § 924(c) in the "penalties" section of the GCA, courts soon held that it was a separate substantive offense that could be

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145 *Id.* § 102.

146 *Id.*

147 *Id.*

148 One caveat to this observation is that the prohibited status of an unlawful user or addict of drugs was not based on the mere possession of a firearm under the federal Firearm Owners' Protection Act in 1986. United States v. Carter, 669 F.3d 411, 417–18 (4th Cir. 2012) (describing Congress's closure of the "loophole" in 1986).

149 Gun Control Act of 1968 § 102 ("Whoever—'(1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or '(2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States, shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.).

150 *Id.*

151 *Id.*

152 In 1971, Congress also took away a sentencing judge's discretion to run a § 924(c) sentence concurrently to its predicate offense. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 13, 84 Stat. 1880, 1890 (1971) (adding "nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony").

either independently charged or charged in conjunction with another federal offense.[153] Because the § 924(c) offense was a discretionary add-on offense with a mandatory minimum, it gave federal prosecutors a lever to increase the punishment exposure of a criminal defendant to either entice a plea or add to the punitive cost of going to trial.[154]

2. Theme and Legacy: The Era of Impulse

The 1960s reforms were an era of impulse. Congress did much more in a decade in the 1960s than it had done in twice that time across the Interwar Period. But while Congress's actions in the Interwar Period were incremental and measured, Congress's behavior in the 1960s was erratic. At times, Congress made enormously consequential decisions, seemingly without much thought or reflection. Its 1961 expansion of the FFA to cover all felons, a decision that remains controversial to this day,[155] appears not to have been debated in the Senate, if at all.[156] Its 1968 passage of Title VII is an even more extreme example, which the Supreme Court later characterized as "hastily passed, with little discussion, no hearings, and no report."[157] Not only were they unstudied, Title VII's new additions to the prohibited-person list appeared ad hoc: a combination of the characteristics of Lee Harvey Oswald, James Earl Ray, and Sirhan Sirhan without explanations of their relation to firearms or the crimes they committed.[158] Given the frenzied deliberative atmosphere, if Oswald had had red hair, there is a nontrivial chance that redheads would also have made the list of prohibited persons.

At other times, Congress demonstrated uncharacteristic reluctance when facing obvious and almost inevitable decisions. When JFK was assassinated in 1963, Senator Dodd had already been advocating for much of what would

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153 *See* United States v. Sudduth, 457 F.2d 1198, 1202 (10th Cir. 1972) ("We thus conclude that the statute was intended to create a separate offense, and that Count II of the indictment here concerned should not have been dismissed.").

154 Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 213 (1993) (characterizing § 924(c) as one of the primary "[d]iscretionary mandatories," which are "mandatory for judges, but not for prosecutors, and are largely used as bargaining chips for plea negotiation").

155 *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 466 (7th Cir. 2019) (Barrett, J., dissenting) (criticizing an all-felon ban on firearms as "'wildly overinclusive").

156 *See* 107 CONG. REC. 10229 (1961) (passing the bill with no further amendments or debates).

157 United States v. Bass, 404 U.S. 336, 344 (1971).

158 *See* 114 CONG. REC. 14773 (1968) (explaining that the added categories of persons barred from possession of firearms were particularly motivated because they were characteristics describing Oswald, Ray, and Sirhan).

become the Omnibus Act of 1968. Moreover, mail-order firearms presented problems—albeit partially economic—that had been discussed for years, going back to 1958. When Oswald's mail-order rifle was recovered, that should have been an easy decision for Congress. Instead, Congress waited for two more high-profile assassinations, MLK and RFK, before mustering the will to act.[159]

The 1960s reforms brought three contributions to the federal firearms scheme that tower above the rest. First, they completed the actus-reus transition from the *misuse* of a firearm to *shipping or receipt* of a firearm to the *mere possession* of a firearm.[160] The Omnibus Act, for the first time, prohibited the mere possession of a firearm based solely on the person's status.[161] From the 1960s forward, but especially during the modern enforcement era of the Federal War on Guns, felon-in-possession has been the overwhelming favorite offense of federal prosecutors.[162] Without a possession offense to pursue, it seems unlikely that the Federal War on Guns would have been able to produce the number of convictions it has.

Second, the reforms created § 924(c). The effects of this provision, to present day, simply cannot be overstated, in both individual cases and the aggregate.[163] In terms of total firearms convictions over time, the § 924(c) offenses are second only to the prohibited-persons statute.[164] Section 924(c) also began a tradition of federal mandatory minimum statutes, growing harsher

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159 *See* Zimring, *supra* note 56, at 146 (describing the long legislative history of the bill); *see also* Vizzard, *supra* note 114, at 84–85 (describing how the assassinations of Robert F. Kennedy and Martin Luther King Jr. led to the passage of the bill).

160 Vizzard, *supra* note 114, at 84 ("Title VII addressed simple firearm possession for the first time at the federal level.").

161 *Id.*

162 In Fiscal Year 2021, the most common federal firearms offense was felon-in-possession of a firearm. *See* U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf (last visited Feb. 27, 2023) (providing statistics on cases of felons in possessions of firearms).

163 In 2016, for example, 1,976 offenders were convicted under § 924©, which accounted for 2.9% of the federal convictions that year. Their average sentence was 151 months imprisonment. U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSE IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19, 31 (Mar. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

164 In 2016, for example, 1,976 offenders were convicted under § 924(c), which accounted for 2.9% of the federal convictions that year. Their average sentence was 151 months imprisonment. *Id.*

over time, that would devastate criminal defendants—sometimes in disproportionate ways[165]—and flummox the Supreme Court again and again.[166]

Third, the 1960s reforms first criminalized possession of a firearm while a user of a controlled substance, a less discussed provision that created the first point of contact between what would become the War on Drugs and the Federal War on Guns.[167] This point of contact, and the others that followed, reinforced one another and created inflection points that tipped toward mass incarceration.[168] No better character represented these points of contact across changing times than the protagonist of the 1960s reforms himself: Thomas Dodd. Not only was Senator Dodd a lawman during the 1930s and a policymaker in the 1960s, he later became a proto drug czar in the 1970s, pushing policies that formed the core of the burgeoning War on Drugs.[169]

C. ACT THREE: THE REAGAN ERA (1981-1986)

If the 1920s and 30s were an era of unease and the 1960s were an era of impulse, then the 1980s were an era of confident law-and-order legislation. Crime was surging, the national homicide rate had reached a record high in 1980, and President Reagan had a clear vision of how to fix it: increase sentences, reduce the discretion of lenient judges, and weaken procedural safeguards that benefitted criminal defendants.[170] He advanced his vision

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165 *See* United States v. Angelos, 433 F.3d 738, 742–43 (10th Cir. 2006) (describing a case in which defendant Weldon Angelos was sentenced to a mandatory minimum of fifty-five years imprisonment under § 924(c) for dealing marijuana while possessing a firearm).

166 *See, e.g.*, United States v. Davis, 139 S. Ct. 2319 (2019) (ruling that § 924(c)(3)(B) was unconstitutionally vague); *see also* United States v. Taylor, 142 S. Ct. 2015 (2022) (deciding what constitutes a crime of violence under § 924(c)(3)(B)).

167 *See* Joshua Taylor, *Is Congress's Denial of the Second Amendment Right to Medicinal Marijuana Cardholders Substantially Related to Preventing Gun Violence?*, 45 T. MARSHALL L. REV. 75, 79–80 (2020) (describing the history of the U.S. government's view of marijuana's effect on violent crimes).

168 *See id.* (observing the drug-user firearms disability as a point of contact with the War on Drugs).

169 *See Ex-Senator Dodd Is Dead at 64*, N.Y. TIMES (May 25, 1971), https://www.nytimes.com/1971/05/25/archives/exsenator-dodd-is-dead-at-64-censured-in-1967-by-colleagues.html [https://perma.cc/7MHG-EJYE] ("For years he also sponsored drug legislation, and he was the principal Senate sponsor of the Drug-Abuse Prevention Act, which went into effect last year, giving the police the right to search for drugs without a warrant or a warning.").

170 *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 258 (1993) (describing the actions Reagan took in an effort to reduce national crime).

rhetorically, in speech after speech, bending the ear of the nation and earning a mandate to act.[171]

The villains of President Reagan's Dirty Harry cinematic universe were not larger-than-life figures like John Dillinger. They were also not anti-American incendiaries like Oswald, Ray, or Sirhan Sirhan. Instead they were faceless, hardened street thugs who preyed on society's most vulnerable citizens.[172] His other villains were liberal judges who lived in the heady world of constitutional technicalities and cared more about the comfort of the bad guys than about all of the innocent Americans that would be harmed when they were back on the streets.[173]

Reagan's heroes, by contrast, are state and local police officers, who served as the front line of violence crime enforcement.[174] His heroes also included "enlightened" federal judges who eschewed "technicalities" in the name of justice.[175] Reagan called on Congress to help and, beginning in 1984, Congress took action.[176]

1. Perfecting the Modern Federal Firearms Scheme

The Comprehensive Crime Control Act of 1984 is perhaps the most substantial collection of crime legislation in our nation's history. A law-and-order behemoth, it touched on nearly everything in the criminal realm,

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171 Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners"*, 9 CONN. PUB. INT. L.J. 185, 239–40 (2010); *see also* Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. Ill. U. L.J. 1, 9 (2011) ("Reagan's direct references to the War on Drugs in official statements and speeches surpassed President Ford's by a factor of seven.").

172 Ronald Reagan, President of the U.S., *Radio Address to the Nation on Crime and Criminal Justice Reform*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Sept. 11, 1982), https://www.reaganlibrary.gov/archives/speech/radio-address-nation-crime-and-criminal-justice-reform [https://perma.cc/VY8E-A94D] ("We must make America safe again, especially for women and elderly who face so many moments of fear. You have every right to be concerned.").

173 *Id.* (Monday, I will send to the Congress another package of major anticrime measures. These will include suggested revisions of the exclusionary rule. Now, this is the rule that can force a judge to throw out of court on the basis of a small technicality an entire case, no matter how guilty the defendant or how heinous the crime. Our bill would stop this grievous miscarriage of justice by allowing evidence to be introduced where the police officer was acting in good faith.).

174 *Id.* ("The primary responsibility for dealing with these career criminals must, of course, rest with local and State authorities.").

175 *Id.* ("This position has already been taken by some enlightened Federal judges, and I'm asking the Congress to make it the law of the land.").

176 *See generally* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (passing a bill revising the U.S. criminal code).

dramatically expanding the federal government's power over offenders.[177] The CCCA included the Sentencing Reform Act (SRA),[178] the Armed Career Criminal Act (ACCA),[179] changes to § 924(c),[180] a prospective abolition of federal parole,[181] increased penalties for drug crimes,[182] and more.[183] While the complex legislative history and full implications of the CCCA are beyond the scope of this article, two of its reforms were key to building the legislative structure essential for the upcoming enforcement era of the Federal War on Guns: (1) the Sentencing Reform Act; and (2) the Armed Career Criminal Act.

The Sentencing Reform Act (SRA) created the U.S. Sentencing Commission, whose mission was to study federal sentencing, report data to Congress, and produce a set of sentencing guidelines ("Guidelines").[184] Because the SRA made the Guidelines mandatory, their immediate effect was to bind the sentencing discretion of district courts.[185] The Sentencing Commission issued its first guidelines manual in 1987.[186] From 1987 to present day, most firearms offenses fall within § 2K2 of the Guidelines, which has grown over time to include a variety of enhancements for firearms

177 Brandon E. Beck, *The Orwell Court: How the Supreme Court Recast History and Minimized the Rule of the U.S. Sentencing Guidelines to Justify Limiting the Impact of Johnson v. United States*, 66 BUFF. L. REV. 1013, 1018 (2018).

178 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. For a playful description of the Sentencing Reform Act's reforms, *see* J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693 (2011).

179 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185.

180 Congress narrowed the list of § 924(c) predicate offenses to "crimes of violence" but increased the minimum penalty for a first-time offense to a mandatory consecutive sentence of five years imprisonment, while lowering the penalty for a second or subsequent offense to ten years imprisonment. Comprehensive Crime Control Act of 1984, Pub L. 98-473, § 1005, 98 Stat. 2138.

181 Act of Oct. 12, 1984, Pub. L. No. 98-473, Title II, § 218(a)(5), 98 Stat. 2027 (repealing 18 U.S.C. § 4201).

182 *Id.* §§ 502-504 (amending 21 U.S.C. § 841(b)).

183 *See, e.g.*, Michael Neal, *Zero Tolerance for Pretrial Release of Undocumented Immigrants*, 30 B.U. PUB. INT. L.J. 1, 7-8 (2021) (describing the CCCA changes to the Bail Reform Act).

184 Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 664–66 (2016).

185 The mandatory guidelines regime lasted from 1987 until 2005, when the U.S. Supreme Court decided *United States v. Booker*. United States v. Booker, 543 U.S. 220 (2005) (invalidating the mandatory nature of the sentencing guidelines).

186 U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1-11 (1987); *see also* Gall v. United States, 552 U.S. 38, 46 (2007) (describing the U.S. Sentencing Guidelines as "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions").

offenses, triggered by all sorts of circumstances, including the characteristics of the firearm, the nature of an offender's prior convictions, the number of firearms involved, and the relationship of a firearm to another offense, whether charged or uncharged.[187] This combination—of a growing list of firearms enhancements and limited sentencing discretion—produced new opportunities for prosecutors and courts to increase the sentencing exposure of firearms offenders, all in the name of uniformity.[188]

The Armed Career Criminal Act (ACCA) created a three-strikes recidivism law that imposed a harsh mandatory minimum on certain qualifying firearms offenders.[189] Before the ACCA, any felon who possessed a firearm was subject to a maximum penalty of only two years imprisonment.[190] But, under the ACCA, if that same felon had three prior convictions for burglary or robbery, he now faced a mandatory minimum of fifteen years imprisonment, up to life.[191] While at first the ACCA produced very few enhanced sentences, it was used more frequently as prosecution practices

187 *Compare* U.S. SENT'G COMM'N, GUIDELINES MANUAL § 2K2.1-4 (1987), *with id.* § 2K2.1.

188 Ironically, there is some evidence that the Guidelines may have also exacerbated, rather than eliminated, sentencing disparities based on race. *See* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1266–67 (1996); *see also* United States v. Smith, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) ("Primarily as the result of the different penalties for crack and powder cocaine, and contrary to one of the Sentencing Reform Act's primary goals, the sentencing guidelines have led to increased disparity between the sentences of blacks and whites. Before the guidelines took effect, white federal defendants received an average sentence of 51 months and blacks an average of 55 months. After the guidelines took effect, the average sentence for whites dropped to 50 months, but the average sentence for blacks increased to 71 months.").

