

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. ALFONSO LOPEZ, JR.

CASE NO: 93-1260

PLACE: Washington, D.C.

DATE: Tuesday, November 8, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
v. : No. 93-1260  
ALFONSO LOPEZ, JR. :  
- - - - -X

Washington, D.C.  
Tuesday, November 8, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.  
JOHN R. CARTER, ESQ., San Antonio, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-1260, United States v. Alfonso Lopez, Jr.

General Days.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE PETITIONER

GENERAL DAYS: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the court of appeals has taken the extraordinary step of invalidating an act of Congress as being beyond its power under the Commerce Clause. The act in question, known as the Gun-Free School Zones Act of 1990, makes it unlawful for any individual knowingly to possess a firearm within a distance of 1,000 feet from the grounds of an elementary or secondary school.

The court of appeals held the statute unconstitutional because neither the statute nor its legislative history contained express congressional findings identifying the nexus between interstate commerce and gun possession in schoolyards.

The court of appeals reached its erroneous result, in our estimation, through a fundamental misreading and misapplication of the precedents of this

1 Court. First, the court imposed on Congress a requirement  
2 that it make judicial -- make legislative findings as to  
3 the nexus between the activity it was regulating here and  
4 interstate commerce to satisfy the court that it was  
5 exercising that power in a constitutional manner.

6 In doing so, the court of appeals essentially  
7 treated Congress as though it was subject to procedural  
8 rules that would be appropriate in the context of a  
9 judicial or administrative proceeding, but not where  
10 Congress was legislating for the entire Nation pursuant to  
11 its plenary powers under the Constitution.

12 QUESTION: Well, if we were concerned that the  
13 original understandings and structural theories that  
14 underlay the Federal system have been so eroded that that  
15 whole system is in danger, I take it that it would be  
16 appropriate for us to consider some procedural guarantees.

17 GENERAL DAYS: Yes, and this Court has  
18 considered and imposed certain procedural guarantees  
19 where, for example, it felt that Congress was legislating  
20 in a way that encroached upon the operations of State  
21 governments, as in the case of New York v. United States,  
22 where this Court held that Congress could not legislate to  
23 the extent it did to require that the States take title to  
24 certain nuclear waste.

25 It's done so under what has been referred to in

1 the court of appeals decision as the clear statement rule,  
2 or the plain statement rule, that where there are  
3 incursions upon Government operations, that Congress has  
4 to make its intent to exercise its authority to the  
5 fullest extent clear in the legislation, and there cannot  
6 be any ambiguity in that respect.

7 But what this Court has been doing is looking  
8 at, as it properly should, limitations on the exercise of  
9 the Commerce Clause found within the Constitution itself,  
10 and not based upon some generalized concern that Congress  
11 was going too far in carrying out that responsibility.

12 QUESTION: Well, let's do exactly that, and ask  
13 whether the simple possession of something at or near a  
14 school is commerce at all. Is it?

15 GENERAL DAYS: I think the answer to that is  
16 that it is, yes, Your Honor.

17 QUESTION: I would have thought that it wasn't,  
18 and I would have thought that it, moreover, is not  
19 interstate.

20 GENERAL DAYS: Justice O'Connor --

21 QUESTION: If this is covered, what's left of  
22 enumerated powers? What is there that Congress could not  
23 do, under this rubric, if you are correct?

24 GENERAL DAYS: Justice O'Connor, that certainly  
25 is a question that one might ask, but this Court has asked

1 that question in a number of other circumstances, and  
2 rather than starting from the assumption that something  
3 was inherently local, it's looked at the degree to which  
4 Congress had a reasonable basis for extending its  
5 authority under the commerce power to regulate that  
6 particular activity.

7 QUESTION: But in some of those very cases,  
8 General Days, the statement is found that the power is not  
9 limitless.

10 GENERAL DAYS: Well, that is certainly the case,  
11 Chief Justice Rehnquist. That's an understanding from the  
12 Constitution, but one has to look at where the limitations  
13 are that are imposed by the Constitution itself.

14 QUESTION: Well, what would be -- if this case  
15 is -- Congress can reach under the interstate commerce  
16 power, what would be an example of a case which you  
17 couldn't reach?

18 GENERAL DAYS: Well, Your Honor, I'm not  
19 prepared to speculate generally, but this Court has found  
20 that Congress, for example, in New York v. United States  
21 could not regulate -- could not require New York State to  
22 carry out certain responsibilities, because it was  
23 commandeering the instrumentalities of the State.

24 QUESTION: Well, the objection there was that it  
25 was objecting the State governmental machinery to operate

1 in a certain way. The question here, it seems to me, is  
2 quite different. The question here is the universe of  
3 transactions that the Congress may reach.

4 GENERAL DAYS: Yes.

5 QUESTION: Can you tell me, Mr. Days, has there  
6 been anything in our recent history in the last 20 years  
7 where it appears that Congress made a considered judgment  
8 that it could not reach a particular subject?

9 (Laughter.)

10 GENERAL DAYS: I don't know whether there's been  
11 a conscious effort to do that, but I think as this Court  
12 has said in its Tenth Amendment jurisprudence that  
13 Congress reflects the will of the people, and it has built  
14 into it, and into its operations, a concern about the  
15 extent to which its regulations and its legislation would  
16 encroach on matters that have been traditionally left to  
17 the State.

18 QUESTION: Mr. Days, we have really not been  
19 too -- what should I say, too strict about, you know, what  
20 the farthest reach of the Commerce Clause may be.

21 But as I read our cases, the ones that are most  
22 often cited, indeed, I think all of them, involve the  
23 issue of whether some commercial activity of some sort --  
24 renting a hotel room, growing a commodity that is used in  
25 commerce -- whether some commercial activity is interstate

1 commerce or not, and one can say we're prepared to be very  
2 broadminded about that. If Congress says some commercial  
3 activity is interstate commerce, or affects interstate  
4 commerce, that's okay.

5 But here you have regulation of something that  
6 is not commercial activity in any sense of the word,  
7 merely the possession of an item.

8 GENERAL DAYS: Your Honor, two --

9 QUESTION: Might we not apply a different rule  
10 in that case than we do -- I mean, give up the whole realm  
11 of commerce to the Federal Government. Say, anything that  
12 relates to commerce, the Federal Government can control,  
13 securities regulation, all sorts of things.

