PRELIMINARY MEMORANDUM

April 15, 1994 Conference
List 3, Sheet 2 (Page 16)

No. 93-1260-CFY

UNITED STATES (Congress has the power to enact this firearm statute)	Cert to CA5 (Reavley, King, and Garwood)
v.	
Alfonzo LOPEZ (the statute is invalid b/c Congress failed to establish a proper nexus to interstate commerce)	Federal/Criminal — Timely

1. *Summary*: CA5 held that 18 U. S. C. §922(q), which makes it a federal offense to possess a firearm within 1000 feet of a school, "is invalid as beyond the power of Congress under the Commerce Clause." The SG urges this Court to grant cert to resolve a split between CA5 and CA9. Very close, but I recommend denial in view of the fact that only two CAs have

addressed the issue and pending legislation may remedy the alleged defects in the existing statute. DENY.

2. *Facts and Decisions Below*: On March 10, 1992, resp, then a twelfth-grade student attending Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun. Based on an anonymous tip, school officials confronted resp, who admitted that he was carrying the weapon. After being advised of his rights, resp explained that he had been paid $40 to deliver the gun to a classmate who planned to use it in a "gang war."

Resp was charged in a one-count indictment with violating 18 U. S. C. §922(q), which makes it illegal to possess a firearm in a school zone. Resp moved to dismiss the indictment on the ground that §922(g) is unconstitutional, "as it is beyond the power of Congress to legislate control over our public schools." The dct [WDTX, ?] denied the motion, concluding that §922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."

CA5 reversed: The constitutionality of §922(q) is a question of first impression in the federal courts. The govt argues that §922(q) is no different from a number of other federal firearms crimes. But with the exception of a few relatively recent, special case provisions, federal laws proscribing firearm possession require the govt to prove a connection to commerce, or other federalizing feature, in individual cases. See, e.g., 18 U. S. C. §922(g) (making it unlawful for felons to "possess [a firearm] in or affecting commerce"). Because a commerce nexus is an element of the crime defined by these provisions, each application of that statute is within the commerce power. The govt points to several firearm proscriptions not requiring the

specific firearm to have traveled in commerce, such as: 18 U. S. C. §922(a)(6) (false statement in acquisition of firearm from licensed dealer, manufacturer or importer); §922(b)(1) & (2) (sale or delivery by licensed dealer, manufacturer, or importer to a minor or in violation of state law); §922(b)(4) (sale or delivery by licensed dealer, manufacturer, or importer of certain specified weapons, such as machine guns or short-barreled rifles); 922(m) (recordkeeping violations by licensed dealer, manufacturer, or importer). However, not only do all these provisions pertain to essentially commercial actions involving the firearms business, as opposed to mere simple possession by an individual, but each is also expressly tied to the dealer, manufacturer, or importer in question being federally licensed. 18 U. S. C. §921(a)(9), (10) & (11).

[The opinion then goes on for almost 30 pages reviewing the evolution of federal firearms legislation].

We are, of course, fully cognizant and respectful of the great scope of the commerce power. It is generally agreed that in a series of decisions culminating in Wickard v. Filburn, 317 U. S. 111 (1942), the SCt fixed the modern definition of the commerce power, returning it to the breadth of Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1 (1824). Broad as the commerce power is, its scope is not unlimited, particularly where intrastate activities are concerned. Never has the SCt indicated that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." Maryland v. Wirtz, 392 U. S. 183, 196–197 n.27 (1968). Rather, the regulated activity must have a "substantial economic effect on interstate commerce," Wickard v. Filburn, 317 U. S. 111 (1942); otherwise the scope of the Commerce Clause would be unlimited, as there would be no "exclusively internal commerce of a state." Gibbons v. Ogden.

Where Congress has made finding, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer "if there is any rational basis for" the finding. Preseault v. ICC, 494 U. S. 1, 17 (1990). Practically speaking, such findings almost always end the matter. But courts cannot properly perform their duty to determine if there is any rational basis for a Congressional finding if neither the legislative history nor the statute itself reveals any such relevant finding. In such a situation, there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states. Indeed, as in this case, there is no substantial indication that the commerce power was even invoked.

Congressional enactments are presumed constitutional. But in certain areas the presumption has less force. Cf. United States v. Carolene Products Co., 304 U. S. 144, 152–153 n.4 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . ."). Here the question is essentially a jurisdictional one, and any expansion of federal power is at the expense of the powers reserved to the states by the Tenth Amendment, which is, after all, as much a part of the Bill of Rights as the First. Both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States. In such a situation where we are faced with competing constitutional concerns, the importance of Congressional findings is surely enhanced.

We draw support for our conclusion concerning the importance of Congressional findings from recent holdings that when Congress wishes to stretch its commerce power so far as to intrude upon state prerogatives, it must express its intent to do so in a perfectly clear fashion. See Pennsylvania v. Union Gas, 491 U. S. 1, 7 (1989) (holding that Congress could use its commerce power to abrogate the sovereign immunity guaranteed to the States by the 11th Amendment only if its intent to do so is "unmistakably clear"). Here, Congress surely intended to make the possession of a firearm near a school a federal crime, but it has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause.

The Gun Free School Zones Act extends to criminalize any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session. Neither the act itself nor its legislative history reflect any Congressional determination that the possession denounced by §922(q) is in any way related to interstate commerce or regulation, or, indeed, that Congress was exercising its powers under the Commerce Clause. Nor do any prior federal enactments or congressional findings speak to the subject matter of §922(q) or its relationship to interstate commerce. If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, sneakers, Game Boys, or slide rules.

