

1-2003

## A Better Way to Disarm Batterers

Tom Lininger

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### Recommended Citation

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

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# A Better Way to Disarm Batterers

by  
TOM LININGER\*

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## Introduction

William Smith repeatedly battered Lauralee Lorenson, the mother of his child, when they lived together in Cedar Falls, Iowa. He beat her, choked her, and threatened to kill her if she tried to break off their relationship. One of these incidents led to a misdemeanor conviction for assault, but Smith never served any jail time.<sup>1</sup>

After the misdemeanor conviction, Smith acquired a gun and shot Lorenson in the back. Lorenson did not cooperate with local prosecutors when they attempted to file charges against Smith for the shooting.<sup>2</sup> Without her cooperation, there was little possibility that a prosecution under Iowa law would result in any significant sentence. It appeared that Smith, like so many other batterers, would escape with impunity.

Enter the federal government. Smith had violated the newly enacted Lautenberg Amendment when he purchased a firearm after a misdemeanor conviction for domestic violence. This law, codified at 18 U.S.C. § 922(g)(9), prohibits the possession of a firearm by a convicted domestic abuser.<sup>3</sup> The federal authorities did not need to rely on any assistance from Lorenson to obtain a conviction of Smith under the Lautenberg Amendment; his possession of the gun was beyond dispute. Evidence of the shooting could be introduced in the sentencing hearing with a lower standard of proof than a trial to provide the basis for an enhanced sentence under the U.S. Sentencing

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1. These facts are drawn from the Memorandum in Support of United States' Resistance to Defendant's Motion to Dismiss at 288, *United States v. Smith*, 964 F. Supp. 286 (N.D. Iowa 1997).

2. *Id.* at 14. It is well documented that victims of domestic violence sometimes recant or refuse to cooperate after filing complaints against their assailants. Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 *FORDHAM L. REV.* 853, 857 (1994) ("In many jurisdictions, prosecutors routinely drop domestic violence cases because the victim requests it, refuses to testify, recants, or fails to appear in court. In these situations, prosecutors dispose of approximately fifty to eighty percent of cases by dropping the charges."); *see also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 *HARV. L. REV.* 1849, 1883-84 (1996) (describing complexity of victim's role in abusive relationship). Victims of domestic violence may refuse to cooperate for a number of reasons, including financial concerns, fear of retaliation, low self-esteem, and sympathy for the assailant. Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 *WM. & MARY J. WOMEN & L.* 383, 392-98 (2001).

3. 18 U.S.C. § 922(g)(9) (2002).

Guidelines.<sup>4</sup> Thus, the Lautenberg Amendment made the difference between a dangerous abuser walking free or serving a four-year sentence in federal prison.<sup>5</sup>

Moreover, the media coverage of the Smith case sent a signal throughout the local community that convicted batterers could face a federal prison sentence if they possessed firearms. This new awareness likely led some batterers to give up their guns or avoid acquiring guns. Perhaps other shootings were averted due to the removal of firearms from households with a history of domestic violence. This ancillary effect of the Smith prosecution demonstrated the greatest promise of the Lautenberg Amendment as a tool not simply to punish batterers who possess guns, but to dissuade other batterers from possessing guns in the first place.

As the Smith case illustrates, the need to disarm batterers is urgent. In 1999 approximately 790,000 violent assaults were committed against intimate partners in the United States.<sup>6</sup> In fifteen percent of the cases, the assailants used weapons against the victims.<sup>7</sup> As a general matter, a firearm increases the likelihood that an episode of domestic violence will cause the death of the victim.<sup>8</sup> One study of family and intimate assaults in Atlanta found that these assaults were twelve times more likely to result in death if a firearm was present.<sup>9</sup> The authors concluded that many batterers who kill “with a firearm would be unable or unwilling to exert the greater physical or psychological effort required to kill with another, typically

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4. At a federal sentencing hearing, most facts need only be proven by a preponderance of the evidence, rather than beyond a reasonable doubt. Commentary to U.S. SENTENCING GUIDELINES MANUAL § 6A1.3, cmt. background (2002) [hereinafter U.S.S.G.]. When a prohibited person uses a firearm to commit a violent offense, a number of enhancements are available under U.S.S.G. § 2K2.1.

5. Smith received a prison sentence of fifty-one months, to be followed by a three-year term of supervised release. *United States v. Smith*, 171 F.3d 617, 619 (8th Cir. 1999).

6. CALLIE MARIE RENNISON, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-99, CRIME DATA BRIEF, REPORT NO. NCJ-187635, BUREAU OF JUST. STAT., OFFICE OF JUST. PROGRAMS, U.S. DEP'T OF JUST. (2003), available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm>. For purposes of this study, the term “intimate partner” includes current and former spouses, as well as current and former boy/girlfriends. *Id.*

7. *Id.* The type of weapon was not specified in this study.

8. Speaking in support of the Lautenberg Amendment, Senator Frank Lautenberg stated that, “[t]here is no question that the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder.” 142 CONG. REC. S1122 (daily ed. Sept. 25, 1996). Senator Patty Murray said that “the gun is the key ingredient most likely to turn a domestic violence incident into a homicide.” 142 CONG. REC. S10,379 (daily ed. Sept. 12, 1996). Senator Diane Feinstein characterized batterers with guns as “ticking time bombs,” adding that “it is only a matter of time before the violence gets out of hand, and the gun results in tragedy.” *Id.*

9. Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. AM. MED. ASS'N 3043, 3046 (1992).

available weapon.”<sup>10</sup> According to a 1997 study that analyzed homicide cases in which women were killed by intimate acquaintances, such murders were 14.6 times more likely to occur in a household with a history of domestic violence, and 7.2 times more likely to occur in a household where firearms were present.<sup>11</sup>

The danger posed by domestic abusers with firearms was underscored in October 2002, when police arrested John Allen Muhammad as one of the prime suspects in the most notorious criminal case of the year: a series of sniper attacks that left ten victims dead and three injured in the Washington, D.C. area. At the time of these shootings, Muhammad was subject to a restraining order obtained by his wife. In fact, it appears that the firearm he used in the shooting spree had been acquired shortly after the restraining order was entered.<sup>12</sup>

The strong evidence of a link between domestic abuse and gun-related violence has led Congress to enact two statutes prohibiting

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10. *Id.* at 3045.

11. James E. Bailey et al., *Risk Factors for Violent Death of Women in the Home*, 157 ARCHIVES OF INTERNAL MED. 777 (1997). Dan Eggen, *Domestic Abusers Bought Guns*, WASH. POST, June 26, 2002, at A8. The nexus between firearms and domestic homicides is well established. *Id.* Of the 15,000 annual homicides in the U.S., nearly ten percent involve the killing of an intimate partner. *Id.* Almost all of these victims are women. Most of them are killed with firearms. According to data collected by the FBI for the year 2000, fifty percent of female homicide victims were killed with a firearm. FED. BUREAU OF INVESTIGATION, 2000 SUPPLEMENTARY HOMICIDE REPORT (this statistic does not take account of homicide cases in which the weapon was unknown). The FBI found that more than two-thirds of these victims had been murdered by family members or intimate acquaintances. *Id.*; see also *Deny Guns to Abusers*, U.S.A. TODAY, July 13, 1994, at 12A. (stating that firearms figure in more than 40% of all family killings). The rate of firearm homicides committed by men against women is higher in the United States than in other high-income nations: a recent study found that although the United States represents only thirty-two percent of the female population among the twenty-five high-income nations, the United States accounts for eighty-four percent of all female victims of firearm homicides in these nations. David Hemenway et al., *Firearm Availability and Female Homicide Victimization Rates Among 25 Populous High-Income Countries*, 57 J. AM. MED. WOMEN'S ASS'N 100 (2002). Even when gun-related domestic violence does not result in death, the harm can be significant. For example, children who observed incidents of domestic violence involving the use or threatened use of a firearm exhibited higher levels of behavior problems than did other children. Ernest N. Jouriles et al., *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. FAM. PSYCHOL. 178, 190 (1998).

12. A federal complaint indicated that the restraining order was entered in March 2000, and Muhammad acquired the firearm in May 2000. Complaint, *United States v. Muhammad*, No. 02-5614 (W.D. Wash., Oct. 23, 2002); see also Carol Morello et al., *Pair Seized in Sniper Attacks; Gun in Car Tied to 11 Shootings*, WASH. POST, Oct. 25, 2002, at A01. When police arrested Muhammad on October 24, 2002, the charge for which he was initially detained was not murder, but simply a violation of 18 U.S.C. § 922(g)(8), the statute which prohibits possession of firearms by domestic abusers subject to a restraining order. *Id.*; see generally 18 U.S.C. § 922(g)(8) (2002).

domestic abusers from possessing firearms. The first such statute is 18 U.S.C. § 922(g)(8), enacted in 1994.<sup>13</sup> This statute prohibits the possession of a firearm by a person who is subject to a restraining order meeting certain requirements.<sup>14</sup> The second statute that denies guns to batterers is 18 U.S.C. § 922(g)(9), enacted in 1996.<sup>15</sup> This statute prohibits the possession of a firearm by a person who has been convicted of a misdemeanor crime involving domestic violence.<sup>16</sup> A violation of either section 922(g)(8) or section 922(g)(9) is punishable by a prison term of up to ten years and a fine of up to \$250,000.<sup>17</sup>

Federal prosecutors have charged relatively few cases under sections 922(g)(8) and 922(g)(9). In July 2002, the Executive Office for United States Attorneys (“EOUSA”) released information detailing the utilization of these statutes by federal prosecutors.<sup>18</sup> In

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13. 18 U.S.C. § 922(g)(8).

14. Four requirements must be met for the restraining order to result in a firearms disability. First, the defendant/respondent must have received actual notice and had an opportunity to participate in the hearing that led to the issuance of the restraining order. *Id.* §§ 922(g)(8)(A), 922(g)(8)(B). Second, the plaintiff/petitioner must be an intimate partner of the defendant/respondent—that is, the parties must be spouses, ex-spouses, parents of the same child, or present or former co-habitants. *Id.* § 922(g)(8)(B). Third, the order in question must restrain defendant/respondent from one of the following acts: a) harassing, stalking, or threatening the intimate partner, child of the defendant/respondent, or child of the defendant/respondent’s intimate partner; or b) engaging in other conduct that would place the intimate partner in reasonable fear of bodily injury to the partner or child. *Id.* §§ 922(g)(8)(B), 922(g)(8)(C). Fourth, the order must include a finding that the defendant/respondent is a credible threat to the physical safety of the intimate partner or child, and must explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury. *Id.* § 922(g)(8)(C).

15. *Id.* § 922(g)(9).

16. Several requirements must be met before a misdemeanor crime of domestic violence will result in a firearms disability. First, the offense will not qualify unless it has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. *Id.* § 921(a)(33)(A). Further, the misdemeanor conviction will not qualify unless the defendant was represented by counsel, or knowingly and intelligently waived the right to counsel. *Id.* § 921(a)(33)(B)(i)(I). Similarly, the offense will not qualify if the person was entitled to a jury trial and the case not tried by a jury unless the person knowingly and intelligently waived the right to a jury trial. *Id.* § 921(a)(33)(B)(i)(II).

17. *Id.* § 924(a)(2).

18. The report by EOUSA was prepared at the request of this author and was faxed to this author on July 24, 2002. The statistics in the report are derived from data submitted regularly by the ninety-four United States Attorneys’ offices. The report includes all cases in which section 922(g)(8) and section 922(g)(9) were charged, even if these were not the lead charges. It is important to note that prior to 1999, the United States Attorneys’ case management system did not include complete statutory citations for all subsections of 18

1995, the first year when section 922(g)(8) took effect, no prosecutions were filed under that statute.<sup>19</sup> In 1996, three cases were filed under section 922(g)(8); in 1997, thirteen cases were filed; in 1998, twelve cases were filed; in 1999, thirty-six cases were filed; in 2000, fifty-five cases were filed; and in 2001, sixty-eight cases were filed.<sup>20</sup> EOUSA's report predicted that by the end of 2002, a total of fifty-eight cases would be filed under section 922(g)(8).<sup>21</sup> These statistics represent approximately one percent of the 6,000 cases filed by federal prosecutors each year against defendants who illegally possess firearms.<sup>22</sup> Put another way, the ninety-four U.S. Attorneys' offices have failed to generate an annual average of one case per district since section 922(g)(8) was enacted in 1994. The infrequency of charges under section 922(g)(8) cannot be attributed to a lack of defendants eligible for prosecution: Judge Posner of the Seventh Circuit estimated that approximately 40,000 people violate section 922(g)(8) each year, and he complained that the federal government only prosecutes a "minuscule" number of potential cases under this statute.<sup>23</sup>

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U.S.C. § 922. Thus, the reported totals for prosecutions under sections 922(g)(8) and 922(g)(9) in the years prior to 1999 may not be complete.

19. *Id.*

20. *Id.*

21. *Id.*

22. BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING, 2000: WITH TRENDS 1982-2000, REPORT NO. NCJ-189737, OFFICE OF JUST. PROGRAMS, U.S. DEPT' OF JUST., 10 (2001), available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm> [hereinafter CRIMINAL CASE PROCESSING, 2000]. Table A7 of this report indicates that 6,037 weapons prosecutions were filed in 2000. *Id.* at 10 30. This statistic only includes cases in which the weapons charge was the most serious charge, so it likely underestimates the total number of prosecutions. Most of the weapons cases brought by federal prosecutors arise from possession of a firearm by a convicted felon in violation of section 922(g)(1). There are several other firearms disabilities under section 922(g) that account for the rest of the 6,000 cases per year. The list of prohibited persons includes fugitives, drug users, mental patients, illegal aliens, and veterans who have been dishonorably discharged. 18 U.S.C. §§ 922(g)(2)-(6)(2002). From 1992 to 1999, the total number of defendants charged under the federal firearms laws ranged from a high of 7,621 (in 1992) to a low of 5,993 (in 1997). Press Release, Bureau of Justice Statistics, More Than 200,000 Firearms Applications Rejected in 1999, Defendants Charged with Federal Firearms Offenses Increased from 1998 to 1999 (June 4, 2000) available at <http://www.ojp.usdoj.gov/bjs/pub/press/ffobcfpr.htm>.

23. *United States v. Wilson*, 159 F.3d 280, 294 (7th Cir. 1998) (Posner, J., dissenting). Judge Posner offered this basis for his estimate:

[18 U.S.C. § 922(g)(8)] was enacted in 1994 and the number of prosecutions for violating has been minuscule (perhaps fewer than 10, though I have not been able to discover the exact number, which is not a reported statistic) in relation to the probable number of violations. I estimate that every year the law has been in effect almost one hundred *thousand* restraining orders against domestic violence have been issued. Since 40 percent of U.S. households own guns, there can be



The number of prosecutions filed under section 922(g)(9) is slightly higher but is also far below its potential. In 1996, only one prosecution was filed under section 922(g)(9).<sup>24</sup> In 1997, ten cases were filed; in 1998, sixteen cases were filed; in 1999, sixty-eight cases were filed; in 2000, 159 cases were filed; and in 2001, 125 cases were filed.<sup>25</sup> EOUSA's report predicted that 162 cases would be filed under section 922(g)(9) in the year 2002.<sup>26</sup> In other words, prosecutions under this statute make up just two to three percent of the total prosecutions under 18 U.S.C. § 922(g) for illegal possession of firearms. The low rate of prosecution under section 922(g)(9) is alarming given early predictions that one million potential defendants would meet the requirements for prosecution under this statute.<sup>27</sup> Recent evidence shows that enforcement problems persist under section 922(g)(9). In July 2002, the General Accounting Office documented that at least 3,000 persons subject to the gun ban under section 922(g)(9) were able to acquire *new* guns from federally licensed dealers between 1998 and 2001.<sup>28</sup> Thus, for every one person prosecuted under section 922(g)(9), ten more bought new guns in so conspicuous a manner that their purchases could be documented by federal investigators. Surely a much higher number of domestic abusers are circumventing the gun ban with purchases at gun shows and on the black market.

Why are section 922(g)(8) and section 922(g)(9) underutilized by federal prosecutors and law enforcement agencies?<sup>29</sup> There are a number of possible explanations,<sup>30</sup> but this Article will focus on a

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very little doubt that a large percentage of those orders were issued against gun owners.

*Id.* (internal citations omitted; emphasis in original); *see also* United States v. Spruill, 61 F. Supp. 2d 587, 589 (W.D.Tex. 1999) (section 922(g)(8) is "rarely enforced"), *rev'd*, 292 F.3d 207 (5th Cir. 2002).

24. *See* EOUSA Report, *supra* note 18.

25. *Id.*

26. *Id.*

27. James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at A12.

28. Dan Eggen, *Domestic Abusers Bought Guns*, WASH. POST, June 26, 2002, at A8.

29. While some advocates for domestic violence victims might be disappointed by the number of prosecutions under these statutes, it is important to commend the attorneys in the U.S. Department of Justice who have led the nationwide effort to facilitate such prosecutions. These attorneys have done an outstanding job training prosecutors and law enforcement agents regarding section 922(g)(8) and section 922(g)(9).

30. In addition to the factors listed in the accompanying text, it is possible that the low prosecution rates can be attributed to other considerations: 1) a lack of enthusiasm among some prosecutors and law enforcement agents for laws that appear to limit gun rights; 2) a lack of resources for enforcement of section 922(g)(8) and section 922(g)(9) given the overriding concern for combating terrorism after the tragedy of September 11, 2001; and

short list of factors that hinder the effective enforcement of section 922(g)(8) and section 922(g)(9). First, the statutes themselves are flawed. For example, section 922(g)(8) prohibits the possession of a firearm by a batterer who is subject to a restraining order, but only if the restraining order was issued after a hearing of which the batterer received notice and at which the batterer had an opportunity to participate. The purpose of this exception is to ensure that an accused abuser will be given a fair chance to contest the allegations before he loses his gun rights. Yet this provision overlooks the reality that many local jurisdictions issue restraining orders on an emergency basis without requiring the presence of the respondent. The *ex parte* procedure is designed to protect the petitioner from reprisals by the batterer. It is ironic that these cases, in which the petitioner's safety is in the greatest jeopardy, lie outside the scope of the gun ban under section 922(g)(8). The statute also appears to exempt stipulated restraining orders that the judge has approved without a hearing.<sup>31</sup> The statute includes many formalistic requirements for restraining orders that do not mesh with current state practices. Further, section 922(g)(8) is inapplicable to police officers and military personnel who are subject to restraining orders for domestic violence.<sup>32</sup>

The gun ban for convicted abusers, 18 U.S.C. § 922(g)(9), is riddled with similar exceptions that limit its effectiveness. The "use of force" requirement for predicate misdemeanors apparently does not include the threatened use of force, such as a threat to kill one's ex-wife.<sup>33</sup> The "domestic relationship" requirement does not extend to cases of elder abuse.<sup>34</sup> Other definitional problems could render the gun ban useless in states with assault statutes that do not closely track the federal language.<sup>35</sup> Moreover, the requirements for

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3) a lack of understanding among local law enforcement agencies regarding the eligibility of certain offenders for federal prosecution under these statutes.

31. The Fifth Circuit recently ruled that such orders do not result in a firearms disability. *Spruill*, 292 F.3d at 217–18. In the *Spruill* case, the Fifth Circuit cited its earlier ruling in *United States v. Emerson*, 270 F.3d 203, 211 n.2 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002), that an *ex parte* restraining order could not furnish the basis for a firearms disability under section 922(g)(8) because no hearing was held. *Id.*

32. By contrast, there is no exception for law enforcement and military personnel under 18 U.S.C. § 922(g)(9). It seems odd indeed that a twenty-year-old misdemeanor conviction for domestic violence could disqualify a police officer from carrying a gun, but not a currently pending restraining order based on a finding that he poses a risk of violence to his ex-girlfriend.

33. 18 U.S.C. § 921(a)(33)(A)(2002).

34. *Id.*

35. *Id.* For example, confusion has arisen as to whether the predicate offense must include, as an element, the domestic relationship between the assailant and the victim. Some circuits have resolved this question in favor of the government, finding that the relational requirement need not be an element of the predicate offense. *United States v. Barnes*, 295 F.3d 1354, 1368 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305,

predicate offenses under section 922(g)(9) exclude indictments, uncounseled pleas, and pleas in which the defendant did not knowingly waive his right to a jury trial,<sup>36</sup> exclusions that are not necessitated by the Constitution and that substantially limit the scope of the gun ban.

Enforcement of section 922(g)(8) and section 922(g)(9) has also been constrained by several factors other than the language of the statutes themselves. For example, the Brady law,<sup>37</sup> which establishes a system of background checks for purchasers of firearms, does not allow sufficient time for law enforcement agencies to check whether purchasers have a history of domestic violence. One last factor that explains prosecutors' reluctance to utilize section 922(g)(8) and section 922(g)(9) is the lack of sentencing guidelines tailored for these statutes. Defendants convicted under these statutes typically receive lower sentences than defendants convicted under the other federal gun laws. Prosecutors with scarce resources may be deterred from filing charges under section 922(g)(8) or section 922(g)(9) if they realize that such charges will not result in any significant prison time.<sup>38</sup>

This Article argues that the effective enforcement of section 922(g)(8) and section 922(g)(9) will require revision of these statutes, the Brady law, and the applicable sentencing guidelines.<sup>39</sup> The

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1313–14 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 218–19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999). The majority of circuits have not yet resolved this question. In some jurisdictions, the U.S. Attorney's Office appears to be troubled by the language of 18 U.S.C. § 921(a)(33)(A) and has been reluctant to file charges based on predicate offenses that lack a "domestic relationship" element. Federal prosecutors in the District of Oregon even appeared before the Oregon Legislature, urging that the state's assault statute be modified to include a domestic relationship element in order to eliminate any doubt about the enforceability of 18 U.S.C. § 922(g)(9) in the District of Oregon. Summary of Hearing Before the Oregon House Interim Judiciary Committee, November 19, 1997, available at <http://www.leg.state.or.us/comm/Summ4Feb.html>. If the courts determine that the predicate offense must include the relational requirement as an element, the enforcement of the gun ban will be very difficult.

36. 18 U.S.C. § 921(a)(33)(B)(2002).

37. *Id.* § 922(t).

38. The prison sentence in *United States v. Smith*, 171 F.3d 617, 619 (8th Cir. 1999), was unusually high because the defendant used the gun to commit a crime of violence. Most cases brought under section 922(g)(9) involve passive possession of a gun, so the offense level under U.S.S.G. § 2K2.1 will be much lower than in the *Smith* case.