189 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185.

190 Prior to 1986, the felon-in-possession statute was codified at 18 U.S.C. § 1202(a)(1), which imposed a maximum sentence of two years imprisonment. *See* United States v. Harris, 755 F.2d 127, 127 (8th Cir. 1985) (describing a defendant who was convicted under § 1202(a)(1) with a maximum penalty of two years).

191 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185. On average, those who face an ACCA enhancement endure a sentence more than twice as long as a non-ACCA sentence, even when the instant offense is the same. In fiscal year 1998, for example, the average sentence for a non-ACCA felon-in-possession offender was 105 months imprisonment; the average sentence for an ACCA-enhanced felon-in-possession offender was more than 214 months imprisonment. JOHN SCALIA, U.S. DEP'T OF JUST., FEDERAL FIREARMS OFFENDERS, 1992-98, at 7 (June 2000), https://bjs.ojp.gov/content/pub/pdf/ffo98.pdf.

evolved,[192] and would soon earn its place as the third pillar of the federal firearms enforcement, after the prohibited-person statute and § 924(c).[193]

The final truly formative legislative year of the Reagan Era came in 1986, less than two years after the CCCA. Congress enacted two pieces of legislation—the Firearms Owner's Protection Act and the Anti-Drug Abuse Act—that broadened the most common federal firearms offenses and drew new criminal connections between drugs and firearms. These Acts gave federal prosecutors new tools to seek harsh mandatory minimums and would lay the foundation for the fourth act of our story: the Federal War on Guns.

The Firearms Owners' Protection Act of 1986 (FOPA) reorganized and revised the federal firearms framework. Rather than a continuation of the CCCA, the FOPA's origins began earlier than the CCCA and largely addressed separate concerns, most loudly raised by the NRA, that the breadth of the Omnibus Act and GCA gave the Bureau of Alcohol Tobacco and Firearms too much discretion and enforcement power over "technical" firearms violations.[194] While the FOPA, in its final form, did much to assuage the concerns of the NRA and gun manufacturers,[195] Congress also used it as a ripe opportunity to organize and strengthen the most common firearms crimes and to sharpen the tools that federal prosecutors could use against offenders

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192 Throughout the 1980s, only a handful of offenders received the ACCA enhancement. By the mid-2000s, the number of ACCA enhancements imposed each year had increased by more than ten-fold. *See infra* Figure 4 at Part II.C.

193 In fiscal year 1998, for example, the average sentence for a non-ACCA felon-in-possession offender was 105 months imprisonment; the average sentence for an ACCA-enhanced felon-in-possession offender was more than 214 months imprisonment. SCALIA, *supra* note 192, at 7.

194 In 1982, the Senate Judiciary Committee issued a report, in support of the FOPA, claiming that "75 percent of BATF gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations." SUBCOMM. ON THE CONST. OF THE COMM. ON THE JUDICIARY, 97TH CONG., REP. ON THE RIGHT TO KEEP AND BEAR ARMS 23 (Comm. Print 1982); *see also* David B. Kopel, *The Great Gun Control War of the Twentieth Century--And Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1565–67 (2012) (describing the NRA's role in designing and advocating for the FOPA).

195 Congress asserted that the FOPA was necessary to fulfill the GCA's promise that "it is not the purpose of this title 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, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." Firearms Owners' Protection Act, Pub. L. No. 99-308, § 1(b)(2), 100 Stat. 449 (1986). The FOPA, for example, prohibited the government from keeping a national firearms registry, it expressly allowed for the interstate sale of long guns, and it placed restrictions on the warrantless searches of firearms dealers. *Id.* §§ 103-07; *see also* Charles & Garrett, *supra* note 15, at 663–65 (2022) (characterizing FOPA as the "Firearm *Dealers* Protection Act").

involved with both firearms and drugs. The FOPA, in conjunction with the Anti-Drug Abuse Act of 1986 (ADAA), strengthened all three pillars of the federal enforcement scheme.

First, Congress used the FOPA to gather the prohibited-person laundry list—now containing seven statuses—and put them in the same statutory location: 18 U.S.C. § 922(g).[196] Congress also harmonized the list to ensure they all prohibited the mere possession of a firearm. Prior to the FOPA, drug users were prohibited from *receiving* or *transporting* a firearm but could technically *possess* a firearm legally, while a felon, for example, could neither receive, transport, nor possess a firearm.[197] Now, under the FOPA, it was a crime for all prohibited persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition."[198] This both broadened and streamlined the government's program of status-based criminalization.

Second, Congress broadened § 924(c) considerably. While § 924(c) had once applied to the use of a firearm to commit any felony offense, in 1984, Congress narrowed its application to just crimes of violence.[199] With the FOPA, Congress took a step back in the pre-1984 direction by adding drug trafficking crimes as § 924(c) predicates.[200] Similar to what Congress did when it harmonized the drug user status with the other prohibited persons, this reflected Congress's growing focus on drug crimes[201] and its heightened sensitivities to crimes that involved both drugs and firearms.[202] The FOPA also

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196 *See* H.R. REP. NO. 99-495, at 23 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1349 (describing Congress's organizational aspiration).

197 *See id.* at 4 (describing Congress's goal to close "a number of loopholes concerning possession of firearms by illegal users of drugs"); United States v. Carter, 669 F.3d 411, 417–18 (4th Cir. 2012) (describing the FOPA's closure of the drug-user "loophole").

198 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102, 100 Stat. 449 (1986).

199 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001, 98 Stat. 1837, 2136 (narrowing the range of § 924(c) predicate offenses to crimes of violence).

200 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(C), 100 Stat. 449 (1986).

201 Congress escalated the War on Drugs significantly in 1986. The Anti-Drug Abuse Act of 1986, for example, both created new federal drug offenses and imposed the infamous 100:1 crack-powder disparity. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

202 Sensitivities to this connection are reflecting throughout the committee reports leading up to the FOPA. It appears that "drug trafficking crime" may have been added as a § 924(c) predicate because Congress in fact believed that drug crimes were themselves crimes of violence. *See* H.R. REP. 99-495, at 17-18 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1343-44 ("The bill would provide that those who carry or use firearms in the commission of Federal drug offenses will be

increased the penalties under § 924(c) for use of a machine gun or a firearm with a suppressor—ten years of mandatory imprisonment for a first offense, twenty years for a second or subsequent offense.[203]

Third, Congress used the ADAA to broaden the Armed Career Criminal Act, now housed in 18 U.S.C. § 924(e),[204] in a way similar to what the FOPA had done with § 924(c). At its inception in 1984, the ACCA only had two predicate convictions: robbery and burglary.[205] Congress used the ADAA to replace those two enumerated offenses with two *categories* of offenses: "violent felony" and "serious drug offense."[206] Congress defined both broadly—more broadly, in some ways, than § 924(c)'s roughly analogous categories of "crime of violence" and "drug trafficking crime."[207] As with the FOPA and § 924(c), the ADAA's changes granted federal prosecutors many new opportunities to pursue the ACCA's harsh mandatory minimum. And as we shall see later, granted the courts many new opportunities to scrutinize Congress's massive Reagan-era reforms.

2. Theme and Legacy: The Era of (Over)Confidence

The Reagan Era extended the work of the prior traditional eras and finished the job of providing federal prosecutors with all of the tools and discretion they would later need to lift the Federal War on Guns off of the ground. From 1986 onward, the Federal War on Guns would no longer be a matter of ability or opportunity, but rather a simple matter of resources and executive policy.

The raw prosecutorial power and discretion that Congress had given to the Executive Branch, by the end of the Reagan era, was enormous. In hindsight, however, Congress did so with an over-confidence that doubles as naivete and borders on gullibility. Congress—and perhaps Reagan himself—did not believe that the Executive Branch would actually use its newfound power in any

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subject to the Act's mandatory penalties. This amendment would resolve the current uncertainty whether such crimes are crimes of violence and, thus, fall within the existing mandatory penalty provision. However, there are significant negative aspects of the mandatory penalty provision which are discussed below.").

203 Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(D)-(E), 100 Stat. 449 (1986).

204 *Id.* § 1401.

205 Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 1837, 2185.

206 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1401–02, 100 Stat. 3207, 3207-39.

207 The ADAA, for example, defines "violent felony" to include the enumerated offenses of burglary, arson, extortion, or the use of explosives, which § 924(c) omits. *See id.*

profound way. Instead, much like the role of the atomic bomb in geopolitics, the role of this power was simply to exist, as a deterrent against crime and an incentive to promptly plead to state charges.

Arlen Specter's statements in support of the Armed Career Criminal Act offer a fascinating glimpse into this now-antiquated view of federal power. After President Reagan had pocket-vetoed an earlier version of the ACCA on federalism grounds, Specter, in support of a revised version, explained that the beauty of the ACCA is that it would almost never be used:

> If the career criminal bill were in place, it would be possible for a district attorney, like the district attorney of Philadelphia, to refer a few cases—3, 4, or 5, out of 500—where there would be the individual judge's calendar, a trial within 90 days, strong cases, virtually certain convictions, and minimum mandatory sentences of 15 years to life.
>
> I can tell you, Mr. Chairman, that if that happened to a few of Philadelphia's career criminals, there would be a mass rush for guilty pleas in the State courts, and that it is not optimistic to predict that 300 or 400 of the balance of those 500 cases would result in guilty pleas, and not with sentences of 15 years to life but with sentences of 10 years, or 12 years, much more than is being obtained at the present time. It is that leveraging which we really seek to accomplish through the career criminal bill.[208]

For a while, the ACCA was used rarely, as Specter envisioned. But, as the Federal War on Guns began to gain momentum in the 1990s, the ACCA evolved into a tool that federal prosecutors reached for much more often.[209]

The Reagan era also created new points of contact between federal firearms policy and the ongoing War on Drugs. It was during this era that drug users were prohibited from possessing a firearm, and that drug crimes were specifically added as mandatory-minimum firearms predicates. These points of contact, between drugs and firearms, created a synergy between two crime-control movements that have driven mass incarceration from the 1990s forward.[210]

Finally, the Reagan era was the last era of "old federalism." As discussed below, notions of state and local leadership on crime policy would soon end, replaced by Specter's vision of a "new federalism" with high levels of federal leadership and involvement. This shift would be fundamental to the Federal

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208 *Hearings on H.R. 1627 and S. 52*, *supra* note 69, at 13 (statement of Sen. Specter).

209 *See infra* Figure 4 at Part II.C.

210 The best discussion comparing the War on Drugs and federal firearms policy is Benjamin Levin's *Guns and Drugs*. Levin, *supra* note 23.

War on Guns, granting the Executive Branch the political will to exercise its raw power and discretion toward new ends. At the end of the Reagan era, the federal government was about to embark on a new era of firearms policy unlike anything that had come before.

II. ACT FOUR: THE FEDERAL WAR ON GUNS (1991-PRESENT)

By the end of the 1980s, Congress had set into place the modern federal firearms scheme and established all the tools the Executive Branch would need to accelerate firearms prosecutions from the 1990s onward. Up to that point, Congress had been giving federal prosecutors enormous amounts of power—for nearly seventy-five years—to impose the federal firearms scheme, but always with the understanding that federal involvement in state crime affairs would be in a supportive role, not as the primary enforcement implement.[211] But in the 1990s, a new philosophy on federal firearms enforcement emerged, which only escalated in the decades that followed.

Under this new philosophy, the Executive Branch jettisoned past assumptions of federalism and restraint, replacing them with a model of cooperative federalism, under which the federal government became the primary arbiter of how firearms cases were prosecuted.[212] And once the government decided to leverage its full power on firearms enforcement, the number of federal firearms convictions skyrocketed.[213] This represented a break from the past in almost every way, ushering in the fourth act of our story: the Federal War on Guns.

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211 *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 197 ("Congress finds further that crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively.").

212 *Review of Department of Justice Firearm Prosecutions: Hearing Before the Subcomm. on Crim. Just. Oversight and the Subcomm. on Youth Violence, S. Judiciary Comm.*, 106th Cong. 201 (1999) https://www.govinfo.gov/content/pkg/CHRG-106shrg59738/html/CHRG-106shrg59738.htm [https://perma.cc/A3GZ-MJJJ] [hereinafter *Review of Department of Justice Firearm Prosecutions*] (statement of Helen F. Fahey, U.S. Att'y, E. Dist. of Va.) (explaining that, during Project Exile (1997), ATF agents would serve as a liaison to funnel state firearms cases into the hands of federal prosecutors).

213 *See* Gardner, *supra* note 31, at 311 (describing a seventy-three percent increase in federal firearms prosecutions from 2000–2005).

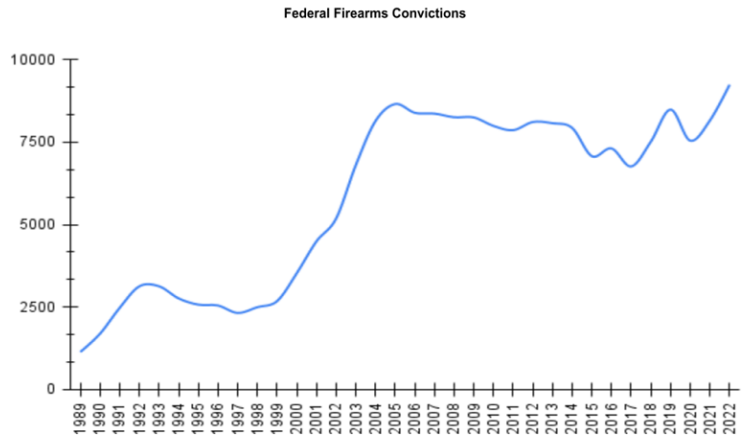

Figure 1: Total Federal Firearm Convictions. Data from U.S. Sentencing Commission Annual Sourcebooks and Reports.

