IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

REPORT AND RECOMMENDATION

v.

00-CR-91-C

ANDREW P. HOFFMEYER,

Defendant.

REPORT

Defendant Andrew P. Hoffmeyer is charged with possessing firearms at Hudson High School in violation of the federal Gun-Free School Zones Act, 18 U.S.C. §922(q)(2)(A). Hoffmeyer has moved to suppress evidence derived from his arrest (dkt. #20) and from the execution of a subsequent search warrant (dkt. #21). Hoffmeyer also has moved to dismiss the indictment because the charging statute is unconstitutional (dkt. #22) and because the state's applicable gun control statute, Wis. Stat. § 948.605(2)(b)3.a., preempts the federal statute.

For the reasons stated below, I am recommending that this court grant Hoffmeyer's first motion to suppress, which would dispose of the case. If Judge Crabb does not accept this recommendation, I am recommending that this court declare the current iteration of the Gun-Free School Zones Act unconstitutional.

I. Motion to Suppress: The Arrest

Hoffmeyer has moved to suppress evidence obtained directly and derivatively from a police "felony stop" on March 13, 2000. Hoffmeyer contends that the police did not have probable cause to arrest him or reasonable suspicion to detain him. On December 13, 2000, I held an evidentiary hearing on this motion. Having heard and seen the witnesses testify, and having considered the exhibits, I find the following facts:

A. Facts

Hudson, Wisconsin is a city of about 6,400 located near Minneapolis. The Hudson Police Department has a liaison officer assigned to work in the public schools. For the past three years, Officer Edward Rankin has served as liaison officer, spending approximately 20 to 30 hours each work week at Hudson High School. About 1,000 students attend Hudson High. School buses park in or near the parking lot at the beginning and end of each school day. A parking monitor's booth flanks the entrance to the school parking lot.

On March 13, 2000, Officer Rankin received an anonymous telephonic tip through a "Crime Stoppers" program. It is not clear whether Officer Rankin spoke directly to the tipster. The tipster alleged that a man named Andrew Hoffmeyer, approximately 22-23 years old, would be arriving at Hudson High at the end of the school day driving a black Blazer-type vehicle, and that he would have rifles in his vehicle and might be carrying a silver handgun. The tipster stated that Hoffmeyer usually met with a group of students near the

school auditorium. Rankin recalled that during his patrols over the past two weeks or so, he had noticed a group of students who met in front of the auditorium; one of the people in this group was not a student and appeared older than the others. Apparently, Officer Rankin had seen no need to confront this man to challenge his presence inside the school.

Officer Rankin relayed the Crime Stoppers tip to his supervisor and obtained a squad of officers to stake out the parking lot that afternoon. These officers held a briefing session prior to taking the field. Because Hoffmeyer was believed to be armed, and because the parking lot would be full of students as school let out, the officers decided to ensure everyone's safety by conducting an immediate "felony stop" if Hoffmeyer showed up as predicted. Two pairs of uniformed officers in two unmarked squad cars positioned themselves discreetly in the school parking lot. Officer Rankin sat in the parking monitor's booth in plain clothes.

When school ended that afternoon and the students headed out, a black Blazer arrived and headed in, driving past Officer Rankin in the monitor's both. Officer Rankin observed just one person in the Blazer, a white male in his early 20's wearing some sort of camouflaged baseball cap. Officer Rankin radioed Officers Dunn and Ziemek and told them to follow the Blazer until it stopped, then detain the driver before he could enter the school.

The Blazer meandered through the parking lot toward a spot near the school building. As it pulled in at a diagonal, Officers Dunn and Ziemek pulled up behind it and jumped out

to conduct their felony stop. Simultaneously, Officer Rankin dashed from the monitor's booth to participate in the stop.

Officer Ziemek drew his firearm and ordered the driver out of the Blazer. The driver, now known to be Andrew Hoffmeyer, complied. By then Officer Rankin had arrived on the scene; other officers arrived shortly thereafter. Officer Ziemek ordered Hoffmeyer to place his hands on the side of his car and to spread his legs for a weapons frisk. Officer Dunn conducted the pat down while Officer Ziemek trained his firearm on Hoffmeyer. While exiting his Blazer and being patted down, Hoffmeyer asked what was happening and why. Officer Rankin explained that he was being detained for suspicion of bringing firearms onto school property.

Officer Dunn found a butterfly knife in Hoffmeyer's left rear pocket, so the officers arrested Hoffmeyer for carrying a concealed weapon. They put handcuffs on him and began to search the Blazer. Although none of the officers posed any questions to Hoffmeyer, he may have made some statements following his arrest.

The search, which concluded at a different location, ultimately uncovered a Bowie knife, a Samurai-type sword and three firearms: a Smith & Wesson .45 caliber semi-automatic handgun, a Model 56 7.62 caliber assault-type rifle, and a .280 caliber bolt action rifle with a scope. All three firearms were unloaded and ensconced in gun cases. Apparently, none of the gun cases were locked. Notes seized indicated that Hoffmeyer and his friends

had formed a fictitious military unit called the "Gun Toting Wackos." The actual existence and purpose of the "GTW"s has not been established.

B. Analysis

Citing to the Supreme Court's recent decision in *Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375 (2000), Hoffmeyer argues that the police had insufficient reasonable suspicion or probable cause to support their initial detention and frisk of him in the school parking lot. I agree.

In *J.L.*, an anonymous caller reported to the Miami-Dade police that a young black man standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Police responded to the tip and saw three black men hanging around the bus stop, one of whom, J.L., was wearing a plaid shirt. Apart from the telephonic tip, the officers had no reason to suspect any illegal conduct. The officers did not see a firearm and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to assume the position, frisked him, and seized a gun from his pocket. 120 S. Ct. at 1377.

The Supreme Court affirmed the Florida Supreme Court's decision to suppress the gun seized during the frisk. The Court noted that unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if his allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. *Id.* at 1378. Although the Court acknowledged that it previously had

upheld a search based on an anonymous tip that accurately predicted the suspect's future movements, *see Alabama v. White*, 469 U.S. 325 (1990), the Court noted that it had deemed the facts in *White* "borderline." *Id*. at 1378-79. In most cases, knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband. *Id*. The Court found the tip in *J.L.* insufficient because it contained no predictive information and therefore left the police without means to test the informant's knowledge or credibility: "All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." *Id*. at 1379.

In response to the government's claim that everything the tipster said turned out to be true, the Court stated that

> an accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: it will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Id. Finally, the court noted that the mere fact that a tip, if true, would describe illegal activity does not mean that the police may make a *Terry* stop without meeting *Terry*'s

reliability requirement. *Id*. at 1380, fn. *. Accordingly, the information known to the police at the time they frisked J.L. was not enough to make the search reasonable.

In demarcating the limits of this holding the Court noted, among other things, that it was not overruling *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) which holds that school officials may conduct protective searches on the basis of information insufficient to justify searches elsewhere. *Id*. at 1380.