39. While other scholarship has addressed the federal statutes that deny guns to domestic abusers, most of these other pieces have focused on the constitutionality of section 922(g)(8) and section 922(g)(9). *E.g.*, Ashley G. Pressler, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT. 705 (1999); Kerri Fredheim, Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. § 922(g)(9)*, 19 PACE L. REV. 445 (1999); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999);

Article will proceed in three analytic steps. First, I will examine the background of section 922(g)(8) and section 922(g)(9): I will analyze their legislative history, their provisions, and their constitutionality. Second, I will focus on the practical hindrances that have limited the effectiveness of these statutes. Third, I will suggest reforms that will improve enforcement of the gun ban for domestic abusers.

## I. Federal Statutes Prohibiting Domestic Abusers from Possessing Firearms

### A. 18 U.S.C. § 922(g)(8)—Gun Ban While Restraining Order Is in Effect

#### (1) Provisions of Section 922(g)(8)

The Violent Crime Control and Law Enforcement Act of 1994<sup>40</sup> added a new provision to the list of firearms disabilities under 18 U.S.C. § 922(g).<sup>41</sup> This provision, codified at 18 U.S.C. § 922(g)(8), prohibits the possession of a firearm or ammunition by any person who is subject to a court order that

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an

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Eric A. Pullen, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment*: “[S]imply Because Congress May Conclude That a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make It So,” 39 S. TEX. L. REV. 1029 (1998); Melanie L. Mecka, *Seizing the Ammunition from Domestic Violence: Prohibiting the Ownership of Firearms by Abusers*, 29 Rutgers L.J. 607 (1998). Now that the constitutionality of the statutes has been clearly established, it is important to take the next analytical step and evaluate the need for reforms that will improve the enforceability of the gun ban.

40. The relevant portions of this statute are set forth in Title XI, § 110401, Pub. L. No. 103-322, 18 Stat. 1796. President Clinton signed this legislation on September 13, 1994. Holly Idelson & David Masci, *Crime Bill Provisions*, CONG. Q. WKLY. REP. 3526 (Dec. 10, 1994).

41. 18 U.S.C. § 922(g). Previous legislation had created firearms disabilities for felons (18 U.S.C. § 922(g)(1)), fugitives (section 922(g)(2)), drug users (section 922(g)(3)), the insane (section 922(g)(4)), illegal aliens (section 922(g)(5)), veterans who were dishonorably discharged from the Armed Forces (section 922(g)(6)), former U.S. citizens who have renounced their citizenship (section 922(g)(7)), defendants who have been indicted for felony offenses but not yet tried (section 922(n)), and juveniles (sections 922(b) and 922(x)). Other provisions of section 922 criminalize the possession of certain types of weapons and paraphernalia, such as machine guns (section 922(o)), semiautomatic assault weapons (section 922(v)), large capacity ammunition feeding devices (section 922(w)), stolen firearms (section 922(i)), firearms with obliterated serial numbers (section 922(k)), and firearms that are not detectable by airport x-ray machines (section 922(p)).

intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

A related provision in 18 U.S.C. § 922(d)(8) uses virtually identical language to criminalize the act of selling or otherwise disposing of a firearm by giving it to a person who is subject to such a restraining order.<sup>42</sup>

The term “intimate partner” is defined in section 921(a)(32), which was added contemporaneously with sections 922(d)(8) and 922(g)(8). “[I]ntimate partner” means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.”<sup>43</sup>

Notably, all the firearms prohibitions in 18 U.S.C. §§ 922(g)(1) through 922(g)(8) are subject to certain limitations. First, these prohibitions only apply to firearms and ammunition that have traveled in interstate commerce.<sup>44</sup> Second, these prohibitions do not apply to police, military personnel, and other government employees who use firearms and ammunition in connection with their official duties.<sup>45</sup>

A violation of section 922(g)(8) is punishable by a prison term of up to ten years.<sup>46</sup> In most cases, there is no mandatory minimum

42. *Id.* § 922(d)(8).

43. *Id.* § 921(a)(32).

44. Under section 922(g), it is illegal “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” The language referring to “commerce” and to “interstate commerce” functions as a jurisdictional predicate. It is typically satisfied by proof that the firearm or ammunition or components thereof were manufactured outside the state in which the illegal possession took place. *E.g.*, *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000) (noting that the jurisdictional element in section 922(g) is satisfied where gun has been manufactured in one state and then possessed by the defendant in another), *cert. denied*, 529 U.S. 1123 (2000).

45. 18 U.S.C. § 925(a)(1) (2002):

The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

46. *Id.* § 924(a)(2).

sentence.<sup>47</sup> Within the statutory sentencing parameters of zero to ten years, the defendant's sentence is determined by the United States Sentencing Guidelines.<sup>48</sup> Typically defendants who are convicted of violating section 922(g)(8) receive sentences that are far below the ten-year maximum. Among the 188 defendants convicted under section 922(g)(8) since 1995, only 21.3% were sentenced to a prison term exceeding five years. Most received sentences of two years or less, and 14.4% received no prison sentence at all.<sup>49</sup> These sentences are far lower than the average sentence for federal weapons prosecutions, which is approximately eight years.<sup>50</sup> A defendant convicted under section 922(g)(8) is subject to a fine of up to \$250,000,<sup>51</sup> although in reality fines are rarely imposed.

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47. *Id.* This statute provides for sentencing enhancements under certain circumstances. For example, 18 U.S.C. § 924(e) provides that a defendant who violates any provision of section 922(g) after three prior felonies involving "serious drug offenses" or "violent felonies," as defined in 18 U.S.C. § 924(e)(2), shall be imprisoned not less than fifteen years. Under 18 U.S.C. § 924(c), if a defendant uses, carries, or possesses a firearm to further a "crime of violence" or "drug trafficking crime," as defined in sections 924(c)(2) and 924(c)(3), the defendant is subject to a mandatory minimum sentence of at least five years to run consecutively with the sentence imposed under section 924(a)(1) for possessing the firearm as a prohibited person.

48. U.S.S.G. § 2K2.1 (2002) is the specific sentencing guideline for defendants convicted under 18 U.S.C. § 922(g)(9). A number of guideline adjustments may be available for cases prosecuted under 18 U.S.C. § 922(g)(8). *E.g.*, U.S.S.G. §§ 2K2.1(b)(5) (use of firearm in connection with felon), 2K2.1(b)(6) (cross reference to other guidelines).

49. *See* EOUSA Report, *supra* note 18. The statistics in the report cover the period from January 1995 through March 2002. According to these statistics, of the 188 defendants who were convicted under 18 U.S.C. § 922(g)(8), 21.3% received prison sentences exceeding sixty months, 12.8% received sentences of thirty-seven to sixty months, 11.7% received sentences of twenty-five to thirty-six months, 20.2% received sentences of thirteen to twenty-four months, 19.7% received sentences of one to twelve months, and 14.4% received no prison sentence. *Id.* It is important to note that these statistics include prosecutions in which the section 922(g)(8) charge is only one of several charges. *Id.* The statistics report the *total* sentence received by the defendant, not simply the portion of the sentence attributable to the section 922(g)(8) charge. *Id.* Under the federal sentencing rules, the judge calculates separate offense levels for each aspect of the defendant's misconduct (*e.g.*, drug offenses and gun offenses are grouped separately), and then combines these offense levels to determine the total sentence. U.S.S.G. § 3D1.4. When gun and drug charges are grouped, the drug charges normally account for the lion's share of the sentence. Thus the EOUSA's statistics probably overstate the sentences that are attributable section 922(g)(8). Among those defendants sentenced to sixty-one months or more, it is likely that the bulk of the sentence is attributable to offenses other than the violation of section 922(g)(8).

50. CRIMINAL CASE PROCESSING, 2000, *supra* note 22. Table 6 of this report indicates that in the most recent year for which data are available (the period October 1, 1999 through September 30, 2000), the mean sentence in federal weapons prosecutions was 92.2 months. *Id.* The mean sentence in all federal prosecutions during this period was 56.8 months. *Id.*

51. 18 U.S.C. § 3571 (2002).

(2) *Legislative History of Section 922(g)(8)*

The gun ban under 18 U.S.C. § 922(g)(8) traces its origins to three bills that were introduced in the fall of 1993. The first of these bills was introduced by Senator Paul Wellstone, and the second was introduced by Representative Robert Torricelli.<sup>52</sup> Senator Wellstone and Representative Torricelli were working closely together, and their proposals were identical. They sought to prohibit the possession of a firearm by a batterer subject to a restraining order and also to prohibit the possession of a firearm by any person who had been convicted of a domestic violence misdemeanor.<sup>53</sup> They offered these proposals as amendments to the Omnibus Crime Bill that was under consideration in each chamber.<sup>54</sup>

Senator John Chafee proposed a third version of the gun ban.<sup>55</sup> His bill would have prohibited gun possession while a restraining order was pending but would not have created a gun ban for misdemeanants.<sup>56</sup> Senate Republicans such as Bob Dole and Orrin

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52. Senator Wellstone introduced this bill, S. 1570, on October 20, 1993. S. 1570, 103d Cong. (1993). Representative Robert Torricelli introduced a companion bill, H.R. 3301, at the same time in the House. H.R. 3301, 103d Cong. (1993). Press Release, Office of Senator Paul Wellstone (May 19, 1994) (1994 WL 14179879); Press Release, Office of Representative Robert Torricelli (May 19, 1994) (1994 WL 14179910); 139 CONG. REC. S15,500 (daily ed. Nov. 10, 1993) (statement of Sen. Wellstone); 139 CONG. REC. S14,011 (daily ed. Oct. 20, 1993) (statement of Sen. Wellstone).

53. S. 1570 and H.R. 3301 would have extended the gun ban under 18 U.S.C. § 922(g) to any person who:

- (8)(A) has been convicted in any court of the United States of an offense that—
- (i) has as an element the use, attempted use, or threatened use of physical force against a spouse, former spouse, domestic partner, child, or former child of the person; or
  - (ii) by its nature, involves a substantial risk that physical force against a spouse, domestic partner, child, or former child of the person may be used in the course of committing the offense; or
- (B) is required, pursuant to an order issued by a court of the United States in a case involving the use, attempted use, or threatened use of physical force against a person described in subparagraph (A), to maintain a minimum distance from the person so described.

139 CONG. REC. S14,011 (daily ed. Oct. 20, 1993).

54. At this time, the Omnibus Crime Bill was assigned the number S. 1607. 139 CONG. REC. S15,638 (daily ed. Nov. 10, 1993).

55. This proposal was introduced on November 10, 1993, as amendment 1169 to the Omnibus Crime Bill, S. 1607. 139 CONG. REC. S15,638 (daily ed. Nov. 10, 1993).

56. Senator Chafee proposed to prohibit possession of a firearm by any person (A) who is subject to an order, issued by a Federal or State court after a hearing about which that person received actual notice and at which that person had the opportunity to participate, restraining that person from harassing, stalking, threatening, or engaging in other such conduct that would place another person in fear of bodily injury or the effect of which conduct would be to place a reasonable person in fear of bodily injury; and

Hatch backed the Chafee proposal,<sup>57</sup> while Senate Democrats such as Joseph Biden supported the Wellstone/Torricelli version.<sup>58</sup> In the end, the Senate approved both the Wellstone amendment<sup>59</sup> and the Chafee Amendment,<sup>60</sup> leaving the conference committee to sort out any conflicting provisions.<sup>61</sup> The Crime Bill itself was approved by the Senate on November 19, 1993.<sup>62</sup>

The House was less enthusiastic about the gun ban for domestic abusers. Representative Torricelli's proposal encountered resistance from Representative Jack Brooks of Texas, the Chairman of the House Judiciary Committee,<sup>63</sup> and from the National Rifle Association.<sup>64</sup> When the House passed its version of the Omnibus Crime Bill on April 21, 1994,<sup>65</sup> Representative Torricelli's amendment was included but in a weakened form.<sup>66</sup> The House had

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(B) whom the court issuing the order finds under this subsection to represent a credible threat to the physical safety of that other person.

139 CONG. REC. S15,638 (daily ed. Nov. 10, 1993); 139 CONG. REC. S15,620 (daily ed. Nov. 10, 1993).

57. 139 CONG. REC. S15,638 (daily ed. Nov. 10, 1993) (statement of Sen. Dole).

58. *Id.*

59. This amendment was approved by a voice vote on November 10, 1993. Holly Idelson, *Congress Responds to Violence; Tackles Guns, Criminals*, 51 CONG. Q. WKLY. REP. 3127 (Nov. 13, 1993).

60. This amendment was approved by a voice vote on November 19, 1993. 139 CONG. REC. S16,288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee).

61. The Wellstone and Chafee amendments were compared in a press release from Senator Wellstone's office. Press Release, Office of Senator Wellstone, (May 19, 1994)(1994 WL 14179879 \*2).

62. The bill passed by a vote of 95-4. Holly Idelson, *Anti-Crime Bills Compared*, 52 CONG. Q. WKLY. REP. 1147 (May 7, 1994).

63. Ellen J. Silberman, *Backers Fear for Proposal to Keep Guns from Abusers*, RECORD (Northern N.J.), June 29, 1994, at A12 ("The chairman of the House Judiciary Committee, Rep. Jack Brooks, D-Texas, is a longtime opponent of gun control measures.").

64. The NRA was openly hostile toward Representative Torricelli and his bill. NRA spokesman Joe Phillips said, "Bob Torricelli is an idiot for suggesting he has the only solution to this problem." Neal Thompson, *Denying Guns to Spouse Abusers Torricelli Girds to Battle NRA*, RECORD (Northern N.J.), Dec. 3, 1993, at B1. The NRA took the position that the gun ban should be limited to felonies, and that advocates for battered women should strive to reclassify domestic violence offenses as felonies, rather than to create a new gun ban based on misdemeanors. Silberman, *supra* note 63. For his part, Representative Torricelli said that NRA lobbyists "have defended those who have beaten their spouses and children." RECORD (Northern N.J.), Dec. 3, 1993, at B1, *available at* 1993 WL 7916684.

65. The bill passed by a vote of 285-141. Idelson, *supra* note 62.

66. *Guns and Family Abusers*, WASH. POST, June 25, 1994, at A20. Representative Torricelli was critical of the House's revised version. Press Release, Office of Representative Torricelli (May 19, 1994)(1994 WL 14179910 \*2) ("Unfortunately, the House has passed a watered-down version of this legislation . . . . [I]t is critical that our colleagues in the conference committee correct the House version to provide full protections."); Letter from Representative Torricelli to Representative Brooks (June 27,



deleted the gun ban for misdemeanants. The House had also changed much of the other language in Representative Torricelli's proposal.<sup>67</sup>

The Crime Bill proceeded to the conference committee in the summer of 1994.<sup>68</sup> The conferees faced a difficult task. Many provisions of the Crime Bill such as the proposed ban on assault weapons, and the proposed civil remedy in the Violence Against Women Act attracted far more attention than the gun ban for domestic abusers.<sup>69</sup> The conference committee was embroiled in

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1994) (1994 WL 14180473 \*2) ("Unfortunately, the House crime bill contains a weakened version [of the gun ban] which would only prohibit possession by some of those who are subject to a court restraining order."). Senator Wellstone urged the conferees not to adopt the "severely weakened version of the Act" that was passed by the House. Press Release, Office of Senator Paul Wellstone (May 19, 1994)(1994 WL 14179879). In a floor statement, Senator Wellstone vented his frustration that "[t]his amendment was severely weakened on the House side." 140 CONG. REC. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone). Representative Torricelli also favored the Senate's stronger version, although he tempered his enthusiasm by offering this comment: "[a]dmitting the Senate has a better provision is a bit like cheering for the Russians in the Cold War, or for the Cowboys in the Super Bowl." Press Release, Office of Representative Robert Torricelli (May 19, 1994) (1994 WL 14179910).

67. The revised version of Representative Torricelli's bill appeared as section 1625 of the Violent Crime Control and Law Enforcement Act of 1994 (then known as H.R. 4092), which was printed in the Congressional Record on April 14, 1994. 140 CONG. REC. H2,260 (1994). This version of the bill included the same definition of "intimate partner" that appeared in the final version signed into law. (Previous versions of the bill did not define or even refer to the term "intimate partner.") The revised House version also offered a new formulation of 18 U.S.C. § 922(g)(8), prohibiting firearm possession by any person

who is subject to a court order that—

- (A) was issued after a hearing of which such person received actual or constructive notice, and at which such person had an opportunity to participate;
- (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury; and
- (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
- (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

*Id.*

68. *Id.*

69. Senator Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 7 (2000) ("The civil rights remedy was among the most closely considered provisions of the Violence Against Women Act."); Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 114 (2000) ("The civil rights remedy was the subject of much debate before its ultimate enactment."); Michael Ross, *House OKs Crime Bill, Keeps Assault Gun Ban*, L.A. TIMES, Aug. 22, 1994, at A1 (The proposed ban on assault

controversy,<sup>70</sup> and its first report was scrapped altogether.<sup>71</sup> In a second effort to pass the Crime Bill, the conferees reached a compromise that saved some of the bill's more controversial provisions but sided with the conservative House version of the gun ban for domestic abusers.<sup>72</sup> The House approved the conference report on August 21, 1994, and the Senate approved it four days later.<sup>73</sup> President Clinton signed the Crime Bill into law on September 13, 1994.<sup>74</sup>

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weapons provoked "tenacious opposition by the National Rifle Association and other gun lobbying groups.").

70. Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation Strategy*, 4 J.L. & POL'Y 391, 394 (1995) ("[T]he civil rights provision, having attracted a great deal of controversy, squeaked through the Conference Committee by only one vote."); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1, 35-36 (1996) (explaining that House conferees were apprehensive about VAWA's civil rights remedy); Carolyn P. Weiss, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 733 (1997) (The civil rights remedy "was the most controversial provision of the VAWA."). The proposed ban on assault weapons was so controversial that fifty pro-NRA Democrats, including House Judiciary Chairman Jack Brooks, teamed up with Republicans in opposing the measure. Ross, *supra* note 69.

71. The pro-NRA coalition in the House, outraged by the ban on assault weapons, succeeded in blocking consideration of the first conference report on a narrow procedural vote. Ross, *supra* note 69.

72. Holly Idelson, *\$33 Billion Crime Measure Heads to Last Hurdles*, 52 CONG. Q. WKLY. REP. 2137 (July 30, 1994). According to Senator Wellstone, the House conferees "stonewall[ed]" when he sought their approval of the Wellstone/Torricelli language. 140 CONG. REC. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone). The conference committee basically adopted the revised House language in the April 14, 1994 bill, with a few revisions. The conference report tightened some of the language of 18 U.S.C. § 922(g)(8) beyond what the House had required. For example, in section 922(g)(8)(A), the conferees deleted the House language that had allowed "constructive notice" to respondents in restraining order proceedings. In section 922(g)(8)(B), the conferees inserted language modifying the term "reasonable fear of bodily injury" to clarify that this language only covers injury to the "intimate partner or child." On the other hand, the conferees somewhat loosened the requirements of section 922(g)(8)(C). The revised House version had insisted that all restraining orders include "a finding that [the respondent] represents a credible threat to the physical safety of such intimate partner"; the conferees added the words "or child" to the end of this phrase, and also added an alternative provision so that a restraining order would qualify if it "explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury." Compare section 1625 of H.R. 4092, 140 CONG. REC. H2260 (daily ed. Apr. 14, 1994), with Title XI, § 110401, Public Law No. 103-322, 18 Stat. 1796 (enacted September 13, 1994).

73. The conference report was approved in the House by a vote of 235-195, and in the Senate by a vote of 61-38. Nourse, *supra* note 70, at 36.; Holly Idelson & David Masci, *Crime Bill Provisions*, 52 CONG. Q. WKLY. REP. 3526 (Dec. 10, 1994).

74. Idelson & Masci, *supra* note 73.

Because the three bills that became 18 U.S.C. § 922(g)(8) were introduced on the floor, rather than in a committee, there was no opportunity to hold hearings on these proposals. The intent of Congress must be gleaned primarily from floor statements by the sponsors of the bills.<sup>75</sup> To the extent that such expressions of intent are available, three themes are strongly evident. First, the sponsors stressed the great dangers posed by firearms in the hands of domestic abusers.<sup>76</sup> Second, the sponsors expressed their intent to disarm every

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75. It is well settled that the statements of a bill's primary sponsors are an authoritative guide to statutory construction. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."); *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Fed. Energy Admin. v. Algonquin, SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute."). Indeed, every circuit has held that the statements of a bill's primary sponsor are an important expression of legislative intent. *See, e.g.*, *CIA Petrolera Caribe v. ARCO Caribbean, Inc.*, 754 F.2d 404, 425 (1st Cir. 1985) ("[R]emarks on the floor by the bill's sponsor . . . are entitled to substantial weight."); *Lieberman v. Fed. Trade Comm'n*, 771 F.2d 32, 39 (2d Cir. 1985) (sponsors' statements deserve substantial weight); *SmithKline Corp. v. Staats*, 668 F.2d 201, 210 (3d Cir. 1981) ("[A] sponsor's statement of purpose generally is regarded as a persuasive indicator of congressional intent."); *Radowich v. United States Attorney, Dist. of Maryland*, 658 F.2d 957, 962 (4th Cir. 1981) (author's comments on meaning of statutory language are entitled to substantial weight); *Rowinsky v. Bryan Indiana Sch. Dist.*, 80 F.3d 1006, 1014 n.19 (5th Cir. 1996) (sponsor's comments are "authoritative"); *Browder v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980) ("Because Edmunds was the Senate manager of the bill, we afford his statements great weight."); *In re Grand Jury Materials*, 659 F.2d 800, 806 (7th Cir. 1981) (sponsor's statements should be accorded substantial weight); *Hodgson v. Bd. of County Comm'rs*, 614 F.2d 601, 613 (8th Cir. 1980) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (citation omitted); *Kalvinskas v. California Inst. Tech.*, 96 F.3d 1305, 1309 (9th Cir. 1996) ("[R]elevant statements by sponsors" should be given substantial weight); *United States v. Boling*, 947 F.2d 1461, 1463 n.1 (10th Cir. 1991) (Sponsor's "views as to the intent and meaning [of a statute] would seem to have special significance."), *overruled on other grounds*, *United States v. Rockwell*, 984 F.2d 1112 (10th Cir. 1993); *Curse v. United States Dept. of Labor*, 843 F.2d 456, 462 n.18 (11th Cir. 1988) (statement of legislator who worked on statute is "helpful in clarifying legislative intent"); *St. Louis Fuel & Supply Co. v. Fed. Energy Regulatory Comm'n*, 890 F.2d 446, 449 (D.C. Cir. 1989) ("Because Eckhardt and Javits sponsored the provisions, moreover, their comments carry 'substantial weight.'").