14 GENERAL DAYS: Well, I have two --

15 QUESTION: But it has to relate to commerce.  
16 This doesn't relate to commerce, even.

17 GENERAL DAYS: I have two responses. One, this  
18 Court did decide, in a case called Preseault v. ICC, that  
19 Congress could use its commerce powers to convert rights  
20 of ways to recreational uses for hiking trails, and there  
21 was no indication that that particular objective by  
22 Congress was a commercial objective.

23 But I think we have to keep in mind that the  
24 Commerce Clause -- the Commerce Clause has been viewed as  
25 dealing with three areas, the channels of commerce itself,

1 instrumentalities of commerce, but in recent years, in  
2 fact for many of the past couple of decades, what this  
3 Court has found is that activities that affect commerce  
4 are also reachable by Congress under the Commerce --

5 QUESTION: Noncommercial activities that affect  
6 commerce. What cases do you have that involve that?

7 GENERAL DAYS: Well, it's not --

8 QUESTION: Noncommercial activities that affect  
9 commerce.

10 GENERAL DAYS: If one looks, Justice Scalia, for  
11 example, at the regulation of firearms, certainly Congress  
12 was concerned about the degree to which transfer or  
13 possession in some instances affected interstate commerce,  
14 but I think it also recognized that having a gun in and of  
15 itself is not interstate commerce, it's the impact of  
16 certain activity on interstate commerce.

17 For example, the rules that limit the types of  
18 persons who can possess firearms, it's not suggesting that  
19 that particular regulation --

20 QUESTION: I understand --

21 GENERAL DAYS: -- has to do with interstate  
22 commerce.

23 QUESTION: -- but have we ever held -- I'm  
24 talking about cases of ours. What cases of ours would  
25 stand in the way of a stricter -- of a stricter Commerce

1 Clause jurisprudence where the activity in question is not  
2 commercial activity? What cases --

3 GENERAL DAYS: I don't believe that the issue  
4 has been clearly presented, Justice Scalia, but I think  
5 that what this Court has operated upon as an initial  
6 assumption is that Congress was given the power under the  
7 Constitution to legislate directly upon private  
8 individuals, and that there are no built-in limitations on  
9 the Constitution.

10 QUESTION: General Days, just to understand what  
11 we're talking about, do I correctly understand your  
12 position to be, your rationale for this --

13 GENERAL DAYS: Yes.

14 QUESTION: -- that all violent crime, if  
15 Congress so desired, could be placed under a Federal wing,  
16 could be placed in the Federal court for prosecution, all  
17 violent crime, or is there any stopping point? Is there  
18 any violent crime that doesn't affect interstate commerce  
19 on you rationale?

20 GENERAL DAYS: Well, Your Honor, I think that  
21 the answer is that it may be possible for Congress to do  
22 that under the commerce power. Again, one would have to  
23 look at was Congress legislating rationally, with a  
24 rational basis for thinking that regulating violence would  
25 have an impact on interstate commerce, would have -- would

1 be the type of activity that affected instate commerce?

2 But what we have in this particular act is not  
3 that bold assertion by Congress. What we have is, first  
4 of all, enough evidence to meet the test that this Court  
5 has set that Congress had a rational basis for thinking  
6 that gun possession on or near school grounds affected  
7 interstate commerce.

8 One was the relationship between violence itself  
9 and the economic activity of the country. To the extent  
10 that there is violence in certain parts of the country, it  
11 makes it difficult for institutions to function. There is  
12 the insurance consequence. Where violence occurs,  
13 insurance burdens are shared by the entire country, not  
14 just by the locale where this particular violence occurs.

15 It interferes in the same way that this Court  
16 found in Heart of Atlanta Motel with respect to the travel  
17 of persons in the face of segregation in places of public  
18 accommodations. It interferes with the willingness of  
19 people to travel to certain parts of the country --

20 QUESTION: General Days --

21 GENERAL DAYS: -- where there is violence  
22 present. Yes.

23 QUESTION: May I test a different way of reading  
24 the congressional rationale?

25 What if Congress had said, as part of its

1 thought process expressed in the amendment, that the  
2 States, for whatever reason, violence, or whatever reason,  
3 had simply proven incapable of providing sufficient  
4 education in math and technology, that in the long run was  
5 a threat to commercial activity, and as a response to  
6 that, Congress was, in fact, going to nationalize the  
7 schools, and it in effect would provide a Federal public  
8 school education for every child from kindergarten on up?  
9 Would that be justifiable under the Commerce Clause?

10 GENERAL DAYS: Well, that's certainly one of the  
11 concerns that's been expressed, but I think that this  
12 Court has readily available to it a way of analyzing that,  
13 and that in reading New York v. United States, one would  
14 have to be concerned whether this particular activity was  
15 imposing statutory requirements on the State, or --

16 QUESTION: It's relieving the State --

17 GENERAL DAYS: -- making local governments  
18 assume responsibility.

19 QUESTION: It's relieving the State of a burden,  
20 saying you don't have to pay for this any more. We'll  
21 take care of it.

22 GENERAL DAYS: Well, certainly --

23 QUESTION: Federal schools with Federal  
24 teachers, all Federal money --

25 GENERAL DAYS: Certainly, pursuant to the

1 spending power, Congress could provide that type of  
2 support, but I think it would raise questions in this  
3 Court's jurisprudence as to whether Congress was in fact  
4 taking over something that was clearly part of the State  
5 responsibility.

6 QUESTION: But there is no question that  
7 Congress has the power, in effect, to take over crime,  
8 because I --

9 GENERAL DAYS: I do not --

10 QUESTION: -- presume there's no limitation on  
11 your rationale, or on Congress' rationale, that would  
12 preclude it from reaching any traditional criminal  
13 activity.

14 GENERAL DAYS: That's correct. As long as  
15 Congress is dealing with the conduct of individuals --

16 QUESTION: Well --

17 GENERAL DAYS: -- and where there is this  
18 affecting interstate commerce nexus, then Congress should  
19 be permitted to do that, allowed to do that under the  
20 Constitution.

21 QUESTION: General Days, if Congress proscribes  
22 the possession of guns in schoolyards all across the  
23 country, it ought to have an even effect. It isn't going  
24 to improve people's reasons for traveling, is it, because  
25 everyone is equally affected. You're not going to --

1 unless you're -- are you saying that violence as a whole  
2 will be cut down and therefore people will feel freer to  
3 travel in interstate commerce?

4 GENERAL DAYS: Yes, I think that's a reasonable  
5 assumption to think that Congress could have held or  
6 relied upon in enacting this statute.

7 QUESTION: That possession of a gun in a  
8 schoolyard contributes to that sort of violence?

9 GENERAL DAYS: Well, I think, Chief Justice  
10 Rehnquist, that it is an easy step from possession to use  
11 and, therefore, the fact that Congress might be concerned  
12 with possession doesn't mean that it wasn't concerned  
13 about use.