Although the focus of the first three acts was on legislation and its goals, the focus of the fourth act was on *enforcement*. While Congress did make many subsequent changes to federal firearms laws—usually in the form of increasing their penalties—very few had a fundamental effect on (1) who was subject to the federal criminal scheme, or (2) how the offenses were prosecuted. And the few pieces of 1990s legislation that did increase the reach of firearms offenses did so in incremental steps that added onto rather than reorganized or revised the existing scheme.[214] None of the post-1986

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214 The three salient examples are the addition of two new statuses in 1994 and 1996—under a domestic-violence protective order, and misdemeanant of domestic violence—and the post-*Bailey* amendment to § 924(c), which added more structure and increased the mandatory minimum punishments if the firearm were brandished or discharged. Act to Throttle Criminal Use of Guns, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998). Even the 1994 assault weapons ban, which lapsed in 2004 and continues to garner much national attention, is little more than a curiosity when compared to the three core pillars of the federal firearms scheme: § 922(g) (prohibited persons); § 924(c); and § 924(e) (the ACCA). *See* U.S. DEP'T OF JUST., IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–96 (1999), https://www.ojp.gov/pdffiles1/173405.pdf [https://perma.cc/KY9W-VYRT] (reporting largely inconclusive impacts of the 1994 Assault Weapons Ban on gun crime and prosecution). And the only major legislative pushback to the Federal War on Guns—the First Step Act of 2018—did not reduce the number of charged offenses but rather only the availability of certain higher enhancements. After the First Step Act, the total number of § 924(c) offenders actually increased while the average sentence of a § 924(c) offender decreased considerably, from 150 months to 140 months imprisonment. U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 36–37 (Aug. 2020),

legislation was necessary for the increased federal enforcement of firearms offenses—the news laws only either empowered its progression or dampened its effects. The Federal War on Guns may have looked a bit different, but an era of enhanced enforcement still could have happened.

With the legislation of the first three acts in place, the federal government had the ability to wage the Federal War on Guns. But ability was not enough. The government still needed the political will, the resources, and the leadership to act. Only once these were in place, the Federal War on Guns could rise and then sustain itself. In short, the story of act four, the Federal War on Guns, is not the story of new legislation but rather of the political will to wage a new criminal war at the federal level, the resources to apprehend and prosecute large numbers of offenders federally, and leadership in the Department of Justice willing to give the marching orders. These began to come together in the 1990s and reached new heights in the mid-2000s and late 2010s.

A. THE POLITICAL WILL: THE NEW FEDERALISM AND THE RISE OF NEOLIBERALISM

The rise of the Federal War on Guns in the early 1990s coincided with shifting views on the relationship between federal and state power to control certain crimes. For much of our nation's history, firearms crime was considered a state issue.[215] The 1980s, the last decade before the rise of the Federal War on Guns, was a period of great debate—at the highest levels of influence—over the role of the federal government in traditional state crime policy.

In 1982, Senator Arlen Specter published an article titled "The Need for New Federalism in Criminal Justice," in which he asserted that while crime "has always been considered primarily a state and local problem," "there is by now general agreement that the federal government can and should take

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [https://perma.cc/CJ8B-ARLE]. In short, none of the post-1986 pieces of legislation were necessary for the increased enforcement of the Federal War on Guns—they only either empowered its progression or dampened its effects.

215 *See* Specter & Michel, *supra* note 45, at 60 ("Crime in the United States has always been considered primarily a state and local problem.").

additional steps to combat violent crime beyond simply enforcing existing federal criminal laws."[216]

Senator Specter proposed both a new level of federal involvement in the prosecution of violent "street crime" and the creation of new federal crimes that targeted "armed career criminals."[217] According to Senator Specter, Congress and the Executive Branch could achieve this with a new cooperative federalism, through which federal prosecutors work hand in hand with state and local authorities to ensure the safety of society.[218]

Senator Spector's article was primarily to garner support for an early incarnation of the Armed Career Criminal Act, which he had introduced in 1981 to create a new federal crime that would punish repeat state offenders of burglary and robbery.[219] Despite his assertion of a "general agreement," many disagreed. In 1982, for example, all nine Supreme Court Justices signed a letter to Congress stressing "that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no 'wide public importance.'"[220] Later, Justices Rehnquist, Scalia, and O'Connor, in rare critiques of Executive Branch policy, repeatedly warned of the dangers of turning federal courts into "police courts."[221] Even President Reagan disagreed, demonstrated by his decision to pocket-veto the Armed Career Criminal Act in 1983 over federalism concerns.[222]

Nonetheless, even President Reagan could not stop what was coming. In 1984, after Senator Specter and then-Congressman Ron Wyden revised the bill, limiting it to instances that also involved a pre-existing federal firearms

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216 *Id.*

217 *Id.* at 64–65.

218 *Id.* at 70–71.

219 Career Criminal Life Sentence Act of 1981, S. 1688, 97th Cong. (1981); *Career Criminal Life Sentence Act of 1981: Hearings on S. 1688, S. 1689, and S. 1690 Before the Subcomm. On Juv. Just. Of the S. Comm. On the Judiciary*, 97th Cong. 3–4 (1981). For a discussion of the ACCA's early legislative history, *see* United States v. Balascsak, 873 F.2d 673, 679 (3d Cir. 1989) (en banc).

220 Letter from Sup. Ct. Justices to Robert Kastenmeier, Rep., U.S. House of Reps. (June 17, 1982), *reprinted in Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing on H.R. 2406, 4395, & 4396 Before the Subcomm. On Cts., C.L., & the Admin. Of Just. Of the H. Comm. On the Judiciary*, 97th Cong. 22–23 (1982); *see also* Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 94 N.C. L. REV. 7, 47–48 (2015) (describing and quoting the 1982 Supreme Court letter).

221 Mazzone & Woock, *supra* note 220, at 55–58.

222 873 F.2d at 680 ("S.1688 was passed by both Houses of Congress as part of a larger package, but President Reagan pocket-vetoed it. The President's objection to this aspect of the package concerned the relationship between federal and local prosecutors.").

offense, President Reagan signed it into law as the Armed Career Criminal Act of 1984.[223] Still, Reagan's decision in 1983 offers a fascinating glimpse of a past outlook on crime policy quite incongruent with that of elected officials of any political persuasion.

Meanwhile, beginning in the 1980s and continuing into the 1990s, an ideological shift toward political and economic neoliberalism had taken root among both policymakers and victim-rights advocates.[224] This shift embraced criminalization and other market-based approaches to crime policy.[225] Whatever liberal-conservative divide on crime policy existed in the 1960s had closed by the 1990s, when, to most everyone, the punishment of offenders was a far greater focus of concern than talk of "rehabilitation" or "crime prevention."[226]

There was no better exemplar of the neoliberal Democrat than Bill Clinton. Attuned to a bipartisan yearning for tougher criminal laws, Clinton took a much tougher approach to crime than his predecessors on the left.[227] As a presidential candidate, he touted his support for the death penalty and even left his campaign to personally oversee the Arkansas execution of Ricky Ray Rector, a man so severely brain-damaged that he set part of his last meal aside to finish later.[228] Clinton's signature campaign promise on crime was to

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223 James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546–47 (2009).

224 *See* Jeremy Kaplan-Lyman, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 192 (2012) (describing the "ascendency" of the neoliberal approach to policing as beginning in the mid-1980s).

225 *See id.* at 179 ("[T]he neoliberal turn in the United States has underwritten increasing government intervention around the idea of crime and has led to the creation of a punitive state that turns to incarceration as a solution to structural economic inequality and political instability.").

226 Charles & Garrett, *supra* note 15, at 668–69; Tony G. Poveda, *Crime and Justice in the Clinton Era*, 21 SOC. JUST. 73, 73 (1994) ("Liberals of the 1960s often called for an examination of the root causes of crime, the rehabilitation of offenders, and for procedural safeguards in the administration of justice. Conservatives of that period, like today, emphasized punishment and crime control in their crime agenda. These poles (crime prevention versus punishment and due process versus crime control) of the traditional liberal-conservative dialogue have largely disappeared, as measures emphasizing punishment far overshadow any consideration of crime prevention."); *see also* Deborah J. Daniels, *Sentencing Guidelines and Prosecutorial Discretion: The Justice Department's "Clarification" of the Thornburgh Memo*, 6 FED. SENT'G REP. 302, 302–05 (1994) (noting a shift away from "the defendants' rights and rehabilitative focus of the 1960s").

227 Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 543 (1996).

228 Ron Fournier, *The Time Bill Clinton and I Killed a Man*, ATLANTIC (May 28, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-time-bill-clinton-and-i-killed-a-

hire 100,000 new police officers.[229] As president, he had the support of Senators Biden and Schumer, like-minded Democrats who pushed new proposals to address gun violence with a simple message: more police, fewer guns.[230]

While President Clinton's views on firearms and crime were undoubtedly informed by political expediency,[231] they were also molded by specific mass-shooting events. In January 1989, almost exactly four years before Clinton was sworn into the presidency, a man armed with an AK-47 entered Cleveland Elementary School in Stockton, California, and fired 106 rounds, killing five children and wounding thirty others.[232] That event, both senseless and race-based,[233] was unlike anything this nation had seen.[234] Within months, California had imposed the first statewide assault-weapons ban and begun a national conversation.

Other such high-publicity shootings also echoed in the nascent twenty four-hour news cycle throughout Clinton's campaign and early presidency: on October 16, 1991, twenty-three patrons were shot dead at a Luby's Cafeteria in Killeen, Texas; on February 28, 1993, four ATF agents were killed by

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man/460869/ [https://perma.cc/5X4D-89RG] ("Earlier that day, January 24, 1992, then-Arkansas Gov. Bill Clinton had left the presidential campaign trail to be home for Rector's execution."). For a discussion of Ricky Ray Rector's mental state, see Ariane M. Schreiber, *States that Kill: Discretion and the Death Penalty—A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 300 n.202 (1996). For a description of the last meal episode, see Nathan J. Robinson, *The Death of Ricky Ray Rector*, JACOBIN (Nov. 5, 2016), https://jacobinmag.com/2016/11/bill-clinton-rickey-rector-death-penalty-execution-crime-racism [https://perma.cc/9F26-MQF2].

229 Chernoff et al., *supra* note 228, at 543.

230 *Id.* at 539.

231 *See* Noam Biale et al., *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L. & POL'Y REV. 115, 141 (2021) (describing Clinton's various publicity stunts to demonstrate his commitment to crime).

232 Jay Matthews & Matt Lait, *Rifleman Slays Five at School*, WASH. POST (Jan. 18, 1989), https://www.washingtonpost.com/archive/politics/1989/01/18/rifleman-slays-five-at-school/5417a754-b716-4c10-8b58-dac2bc29ae5d/ [https://perma.cc/R8UH-M4EW].

233 Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24 (1994) (observing that the assailant chose the school to target Southeast Asian children).

234 Even President Reagan, responding to the Stockton shooting, claimed that there was no place for the AK-47 (or similar weapons) in American society: "I don't believe in taking away the right of the citizen to own a gun for sports, hunting or their own personal defense. But I do not believe that an AK-47, a machine gun, is a sporting weapon," said Reagan. OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 201 (1993); *see also* Robert Reinhold, *Los Angeles Bans Rapid-Firing Guns*, N.Y. TIMES (Feb. 18, 1989), https://www.nytimes.com/1989/02/08/us/los-angeles-bans-rapid-firing-guns.html [https://perma.cc/6Y6L-FAQ7].

Branch Davidians to begin a months-long standoff in Waco, Texas; on December 7, 1993, a gunman shot and killed six passengers on a Long Island commuter train; and on October 29, 1994, a man fired twenty-nine rounds at the White House.[235]

The 101 California Street shooting was perhaps the tipping-point for the 1994 assault weapons ban.[236] On July 1, 1993, a man walked into an office building, took the elevator up to a 34th-floor law firm, and murdered eight people.[237] The shooter used two TEC-9 handguns during the attack, each of which held 32-round magazines.[238] Steve Sposato, whose wife was killed in the shooting, testified before Congress only one month later to support an assault weapons ban.[239] As he spoke to Congress, his ten-month-old daughter—now without a mother—sat in a carrier strapped to his back.[240] As a result of all of these mass-shooting events, Americans grew accepting of further firearms regulations, with overwhelming support for an assault weapons ban.[241]

The 1994 assault weapons ban likely had some impact on gun violence[242] but was a political disaster for Democrats that overshadowed the rest of the Crime Bill and contributed to them losing control of the House in 1994.[243]

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235 Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 577 (1995).

236 *See* Ashley Mata, Comment, *Kevlar for the Innocent: Why Modeling Gun Regulation After Great Britain, Australia, and Switzerland Will Reduce the Rate of Mass Shootings in America*, 45 CAL. W. INT'L L.J. 169, 180 (2014) (noting the Violent Crime Control Act's connection to the 101 California Street shooting).

237 Diane Dwyer & Amanda Hochmuth, *101 California Shooting: 20 Years Later*, NBC BAY AREA (July 1, 2013), http://www.nbcbayarea.com/news/local/101-California-Shooting-20-Years-Later-213705691.html.

238 *Id.*; *see also* Robert Reinhold, *The Broker Who Killed 8: Gunman's Motives a Puzzle*, N.Y. TIMES (July 3, 1993), https://www.nytimes.com/1993/07/03/us/the-broker-who-killed-8-gunman-s-motives-a-puzzle.html [https://perma.cc/6V4C-4LNA] (describing the firearms as "two 9-millimeter Intratec DC9 semi-automatic machine pistols").

239 *User Clip: Steve Sposato Testimony, August 3, 1993*, C-SPAN (Aug. 3, 1993), https://www.c-span.org/video/?c4249606/user-clip-steve-sposato-testimony-august-3-1993 [https://perma.cc/AF68-Q4NX].

240 *Id.*

241 *See* Lenett, *supra* note 235, at 584 n.29 (describing polling that reflected more than 60 percent support for a variety of firearms bans).

242 *See* CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003: REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE 1–3 (2004), https://perma.cc/3GHD-W5D3 (noting the mixed results of the weapons ban).

243 *See* Evelyn Theiss, *Gun Lobby Shot Down Democrats In Congress Clinton*, PLAIN DEALER, at A1 (Jan. 14, 1995) (quoting President Clinton as saying, "the fight for the assault-weapons ban cost 20 members their seats in Congress").

President Clinton, however, persisted in his law-and-order efforts. In 1996, he signed the Lautenberg Amendment into law, a bipartisan amendment that disarmed misdemeanants of domestic violence.[244] In January 1997, in the first radio address of his second term, President Clinton pledged to make addressing gang violence his top priority:

> As I begin my second term as President, the next stage in our fight must center on keeping our children safe and attacking the scourge of juvenile crime and gangs. I want every police officer, prosecutor, and citizen in America working together to keep our young people safe and young criminals off the streets. This should be America's top priority in the fight for law and order over the next 4 years. I pledge it will be mine.[245]

He echoed these same priorities in the first State of the Union Address of his second term, asking Congress to "mount a full-scale assault on juvenile crime, with legislation that declares war on gangs, with new prosecutors and tougher penalties."[246] By February 1997, he had used grants from the newly created Office of Community Oriented Policing Services (COPS)[247] to make significant gains toward fulfilling his campaign promise of hiring 100,000 new police officers.[248]

Once President Clinton and the Democrat leadership in the Senate had gathered the political will to leverage federal power against street crime, it was only a matter of marshaling the resources to act. Even though a Republican Congress was reluctant to give Clinton any political victories on crime legislation,[249] the parties would work with one mind on enhanced enforcement

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244 Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 551–55 (2003).