76. 140 CONG. REC. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone) ("I have said it once. I have said it twice. I have said it 10 times. All too often the only difference between a battered woman and a dead woman is the presence of a gun."); Press Release, Office of Senator Wellstone (June 28, 1994)(1994 WL 14180478 \*2) ("More than 4,000 women are killed each year at the hands of their batterers. An estimated 150,000 incidents of domestic violence involve a weapon. A recent study in the *New England Journal of Medicine* found that [if there is a gun present in the house, a woman who has] been physically abused in a previous family fight [is] almost five times more likely to be murdered or involved in a fatal shooting."); Press Release, Office of Representative Torricelli (May 19, 1994)(1994 WL 14179910 \*2) ("[I]f you are under threat from domestic

person against whom a domestic violence restraining order is pending, without extensive inquiry into the precise basis for each restraining order.<sup>77</sup> Third, the sponsors relayed their concern that, under present law, the possibility of disarming batterers depended too much on the discretion of individual judges and prosecutors; a uniformly enforced gun ban was necessary to protect battered women and children.<sup>78</sup>

Certain less conspicuous aspects of this legislative history are noteworthy for purposes of this Article. For example, the origin of the notice and hearing requirements in section 922(g)(8) merits close scrutiny. The notice requirement was absent from the bills offered by

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violence and your chances of being under such a threat are increasing then it's likely that the person threatening you will use a gun."); 139 CONG. REC. S16,288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) ("There have been far, far too many dreadful cases in which innocent people and usually they are women have been wounded or killed by a former boyfriend or girlfriend, partner, or other intimate using a gun despite the fact that attacker was subject to a restraining order."); *see also* H.R. Conf. Rep. No. 103-711, at 391 (1994), *quoted in* *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999) ("Congress finds with respect to this provision [section 922(g)(8)] that domestic violence is the leading cause of injury to women in the United States between the ages of 15 and 44; firearms are used by the abuser in 7% of domestic violence incidents and produces [sic] an adverse effect on interstate commerce; and individuals with a history of domestic abuse should not have easy access to firearms.").

77. 140 CONG. REC. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone) (Proposal "would prohibit *anyone who has a restraining order issued against them* [from] owning or possessing a gun.") (emphasis added); 139 CONG. REC. S16,288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) ("There simply is no rational reason whatsoever to allow persons who have been deemed a clear and present danger to another person, usually a woman, to have a gun. None at all."); *Id.* at \*15 ("Restraining orders are issued for the express reason that a woman sincerely believes and a court agrees that she is in imminent danger of being harmed, attacked or killed. It therefore is nothing short of insanity for Federal law to allow such dangerous persons to possess a gun."); 139 CONG. REC. S15,500 (daily ed. Nov. 10, 1993) (statement of Sen. Wellstone) ("[I]f someone has not been responsible enough so that he, or sometimes it could be she, has a record of violence against a spouse or a child, then we have no responsibility whatsoever to enable that person to go out and buy a gun or, for that matter, own a gun."); WASH. POST, Nov. 6, 1993, at A24 (quoting Representative Torricelli's statement that, "The bill would make it clear that if you are not responsible enough to keep from doing harm to your spouse or your children, then society does not deem you responsible enough to own a gun.").

78. 140 CONG. REC. S7884 (daily ed. June 29, 1994) (statement of Sen. Wellstone) (decrying the evils of charge bargaining, whereby batterers avoid the felony gun ban by pleading to misdemeanor assault charges in many jurisdictions); Press Release, Office of Representative Torricelli (May 19, 1994) (1994 WL 14179910 \*2) (complaining that the current ability of police to disarm abusers was inconsistent because "most states do not consider domestic violence to be a felony . . ."); 139 CONG. REC. S16,288 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee) (citing need for more "definite protection" under the law); *see* 140 CONG. REC. S7,393 (daily ed. June 22, 1994) (statement of Sen. Wellstone) ("[I]f you have committed an act of violence against your spouse or child, whatever your gender is, you should not be able to own a firearm.").

Senator Wellstone and Representative Torricelli.<sup>79</sup> Then it was introduced in April 1994 in the House, where critics of the gun ban had their strongest influence. The revised House version insisted on “a hearing of which such person received actual *or constructive* notice, and at which such person had an opportunity to participate.”<sup>80</sup> When critics of the gun ban exacted further concessions in the conference committee during the summer of 1994, they deleted the words “or constructive,” further limiting the flexibility of the notice requirement.<sup>81</sup>

It also bears mentioning that the requirement of express findings in the restraining order was inserted by critics, not by not the original proponents of the legislation.<sup>82</sup> The House Judiciary Committee inserted this requirement in the House bill in April 1994 despite objections by Representative Torricelli.<sup>83</sup> The new requirement of explicit findings in the restraining order was one of the shortcomings that Senator Wellstone complained of when he stated that “the modification made to the Domestic Violence Firearm Prevention provision in the House bill narrowed it so that very few perpetrators would be covered.”<sup>84</sup>

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79. At this time the Omnibus Crime Bill was assigned the number S. 1607. 130 CONG. REC. S15,638 (daily ed. Nov. 10, 1993).

80. See sources cited *supra* note 69. Senator Wellstone and Representative Torricelli felt the notice and hearing requirements would greatly weaken the legislation. See Press Release, Office of Representative Torricelli (May 19, 1994) (1994 WL 14179910 \*2) (complaining that, due to the notice requirement inserted by the House, the gun ban “only applies to individuals who have the opportunity to appear before the court . . .”); Press Release, Office of Senator Wellstone (May 19, 1994) (1994 WL 14179879 \*3) (protesting the insertion of the notice and hearing requirements in the Wellstone/Torricelli bill, and insisting that “the modification made to the Domestic Violence Firearm Prevention provision in the House bill narrowed it so that very few perpetrators would be covered”).

81. See sources cited *supra* note 73.

82. *United States v. Emerson*, 270 F.3d 203, 215 (5th Cir. 2001) (noting that the original Wellstone bill “clearly contemplates a firearms disability without . . . an express judicial finding of future dangerousness.”), *cert. denied*, 122 S. Ct. 2362 (2002).

83. Press Release, Office of Representative Torricelli (May 19, 1994) (1994 WL 14179910 \*2) (criticizing the authors of the “watered-down version of this legislation” passed in the House); Letter from Representative Torricelli to Representative Brooks (June 27, 1994) (1994 WL 14180473 \*2) (“Unfortunately, the House crime bill contains a weakened version [of the gun ban] which would only prohibit possession by some of those who are subject to a court restraining order.”).

84. Press Release, Office of Senator Wellstone (May 19, 1994) (1994 WL 14179879 \*3).

(3) *Constitutional Challenges to Section 922(g)(8)*

Shortly after 18 U.S.C. § 922(g)(8) took effect, it drew many constitutional challenges.<sup>85</sup> The earliest challenges invoked the Commerce Clause. Defendants argued that Congress exceeded its power to regulate interstate commerce when it created a nationwide firearms disability for batterers. This argument has been rejected by every court that has heard it. Courts have ruled that the inclusion of a jurisdictional predicate in section 922(g) guarantees a sufficient nexus with interstate commerce.<sup>86</sup> No prosecution can proceed under 18 U.S.C. § 922(g) unless the government shows that the gun or one of its component parts has crossed state lines.<sup>87</sup> While the Supreme Court has breathed life into the Commerce Clause with its rulings in *United States v. Lopez*<sup>88</sup> and *United States v. Morrison*,<sup>89</sup> these decisions are not controlling because they addressed statutes that lacked a jurisdictional element.

As an alternative constitutional argument, some defendants have claimed that section 922(g)(8) violates their due process rights because they never received notice of the gun ban until they were

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85. The constitutional challenges will be discussed only briefly here, because the primary purpose of this article is to explore problems with the enforcement of the gun ban once it was found to be constitutional.

86. Under section 922(g), it is illegal "to ship or transport in interstate or foreign commerce; or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." No defendant can be prosecuted under this statute unless he possessed "in and affecting commerce . . . a firearm [or] ammunition." Citing this jurisdictional predicate, every court considering the issue has upheld section 922(g)(9) as a lawful exercise of the commerce power. See e.g., *United States v. Henry*, 288 F.3d 657, 664 (5th Cir. 2002) (rejecting challenge to section 922(g)(8) under Commerce Clause); *Emerson*, 270 F.3d at 217; *United States v. Napier*, 233 F.3d 394, 401-02 (6th Cir. 2000); *United States v. Jones*, 231 F.3d 508, 514-15 (9th Cir. 2000); *United States v. Baker*, 197 F.3d 211, 215 (6th Cir. 1999), cert. denied, 528 U.S. 1197 (2000); *United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999); *United States v. Cunningham*, 161 F.3d 1343, 1346 (11th Cir. 1998); *United States v. Wilson*, 159 F.3d 280, 285-87 (7th Cir. 1998); *United States v. Pierson*, 139 F.3d 501, 502-03 (5th Cir. 1998); *United States v. Bayles*, 151 F. Supp. 2d 1318, 1321 (D. Utah 2000); *United States v. Visnich*, 109 F. Supp. 2d 757, 759-62 (N.D. Ohio 2000); *United States v. Bunnell*, 106 F. Supp. 2d 60, 66 (D. Maine 2000), *aff'd*, 280 F.3d 46 (1st Cir. 2002); *United States v. Myers*, No. 98-2560, 1999 WL 475571, at \*1 (8th Cir. June 29, 1999).

87. This is usually demonstrated through proof that the gun or a component part was manufactured in a different state. E.g., *Pierson*, 139 F.3d at 503-04 (proof of out-of-state manufacture was sufficient to show nexus with interstate commerce in prosecution under section 922(g)(8)).

88. 514 U.S. 549 (1995) (striking down Gun Free School Zone Act, 18 U.S.C. § 922(q)(1)(A), as improper exercise of Congress' power to regulate interstate commerce).

89. 529 U.S. 598 (2000) (striking down civil remedy provision in Violence Against Women Act, 42 U.S.C. § 13981, because Congress exceeded its authority under the Commerce Clause).

arrested for violating this law. Judge Posner of the Seventh Circuit embraced this argument in his dissenting opinion in *United States v. Wilson*, arguing that the federal government had “set a trap” for the defendant when it enacted a new *malum prohibitum* statute without taking proper steps to ensure the public received notice.<sup>90</sup> A few courts have adopted Judge Posner’s interpretation on this issue,<sup>91</sup> but most courts have rejected constitutional challenges to section 922(g)(8) based on insufficient notice. These courts have held that the pendency of a restraining order should put a reasonable person on inquiry notice about the risk that his gun rights might be subject to regulation.<sup>92</sup>

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90. *Wilson*, 159 F.3d at 293–96 (Posner, J., dissenting).

91. *E.g.*, *United States v. Ficke*, 58 F. Supp. 2d 1071 (D. Neb. 1999); *United States v. Emerson*, 46 F. Supp. 2d 598, 613 (N.D. Tex. 1999), *rev’d*, 270 F.3d 203, 261 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

92. *United States v. Henry*, 288 F.3d 657, 660 (5th Cir. 2002) (“[T]he necessary mens rea [for a violation of section 922(g)(8)] does not require knowledge that one is violating the law but merely of the legally relevant facts.”) *cert. denied*, 123 S. Ct. 224 (2002); *United States v. Emerson*, 270 F.3d 203, 216 (5th Cir. 2001) (rejecting due process argument by defendant who claimed he had not received notice of gun ban under section 922(g)(8)) *cert. denied*, 122 S. Ct. 2362 (2002); *United States v. Napier*, 233 F.3d 394, 399 (6th Cir. 2000) (“His status alone, as one subject to a domestic violence order, was sufficient to preclude him from claiming a lack of fair warning with respect to the requirements of § 922(g)(8).”); *United States v. Kafka*, 222 F.3d 1129, 1131–32 (9th Cir. 2000) (restraining order transformed the defendant’s otherwise “innocent” possession of a firearm); *United States v. Reddick*, 203 F.3d 767, 769–71 (10th Cir. 2000) (“We agree with every circuit court that has considered due process challenges to § 922(g)(8) and conclude that due process does not require actual knowledge of the federal statute.”); *United States v. Baker*, 197 F.3d 211, 220 (6th Cir. 1999) (“The fact that Baker had been made subject to a domestic violence protection order provided him with notice that his conduct was subject to increased government scrutiny. Because it is not reasonable for someone in his position to expect to possess dangerous weapons free from extensive regulation, Baker cannot successfully claim a lack of fair warning with respect to the requirements of § 922(g)(8).”) *cert. denied*, 528 U.S. 1197 (2000); *United States v. Meade*, 175 F.3d 215, 225 (1st Cir. 1999) (holding that individuals subject to restraining orders “would not be sanguine about the legal consequences of possessing a firearm.”); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999) (“Like a felon, a person [subject to domestic violence protective order] cannot reasonably expect to be free from regulation when possessing a firearm.”); *United States v. Wilson*, 159 F.3d 280, 293 (7th Cir. 1998) (defendant can “knowingly” violate section 922(g)(8) without knowing that his conduct is illegal); *United States v. Bayles*, 151 F. Supp. 2d 1318, 1321 n.1 (D. Utah 2000) (In prosecution under section 922(g)(8), “ignorance of the law is no excuse.”); *United States v. Visnich*, 65 F. Supp. 2d 669, 673 (N.D. Ohio 1999) (“[W]here an individual is subject to a domestic violence restraining order, he or she must be aware of the consequences of possessing firearms and ammunition.”); *United States v. Henson*, 55 F. Supp. 2d 528, 530 (S.D. W.Va. 1999) (defendant cannot defeat prosecution under section 922(g)(8) by claiming ignorance of the law); *United States v. Hopper*, No. 00-5289, 2001 WL 1671083, at \*2 (6th Cir. Dec. 28, 2001) (upholding conviction under section 922(g)(8) even though defendant did not receive notice that restraining order precluded him from possessing firearms).

Other defendants have attacked section 922(g)(8) as an unconstitutional infringement on their right to bear arms. Courts have generally responded to these Second Amendment challenges by characterizing the right to bear arms as a collective right and by refusing to find a violation of this right unless the defendant can demonstrate that his loss of gun rights somehow affects the readiness of a well regulated militia.<sup>93</sup> In *United States v. Emerson*, the Fifth Circuit ruled that individuals do have a Second Amendment right to bear arms, but determined that section 922(g)(8) is a permissible imposition on this right.<sup>94</sup>

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93. Whether this interpretation has merit is a highly controversial topic that lies beyond the scope of the present article. It appears that most courts have construed the right to bear arms as a collective right, and have declined to strike down the federal firearms prohibitions as infringements on Second Amendment rights. *E.g.*, *Napier*, 233 F.3d at 402–03 (rejecting Second Amendment challenge where defendant could not “show that § 922(g)(8) has some impact on the collective right of the militia”); *Bayles*, 151 F. Supp. 2d at 1320–21 (rejecting Second Amendment challenge to section 922(g)(8)); *Visnich*, 65 F. Supp. 2d at 671–72; *Henson*, 55 F. Supp. 2d at 529–30; *United States v. Boyd*, 52 F. Supp. 2d 1233, 1237 (D. Kan. 1999), *aff’d*, 211 F.3d 1279 (10th Cir. 2000); *see Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing, with approval, other opinions holding that section 922(g) does not violate Second Amendment); *United States v. Baer*, 235 F.3d 561, 564 (10th Cir. 2000) (rejecting Second Amendment challenge to section 922(g)(1), noting that “the circuits have consistently upheld the constitutionality of federal weapons regulations like [this one] absent evidence that they in any way affect the maintenance of a well regulated militia.”); *United States v. Stepney*, No. CR 01-0344, 2002 WL 1460258, at \*\*1–2 (N.D. Cal. July 1, 2002) (denying CJA reimbursement to appointed defense counsel who filed “specious” brief challenging section 922(o) under Second Amendment).

94. 270 F.3d 203, 261 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002). The district court in *Emerson* had attacked section 922(g)(8) vehemently:

It is absurd that a boilerplate state court divorce order can collaterally and automatically extinguish a law-abiding citizen’s Second Amendment rights, particularly when neither the judge issuing the order, nor the parties nor their attorneys are aware of the federal criminal penalties arising from firearm possession after entry of the restraining order. That such a routine civil order has such extensive consequences totally attenuated from divorce proceedings makes the statute unconstitutional. There must be a limit to government regulation on lawful firearm possession. This statute exceeds that limit, and therefore it is unconstitutional.

*United States v. Emerson*, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999). *See* Oskar M. Pérez, *United States v. Emerson: The Decision That Will Potentially Force the Supreme Court to Finally Decide Whether the Second Amendment Protects the State or the People*, 48 LOY. L. REV. 367 (2002); William C. Plouffe, Jr., *A Federal Court Holds the Second Amendment is an Individual Right: Jeffersonian Utopia or Apocalypse Now?*, 30 U. MEM. L. REV. 55 (1999); Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157 (1999); Scott A. Henderson, *United States v. Emerson: The Second Amendment as an Individual Right—Time to Settle the Issue?*, 102 W. VA. L. REV. 177 (1999).



Additional constitutional challenges to section 922(g)(8) have invoked the Equal Protection Clause of the Fifth Amendment,<sup>95</sup> the Eighth Amendment's prohibition of cruel and unusual punishment,<sup>96</sup> and the Tenth Amendment's reservation of certain powers for the states.<sup>97</sup> None of these arguments has prevailed.

**B. 18 U.S.C. § 922(g)(9)—Gun Ban After Misdemeanor Crime of Domestic Violence**

(1) *Provisions of Section 922(g)(9)*

Section 922(g)(9) of Title 18 (often known as the “Lautenberg Amendment”) creates a firearms disability for any person who has been convicted of “a misdemeanor crime of domestic violence.”<sup>98</sup> The Lautenberg Amendment also criminalizes the act of selling or otherwise disposing of a firearm by giving it to a person who has been convicted of a misdemeanor crime of domestic violence.<sup>99</sup> Only convictions—not mere indictments—for a misdemeanor crime of domestic violence can result in a firearms disability under section 922(g)(9).<sup>100</sup> Like 18 U.S.C. § 922(g)(8), section 922(g)(9) has a

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95. In *United States v. Baker*, 197 F.3d 211, 216 (6th Cir. 1999), the Sixth Circuit determined that section 922(g)(8) affects neither a fundamental right nor a suspect class, so the court utilized a “rational basis” standard in reviewing this statute. The court found that denial of firearms to domestic abusers under restraining orders is rationally related to a legitimate governmental interest of reducing gun-related violence. *United States v. Bunnell*, 106 F. Supp. 2d 60, 66 (D. Maine 2000) (summarily rejecting equal protection challenge to section 922(g)(8)).

96. *Baker*, 197 F.3d at 217 (punishment for violation of section 922(g)(8) is not “grossly disproportionate to the crime committed,” as required to show a violation of the Eighth Amendment).

97. *United States v. Myers*, No. 98-2560, 1999 WL 475571, at \*1 (8th Cir. June 29, 1999) (Tenth Amendment challenge to section 922(g)(8) must fail once court has concluded that this statute is a valid exercise of Congress's commerce powers); *Meade*, 175 F.3d at 224; *Bostic*, 168 F.3d at 723–24; *Wilson*, 159 F.3d at 287–88; *Visnich*, 109 F. Supp. 2d at 762–63; *United States v. Bunnell*, 106 F. Supp. 2d 60, 66 (D. Maine 2000); *Visnich*, 65 F. Supp. 2d at 672.

98. 18 U.S.C. § 922(g)(9) (2002). Section 922(g)(9) provides in pertinent part: “It shall be unlawful for any person . . . , who has been convicted in any court of a misdemeanor crime of domestic violence . . . , to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . . .” *Id.* Of course, there was no need to create such a gun ban for felony crimes of domestic violence, because all felons are already subject to the long-standing gun ban under 18 U.S.C. § 922(g)(1).

99. *Id.* § 922(d)(9).

100. By contrast, in the context of felony offenses, either a conviction or an indictment will result in a firearms disability. *Id.* §§ 922(g)(1), 922(n).

jurisdictional predicate: the government must prove that the firearm or ammunition in question has traveled in interstate commerce.<sup>101</sup>

The term “misdemeanor crime of domestic violence” is defined in 18 U.S.C. § 922(a)(33)(A):

“misdemeanor crime of domestic violence” means an offense that—

- (i) is a misdemeanor under Federal or State law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.<sup>102</sup>

In addition to these definitional requirements for the predicate offense, section 922(a)(33)(B)(i) also imposes procedural requirements:

A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless —

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.<sup>103</sup>

The statute does not allocate the burden of proof on these procedural requirements, and the case law has not settled the issue.<sup>104</sup>

101. Under 18 U.S.C. § 922(g)(9), it is illegal for a convicted domestic violence misdemeanant “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

102. *Id.* § 922(a)(33)(A).

103. *Id.* § 921(a)(33)(B)(i).

104. *See, e.g.,* *United States v. Akins* [hereinafter *Akins I*], 243 F.3d 1199, 1202 (9th Cir. 2001), *amended and superseded on denial of reh'g by* *United States v. Akins* [hereinafter *Akins II*], 276 F.3d 1141 (9th Cir. 2002). The Ninth Circuit in *Akins I* initially took the position that the burden fell on the government:

By defining the federal offense to require a knowing and intelligent waiver of the right to counsel in the underlying domestic violence conviction, Congress made knowing and intelligent waiver an element of the § 922(g)(9) offense. The government thus has the burden of proving beyond a reasonable doubt a knowing and intelligent waiver of the right to counsel in the predicate offense.