Many circuit courts have applied *Florida v. J.L.* to challenged stops and searches; none has upheld a stop or search on facts as sparse as those presented here. In *United States v. Thompson*, ___ F.3d ___, 2000 W.L. 1824289 (D.C. Cir. 2000), the court upheld the seizure of a firearm against a *J.L.* challenge because: 1)the anonymous tipster provided his tip in person; 2)he told the police that he "just saw" the defendant, which indicated he had recent, firsthand information; and, 3) the responding officers personally observed the defendant at 3:00 a.m. concealing himself behind a fence peering out toward the street in the parking lot of a closed restaurant, which was not merely consistent with the tip that he had a gun, but also signaled that he was positioning himself to use it. *Id*. at *, 4-*5.

In *United States v. Valentine*, 232 F.3d 350 (3rd Cir. 2000), the court also upheld a felon-with-a-gun conviction against defendant's *J.L.* challenge. The court found first that although the police had received an anonymous tip, the tipster had delivered it in person and was reporting what he had observed moments ago, "not what he learned from stale or secondhand sources." *Id*. at 354. Second, the tipster was providing information against

someone nearby, which exposed the informant to a risk of retaliation from the person named; assuming this risk further corroborated his reliability. Third, the responding officers could consider in their analysis the fact that the stop occurred in a high crime area at 1:00 a.m. Fourth, the officers were also allowed to consider that the defendant and the two men with him immediately began walking away from the patrol car when it arrived, raising additional suspicions. *Id*. The court found that these four factors sufficiently corroborated the anonymous informant's tip to validate the resulting stop and frisk.

In *United States v. Christmas*, 222 F.3d 141 (4th Cir. 2000), the defendant raised a *J.L.* challenge against his stop and frisk. The court was unmoved, finding first that the tipster had provided face-to-face information which allowed the officer the opportunity to assess the tipster's credibility and demeanor. Second, the tipster provided her home address, which was proximate to the illegal activities about which she was reporting; by informing the police about her neighbors' illegal activity, the informant exposed herself to the risk of reprisal, which is an indicium of reliability. *Id.* at 144. Finally, the court noted that by providing her home address to the officers, the informant exposed herself to the repercussions of misleading or deceiving the police. All of these circumstances provided articulable facts that criminal activity might be afoot, which raised a reasonable suspicion sufficient to allow a stop and frisk. *Id*.

In *United States v. Reid*, 220 F.3d 476 (6th Cir. 2000), the court listed five facts known to police in addition to the informant's anonymous tip which provided probable

cause to arrest the defendant for trespassing in a private housing project: 1) the arresting officer personally had given defendant prior warnings not to enter this project; 2) that same officer observed defendant on the project's property; 3) the defendant was not a resident of the housing project; 4) there were 26 "No Trespassing" signs posted throughout the project property, providing adequate notice; and 5) the defendant walked away upon the lawful approach of the officers. *Id*. at 478.

At least one circuit has applied *J.L.* to suppress evidence. In *United States v. Wells*, 223 F.3d 835 (8th Cir. 2000), the court threw out a search warrant based on its finding that the information linking defendant's home to contraband was insufficient. The court found that the only information either directly or circumstantially linking either the defendant or the searched apartment to criminal activity was the statement of one anonymous caller to a Crime Stoppers hotline. The court held that this was not enough: when suspicions arise not from any observations of police officers but solely from a call made from an unknown location by an unknown caller whose reputation cannot be assessed, the police must engage in suitable corroboration of the alleged criminal activity. *Id*. In *Wells*, the anonymous caller remained unknown to the police, he did not report any firsthand information or intimate details that could provide a reliable basis for his purported knowledge, and the police were only able to corroborate innocent details, namely the location of the residence, identity of its renter, and the defendant's relationship with the renter. None of this corroborated the tipster's allegation of criminal conduct by the defendant or criminal activity at the residence

searched. Accordingly, the circuit court affirmed the district court's suppression of evidence seized by the police. *Id.* at 839-40.

In Hoffmeyer's case, the police had nothing but the anonymous tip of a caller to the Crime Stoppers line. For the most part, the tipster merely identified Hoffmeyer by name and description, then accused him of bringing guns to Hudson High. Under *J.L.*, this is clearly insufficient.

There is a bit more: as the government notes, the tipster predicted that Hoffmeyer would be driving to Hudson High in a black Blazer at the close of the school day, and this turned out to be true. From this, the government argues that the informant provided the sort of predictive information that would lend weight to the tip regarding possession of firearms. While this might have been true under different circumstances, it is not true here.

As Hoffmeyer points out, it was no secret that he hung out with his friends after school near the auditorium: Officer Bertram himself had seen someone fitting Hoffmeyer's description doing this, apparently more than once, in the two weeks preceding the tip. So, the tipster's prediction that Hoffmeyer would appear at Hudson High School that afternoon in his Blazer provided no basis for the police to believe that the tipster had any inside information about Hoffmeyer. *See J.L.*, 120 S. Ct. at 1379. Adding a prosaic prediction to a prosaic tip doesn't transcend prosaism. This "prediction" is merely a variation of the "accurate description of a subject's readily observable location" that the Supreme Court

found unpersuasive in *J.L.*. *See id*. It did nothing to add to the probable cause or reasonable suspicion that would allow the police to seize Hoffmeyer and search him at gunpoint.

As the second prong of its riposte, the government correctly notes that the Supreme Court did not intend *J.L.* to govern school searches. The government doesn't develop this argument much, perhaps tacitly acknowledging that it is inapplicable to our facts. In excepting school searches from the reach of *J.L.,* the Court cited to *New Jersey v. T.L.O.,* 469 U.S. 325. In *T.L.O.* the Supreme Court found a "special need" to except public schools from rigid adherence to the Fourth Amendment because requiring that school searches be based on probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools. *See T.L.O.*, 469 U.S. at 340, 341; *Joy v. Penn-Harris-Madison School Corporation*, 212 F.3d 1052, 1058 (7th Cir. 2000). Put another way, even though the Fourth Amendment continues to protect public school students against unreasonable searches and seizures by school officials, "reasonableness" in the school context does not require *school officials* to demonstrate the existence of probable cause to justify a search of a *student's* person or property. *See Bridgman v. New Trier High School District No. 203*, 128 F.3d 1146, 1149 (7th Cir. 1997), emphasis added. This is because

> a school official's primary mission is not to ferret out crime, but is instead to teach students in a safe and secure learning environment. School teachers and administrators should not be required to keep abreast of the most recent developments in Fourth Amendment jurisprudence; nor should they be required to retain counsel and proceed through the courts each time they desire to obtain further information regarding a potential violation of school rules.

Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309, 1314 (7th Cir. 1988).

Thus, the Court's observation in *J.L.* simply confirmed that *T.L.O.* still governs searches of school students by school employees when undertaken for the purpose of maintaining order and discipline within the school. There is no support for the proposition that on-duty police officers are excused from the requirements of the Fourth Amendment because their adult suspect happens to be on school property at the time they wish to search him.