245 The President's Radio Address, 1997 PUB. PAPERS 29–30 (Jan. 11, 1997).

246 William J. Clinton, U.S. President, State of the Union Address 7 (Feb. 4, 1997), https://clintonwhitehouse3.archives.gov/WH/SOU97/ [https://perma.cc/PTQ3-3NS6].

247 The Office of Community Oriented Policing Services (COPS) was created by the 1994 Crime Bill "to advance the practice of community policing by the nation's state, local, territorial, and tribal law enforcement agencies through information, technical assistance, training and grant resources." *Organization, Mission, and Functions Manual: Office of Community Oriented Policing Services*, U.S. DEP'T OF JUST. (Sept. 12, 2023), https://www.justice.gov/doj/office-community-oriented-policing-services [https://perma.cc/5AJ9-4XKR].

248 By February 1997, COPS had awarded grants "for the hiring or redeployment of more than 54,000 police officers and sheriff's deputies." U.S. DEP'T OF JUST., NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 55 (1997), https://www.ncjrs.gov/ovc_archives/directions/pdftxt/direct.pdf [https://perma.cc/NX6H-HCVV].

249 *See* Chernoff et al., *supra* note 227, at 532 ("Initially, the Republicans worked closely with Democrats to craft the 1994 crime bill. The Republicans then shifted tactics and ruthlessly attacked the same bill they had helped to write.").

in the form of national federal law enforcement initiatives.[250] It was these enforcement initiatives, beginning at the tail of the George H.W. Bush Administration and continuing into the Clinton Administration, nudged forward by a shared ideological view of federalism and crime, that first gave rise to the Federal War on Guns.

B. MARSHALING RESOURCES: FEDERAL FIREARMS INITIATIVES AND COOPERATIVE FEDERALISM

After ability, opportunity, and political will, the biggest barrier to increased federal enforcement of firearms crime was that the government lacked the boots-on-the-ground resources to do the work. State and local police greatly outnumbered federal agents, the FBI and ATF did not patrol the city streets, and federal agents were largely encumbered by other, less-granular tasks.[251] Meanwhile, many believed that the federal court system was meant to focus on complex criminal cases such as RICO prosecutions, white-collar crime, and environmental enforcement—not garden-variety street crime.[252]

In April 1991, President George H.W. Bush and Attorney General Richard Thornburgh devised a first-of-its-kind plan to address firearms crime at the federal level.[253] Named "Project Triggerlock," the plan was a national initiative under which federal prosecutors would work with state and local law enforcement to route firearms offenders into the federal system so they could

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250 *See* Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 101, 113 (2017) ("A few months later, President Bill Clinton spotlighted the Polly Klass case during his [S]tate of the [U]nion address commenting, 'those who commit repeated violent crimes should be told when you commit a third violent crime, you will be put away and put away for good.' And then, to roaring applause, Clinton boomed, 'three strikes and you are out.'"); *see also* David Johnston & Tim Weiner, *Seizing the Crime Issue, Clinton Blurs Party Lines*, N.Y. TIMES (Aug. 1, 1996), https://www.nytimes.com/1996/08/01/us/seizing-the-crime-issue-clinton-blurs-party-lines.html.

251 *See* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 405 (2006) ("But when it came to violent crime, local police officials were generally in the cat-bird's seat. FBI, ATF, DEA, and other federal agents could not patrol the streets. They rarely infiltrated gangs. Calls to 911 were not routed to them. And citizens generally took their complaints to the police.").

252 *See* Mazzone & Woock, *supra* note 220, at 48 (quoting a 1982 letter to Congress, signed by all Supreme Court Justices, explaining, "Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no 'wide public importance.'").

253 Charles & Garrett, *supra* note 14, at 679 (describing Project Triggerlock as the formal beginning of the "modern federal-state-local collaboration").

be prosecuted aggressively without plea bargains.[254] Putting into action new attitudes of "cooperative federalism,"[255] Project Triggerlock would become the blueprint for many future federal firearms initiatives that would have a profound effect on the number of federal firearms convictions.[256]

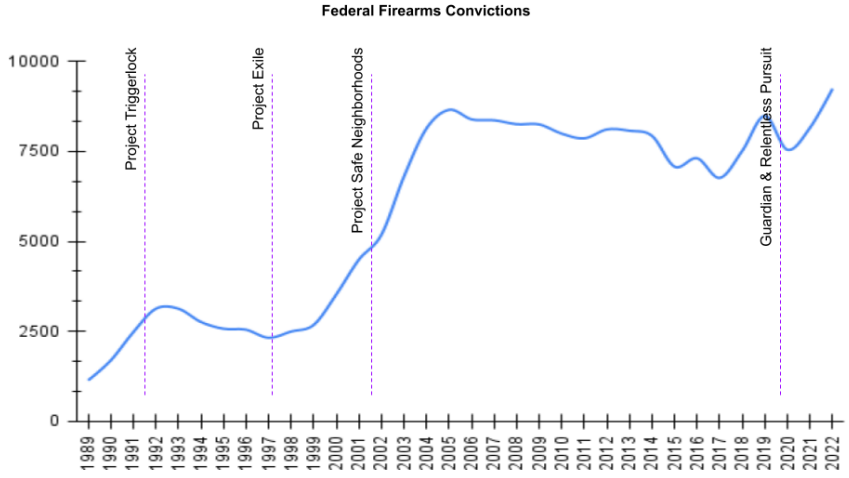

Figure 2: Total Federal Firearm Convictions (figure 1) with Federal Law Enforcement Initiatives.

According to the DOJ, Project Triggerlock was a success: from 1990 to 1992, the number of suspects federally investigated and prosecuted for a firearms offense increased substantially.[257] The reality of this success, however, did not quite match up with the DOJ's public relations campaign. The increases that Project Triggerlock brought were, on the whole, not against violent offenders but rather against those who merely possessed a firearm as a

254 *See* Tracy Thompson, *Gun Crimes Targeted by Prosecutors*, WASH. POST (Apr. 11, 1991), https://www.washingtonpost.com/archive/politics/1991/04/11/gun-crimes-targeted-by-prosecutors/23e5e72e-f5bb-4d60-aa1f-19912559e9ad/ [https://perma.cc/XWA7-J7ZE] ("Federal prosecutors across the country . . . will aggressively pursue those who commit crimes with guns by refusing plea bargains . . . .").

255 Partlett, *supra* note 29, at 1673–74 n.81.

256 For example, the Clinton Department of Justice promoted its later initiative, Project Exile, as "Trigger[l]ock on steroids." *See* Jennifer Nislow, *Get Out of Town! Richmond's Project Exile Stems a Spiral of Violence with Its Focus on Gun-Toting Felons*, L. ENF'T NEWS (Dec. 15, 1999), https://archive.org/details/lawenforcementne00john_97 [https://perma.cc/W9YW-MUSR] (quoting then-Assistant U.S. Attorney James Comey).

257 SCALIA, *supra* note 191, at 4.

prohibited person.[258] Meanwhile, the vast majority of violent offenders remained in the state system.[259]

As the Bush administration transitioned into the Clinton administration, Project Triggerlock continued, but at a slower pace. The number of federal firearms prosecutions declined, albeit gradually, from 1992 to 1997.[260] Meanwhile, Triggerlock morphed into a political football. Pointing to the dipping federal gun prosecution rates, Republicans accused the Clinton administration of "abandoning" Project Triggerlock.[261] The Clinton administration, in response, claimed that Project Triggerlock continued to thrive and that prosecution rates were only down because of a temporary Supreme Court setback in *Bailey*[262] and because federal prosecutors were allocating their resources to the most serious cases.[263] After the administration spent so much political capital on the Brady Bill, and with the complex political buildup toward the 1994 Crime Bill, it was time to rebrand.

In March 1994, Vice President Al Gore and Attorney General Janet Reno introduced the Anti-Violent Crime Initiative, which sought to increase federal involvement in firearms prosecutions.[264] Under the initiative, the U.S. Attorney for each federal district would designate a federal Violent Crime Coordinator that would work closely with state and local authorities to identify

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258 *See* David E. Patton, *Criminal Justice Reform and Guns: The Irresistible Movement Meets the Immovable Object*, 69 EMORY L.J. 1011, 1012 (2020) ("Announced by Attorney General Richard Thornburgh in 1991, Triggerlock led to widespread federal prosecutions of so-called 'felon-in-possession' cases."); *see also* Charles & Garrett, *supra* note 14, at 679 ("The main driver of the program was increased and consistent prosecution of felon-in-possession cases.").

259 *See* David E. Patton, *Guns, Crime Control, and a Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1442 (2011) (referencing the disproportionate ratio of state to federal convictions).

260 The number of federal firearms charges decreased from 1992 to 1997 but began to increase again in 1998. SCALIA, *supra* note 191, at 1.

261 Daniel C. Richman, *"Project Exile" and the Allocation of Federal Enforcement Authority*, 43 ARIZ. L. REV. 369, 375–76 (2001).

262 SCALIA, *supra* note 191, at 9–12.

263 Richman, *supra* note 261, at 375–76; *see also Prosecution of Federal Gun Crimes: Hearing Before the Subcomm. on Crime & Crim. Just. of the H. Judiciary Comm.*, 103rd Cong. 4–5 (1994) (statement of Jo Ann Harris, Assistant U.S. Attorney) (noting that a strategic shift toward prosecuting the most serious cases was responsible for a slight decline in prosecutions).

264 *See* Pierre Thomas, *Administration Devises Plan to Fight Violence*, WASH. POST (Mar. 1, 1994), https://www.washingtonpost.com/archive/politics/1994/03/01/administration-devises-plan-to-fight-violence/0f24c3a7-87d5-48e6-9622-ab6b76a70669/ [https://perma.cc/53TS-9L9F] (describing the administration's plan to fight violent crime); *see also* 1994 ATT'Y GEN. ANN. REP., https://www.justice.gov/archive/ag/annualreports/ar94/finalag.txt [https://perma.cc/2KGS-DFZC].

cases for federal prosecution.[265] While the initiative did not bring additional funding, it memorialized evolving Justice Department attitudes about increasing federal involvement in traditionally state activities and empowered U.S. Attorney's offices nationwide.[266] The most significant Clinton-era initiative to emerge from this framework was Project Exile.[267]

In the mid-1990s, while the murder rates in New York and Los Angeles were at historic lows, the murder rate in Richmond, Virginia was one of the highest in the country.[268] The wide latitude offered by the Anti-Violent Crime Initiative, coupled with the raft of new federal firearms legislation from the 1980s, presented a new opportunity to bring the power of the federal government to bear Richmond's violence epidemic. James Comey, criminal chief of the U.S. Attorney's Office for the Eastern District of Virginia, in coordination with local police, devised a plan: Project Exile.[269] The plan was simple and required few additional resources beyond the appointment of liaisons between state and federal law enforcement bodies: whenever local police came across a firearm, they immediately notified an ATF agent, available 24 hours a day, who then determined whether a federal statute applied. If so, federal prosecutors brought the case.[270] In the course of the proceeding, the government would, as a matter of policy, seek to deny bail, minimize plea bargaining, and ask for the offender's term of imprisonment to be served out-of-state (hence "Project Exile").[271]

In conjunction with the prosecutions, the government conducted an advertising campaign in Richmond with a straightforward message: "An illegal gun will get you *5* years in a federal prison."[272] The focus of Project Exile was the "bread-and-butter charge of 18 U.S.C. 922(g)," felon in possession of a

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265 Thomas, *supra* note 264; U.S. DEP'T OF JUST., *supra* note 265.

266 *See* Thomas, *supra* note 264 ("If implemented, the measure could greatly widen the federal government's role in prosecuting violent crimes, a job largely reserved for states. In 1990, for example, the federal government prosecuted only about 1.5 percent of the country's violent offenses.").

267 Richman, *supra* note 261, at 397.

268 Kathryn Jermann, *Project Exile and the Overfederalization of Crime*, 10 KAN. J.L. & PUB. POL'Y 332, 333 (2000).

269 Nislow, *supra* note 256 (referring to James Comey as the "chief midwife" of Project Exile).

270 *Review of Department of Justice Firearm Prosecutions*, *supra* note 212, at 38 (statement of Helen F. Fahey, U.S. Att'y, E. Dist. of Va.).

271 Ross Arends, *Project Exile: Still the Model for Firearms Crime Reduction Strategies*, THE POLICE CHIEF 57 (Nov. 2013), https://www.policechiefmagazine.org/wp-content/uploads/Police-Chief-November-2013-WEB.pdf [https://perma.cc/39DG-3KMP].

272 *Id.*

firearm.[273] And because nearly all firearms offenses could be brought federally through an expansive interpretation of Congress's Commerce Clause power, the effect of Project Exile was to funnel virtually all such prosecutions into federal court.[274] Then, once convicted, the offenders would be "exiled"—both figuratively and literally—from the community and likely to a federal penitentiary in another state.[275]

Dubbed "Triggerlock on steroids" by Comey,[276] Project Exile caused a spike in federal prosecutions big enough to register in the year's nationwide data: in its first year, more than 200 firearms offenders were processed through the federal system and murders in Richmond were down 33 percent.[277] Although commentators have disagreed over whether Project Exile caused, or merely correlated with, Richmond's decline in murder rates,[278] Project Exile has had an enduring legacy: Birmingham (in 1999), Montgomery (in 2002), Lowell (also in 2002), and Rochester (in 2010) all based later local initiatives on its model.[279]

Despite Project Exile's perceived success and legacy, it did not evolve into the predominant nationwide federal law enforcement strategy. That distinction, to this day, belongs to Project Safe Neighborhoods.[280] President George W. Bush, in conjunction with Attorney General John Ashcroft, created Project Safe Neighborhoods in May 2001, explained in remarks that the initiative's purpose was to target "gun violence" and to send a clear

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273 *Id.* at 56.