We hold that §922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause. Whether with adequate Congressional findings or legislative history, national legislation of a similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate §922(q) within the Commerce Clause. And we expressly do not resolve the question whether §922(q) can ever be constitutionally applied. Conceivably, a conviction under §922(q) might be sustained if the govt alleged and proved that the offense had a nexus to commerce. Here, in fact, the parties stipulated that a BATF agent was prepared to testify that resp's gun had been manufactured outside of the State of Texas. Resp's conviction must still be reversed, however, because his indictment did not allege any connection to interstate commerce. An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective. See Stirone v. United States, 361 U. S. 212, 216–218 (1960). This is true even though the language of §922(q) contains no such requirement. See Russell v. United States, 369 U. S. 749 (1962). Finally, because an indictment, unlike a bill of information, cannot be amended, the failure to allege each element is fatal. Cf. United States v. Garrett, 984 F.2d 1402, 14145 (CA5 1993).

3. *Contentions*: Petr (SG): CA5's decision misapprehends the nature of Congress's authority under the Commerce Clause and the role of federal courts in discerning the bounds of that authority. The Constitution is not a style manual that requires Congress to follow particular drafting rules in order to secure judicial acceptance of its Acts. Accordingly, the appropriate question is whether Congress rationally could have found that the actions proscribed by §922(q)

affect commerce among the states. Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 258 (1964).

The long tradition of federal regulation of firearms activity and Congress's repeated findings regarding the effects of that activity on interstate commerce adequately support the statute at issue here. In several instances, Congress has imposed obligations that are not dependent on a particularized effect on interstate commerce; their validity rests instead on congressional findings generally on interstate commerce. See, e.g., 18 U. S. C. §922(a)(1) (federal license required for all firearms dealers); 18 U. S. C. §922(p) (federal offense to possess firearms not detectable by typical airport metal detectors). The congressional findings that support the validity of those statutes strongly support the validity of the statute at issue here, which proscribes activity with an effect on interstate commerce no less than the effects of the activities regulated by those other statutes. Because we believe that those findings were rational, and that a similar finding in this case would have been rational, we submit that §922(q) is a valid exercise of Congress's commerce power.

Aside from the obvious importance of any decision that involves "the exercise of the grave power of annulling an Act of Congress," United States v. Gainey, 380 U. S. 63, 65 (1965), the decision conflicts with CA9's recent decision in United States v. Edwards, 13 F.3d 291 (CA9 1993). In Edwards, CA9 squarely rejected CA5's analysis and held that §922(q) "represents a valid exercise of congressional power under the Commerce Clause."

Resp: CA5 did not annul an Act of Congress. Instead, it ruled that the indictment in this case was defective because it failed to allege a nexus to commerce. CA5 expressly reserved for later decision whether §922(q) can ever be constitutionally applied, and implied that a

§922(q) conviction might be sustained if the government alleged and proved that the offense had a nexus to commerce. Rather than accept this tacit invitation to alter its charging practices, the govt has chosen to seek review by certiorari. Unless and until the govt avails itself of this easily available alternative, this Court should decline review.

Moreover, although the results reached in Edwards and in this case "are diametrically opposed, the conflict between the two decisions is neither direct nor irreconcilable." In Edwards, CA9 mistakenly believed that it was bound by circuit precedent involving a different firearms provision, and therefore the language in Edwards disapproving CA5's decision in this case must be viewed as only dicta.

It also should be noted that state law already forbids the carrying of most firearms in and around schools. See Tex. Penal Code Ann. §46.04(a)(1). Indeed, resp initially was charged in state court, but that prosecution was dropped because the govt instituted federal charges. Thus, requiring a nexus to interstate or foreign commerce in this context will not impair federal law enforcement in this area. In the 26 years since the passage of the Gun Control Act of 1968, Congress has never found it necessary to expand the Act's proscription against possession of firearms by convicted felons by abandoning a nexus with commerce, probably because most firearms do have such a nexus.

Finally, legislation now before Congress may supply findings that link the proscribed activities to the Commerce Clause powers. Such findings should significantly alter the effect of the decision below on future prosecutions under the Act. Such findings would also limit the effect of this Court's review to prosecutions under the existing, unamended Act.

4. *Discussion*: Although this is an interesting issue and the split is clear, I recommend denial. Only CA5 and CA9 have considered the constitutionality of §922(q), and the Senate has passed an amended version of a House bill that includes specific findings that the actions proscribed by §922(q) affect interstate commerce. If the proposed legislation is enacted, the practical significance of a decision in this case would be minimal. The SG points out in a footnote that the House of Representatives has not yet passed a comparable provision, and that even if such a provision is enacted, the amendment will not eliminate the split regarding the validity of prosecutions under the existing statute. See Pet. 6 n.4. While this is true, it still seems prudent for the Court to wait to see if the split deepens and if the statute is amended. Section §922(q) is unique among other federal firearms statutes, in so far as the nexus to interstate commerce is not obvious from the face of the statute or otherwise self-evident. If Congress remedies the problem shortly, the Court's guidance on this issue surely will be of limited utility. Very close, but deny.

5. *Recommendation*: DENY.

There is a response.

April 3, 1994 Alexander 2 F.3d 1342

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