In sum, the police did not have probable cause to arrest Hoffmeyer or reasonable suspicion to detain him and frisk him for weapons at the time they ordered him from his car at gunpoint. Hoffmeyer is entitled to suppression of all evidence derived from this illegal detention and search.

In the wake of Columbine and other recent school massacres, some might pose a rhetorical question along the lines of "what the heck is the court thinking, cutting loose a self-styled 'Gun-Toting Wacko" who hauls pistols, assault rifles and *Pulp Fiction* swords into a high school parking lot?" The answer, if one is even needed, is that the court is performing its duty to apply the law to the facts. This time, that application leads me to conclude that the police, in achieving their goal of maximizing safety, moved too quickly to ensure that subsequent charges would stick.

So, although suppression is warranted, on a more fundamental level, the police acted appropriately. The two main goals of the October 4 police interdiction at Hudson High were

to avoid injury to anyone, and to make a case against Hoffmeyer if in fact he was breaking the law. Two tactical options were available, one decisive, the other incremental, and each promoted one of these goals at the possible expense of the other.

Under the decisive approach, the police would instantly arrest Hoffmeyer at gunpoint upon his appearance at the school. This would minimize the risk of personal injury (goal one), but possibly would surrender the opportunity legally to develop further evidence against Hoffmeyer (goal two).

Under the incremental approach, the police could have allowed Hoffmeyer to park on school property and leave his vehicle, then would approach him, request identification, ask whether he possessed any firearms on his person or in his car, ask for permission to search his vehicle, and perhaps perform a *Terry* frisk based on how Hoffmeyer responded to these inquiries. This approach would have maximized the potential to obtain additional admissible evidence against Hoffmeyer if in fact he illegally possessed firearms (goal two) but possibly would have jeopardized safety (goal one) by giving Hoffmeyer at least a theoretical opportunity to draw a firearm and open fire. However minimal that risk might have been with five police officers available on the scene, it was still more of a risk in the incremental approach than in the decisive approach.

The police cannot be faulted for having chosen the decisive approach, which virtually guaranteed the safety of all concerned. The potential trade-off, which has vested in this report and recommendation, is that this approach prevented the development of additional

evidence and essentially short-circuited Hoffmeyer's prosecution. (Of course, if Judge Crabb declines to accept my recommendation and denies the motion to suppress, then the police will eat their cake and have it too. While it would not be inequitable for the police to have successfully executed a "win-win" strategy, this is not a result that I see as legally or factually available in this case. The final decision, however, is up to Judge Crabb.)

The bottom line is that the police achieved their primary goal but fell short of their secondary goal. I am recommending that the court grant Hoffmeyer's motion to suppress evidence.

II. Motion To Suppress: The Search Warrant

Hoffmeyer has moved to suppress evidence derived from the execution of a search warrant issued by the state circuit court. The government has responded that it does not intend to use any evidence seized during the search. *See* dkt. #36. So, this motion should be granted as a placeholder.

III. Motion To Dismiss: The Constitutionality of the Statute

If the court accepts my recommendation to suppress evidence, then there is no need to address Hoffmeyer's challenge to the constitutionality of the charging statute. If the court denies Hoffmeyer's motion to suppress, then it will have to address this issue. In that case,

I am recommending that the court should declare the statute unconstitutional. Because this is a close call, I have also set forth the grounds on which the court could uphold the statute.

A. Historical Background

Congress's powers are limited to those enumerated in the Constitution. *See United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 17440, 1748 (2000). "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Id*. (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.)). Congress explicitly identified the Commerce Clause as the source of its federal authority for enacting 18 U.S.C. § 922(q)(2)(A). *See* 18 U.S.C. § 922(q)(1)(I) ("the Congress has the power, under the interstate commerce clause . . . to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.") Laws passed by Congress are presumed to be constitutional. *See Morrison*, 120 S. Ct. at 1748.

The Commerce Clause authorizes Congress to "regulate Commerce . . . among the several States . . . ". U.S. Const., Art. I, § 8, cl. 3. The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *United States v. Lopez*, 514 U.S. 549, 553 (1995) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196

(1824)). Although broad, Congress' power under the Commerce Clause is not without limits. As Chief Justice Marshall explained in *Gibbons*:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

Gibbons, 22 U.S. at 194-95.

For nearly a century after *Gibbons*, the Court's Commerce Clause decisions relied on categorical distinctions to determine whether particular activities properly fell within the scope of Congress' commerce authority. Thus, the Court found that certain categories, such as "production," "manufacturing," and "mining" were off limits to Congress because they were within the province of the states. *See Lopez*, 514 U.S. at 553-558 (discussing history of Court's Commerce Clause jurisprudence). The Court continued to rely on these categories even after Congress began to exercise its commerce powers more assertively by enacting legislation such as the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890. *See Lopez*, 514 U.S. at 554; *Wickard*, 317 U.S. at 122. However, the Court began to recognize that its technical distinctions were becoming outdated in light of the

country's expansion from local and regional economies into a national economy. *See Lopez*, 514 U.S. at 556.

The Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) heralded the beginning of "an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause" by allowing Congress to regulate purely intrastate activities so long as the activity had a substantial economic effect on interstate commerce. *Lopez*, 514 U.S. at 556. Thus, in *Wickard v. Filburn*, 317 U.S. 111, (1942), the Court upheld legislation establishing quotas for the production and consumption of homegrown wheat, reasoning that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." *Wickard*, 317 U.S. at 125. Recognizing that its earlier cases had "artificially constrained" the authority of Congress to regulate interstate commerce, the Court in the years after *Jones & Laughlin Steel* abandoned its categorical approach in favor of a deferential approach that asked only whether Congress had a rational basis for concluding that a regulated activity sufficiently affected interstate commerce. *See Lopez*, 514 U.S. at 556-57. Although the Court paid lip service to the notion that Congress' commerce power was "subject to outer limits," this assertion had little practical effect: in the nearly 60 years after *Jones & Laughlin Steel*, the Court consistently upheld federal legislation against claims that Congress had exceed its powers under the

Commerce Clause. *See United States v. Taylor*, 226 F.3d 593, 598 (7th Cir. 2000) (citing cases).

That is, until *Lopez*.

B. *United States v. Lopez*

In *United States v. Lopez*, the Supreme Court ended its 58-year history of upholding federal legislation against claims that Congress had exceeded its authority under the Commerce Clause when it struck down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), as an unconstitutional exercise of Congress' powers to regulate commerce. Lopez was a high school student who carried a handgun to school in San Antonio. Acting on an anonymous tip, school authorities confronted Lopez, who admitted carrying a weapon. Eventually Lopez was charged with violating 18 U.S.C. § 922(q)(1)(A), which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A)(1988 ed., Supp. V). After an unsuccessful attack on the statute's constitutionality, Lopez was convicted.

On appeal, Lopez challenged his conviction on the ground that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed the conviction. The Supreme Court granted certiorari and, in a 5-4 decision, affirmed the court of appeals.