274 *See* Scarborough v. United States, 431 U.S. 563, 575 (1977) ("[W]e see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce."); *see also* Partlett, *supra* note 29, at 1667–68 (describing the impact of *Scarborough*).

275 Partlett, *supra* note 29, at 1675 (describing the dual meaning of "exile").

276 Nislow, *supra* note 256.

277 *Project Exile: A Case Study in Successful Gun Law Enforcement*: *Hearing Before the Subcomm. on Crim. Just., Drug Pol'y, & Hum. Res. of the H. Comm. on Gov't Reform*, 106th Cong. 2, 16 (1999) (statement of Rep. John L. Mica, Chairman, H. Subcomm. on Crim. Just., Drug Pol'y, & Hum. Res.).

278 *Compare* Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, *in* EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 251, 274–77 (Jens Ludwig & Philip J. Cook, eds., 2003), https://popcenter.asu.edu/sites/default/files/problems/gun_violence/PDFs/Raphael_Ludwig_2003.pdf [https://perma.cc/DHQ6-Z8YH], *with* Richard Rosenfeld et al., *Did Ceasefire, CompStat, and Exile Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL'Y 419, 436 (2005).

279 Arends, *supra* note 272, at 58.

280 *Project Safe Neighborhoods*, U.S. DEP'T OF JUST., https://www.justice.gov/psn [https://perma.cc/GZZ6-SUE5] (last visited Feb. 26, 2023).

message: "if you use a gun illegally, you will do hard time."[281] Project Safe Neighborhoods would pursue these goals with $900 million of initial federal funding, used to hire 207 new federal prosecutors and nearly 400 new ATF agents, and given to individual districts in the form of grants for individual law enforcement and community outreach needs.[282]

Within a short time, the impact of Project Safe Neighborhoods was substantial. In January 2003, a year and a half after Project Safe Neighborhoods launched, Attorney General Ashcroft touted the early successes of the program at the Project Safe Neighborhoods National Conference in Philadelphia. He bragged of a 32 percent increase in federal firearms prosecutions with a conviction rate of over 90 percent.[283] And most of those convictions yielded a sentence of more than five years imprisonment.[284]

Because Project Safe Neighborhoods was, and continues to be, a national, comprehensive initiative, it is difficult to connect any individual case to it directly. But despite Project Safe Neighborhood's rhetoric about "violent crime" and "if you *use* a gun illegally," the Justice Department and U.S. Sentencing Commission data make it clear that the overwhelming majority of the convictions gained under Project Safe Neighborhoods have been status-based possession crimes, largely felon-in-possession of a firearm.[285] The remaining offenders were mostly convicted under § 924(c), a possession-plus crime most often predicated on drug trafficking.[286] As William Partlett has observed, "[t]hese charges suggest PSN's focus on urban communities—and not the gun traffickers who supply the guns to these areas."[287]

Project Safe Neighborhood remains the "centerpiece" of the government's "violent crime reduction efforts," and is perhaps the primary driver of the

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281 George W. Bush, Remarks by the President on Project Safe Neighborhoods (May 14, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010514-1.html [https://perma.cc/J5ZM-TVPZ] ("The program I propose we call Project Safe Neighborhoods will establish a network of law enforcement and community initiatives targeted at gun violence.").

282 John Ashcroft, U.S. Att'y Gen., Prepared Remarks of Attorney General Ashcroft: Project Safe Neighborhoods National Conference (Jan. 30, 2003), http://www.usdoj.gov/archive/ag/speeches/2003/013003agpreparedremarks.htm [https://perma.cc/DQH4-EBUP].

283 *Id.*

284 *Id.*

285 Partlett, *supra* note 29, at 1678.

286 *Id.*

287 *Id.*

sustained rates of firearms prosecutions across the George W. Bush, Obama, Trump, and Biden administrations.[288] The exact overall cost of Project Safe Neighborhoods is reported inconsistently but it is certainly in the billions of dollars.[289] And the funding continues: on October 13, 2022, for example, the Department of Justice announced an additional $17.5 million in new grants to jurisdictions across the country to support continuing efforts under Project Safe Neighborhoods.[290]

Concomitant with its implementation of Project Safe Neighborhoods, the George W. Bush administration engaged in law enforcement institution building that would inject additional focus and energy into its keystone initiative. In January 2003, less than two years after the creation of Project Safe Neighborhoods, President George W. Bush transferred the Bureau of Alcohol, Tobacco, and Firearms (ATF) from the Department of Treasury to the Department of Justice as part of Homeland Security Act's restructuring.[291] Renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives, the ATF would no longer perform its historic duties of collecting taxes on alcohol and

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288 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Attorney General Sessions Announces Reinvigoration of Project Safe Neighborhoods and Other Actions to Reduce Rising Tide of Violent Crime (Oct. 5, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-reinvigoration-project-safe-neighborhoods-and-other [https://perma.cc/LV5Z-WYCU] (quoting Attorney General Jeff Sessions as stating: "Let me be clear – Project Safe Neighborhoods is not just one policy idea among many. This is the centerpiece of our crime reduction strategy.").

289 The Department of Justice says that around $2 billion have been spent on Project Safe Neighborhoods to present day. *Project Safe Neighborhoods*, U.S. DEP'T OF JUST.: U.S. ATT'Y'S OFF. E. DIST. OF CAL., https://www.justice.gov/usao-edca/project-safe-neighborhoods [https://perma.cc/SV5P-WWEL] (last visited Feb. 26, 2023). By contrast, a DOJ-funded team of researchers estimated that $3 billion had been spent on Project Safe Neighborhoods by Fiscal Year 2008. EDMUND F. MCGARRELL ET AL., PROJECT SAFE NEIGHBORHOODS - A NATIONAL PROGRAM TO REDUCE GUN CRIME: FINAL PROJECT REPORT iii, 129 (2009), https://www.ojp.gov/pdffiles1/nij/grants/226686.pdf [https://perma.cc/DF7R-STH5].

290 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Awards $17.5 Million To Support Project Safe Neighborhoods (Oct. 13, 2022), https://www.justice.gov/opa/pr/justice-department-awards-175-million-support-project-safe-neighborhoods [https://perma.cc/GS9Q-MALM].

291 *Transfer of ATF to U.S. Department of Justice*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 28, 2016), https://www.atf.gov/our-history/timeline/transfer-atf-us-department-justice [https://perma.cc/5Q4B-DXH7].

tobacco.[292] Instead, the ATF would now operate primarily as a criminal law enforcement agency, with a particular focus on firearms offenses.[293]

Although rehousing the ATF within the DOJ was a post-9/11 reform, the transfer would play a much larger role in domestic firearms policing and prosecution than it would in counter-terrorism. The ATF was already working closely with the DOJ as part of Project Safe Neighborhoods, and its transfer was a natural fit for strengthening an already cooperative law enforcement relationship.[294]

It was also a welcome shift in focus for the ATF itself. With a new mandate to go after criminals, the ATF was able to avoid the ire of the NRA and others opposed to gun control, who had worked to limit the ATF's regulatory power throughout the Carter, Reagan, and Bush administrations.[295] During the Clinton administration, the ATF had already been able to use the success of Project Exile to justify enormous budget increases, successfully leveraging—politically and financially—its growing role in combating street-level gun crime.[296] After 2003, the ATF also enjoyed new levels of discretion, able to operate as it wished so long as its focus remained on violent crime or, at least, firearms offenders.[297] "Their job," according to Attorney General Ashcroft's

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292 The new Alcohol and Tobacco Tax and Trade Bureau (TTB), within the Treasury Department, took on the tax-collecting role. *Id.*

293 Dan Eggen, *Move to Justice Dept. Brings ATF New Focus*, WASH. POST (Jan. 23, 2003), https://www.washingtonpost.com/archive/politics/2003/01/23/move-to-justice-dept-brings-atf-new-focus/76f43384-a848-4dec-9490-29dd2a2ade6c/ [https://perma.cc/B2H5-E4PP].

294 *See* Ashcroft, *supra* note 283 ("As many of you know, ATF is the newest member of the Justice family, but has been a partner in Project Safe Neighborhoods since its inception.").

295 William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation: The Case of Gun Control*, 55 PUB. ADMIN. REV. 341, 342–43 (1995) (explaining that during the Reagan years, the ATF's budget was cut and it was in danger of being merged with the U.S. Secret Service); Richman, *supra* note 251, at 402 ("And ATF had its own incentives: By making a specialty of violent crime, the agency whose unpopular gun control mission had almost led to its elimination gained a mission that even the National Rifle Association could not quarrel with and gained valuable allies in the local law enforcement community.").

296 *See* Richman, *supra* note 261, at 401 ("And if ATF had to be saddled with nationwide Exile-type programs, the agency needed more manpower. Hence the 2000 budget request, which (in brilliant judo fashion) used such programs to justify a massive expansion of the beleaguered agency.").

297 *See id.* at 402 ("Agents and prosecutors also enjoyed the extent of their discretion in this area. There may have been political pressure to do violent crime cases. But there was little pressure to any particular case. Violent crime was still, after all, primarily a local responsibility. Federal enforcers thus could be quite strategic in their case selection decisions and in the neighborhoods they targeted (Glazer 1999).").

legal counsel in 2003, "will continue to be the enforcement of federal gun laws."[298]

While firearms prosecution rates declined during the Obama administration, likely due to increased prosecutorial discretion,[299] that changed in the Trump administration. In October 2017, Attorney General Jeff Sessions announced the "reinvigoration" of Project Safe Neighborhoods.[300] The initiative, of course, had never gone away and its "reinvigoration" was perhaps, in part, a political jab at the Obama administration.[301] Nevertheless, the Trump administration did allocate additional funding to Project Safe Neighborhoods in order to hire new federal prosecutors, increase grants to the COPS program, and provide technical assistance to state and local authorities.[302] This would mark the beginning of a new inflection point in federal firearms prosecutions and convictions. But the administration would not stop there.

In November 2019, Attorney General William Barr announced Project Guardian, framing it as an initiative modeled on Project Triggerlock meant to complement Project Safe Neighborhoods.[303] Ultimately, according to the Department of Justice, Project Guardian was "designed to reduce gun violence and enforce federal firearms laws across the country."[304] Very much like Project Triggerlock and Project Exile, Project Guardian doubled down on funneling firearms offenders into federal court where they would routinely receive higher sentences. Project Guardian also emphasized increased federal scrutiny of low-level firearms offenses that "the department has not always

298 Eggen, *supra* note 293.

299 *See* Att'y Gen. Eric H. Holder, Jr., Memorandum to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010) [hereinafter Holder Memo], https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2014/DOJ_memo.pdf [https://perma.cc/SFY9-9MGZ].

300 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., *supra* note 290.

301 The political tone was evident in the announcement itself: "Fortunately, we have a President who understands that and has directed his administration to reduce crime." *Id.*

302 *Id.*

303 *Project Guardian*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/projectguardian [https://perma.cc/D2UB-CBA8] (last visited Feb. 26, 2023).

304 *Id.*

prioritized," such as marijuana users, misdemeanants of domestic violence, and straw purchasers.[305]

One month later, in December 2019, Attorney General Barr announced Operation Relentless Pursuit, a nationally-funded program that promised to "surge federal law enforcement resources" into "America's most violent cities": Albuquerque, Baltimore, Cleveland, Detroit, Kansas City, Memphis, and Milwaukee.[306] The operation used the COPS Hiring Program, created by the 1994 Crime Bill,[307] to allocate $51 million to hire 214 new state and local task force officers, and additionally set aside $10 million to spend on new federal prosecutors, overtime pay, and computer support.[308] Although the acute effects of Project Guardian and Operation Relentless Pursuit have yet to be adequately studied, both initiatives correlated with an uptick in federal firearms prosecutions before an observable dip likely caused by the disruptions from COVID-19.

On the whole, law enforcement initiatives appear to have had an enormous impact on federal firearms prosecutions and continue to be a driving force in the federal war on guns. They were made possible by the legislative changes in the 1960s and 1980s as well as an ideological willingness to address crime with increased policing, prosecution, and incarceration. Still, arrests do not necessarily convert to convictions. Once the initiatives caught offenders and funneled them into the federal system, it was still up to federal prosecutors to acquire the convictions. At that point, the prosecutorial guidance of the Department of Justice became an essential third ingredient in the rise of the Federal War on Guns.

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305 Peter Hermann, *Federal Authorities Launch New Initiative to Combat Gun Violence in D.C., Region*, WASH. POST (Nov. 15, 2019), https://www.washingtonpost.com/local/public-safety/federal-authorities-launch-new-initiative-to-combat-gun-violence-in-dc-region/2019/11/15/5caa4f28-07a7-11ea-924a-28d87132c7ec_story.html [https://perma.cc/ZL8X-HCPT].

306 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Attorney General William P. Barr Announces Launch of Operation Relentless Pursuit (Dec. 18, 2019), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit [https://perma.cc/KT7J-2TTX].

307 *Organization, Mission, and Functions Manual*, *supra* note 250.

308 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Releases $61 Million in Awards to Support Efforts to Combat Violent Crime in Seven U.S. Cities (May 11, 2020), https://www.justice.gov/opa/pr/justice-department-releases-61-million-awards-support-efforts-combat-violent-crime-seven-us [perma.cc/H2A5-UXPQ].

C. MARCHING ORDERS: MAIN JUSTICE CONTROL OVER PROSECUTORIAL DISCRETION

While the law enforcement initiatives brought more firearms cases into the federal system, they did not do much to dictate the discretion that federal line prosecutors have traditionally enjoyed to dispose of their cases. That gap, however, was filled—in different ways under different attorneys general—through memoranda instructing federal prosecutors how to consider their cases. These departmental "marching orders" affected charging decisions, plea bargaining, and the application of certain enhancements, all of which ultimately affected not only the number of prosecutions but also the number of discretionary sentencing enhancements imposed.

Whenever the DOJ rescinded its marching orders—as did the Reno Bluesheet and Holder Memo—and returned charging, plea, and sentencing discretion back to individual line prosecutors, the number of enhancements declined, demonstrating the profound effect of Attorney General memoranda. Still, however, the numbers would only decline in part, never returning to their lower levels. This shows another, more general trend: a growing ease with the new normal even under more discretion-oriented administrations.[309] Consider the effects of these marching orders—the Thornburgh Memo, Terwilliger Bluesheet, Ashcroft Memo, and Sessions Memo—in contrast to the DOJ guidance that rescinded them—the Reno Bluesheet and the Holder Memo—on the number of § 924(c) convictions and ACCA enhancements:

309 *See* Jenny W.L. Osborne, *One Day Criminal Careers: The Armed Career Criminal Act's Different Occasions Provision*, 44 J. MARSHALL L. REV. 963, 964 (2011) ("Intended to target the small group of 'hard core' habitual offenders responsible for the lion's share of violent crime, ACCA has instead been applied as frequently to defendants with relatively minor criminal records and no history of serious violence.").