*Akins I*, 243 F.3d at 1202. However, all of this language was deleted when the Ninth Circuit amended its opinion in *Akins II*. 276 F.3d at 1144–46. The only other court to reach this question in a published opinion is the district court in *United States v. Bethurum*. 213 F. Supp. 2d 679, 687–88 (N.D. Tex. 2002). There, the court held that the government

The Lautenberg Amendment includes other language allowing an exception to the gun ban for defendants whose civil rights were forfeited as a result of the misdemeanor conviction and then restored at a later time. For purposes of the Lautenberg Amendment, the forfeiture and restoration of civil rights will be evaluated under state law, not federal law.<sup>105</sup> A defendant seeking to invoke the exception for restoration of civil rights bears the burden of proof on this issue.<sup>106</sup> A defendant who appeals a conviction for a misdemeanor crime of domestic violence is still subject to the gun ban until the conviction is vacated.<sup>107</sup>

One unique provision of the Lautenberg Amendment extends its coverage to military and law enforcement personnel, who are exempted from all the other gun bans under 18 U.S.C. §§ 922(g)(1)–922(g)(8).<sup>108</sup> These personnel are subject to the same criminal penalties that apply to ordinary citizens who possess firearms after a misdemeanor crime of domestic violence.

A violation of the Lautenberg Amendment is punishable by a prison term of up to ten years<sup>109</sup> and a fine of up to \$250,000.<sup>110</sup> Among the 371 defendants convicted under section 922(g) since 1996, fewer than fifteen percent were sentenced to a prison term exceeding five years. Most were sentenced to a term of two years or less, and

bears the burden of proof on the counsel requirement and the jury trial requirement under 18 U.S.C. § 921(a)(33)(B)(i). *Id.*

105. Under 18 U.S.C. § 921(a)(33)(B)(ii)(2002):

A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

*E.g.*, *United States v. Wegrzyn*, 305 F.3d 593, 595–96 (6th Cir. 2002) (interplay of Michigan's restoration statute and 18 U.S.C. § 921(a)(33)(B)(ii) required *vacatur* of conviction under Lautenberg Amendment where defendant had successfully completed probation for misdemeanor crime of domestic violence).

106. *Bethurum*, 213 F. Supp. 2d at 686.

107. *United States v. Blosser*, No. 02-40074-01, 2002 WL 31261170, at \*3 (D. Kan. Oct. 4, 2002).

108. 18 U.S.C. § 925(a)(1)(2002) provides:

[T]he provisions of this chapter, *except for sections 922(d)(9) and 922(g)(9)* and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

The italicized language was added by the Lautenberg Amendment.

109. *Id.* § 924(a)(2).

110. *Id.* § 3571.

nineteen percent received no prison sentence at all.<sup>111</sup> These sentences were far below the eight-year average in federal weapons cases during fiscal year 2000.

(2) *Legislative History of Section 922(g)(9)*

Though named after Senator Lautenberg, the Lautenberg Amendment owes its origins to the work of Senator Wellstone and Representative Torricelli in 1993 and 1994. They had proposed a gun ban for two categories of domestic abusers: 1) those subject to restraining orders, and 2) those who had been convicted of misdemeanor offenses involving domestic violence.<sup>112</sup> As noted previously, the second component of the Wellstone/Torricelli bill perished in the House Judiciary Committee and in the conference committee on the 1994 Crime Bill.<sup>113</sup>

In the next Congress, Senator Frank Lautenberg picked up where Senator Wellstone and Representative Torricelli had left off. On March 21, 1996, Senator Lautenberg introduced S. 1632, "a bill to prohibit persons convicted of a crime involving domestic violence from owning or possessing firearms."<sup>114</sup> As originally introduced, the bill was fairly straightforward. It prohibited the possession of firearms by any person who had committed a "crime involving domestic violence," whether the charged offense was a felony or misdemeanor.<sup>115</sup> The bill created a disability not only for defendants who had been convicted of such an offense, but also for defendants

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111. See EOUSA Report, *supra* note 18. According to these statistics, of the 371 defendants who were convicted under 18 U.S.C. § 922(g)(9), 14.6% received prison sentences exceeding sixty months, 16.7% received sentences of thirty-seven to sixty months, 11.1% received sentences of twenty-five to thirty-six months, 22.6% received sentences of thirteen to twenty-four months, 15.4% received sentences of one to twelve months, and 19.4 % received no prison sentence. *Id.* As noted previously, it is important to bear in mind that these statistics include prosecutions in which the section 922(g)(9) charge is only one of several charges, so it is likely that the statistics overstate the sentences attributable solely to section 922(g)(9).

112. See 139 CONG. REC. 515, 638 (daily ed. Nov. 10, 1993) (at this time the Omnibus Crime Bill was assigned the number S. 1607).

113. See *supra* notes 64–75 and accompanying text.

114. 142 CONG. REC. S2646 (daily ed. Mar. 21, 1996) (statement of Sen. Lautenberg).

115. This bill included the following definition of the predicate offense:

The term "crime involving domestic violence" means a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or a by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.

142 CONG. REC. S2646-02 (daily ed. Mar. 21, 1996) (statement of Sen. Lautenberg).

who had been indicted and were awaiting trial.<sup>116</sup> The bill did not include any language requiring that certain “elements” be present in the state statutes defining the predicate offense. Like other provisions of 18 U.S.C. § 922(g), the original version of the Lautenberg Amendment did not create a new overlay of procedural safeguards for the underlying case. The bill did not even discuss a defendant’s right to counsel or right to a jury trial in the predicate misdemeanor proceeding.

Over the next six months, the Lautenberg Amendment underwent significant revisions. The first round of changes came in June 1996, when Senator Lautenberg sought approval to add his amendment to the Interstate Stalking Punishment and Prevention Act, H.R. 2980.<sup>117</sup> Senator Kay Bailey Hutchinson, a Texas Republican, was shepherding H.R. 2980 in the Senate. She and her Republican colleagues let Senator Lautenberg know in no uncertain terms that they felt his amendment was inappropriate for the stalking bill.<sup>118</sup> When Senator Lautenberg persisted, they demanded two significant changes in the Lautenberg Amendment as a condition for incorporating it into the stalking bill. First, they insisted that Senator Lautenberg drop the language creating a firearms disability based solely on an indictment for a misdemeanor crime of domestic violence.<sup>119</sup> Second, the Republicans inserted a requirement that no predicate would qualify under the Lautenberg Amendment unless the defendant had been represented by counsel in the misdemeanor proceeding or had knowingly and intelligently waived his right to counsel.<sup>120</sup> The Senate approved the Lautenberg Amendment by a voice vote on July 25, 1996.<sup>121</sup> Although the Senate passed the anti-stalking bill the same day,<sup>122</sup> the House failed to act on it, apparently

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116. *Id.*

117. 142 CONG. REC. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg).

118. Senator Lautenberg complained in a floor statement that the Republicans had threatened to hold up President Clinton’s judicial appointments if Senator Lautenberg did not relent with his amendment. 142 CONG. REC. S9458 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

119. 142 CONG. REC. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg).

120. Both of these changes were reflected in the version of the bill that appeared in the Congressional Record on July 25, 1996. 142 CONG. REC. S8922 (daily ed. July 25, 1996).

121. 142 CONG. REC. S8829 (daily ed. July 25, 1996) (statement of Sen. Lautenberg). In a floor statement on August 2, 1996, Senator Lautenberg offered the following account of the compromise that took place in July:

Finally, on July 25, after agreeing to several changes at the request of my Republican colleagues, my legislation passed the Senate by a voice vote. The compromise, Mr. President, that was worked out was supported by even the most ardent progun Members of this body.

142 CONG. REC. S9459 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

122. 142 CONG. REC. S8831 (daily ed. July 25, 1996).

because some representatives were opposed to the Lautenberg Amendment.<sup>123</sup>

Senator Lautenberg then sought another vehicle for his bill. On September 12, 1996, Senator Lautenberg offered his bill as an amendment to the Treasury, Postal Service, and General Appropriations Act.<sup>124</sup> The amendment was approved by a voice vote of 97-2.<sup>125</sup> The Treasury-Postal appropriation bill was withdrawn and subsumed within the Omnibus Consolidated Appropriations Act, H.R. 4278, which also included the Lautenberg Amendment.<sup>126</sup>

Despite his success in winning the support of Republican senators, Lautenberg knew that a showdown was coming with the House Republicans.<sup>127</sup> After all, the House Republicans had defeated this same proposal when Senator Wellstone and Representative Torricelli first offered it in 1994, and the House Republicans had thwarted the proposal again when it was attached to the stalking bill in the summer of 1996. Now, the House Republicans were proposing sweeping changes to the Lautenberg Amendment as a price for their approval.<sup>128</sup> They proposed, *inter alia*, limiting the ban to misdemeanants who had been entitled to a jury trial, limiting the ban to misdemeanants who were notified of the law at the time of their conviction, and limiting the ban to misdemeanants who had abused their intimate partners (as opposed to their children).<sup>129</sup>

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123. 142 CONG. REC. S9458 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg). In a floor statement on September 12, 1996, Senator Lautenberg commented that the House had rejected the anti-stalking bill because it included the Lautenberg Amendment. "Unfortunately, when [the anti-stalking bill] got to the House of Representatives they, despite a commitment of support, let it be known that they will not let this 'no guns for domestic abuser' amendment survive." 142 CONG. REC. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

124. 142 CONG. REC. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

125. 142 CONG. REC. S10,379 (daily ed. Sept. 12, 1996).

126. 142 CONG. REC. S11,872 (daily ed. Sept. 30, 1996).

127. Senator Lautenberg was aware that his greatest challenge lay in persuading the House conferees, who had thwarted the gun ban for domestic violence misdemeanants that the Senate had passed back in 1994. "There is no reason why wife beaters and child abusers should have guns, and only the most progun extremists could possibly disagree with that. Unfortunately, these same extremists seem to have veto rights in the House of Representatives." 142 CONG. REC. S9459 (daily ed. August 2, 1996) (statement of Sen. Lautenberg).

128. In a floor statement on September 25, 1996, Senator Lautenberg said, "I was told last night that, behind closed doors, the Republican leadership has decided to entirely gut this legislation and say that someone who beats his wife and beats his child ought to be able to own a gun." 142 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg). Lautenberg feared a "complete cave-in to the most radical fringe of the gun lobby," which was trying to "emasculat[e] this legislation." *Id.*

129. These proposals were summarized in a floor statement by Senator Lautenberg on September 30, 1996. 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

In order to fend off these major changes, which he felt would “gut” his bill,<sup>130</sup> Senator Lautenberg agreed to other changes that he deemed to be less significant. He reached a compromise with the Republican negotiators in the early morning hours on September 28, 1996,<sup>131</sup> the very day when the House voted on the bill. Senator Lautenberg accepted eleventh-hour amendments that, according to Lautenberg, had been authored by “enemies of the ban—lawmakers who oppose any curbs on guns.”<sup>132</sup>

The first of the revisions incorporated a new “use of force” requirement. As Lautenberg would later recount, “Some argued that the term ‘crime of violence’ [in the original bill] was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition.”<sup>133</sup> The Republican negotiators proposed, and Senator Lautenberg accepted, a version of the “use of force” requirement that was more restrictive than the typical definition in the federal gun laws.<sup>134</sup> The legislative history lacks any explanation for this departure from established definitions.

The second revision on September 28 was a toned-down version of the jury trial requirement that Republicans had sought. Senator Lautenberg downplayed the importance of this concession.

[W]e agreed to include in the final agreement a provision that has no real substantive effect, but that may help to assure some people that nobody will lose their ability to possess a gun because of a flawed trial. . . . The language protects from the ban anyone who has been entitled to a jury trial, but who did not receive such a jury trial, or who did not knowingly and intelligently waive his right to a jury trial.<sup>135</sup>

Senator Lautenberg also agreed to leave in the counsel requirement that Senate Republicans had inserted back in July when

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130. *Id.*

131. 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (“The language in the final agreement was worked out early Saturday morning, September 28, through further negotiations with the Republican leadership.”).

132. Guy Gugliotta, *Gun Ban Exemption Ricochets in the Struggle*, WASH. POST, June 10, 1997, at A15.

133. 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

134. The new “use of force” requirement in the Lautenberg Amendment required that the predicate offense must involve “the use or attempted use of force, or the threatened use of a deadly weapon.” Typically in the U.S. Code, this requirement is defined more broadly to include “the use, attempted use, or threatened use of physical force.” Compare 18 U.S.C. § 921(a)(33)(A)(ii) (narrow definition in Lautenberg Amendment) with 18 U.S.C. § 922(g)(8) (broader definition); 18 U.S.C. § 924(c) (broader definition); 18 U.S.C. § 924(e) (broader definition). Senator Wellstone had used the broader definition in his original proposal of a gun ban for convicted domestic abusers. See *supra*, note 54.

135. 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

he sought their consent to amend the stalking bill.<sup>136</sup> Under this requirement, a predicate offense would not cause a firearms disability unless the defendant had been represented by counsel or had knowingly and intelligently waived his right to counsel.<sup>137</sup> The legislative history lacks any discussion of this requirement, and apparently Senator Lautenberg was not concerned that the counsel requirement lacked any precedent in the federal gun laws.<sup>138</sup>

Finally—and apparently without Senator Lautenberg’s prior approval—Republican Representative Bob Barr arranged for the Lautenberg Amendment to include language that would subject police officers and military personnel to the new gun ban.<sup>139</sup> Senator Lautenberg later recounted that this change was made to the bill after Senator Lautenberg had gone to sleep in the early morning hours of September 28, 1996.<sup>140</sup> Senator Lautenberg did not object to the revision when he woke up the next day, but he speculated that Representative Barr had inserted it as a “poison pill” to make the bill less attractive to fellow Republicans and decrease the likelihood of its passage.<sup>141</sup>

Notwithstanding Representative Barr’s last-minute amendment, the House approved the conference report on September 28, 1996, by a vote of 370-37.<sup>142</sup> The Senate passed the bill on September 30, 1996, by a vote of 84-15.<sup>143</sup> The President signed the bill into law on September 30, 1996.<sup>144</sup>

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136. In a floor statement on September 12, 1996, Senator Lautenberg recounted that he was only able to incorporate his bill into the Anti-Stalking Bill after he struck a deal with critics including Senator Trent Lott, Senator Larry Craig, and Senator Kay Bailey Hutchinson. 142 CONG. REC. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg); see 142 CONG. REC. S9628 (daily ed. Sept. Aug. 2, 1996) (statement of Sen. Lautenberg) (“[F]inally, on July 25, after agreeing to several changes at the request of my Republican colleagues, my legislation passed the Senate by voice vote.”). The counsel requirement was one such change.

137. 142 CONG. REC. S8922 (daily ed. July 25, 1996).

138. See discussion *infra* notes 147–50 and accompanying text.

139. Naftali Bendavid, *A Political Gunfight*, 19 LEGAL TIMES 42, March 3, 1997, at 19. Representative Barr denied that he had authored this change, but most other observers have attributed it to him. *E.g., id.*; Gugliotta, *supra* note 132; Press Release, Office of Senator Lautenberg (Jan. 8, 1997) (1997 WL 4428604, at \*1).

140. Gugliotta, *supra* note 132.

141. Bendavid, *supra* note 139; Press Release, Office of Senator Lautenberg, Statement Opposing Repeal of Domestic Violence Gun Ban Law (Jan. 8, 1997) (1997 WL 4428604) (“Gun ban opponents, at the last minute, insisted on inserting into the law a provision that exempts covered offenders from a provision of the Gun Control Act that generally excludes government entities from the Act.”).

142. 142 CONG. REC. H12,110 (daily ed. Sept. 28, 1996).

143. 142 CONG. REC. S11,936 (daily ed. Sept. 30, 1996).

144. CONG. Q. NEWS, Oct. 1, 1996.



The final version of the law was poorly drafted and internally inconsistent. The D.C. Circuit recently complained that “section 921(a)(33)(A) is not a paradigm of precise draftsmanship.”<sup>145</sup> For example, section 921(a)(33)(A)’s definition of “misdemeanor crime of domestic violence” refers to a “subparagraph (C)” that Congress had actually deleted from the bill.<sup>146</sup>

In the proceedings that led to the passage of the Lautenberg Amendment, expressions of legislative intent were few and far between. To the extent that legislative intent can be discerned from these sources, a number of important themes emerge. First, Congress perceived an urgent need to disarm batterers.<sup>147</sup> Second, Congress

145. *United States v. Barnes*, 295 F.3d 1354, 1356 (D.C. Cir. 2002); *see also id.* at 1361 (“Needless to say, if the Congress had more precisely articulated its intention, our task would have been easier” in construing the meaning of 18 U.S.C. § 921(a)(33)(A).).

146. 18 U.S.C. § 921(a)(33)(A) (2002). Section 921(a)(33)(A) begins with the language, “Except as provided in subparagraph (C),” but subparagraph (C) was deleted in the final version of the statute.

147. Senator Lautenberg’s floor statements provide insight into the policy concerns that led Congress to pass the Lautenberg Amendment. He explained that, “we proposed that no wife beater, no child abuser . . . ought to be able to have a gun, because we learned one thing—that the difference between a murdered wife and a battered wife is often the presence of a gun.” 142 CONG. REC. S11,363 (daily ed. Sept. 26, 1996) (statement of Sen. Lautenberg). Senator Lautenberg noted that approximately two million cases of domestic abuse are reported each year, and that approximately 150,000 of these cases involve a firearm. *Id.* Senator Lautenberg discussed the fatal consequences of gun possession by batterers:

There is no question that the presence of a gun dramatically increases the likelihood that domestic violence will escalate into murder. According to one study, for example, in households with a history of battering, the presence of a gun increases the likelihood that a woman will be killed threefold [sic].

142 CONG. REC. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg). “Every year thousands of women and children die at the hands of a family member, and sixty-five percent of the time those murderers use that gun.” 142 CONG. REC. S9459 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg). Senator Lautenberg stated that “for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death.” 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). If abusers are permitted to retain their guns, “[t]he end result, without any question, would be more shootings, more injuries, and more death.” 142 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

Other sponsors of the Lautenberg Amendment echoed the statements made by Senator Lautenberg. Several sponsors emphasized the urgent need to deny firearms to batterers. Senator Murray stated that:

[W]e know from the research that nearly 65 percent of all murder victims known to have been killed by intimates were shot to death. We have seen that firearms-associated family and intimate assaults are 12 times more likely to be fatal than those not associated with firearms. A California study showed when a domestic violence incident is fatal, 68 percent of the time, the homicide was done with a firearm. . . [T]he gun is the key ingredient most likely to turn a domestic violence incident into a homicide.

expressed its intent that the new gun ban be applied broadly,<sup>148</sup> a fact that should be significant for statutory construction by the courts.<sup>149</sup>

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142 CONG. REC. S10,379 (daily ed. Sept 12, 1996) (statement of Sen. Murray). Senator Feinstein stated that, “many perpetrators of severe and recurring domestic violence are still permitted to possess a gun. Mr. President, these people are like ticking time bombs. It is only a matter of time before the violence gets out of hand, and the gun results in tragedy.” 142 CONG. REC. S10,380 (daily ed. Sept 12, 1996) (statement of Sen. Feinstein). Representative Torricelli, the primary sponsor of the House analog to the Lautenberg Amendment, stated in a press release on September 19, 1996, that “[it] is critical to the health and well-being of countless American women and children that we move promptly to disarm wife beaters and child abusers.” Press Release, Office of Robert Torricelli, Lautenberg & Torricelli Urge Gingrich to Include Domestic Violence Gun Ban in Continuing Resolution (Sept. 19, 1996)(1996 WL 11125168, at \*2).

148. Senator Lautenberg stated that his bill “establishes a policy of zero tolerance when it comes to guns and domestic violence.” 142 CONG. REC. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg). In a press release on September 12, 1996, Senator Lautenberg emphasized that “[w]e need to ensure that every innocent child or terrorized woman enjoys the fullest protection of the law.” Press Release, Office of Sen. Lautenberg, Lautenberg Offers Amendment to Treawy Postal Service Appropriations Bill That Takes Guns Out of the Hands of Wife Beaters & Child Abusers (Sept. 12, 1996)(1996 WL 11124929). Senator Lautenberg indicated that any person who has committed an act of domestic violence, in any form, should forfeit the right to possess a firearm: “In my view, anyone who attempts or threatens violence against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.” 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). That Senator Lautenberg intended a broad construction of the statute is clear in the following statement:

We hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun. That is the way it ought to be.

142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). Senator Lautenberg believed that broad application of the statute was crucial because “[t]here is no margin of error when it comes to domestic abuse and guns.” 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). “The lives of thousands of women and children are at stake.” 142 CONG. REC. S9628 (daily ed. Aug. 2, 1996) (statement of Sen. Lautenberg).

Others in Congress stressed that the law should be construed broadly. Senator Kerry stated that “guns absolutely must be forbidden for those who abuse their spouses.” 142 CONG. REC. S12,141 (daily ed. Oct. 1, 1996) (statement of Sen. Kerry). Representative Woolsey made this categorical statement: “It is simple: Wife-beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period.” 142 CONG. REC. H8100 (daily ed. July 23, 1996) (statement of Rep. Woolsey). No less an authority than House Speaker Newt Gingrich stated that “I’m very much in favor of stopping people who engage in violence against their spouses from having guns.” Interview by Meet the Press with Newt Gingrich (Sept. 15, 1996).

149. The Supreme Court has held that where Congress manifests its intent for a firearms statute to be construed broadly, the courts should heed that directive. In the leading case, *Scarborough v. United States*, the Supreme Court decided that section 922(g) should be construed broadly because the legislative history “while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that ‘they cannot be trusted to possess a firearm without becoming a

Third, Congress intended for the new law to be applied uniformly to reach any conviction for an act involving domestic violence,<sup>150</sup> notwithstanding the vagaries of state statutory definitions.<sup>151</sup>

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threat to society.” 431 U.S. 563, 572 (1977) (citation omitted) (giving expansive interpretation to interstate commerce requirement); *accord* *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 112–13 (1983) (citing Congress’ intent “to rule broadly” and refusing to exempt deferred judgments from the coverage of section 922(g)); *Lewis v. United States*, 445 U.S. 55, 63 (1980) (citing same rationale in refusing to limit section 922(g) to counseled convictions).