After glossing its significant Commerce Clause decisions, the Court identified three broad categories of activity that Congress may regulate and protect under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. Concluding that § 922(q)'s targeted activity was properly analyzed under the third category, the Court determined it could not sustain the statute as a regulation of activity that substantially affected interstate commerce. *Id*. at 559.

The Court identified four considerations that led to its conclusion. First, the court found that § 922(q) was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Id*. at 561. As such, it could not be sustained as an essential part of a larger regulation of economic activity under a *Wickard*-styled theory that the aggregate effect of such intrastate activity, if repeated elsewhere, could substantially affect interstate commerce. *See id*., at 559-61.

Second, the Court noted that § 922(q) contained no express jurisdictional element "which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id*. at 562. The Court contrasted § 922(q) with 18 U.S.C. § 1202(a) (the predecessor of the current felon-in-possession statute, § 922(g)(1)), which the Court had interpreted as requiring a nexus between firearm possession and interstate commerce. *Id.,* citing *United States v. Bass*, 404 U.S. 336 (1971). The Court observed that

"[u]nlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

Third, Congress made no specific findings that would enable the Court to evaluate the legislative judgment that gun possession in a school zone substantially affected interstate commerce. *Id*. at 562-63. Although Congress normally need not generate formal findings, the Court stated that such findings would have enabled it better to evaluate the legislative judgment of a substantial effect on interstate commerce where no such effect was "visible to the naked eye." *Id*. The Court noted that on September 13, 1994, President Clinton had signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 which amended § 922(q) to include congressional findings regarding the effects that firearm possession in and around schools would have upon interstate and foreign commerce. The government did not rely on these findings as a substitute for the absence of Congressional findings, but argued that the subsequent findings "indicate that reasons can be identified for why Congress wanted to regulate this particular activity." *Id*. at n. 4. These findings are now codified at 18 U.S.C. § 922(q)(1).

Finally, the Court found that the causal chain between gun possession in a school zone and a substantial effect on interstate commerce was too attenuated to support the government's contention that the statute was a valid exercise of Congress' Commerce Clause authority. *Id*. at 564-67. The government argued that possession of a firearm in a school

zone may result in violent crime, which in turn would affect the functioning of the national government in two ways: 1) by creating substantial costs that would be spread throughout the population through the mechanism of insurance; and 2) by reducing the willingness of individuals to travel to areas within the country that were perceived to be unsafe. In addition, the government argued that the presence of guns in schools posed a threat to the educational process, which, in turn, resulted in a less productive citizenry, which, in turn, had an adverse effect on the nation's economic well-being.

The Court found that under these theories, Congress would have virtually unlimited power, as it could regulate any activity that might lead to violent crime, or any activity that it found was related to the economic productivity of individual citizens. *Id*. at 564. To accept this reasoning, said the Court, would be tantamount to converting Congress's authority under the Commerce Clause to a "general police power of the sort retained by the States" and would blur the distinction between "what is truly national and what is truly local." *Id*. at 567-68.

The court summed up:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at 567.

C. *Bass* and *Scarborough*

Although *Lopez* is the lynchpin of the instant analysis, two pre-*Lopez* cases analyzing the federal felon-with-a-gun statute must be added to the mix: *United States v. Bass*, 404 U.S. 336, which the Court cited approvingly in *Lopez*, and *Scarborough v. United States*, 431 U.S. 563 (1977). In these cases, the Court was called upon to interpret 18 U.S.C. § 1202(a), the predecessor statute to 18 U.S.C. § 922(g)(1), which outlaws possession of firearms by convicted felons. Although the Court was not asked in either case to decide whether Congress had exceeded its commerce powers in enacting the statute, both cases nonetheless have significant Commerce Clause implications.

In *Bass*, the Court had to decide whether the statutory phrase "in commerce or affecting commerce" in the predecessor statute to § 1202(a) applied to "possesses" and "receives" as well as "transports."[1] After finding that the statute was ambiguous, the Court concluded that the phrase modified all three offenses; therefore the statute did not reach the mere possession of firearms. *See Bass*, 404 U.S. at 340-50. Two principles of statutory construction led the Court to adopt the narrower reading of the statute. First, the Court noted that ambiguity in the criminal law should be resolved in favor of leniency. *Id*. at 347-48. Second, the Court found that absent proof of some interstate commerce nexus in each case, § 1202 (a) would "dramatically intrude" upon an area of criminal jurisdiction

[1] Section 1202(a) made it a crime for convicted felons and other categories of individuals to "receive[], possess[], or transport[] in commerce or affecting commerce . . . any firearm . . .".

traditionally exercised by the states. Absent a clear statement from Congress, the Court was unwilling to assume that Congress intended to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id*. at 349-50. Because the government had made no attempt to show that the firearms possessed by defendant had any nexus to interstate commerce, the Court did not decide what would constitute an adequate nexus with commerce under the statute.

The Court resolved that question six years later in *Scarborough*. There, the Court rejected defendant's claim that the statute required the government to show that the commerce nexus was contemporaneous with his possession of the firearm. Instead, the Court upheld the lower courts' determination that the nexus requirement was satisfied by proof that the firearm had traveled at some previous time in interstate commerce. Noting that Congress had found expressly that "the receipt, possession, or transportation of a firearm by felons . . . constitutes a burden on commerce or threat affecting the free flow of commerce," the Court inferred that Congress intended to assert "its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce" and not merely activities "in commerce." *Scarborough*, 431 U.S. at 571.

Moreover, the statute's legislative history revealed that "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred." *Id*. at 577. Indeed, found the Court, "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of Title VII [of the Omnibus

Crime Control Act of 1968]." *Id*. at 575, n. 11. In fact, had Congress expressed its intent more clearly, the Court might have decided *Bass* differently and found that the statute did not require proof of any nexus with interstate commerce. Having concluded that a nexus was required, however, the Court found there was "no question" that Congress intended that it be no more than minimal. *Id*. at 577.

D. Legal Challenges After *Lopez*

(1) Lower Court Decisions

Not surprisingly, after *Lopez* federal courts were inundated with challenges to various federal statutes on the ground that Congress had exceeded its Commerce Clause powers. Many of these challenges were directed at § 922(g)(1) which makes it unlawful for convicted felons "to possess in or affecting commerce any firearm or ammunition . . . ." *See* 18 U.S.C. § 922(g). Although legal scholars disagree on the impact of *Lopez*[2], the federal circuit courts quickly concluded that *Lopez* had no impact on the constitutionality of §922(g)(1).

The Seventh Circuit's opinion in *United States v. Bell*, 70 F.3d 495 (7th Cir. 1995), typifies the reasoning employed by the courts in rejecting the contention that § 922(g)(1)

[2] *Compare* Calabresi, "*A Government of Limited and Enumerated Powers*": *In Defense of United States v. Lopez*, 94 Mich. L. Rev. 752, 752 (1995) (calling *Lopez* "a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers") *with* Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 Mich. L. Rev. 554, 554 (1995) (opining that "*Lopez* is [un]likely to inaugurate a major change in the Court's inclination to uphold federal regulation").

was an unconstitutional exercise of Congress's power under the Commerce Clause. In concluding that § 922(g)(1) was unaffected by *Lopez*, the court found that

> [s]ection 922(g)(1) does not suffer from the same infirmities [identified by the Court with respect to 922(q)]. It contains an explicit requirement that a nexus to interstate commerce be established. It makes it unlawful for a felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm . . .." . . . In other words, to secure a conviction under § 922(g)(1) the government had to prove exactly what *Lopez* found missing under § 922(q).