14 And there also is sufficient evidence in the  
15 consideration of even the Gun-Free School Zones Act that  
16 there was heightened violence on school property by  
17 juveniles, and if one looks at the findings and records  
18 with respect to earlier legislation -- for example, the  
19 Omnibus Crime Control and Safe Streets Act of 1968 --  
20 Congress makes specific findings between the easy  
21 availability of firearms and the level of juvenile and  
22 youthful violence and criminality.

23 So that the connection between possession of  
24 firearms on or near schoolyards and violence and the  
25 regulation of that possession are relationships that

1 Congress has considered in the past, and in our estimation  
2 made perfectly good sense under the Gun-Free School Zones  
3 Act.

4 QUESTION: General Days, I think it's well-  
5 established that a factor in both the education of  
6 children and in the law-abiding nature of children, a  
7 major factor is the stability of families. I suppose,  
8 under your reasoning, Congress could enact a Federal  
9 domestic relations law providing a Federal marriage,  
10 Federal divorce procedures, and what-not. I mean, there's  
11 nothing that affects levels of crime and levels of  
12 education as much as that. Why not?

13 GENERAL DAYS: Justice Scalia, Congress has  
14 legislated, for example, with respect to problems of --

15 QUESTION: Domestic violence, I'm aware.

16 GENERAL DAYS: -- domestic violence, or the  
17 disappearance of children --

18 QUESTION: That doesn't --

19 GENERAL DAYS: -- or interstate divorce  
20 problems, so it's not that Congress hasn't dealt with  
21 those issues, but I think we would look to the --

22 QUESTION: The question is whether it has dealt  
23 with them constitutionally.

24 (Laughter.)

25 GENERAL DAYS: Justice Scalia, that is really

1 your department, but let me say that --

2 (Laughter.)

3 GENERAL DAYS: That one would look to --

4 QUESTION: I'm not sure what your answer is. Is  
5 it -- would a Federal marriage and divorce law be okay?

6 GENERAL DAYS: The answer is that one would have  
7 to look to the Constitution itself, and try to identify  
8 where there are any limitations --

9 QUESTION: General Days --

10 GENERAL DAYS: -- and one would assume, for  
11 example, that privacy would be one of the considerations.

12 QUESTION: I thought by repeatedly bringing up  
13 the nuclear waste case you were making the distinction --  
14 perhaps you weren't -- between Federal regulations  
15 concurrent with State regulation, as it would be in this  
16 case, and Federal regulations displacing State regulation,  
17 taking over the field.

18 GENERAL DAYS: Yes.

19 QUESTION: Are you making that distinction, and  
20 is it --

21 GENERAL DAYS: No, I'm not intending to make  
22 that distinction as a major point. Certainly, there's a  
23 difference between the two approaches, and --

24 QUESTION: Well, wouldn't you say, just -- I  
25 don't mean to interrupt --

1 GENERAL DAYS: Yes.

2 QUESTION: -- but it relates to her question.  
3 Supposing a State had a law saying, it is permissible for  
4 children to bring weapons to school to defend themselves  
5 against the risk of violence. Do you think the Federal  
6 Government could preempt that law with a law like this?

7 GENERAL DAYS: Yes, I do. I think that, based  
8 upon its interstate commerce power, it could determine  
9 that what the State had done interfered with the free flow  
10 of commerce, affected commerce in a negative way, and  
11 therefore had to be dealt with, but getting back to --

12 QUESTION: The only limitation, then, that  
13 you're recognizing, is the narrow reading -- well, strike  
14 narrow, is a reading of U.S. v. New York that Congress  
15 could not impose certain affirmative obligations upon the  
16 State, but so far as concurrent regulation, and, indeed,  
17 even displacement of State regulation, presumably there is  
18 no limit, if, in fact, it can reach the case before us?

19 GENERAL DAYS: Well, I think there are limits,  
20 Justice Souter. The question is whether there's anything  
21 left of the State once the Federal Government gets done.  
22 If what the Federal Government is doing is essentially  
23 destroying the delicate balance between the Federal  
24 Government and the States in ways that this Court has not  
25 indicated the Constitution contemplated, then that would

1 be difficult. I think there would be limitations on that  
2 ability.

3 QUESTION: Well, that's my question, and it  
4 seems to me you're saying that the only instance in which  
5 we can clearly say that the delicate balance would be  
6 destroyed is the instance in which the national Government  
7 imposes affirmative obligations on the States, e.g.,  
8 making them the owners of nuclear waste and so on, and  
9 that short of that, there apparently isn't any  
10 recognizable limit.

11 GENERAL DAYS: Well, I think there is a  
12 recognizable limit, but that is the situation where I  
13 think this Court has indicated that Congress could not go,  
14 but the Gun-Free School Zones Act does not have any  
15 preemption.

16 QUESTION: Are we left with the proposition,  
17 then, that it is for Congress, not the Court, to preserve  
18 the Federal structure?

19 GENERAL DAYS: I'm not saying that. I think  
20 that --

21 QUESTION: But with reference to the commerce  
22 point, realistically, that's where we are. None of us at  
23 least can think of anything under our present case law, or  
24 at least under your argument, that Congress can't do if it  
25 chooses under the Commerce Clause, so if the Federal

1 system must be preserve by someone, and the Commerce  
2 Clause is a means by which the Federal structure can be  
3 obliterated, and if we have no tools or analytic  
4 techniques to make these distinctions, then it follows  
5 that the Federal balance is remitted to the political  
6 judgment of the Congress.

7 GENERAL DAYS: Well, I think, Your Honor, in  
8 Garcia what this Court indicated was that the protection  
9 of this balance, insofar as the Tenth Amendment is  
10 concerned, really does reside with the political process  
11 and in Congress.

12 QUESTION: I think that's the necessary  
13 consequence of the argument that you're making here.

14 GENERAL DAYS: It's not an argument that I  
15 concocted, Justice Kennedy. It's one that I think flows  
16 from this Court's decisions, and that one does -- as I  
17 indicated to Justice O'Connor, one doesn't start the  
18 analysis by saying there are things that are clearly local  
19 and within local control that Congress cannot reach. The  
20 analysis has to be whether one can identify a rational  
21 basis for Congress' wanting to extend its commerce power  
22 into a particular area.

23 QUESTION: But one always can. I mean, there is  
24 no limit. Benjamin Franklin said, it is so wonderful to  
25 be a rational animal, that there is a reason for

1 everything that one does.