150. Senator Lautenberg also sought to ensure that his new law would be applied uniformly to reach any conviction for an act involving domestic violence, notwithstanding the vagaries of state statutory definitions. Senator Lautenberg made clear that his bill targeted “[d]omestic violence, no matter how it is labeled. . . .” 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). Senator Lautenberg said that variation among the states’ laws should not hinder the enforcement of the federal firearms ban. For example, Senator Lautenberg did not want the applicability of the statute to depend on whether the defendant had been convicted by a jury, because “[s]tates vary considerably with respect to the types of crimes for which a jury trial is required.” 142 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg). Senator Lautenberg also was concerned that variation in states’ plea bargaining practices should not determine whether an offense involving domestic violence would qualify under the definition in his statute. 142 CONG. REC. S10,377 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). Senator Lautenberg intended for his bill to apply uniformly even though “in many places today, domestic violence is not taken as seriously as other forms of criminal behavior.” 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg). Many sponsors agreed with Senator Lautenberg that the application of the new law should not be thwarted by variation among states’ statutory definitions of domestic violence and assault. As Senator Feinstein stated, “[t]his amendment looks to the type of crime, rather than the classification of the conviction.” 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein). Senator Dodd indicated that the law would “prevent anyone convicted of *any kind* of domestic violence from owning a gun.” 142 CONG. REC. S12,341 (daily ed. Oct. 3, 1996) (statement of Sen. Dodd) (emphasis added). Senator Feinstein, Senator Wellstone, and Representative Schroeder all noted the variation in states’ charging practices, which necessitated a generic federal definition of the predicate offense so that batterers would uniformly be denied the right to possess firearms. 142 CONG. REC. H10,434 (daily ed. Sept. 17, 1996) (statement of Rep. Schroeder); 142 CONG. REC. S10,380 (daily ed. Sept. 12, 1996) (statement of Sen. Feinstein); 142 CONG. REC. S10,378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

151. The Supreme Court has proven sympathetic to this concern in other contexts. *See Taylor v. United States*, 495 U.S. 575, 590 (1990) (“It seems to us to be implausible that Congress intended the meaning of ‘burglary’ for purposes of § 924(e) to depend on the definition adopted by the state of conviction.”); *Dickerson*, 460 U.S. at 119–20 (1983) (absent a plain indication to the contrary by Congress, federal laws are not to be construed so that their application is dependent on state law, “because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control”); *United States v. Turley*, 352 U.S. 407, 411 (1957) (“[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law.”).

(3) *Constitutional Challenges to Section 922(g)(9)*

Criminal defendants and police organizations have raised several challenges to the constitutionality of section 922(g)(9), all of which have ultimately failed.<sup>152</sup> The most commonly raised argument is that Congress exceeded its power under the Commerce Clause when it enacted the Lautenberg Amendment. Courts have ruled that the inclusion of a jurisdictional predicate in section 922(g) guarantees a sufficient nexus with interstate commerce.<sup>153</sup>

Some challenges have asserted that section 922(g)(9) violates the Due Process Clause because the statute does not require the government to prove that defendants knew their possession of firearms was illegal. However, the Supreme Court has made clear that “the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense,” not of their illegality.<sup>154</sup> It is axiomatic that ignorance of the law is no excuse.<sup>155</sup> Lower courts have

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152. Shortly after enactment of 18 U.S.C. § 922(g)(9), Senator Lautenberg asked the Congressional Research Service to prepare a memorandum evaluating whether the statute would be struck down by the courts. The analysts responded, “there is little question that the new ban is constitutional.” Press Release, Office of Senator Lautenberg, Statement Opposing Repeal of Domestic Violence Gun Ban Law (Jan. 8, 1997) (1997 WL 4428604, at \*1); Memorandum from American Law Division of Congressional Research Service, to Senator Frank Lautenberg (December 6, 1996) (on file with author). This analysis turned out to be prescient. Only one constitutional challenge to 18 U.S.C. § 922(g)(9) has proven successful, and that success was short-lived. *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998), *vacated on rehearing*, 173 F.3d 898 (D.C. Cir. 1999) [hereinafter *FOP I*].

153. See e.g., *United States v. Hemmings*, 258 F.3d 587, 594–95 (7th Cir. 2001) (rejecting Commerce Clause challenge to section 922(g)(9)); *United States v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001); *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001); *United States v. Organ*, 230 F.3d 1356 (4th Cir. 2000) (per curiam); *United States v. Boyd*, 211 F.3d 1279 (10th Cir. 2000); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 704–05 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *United States v. Myers*, 187 F.3d 644 (8th Cir. 1999) (same); *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999) [hereinafter *FOP II*]; *United States v. Rivera*, No. 00-3127, 2001 WL 1610054, at \*1 (D.C. Cir. Nov. 21, 2001); *United States v. Ball*, No. 00-4582, 2001 WL 324624, at \*1 (4th Cir. Apr. 4, 2001); *United States v. Costigan*, No. 00-2457, 2001 WL 535734, at \*3 (1st Cir. Mar. 26, 2001); *United States v. Brown*, No. 00-4369, 2001 WL 285210, at \*1 (4th Cir. Mar. 23, 2001).

154. *Bryan v. United States*, 524 U.S. 184, 193 (1998).

155. *Cheek v. United States*, 498 U.S. 192, 199 (1991) (“[I]gnorance of the law or a mistake of law is no defense to criminal prosecution.”). The Supreme Court has carved out a narrow exception to this principle in *Lambert v. California*. 355 U.S. 225, 228–30 (1957). That decision reviewed a Los Angeles ordinance creating a new criminal penalty for any felon who remained in the city limits for over five days without registering with a law enforcement agency. *Id.* The Supreme Court reversed a defendant’s conviction under the ordinance because the city had not proven the defendant received notice that her “wholly passive” conduct could constitute a crime. *Id.* at 228. While defendants charged under section 922(g)(9) have claimed that their predicament is analogous to the situation in *Lambert*, courts evaluating such claims have ruled that the defendants’ conviction for a

followed this principle and have rejected due process challenges to section 922(g)(9) based on a defendant's lack of notice that his possession of a firearm is illegal.<sup>156</sup>

Other defendants challenging the Lautenberg Amendment have claimed that it is unconstitutionally vague. These defendants have identified three areas of vagueness in the statute: 1) ambiguity as to which acts meet the "use of force" requirement; 2) ambiguity as to what sorts of relationships fall within the "domestic relationship" requirement; and 3) ambiguity as to whether the relationship between the victim and the assailant must be an element of the predicate offense. Courts considering these challenges have been mindful of the strict test for invalidating a statute on grounds of vagueness<sup>157</sup> and have uniformly rejected such challenges.<sup>158</sup>

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violent crime should have put them on notice that the government could impose limits on their gun rights. *United States v. Barnes*, 295 F.3d 1354, 1367 (D.C. Cir. 2002) ("Having been convicted of a violent crime, Barnes had reason to know that the government could regulate his possession of firearms and thus he cannot avail himself of the limited *Lambert* exception."); *United States v. Denis*, 297 F.3d 25, 29–30 (1st Cir. 2002) (holding that defendant's conviction for misdemeanor crime of domestic violence should have put him on "inquiry notice" about possible illegality of gun possession); *United States v. Hancock*, 231 F.3d 557, 564 (9th Cir. 2000) ("[B]y commit[ing] the domestic violence offense, [the defendant] removed himself from the class of ordinary and innocent citizens who would expect no special restrictions on the possession of a firearm.") (citations omitted); *United States v. Hutzell*, 217 F.3d 966, 968 (8th Cir. 2000) ("[A]n individual's domestic violence conviction should itself put that person on notice that subsequent possession of a gun might well be subject to regulation."); *United States v. Mitchell*, 209 F.3d 319, 323 (4th Cir. 2000) ("[Defendant's] conduct in assaulting his wife—the act that led to his misdemeanor domestic violence conviction—put [him] on sufficient notice."); *United States v. Beavers*, 206 F.3d 706, 710 (6th Cir. 2000) ("[W]e conclude that Beavers's conviction on a domestic violence offense sufficiently placed him on notice that the government might regulate his ability to own or possess a firearm."). Courts have also offered a second reason for rejecting *Lambert* challenges to section 922(g)(9): possession of a firearm is "active conduct," as opposed to the "wholly passive conduct" at issue in the *Lambert* case. *Denis*, 297 F.3d at 29 (possession of firearm is "active conduct" for purposes of *Lambert* analysis); *Hancock*, 231 F.3d at 564.

156. See e.g., *Barnes*, 295 F.3d at 1366–67 (holding government need not prove, as element of offense under 18 U.S.C. § 922(g)(9), that defendant knew his possession of firearm was illegal); *Denis*, 297 F.3d at 29–30; *Ball*, 2001 WL 324624, at \*1; *Hancock*, 231 F.3d at 561–62; *Organ*, 230 F.3d at 1356; *Hutzell*, 217 F.3d at 968; *United States v. Scarberry*, 215 F.3d 1328 (6th Cir. 2000); *Boyd*, 211 F.3d at 1279; *Mitchell*, 209 F.3d at 322–23; *Beavers*, 206 F.3d at 708–09; *United States v. Bostic*, 168 F.3d 718, 722–23 (4th Cir. 1999), *cert. denied*, 527 U.S. 1029 (1999); *United States v. Meade*, 175 F.3d 215, 226 n.5 (1st Cir. 1999).

157. To decide a vagueness challenge, the court must assess whether the statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997). "The person challenging the statute as void for vagueness has a weighty burden of proof and must overcome a strong presumption of constitutionality." 1A NORMAN J SINGER, *SUTHERLAND ON STATUTORY CONSTRUCTION* § 21.16 at 142 (5th ed. 1993). "Since words, by their nature, are imprecise

Defendants and police organizations have also attacked the Lautenberg Amendment under the Equal Protection Clause. Many of these challenges have focused on the provision of section 921(a)(33)(B)(ii) that creates an exemption from the gun ban for a convicted misdemeanor who “has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense).” In most states, conviction for a misdemeanor offense does not entail the loss of civil rights, so misdemeanants in these states cannot avail themselves of the exemption under section 921(a)(33)(B)(ii). Some defendants have claimed that this asymmetry violates their right to equal protection of the laws under the Fourteenth Amendment.<sup>159</sup> Courts have evaluated such claims under the rational basis test, because domestic violence misdemeanants are not a suspect class and because the right to possess firearms has not been deemed a “fundamental right.”<sup>160</sup> Using this lenient standard, courts have found that Congress’s decision to incorporate state law governing forfeiture of civil rights was rational even though it led to disparity among the states in the application of the gun ban.<sup>161</sup> The finding of a rational

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instruments, even laws that easily survive vagueness challenges may have gray areas at the margins.” *United States v. Nason*, 269 F.3d 10, 22 (1st Cir. 2001).

158. *Barnes*, 295 F.3d at 1366 (rejecting argument that “there is no way for a person to know . . . whether the relational requirement is an element of the predicate crime”; also rejecting claim that list of required relationships is vague); *Nason*, 269 F.3d at 22 (rejecting argument that “use of force” requirement is vague); *Meade*, 175 F.3d at 222 (holding that section 921(g)(9) “contains no ambiguity either as to the persons to whom the prohibitions apply or as to what conduct is proscribed”); *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999) (“18 U.S.C. § 921(a)(33) is unambiguous.”); *United States v. Thomson*, 134 F. Supp. 2d 1227, 1229–30 (D. Utah 2001) (“[T]his court concludes that a person of ordinary intelligence could easily understand what conduct is prohibited by this statute and to whom it applies.”); *Costigan*, 2001 WL 525734, at \*\*1–2 (rejecting claim that term “cohabiting” in section 921(a)(33)(A) is vague); *Brown*, 2002 WL 31242235 at \*2 (section 921(a)(33) not void for vagueness).

159. A few defendants have presented an alternative theory, claiming that the violation of the Equal Protection Clause arises from the differential treatment of domestic violence misdemeanants and other misdemeanants. Courts have quickly disposed of this argument. “Congress could legitimately believe that the problem of domestic violence is sufficiently serious to deserve separate treatment, and it could also reasonably believe that persons convicted of a domestic-violence offense are likely to commit such an offense again. Thus, it is entirely rational to keep firearms out of the hands of such persons.” *United States v. Lewis*, 236 F.3d 948, 949 (8th Cir. 2001); *accord* *United States v. Lewitzke*, 176 F.3d 1022, 1025 (7th Cir. 1999).

160. *See e.g.*, *Barnes*, 295 F.3d at 1368 (using rational basis test to evaluate equal protection challenge to Lautenberg Amendment); *Hancock*, 231 F.3d at 566; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 709 (7th Cir. 1999); *FOP II*, 173 F.3d at 903. The D.C. Circuit initially agreed with this argument before reversing itself on rehearing. *FOP I*, 152 F.3d at 1002–03.

161. *Barnes*, 295 F.3d at 1368 (holding that Congress acted rationally in relying on varying state requirements for restoration of civil rights); *Smith*, 171 F.3d at (Congress did

basis was buttressed by Congress's inclusion of other means for restoring gun rights under section 921(a)(33)(B)(ii), such as expungement and pardon, which do not vary among the states to such a great degree.<sup>162</sup>

Still other constitutional challenges to section 922(g)(9) have invoked the Ex Post Facto Clause. Specifically, these claims have hypothesized that section 922(g)(9) imposes improper *ex post facto* punishment when it is applied to predicates predating the enactment of the statute or when it is used to prosecute possession of a firearm that the defendant acquired before the enactment of the statute. No published opinion has adopted this reasoning in a prosecution under section 922(g)(9). The courts have emphasized that section 922(g)(9) punishes possession of a firearm by a domestic violence misdemeanor after the statute took effect on September 30, 1996.<sup>163</sup>

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not act irrationally when it looked to state law to define the restoration exception.); *see also Hancock*, 231 F.3d at 567 ("Congress reasonably could conclude that felons who had been through a state's restoration process and had regained their civil rights (without any restriction on their possession of firearms) were more fit to own firearms than domestic-violence misdemeanants who had not had their convictions expunged or been pardoned. Reasonable people might argue whether that distinction is good public policy; but it is not irrational.").

162. *Barnes*, 295 F.3d at 1368 (ruling that availability of other remedies under section 921(a)(33)(B)(ii) supports finding of rational basis); *Hancock*, 231 F.3d at 567 ("Defendant had, and has, several adequate legal mechanisms at his disposal for regaining his right to possess firearms: pardon, expungement, and setting aside of convictions. 'Restoration of civil rights' is not one of those mechanisms, as it might be for some felons. But that minor distinction between felons and misdemeanants is not sufficient to constitute a violation of equal protection."); *Smith*, 171 F.3d at 626 (Lautenberg Amendment did not violate equal protection because it offered other means for misdemeanants to regain their right to possess firearms.).

163. *United States v. Denis*, 297 F.3d 25, 32 (1st Cir. 2002) ("[T]he conduct for which Denis is punishable under § 922(g)(9) is not the conviction for domestic assault in 1996, but the possession of a firearm in 2000); *United States v. Hemmings*, 258 F.3d 587, 594–95 (7th Cir. 2001) (section 922(g)(9) is not an *ex post facto* law); *United States v. Mitchell*, 209 F.3d 319, 322 (4th Cir. 2000) ("It is immaterial [to the analysis under the Ex Post Facto Clause] that Mitchell's firearm purchase and domestic violence conviction occurred prior to § 922(g)(9)'s enactment because the conduct prohibited by § 922(g)(9) is the *possession* of a firearm.") (emphasis in original); *United States v. Boyd*, 52 F. Supp. 2d 1233, 1236–37 (D. Kan. 1999) ("This court, as have all others deciding such a challenge, [has] concluded that . . . the illegal act in § 922(g)(9) is the possession of the firearm, not the misdemeanor domestic violence conviction."); *United States v. Rivera*, No. 00-3127, 2001 WL 1610054, at \*1 (D.C. Cir. Nov. 21, 2001) (rejecting *ex post facto* challenge to prosecution under section 922(g)(9) because defendant "does not show either that the law applied to events occurring before its enactment, or that it increased the punishment for prior conduct.") (citations omitted); *United States v. Ball*, No. 00-4582, 2001 WL 324624, at \*1 (4th Cir. Apr. 4, 2001) (no *ex post facto* problem where predicate misdemeanor conviction occurred before enactment of section 922(g)(9)); *see Cox v. Hart*, 260 U.S. 427, 435 (1922) (holding that a law is not unconstitutionally retroactive merely because it "draws upon antecedent facts for its operation").

Courts have summarily disposed of other constitutional challenges to section 922(g)(9). Among these arguments are claims that section 922(g)(9) constitutes a “bill of attainder,”<sup>164</sup> claims that section 922(g)(9) violates the Second Amendment,<sup>165</sup> claims that section 922(g)(9) violates the Eighth Amendment by imposing cruel and unusual punishment for the predicate misdemeanor offense,<sup>166</sup> claims that section 922(g)(9) violates the Tenth Amendment by usurping powers reserved for the states,<sup>167</sup> and claims that section 922(g)(9) violates the so-called “Domestic Violence Clause” in Article IV, Section 4 of the Constitution.<sup>168</sup>

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164. A bill of attainder is “a law that legislatively determines guilt and inflicts punishment upon an individual without provision of the protections of a judicial trial.” *Nixon v. Adm’r of Gen. Serv.*, 433 U.S. 425, 468 (1977). It is improper to characterize section 922(g)(9) as a bill of attainder because the statute does not determine guilt solely on the basis of the prior conviction. Moreover, the statute does not deprive the defendant of his right to trial by jury. *Hemmings*, 258 F.3d at 594–95 (rejecting argument that section 922(g)(9) is bill of attainder).

165. *Gardner v. Vespia*, 252 F.3d 500, 503 (1st Cir. 2001) (upholding summary judgment in favor of police chief sued by plaintiff who could not buy gun due to misdemeanor crime of domestic violence; the plaintiff had claimed that this denial infringed his Second Amendment rights, but the First Circuit held that “the Second Amendment does not confer an absolute right to bear arms”). *Lewis*, 236 F.3d at 950 (rejecting Second Amendment challenge to section 922(g)(9),); *United States v. Chavez*, 204 F.3d 1305, 1313 n.5 (11th Cir. 2000) (if convicted under section 922(g)(9), “Chavez might not have any claim under the Second Amendment since he has not shown his gun possession is reasonably related to a state-run militia.”); *Gillespie*, 185 F.3d at 711 (declining to invalidate section 922(g)(9) under Second Amendment because the plaintiff “does not argue (and we do not believe under any plausible set of facts that he could) that the viability and efficacy of state militias will be undermined by prohibiting those convicted of perpetrating domestic violence from possessing weapons in or affecting interstate commerce.”); *United States v. Finnell*, No. 00-4928, 2001 WL 1464305, at \*1 (4th Cir. Nov. 19, 2001) (section 922(g)(9) does not violate the Second Amendment).

166. *See Lewis*, 236 F.3d at 950 (rejecting Eighth Amendment challenge to section 922(g)(9), because “punishment is not based solely on status as a convict, but also on voluntary act of possession of a firearm”) (*citing United States v. Jester*, 139 F.3d 1168, 1170–71 (7th Cir. 1998)).

167. *Hemmings*, 258 F.3d at 594 (declining to find section 922(g)(9) unconstitutional under Tenth Amendment); *Lewis*, 236 F.3d at 950; *Meade*, 175 F.3d at 224; *FOP I*, 173 F.3d at 906–07.

168. U.S. Const. art. IV. Article IV, Section 4 of the Constitution reads as follows: “The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or the executive (when the legislature cannot be convened) against domestic violence.” Any attempt to invoke this provision in defending a prosecution under 18 U.S.C. § 922(g)(9) is clearly specious. *See e.g.*, *United States v. Smith*, 171 F.3d 617, 626 (8th Cir. 1999) (“Suffice it to say that when that Clause speaks of ‘domestic violence’ it means insurrection, riots, and other forms of civil disorder. It has no application to the Congress’s powers to regulate the possession of handguns under the Commerce Clause.”).



### III. Impediments to Effective Enforcement of These Statutes

Since the enactment of 18 U.S.C. §§ 922(g)(8) and 922(g)(9), most of the published opinions discussing these statutes have focused on their constitutionality. Comparatively little attention has centered on the enforceability of sections 922(g)(8) and 922(g)(9). Now that the constitutionality of these statutes is settled, it is time to consider whether they create an effective regulatory framework for disarming domestic abusers.

#### A. Flaws in Language of Section 922(g)(8)

##### (1) Notice and Hearing Requirements

A restraining order does not cause a firearms disability under 18 U.S.C. § 922(g)(8)(A) unless that order “was issued after a hearing of which [the respondent] received actual notice, and at which such person had an opportunity to participate.”<sup>169</sup> Though this requirement appears reasonable on its face, it actually creates enforcement problems because a large number of restraining orders in domestic violence cases are issued on an *ex parte* basis.

In all fifty states, a judge may issue a temporary restraining order (“TRO”) without any involvement by the respondent if the petitioner demonstrates an urgent need for the order.<sup>170</sup>

The *ex parte* TRO remains in force until the court holds a full hearing (i.e., a hearing of which the respondent receives actual notice,

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169. 18 U.S.C. § 922(g)(8)(A)(2002). In many respects, the hearing requirement appears to be perfunctory. The hearing itself need not be a hearing on the merits; for example, a hearing at which respondent’s counsel asks for a continuance would be considered sufficient to begin the gun ban under section 922(g)(8). *United States v. Calor*, 172 F. Supp. 2d 900, 905 (E.D. Ky. 2001) (“The fact that Calor’s counsel only made a ‘limited appearance’ and convinced the court to grant an extension of time does not alter the fact that a hearing occurred and the Defendant had an ‘opportunity to participate.’”). The enforceability of the gun ban does not depend on whether the respondent’s attorney rendered effective assistance of counsel at the hearing on the restraining order. *See United States v. Falzone*, No. 3: 97-CR-142, 1998 WL 351471, at \*1–2 (D. Conn. June 2, 1998) (gun ban commenced at hearing even though respondent claimed he “had only seconds” to speak with his attorney before the hearing, and respondent claimed he was “afforded no chance to give input” regarding his attorney’s handling of the hearing). Nor is it even necessary that the respondent was represented by counsel at the hearing. *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir. 1998) (hearing was sufficient to begin gun ban under section 922(g)(8) even though respondent proceeded *pro se*). If a respondent receives notice of the hearing, but decides not to attend, the gun ban can nonetheless commence at the time of the hearing. *United States v. Bunnell*, 106 F. Supp. 2d 60, 66 (D. Maine 2000) (section 922(g)(8) does not necessarily require attendance of respondent, but does require notice and opportunity to attend).