Bell, 70 F.3d at 498. Also, the court indicated that it saw nothing in *Lopez* to undermine *Scarborough*'s holding that the "mere movement of a weapon, at some time, across state lines" was sufficient to satisfy the commerce nexus of § 922(g)(1). *Id*.

The Sixth Circuit reached the same conclusion in *United States v. Chesney*, 86 F.3d 568 (6th Cir. 1996). In addition to the fact that all of the other courts of appeals had sustained § 922(g)(1) on the ground that it contained an express jurisdictional element, the court found it significant that the *Lopez* court had cited with approval former § 1202(a), as interpreted in *United States v. Bass*, as an example of a statute containing an express jurisdictional element. Although it recognized that the *Bass* court addressed a question of statutory construction and did not decide the constitutionality of § 1202(a), the *Chesney* court determined that "the citation of *Bass* in *Lopez* strongly implies that the jurisdictional element was sufficient." *Id*. at 569 (quoting *United States v. Turner*, 77 F.3d 887, 889 (6th Cir. 1996)). Because the jurisdictional element of § 922(g)(1) was virtually identical to the

jurisdictional element of § 1202(a), the court concluded that "under the very language of *Lopez*, § 922(g)(1) is constitutional on its face . . . ." *Id*.

Although the courts have decisively rejected "facial" challenges to § 922(g)(1) and its companions, they have been more reflective toward "as applied" challenges which raise the question whether *Lopez* altered the "minimal nexus" requirement established in *Scarborough*.

In *Chesney*, 86 F.3d 564, the Sixth Circuit decided that *Lopez* "did not disturb the Supreme Court's precedents which indicate that a firearm that has been transported at any time in interstate commerce has a sufficient effect on commerce to allow Congress to regulate the possession of that firearm pursuant to its Commerce Clause powers." 86 F.3d at 570-71. The court found support for its conclusion in *Scarborough*, noting that "although *Scarborough* was decided as a matter of statutory construction, the Court noted that Congress knew how to assert 'its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce,' and that Congress intended to exercise the full extent of its Commerce Clause power when enacting § 1202(a)." *Chesney*, 86 F.3d at 571 (quoting *Scarborough*, 431 U.S. at 571-72). The court found that this language, coupled with the Court's silence on the constitutionality of the statute, indicated that the Court believed that § 1202(a) as construed, and thus § 922(g)(1), clearly was within Congress's power. *Id*. (noting that "when the Court construes a statute to avoid a constitutional question, the Court's construction must itself be constitutional"). The court found additional support for its conclusion in *Bass*, where the Court construed § 1202(a) as requiring a nexus to

commerce "in part to avoid the constitutional question." *Id*. *Accord United States v. McAllister*, 77 F.3d 387, 90 (11th Cir. 1996) ("Nothing in *Lopez* suggests that the "minimal nexus" test should be changed"); *United States v. Hanna*, 55 F.3d 1456, 1462 n. 2 (9th Cir. 1995) (relying on *Lopez*'s reference to § 1202(a) as support for constitutionality of *Scarborough*'s "minimal nexus" requirement); *United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam) (affirming continued vitality of *Scarborough*); *United States v. Sorrentino*, 72 F.3d 294, 296-97 (2d. Cir. 1995) (same). *Contra Chesney*, 86 F.3d at 581-82 (Batchelder, J., concurring)(disagreeing that Court's silence in *Scarborough* and *Bass* constitutes implicit finding that § 922(g)(1) is constitutional).

The court in *Chesney* took the analysis a step further and concluded that § 922(g)(1) as construed to require only a minimal nexus to commerce could be sustained under *Lopez* "as part of a statutory framework prohibiting felons from interstate trafficking in firearms." 86 F.3d at 571. The court reasoned that

> [p]rohibiting possession by felons limits the market for firearms, and discourages shipping, transporting, and receiving firearms in or from interstate commerce. Regulation of interstate gun trafficking, which is clearly commercial activity, is thus facilitated by regulation of possession in or affecting commerce. This satisfies both the spirit and language of *Lopez*, and can "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."

Id. at 571-72 (quoting *Lopez*, 514 U.S. at561). *See also McAllister*, 77 F.3d at 390 ("When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals.")

In *United States v. Lewis*, 100 F.3d 49 (7th Cir. 1996), the Seventh Circuit amplified its conclusion in *Bell* that *Lopez* had not affected the continued vitality of *Scarborough*. Tracking the analysis in *Chesney,* the court found that "*Lopez*'s own approving citation to *Bass* and the minimal showing of a connection to interstate commerce *Bass* found sufficient to avoid a constitutional question confirms that *Lopez* changed nothing in that regard." *Id*. at 52 (citations omitted).

The court acknowledged that Lewis's possession of a gun manufactured in Hungary that apparently had not crossed a state line for "years, or even decades" probably did not have much impact an interstate commerce. *See Lewis*, 100 F.3d at 52. However, the court agreed with *Chesney* that a "a single journey across state lines, however remote from the defendant's possession," was enough to establish the constitutionally minimal tie of a weapon to interstate commerce because it was part of "a framework of regulation whose connection to interstate commerce is more apparent." *Id*. Quoting from *Chesney*, the court agreed that the statute could be sustained under *Lopez* because, when viewed in the aggregate, the statute would affect the flow of guns in interstate commerce to criminals. *Id*. at 52-53 (quoting *Chesney*, 86 F.3d at 571-72 and *McAllister*, 77 F.3d at 390).

In *United States v. Rawls*, 85 F.3d 240, the Fifth Circuit was more pointed in questioning whether a firearm's travel across a state line actually affected interstate commerce. Although the court ultimately upheld the minimal nexus requirement, it might have reached a different result were it writing on a clean slate, untarnished by *Scarborough*:

> If the matter were *res nova*, one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce. It is also difficult to understand how a statute construed never to require any but such a *per se* nexus could "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."

Rawls, 85 F.3d at 243 (Garwood, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

However, like the Sixth Circuit in *Chesney*, the court concluded that because *Scarborough* had held implicitly that the minimal nexus requirement was constitutional and that nothing in *Lopez* expressly purported to question *Scarborough*, it was bound to continue to apply it. *Id*. Additionally, the court noted that § 922(g)(1) contained a jurisdictional element requiring a nexus to interstate commerce, "thus importantly reflecting that Congress was exercising that delegated power and not merely functioning as if it were the legislative authority of a unitary state." *Id*.