2 (Laughter.)

3 QUESTION: And if that's the test, it's all  
4 over.

5 GENERAL DAYS: Well, I don't believe it is,  
6 because as I was indicating, that this Court has  
7 identified there are limits within the Constitution.  
8 There are the --

9 QUESTION: Well, but there ought to be limits  
10 within the Commerce Clause itself. These are powers  
11 expressly delegated to the Congress under a constitutional  
12 scheme that envisions that Congress has certain enumerated  
13 powers and that's it, and if the function being regulated  
14 is wholly intrastate, and is not commercial, it is very  
15 hard for me to understand why it's within the text of the  
16 Interstate Commerce Clause power.

17 GENERAL DAYS: Well, Justice O'Connor, I think  
18 we have to remember that the commerce power is one of the  
19 heads of authority under the Constitution that transformed  
20 our country from an agrarian society to one that --

21 QUESTION: Well, rightly so, but --

22 GENERAL DAYS: -- was a powerful commercial  
23 enterprise.

24 QUESTION: But it can clearly deal with  
25 commercial activity. We've been very generous about

1 that --

2 GENERAL DAYS: Your Honor --

3 QUESTION: -- and interstate activity.

4 GENERAL DAYS: Your Honor, we're talking about  
5 commercial activity. We are talking about something that  
6 affects interstate commerce.

7 As we indicate in our brief, Congress has been  
8 concerned long before 1990 with the impact of diminished  
9 achievement in primary and secondary schools and this  
10 country's ability to compete and to have a strong economy.  
11 This is not about just regulating guns --

12 QUESTION: And it has acted --

13 GENERAL DAYS: -- possession.

14 QUESTION: -- simply under the spending power up  
15 to this point, right?

16 GENERAL DAYS: I beg your pardon?

17 QUESTION: Hasn't it acted simply under the  
18 spending power? It has given money.

19 GENERAL DAYS: Well, in that regard, yes, it has  
20 given money, but it indicates Congress' concern with this  
21 impact on the national economy. Once, it seems to me,  
22 that's identified, it's identified as having an impact on  
23 interstate commerce, that, then, opens the way for  
24 Congress to regulate directly through the Commerce Clause.

25 QUESTION: General Days, it sounds to me like

1 you're making -- you're presenting what has sometimes been  
2 called a political question argument, that is, that there  
3 are some decisions that are committed to another branch to  
4 determine the constitutionality. It seems to me that  
5 you're saying that what is within commerce or not is for  
6 Congress to decide, and that the courts don't have an  
7 oversight rule.

8 GENERAL DAYS: I am absolutely not saying that.

9 QUESTION: What are the limits, then? You said  
10 it could be all of violent crime could come within it.  
11 You're not making the distinction between concurrent  
12 jurisdiction and displacing the State authority, so what  
13 is the check? How would you describe the check that the  
14 Court has?

15 GENERAL DAYS: Well, I'm perhaps left to repeat  
16 myself in some respects. This Court has never said that  
17 there are absolute limits to the exercise of the commerce  
18 power. It's looked at individual cases and tried to  
19 determine, exercising --

20 QUESTION: What would be a case that would fall  
21 outside, other than the one that you -- the nuclear waste,  
22 telling the State, in effect, you serve as Federal  
23 official for this purpose?

24 GENERAL DAYS: I don't have --

25 QUESTION: Don't give away anything here.

1 (Laughter.)

2 QUESTION: They might want to do it next --

3 (Laughter.)

4 GENERAL DAYS: Your Honor, I --

5 QUESTION: General Days, could I ask --

6 GENERAL DAYS: -- the Court has never looked at  
7 this in the abstract. It's not an abstract process. It's  
8 been viewed by the Court as an empirical process.

9 QUESTION: But my point is, Mr. Days, maybe the  
10 constitutional system would be better served if we  
11 recognize that there are no judicial tools to do this.

12 GENERAL DAYS: There are -- excuse me.

13 QUESTION: There are no judicial tools to put  
14 meaningful limits on the Commerce Clause. Therefore, it's  
15 essentially a political question, therefore, the  
16 obligation to protect the Federal system is that of the  
17 Congress, and therefore we have to ensure that there's  
18 some mechanics or procedures that they must follow to do  
19 so --

20 GENERAL DAYS: Your Honor --

21 QUESTION: -- especially if there is an  
22 indication that this is never an explicit subject of  
23 concern.

24 GENERAL DAYS: Well, I'm not arguing that it's a  
25 political question.

1           Indeed, one of the elements of the political  
2 question doctrine is that there are not available judicial  
3 tools for evaluating what is at issue.

4           I think this Court has identified in a number of  
5 cases the fact that there are limits within the  
6 Constitution that can be applied by this Court to control  
7 the extent to which Congress operates under the commerce  
8 power.

9           The fact that this Court has not found the need  
10 to rein in Congress is simply an indication that Congress  
11 is legislating in a way that's consistent and rational --

12           QUESTION: Or an indication --

13           GENERAL DAYS: -- in light of the growth of this  
14 country.

15           QUESTION: -- of what Justice Kennedy said. I  
16 mean, the cases can be read equally consistently with  
17 Justice Kennedy's suggestion that there simply is no  
18 judicial way to do this job.

19           QUESTION: May I ask you one question, General  
20 Days?

21           GENERAL DAYS: This Court has never suggested  
22 that it was abdicating its responsibility in that regard.

23           QUESTION: You filed in a recent submission  
24 copies of congressional findings made in the recently  
25 enacted Crime Control Act.

1 GENERAL DAYS: Yes.

2 QUESTION: What relevance do you think those  
3 findings have to our problem today?

4 GENERAL DAYS: Justice Stevens, we're not  
5 relying on them in the strict sense of the word, but we  
6 think that at a very minimum they indicate that reasons  
7 can be identified for why Congress wanted to regulate this  
8 particular activity, so that it's corroborative of what we  
9 were saying our briefs, and what we think this Court  
10 should properly find about the bases that Congress relied  
11 upon in legislating it as it did, or could rely upon.

12 QUESTION: Do you think the court of appeals  
13 would have decided the case the same way if those findings  
14 had been in the original statute?

15 GENERAL DAYS: I do not believe that the court  
16 of appeals, based upon just the reading of the decision,  
17 would have come out the same way, but I can't be  
18 absolutely certain.

19 What the Court did was impose a number of  
20 procedural requirements on Congress, and I'm not certain  
21 how it would view these particular findings, whether they  
22 had been promulgated in a way that touched every base that  
23 the court of appeals felt was necessary.