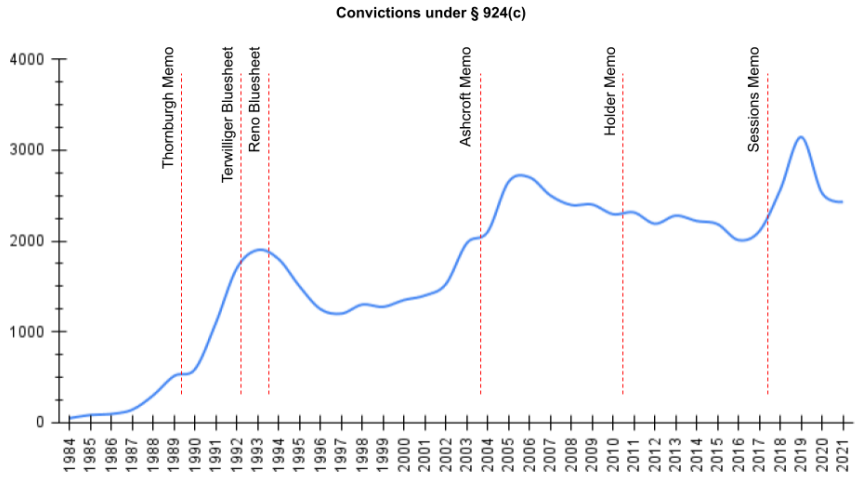

Figure 3: Total § 924(c) Convictions with Memoranda. Data from U.S. Sentencing Commission Annual Sourcebooks and Reports.

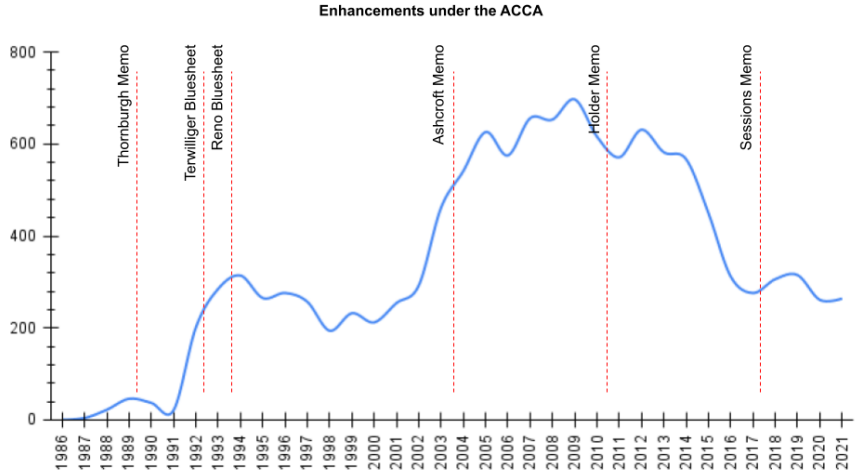

Figure 4: Total ACCA Enhancements with Memoranda. Data from U.S. Sentencing Commission Annual Sourcebooks and Reports.

The Department of Justice first sought to create a uniform charging and plea policy at the tail end of the Carter administration.[310] In July 1980, Attorney General Benjamin Civiletti issued *Principles of Federal Prosecution*,

310 Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 525 (2011) (calling *Principles of Federal Prosecution* "[t]he first step toward a centralized prosecutorial charging policy").

a nationwide guidebook for federal prosecutors.[311] This guidance was general and left prosecutors with substantial discretion over their own cases. While its lodestar principle was to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction,"[312] prosecutors still had the authority to decline charges, even when a federal offense was committed,[313] and to charge lesser or different offenses to avoid statutory mandatory minimums that were "out of proportion to the seriousness of [the] defendant's conduct."[314] As for plea agreements, although the DOJ required prosecutors to ensure that the offense of guilt "bear[s] a reasonable relationship to the defendant's criminal conduct, both in nature and in scope," the guidance was also clear that such a requirement was "not inflexible," especially when the defendant was a cooperating witness.[315] This flexible, discretion-oriented approach to federal prosecution remained the DOJ guidance until the U.S. Sentencing Commission promulgated its first Guidelines Manual in 1987.

On November 1, 1987, the same day that the first U.S. Sentencing Guidelines Manual went into effect, Attorney General William Weld distributed *The Prosecutors Handbook on Sentencing Guidelines* ("the Redbook") in order to provide federal prosecutors with the DOJ's charging and plea policies under the new Guidelines regime.[316] Based on the new Guidelines' guidance that federal district judges should only accept a plea agreement that dismisses a charge or agrees not to pursue a charge when "the remaining charges adequately reflect the seriousness of the actual offense behavior,"[317] the Redbook conferred a similar requirement on the prosecutors, advising them to pursue a charge that reflects the "seriousness" of the

311 U.S. Dep't of Just., *Principles of Federal Prosecution*, 6 Fed. Sent'g Rep. 317, 317–29 (1994); *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1432 (2008) (explaining that there were no Justice Department policies on sentencing prior to the *Principles*).

312 U.S. Dep't of Just., *supra* note 313, at 322.

313 *Id.* at 319 ("Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he necessarily should initiate or recommend prosecutions[.]").

314 *Id.* at 323.

315 *Id.* at 327.

316 William F. Weld, *Prosecutors Handbook on Sentencing Guidelines*, 6 FED. SENT'G REP. 333, 333–41 (1994) ("In order for sentencing under the sentencing guidelines to be successful, it is imperative that prosecutors consult the guidelines and consider their effect on the case at hand in making the initial decision of what offenses or counts to charge.").

317 U.S. SENT'G GUIDELINES MANUAL § 6B1.2(a) (U.S. SENT'G COMM'N 1987).

defendant's "offense behavior" unless there exists "real doubt as to the ultimate provability of the [*sic*] [c]harge."[318]

Still, the prosecutor enjoyed significant flexibility, as the Redbook went on to emphasize that "the prosecutor is in the best position to assess the strength of the government's case and enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence."[319] It was these two documents, the *Principles* and the Redbook, that have remained the starting point for prosecution policies ever since.[320] Future administrations would either amend these policies, taking away discretion, or return to the policies, giving discretion back to line federal prosecutors.

The DOJ issued its first "marching orders" at the beginning of the George H.W. Bush presidency. On May 15, 1989, President Bush spoke in front of the Capitol at a memorial for police officers killed in the line of duty.[321] In his speech, Bush advocated for new crime legislation on the exclusionary rule, the death penalty, and habeas reform, very much akin to unrealized Reagan proposals.[322] In addition, Bush promised to end plea bargaining by federal prosecutors "in cases involving violent firearm offenses."[323]

In support of Bush's promise, Attorney General Thornburgh issued a memo, "Plea Bargaining in Cases Involving Firearms," which both reiterated the administration's policy "that federal charges always reflect both the seriousness of the defendant's conduct"[324] and added new guidance that, when possible, prosecutors should charge firearms offenses and should not hesitate just because the applicable statute may impose a mandatory minimum:

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318 Weld, *supra* note 318, at 339.

319 *Id.*

320 *See* Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1087–88 (2021) ("The first formal guidance on general principles of prosecution can be traced back to Attorney General Benjamin Civiletti's Principles of Federal Prosecution, which, in their current form, can be found in the Justice Manual.").

321 Janet Cawley, *Bush's Plan: $1.2 Billion to Take Back Streets*, CHI. TRIB. (May 16, 1989, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1989-05-16-8902010956-story.html [https://perma.cc/LV4W-PNQJ].

322 Ruth Marcus, *Crime Plan Revives Reagan Proposals*, WASH. POST, at A8 (May 16, 1989), https://proquest.com/docview/140011511/fulltextPDF/FEBB4938C2094BA8PQ/1?accountid=14707 [https://perma.cc/MS9H-GHVL].

323 Cawley, *supra* note 323.

324 This policy came from an earlier, general memo that Attorney General Thornburg distributed in June 1989. Atty Gen. Richard Thornburgh, Memorandum to Federal Prosecutors: Plea Bargaining in Cases Involving Firearms (June 16, 1989).

> [I]n all but exceptional cases . . . federal prosecutors will seek conviction for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.[325]

The Thornburgh Memo was a clear departure from the Civiletti *Principles*, which advised federal prosecutors to avoid mandatory minimums when it could result in a sentence disproportionate to the offender's actual conduct.[326]

The Bush administration also promulgated the first specific guidance on charging § 924(c) offenses. On February 7, 1992, Acting Deputy Attorney General George Terwilliger issued a bluesheet on plea bargaining to supplement the Thornburgh Memo.[327] The Terwilliger Bluesheet's focus was the proper procedures for moving for a lower sentence based on substantial assistance, but it included a reminder to bring additional charges under § 924(c) wherever they were available:

> Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code § 924(c).[328]

The effect of the Thornburgh Memo and the Terwilliger Bluesheet—in conjunction with the roughly contemporaneous implementation of Project Triggerlock—on § 924(c) convictions was significant. In 1988, there were a total of 302 conviction under § 924(c).[329] By 1990, the number had risen to

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325 U.S. SENT'G COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 165 (1991) (quoting Thornburg Memo, *supra* note 327).

326 *Id.* at 223 (noting that in other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances).

327 George J. Terwilliger, III, Bluesheet on Plea Bargaining (Feb. 7, 1992), *reprinted in* 6 FED. SENT'G REP. 350, 350–51 (1994).

328 *Id.* at 351.

329 U.S. SENT'G COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL JUSTICE SYSTEM 11 (1991).

590.[330] By 1991, the number was over 1,000 and, by 1993, the number was nearly 2,000.[331]

The Thornburgh Memo and Terwilliger Bluesheet were replaced by the Reno Bluesheet in October 1993, which returned discretion to individual prosecutors and remained the primary prosecutorial guidance on charging and pleas for a decade, until 2003.[332] In September 2003, Attorney General Ashcroft issued a memorandum to all federal prosecutors setting forth new uniform DOJ charging policies.[333] Unlike earlier memos and bluesheets, which feigned a sense of continuity with the past, the Ashcroft Memo openly broke from prior guidance. It commented on the discretion and individualized assessments afforded by the Thornburgh Memo and Reno Bluesheet, and concluded it was "appropriate at this time to re-examine the subject thoroughly."[334] With limited exceptions, the Ashcroft Memo required that "in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case."[335] The Ashcroft Memo explained that "[t]he most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence."[336] Further, "[o]nce filed, the most serious readily provable charges may not be dismissed" except under limited circumstances.[337]

The Ashcroft Memo also included specific guidance on charging § 924(c) offenses, requiring prosecutors, "[i]n all but exceptional cases," to charge and

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330 *Id.*

331 *Id.* at 1, 17–18.

332 Att'y Gen. Janet Reno, Reno Bluesheet on Charging and Plea Decisions (Oct. 12, 1993), *reprinted in* 6 FED. SENT'G REP. 352, 352 (1994); *see also* Stith, *supra* note 311, at 1441 (noting that Attorney General Janet Reno's 1993 bluesheet remained until Congress enacted the Feeney Amendment in 2003).

333 Att'y Gen. John Ashcroft, Memo Regarding Policy On Charging Of Criminal Defendants (Sept. 22, 2003) [hereinafter Ashcroft Memo], *reprinted in* 16 FED. SENT'G REP. 129, 129 (2003).

334 *Id.*

335 *Id.* at 130.

336 *Id.*

337 The Ashcroft Memo also strongly cautioned federal prosecutors against moving for, or acceding to, a downward departure from the sentencing range under the Guidelines except in rare circumstances. Instead, the prosecutors were required to oppose downward departure motions, and could not "stand silent" in the face of such a motion, unless a supervisory attorney signed off on the downward departure due to the defendant's substantial assistance or participation in a fast-track program. *Id.*

pursue "the first readily provable violation of 18 U.S.C. § 924(c)."[338] And if the case involved three or more readily provable violations of § 924(c), the Ashcroft Memo required prosecutors to charge and pursue at least two.[339] On the whole, "[t]he use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements . . . are sought in all appropriate cases."[340] Combined with the investigative focus of Project Safe Neighborhoods, the Ashcroft Memo had immediate and sustained effects on firearms charges, convictions, and sentences, ultimately ushering in the greatest escalation in the Federal War on Guns, in terms of the number of convictions, prevalence of charging offenses under § 924(c), and the number of ACCA-enhanced sentences.

In May 2010, Attorney General Eric Holder issued new guidance—the Holder Memo[341]—which expressly superseded the Ashcroft Memo,[342] and largely reverted to the guidance of the Civiletti *Principles* and Reno Bluesheet.[343] The Holder Memo would govern prosecutorial discretion for seven years, until Jeff Sessions was sworn in as Attorney General on February 9, 2017.[344] That same day, President Trump signed an executive order directing Attorney General Sessions to create a Task Force on Crime Reduction and Public Safety in order to effectuate "the policy of the executive branch to reduce crime in America."[345]

One month later, in March 2017, as part of his response to Trump's order, Attorney General Sessions issued a memorandum to federal prosecutors,

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338 *Id.* at 131.

339 *Id.*

340 *Id*.

341 Holder Memo, *supra* note 301.

342 *Id.* at 3 ("This memorandum supersedes previous Department guidance on charging and sentencing including the September 22, 2003 memorandum issued by Attorney General John Ashcroft . . . and the January 28, 2005 memorandum issued by Deputy Attorney General James Comey[.]").

343 Alan Vinegrad, *Assessing DOJ's Charging and Sentencing Policies: From Civiletti to Sessions*, 30 FED. SENT'G REP. 3, 4 (2017). While the Holder Memo reiterated the "long-standing principle" that prosecutors should "ordinarily charge the most serious offense that is likely to result in a sustainable conviction," the memo simultaneously emphasized that such determinations "must always be made in the context of an individualized assessment" of the case. Holder Memo, *supra* note 299.

344 *Attorney General Jeff Sessions' Swearing In*, U.S. DEP'T OF JUST. ARCHIVES (Feb. 9, 2017), https://www.justice.gov/archives/opa/gallery/attorney-general-jeff-sessions-swearing [https://perma.cc/P6KH-RVZZ].