170. CLAIRE DALTON AND ELIZABETH SCHNEIDER, BATTERED WOMEN AND THE LAW 519–20 (2001).

and at which the respondent has an opportunity to participate). In most states, the judge must schedule a full hearing on the restraining order within two to four weeks after the *ex parte* TRO was issued.<sup>171</sup> An *ex parte* TRO can be renewed if the petitioner has been unable to serve the respondent with notice of the full hearing.<sup>172</sup> In some states,

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171. In Alaska, an *ex parte* TRO expires twenty days after issuance if no hearing is held. ALASKA STAT. § 18.66.110 (Michie 2002). In Arkansas, this period is thirty days. ARK. CODE ANN. § 9-15-206 (Michie 2002). In California, this period is twenty days, or if good cause is shown, twenty-five days. CAL. FAM. CODE § 546 (Deering 2002). In Colorado, this period is fourteen days. COLO. REV. STAT. § 13-14-102 (2002). In Connecticut, this period is fourteen days. CONN. GEN. STAT. ANN. § 46b-15 (West 2001). In Delaware, this period is ten days. DEL. CODE ANN. tit. 10, § 1043 (2002). In the District of Columbia, this period is fourteen days. D.C. CODE ANN. § 16-1004 (2002). In Florida, this period is fifteen days. FLA. STAT. ANN. § 741.30 (West 2002). In Idaho, this period is fourteen days. IDAHO CODE § 39-6308 (Michie 2002). In Illinois, this period is twenty-one days. 235 ILL COMP. STAT. 5/3-110 (2002). In Iowa, this period is fifteen days. IOWA CODE § 236.4 (2002). In Kentucky, this period is fourteen days, but it can be extended by an additional fourteen days. KY. REV. STAT. ANN. § 403 (Michie 2002). In Louisiana, this period is twenty days. LA. REV. STAT. ANN. § 46:2135 (West 2002). In Maine, this period is twenty-one days. ME. REV. STAT. TIT. 19, § 4006 (West 2002). In Maryland, this period is seven days, but the court may extend the period to up to thirty days. MD. CODE ANN., Fam. Law § 4-505 (2002). In Massachusetts, this period is ten days. MASS. GEN. LAWS ch. 209A, § 4 (2002). In Mississippi, this period is ten days, but can be continued by an extra twenty days. MISS. CODE ANN. § 93-21-11 (2002). In Montana, this period is twenty days. MONT. CODE ANN. § 40-4-121 (2002). In New Jersey, this period is ten days. N.J. STAT. ANN. § 2C:25-29 (West 2002). In New Mexico, this period is ten days. N.M. STAT. ANN. § 40-13-4 (Michie 2002). In North Carolina, this period is ten days. N.C. GEN. STAT. § 50B-2 (2002). In North Dakota, this period is fourteen days. N.D. CENT. CODE § 14-07.1-02 (2002). In Oklahoma, this period is fifteen days. OKLA. STAT. ANN. tit. 22, § 60.4 (West 2003). In Rhode Island, this period is twenty-one days. R.I. GEN. LAWS § 15-15-4 (2002). In South Dakota, this period is thirty days. S.D. CODIFIED LAWS § 25-10-7 (Michie 2002). In Tennessee, this period is fifteen days. TENN. CODE ANN. § 36-3-605 (2002). In Texas, this period is twenty days, but it may be renewed for additional twenty day periods. TEX. FAM. CODE ANN. § 83.002 (Vernon 2002). In Utah, this period is twenty days. UTAH CODE ANN. § 30-6-4.3 (2002). In Vermont, this period is ten days. VT. STAT. ANN. tit. 15, § 1104 (2002). In Virginia, this period is fifteen days. VA. CODE ANN. § 16.1-253.1 (Michie 2002). In Washington, this period is either fourteen days or twenty-four days, depending on the method of service that the petitioner selects. WASH. REV. CODE § 26.50.070 (2002). In West Virginia, this period is ten days. W. VA. CODE § 48-27-403 (2002). Many states have procedures for renewing *ex parte* orders if the respondent cannot be served. See, e.g., sources cited *infra* note 172.

172. See e.g., KY. REV. STAT. ANN. § 403.740 (Michie 2002) (*ex parte* restraining order lapses after fourteen days, but can be renewed one or more times for fourteen additional days if petitioner has not been able to serve respondent despite best efforts); OKLA. STAT. ANN. tit. 22, § 60.4 (West 2003) (*ex parte* restraining order lasts for fifteen days, but can be renewed for additional fifteen-day periods if respondent can't be served for full hearing); TEX. FAM. CODE ANN. § 83.002 (Vernon 2002) (*ex parte* order expires in twenty days, but "may be extended for additional twenty day periods").

the *ex parte* TRO can remain in effect for a long period without any requirement of renewal.<sup>173</sup>

Despite the widespread use of *ex parte* TROs, these orders do not cause a firearms disability under 18 U.S.C. § 922(g)(8)(A). Only one federal court of appeals has considered the applicability of the gun ban to *ex parte* TROs. In *United States v. Spruill*, the Fifth Circuit determined that such orders “are clearly not within § 922(g)(8)(A).”<sup>174</sup> Indeed, the original sponsors of 18 U.S.C. § 922(g)(8) feared that the inclusion of the notice and hearing requirement in this statute would greatly reduce the number of domestic abusers subject to the gun ban.<sup>175</sup>

Congress has created grave dangers for victims of domestic violence by denying them protection from armed abusers during the initial two- to four-week period after they obtain *ex parte* TROs.

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173. In Alabama, the *ex parte* order remains in effect until the hearing on the final order, and there is no time limit within which that hearing must be scheduled. ALA. CODE § 30-5-7 (2002). In Arizona, the *ex parte* order remains in effect for one year unless the respondent requests and wins a full hearing on the order during that one-year period. ARIZ. REV. STAT. § 13-3602 (2002). In Georgia, the *ex parte* order is effective for up to six months without a full hearing. GA. CODE ANN. § 19-13-4 (2002). In Hawaii, the *ex parte* order remains in effect for up to ninety days. HAW. REV. STAT. § 604-10.5 (2002). In Indiana, the *ex parte* order remains in effect for up to two years. IND. CODE § 34-26-5-9 (2002). In Kansas, the *ex parte* order remains in effect for a fixed period not to exceed one year. KAN. STAT. ANN. § 60-3107 (2001). In Michigan, the *ex parte* order remains in effect indefinitely until the respondent schedules and wins a full hearing on the order. MICH. COMP. LAWS § 600.2950 (2002). In Minnesota, the *ex parte* order remains in effect for up to one year or until the respondent requests and prevails in a full hearing (whichever comes first). MINN. STAT. ANN. § 518B.01 (West 2002). In Missouri, the *ex parte* order is valid for up to one year. MO. ANN. STAT. § 455.040 (West 2001). In Nebraska, the *ex parte* order continues in force for up to one year unless the respondent sets a hearing and can show cause why the order should not remain in effect. NEB. REV. STAT. § 42-925 (2002). In New Hampshire, the *ex parte* order is enforceable for up to one year. N.H. REV. STAT. ANN. § 173-B:4 (2002). In Oregon, the *ex parte* order continues in force until the respondent schedules and wins a full hearing on the order. OR. REV. STAT. § 107.718 (2001). In Pennsylvania, the *ex parte* order remains in effect indefinitely until the court modifies or terminates the order. 23 PA. CONS. STAT. § 6107 (2002). In South Carolina, the *ex parte* order remains in force for up to one year. S.C. CODE ANN. § 20-4-70 (Law. Co-op. 2002).

174. 292 F.3d 207, 217 n.13 (5th Cir. 2002); accord *United States v. Emerson*, 270 F.3d 203, 211 n.2 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

175. Press Release, Office of Representative Torricelli, Torricelli Statement on Domestic Violence Firearm Prevention Act (May 19, 1994)(1994 WL 14179910, at \*2) (complaining that, due to the notice requirement inserted by the House, the gun ban “only applies to individuals who have . . . the opportunity to appear before the court.”); Press Release, Office of Senator Wellstone, Wellstone to Crime Bill Conferees: Support Strong Provision to Take Guns Out of the Hands of Abusers (May 19, 1994)(1994 WL 14179879, at \*3) (protesting the insertion of the notice and hearing requirements in the Wellstone/Torricelli bill, and insisting that “[t]he modification made to the Domestic Violence Firearm Prevention provision in the House bill narrowed it so that very few perpetrators would be covered.”).

Research has shown that the risk of domestic violence escalates shortly after the victim attempts to separate from the abuser. Professor Martha Mahoney coined the phrase “separation assault” to describe the tendency of batterers to commit retaliatory abuse immediately after their victims attempt to escape the relationship (e.g., through obtaining a restraining order).<sup>176</sup> Rita Smith and Pamela Coukos, leaders of the National Coalition Against Domestic Violence, have also cautioned that a petition for a restraining order can “fuel violent retaliation” by the respondent.<sup>177</sup> Anecdotal evidence of such reprisals is abundant.<sup>178</sup> Of course, even a 100-foot stay-away order cannot protect a battered woman from an abuser with a gun, as Senator John Chafee observed: “[A] gun can be fired from far away, with some anonymity, and without much visual warning.”<sup>179</sup>

While the first month after the issuance of the *ex parte* TRO is the most dangerous month, the problems created by 18 U.S.C. § 922(g)(8)(A) may persist for a much longer period. For example, when petitioners are unable to serve respondents with notice of the full hearing, they must continually renew their *ex parte* TROs before they can obtain longer-term orders that would qualify for the federal gun ban.<sup>180</sup> Moreover, some jurisdictions such as Oregon have established innovative procedures that allow for the *ex parte* orders to ripen automatically into longer-term orders unless the respondent takes the initiative to schedule a hearing.<sup>181</sup> Depending on the particular circumstances of each case, these longer-term orders might

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176. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 71–76 (1991).

177. Rita Smith is the Executive Director of the National Coalition Against Domestic Violence (“NCADV”), and Pamela Coukos is NCADV’s Public Policy Director.

178. Some of these stories emerged during the 1994 debate over the proposal to create a firearms disability while a restraining order is in effect. Senator Chafee relayed a story of a Chicago woman who was shot dead by her former boyfriend one day before she was due in court on a hearing to extend a restraining order against him. 139 CONG. REC. S16,293 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee). Columnist Anna Quindlen told the story of a woman who “was shot to death by her husband a week after she got a temporary restraining order against him.” Anna Quindlen, *Crime Bill Contains Provisions That May Save Women’s Lives*, CHICAGO TRIB., May 30, 1994, at \*2, available at 1994 WL 6511101.

179. 139 CONG. REC. S16,293 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee). Other weapons such as a knife would require that “the attacker actually approach the victim, which may mean the intended victim has a chance to recognize the attacker and react,” or which may permit others around the victim to assist her if they recognize that the assailant is violating the restraining order. *Id.*

180. See sources cited *supra* note 173.

181. OR. REV. ST. 107.718 (2001); see DALTON & SCHNEIDER, *supra* note 170, at 519–20 (describing Oregon’s statute); see also, *supra* note 171 for examples of other states with self-finalizing *ex parte* orders in domestic violence cases.

never pass muster under section 922(g)(8)(A).<sup>182</sup> Yet victims' advocates in these states—faced with a Hobson's choice of lobbying to roll back their progressive state laws or foregoing the protection of the federal gun ban—will naturally choose the latter course.<sup>183</sup> Inconsistent enforcement of 18 U.S.C. § 922(g)(8) will be the result, frustrating the intent of Congress that this law apply uniformly in all the states.<sup>184</sup>

Perhaps the most significant problem caused by the notice and hearing requirement under section 922(g)(8)(A) is not the exclusion of *ex parte* orders, but rather the exclusion of stipulated orders. Due to the increasing use of mediation in family law disputes,<sup>185</sup> many couples have stipulated to restraining orders without scheduling a hearing of any sort.<sup>186</sup> Because these cases do not present the respondent with an opportunity to participate in a hearing, it is arguable that the requirements of 18 U.S.C. § 922(g)(8)(A) may not be satisfied.<sup>187</sup> Ironically, the cases in which abuse is most egregious are the least likely to go to a hearing, so the enforcement of section

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182. According to the Fifth Circuit in *United States v. Spruill*, 292 F.3d 219–20 (5th Cir. 2002), the notice and hearing requirements of section 922(g)(8)(A) cannot be satisfied merely by giving the respondent the option of scheduling a hearing. Only when a hearing is actually scheduled, and the respondent receives notices and an opportunity to participate, will section 922(g)(8)(A) be satisfied.

183. *Regarding Points of Conflict Between Oregon and Federal Domestic Violence Laws: Before Oregon House Interim Judiciary Comm.*, 69th Leg. Assem. (Or. 1997) (submitted written testimony of Maureen McKnight submitted Nov. 19, 1997) (arguing that Oregon's unique procedures for issuing restraining orders should not be abandoned altogether in order to match federal requirements). As an alternative to such wholesale changes, Oregon has enacted a statute providing that, if an eligible protective order is entered, the court "shall also include in the order, when appropriate, terms and findings sufficient under 18 U.S.C. §§ 922(d)(8) and (g)(8) to affect the respondent's ability to possess firearms and ammunition" if the respondent was provided with the requisite notice and opportunity to be heard. OR. REV. STAT. § 30.866(10)(2001). In other words, rather than modify Oregon's procedures to fit the requirements for the federal gun ban, this statute directs judges to make a record whenever their normal procedures happen to satisfy the federal requirements.

184. See sources cited *supra* note 151.

185. See e.g., Laurel Wheeler, *Mandatory Family Mediation & Domestic Violence*, 26 S. ILL. U. L.J. 559, 559–63 (2002); Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering & the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2141–56 (1993).

186. Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 805 (1996) ("Respondents frequently stipulate to the entry of the order.")

187. *Spruill*, 292 F.3d at 221 (finding that, for purposes of gun ban under 18 U.S.C. § 922(g)(8), notice and hearing requirements were not met by stipulated restraining order without hearing). By contrast, if a respondent stipulates to a restraining order at a hearing, there is no difficulty applying section 922(g)(8). See *United States v. Wilson*, 159 F.3d 280, 290 (7th Cir. 1998) (respondent did not object to order).

922(g)(8) may be limited to “borderline” cases in which the parties insist on a hearing.

The omission of *ex parte* and stipulated orders from the coverage of 18 U.S.C. § 922(g)(8) is perplexing when considered within the overall context of the federal firearms laws. The Supreme Court has made clear that federal firearms prohibitions are intended to be a “sweeping prophylaxis,”<sup>188</sup> and the legislative history of section 922(g)(8) indicates that Congress intended to take a similar approach in disarming batterers.<sup>189</sup> Congress has determined that the right of firearm ownership can be regulated when there exists a strong likelihood of danger to the public—even in the absence of procedural safeguards<sup>190</sup> such as the notice and hearing requirement in 18 U.S.C. § 922(g)(8)(A). For example, a felony indictment causes a firearms disability, even though the defendant has not yet been given an opportunity to tell his side of the story at trial.<sup>191</sup> A defendant’s status as a drug user can lead to a firearms disability, even though he has not been “convicted” or otherwise designated a drug user by any court before this disability takes effect.<sup>192</sup> Under the felon-in-possession statute, the defendant is subject to the gun ban even if he shows that the underlying felony conviction was unconstitutional.<sup>193</sup> The application of strict procedural protections in misdemeanor domestic violence proceedings seems incongruous alongside these less exacting standards for the other firearms disabilities under 18 U.S.C. § 922(g).

## (2) *Formalistic Requirements for Restraining Orders*

In addition to the notice and hearing requirements, a restraining order must meet certain formalistic requirements set forth in 18 U.S.C. § 922(g)(8)(C). This subsection provides that the gun ban will not apply unless the restraining order

- (i) includes a finding that [the respondent] represents a credible threat to the physical safety of such intimate partner or child; or
- (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.<sup>194</sup>

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188. *Lewis v. United States*, 445 U.S. 55, 63 (1980).

189. See sources cited *supra*, note 149.

190. *Lewis*, 445 U.S. at 63 (“There is no indication of any intent to require the Government to prove the validity of the predicate conviction.”).

191. 18 U.S.C. § 922(n)(2002).

192. *Id.* § 922(g)(3).

193. *Lewis*, 445 U.S. at 63 (holding that procedural flaws in the underlying felony case are not an obstacle to enforcement of the felon-in-possession law, 18 U.S.C. § 922(g)(1)).

194. 18 U.S.C. § 922(g)(8)(C).

Like the notice and hearing requirements, this language was absent from the Wellstone/Torricelli bill<sup>195</sup> and was inserted without their consent when the House redrafted the bill.<sup>196</sup>

In evaluating this requirement, the first question that arises is why Congress might perceive a need to narrow the list of potential defendants in such a manner. Recall that all of the requirements in Subsections (A), (B), and (C) in section 922(g)(8) must be satisfied in every prosecution under this statute. Subsection (B) requires that the restraining order in question will not qualify for the gun ban unless it “restrains [the respondent] from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.” Having determined that these alarming circumstances are present, why is it necessary to impose additional requirements to test whether the defendant is truly dangerous? Surely, the fulfillment of Subsection (B)’s requirements will guarantee that all defendants covered by 18 U.S.C. § 922(g)(8) are at least as dangerous as some of the other “prohibited persons” subject to section 922(g), such as marijuana smokers (section 922(g)(3)), aliens (section 922(g)(5)), and non-violent felons like tax cheats and embezzlers (section 922(g)(1)). Further, the temporary duration of the gun ban under section 922(g)(8) should assuage concerns that the list of stalkers, harassers, and batterers subject to section 922(g)(8)(B) might somehow be overinclusive if it were not further limited by section 922(g)(8)(C).

The strict formalistic requirements of 18 U.S.C. § 922(g)(8)(C) are markedly different from the requirements of state laws that create a gun ban for batterers subject to restraining orders. Several states such as California have passed laws that prohibit the possession of a firearm by any person subject to a restraining order in a domestic abuse case.<sup>197</sup> Very few of these statutes require—as the federal statute does—that the restraining order state the respondent poses a credible threat, or that the order require the respondent to refrain from committing certain crimes. Indeed, this latter requirement would be redundant with the states’ criminal laws: why would a restraining order prohibit that which is already illegal?

It is likely that section 922(g)(8)(C)’s formalistic requirements have adversely affected the enforcement of the federal gun ban.

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195. *See supra* note 54.

196. *See supra* notes 55–65 and accompanying text.

197. *E.g.*, CAL. PEN. CODE § 12021 (Deering 2002); DEL. CODE ANN. § 1448(a) (2002); FLA. STAT. 790.233 (2002); HAW. REV. STAT. § 134-7 (Michie 2002); 430 ILL. COMP. STAT. 65/8 (2002); MD. CODE ANN., FAM. LAW § 455(d)(2) (2002); MASS. ANN. LAWS ch. 209a, § 3B (Law. Co-op. 2002); N.C. GEN. STAT. § 14-269.8 (2002); VA. CODE ANN. § 18.2-308.1:4 (Michie 2002); WIS. STAT. § 941.29 (2001).

Many courts that issue restraining orders may lack the time and resources to create the thorough record required by section 922(g)(8)(C). Restraining orders are issued by some of the busiest judges in America, many of whom conduct hearings on these orders over the phone. Judge Posner estimated that at least 100,000 restraining orders are issued each year,<sup>198</sup> and this figure seems quite conservative. It seems inappropriate to require that such a huge volume of cases be managed differently in order to facilitate a much smaller number of prosecutions under the federal gun statutes. Some states such as Maine have amended their procedures for issuing restraining orders in order to comply with the requirements of section 922(g)(8)(C).<sup>199</sup> Other states such as Oregon considered and rejected bills that would enact such reforms.<sup>200</sup> In particular, controversy has arisen over the proposal to create forms for state judges that allow them the option of checking boxes indicating that the conditions required by 18 U.S.C. § 922(g)(8)(C) are present. Some critics believe that judges could selectively circumvent the federal gun ban simply by refraining from checking a box on the form when they sympathize with a particular defendant. In sum, no reform short of revising 18 U.S.C. § 922(g)(8) itself is likely to achieve the uniformity in enforcement that the sponsors of this legislation were seeking.<sup>201</sup>

### (3) *Exception for Government Personnel*

Pursuant to the “official use exception,”<sup>202</sup> the gun ban under 18 U.S.C. § 922(g)(8) does not apply to police officers, military personnel, and other government employees who use firearms in connection with their official duties. Thus, a police officer can be subject to a restraining order based on domestic abuse and still carry a firearm at work. On the other hand, the Lautenberg Amendment, 18 U.S.C. § 922(g)(9), does not grant any special exception for government employees who have committed misdemeanor crimes of domestic violence—no matter how long ago these offenses

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198. Bovard, *supra* note 27.

199. In 1997, victims’ advocates in Maine proposed a bill, H.R. 1264, to adapt the state’s requirements for restraining orders to fit the requirements of 18 U.S.C. § 922(g)(8)(C). This proposal was adopted as an amendment to MAINE REV. STAT. tit. 15, § 393 and MAINE REV. STAT. tit. 19-A, § 4007 (Deering 2001).

200. *Hearings on H.B. 2302 Before Oregon House Interim Judiciary Comm.*, 69th Leg. Assem. (Or. 1997) (Nov. 19, 1997) (regarding proposal to amend Oregon’s procedure for issuing restraining orders in order to facilitate federal prosecutions under 18 U.S.C. § 922(g)(8)). Instead, Oregon has adopted a statute that requires judges to make a record whenever their customary practices happen to match the federal requirements. OR. REV. STAT. § 30.866 (2001).

201. See sources cited *supra* note 151.

202. 18 U.S.C. § 925(a)(1) (2002).



occurred.<sup>203</sup> The inconsistent application of the “official use exception” has been challenged as violating the Equal Protection Clause, and all such challenges have been rejected.<sup>204</sup> So the only remaining question is whether—as a policy matter—Congress can be persuaded to reexamine the asymmetry in the “official use exception” for domestic abusers.

There are strong arguments that government personnel should be subject to the same rules as civilians, especially in the context of domestic violence. The rates of domestic violence among military and police families appear to be at least as high as the rates among civilians. Domestic violence on military bases is underreported, but severe when it occurs.<sup>205</sup> Police experience higher rates of family abuse than the general population. One survey of police on the East Coast found that forty percent of respondents admitted domestic violence had occurred in their households within the last six months.<sup>206</sup> The prevalence of domestic violence among police raises concerns

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203. 18 U.S.C. § 925(a)(1) provides that,

The provisions of this chapter, *except for sections 922(d)(9) and 922(g)(9)* and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued of the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

(emphasis added).