24 I'd like to reserve the balance of my time.

25 QUESTION: Very well, General Days.

1 Mr. Carter, we'll hear from you.

2 ORAL ARGUMENT OF JOHN R. CARTER

3 ON BEHALF OF THE RESPONDENT

4 MR. CARTER: Mr. Chief Justice, and may it  
5 please the Court:

6 When the American people established the  
7 national Government, if they had then invested it with a  
8 general police power, there'd be little problem with laws  
9 like the Gun-Free School Zones Act. State legislators  
10 possess general police powers, and they pass laws like  
11 this all the time.

12 QUESTION: I am aware of at least two schools  
13 within 1,000 feet of an interstate highway. I am sure  
14 there are many schools in the United States that are  
15 within 1,000 feet of an interstate highway, or of a  
16 heavily traveled artery. Don't you think that's correct?

17 MR. CARTER: Yes, sir.

18 QUESTION: Well, if a State tried to pass this  
19 identical statute, would that not be, then, an  
20 interference with interstate commerce beyond the authority  
21 of the States to enact?

22 MR. CARTER: It might very well be, if that act  
23 were, in fact interfering with interstate commerce.

24 QUESTION: But if that is so, under the vacuum  
25 theory, then the Federal Government necessarily would have

1 the power to enact this same law, lest there be a vacuum.

2 MR. CARTER: The -- let me back pedal, then, a  
3 little bit on my statement regarding preemption. I think  
4 the preemption would apply at -- on the interstate  
5 highway.

6 QUESTION: Is that so, the States cannot  
7 prohibit crimes on interstate highways? All crimes that  
8 occur on interstate highways have to be punished by  
9 Federal criminal law and not by State criminal law? This  
10 is new. I just thought it was Federal enclaves.

11 MR. CARTER: If the Court found -- I believe if  
12 the Court found --

13 QUESTION: This is extraordinary.

14 MR. CARTER: -- that the State law was burdening  
15 interstate commerce, which I don't believe it would find,  
16 but assuming that -- I was assuming in Justice Kennedy's  
17 hypothetical that there would be a finding that it  
18 burdened --

19 QUESTION: That there would be an interference,  
20 yes.

21 MR. CARTER: -- interstate commerce and in that  
22 case, the case law I believe would -- that's one of the  
23 dangers of preemption of State law by Commerce Clause  
24 legislation.

25 QUESTION: But we would make such a finding of

1     burdening interstate commerce presumably because we  
2     believe we have the capacity to figure out what is  
3     interstate commerce and, indeed, much beyond that, what  
4     burdens it, right?

5             MR. CARTER: That's correct.

6             QUESTION: But of course, the argument made here  
7     is that we don't have that capacity, because it's a  
8     political question. It seems to me we have it or we don't  
9     have it.

10            MR. CARTER: Well, that's an argument that seems  
11    to me to have been raised at argument today. It's not  
12    something that the Government's argued in its brief.

13            QUESTION: It's an argument that was disclaimed,  
14    as I understood the Solicitor General. He disclaimed that  
15    argument.

16            MR. CARTER: Yes, I believe that's correct,  
17    and --

18            QUESTION: You disclaim it, too.

19            MR. CARTER: I'll disclaim it to a -- large  
20    extent, yes, although I believe that Justice Kennedy's  
21    rationale for clear statement principles in Commerce  
22    Clause cases is a very good one, and illustrates why you  
23    can't simply have laws like the Gun-Free School Zones Act,  
24    which on its face appears to be a general police power  
25    statute.

1           It makes no mention of commerce, what it  
2 regulates is not commerce, it's got no legislative history  
3 dealing with commerce --

4           QUESTION: Suppose it had the findings that have  
5 been subsequently added, would that be sufficient --

6           MR. CARTER: That --

7           QUESTION: -- and if not, why not?

8           MR. CARTER: That would call for a different  
9 analysis by this Court under its prior case law. This  
10 Court has been very deferential to the regulation of  
11 activities affecting interstate commerce where Congress  
12 has made findings.

13          QUESTION: Well, what's your position? If those  
14 findings in the recent findings had been there at the time  
15 that this statute was enacted, is it valid or invalid?

16          MR. CARTER: Those particular findings are  
17 awfully global. I have a lot of problem with those --

18          QUESTION: Could you answer the question,  
19 though?

20          MR. CARTER: I would --

21          QUESTION: Valid or invalid, under your theory?

22          MR. CARTER: Under my theory, shooting from the  
23 hip today, I would question their validity. They -- I do  
24 not believe they draw a tight enough nexus with commerce.  
25 To explain why I back-pedal --

1 QUESTION: They just have to say more, but so  
2 long as they say enough, whether it's true or not, it's  
3 okay, is that it, and we would not inquire as to whether  
4 it's true or not.

5 MR. CARTER: Under this Court's precedent, if  
6 they say enough, then it triggers the deferential standard  
7 of review.

8 QUESTION: Even if it isn't interstate and isn't  
9 commercial, that's fine, just so long as they add a string  
10 of rationales here?

11 MR. CARTER: One can make that argument from  
12 this Court's prior case law, yes.

13 QUESTION: I just wanted to know what argument  
14 you were making.

15 MR. CARTER: I -- I'm trying to make an argument  
16 that comports the Court's prior case law, which, as a  
17 practitioner of law, I'm in a position -- not in a very  
18 good position to question, with what happened here, and  
19 how very different this law is even from prior legislation  
20 which doesn't appear to regulate the concerns that you've  
21 identified but the Court has upheld.

22 For example, the loan-sharking case in Perez.  
23 The Court upheld the law there. That law at least had  
24 findings.

25 QUESTION: I would have thought that was

1 commercial activity.

2 MR. CARTER: I would -- I would agree with you  
3 100 percent on that. The Court, however, did not  
4 specifically recognize that as its rationale.

5 Believe me, I wish it had, because I think  
6 you're absolutely correct that when Congress reaches to  
7 regulate intrastate, noncommercial activity without some  
8 strong, strong connection, I -- and the first cases which  
9 expanded into this area talked about a close and  
10 substantial connection, and somehow along the way that  
11 gets transferred into rational relationship.

12 And I would welcome the Court to look at the  
13 cases which opened this door and examine more closely how  
14 it has continued to erode over the years, in that we have  
15 a situation now where the Solicitor General can argue that  
16 Congress has almost plenary power over crimes.

17 QUESTION: But basically you have a client  
18 you're trying to keep out of jail, and as far as you're  
19 concerned it's enough to say they didn't make the findings  
20 and let us worry about the rest some other time.