The Seventh Circuit has relied on the presence of a jurisdictional element to sustain other provisions of § 922(g) and other criminal statutes. *See United States v. Wilson*, 159 F.3d 280, 286 (7th Cir. 1998) (relying on jurisdictional element to uphold § 922(g)(8)

banning possession by person under domestic restraining order); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 704-05 (7th Cir. 1999) (§ 922(g)(9) (banning possession by person convicted of misdemeanor crime of domestic violence); *United States v. Hardy*, 120 F.3d 76, 77 (7th Cir. 1997) (§ 922(u), theft of firearm from licensed firearm dealer) (per curiam); *United States v. Taylor*, 226 F.3d 593, 600 (7th Cir. 2000) (§ 2119, carjacking).

However, language in a recent Seventh Circuit decision suggests that the mere presence of a jurisdictional element will not automatically ensure that a statute will survive a Commerce Clause challenge. In *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000), the defendant contended that 18 U.S.C. § 2252(a)(4)(B)–which prohibits possession of child pornography that has traveled in interstate commerce or has been produced with materials that have traveled in interstate commerce–was an unconstitutional exercise of Congress' commerce powers because it failed to limit the statute's intrastate application to activity that substantially affected interstate commerce. Although the court ultimately upheld the statute, it declined to do so on the ground that the statute included a jurisdictional element, noting that it "doubt[ed] whether § 2252(a)(4)(B)'s jurisdictional element (particularly with respect to precursor materials) guarantees that the activity regulated (intrastate possession of child pornography) substantially affects interstate commerce . . .." *Angle*, 234 F.3d at 337. Instead, the court upheld the statute as a category three regulation via a market theory, finding that Congress could have rationally believed that outlawing the intrastate possession of child pornography would curb demand for interstate pornography. *Id*.

In reaching its conclusion, the court said it was "inclined to agree" with the Third Circuit in *United States v. Rodia*, 194 F.3d 465 (3rd Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 2008 (2000), which found that "[§ 2252(a)(4)(B)'s] jurisdictional element–the requirement that precursor materials like film or cameras moved in interstate commerce–is only tenuously related to the ultimate activity regulated: intrastate possession of child pornography." *Id*. at 337 (quoting *Rodia*, 194 F.3d at 473).

In *Rodia*, the court rejected the government's suggestion that the presence of a jurisdictional element was always sufficient, reasoning that such a rule "ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce." *Rodia*, 194 F.3d at 472.

> A jurisdictional element is only sufficient to ensure a statute's constitutionality when the element either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power . . .
>
> As a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce and will therefore fall within the sweep of the statute.

Rodia, 194 F.3d at 473 (quoted in *Angle*, 234 F.3d at 336). However, like the court in *Angle*, the Third Circuit upheld the statute on the ground that Congress could have rationally believed that the intrastate possession of pornography has a substantial effect on interstate commerce. *Id*. at 475-77.

(2) *United States v. Morrison*

Last year, the Supreme Court reaffirmed the principles set forth in *Lopez* in *United States v. Morrison*, ___ U.S. ___, 120 S. Ct. 1740 (2000), a case challenging a provision in the Violence Against Women Act, 42 U.S.C. § 13981(b), that provided a federal civil remedy for the victims of gender-motivated violence. Referring back to the considerations underlying its decision in *Lopez*, the court struck down the provision, finding that gender-motivated crimes of violence are not economic activity and that § 13981 contained no jurisdictional element "establishing that the federal cause of action was in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 120 S. Ct. at 1751-52. Regarding the jurisdictional element, the court stated: "Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime." *Id*.

Additionally, even though Congress supported the statute with specific findings regarding the serious impact that gender-motivated violence has on victims and their families and the effect that such violence would have on interstate commerce, the Court found that Congress' reasoning–that gender-motivated violence affects interstate commerce in ways such as deterring potential victims from traveling interstate, from engaging in employment and transacting in interstate business–was too strained a basis on which to uphold the statute as valid Commerce Clause legislation. After noting that the Court has the final say whether a

particular activity affects interstate commerce sufficiently to allow Congress to regulate it, the Court found that to accept Congress' reasoning would "allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption" and would unduly interfere with the police power of the States. *Id*. at 1752-54.

Unfortunately, the Court's opinion in *Morrison* failed to clarify the extent to which a jurisdictional element would save an otherwise unconstitutional statute. However, the Court did clarify what it had suggested in *Lopez* regarding Congressional findings: Congress may not insulate legislation from Commerce Clause scrutiny merely by setting to paper its judgment that a particular activity affects interstate commerce. *See Morrison*, 120 S. Ct. at 1752 ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.") (citation omitted).

E. The New § 922(q)

Having explored the relevant legal landscape, it's time to circle back to the statute at issue in the instant case. In response to the flaws identified by the Supreme Court in *Lopez*, Congress enacted a new version of § 922(q) in 1996:

> It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

18 U.S.C. § 922(q)(2)(A).

In addition to including a jurisdictional element, the statute is supported by a number of Congressional findings regarding the effect of gun possession in a school zone on interstate commerce. 18 U.S.C. § 922(q)(1). Specifically, Congress found as follows:

> (A) crime, particularly crime involving drugs and guns, is a pervasive nationwide problem;
>
> (B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;
>
> (C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary [in] the House of Representatives and the Committee on the Judiciary of the Senate;
>
> (D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerable moved in interstate commerce;
>
> (E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;
>
> (F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;
>
> (G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;
>
> (H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves–even States, localities, and school systems that have made strong efforts to

> prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and
>
> (I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

Hoffmeyer contends that if this statute is to be upheld, it must be as a category three regulation of an activity that substantially affects interstate commerce. Hoffmeyer acknowledges that the new § 922(q)(2) has an explicit jurisdictional element requiring that the firearm "has moved in or . . . otherwise affects interstate or foreign commerce," but he argues that the jurisdictional element is insufficient by itself to render the statute constitutional. According to Hoffmeyer, the jurisdictional element applies only to the firearm itself and does not alter the fact that the *activity* sought to be regulated–possessing a gun in a school zone–is a non-economic crime that has nothing to do with commerce or any sort of economic enterprise. Finally, defendant contends that the Congressional findings are nothing more than a "warmed-over" version of the attenuated but-for reasoning that the Supreme Court rejected in *Lopez* and *Morrison*.

The government does not challenge Hoffmeyer's contention that the statute is properly analyzed as a category three regulation. The government defends § 922(q) by arguing that the jurisdictional element brings the statute within Congress' power under the Commerce Clause, pointing to the overwhelming number of cases in which the courts have

relied on the presence of a jurisdictional element to uphold various gun statutes after *Lopez*. In the only case challenging the revised version of § 922(q), the Eighth Circuit found this reasoning persuasive and rejected the defendant's facial challenge to the statute, holding that the amended statute was a constitutional exercise of Congress's Commerce Clause power. *See United States v. Danks*, 221 F.3d 1037, 1038 (8th Cir. 1999) ("Like section 922(g), section 922(q) contains language that ensures, on a case-by-case basis, that the firearm in question affects interstate commerce"), *cert. denied*, 528 U.S. 1091 (2000). (Although it is unclear whether the defendant had also contended that the statute was unconstitutional as applied, in affirming the conviction the court implicitly held that proof that the firearm had moved in interstate commerce was sufficient to establish the commerce nexus. *See id*.)