204. See sources cited *supra* note 156.

205. Alison J. Nathan, *At the Intersection of Domestic Violence & Guns: The Public Interest Exception & the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 856–67 (2000) (collecting sources indicating the high incidence and severity of domestic violence among military personnel). Senator Chafee told this chilling story when he advocated his proposed gun ban for batterers subject to restraining orders:

In my State of Rhode Island, all of us were horrified by the shooting death of 30 year-old Marie Willis, of Middletown, earlier this year. Mrs. Willis was living in South Carolina with her husband, an enlisted man at Myrtle Beach Air Force Base. She left him and returned to Rhode Island with her six-year-old son after her husband repeatedly abused her—abuse that included twice choking her in front of her son, and burning her legs with a propane torch. At the urging of the Bristol police, Mrs. Willis obtained a restraining order against her husband.

On January 3, Marie Willis flew to Myrtle Beach to testify at a military evidentiary hearing for a possible court-martial of her husband. At 8:15 a.m. on January 4, Senior Airman Willis walked into the hearing with a 9-millimeter pistol and opened fire. Mrs. Willis was hit twice in the head and once in the chest; she was pronounced dead at the hospital at 11:30 a.m.

139 CONG. REC. S16,293 (daily ed. Nov. 19, 1993) (statement of Sen. Chafee).

206. Arlene Levinson, *When Law, Love Collide in Violence: Evidence Suggests That Spousal Abuse Among Police Officers is Not Uncommon and That Departments Often are Reluctant to Punish Offenders*, L.A. TIMES, July 6, 1997, at A1. During the mid-1980s, Professor Leonor Boulton Johnson of Arizona State University asked 728 officers in two East Coast police departments whether they had behaved violently toward family members within the last six months.

not only about the safety of their families, but also about their zeal in investigating allegations of domestic abuse by others. For example, shortly after the gun ban for convicted abusers was enacted in 1996, the Los Angeles County Sheriff's Department determined that only three of its 8,000 deputies were subject to this ban; critics believed that the Department was not enforcing the ban in good faith.<sup>207</sup>

On the other hand, if the official use exception were completely abandoned, the burden of the gun ban would be more onerous for police and soldiers than for civilians. Advocates for policy and military personnel have argued that their ability to carry firearms is vital to their careers. Moreover, when they use their weapons in connection with their official duties, they are under strict control by their supervisors, and the risks that they will use the weapons against their intimate partners is slight.<sup>208</sup>

Even Senator Frank Lautenberg himself admitted the complexity of the issue: "There are legitimate questions about the effect of [the gun ban for domestic abusers in] the military, our intelligence agencies, and whole range of federal agencies, including the Immigration and Naturalization Service, the Drug Enforcement Administration, the Customs Service, and other federal agencies, as well as some police agencies."<sup>209</sup> At the same time, said Senator Lautenberg, "[i]t is ridiculous to suggest that we need to allow all wife beaters and child abusers to have guns in order to protect public safety."<sup>210</sup>

One conclusion is ineluctable: there is nothing intrinsically different about restraining orders and misdemeanor convictions that merits excluding the former from the gun ban while including the latter. Congress should at least revise the "official use exception" so that it applies to both—or to neither—of the gun bans for domestic abusers under section 922(g)(8) and section 922(g)(9).

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207. Hector Tobar, *Three Deputies Go to Court, Regain Right to Carry Guns*, L.A. TIMES, May 1, 1997, at B1.

208. Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, & Implementational Flaws*, 29 FORDHAM URB. L.J. 427, 449–51 (2001); Capt. E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, ARMY LAWYER, Oct. 2000, at 3–18.

209. Press Release, Office of Senator Lautenberg, Statement Opposing Repeal of Domestic Violence Gun Ban Law (Jan. 8, 1997) (1997 WL 4428604, at \*1).

210. *Id.*

## B. Flaws in Language of Section 922(g)(9)

### (1) "Use of Force" Requirement for Predicate Offense

Under 18 U.S.C. § 921(a)(33)(A)(ii), a predicate offense will not provide the basis for a prosecution under the Lautenberg Amendment unless the predicate "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon . . ."<sup>211</sup> Conspicuously absent from this list of qualifying acts is *the threatened use of physical force* (other than simply the threatened use of a deadly weapon).

The exclusion of violent threats from the definition in 18 U.S.C. § 921(a)(33)(A)(ii) is an anomaly in the federal firearms statutes. Every other firearms statute that defines crimes of violence includes the term "threatened use of physical force" in that definition. For example, section 922(g)(8) includes the words "threatened use of physical force" in its use of force requirement.<sup>212</sup> In section 924(c), the term "crime of violence" includes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."<sup>213</sup> In section 924(e), the term "violent felony" includes an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another."<sup>214</sup> Indeed, the generic definition of "crime of violence" at the beginning of Title 18 also uses the same language.<sup>215</sup> All of these examples—and even Senator Wellstone's 1994 proposal that served as the model for the Lautenberg Amendment<sup>216</sup>—include violent threats within the "use of force" requirement.

Why did Congress break with tradition in framing the "use of force" provision for the Lautenberg Amendment? One possible explanation is that the "use of force" requirement was added after midnight on the eve of the bill's passage in the House of

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211. 18 U.S.C. § 921(a)(33)(A)(ii)(2002).

212. *Id.* § 922(g)(8)(C)(ii).

213. *Id.* § 924(c)(3)(A).

214. *Id.* § 924(e)(2)(B)(i).

215. The term "crime of violence" includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . ." *Id.* § 16(a).

216. When Senator Wellstone proposed a gun ban for misdemeanants back in 1993, he adopted the traditional "use of force" requirement, defining the predicate offense to include any crime that "has as an element the use, attempted use, or *threatened use of physical force* against a spouse, former spouse, domestic partner, child, or former child of the person." 139 CONG. REC. S14,012 (daily ed. Oct. 20, 1993) (statement of Sen. Wellstone) (emphasis added).

Representatives,<sup>217</sup> and there was little scrutiny of this eleventh-hour revision.<sup>218</sup> The proponents of this particular change had been critics of the gun ban for domestic abusers.<sup>219</sup> They may have inserted this unusual definition in order to limit the scope of the Lautenberg Amendment to a narrower class of prospective defendants.

In any event, the narrow “use of force” requirement in the Lautenberg Amendment has clearly hampered the enforcement of the statute. This definition requires the exclusion of domestic violence predicates that simply involve violent threats. For example, if a defendant threatens to kill his ex-wife by choking, bludgeoning, drowning, or suffocation, and is convicted of misdemeanor assault based on this threat, then that defendant arguably would be free to possess a firearm under the present wording of the “use of force” requirement in the Lautenberg Amendment.

Recent cases exemplify the absurd results of this narrow definition. In *United States v. White*, the Fifth Circuit considered whether a conviction for issuing a “terroristic threat” could serve as a

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217. According to Senator Lautenberg, the “use of force” requirement was proposed by the bill’s detractors during the early morning hours of September 28, 1996, the very day when the House acted on the bill:

[T]he revised language [of the bill] includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition.

142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg). After making this statement, Senator Lautenberg suggested the amended language was consistent with his view that “anyone who attempts *or threatens violence against a loved one* has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.” *Id.* (emphasis added). It is evident from the italicized language that Senator Lautenberg did not foresee the new “use of force” requirement would actually foreclose prosecution of the gun ban in cases with predicate offense that merely involved threats of violence.

218. *Id.*

219. *Id.* The “use of force” requirement had never before appeared in Senator Lautenberg’s bill before this language was inserted at the insistence of his critics on September 28, 1996. The version that the Senate passed on September 12 included the following definition of the predicate offense:

(33) The term “crime involving domestic violence” means a “felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.”

142 CONG. REC. S10,377 (daily ed. Sept. 12, 1996).

predicate under the Lautenberg Amendment.<sup>220</sup> The conviction paperwork in the predicate case indicated that the defendant had threatened to kill his ex-wife.<sup>221</sup> According to the relevant statute, Texas Penal Code section 22.07(a)(2), a defendant commits the offense of issuing a terroristic threat “if he threatens to commit any offense involving violence to any person or property with intent to . . . place the person in fear of imminent serious bodily injury. . . .”<sup>222</sup> The Fifth Circuit reversed the defendant’s conviction under the Lautenberg Amendment because this predicate did not meet the “use of force” requirement in 18 U.S.C. § 921(a)(33)(A).<sup>223</sup> “Obviously, section 22.07(a)(2) does not require actual ‘use’ of physical force, but only threatened use (of violence).”<sup>224</sup>

The Eighth Circuit reached a similar conclusion in *United States v. Larson*.<sup>225</sup> There, the Eighth Circuit evaluated whether a conviction under one subsection of Minnesota’s assault statute would meet the “use of force” requirement in the Lautenberg Amendment.<sup>226</sup> The subsection at issue provided that a person commits a misdemeanor assault if he “commits an act with intent to cause fear in another of immediate bodily harm or death.”<sup>227</sup> Since violation of this subsection would not necessarily entail the use or attempted use of force, or the threatened use of a deadly weapon, the Eighth Circuit found that the subsection did not pass muster under the “use of force” requirement in the Lautenberg Amendment.<sup>228</sup>

A second, more complicated, problem has also arisen in the interpretation of the “use of force” requirement. How should the federal courts treat assault convictions under state statutes that can be violated in two ways, only one of which meets the “use of force” requirement? Three appellate panels have tried to address this question. Two of them managed to sidestep it by finding that the statutes could only be violated in ways that involve the “use of force.”<sup>229</sup> But an Eighth Circuit panel confronted the question head-

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220. 258 F.3d 374, 377 (5th Cir. 2001).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. 13 Fed. Appx. 439, 2001 WL 766842 \*1, (8th Cir. 2001).

226. *Id.*

227. *Id.*

228. *Id.*; accord *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (stating, in dicta, that a misdemeanor assault conviction will suffice under the Lautenberg Amendment so long as the conviction is for assault involving the use of physical force rather than merely placing the victim in fear of imminent bodily harm).

229. In *United States v. Nason*, 269 F.3d 10, 15 (1st Cir. 2001), the First Circuit considered whether the “use of force” requirement under 18 U.S.C. § 921(a)(33)(A) could be satisfied by a violation of Maine’s general-purpose assault statute, when the paperwork

on and vacated a conviction under a state assault statute that could be violated through either violent acts or threats of violence.<sup>230</sup> In that case, the Eighth Circuit held that the government had failed to prove what subsection had been charged in the predicate case, so it was possible that the defendant violated the non-qualifying subsection.<sup>231</sup> A significant number of states have multi-faceted assault statutes that are possibly vulnerable to such a challenge.<sup>232</sup> The Lautenberg

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from the misdemeanor proceeding did not indicate whether the defendant had been convicted under the first or second prong. *Id.* at 11. The First Circuit noted “an interpretive schism that has divided the district courts” on this issue. *Id.* (comparing *United States v. Nason*, No. 00-CR-37, 2001 WL 123722 (D. Me. Feb. 13, 2001) with *United States v. Southes*, No. 00-83, 2001 WL 9863 (D. Me. Jan. 3, 2001)). After examining a lengthy examination of section 921(a)(33)(A)’s history and context, the First Circuit concluded that “Congress intended section 922(g)(9) to encompass crimes characterized by the application of *any* physical force.” *Id.* at 18 (emphasis in original). Violation of either prong under Maine’s assault statute must necessarily involve some physical force, however minimal. *Id.* at 21. Accordingly, any conviction under the Maine statute met the “use of force” requirement in the Lautenberg Amendment. *Id.*

In *United States v. Smith*, the Eighth Circuit considered whether the “use of force” requirement was satisfied by a violation of an Iowa statute that criminalized both a traditional battery and “[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another.” 171 F.3d 617, 619–21 (8th Cir. 1999). The defendant claimed that his conviction under this statute could have been under this “non-violent” language, so the conviction didn’t meet the “use of force” requirement in the Lautenberg Amendment. *Id.* at 619. The Eighth Circuit rejected the defendant’s argument, holding that insulting or offensive contact, “by necessity, requires physical force to complete.” *Id.* at 621 n.2.

Similarly, in a recent district court case, *United States v. Blosser*, the court evaluated a conviction under a municipal code provision that defined battery as either “(1) Intentionally or recklessly causing bodily harm to another person; or (2) Intentionally causing physical contact with another person when done in a rude, insulting or angry manner.” No. 02-40074-01-JAR, 2002 WL 31261170, slip op. at \*4 (D. Kan. Oct. 4, 2002). The conviction paperwork did not make clear which of these two provisions applied. *Id.* The court found that, even if the second provision applied, the offense would still qualify as a predicate for the federal gun ban. *Id.* “Making actual physical contact with another human being cannot be done without some type of physical force.” *Id.*

230. *United States v. Larson*, 13 Fed. Appx. 439, 2001 WL 766842 (8th Cir. Jul. 10, 2001).

231. *Id.* In *Larson*, the Minnesota assault statute applied to a defendant who “(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm on another.” *Id.* The Eighth Circuit found that only the second clause could meet the requirements of the federal gun ban. *Id.* at 439–40.

232. *E.g.*, ALASKA STAT. § 11.41.230 (Michie 2002) (assault); ARIZ. REV. STAT. § 13-1203 (2003) (assault); DEL. CODE ANN. tit. 11, § 602 (2002) (menacing); FLA. STAT. ANN. § 784.011 (West 2002) (assault); GA. CODE ANN. § 16-5-20 (2002) (assault); IDAHO CODE § 18-901 (Michie 2002) (assault); ILL. COMP. STAT. § 5/12-3.2 (2002) (domestic battery); IND. CODE § 35-42-2-1.3 (2002) (domestic battery); IOWA CODE § 708.2A (2002) (domestic abuse assault); KAN. STAT. ANN. § 21-3412a (2001) (domestic battery); MINN. STAT. § 609.2242 (2002) (domestic assault); MISS. CODE ANN. § 97-3-7 (2002) (assault); MO. REV. STAT. § 565.074 (2002) (domestic assault); MONT. CODE ANN. § 45-5-201

Amendment should be fixed in order to ensure that no state is left outside the scope of the gun ban.<sup>233</sup>

(2) “Domestic Relationship” Requirement for Predicate Offense

Under 18 U.S.C. § 921(a)(33)(A), a “misdemeanor crime of domestic violence” means an offense that

has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.<sup>234</sup>

One problem with the relational requirement is quickly apparent. The list of qualifying relationships does not include a situation in which the assailant is the child of the victim.<sup>235</sup> With the growing incidence of elder abuse, this oversight needs to be corrected. One recent case shows that the existing language in the “domestic relationship” requirement cannot easily be stretched to cover predicates involving elder abuse. In *United States v. Skuban*, the defendant was convicted under Nevada’s domestic assault statute for assaulting his mother.<sup>236</sup> He later possessed a firearm and was

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(2003) (assault); NEB. REV. STAT. § 28-310 (2002) (assault); N.M. STAT. ANN. § 30-3-1 (Michie 2002) (assault); TENN. CODE ANN. § 39-13-101 (2002) (assault); TEX. PENAL CODE ANN. § 22.01 (Vernon 2002) (assault); UTAH CODE ANN. § 76-5-102 (2002) (assault); W. VA. CODE § 61-2-28 (2002) (assault).

233. At present, the best strategy for a federal prosecutor responding to such a challenge is to urge that the court examine the charging papers, conviction paperwork, jury instructions, and other materials in the underlying case to aid in determining whether the defendant was convicted under the portion of the state statute that satisfies the “use of force.” See *Taylor v. United States*, 495 U.S. 575, 602 (1990) (in determining whether defendant’s prior conviction qualifies as a “violent felony” under 18 U.S.C. § 924(e)(2)(B), court may consider charging instrument and jury instructions in prior case); *United States v. Palmer*, 68 F.3d 52, 56 (2d Cir. 1995) (court may consider defendant’s admissions in plea hearing); *United States v. Kaplansky*, 42 F.3d 320, 324–25 (6th Cir. 1994) (en banc) (court can consider charging papers, etc.); *United States v. Harris*, 964 F.2d 1234, 1235–36 (1st Cir. 1992) (court may examine plea agreement, transcript of plea hearing, and statements in presentence report to which defendant did not object); see also *United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996) (noting that seven circuits allow inquiry beyond charging papers and jury instructions in cases involving guilty pleas).

234. 18 U.S.C. § 921(a)(33)(A) (2002).

235. By contrast, the gun ban for restraining orders includes a broader definition that covers both sides of the parent-child relationship. Under 18 U.S.C. § 921(a)(32), the term “intimate partner” means “with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.”

236. 175 F. Supp. 2d 1253, 1254 (D. Nev. 2001).

charged under the Lautenberg Amendment.<sup>237</sup> He moved to dismiss this charge on the ground that his relationship with his mother did not qualify under the domestic relationship requirement in 18 U.S.C. § 921(a)(33)(A).<sup>238</sup> The district court agreed. “The relationship defendant had with his victim, i.e., child-aggressor and parent-victim, is not specified in the statute.”<sup>239</sup>

Another question that has plagued interpretation of 18 U.S.C. § 921(a)(33)(A) is whether the relational requirement must be an element of the predicate offense. One view is that only the “use of force” requirement needs to be an element of the predicate offense. The second view is that the “use of force” requirement and the “domestic relationship” requirement constitute a single element that must be present in the predicate offense.<sup>240</sup> If this second interpretation were to prevail, then the gun ban would only apply to defendants who had been convicted under state statutes including a relational requirement as well as a use of force requirement.<sup>241</sup> Such an interpretation would greatly limit the effectiveness of the gun ban under section 922(g)(9), because most states prosecute domestic violence under general assault statutes that lack relational elements.<sup>242</sup>

A defendant advocating the restrictive interpretation of section 921(a)(33)(A) could make several arguments. First, he could raise the common-sense point that if Congress had intended for general assault convictions to qualify under section 921(a)(33)(A), the most logical approach would have been for Congress to remove the domestic relationship requirement from subpoint (ii) and create a new subpoint (iii) for this requirement. Such clarity in drafting would have eliminated any question that the phrase “has, as an element,” in subpoint (ii) applied to the relational element in subpoint (iii).<sup>243</sup> As it

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237. *Id.*

238. *Id.*

239. *Id.* The court did not accept the government’s invitation to view the list of relationships in the statutes simply as examples, rather than an exhaustive list. *Id.* at 1254–55.

240. *See* United States v. Barnes, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, C.J., dissenting) (“An element might be either simple or complex and remain a single element.”).

241. In Oregon, federal prosecutors were concerned enough about this possibility that they proposed changes to the state’s assault statute in order to ensure it would meet federal requirements in case the “domestic relationship” requirement were in fact required to be an element of the predicate offense. The Oregon Legislature did not adopt this proposal. S.B. 318-A, 70th Leg. Assem, 1999 Reg. Sess.

242. *See* Barnes, 295 F.3d at 1364 n.12 (according to government’s brief, only nineteen states had laws that would qualify if domestic relationship must be an element of the predicate misdemeanor offense); United States v. Smith, 964 F. Supp. 286, 293 (N.D. Iowa 1997) (only seventeen states had such laws as of 1997).

243. The D.C. Court of Appeals was not persuaded by this argument in *Barnes*: “The fact that the Congress somewhat awkwardly included the ‘committed by’ phrase in subpart



now stands, the inclusion of both requirements in a single sentence following the words “has, as an element,” could be construed as an indication that these two requirements constitute a single element, which must be present in the state statute defining the predicate offense.<sup>244</sup>

As a second strategy, the defendant advancing the restrictive interpretation could cite the rule of the last antecedent: “Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote.”<sup>245</sup> Following this rule,<sup>246</sup> the qualifying phrase that begins with “committed by” (i.e., the domestic relationship requirement) should be read to modify the phrase that begins with

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(ii) (instead of adding a subpart (iii)) is not significant in view of the *unnatural* reading that would result if ‘committed by’ were construed to modify ‘use of force.’” *Id.* (emphasis in original).

244. In other contexts, Congress has used the single word “element” when referring to a list of requirements in a single sentence. For example, in 18 U.S.C. § 16(a), the term “crime of violence” is defined as “an offense that *has as an element* the use, attempted use, or threatened use of physical force against the person or property of another.” (emphasis added). Both of the requirements in this quoted language—1) the use of force requirement and 2) the requirement that the force be used against another person or her property—are understood to constitute a single element. On the other hand, there are many instances in which Congress has used the plural word “elements” when referring to a series of requirements in a single sentence. *See, e.g.*, 18 U.S.C. § 3559(c)(2)(B) (“[T]he term ‘arson’ means an offense that *has as its elements* maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive.”) (emphasis added); 18 U.S.C. § 3559(c)(2)(C) (“[T]he term ‘extortion’ means an offense that *has as its elements* the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person.”) (emphasis added); 18 U.S.C. § 3559(c)(2)(E) (“[T]he term ‘kidnapping’ means an offense that *has as its elements* the abduction, restraining, confining, or carrying away of another person by force or threat of force.”) (emphasis added); 42 U.S.C. § 14071(a)(3)(B) (“[T]he term ‘sexually violent offense’ means . . . an offense that *has as its elements* engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse.”) (emphasis added).

245. *United States v. Pritchett*, 470 F.2d 455, 459 & n.9 (D.C. Cir. 1972); *see In re Paschen*, 296 F.3d 1203, 1209 (11th Cir. 2002) (“[T]he rule of the last antecedent [is] an accepted canon of statutory construction which provides that when construing statutes, qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to and including others more remote.”) (citations omitted).

246. Some authority suggests that it is not always necessary to follow this rule. *Barnes*, 295 F.3d at 1360 (“[T]he Rule of the Last Antecedent is not an inflexible rule, and is not applied where the context indicates otherwise.”) (quoting *Pritchett*, 470 F.2d at 459) ; *see Witt v. United Co. Lending Corp.*, 113 F.3d 508, 511 (4th Cir. 1997) (following the Rule of the Last Antecedent “is not compelled”) (quoting *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330–31 (1993)).