21 MR. CARTER: That is my duty as his attorney.

22 QUESTION: It is your duty.

23 QUESTION: And that's the same reason why you  
24 suggested that the -- in this very same statute the  
25 prohibition on discharging a gun might present a different

1 case.

2 MR. CARTER: Yes. Yes, there is a, I think a  
3 very obvious difference between the simple possession of a  
4 gun within 1,000 feet of a school which can be for lawful  
5 or unlawful purposes, and the discharge of a gun, even, I  
6 think, in cases where the discharge of itself might be  
7 lawful.

8 QUESTION: What about a general ban on certain  
9 types of assault weapons? Just possession --

10 MR. CARTER: Simple --

11 QUESTION: -- of certain types of weapons.

12 MR. CARTER: -- types of assault weapons. Under  
13 my theory, Congress made in 1968 findings about what it  
14 called highly destructive weapons. Congress has regulated  
15 machine guns and what it -- what it -- it used the term  
16 firearm, but statutorily defined to be the more highly  
17 destructive weapons in the national firearms from 1934 to  
18 the present.

19 I believe that would rest on a different  
20 constitutional basis, because some of the offsetting  
21 considerations -- for example, Congress' longstanding  
22 recognition of the lawful possession of firearms for  
23 sporting purposes.

24 QUESTION: It would be helpful to me if you'd  
25 answer the question -- whether the explosive device or

1 machine gun, just possession of one or the other within  
2 1,000 feet of a school, could be prohibited by Congress.

3 MR. CARTER: If, in an individual instance, it  
4 affected interstate commerce --

5 QUESTION: Well, just the same -- you've got  
6 exactly the same statute you have here, except you  
7 substitute for firearm the word, machine gun, or explosive  
8 device.

9 MR. CARTER: Absent some finding by Congress  
10 linking it to its commerce power --

11 QUESTION: It would be the same case.

12 MR. CARTER: -- I believe it would stand on the  
13 same footing.

14 QUESTION: Now, we have the findings. We do  
15 have findings now. Why can't we take judicial notice of  
16 the facts Congress have found? Maybe they're not  
17 sufficient, but what is the difference whether the --  
18 whether it's in the finding, or something that everybody  
19 knows?

20 MR. CARTER: Because the findings are made by a  
21 subsequent Congress. This Court has been -- has in the  
22 past indicated that that's --

23 QUESTION: But do you think if they had, for  
24 example, made a regulation of railroad transportation and  
25 didn't make the finding that this involves interstate

1 commerce we couldn't take judicial notice of that?

2 MR. CARTER: This Court could take judicial  
3 notice of Congress' prior findings regarding the effect --

4 QUESTION: But why can't we take judicial notice  
5 of what they found today, or just a couple of weeks ago?

6 MR. CARTER: Because we're talking -- we're not  
7 talking about something that happened today, we're talking  
8 about something that happened in 1992, before those  
9 findings were made.

10 QUESTION: Yes, but it's the same statute, and  
11 either that does affect commerce or it doesn't, and I  
12 don't know why the findings make any difference. That's  
13 what you have to explain to me, why the findings make a --

14 QUESTION: We're making up this procedural  
15 requirement, anyway. Why can't we say --

16 (Laughter.)

17 QUESTION: -- you have to make these findings  
18 either at the time you pass it, or later, so long as the  
19 case comes up after you've made the findings? That's a  
20 sensible procedural requirement.

21 MR. CARTER: That would retroactively convict  
22 Mr. Lopez under a different theory than he was prosecuted  
23 under, in that this Court has also considered findings --

24 QUESTION: I don't think that's right, because  
25 he was prosecuted under a statute that was on the books,

1 and the statute is either valid or invalid because it does  
2 or does not have an adequate connection with commerce, and  
3 I don't know that Congress, when Congress makes the  
4 findings has anything to do with that -- with whether in  
5 fact it has a justifiable connection with commerce.

6 MR. CARTER: Well, Congress in 1990 could have  
7 linked gun possession in a school zone with commerce in  
8 another way besides findings. It could have made it an  
9 element of the offense.

10 And when you examine congressional regulation of  
11 firearm possession, which is mostly in section 922, they  
12 more often use the commerce element as part of the  
13 offense, and for this Court, or to assume that Congress in  
14 1994, by passing findings, is doing what Congress may have  
15 wanted to do in 1990, ignores the very real possibility  
16 that Congress could have done the same thing in 1990 by  
17 requiring an element, and in that case, it would have had  
18 to have been part of the indictment and proof in Mr.  
19 Lopez' case.

20 QUESTION: Why isn't your answer that what  
21 Congress finds to have been true in 1994 is not  
22 necessarily what Congress would have found to have been  
23 true in 1990?

24 MR. CARTER: I think --

25 QUESTION: Why isn't that an adequate answer to

1 keep your client out of jail?

2 MR. CARTER: I think in my own awkward way  
3 that's what I was trying to say.

4 (Laughter.)

5 QUESTION: Mr. Carter --

6 QUESTION: You're trying to say that some of the  
7 facts underlying these findings have changed in the last 2  
8 years.

9 MR. CARTER: They very well could have.

10 QUESTION: Which ones?

11 (Laughter.)

12 QUESTION: I think that's really quite  
13 ridiculous. If you look at these findings, they're either  
14 acceptable or they're not, and maybe they're not, I agree  
15 with you, but there's really been no change.

16 MR. CARTER: I don't -- I would think -- I don't  
17 see how they can be retroactively acceptable.

18 QUESTION: I understand that argument, but  
19 that's not saying that the facts underlying the findings  
20 have changed in the last 2 years. I don't think anyone  
21 would accept that.

22 QUESTION: A finding requirement is a finding  
23 requirement, isn't it, and if you insist upon a finding by  
24 Congress, surely that finding has to be a finding related  
25 to 1990, or, you know, whenever the even occurred --

1 MR. CARTER: I would -- I would --

2 QUESTION: -- and there is no finding relating  
3 to that date.

4 MR. CARTER: I would agree 100 percent. The  
5 Congress can't go back and change time. It can judge the  
6 facts today, and this is a factual determination. It's a  
7 jurisdictional prerequisite.

8 QUESTION: All right, so what would you say  
9 about the obvious argument, the simple argument against  
10 your position that this isn't a borderline case?

11 The guns move in interstate commerce, likely,  
12 the books do, the desks do, the teachers might. People  
13 will not move to places in this country where children are  
14 being killed in schools by guns, and in fact, if the  
15 Federal Government can't do something about it, maybe the  
16 whole economy will go down the drain in 1,000 obvious  
17 ways, all right.