Although I think Hoffmeyer is correct, it's not as if this is not a cut-and-dried decision for the court. Therefore, after presenting the reasons why this court should strike the statute, I will present reasons that might convince the court to uphold it.

F. The Statute is Unconstitutional

Contrary to the government's suggestion, the presence of a jurisdictional element does not guarantee that a statute will be upheld as a valid exercise of Congress' commerce powers. *See Morrison*, 120 S. Ct. at 1751 ("a jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce") (emphasis added); *Rodia*, 194 F.3d at 472. As the court explained in *Rodia*, a jurisdictional element will guarantee a

statute's constitutionality only "when the element either limits the regulation to interstate activity or ensures that the activity to be regulated falls within one of the three categories of congressional power." *Id*. at 473; *see also Angle*, 234 F.3d at 337 (indicating that court was inclined to agree with this reasoning); *Lopez*, 514 U.S. at 561 (implying that jurisdictional elements are useful only when they can ensure, through case-by-case inquiry, that regulated activity affects interstate commerce).

Although § 922(q)(2)(A)'s jurisdictional requirement provides a link between the firearm and interstate commerce, it fails to guarantee that the activity to be regulated–the intrastate possession of a firearm in a school zone–substantially affects interstate commerce. As Hoffmeyer points out, the jurisdictional element guarantees only that the *firearm* has some connection to interstate commerce; it does not tie the act of possessing that firearm in a school zone to interstate commerce in any meaningful way. This is what *Lopez* requires. *See Lopez*, 514 U.S. at 567 (criticizing predecessor statute because it did not require that defendant's "*possession of the firearm* have any concrete tie to interstate commerce.") (emphasis added). *See also Rawls*, 85 F.3d at 243 ("[O]ne might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce.")

As with the precursor child pornography items discussed in *Rodia*, merely requiring that a firearm move in or otherwise affect interstate commerce will have no practical effect,

since nearly all firearms have moved in interstate commerce. The statute can be characterized more accurately as a regulation of local schools rather than as a genuine regulation of those firearms that have affected interstate commerce. The jurisdictional element in § 922(q)(2)(A) simply fails to address the federalism concerns that the Court identified in *Lopez*.

Likewise, the findings cited by Congress in support of the statute are insufficient to establish that it had a rational basis for concluding that possession of a firearm in a school zone substantially affects interstate commerce. These findings employ the same faulty reasoning rejected in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 564-65; *Morrison*, 120 S. Ct. at 1752-53. As the Court explained in *Lopez*:

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564. There is simply no significant difference between the new "official" Congressional findings and the "unofficial" reasons offered by the government and rejected

by the Court. As a result, Congress's findings fail to supply the rational relationship between possessing a firearm in a school zone and interstate commerce.

A conclusion that Congress exceeded its commerce powers in enacting § 922(q)(2)(A) seems to run counter to the sweeping language employed by various courts suggesting that Congress has broad authority when it comes to regulating firearms, so long as there is a jurisdictional element requiring the firearm to have traveled in interstate commerce. *See, e.g., Taylor*, 226 F.3d at 600 (upholding constitutionality of carjacking statute, stating that "[r]epeatedly since *Lopez* we have held that a jurisdictional element ensures sufficient nexus with interstate commerce to withstand Commerce Clause challenges."); *Hardy*, 120 F.3d at 77 ("A weapon's having moved across state lines satisfies the jurisdictional element of the Commerce Clause"); *Chesney*, 86 F.3d at 570-71 (stating that *Lopez* "did not disturb the Supreme Court's precedents which indicate that a firearm that has been transported at any time in interstate commerce has a sufficient effect on commerce to allow Congress to regulate the possession of that firearm pursuant to its Commerce Clause powers.").

However, these cases must be viewed in context. Notably, the courts initially employed broad supportive language in cases challenging § 922(g)(1), a hoary statute whose constitutionality had not been questioned in the nearly 20 years since *Scarborough* and to which the Supreme Court seemed to have given a *sub silentio* pass in *Lopez*. Moreover, despite the various courts' reliance on the presence of a jurisdictional element as a basis for upholding § 922(g)(1), the more persuasive opinions took the extra step and found that the

statute could be sustained under *Lopez* as part of "a framework of regulation whose connection to interstate commerce is more apparent." *See, e.g., Lewis*, 100 F. 3d at 52, *Chesney*, 86 F.3d at 571-72, and *McAllister*, 77 F.3d at 390 (when viewed in aggregate, § 922(g)(1) regulates interstate gun trafficking by affecting flow of guns in interstate commerce to criminals). *See also Taylor*, 226 F.3d at 599-600 (discussing significance of carjacking's statute's jurisdictional element only after concluding that statute was part of "comprehensive federal legislation addressing the economic problem of interstate automobile theft"). Unfortunately, these cases are often cited in subsequent cases to stand for the sweeping proposition that "a jurisdictional element ensures sufficient nexus with interstate commerce to withstand Commerce Clause challenges," without any mention of the fact that the court also analyzed whether the regulated activity, when viewed in the aggregate, had an effect on commerce. *See id.* at 600 (citing cases).

In contrast to § 922(g)(1) and its direct progeny, § 922(q) has not been on the books for two decades during an era in which Congress enjoyed virtually limitless Commerce Clause authority. Moreover, while § 922(g) and other possession statutes arguably regulate the national market for firearms by prohibiting certain individuals from possessing firearms, § 922(q) does not regulate possession as such, but regulates how a firearm may be used in discrete and local areas of the states by an individual who otherwise may legally possess a firearm. As Hoffmeyer points out, what made his conduct illegal was not the *fact* that he possessed firearms, but simply *where* he possessed them: had he possessed the same firearms

a block away, he would have been outside the statute's reach. Nor would § 922(q)(2)(A) have reached Hoffmeyer if he had taken one more small step and locked the cases in which his unloaded firearms were already ensconced.[3] Viewed in this light, it is difficult to see how Hoffmeyer's activity, even when viewed in the aggregate, can bear any rational relationship to interstate commerce, unless one adopts the attenuated reasoning invalidated in *Lopez* and *Morrison*. Section § 922(q) simply cannot be sustained via a market theory.

Like its predecessor, § 922(q)(2)(A) is a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." To adopt the government's position and find that the jurisdictional element saves the statute would mean that Congress may constitutionally regulate the use of *any* item so long as it has crossed state lines on one occasion. Clearly, such a broad reading of *Lopez* would be inconsistent with the Court's concerns that there be meaningful limits to Congress's commerce power.

So on what basis did the Eighth Circuit reach a different conclusion in *Danks*? We can't be sure, because the court did not explain how the statute's requirement that the firearm travel in or affect interstate commerce would ensure that the activity to be regulated–intrastate possession of a firearm in a school zone–substantially affected interstate commerce. With all due respect, I recommend that this court decline to follow the Eighth

[3] As discussed below, because the guns were cased and unloaded, Hoffmeyer was in compliance with state law. But for the turn of a key, Hoffmeyer would have had no criminal exposure whatsoever.