345 Exec. Order No. 13,776, 82 Fed. Reg. 10,699 (Feb. 9, 2017).

giving specific instructions on their approach to federal firearms offenses.[346] Noting a rising murder rate and declining number of federal prosecutions for violent crime, the Sessions Firearms Memo directed every U.S. Attorney to redouble their coordination with local and state authorities to identify federal firearms offenses and to "use the substantial tools at their disposal to hold [the offenders] accountable and ensure an appropriate sanction under federal law."[347] The Sessions Firearms Memo specifically noted, among others, the importance of pursuing charges under § 922 (the location of the prohibited-person statute) and § 924(c).[348]

In May 2017, two months later, Attorney General Sessions issued another, general memo articulating the new "Department Charging and Sentencing Policy."[349] The Sessions Memo rescinded the guidance of the Obama administration (the Holder Memo)[350] and reiterated the "core principle that prosecutors should charge and pursue the most serious, readily provable offense."[351] Like the Ashcroft Memo, the Sessions Memo defined "most serious offenses" as "those that carry the most substantial guidelines sentence, including mandatory minimum sentences."[352] Further, any decision that deviated from this policy or any recommendation for a departure or variance required supervisor approval and documentation in the file.[353]

Coupled with a re-energized implementation of Project Safe Neighborhoods,[354] the Sessions memos had observable effects on federal firearms prosecutions, ushering in a new spike in activity second only to that

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346 Att'y Gen. Jeff Sessions, Memorandum for All Federal Prosecutors, Commitment to Targeting Violent Crime (Mar. 8, 2017) [hereinafter Sessions Memo I], https://www.justice.gov/opa/press-release/file/946771/download [https://perma.cc/K4J6-DP2D].

347 *Id.*

348 *Id.*

349 Att'y Gen. Jeff Sessions, Memorandum for All Federal Prosecutors, Department Charging and Sentencing Policy (May 10, 2017) [hereinafter Sessions Memo II], https://www.justice.gov/archives/opa/press-release/file/965896/download [https://perma.cc/4PDL-MVCZ].

350 *Id.*

351 *Id.*

352 *Id.*

353 *Id.*

354 Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Attorney General Sessions Announces New Actions to Improve School Safety and Better Enforce Existing Gun Laws (Mar. 12, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-actions-improve-school-safety-and-better-enforce [https://perma.cc/2BPK-HSH9] (describing Attorney General Sessions's prior launch of "the enhanced Project Safe Neighborhoods initiative").

seen under Attorney General Ashcroft.[355] In a July 2017 press release, the Department of Justice touted the effect of the new Sessions policies: a 23 percent increase in prosecutions for unlawful possession of a firearm from second-quarter 2016 to second-quarter 2017.[356] Moreover, the Department of Justice was proud to report that the Executive Office for United States Attorneys predicted that the upward trend would continue to increase.[357] And it did—for the total number of firearms and § 924(c) convictions—at least up until the systemic disruption of COVID-19.[358]

D. THEME AND LEGACY: THE ERA OF ENFORCEMENT

The Federal War on Guns was the era of enforcement. Free from the ideological shackles of federalism and restraint, the government leveraged its power fully. The results were staggering: more than a ten-fold increase in the number of offenders and mandatory-minimum enhancements in just its first decade.[359]

While the Federal War on Guns recycled the main villain archetype of the 1980s—the violent street thug—it added a new, more ominous villain: the mass shooter, whose emergence had an enormous impact on the psyche of our country and on politics at all levels, and was largely responsible for forging the ideological alliance between the anti-gun left and the law-and-order right.[360] Meanwhile, the Federal War on Guns' heroes were more diverse and unsuspecting: a broad collection of Republicans and neoliberal Democrats, in near universal agreement that the enforcement of federal firearms laws was

355 *See* Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Federal Gun Prosecutions Up 23 Percent After Sessions Memo (July 28, 2017), https://www.justice.gov/opa/pr/federal-gun-prosecutions-23-percent-after-sessions-memo [https://perma.cc/BJ7E-SMY6] (noting that there was a 23 percent rise in federal gun charges compared to 2014).

356 *Id.*

357 *Id.*

358 *See, e.g.*, U.S. SENT'G COMM'N, QUICK FACTS: 18 U.S.C. § 924(C) FIREARMS OFFENSES: FISCAL YEAR 2020 1 (last visited Sept. 21, 2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf [https://perma.cc/M6GY-2LSC] (recording a steady rise in § 924(c) sentences between 2016 and 2019 followed by a drop in § 924(c) sentences in 2020).

359 *See supra* Figures 3 & 4 at Part II.C.

360 *See* Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L.Q. 845, 862–72 (2014) (describing the "liberal war on guns").

a national priority.[361] They pursued this priority in new ways: with massive law enforcement initiatives, enhanced cooperation with state authorities, less prosecutorial discretion, and new charging priorities. Whereas the focus of the first three acts was on legislation, the focus of this fourth act was on enforcement.

A secondary theme of the Federal War on Guns, which follows naturally from increased enforcement of mandatory minimums, is disproportionality. There are countless individual examples of disproportionate sentencing, the most extreme of which stemmed from the federal prosecutors choosing to charge multiple, stacking § 924(c) counts.[362]

Such was the story of Mary Beth Looney, described above, who, in 2004, found herself in the worst place at the worst time: at the heights of Project Safe Neighborhoods and the Ashcroft Memo, and in the crosshairs of the new and refocused ATF.[363] While the Fifth Circuit held, on appeal, that Ms. Looney's sentence was lawful, the court commented with unusual candor about the risks associated with the amount of asymmetric power that federal prosecutors wield under federal firearms statutes:

> Ms. Looney was subject to a mandatory minimum sentence of forty years—essentially determined by Congress. Although Congress established the mandatory minimum terms of imprisonment, and further provided that the firearms counts must be served consecutively, it is the prosecutor's charging decision that is largely responsible for Ms. Looney's ultimate sentence. . . . [T]he prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence for Ms. Looney.
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> . . .
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> [T]he power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of the prosecutors, not only to impose extended sentences; it is also a powerful weapon that can be abused to force guilty pleas under the threat of an astonishingly long sentence.
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> . . .
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> [T]he possibility of abuse is present whenever prosecutors have virtually unlimited charging discretion and Congress has authorized mandatory, consecutive sentences. We trust that the prosecutors in this Circuit are aware

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361 *See* Chernoff et al., *supra* note 230, at 538–42 (describing the efforts of Senators Schumer and Biden to "take the crime issue back from Republicans").

362 *See, e.g.*, United States v. Davis, 754 F.3d 1205, 1209 (11th Cir. 2014); United States v. Usher, 555 F. App'x 227, 228 (4th Cir. 2014).

363 Eggen, *supra* note 293.

> of the potency of this weapon and its potential for abuse, and that they exercise extreme caution in their use of it, all in the interests of justice and fairness.[364]

The type of § 924(c) "stacking" that happened in Mary Beth Looney's case—multiple § 924(c) counts from the same course of conduct, five years for the first and twenty-five years for each subsequent—was not uncommon. Quartavious Davis, a 19-year-old with no criminal history, was sentenced to 162 years imprisonment for a Hobbs Act robbery spree based on seven stacked § 924(c) counts.[365] Domonic Devarrise Usher was sentenced to 176 years imprisonment despite the fact that he harmed no one and stole less than $30,000.[366] Case law is replete with many more examples of enormous sentences based purely on prosecutors' charging decisions.[367] And each time the court affirmed based on the simple observation that Congress gets to make the law, so any injustice is Congress's to fix.[368]

Fortunately for some, Congress eventually did act. The First Step Act of 2018[369] (FSA) curtailed § 924(c) stacking by eliminating its operation based on contemporaneous conduct.[370] While the FSA still permitted prosecutors to charge multiple § 924(c) counts based on the same course of conduct, any second or subsequent count would only be punishable by a mandatory five years imprisonment.[371] A second or subsequent § 924(c) count could only trigger the 25-year minimum if it followed a previous § 924(c) *final conviction*.[372] As a result, after the FSA, none of the above examples could

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364 United States v. Looney, 532 F.3d 392, 397–98 (5th Cir. 2008).

365 754 F.3d at 1209.

366 555 F. App'x at 228.

367 A quick Terms and Connectors search of Lexis or Westlaw for opinions in which a defendant has raised an Eighth Amendment challenge to a stacked § 924(c) sentence yields voluminous examples.

368 United States v. Harris, 154 F.3d 1082, 1083 (9th Cir. 1998) ("We reluctantly find that we must affirm Harris' and Steward's sentences given the precedents established by our court and by the Supreme Court. We publish this opinion to urge Congress to reconsider its scheme of mandatory consecutive minimum sentences and to grant district court judges the discretion to set sentences at the level appropriate for the circumstances of a particular defendant and his or her crimes.").

369 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

370 Nathan James, RSCH. SERV. R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

371 *See, e.g.*, United States v. Davis, No. 3:90-cr-85-MOC, 2021, WL 2229293, at *5 (W.D.N.C. June 2, 2021) ("Were section 403 of the First Step Act in effect when Davis was sentenced, he would have received a sentence of no more than 5 years in prison for each of his grouped section 924(c) sentences, for an aggregate consecutive term of 120 months.").

372 James, *supra* note 370, at 9 ("The act eliminates stacking by providing that the 25-year mandatory minimum for a "second or subsequent" conviction for use of a firearm in furtherance of a drug trafficking crime or a violent crime applies only where the offender has a prior conviction for use

have triggered the § 924(c) 25-year minimum.[373] But since the FSA's changes to § 924(c) were *prospective only*, the pre-FSA offenders would have to seek relief through other avenues.[374]

Finally, even though the Reagan Era and the Federal War on Guns offered reforms that were more comprehensive and less ad hoc than Congress's activity in the 1960s, Congress is still not immune from impulse. The most recent piece of reform legislation, the Bipartisan Safer Communities Act of 2022, offers yet another example of impulsivity.[375] In direct response to the horrific Robb Elementary shooting in Uvalde, Texas,[376] Congress increased the maximum penalty for felon-in-possession of a firearm (and other prohibited statuses) from 10 to 15 years imprisonment.[377] And Congress did so even though the Uvalde shooter was *not* a convicted felon or prohibited person.[378] Old habits die hard and the Executive Branch's enforcement efforts will continue as a matter of course unless another, mitigating power intervenes. Just a few years ago, such a thought was fantastical. But that power may be emerging at this very moment, writing a new fifth act of the story of federal firearms criminalization.

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of a firearm that is already final. Under prior law, two violations that were charged concurrently triggered the enhanced mandatory minimum.").

373 *See* 2021 WL 2229293, at *5 ("Were section 403 of the First Step Act in effect when Davis was sentenced, he would have received a sentence of no more than 5 years in prison for each of his grouped section 924(c) sentences, for an aggregate consecutive term of 120 months.").

374 Fortunately, the story of Mary Beth Looney has a happy ending. On December 5, 2019, she and her husband were released through the First Step Act's expanded "Elderly Release Program" after having served 14 years in prison. Amy Ralston Povah, *Mary Beth Looney – Serving 42 Years Is Now Free Thanks to First Step Act*, CAN-DO (Dec. 19, 2016), https://www.candoclemency.com/mary-beth-looney/ [https://perma.cc/W7G6-PBZE].

375 Bipartisan Safer Communities Act of 2022, Pub. L. No. 117-159, 136 Stat. 1313.

376 Rep. Tony Gonzales, *Opinion: We Passed the Bipartisan Safer Communities Act for the 21 Uvalde Victims – And the People Mourning Their Loss*, CNN (June 25, 2022), https://www.cnn.com/2022/06/25/opinions/bipartisan-gun-safety-bill-uvalde-gonzales/index.html [https://perma.cc/S7JB-DAWM].

377 Bipartisan Safer Communities Act of 2022, § 12004(c).

378 Nicholas Bogel-Burroughs, Karen Zraick & Eduardo Medina, *In Uvalde, a Search for Answers: How Could This Happen?*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/uvalde-shooting-plot-salvador-ramos.html [https://perma.cc/HQA7-2AWB] ("Police officials said the gunman, Salvador Ramos, 18, who was killed by a law enforcement tactical team, had never been diagnosed with a mental illness, nor had he been arrested in connection with any crime.").

III. ACT FIVE: THE *BRUEN* ERA

The Federal War on Guns was a paradigm shift in federal firearms enforcement. While its intensity varied over time, it continued to sustain itself at a fairly steady rate, particularly from 2005 onward.[379] There were, however, a series of technical Supreme Court opinions that put dents in the Federal War on Guns by giving judges more sentencing discretion, narrowing the scope of a firearms statute, or making an offense more difficult for the government to prove.[380] While the effects of these opinions were observable—particularly on the mandatory minimum statutes—they ultimately did little more than slow the momentum of the new enforcement regime.[381]

Meanwhile, there is a separate story emerging, not from the soil of statutory construction or federal sentencing law, but from the fertile silt of changing views of the Second Amendment. Beginning with *Heller* and *McDonald*, and later culminating in the U.S. Supreme Court's 2022 decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Second Amendment now appears to be the most capable adversary the Federal War on Guns has ever faced. Although popularly known as a public-carry regulatory decision, *Bruen*'s implications for the federal firearms scheme are enormous. Whether it realizes its fullest potential, as courts work through its implications, is yet to be seen.

The story of the *Bruen* Era, if it indeed comes to fruition, begins in 2008 with *District of Columbia v. Heller*.[382] In *Heller*, the Supreme Court adopted an individual-rights theory of the Second Amendment based on its text and role in our country's early history.[383] In striking down a ban on handguns in the home, the Court held that the right to keep and bear arms for defense of self and home struck at the core of the Second Amendment.[384] The Court reiterated this view two years later in *McDonald v. City of Chicago*,

379 *See supra* Figure 1 at Part II.

380 Three recent cases hindered the government's ability to impose the ACCA enhancement: Johnson v. United States, 576 U.S. 591 (2015); Borden v. United States, 141 S. Ct. 1817 (2021); and Wooden v. United States, 595 U.S. 360 (2022). Two recent cases had similar effects on § 924(c): United States v. Davis, 139 S. Ct. 2319 (2019); and United States v. Taylor, 142 S. Ct. 2015 (2022). Finally, Rehaif v. United States, 139 S. Ct. 2191 (2019) affected the government's ability to prove § 922(g) offenses.

381 *See generally* Beck, *supra* note 177.

382 District of Columbia v. Heller, 554 U.S. 570 (2008).

383 *Id.* at 595.

384 *Id.* at 629–30.

emphasizing that a person's right to bear arms for self-defense is a "fundamental right[] necessary to our system of ordered liberty."[385]

While *Heller* was clear that the Second Amendment was amenable to "longstanding prohibitions" on the right to bear arms, the Court stopped short of articulating the standard for evaluating the constitutionality of firearms restrictions.[386] Without adequate guidance, courts had to devise a framework for considering post-*Heller* Second Amendment challenges to firearms statutes.[387] Most courts adopted a two-step approach, first considering whether the restriction burdened conduct that falls within the scope of the Second Amendment, then, if so, applying the appropriate level of means-ends scrutiny.[388] In application, when dealing with a federal firearms crime, courts uniformly upheld its constitutionality, almost always under intermediate scrutiny.[389]

Fairly soon after *McDonald*, a minority of judges—writing in dissents and concurrences—began to criticize the two-step approach, observing that it was in tension with portions of *Heller*'s analysis.[390] In its place, they suggested a historical model centered on the text, history, and tradition of the Second Amendment at key points in originalist history.[391]

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385 McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

386 *See e.g.,* District of Columbia v. Heller, 554 U.S. 570, 626–27, 635 (2008); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) ("*Heller* did not set forth an analytical framework with which to evaluate firearms regulations in future cases.").

387 Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (collecting cases).

388 *E.g.*, *id.* at 195–96.

389 *See, e.g.*, United States v. McGinnis, 956 F.3d 747, 757–59 (5th Cir. 2020) (using the two-step framework and intermediate scrutiny to reject a facial constitutional challenge to § 922(g)(8)); *see also* United States v. Reese, 627 F.3d 792, 801–05 (10th Cir. 2010) (same); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) (noting that courts applying the two-step framework "often defer to the determinations of legislatures").

390 *E.g.*, Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing en banc) ("Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny."); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

391 *E.g.*, Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing en banc); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Over about a decade, as the composition of the courts changed, more and more judges grew sympathetic to the historical model.[392] In 2022, the Supreme Court endorsed it. In the course of deciding *Bruen*—which struck a New York public carry restriction—the Supreme Court expressly rejected the majority two-step framework and adopted instead a historical model that involved one step, followed by a rebuttable presumption:

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[393]

In doing so, *Bruen* expressly rejected the two most commonplace tools that circuits had used to uphold firearms restrictions: (1) the two-step analytical framework; and (2) any form of means-ends scrutiny, especially intermediate scrutiny. Now, under *Bruen*, the validity of firearm restrictions turns entirely on a "historical tradition of firearm regulation."[394] Once a defendant can show that the plain text of the Second Amendment covers their conduct, it is up to the government to rebut the presumption of the individual's right to bear arms by pointing to a similar restriction with historical provenance.[395] If the government cannot do so, under *Bruen*, the restriction must fall.

Soon after *Bruen*, federal criminal defendants began to raise new-and-improved Second Amendment challenges to common federal firearms statutes. Some district courts obliged, declaring an assortment of provisions unconstitutional, including § 922(n) (receipt of a firearm while under indictment), § 922(g)(8) (possession of a firearm while under a domestic-violence protective order), and § 922(g)(3) (possession of a firearm as a user of an illicit substance).[396] Other district courts have pushed back on the

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392 *See* United States v. McGinnis, 956 F.3d 747, 762 (5th Cir. 2020) (Duncan, J., concurring, joined by Jones, J.) ("I would support en banc review in this case or any appropriate future case to reassess our Second Amendment analysis.").

393 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022).

394 *Id.*

395 *Id.*

396 United States v. Quiroz, 629 F. Supp.3d 511, 527 (W.D. Tex. 2022) (striking down § 922(n)); United States v. Perez-Gallan, 640 F. Supp.3d 697, 716 (W.D. Tex. 2022) (striking down § 922(g)(8));

wisdom of the whole enterprise, complaining that lawyers and judges are ill-equipped to reach these sorts of difficult historical conclusions.[397]

The Fifth Circuit was the first federal circuit court to strike a statute in light of *Bruen*, holding in *United States v. Rahimi* that § 922(g)(8) was unconstitutional under the Second Amendment.[398] Despite the flood of controversy it elicited,[399] *Rahimi* appears to be a faithful application of *Bruen*. Because § 922(g)(8) required the disarmament of Mr. Rahimi due to the existence of a domestic-violence protective order, the government had the burden of demonstrating a historical tradition of disarmament under such circumstances.[400] In the judgment of the Fifth Circuit, it simply could not do so.[401]

United States v. Harrison, No. CR-22-00328-PRW, 2023 WL 1771138, at *25 (W.D. Okla. Feb. 3, 2023) (striking down § 922(g)(3)).

397 United States v. Bullock, No. 3:18-CR-165-CWR-FKB, 2022 WL 16649175, at *3 (S.D. Miss. Oct. 27, 2022) ("Not wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter. This Court is acquainted with the historical record only as it is filtered through decisions of the Supreme Court and the Courts of Appeals. An expert may help the Court identify and sift through authoritative sources on founding-era firearms restrictions.") (citation omitted).

398 United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023).

399 *E.g.*, Jordan Rubin, *Domestic Abusers Just Got More Gun Rights, Thanks to the Supreme Court*, MSNBC: DEADLINE: LEGAL BLOG (Feb. 3, 2023, 7:30 AM), https://www.msnbc.com/deadline-white-house/deadline-legal-blog/domestic-abusers-guns-supreme-court-rcna68934 [https://perma.cc/JSS4-N3TA] ("[I]t's both absurd and unsurprising that Bruen led a three-judge 5th Circuit panel … to strike down the law keeping guns from abusers because, according to the panel, there wasn't a similar enough law in place hundreds of years ago."); Ian Millhiser, *It's Now Legal for Domestic Abusers to Own a Gun in Texas, Louisiana, and Mississippi*, VOX (Feb. 2, 2023, 5:21 PM), https://www.vox.com/policy-and-politics/2023/2/2/23583377/supreme-court-guns-domestic-abuse-fifth-circuit-second-amendment-rahimi-united-states [https://perma.cc/FN8W-VQJX] ("If courts take this framework seriously, then it is questionable whether any law seeking to prevent domestic abusers from owning firearms may be upheld."); Joe Patrice, *Judge Ho Apparently Didn't Bother to Read the Cases He Cited in Domestic Abuser Gun Opinion*, ABOVE THE LAW (Feb. 3, 2023, 1:13 PM), https://abovethelaw.com/2023/02/judge-ho-domestic-abuse-gun-rahimi/ [https://perma.cc/GJ6B-QN5P] (arguing that the Bruen concurrence inaccurately interpreted precedent).

400 United States v. Rahimi, 61 F.4th 443, 455 (5th Cir. 2023) ("'To sustain § 922(g)(8)'s burden on Rahimi's Second Amendment right, the Government bears the burden of proffering 'relevantly similar' historical regulations that imposed 'a comparable burden on the right of armed self-defense' that were also 'comparably justified.'").

401 *Id.* at 456–61.

Without further Supreme Court guidance, *Rahimi* may well be the first of many such opinions.[402] And nothing appears off the table. Given our nation's historical reluctance to engage in firearms regulation, *Bruen*'s historical model has the potential to become a battering ram against the modern federal firearms scheme. It will be up to the Supreme Court, in *Rahimi*,[403] to either establish a broader limiting principle on Second Amendment challenges or simply accept whatever public safety consequences that *Bruen* will bring. Justice Thomas appears to have chosen the latter.[404] But a majority of other Justices may not be quite so strident.[405] Time will tell.

CONCLUSION

This article has been an attempt to draw out the themes, trajectories, and value shifts across the history of federal firearms criminalization. Its innovative five-act narrative structure does not merely construct a timeline but rather tracks an ongoing story of conceptual clusters, each containing its own heroes and villains, working within shared worldviews about the law and its role in society. As the post-*Bruen* litigation develops and the story of federal firearms law evolves, there will be so much more for scholars and commentators to think about. As the author, my hope is that this article provides a valuable conceptual framework for situating past discussions and new developments within this global story of federal firearms criminalization.

The first act describes an era of unease, telling the story of Attorney General Homer Cummings and his earnest efforts to convince a skeptical Congress that the federal government should play a larger role in traditional state and local crime. His antagonists were John Dillinger and his organized roving gangs, who used Tommy guns to commit crimes and automobiles to

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402 Following *Rahimi*, the Fifth Circuit struck down 18 U.S.C. § 922(g)(3) in United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023) ("Absent a comparable regulatory tradition in either the 18th or 19th century, § 922(g)(3) fails constitutional muster under the Second Amendment.")

403 *See* United States v. Rahimi, 143 S. Ct. 2688 (2023) (granting cert to 61 F.4th 443).

404 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 n.3 (2022) ("Rather than begin with its view of the governing legal framework, the dissent chronicles, in painstaking detail, evidence of crimes committed by individuals with firearms. . . . The dissent invokes all of these statistics presumably to justify granting States greater leeway in restricting firearm ownership and use. But, as Members of the Court have already explained, '[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications.'").

405 Kanter v. Barr, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) ("In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety.").

cross state lines to evade local law enforcement. The fruits of this era were a shift to the Commerce Clause as the primary authority for federal firearms legislation and the creation of the status-based prohibited person.

The second act is the era of impulse, telling the story of two new heroes—Senators Thomas Dodd and Russell Long—and their responses to the actions of a series of villain assassins: Lee Harvey Oswald, James Earl Ray, and Sirhan Sirhan. Their efforts to push the 1968 Omnibus and Gun Control Acts—particularly Title VII—revealed a tendency toward impulsive, ad hoc solutions to individualized problems without regard for the fact that the legislation would remain long after the problems subsided. These efforts criminalized, for the first time, the mere possession of a firearm, produced the first iteration of 18 U.S.C. § 924(c)—perhaps the most powerful tool in the prosecutor's hands—and expanded the list of prohibited persons significantly.

The third act is the Reagan era, the era of confidence, in which lawmakers added new firearms offenses—including harsh mandatory minimums—to the U.S. Code, transferring much of the sentencing discretion to Executive Branch prosecutors based on how they chose to charge their cases. This was also the time that Senator Arlen Specter, former district attorney for Philadelphia, began his crusade for a new federalism, under which the federal government would play a much larger role in state and local affairs. While his approach was met with resistance, it would soon take hold and invite a dramatic era of enforcement.

The fourth act is unlike anything that came before. The Federal War on Guns, much like the War on Drugs was based no longer on legislative priorities but on Executive Branch policy to maximize the impact of the federal power that Congress had granted it over the preceding seventy years. The villains were not armed street criminals even though, ironically, most of the offenders in the era of enforcement merely possessed a firearm while under a prohibited status. The heroes—the enforcers—were a cadre of law-and-order Republicans and neoliberal Democrats who believed that the primary solution to crime was a long-term stay at the federal penitentiary. The enforcers achieved their goals through massive federal law enforcement initiatives, cooperative relations with state and local law enforcement, and, often, federal prosecutors seeking the longest possible prison sentences irrespective of the particular circumstances of a case or defendant. The confluence of these events led to a massive increase in the number of federal firearms offenders that continues to this day.

Just when the story seemed to be over, another conflict has emerged. Even if the Executive Branch continues on its current enforcement trajectory, there is a new, fifth act that is simmering in the courts. This act—based on the interpretation and application, by lower courts, of *Bruen*—foreshadows a twist ending. If *Bruen* is not limited by a new Supreme Court case, it may veer toward a dismantling of the federal firearms scheme. This dismantling has already begun among the district courts and at the Fifth Circuit.[406] This culminated to the Supreme Court granting the government's Petition for Writ of Certiorari in *Rahimi* on June 30, 2023.[407] As the full effects of *Bruen* continue to percolate and work their way back to the Supreme Court, we will likely see many new changes to the firearms scheme.

On a personal note, this article has been a passion project for me. Prior to joining the academy, I was an appellate attorney with the Federal Public Defender's Office. There, I had the good fortune of serving as lead counsel in *United States v. Davis*[408] before the Supreme Court in 2019, *United States v. McGinnis*[409] before the Fifth Circuit in 2020, and *United States v. Rahimi*[410] before the Fifth Circuit in 2023. Two of these cases—*Davis* and *Rahimi*—resulted in a court striking a portion of the federal firearms scheme as unconstitutional.[411] *McGinnis*, meanwhile, advanced the arguments that ultimately prevailed in *Bruen*, only a year too early, and received some discussion in scholarship.[412]

Throughout these cases, and the many more I handled across eight years as an Assistant Federal Public Defender, I saw my clients receive extraordinarily long sentences for firearms possession offenses, so much so that a sentence of only five years—the national average for a federal firearms offense today—seemed light by comparison. But when I spoke with the old-timers, who had dedicated their careers to federal indigent defense and were

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406 United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023); United States v. Daniels, 77 F.4th 337, 339–40 (5th Cir. 2023) (holding 18 U.S.C. § 922(g)(3) unconstitutional under *Bruen*).

407 United States v. Rahimi, 143 S. Ct. 2688 (2023) (granting cert to 61 F.4th 443).

408 United States v. Davis, 139 S. Ct. 2319 (2019).

409 United States v. McGinnis, 956 F.3d 747 (5th Cir. 2020).

410 61 F.4th at 448.

411 United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (striking down a portion of 18 U.S.C. § 924(c) as unconstitutionally vague); United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023) (striking down 18 U.S.C. § 922(g)(8) as unconstitutional).

412 Jake Charles, *The Next Big Second Amendment Case?*, DUKE CTR. FOR FIREARMS L. (Feb. 19, 2021), https://firearmslaw.duke.edu/2021/02/the-next-big-second-amendment-case/ [https://perma.cc/RQJ6-47RL].

nearing retirement, they would tell stories of the way it used to be that painted a picture quite different from what I saw on an almost daily basis.[413]

This article has been an attempt to understand those differences, and to think about how unfamiliar the stories would sound from the old-timers thirty years ago, sixty years ago, and ninety years ago. It is also an attempt to envision the stories thirty years from now, where the federal firearms scheme may be, on account of *Bruen* and its future progeny, so very different.

It is through these stories—of protagonists and villains and ironies and shared assumptions about law and crime—that themes, movements, trends, and trajectories begin to arise. It is through the stories that we move beyond knowing a series of facts put into sequence and begin to truly *understand* where we've been, where we are, and where we're going.

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413 At the 2023 Firearms Research Works-in-Progress Workshop at the Texas A&M School of Law, Professor George A. Mocsary made a statement that captured the spirit of what I think the old-timers were getting at: "When rhetoric pushes out mercy, the result is tyranny."