18 So that would be the argument in Wickard &  
19 Filburn. If some homegrown wheat affects interstate  
20 commerce, which I guess is a borderline question  
21 economically, certainly guns in schools do really, not  
22 borderline, affect commerce. Now, what's your reply to  
23 that?

24 MR. CARTER: My first reply to that is this act  
25 reaches more than guns in schools. It reaches guns near

1 schools, it reaches the lawful possession of guns in  
2 schools. It reaches beyond Congress' power. That's the  
3 biggest problem with this act.

4 I'm not arguing that Congress has no power to  
5 regulate firearms anywhere near schools. What I'm arguing  
6 is that this act, as you read it, is a general police  
7 power type legislation, and that is not the power that  
8 Congress has.

9 QUESTION: Does it make sense for us to say that  
10 the only flaw in this legislation is the one you're  
11 pushing, because it's so obviously easy to get up a set of  
12 findings. It would be diminishing the Constitution, I  
13 think, if you impose that kind of, almost school-ma'am  
14 requirement on Congress.

15 MR. CARTER: I don't believe it would diminish  
16 the Constitution. If anything, it would formalize  
17 procedures for Congress to take. It would recognize --

18 QUESTION: We have no authority under the  
19 Constitution to prescribe procedures for Congress. Can we  
20 tell Congress how it must legislate? Where do we get the  
21 authority to say that? This is not an interpretive rule.

22 I mean, we have the power to adopt rules of  
23 interpretation. Unless something is clear in the statute,  
24 we will not assume it to be true.

25 But this isn't an interpretive rule you're

1 urging upon us, it's a rule saying that even though it's  
2 perfectly clear what Congress intended, we're not going to  
3 give effect to it unless Congress has adopted this  
4 procedure of legislation, and has set forth a prologue of  
5 findings. Where do we get the authority to tell Congress  
6 how to legislate?

7 MR. CARTER: It -- I wouldn't view it as -- in  
8 quite the same sense as you do, Justice Scalia. The  
9 requirement of findings ensures that Congress addresses  
10 problems that this Court has recognized.

11 In the Bass case, the Court speaks of being sure  
12 that Congress has indeed addressed the problem and thought  
13 about the State-Federal balance. Without something like  
14 findings, there's no insurance that that has in fact  
15 happened, and it's --

16 QUESTION: We cannot presume that that has  
17 happened? Don't we usually assume that Congress has acted  
18 responsibly and made the necessary judgments, including  
19 the judgment of whether the necessary piece of legislation  
20 is constitutional?

21 MR. CARTER: In an area of noncommercial  
22 activity, and in a statute that reaches as broadly as this  
23 one, I think the presumption that Congress undertook all  
24 these steps which would be formalized with findings  
25 evaporates, because otherwise we're in a situation where,

1 as Justice Souter quoted Benjamin Franklin, you can  
2 rationalize regulation of any human activity as affecting  
3 commerce.

4 QUESTION: Is that difference in certainty the  
5 reason why you draw a line, as I understand that you do,  
6 between this statute and a statute in which Congress,  
7 presumably without any findings, simply criminalized the  
8 discharge of handguns in a school? We would know, in the  
9 latter case, that Congress had understood and had adverted  
10 to the likely effect on interstate commerce, whereas here  
11 we don't?

12 MR. CARTER: No. My argument about the  
13 discharge of a firearm was aimed at the rational relation  
14 test. If this Court finds that this statute is simply  
15 subject to the same deferential standard of review as a  
16 statute with findings, as --

17 QUESTION: You mean, if Congress simply, without  
18 findings, said discharges are criminalized, there would be  
19 a patent rational relationship there to interstate  
20 commerce, whereas there is not here?

21 MR. CARTER: No. The purpose of my illustration  
22 of discharge is to show how even more further attenuated  
23 this statute is, that there's a closer --

24 QUESTION: Then your answer -- if I push you to  
25 the wall, is your answer going to be that the discharge

1 statute would also be unconstitutional?

2 MR. CARTER: Without a -- having an effect on  
3 commerce, yes, that --

4 QUESTION: Well --

5 MR. CARTER: -- I think --

6 QUESTION: -- assume two cases. You've got a  
7 discharge statute without findings. Unconstitutional?

8 MR. CARTER: A discharge statute, simply  
9 outlawing all discharges --

10 QUESTION: In -- within 1,000 feet of a school.

11 MR. CARTER: I would think that to be  
12 unconstitutional.

13 QUESTION: All right. Same statute, findings  
14 identical to the ones here, discharges within 1,000 feet  
15 of the schools threaten the educational mission, the  
16 educational mission, the threat to the educational mission  
17 will deteriorate education and ultimately that will affect  
18 commerce, because we will have a dumb population. Is that  
19 constitutional?

20 MR. CARTER: That would be more rational than  
21 what we're facing here. I --

22 QUESTION: Is it rational enough?

23 MR. CARTER: Not for me.

24 QUESTION: How about for us?

25 MR. CARTER: That's --

1 (Laughter.)

2 MR. CARTER: I don't think so. I hope not.

3 QUESTION: That would depend upon how rational  
4 we are, I suppose, and you don't want to press that.

5 QUESTION: What about a statute that prohibits  
6 the conduct of school classes in rooms where there's a lot  
7 of asbestos in the wall or the ceiling, just prohibition.  
8 Just like no guns -- one section says, no guns in the  
9 schoolroom, another section says, the room cannot have  
10 asbestos in it, period. No findings at all.

11 MR. CARTER: I would think that that, as stated  
12 by you, would be of very doubtful constitutionality. I  
13 can't, on my feet, think of any constitu --

14 QUESTION: Let me go one step further and  
15 require them to remove asbestos wherever it is on the  
16 school premises, also remove all explosive devices at the  
17 same time.

18 MR. CARTER: I think, as stated by you, that  
19 would be of doubtful constitutionality where it would  
20 also --

21 QUESTION: I think under your theory it would  
22 be.

23 MR. CARTER: Yes, and I think it would raise  
24 questions under New York v. U.S. about ordering the  
25 schools, what Congress can and cannot order States to do.

1           QUESTION: You emphasize in the beginning that  
2 you are an advocate for a particular client, and so you're  
3 concentrating on the absence of findings. As I understand  
4 the Fifth Circuit decision, it didn't go beyond the  
5 absence of findings. Did the Fifth Circuit reach the  
6 question of what if there were findings?