Circuit's opinion because the court bypassed a critical issue. Instead, for the reasons just stated, this court should find that § 922(q)(2)(A) is unconstitutional.

G. A Possible Alternate Conclusion

If the court is not convinced by the previous section, there is probably a basis on which the court could uphold the statute. Obviously, I'm not convinced, but I'm not the final decision maker, so I offer this analysis for the court's consideration and possible adoption:

By specifically amending § 922(q)(2)(A) to require that the firearm possessed in a school zone "has moved in or . . . otherwise affects interstate or foreign commerce," Congress has limited the statute's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Although I agree with Hoffmeyer's contention that the presence of a jurisdictional element does not guarantee that a statute will be upheld as a valid exercise of Congress' commerce powers, *see Morrison*, 120 S. Ct. at 1751 ("a jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce") (emphasis added), this court could find that this element is sufficient with respect to § 922(q)(2)(A). In particular, as other courts have noted, the *Lopez* Court cited approvingly to *United States v. Bass*, in which the court implied that Congress had the authority under the Commerce Clause to regulate the possession of firearms so long as the government demonstrated that

the firearms had a nexus with interstate commerce. Importantly, *Bass* set the stage for the Court's follow-up opinion in *United States v. Scarborough*, which held that Congress need only show that the firearm had traveled at some time in interstate commerce in order to meet the nexus requirement.

The Court did not indicate in *Lopez* that it was questioning Congress's longstanding authority to regulate the possession of firearms that had at one time traveled in interstate commerce. As the Sixth Circuit declared in *Chesney*, *Lopez* "did not disturb the Supreme Court's precedents which indicate that a firearm that has been transported at any time in interstate commerce has a sufficient effect on commerce to allow Congress to regulate the possession of that firearm pursuant to its Commerce Clause powers." 86 F.3d at 570-71; *see also Hardy*, 120 F.3d at 77 ("A weapon's having moved across state lines satisfies the jurisdictional element of the Commerce Clause"). I am aware of no case after *Lopez* in which a court of appeals has invalidated a federal firearms statute on the ground that Congress did not have authority under the Commerce Clause to enact it.

Although Congress has made specific findings that purport to demonstrate a link between gun possession in a school zone and interstate commerce, these findings suffer from the same analytical weaknesses that plagued the Court in *Lopez*. Nonetheless, because the statute no longer seeks to regulate all possessions of firearms in school zones but is now limited to regulating only those firearms that have moved in or otherwise affect interstate commerce, this court might choose to view these findings as Congress hedging its bets.

Admittedly, limiting the reach of the statute to firearms that have traveled in interstate commerce will have little practical effect, for nearly all firearms will meet that requirement. However, some courts have found that the Court's citation in *Lopez* to § 922(g)(1)'s predecessor suggests that, at least where firearms are concerned, Congress has broad authority under the Commerce Clause to regulate so long as the firearms have traveled in interstate commerce. Although the former § 922(q) represented a "sharp break with the long-standing pattern of federal firearms legislation," *see Lopez*, 514 U.S. at 563 (citation omitted) because it regulated purely intrastate firearm possessions, the new § 922(q)(2)(A)'s reach is limited to a discrete set of firearm possessions that have an "explicit connection" to interstate commerce. As such, it is merely another incremental step in Congress' long history of regulating firearms, whether the jurisdictional element has a practical effect or not.

If the court finds this analysis more compelling, it should uphold the statute and deny Hoffmeyer's motion to dismiss the indictment.

IV. Motion to Dismiss: Preemption by Wisconsin's Gun Free School Zones Law

In the event the court determines that § 922(g)(2)(A) is constitutional, then it must consider Hoffmeyer's second motion to dismiss, in which he contends that § 922(g)(2)(A) is preempted by Wisconsin's law establishing gun free school zones, Wis. Stat. § 948.605.

Hoffmeyer's alleged conduct is not illegal under that statute because the firearms were unloaded and encased. *See* Wis. Stat. § 948.605(2)(b)3.a. Latching onto this, Hoffmeyer

reasons as follows: 1) as a general rule, there can be no divided authority over interstate commerce and the acts of Congress on that subject are supreme and exclusive; 2) however, when Congress has chosen not to regulate a part of the subject that is particularly suitable to local regulation, then the states retain the authority to legislate; 3) in § 922(q)(4), Congress expressly gave the states the authority to legislate in this area by establishing gun free school zones [4]; 4) Wisconsin has exercised the authority via Wis. Stat. § 948.605; thus, 5) because there is no divided authority over interstate commerce and because Congress expressly allowed Wisconsin to legislate in this area, then state law must preempt federal law.

Although Hoffmeyer's points are accurate in isolation, they do not tell the whole story. The Supremacy Clause allows Congress to impose its will on the states so long as it is acting within the powers granted it under the Constitution. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This is a one-way street: when Congress allows additional state regulation beyond what Congress has enacted, the state's statutes simply do not–indeed, cannot–preempt federal law.

The primary flaw in Hoffmeyer's argument is his contention that Wisconsin's gun free school zones law is an attempt to regulate interstate commerce. It isn't. It is an exercise of Wisconsin's traditional authority to pass laws regulating the health and safety of its citizens. As such, there is no "divided authority over interstate commerce" that gives rise to

[4] Section 922(q)(4) provides: Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

preemption concerns. Simply because a state law overlaps with an area that Congress has seen fit to regulate under its commerce powers does not mean that the state law is supreme, even where Congress has expressly provided that it did not intend to prevent the state from simultaneously regulating in the same sphere. As the government points out, Congress has enacted various statutes under the Commerce Clause that have state counterparts with different elements. *Compare, e.g.,* 18 U.S.C. § 922(g)(1) with Wis. Stat. § 941.29 (felon in possession of firearms); 18 U.S.C. § 844(i) with Wis. Stat. § 943.02 (arson).

The government is correct: nothing in § 922(q)(4) suggests that Congress intended to defer to state gun-free school zone laws when the federal and state laws conflict. To the contrary, the subsection is better read as invitation to the states to pass legislation even more restrictive than that passed by Congress.

CONCLUSION

My first recommendation is that this court grant Hoffmeyer's motion to suppress evidence derived from his seizure in the school parking lot. If the court accepts this recommendation, then there is no need to reach Hoffmeyer's motions to dismiss. If the court reaches the dismissal motions, then it faces a relatively close question. Although there are valid arguments in both directions, I think the new statute suffers from the same defects as the old one and should be stricken.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court:

1) Grant defendant's motion to suppress evidence derived from his seizure;

2) Grant defendant's motion to suppress evidence derived from the search warrant;

3) Grant defendant's motion to dismiss on the ground that 18 U.S.C. § 922(q) is unconstitutional; and

4) Deny defendant's motion to dismiss on the ground of state preemption.

Entered this 25th day of January, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge