

TO: MARTY WEINBERG  
FROM: KIM HOMAN  
RE: EPSTEIN/EXTRATERRITORIAL APPLICATION OF §922(g)  
DATE: SEPTEMBER 24, 2010

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I see no indication that 18 U.S.C. §922(g) has ever been applied extraterritorially to possession of a firearm by a felon in a foreign country, and there is every reason to believe that it would not be so applied. In *Small v. United States*, 544 U.S. 385 (2005), the Supreme Court considered the extraterritorial applicability of the “convicted in any court” language of §922(g)(1) and held that foreign felony convictions do not subject defendants to prosecution under the felon-in-possession statute. In reaching that conclusion, the Court discussed the presumption that Congress ordinarily intends the statutes it enacts to have only domestic application:

In determining the scope of the statutory phrase we find help in the “commonsense notion that Congress generally legislates with domestic concerns in mind.” *Smith v. United States*, 507 U.S. 197, 204, n. 5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993). This notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949); see also *Palmer, supra*, at 631 (“The words ‘any person or persons,’ are broad enough to comprehend every human being” but are “limited to cases within the jurisdiction of the state”); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 249-251, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). *That presumption would apply, for example, were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically.* And, although the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when we consider the scope of the phrase “convicted in any court” here.

*Id.* at 388-89 (emphasis added). Thus, there is a clear indication from the Supreme Court that §922(g) would not be applied to bar gun possession by a felon in a foreign country.

Section 922(g) is plainly addressed to “domestic concerns,” as is clear from the congressional findings incorporated into §922 in §922(g):

The Congress finds and declares that--

- (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 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 considerably 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.

None of these concerns are related to overseas possession of firearms by convicted felons.

The domestic-only application is also evident in the fact that the statute reaches only firearms which have traveled in interstate commerce or the foreign commerce of the United States. See *United States v. Joost*, 133 F.3d 125, 131 n.5 (1st Cir.1998)(approving the following instruction: "Possession of a firearm or ammunition is in or affecting commerce within the meaning of the statute[ ] if at some time after it was manufactured, and before the offense was committed, that firearm or ammunition was transported *between states or between a state and a foreign country or a foreign country and state*" (emphasis added); *United States v. Riley*, 2007 WL 4561146 at \*4 (D.Kan. December 20, 2007)(§922(g) "requires proof that (1) defendant knowingly possessed a firearm; (2) defendant was convicted of a felony before he possessed the firearm; (3) and that before defendant possessed the firearm, it had moved *from one state to another or from a foreign country to a state*" (emphasis added). Firearms which have traveled wholly extraterritorially, *i.e.*, which have never entered a "state", are not encompassed within the statute. So one easy answer to the question would be the use of a hunting weapon which was manufactured overseas and has never entered American foreign commerce.