7           MR. CARTER: I don't believe it did. The Fifth  
8 Circuit left -- for example, the Fifth Circuit left open  
9 the question of whether a commerce element could be  
10 implied into this statute, which is sort of another  
11 alternative to findings. Congress --

12           QUESTION: So if you're wrong about the  
13 necessity for findings, then what happens to this case?

14           MR. CARTER: If I'm --

15           QUESTION: That's all that the Fifth Circuit  
16 decided, that findings are needed, and if we decide --  
17 follow the ordinary presumption that Congress had a reason  
18 for what it did --

19           MR. CARTER: Then this Court must address the  
20 question of, if Congress had the power to do what it did  
21 under the Commerce Clause.

22           QUESTION: Even though that would be taking a  
23 first view of that question, because it was not decided  
24 below.

25           MR. CARTER: Well, the Court could direct it --

1 remand it to the Cong -- I mean, to the Fifth Circuit in  
2 light of the Court's decision here, of course.

3 QUESTION: Because we are ordinarily not a court  
4 of first view.

5 MR. CARTER: That is correct, and that is an  
6 option open to this Court.

7 QUESTION: Could the Congress make it a crime to  
8 throw a fire bomb into a schoolhouse?

9 QUESTION: You know, if you're going to take the  
10 position that the Federal Government is a Government of  
11 limited powers, it means a limitation on doing good  
12 things, as well as limitations on doing bad things. You  
13 swallow it.

14 MR. CARTER: I --

15 (Laughter.)

16 MR. CARTER: I agree there's -- I don't view the  
17 decision of the court of appeals and what I'm advocating  
18 here as requiring this Court to throw out the concept that  
19 Congress can reach activities which have a close and  
20 substantial relation to interstate commerce, and then the  
21 question, to reach -- I'd really be simply restating your  
22 question.

23 I think there's a more -- a much more open  
24 and -- must more close and substantial relation to an act  
25 of violence directed against a school, an occupied

1 classroom, than -- than there is in simply possessing a  
2 firearm near one, and line-drawing is, you know, is  
3 something the Court does, and I don't really wish to be  
4 back-pedaling on this, but that's not the issue here. The  
5 issue is even more broader than that.

6 If -- if banning simple possession of a firearm  
7 near a school is unconstitutional, that doesn't  
8 necessarily mean that throwing a firebomb into an occupied  
9 classroom is. There -- under the Court's previous  
10 standard, it's -- and I believe the Court said that it's a  
11 question of degree.

12 QUESTION: What about simple possession of  
13 marijuana?

14 MR. CARTER: That's been justified under the  
15 commerce and the foreign commerce power and the problems  
16 of indistinguishability from --

17 QUESTION: But your position is that would be  
18 permissible.

19 MR. CARTER: The courts have so held, yes.

20 QUESTION: On the theory that marijuana is more  
21 apt to be moved in commerce -- I mean, you can have  
22 locally grown marijuana, I suppose -- or on the ground  
23 that it's more harmful than the guns?

24 MR. CARTER: Well, there's findings made by  
25 Congress regarding marijuana. There's no question of the

1 peaceful, lawful possession of marijuana in any State.

2 There's --

3 QUESTION: I'm assuming a State doesn't prohibit  
4 the mere possessio, but might the Federal Government  
5 nevertheless prohibit mere possession?

6 MR. CARTER: If that were necessary to exercise  
7 Congress' commerce powers --

8 QUESTION: It makes precisely the same findings.  
9 If the kids smoke marijuana, they'll be poor students, and  
10 education will suffer, and the economy will suffer.

11 MR. CARTER: I think the prohibition on that  
12 basis would have to be limited to students.

13 QUESTION: To students.

14 MR. CARTER: Under that rationale, there'd be no  
15 rational relation between nonstudents and smoking  
16 marijuana and their effect.

17 In sum, I'd urge this Court to recognize the  
18 Government's argument for what it truly is.

19 QUESTION: To distinguish that, we wouldn't want  
20 to get all of these drug possession cases out of the  
21 Federal courts. It would be --

22 MR. CARTER: The Government's arguing that the  
23 Commerce Clause gives the Federal Government a general  
24 police power that it wasn't given by the Constitution, and  
25 this act doesn't regulate commerce, it doesn't regulate

1 interstate activity, and because Congress may possess some  
2 powers to regulate guns around schools doesn't mean that  
3 it exercised its power in this case, in this act.

4 And to uphold the Gun-Free School Zones Act  
5 under deferential review on the Government's theory that  
6 findings are somehow implicit would allow any limitations  
7 on the Congress' Commerce Clause powers to vanish, and the  
8 line beyond which its powers would not reach is then the  
9 horizon, a line which appears but can never be reached.

10 I would yield my further time.

11 QUESTION: I suppose you could make -- there's  
12 no doubt under our prior cases that you could make it  
13 unlawful to sell or traffic in marijuana. That would  
14 indeed be a regulation of commerce.

15 MR. CARTER: I believe so.

16 QUESTION: And the only issue would be whether  
17 it's interstate or intrastate commerce, and we've been  
18 very liberal on that, once commerce is involved.

19 MR. CARTER: And that is the basis of a lot of  
20 regulation of firearms.

21 QUESTION: Or trafficking in guns, or  
22 trafficking in machine guns and so forth, all of that  
23 would be easily covered.

24 MR. CARTER: Yes, and most of it is today.

25 QUESTION: Or possess with intent to distribute.

1 MR. CARTER: Correct, or to possess with intent  
2 to affect interstate commerce I believe may be regulable.

3 QUESTION: Or just possess with intent to use  
4 either a gun or marijuana would be beyond the Federal  
5 power?

6 MR. CARTER: The gun, I believe, yes. The  
7 marijuana, because there are elements of  
8 indistinguishable -- indistinguishability from foreign  
9 marijuana, which Congress has, I believe, plenary power to  
10 regulate, there's -- it's a closer question.

11 I thank you.

12 QUESTION: Thank you, Mr. Carter.

13 General Days, you have 2 minutes remaining.

14 GENERAL DAYS: Mr. Chief Justice, unless the  
15 Court has further questions, I'd like to waive my  
16 rebuttal.

17 CHIEF JUSTICE REHNQUIST: Very well. The case  
18 is submitted.

19 (Whereupon, at 12:01 p.m., the case in the  
20 above-entitled matter was submitted.)

21

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*UNITED STATES, Petitioner v. ALFONSO LOPEZ, JR.*

*CASE NO.: 93-1260*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Ann Marie Federico*

(REPORTER)