“the use or attempted use of physical force” (i.e., the use of force requirement), rather than the word “offense” in subsection (i).<sup>247</sup>

Third, the defendant could cite the general savings clause, 1 U.S.C. § 1. The savings clause provides that words importing the singular include and apply to several persons, parties or things, unless context indicates otherwise. Relying on the savings clause, the defendant could argue that the phrase “has, as an element,” should stretch to both the use of force requirement and the domestic relationship requirement that follow this phrase, even though Congress elected to use the singular word “element” rather than the plural word “elements.”<sup>248</sup>

Fourth, the defendant could invoke the rule of lenity. D.C. Circuit Judge Frank Sentelle made this argument when he dissented from the majority’s holding in *United States v. Barnes*:

Fundamental to our fairness-centered criminal justice system is the rule of lenity for the interpretation of ambiguous penal statutes. Under the rule of lenity, a criminal defendant is, and should be, afforded the benefit of the doubtful application of ambiguous statutory language. It cannot be gainsaid that the language of this statute [18 U.S.C. § 921(a)(33)(A)] is ambiguous. The majority opinion itself is rife with allusions to its ambiguity.<sup>249</sup>

Indeed, the very need for such detailed grammatical and syntactical analysis suggests that the statute may be somewhat ambiguous and should be construed under the rule of lenity.<sup>250</sup>

The foregoing arguments have a certain logical force, but they have not yet prevailed in any federal appellate or district court. So far every published opinion considering this issue has found that the predicate offense need not include a domestic relationship requirement as an element.<sup>251</sup>

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247. The majority in *Barnes* ruled that the word “committed” in section 921(a)(33)(A)(ii) modified the word “offense” in section 921(a)(33)(A)(i), even though neither of the parties advanced this argument. *Barnes*, 295 F.3d at 1362.

248. No published opinion has yet considered this theory. The government might respond that the savings clause should only be invoked to stop a party from interpreting a statute in a manner that is inconsistent with congressional intent. *First Nat’l Bank v. Missouri*, 263 U.S. 640, 657 (1924); *Toy Mfr. of Am. v. Consumer Prod. Safety Comm’n*, 630 F.2d 70, 74 (2d Cir. 1980). If the government could establish that congressional intent was clear (as discussed in the foregoing legislative history, *supra* notes 120–150), then it would be inappropriate to resort to the savings clause.

249. 295 F.3d at 1369 (internal citations omitted).

250. *Id.*

251. *E.g.*, *Barnes*, 295 F.3d at 1358–66 (upholding conviction under section 922(g)(9) where predicate offense was misdemeanor under D.C.’s general assault statute, which does not include a relational element between the assailant and the victim); *United States v. Chavez*, 204 F.3d 1305, 1313–14 (11th Cir. 2000) (concluding that requirements for “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33)(A) were satisfied by defendant’s conviction under 18 U.S.C. § 113(a)(4), the general assault statute for U.S.

The government has a number of potent arguments to offer in order to defeat a defendant's claim that the "domestic relationship" requirement must be an element of the predicate offense. The most obvious argument for the government is that section 921(a)(33)(A)(ii) contains *two separate* elements: the "use of force" element and the "domestic relationship" element.<sup>252</sup> Because these two requirements must be treated as separate elements, we must impute significance to Congress's use of the singular word "element" in the modifying phrase, "has as an element."<sup>253</sup> This modifier

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territories); *United States v. Meade*, 175 F.3d 215, 218–20 (1st Cir. 1999) (predicate was conviction under Massachusetts' general assault and battery statute, which has no relational element); *United States v. Smith*, 171 F.3d 617, 619–20 (8th Cir. 1999) (predicate was conviction under Iowa's general assault statute, which lacks relational element); *United States v. Thomson*, 134 F. Supp. 2d 1227, 1230 (D. Utah 2001); *United States v. Meade*, 986 F. Supp. 66, 68 (D. Mass. 1997); *United States v. Smith*, 964 F. Supp. 286, 291–92 (N.D. Iowa 1997); *United States v. Ball*, No. 00-4582, 2001 WL 324624, at \*3 (4th Cir. Apr. 4, 2001) ("Section 921(a)(33)(A) requires the predicate offense to have only one element—the use or attempted use of physical force; the relationship between perpetrator and victim need not appear in the formal definition of the predicate offense."); *United States v. Blosser*, No. 02-40079-01-JAR, 2002 WL 31261170, at \*3 (D. Kan. Oct. 4, 2002).

252. The conclusion that the use of force requirement and the domestic relationship requirement are separate elements under section 921(a)(33)(A)(ii) is buttressed by a comparison of that statute with other statutes in which the *nature of the act* and the *identity of the victim* are separate elements. For example, the jury instructions for the offense of assaulting a federal officer indicate that the assaultive act and the identity of the victim are separate elements. 2 EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE & INSTRUCTIONS* § 23.03, (4th ed. 1990); see *United States v. Bettelyoun*, 16 F.3d 850, 852 (8th Cir. 1994) (victim's status as federal officer is a separate element). In the jury instructions for the offense of robbing a federally insured bank, the act of robbery, and the bank's FDIC status are separate elements. 2 DEVITT & BLACKMAR § 49.03. In the jury instructions for the offense of depriving the civil rights of a Citizen of any state, the act of depriving civil rights and the citizenship of the victim are separate elements. *Id.* § 27.03. In the jury instructions for the offense of incest, the sexual act and the defendant's relationship to the victim are separate elements. *United States v. Fiddler*, 688 F.2d 45, 47 n.9 (8th Cir. 1982) ("[C]onsanguinity [is] an essential element of the offense of incest."). Similarly, in the present context of 18 U.S.C. § 921(a)(33)(A)(ii), the forceful act and the relationship between the defendant and the victim must be considered separate elements.

253. See *Bailey v. United States*, 516 U.S. 137, 148 (1995) (court should assume that every word in a statute has significance, especially when the word describes an element of a criminal offense). Because "element" is singular in 18 U.S.C. § 921(a)(33)(A)(ii), it is reasonable to conclude that the modifier "as an element" applies only to the first element that follows the modifier: the use of force element. If Congress had intended for the modifier "as an element" to be stretched to the wholly separate element of the domestic relationship, Congress would have chosen the plural term "elements" rather than the singular term "element." See *United States v. Green*, 902 F.2d 1311, 1312 (8th Cir. 1990) ("Had Congress intended [for defendant's] view to obtain, the obvious choice of words would be plural and not singular."), *cert. denied*, 498 U.S. 943 (1990); *Hall v. United States*, 39 F.3d 102, 106 (6th Cir. 1994) (ascribing significance to Congress' choice of singular rather than plural); *United States v. Freisinger*, 937 F.2d 383, 390 (8th Cir. 1991); *United States v. Scott*, 859 F.2d 792, 796 (9th Cir. 1988); *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 237 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976).

suggests that only the element immediately following the modifier (the “use of force” element) needs to be an element of the predicate offense.

As a second argument, the government could cite the legislative history of the Lautenberg Amendment to show that it was intended to cover convictions under generic assault statutes, so long as the victim and the assailant had the requisite relationship. In particular, Senator Lautenberg stressed that his bill would apply to “convictions for domestic violence-related crimes . . . for crimes, such as assault, that are not explicitly identified as related to domestic violence.”<sup>254</sup> He also stressed that the law should be applied uniformly despite variation in states’ definition of predicate offenses.<sup>255</sup> Comments of a bill’s primary sponsors are authoritative indications of legislative intent.<sup>256</sup>

Third, the government can rely on the interpretation of the lead agency assigned to enforce the Lautenberg Amendment—the Bureau of Alcohol, Tobacco, and Firearms (“ATF”).<sup>257</sup> The courts have consistently deferred to ATF’s interpretation of federal firearms statutes.<sup>258</sup> Here, the Director of the ATF has indicated unequivocally that 18 U.S.C. § 922(g)(9) extends to any conviction for assault against a person with whom the defendant had a domestic relationship, whether or not the statute of conviction required such a

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254. 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996)(statement of Sen. Lautenberg).

255. See sources cited *supra* note 140.

256. See, e.g., *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (“Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”); *Lewis v. United States*, 445 U.S. 55, 63 (1980) (“Inasmuch as Senator Long was the sponsor and floor manager of the bill, his comments are entitled to weight.”); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (“As a statement of one of the legislation’s sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute.”).

257. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”); *Nat’l Wildlife Fed’n v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994) (“[S]ubstantial deference is given to an agency’s interpretation and application of governing statutes.”); 2B NORMAN J. SINGER, *SUTHERLAND ON STATUTORY CONSTRUCTION* § 49.05 (5th ed. 1993) (“Since an agency empowered to enforce a statute has a much greater expertise in its area than a court, the court should defer to the agency’s interpretation of the statute. . . .”).

258. E.g., *Farmer v. Higgins*, 907 F.2d 1041, 1045 (11th Cir. 1990) (“[W]e defer to the Bureau’s interpretation of Section 922(o).”), *cert. denied*, 498 U.S. 1047 (1991); *NRA v. Brady*, 914 F.2d 475, 479 (4th Cir. 1990) (noting ATF’s expertise in construing firearms statutes), *cert. denied*, 499 U.S. 959 (1991); *Gun South, Inc. v. Brady*, 877 F.2d 858, 864 (11th Cir. 1989) (“We must defer to the Bureau’s interpretation of the Gun Control Act and its regulations absent plain error in the Bureau’s interpretation.”); *United States v. Nevius*, 792 F. Supp. 609, 616 (C.D. Ill. 1992) (“Absent compelling indications that the [ATF]’s evaluation of the [sporting weapons exception] is wrong, the court will defer to the [ATF]’s interpretation.”).

relationship.<sup>259</sup> ATF's open letter received wide publicity and was discussed in fifty-seven major newspapers in the thirty-day period following its release.<sup>260</sup> Since ATF issued its open letter, no senator or representative has proposed any amendment that would override ATF's interpretation and exempt simple assaults from the coverage of 18 U.S.C. § 922(g)(9). The fact that Congress has not resisted ATF's interpretation can be construed by the court as a tacit acknowledgment by Congress that ATF has correctly construed the statute.<sup>261</sup>

Fourth, the government may cite the well-settled doctrine of "absurd results," under which a statute should not be construed in a manner that would lead to absurd results. If the real-world implications of a proposed interpretation would plainly contradict the intent of Congress, then the court must reject that interpretation in

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259. In an "open letter" sent to all state and local law enforcement officials, as well as all federally licensed firearms dealers, ATF Director John Magaw interpreted section 921(a)(33)(A) as follows:

As defined in the GCA [Gun Control Act], a "misdemeanor crime of domestic violence" means an offense that:

- (1) is a misdemeanor under Federal or State law; and
- (2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

*This definition includes all misdemeanors that involve the use or attempted use of physical force (e.g., simple assault, assault and battery), if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms.*

Open Letter from John Magaw, ATF Director, to all State and Local Law Enforcement Officials (Nov. 2002) (emphasis added). The open letter sent to state and local law enforcement officials included a section entitled, "Questions and Answers Regarding Misdemeanor Crime of Domestic Violence." Among the questions and answers were the following:

Q: X was convicted of misdemeanor assault on October 10, 1996. The crime of assault does not make specific mention of domestic violence but the criminal complaint reflects that he assaulted his wife. May X still possess firearms of ammunition?

A: No. X may no longer possess firearms or ammunition.

*Id.*

260. This figure is based on a survey of the major newspapers in the Westlaw ALLNEWS database. It is likely that the story was also picked up by many smaller newspapers that do not appear in the Westlaw database.

261. *Bell*, 456 U.S. at 535 (Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and no attempt has been made to amend the statute in response to the agency's interpretation, then presumably the legislative intent has been correctly discerned by the agency.).

favor of another interpretation that is consonant with congressional intent.<sup>262</sup> Construing the Lautenberg Amendment to exclude generic assaults would mean that the statute would only apply in fewer than half the states—clearly an absurd result that Congress did not intend.

In sum, the imprecise drafting of the relational requirement in 18 U.S.C. § 921(a)(33)(A) has caused the exclusion of elder abuse convictions from the gun ban and has also engendered litigation as to whether the relational requirement must be an element of the predicate offense. Congress should clear up any ambiguity by revising the relational requirement so that it better reflects the legislative intent to deny firearms to all convicted domestic abusers.

(3) *Requirement of Counsel (or Waiver) in Misdemeanor Proceeding*

The Lautenberg Amendment provides that, “[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] unless . . . (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case.”<sup>263</sup> As will be seen below, this requirement is far stricter than pre-existing law, and it creates practical problems that hinder the enforcement of the gun ban.

The counsel requirement in the Lautenberg Amendment is remarkable in several respects. First, it is incongruous with the approach that Congress has taken in other subsections of 18 U.S.C. § 922(g). For example, a defendant charged under section 922(g)(1) (the felon-in-possession law) cannot defeat this charge by showing a violation of his right to counsel in the predicate felony case. The Supreme Court rejected such an argument in *Lewis v. United States*.<sup>264</sup> The Court noted that when the felon-in-possession law was first enacted in 1968, Congress intended for the law to serve as a “sweeping prophylaxis.”<sup>265</sup> “There is no indication of any intent to require the Government to prove the validity of the predicate conviction.”<sup>266</sup> Congress intended for the mere fact of conviction to disqualify the defendant from possessing a firearm.<sup>267</sup> If the predicate

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262. *Griffen v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994).

263. 18 U.S.C. § 921(a)(33)(B). This requirement was not part of Senator Lautenberg’s original proposal. The requirement was inserted by the bill’s critics as a condition for permitting Senator Lautenberg to add his amendment to the anti-stalking bill in July 1996. *See supra* note 120.

264. 445 U.S. 55 (1980).

265. *Id.* at 63.

266. *Id.*

267. *Id.* at 67.

conviction was constitutionally invalid, the defendant could only restore his firearms rights by moving to vacate the conviction, appealing the conviction, or seeking a pardon from the governor.<sup>268</sup> Many federal courts have reached similar conclusions in more recent cases.<sup>269</sup> Viewed against the backdrop of *Lewis* and its progeny, the counsel requirement in the Lautenberg Amendment is anomalous indeed: misdemeanants have a greater right to counsel than felons.<sup>270</sup>

The Lautenberg Amendment's counsel requirement is not only out of step with the rest of 18 U.S.C. § 922(g), but also with the Constitution itself. The right to counsel established in the Sixth Amendment does not extend to misdemeanor proceedings in which there is no possibility of a prison sentence.<sup>271</sup> Thus, if a prosecutor files a misdemeanor assault charge and gives notice that she is not seeking incarceration, the Sixth Amendment does not require appointment of counsel for the defendant, and there is no need to make a record that the defendant has knowingly and voluntarily waived counsel. The Lautenberg Amendment ignores this time-honored principle and assumes that counsel is necessary in all misdemeanor cases.<sup>272</sup>

The expansive counsel requirement in section 921(a)(33)(B)(i) is all the more startling when contrasted with the less exacting jury trial requirement in section 921(a)(33)(B)(ii). Congress decided not to require a jury trial, or waiver of a jury trial, in the predicate misdemeanor proceeding unless a jury trial was otherwise required by

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268. *Id.* at 61–62. Until such relief was granted, the defendant would remain disabled from possessing a firearm even though he was not provided with counsel in the prosecution of the predicate felony, in violation of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

269. *United States v. Paleo*, 9 F.3d 988, 989 (1st Cir. 1992) (uncounseled conviction can serve as predicate for section 922(g)(1) charge); *see United States v. Steverson*, 230 F.3d 221, 224 (6th Cir. 2000) (“[P]roof of a defendant’s prior felony convictions is admissible for purposes of proving a § 922(g)(1) violation, even if the prior convictions are constitutionally deficient.”); *United States v. Baker*, 197 F.3d 211, 217 (6th Cir. 1999) (following *Lewis* and holding that a defendant charged under section 922(g)(8) cannot attack the constitutionality of the proceeding that resulted in the restraining order); *United States v. Blevins*, 802 F.2d 768, 770–71 (4th Cir. 1986) (“[I]n a prosecution under the federal gun statutes, the validity of the underlying conviction is simply not a question to be determined.”).

270. It is also noteworthy that counsel is necessary for a predicate misdemeanor offense to qualify for the gun ban under 18 U.S.C. § 922(g)(9), but not for a predicate restraining order to qualify for the gun ban under 18 U.S.C. § 922(g)(8).

271. *Nichols v. United States*, 511 U.S. 738, 746 (1994) (no Sixth Amendment right to appointed counsel for misdemeanor crime if defendant’s sentence does not include imprisonment); *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (no right to counsel where defendant faced possible jail time in misdemeanor prosecution, but was never actually sentenced to incarceration); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (the right to counsel applies to any offense for which a term of imprisonment is imposed).

272. 18 U.S.C. § 921(a)(33)(B) (2002).

law.<sup>273</sup> The legislative history of the Lautenberg Amendment offers no explanation why its jury trial requirement is co-extensive with existing law, but its counsel requirement is far stricter than existing law.

The awkward fit of the counsel requirement in the Lautenberg Amendment may be attributable to its peculiar legislative history. The counsel requirement was inserted by opponents of the Lautenberg Amendment who insisted on this change as a condition of their support.<sup>274</sup> The original version of the bill did not include any counsel requirement.<sup>275</sup> The proponents of the counsel requirement never explained on the record why it was necessary, nor did they justify its inconsistency with other provisions of the gun laws.

Whatever the motives that led to the inclusion of the counsel requirement,<sup>276</sup> there can be no doubt that it has imposed significant limitations on the enforcement of the gun ban for domestic abusers. The counsel requirement renders the Lautenberg Amendment useless in jurisdictions that do not appoint counsel, or secure waivers of counsel, in misdemeanor proceedings with no possibility of jail time. The irony is that uncounseled convictions generally result from plea bargains and stipulated judgments—a context in which the *pro se* defendant presumably has no objection to the finding of guilt. Thus, the cases in which the abuser's guilt is most certain are the cases in which the gun ban is least likely to apply.

Even when state courts recognize a right to counsel in the predicate misdemeanor proceeding, they do not always make a clear record that a *pro se* defendant has knowingly and intelligently relinquished this right, as required by the Lautenberg Amendment.<sup>277</sup> The federal courts employ a strict standard in reviewing the adequacy of a waiver. Any ambiguity in the record militates in favor of a finding the waiver was *not* adequate.<sup>278</sup> Unfortunately, the plea

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273. *Lewis*, 518 U.S. at 325–28 (1996). As a matter of federal constitutional law, jury trials are not required in misdemeanor cases when a sentence of incarceration is actually imposed. *Id.*

274. 142 CONG. REC. S9458 (daily ed. Aug. 2, 1996)(statement of Sen. Lautenberg); see 142 CONG. REC. S8922 (version of Lautenberg Amendment reflecting revisions requested by Republicans in July 1996).

275. 142 CONG. REC. S2646 (daily ed. Mar. 21, 1996) (originally proposed version of Lautenberg Amendment).

276. Senator Lautenberg suggested that some of the Republicans who sought to amend his bill were trying to “gut” or “emasculate” the gun ban for domestic abusers. 142 CONG. REC. S11,226 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

277. 18 U.S.C. § 921(a)(33)(B)(i).

278. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (When courts scrutinize a plea colloquy to determine the validity of a waiver, the courts should adopt “every reasonable presumption against waiver.”); accord *United States v. Akins*, 276 F.3d 1141, 1147 (9th Cir. 2002) (citing *Johnson* in finding that waiver of counsel was inadequate for purposes of



colloquies in misdemeanor cases are rarely as thorough as those in felony cases.<sup>279</sup> The colloquies in misdemeanor cases may not always comport with federal requirements that the defendant must be informed of the nature of the charges and the possible penalties, as well as the dangers and disadvantages of self-representation.<sup>280</sup> Once again, the Lautenberg Amendment has confused the kite with the tail: the plea colloquy for a misdemeanor assault case assumes a greater significance when convictions are reviewed under the Lautenberg Amendment than when they are imposed in the first instance.

Another recurring problem with the counsel requirement in section 921(a)(33)(B)(i) is the lack of a transcript or verbatim recording to assist the federal court's review of misdemeanor plea hearings.<sup>281</sup> Even where judges conduct thorough plea colloquies in misdemeanor cases, these may be of little or no use to federal prosecutors unless they are documented by transcripts or otherwise recorded. Many states do not require transcripts for misdemeanor plea hearings.<sup>282</sup> Where transcripts or recordings are made in

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prosecution under 18 U.S.C. § 922(g)(9)); *United States v. Bethurum*, 213 F. Supp. 2d 679, 687–88 (N.D. Tex. 2002).

279. *See, e.g.*, *State v. Maxey*, 873 P.3d 150, 154 (Idaho 1994) (“We are not convinced . . . that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel.”); *In re Johnson*, 398 P.2d 420, 427 (Cal. 1965) (opining that misdemeanor proceedings should not be burdened by the same constitutional requirements as felony proceedings).

280. In *Akins*, 276 F.3d at 1147, the Ninth Circuit ruled that 18 U.S.C. § 921(a)(33)(B)(i) requires district courts to employ the same standards for evaluating the adequacy of counsel waivers in predicate misdemeanors as the federal courts would use to evaluate counsel waivers in felony cases.

281. For example, no transcript was available in any of the three published cases in which federal appellate courts have assessed the adequacy of waiver under section 921(a)(33)(B)(i). *See infra* notes 286–88 and accompanying text.

282. Many states have lax requirements for the preparation of transcripts in misdemeanor proceedings. *E.g.*, *State v. Nail*, 963 S.W.2d 761, 764 (Tenn. Crim. App. 1997) (stating that generally in Tennessee, a court reporter is “not provided at state expense for a misdemeanor.”); 8 MINN. PRAC. SERIES § 19.7 (In Minnesota, “[a] verbatim record must be made of a plea to an offense punishable by incarceration, except for misdemeanors where the plea is by petition.” (quoting MINN. R. CRIM. P. 15.09); 10 GA. P. CRIM. § 34:52 (“The lack of a transcript does not result in a reversal of a misdemeanor conviction . . . .”) (citing *Gilbert v. Manchester*, 419 S.E.2d 487, 488 (1992)); *Grundset v. Franzen*, 675 F.2d 870, 876 (7th Cir. 1982) (Under Illinois state law, a verbatim transcript is not necessary to show the voluntariness of a guilty plea in a misdemeanor proceeding.). In California, transcripts may be supplanted by docket entries in misdemeanor plea hearings:

In felony cases, a reporter's transcript of the guilty plea proceedings usually establishes the necessary record of the waiver of constitutional rights. In misdemeanor cases, the practicalities of the crowded courts permit some deviation from the strict felony procedure so long as the constitutional rights of defendants are respected. Thus docket entries in misdemeanor cases may be sufficient to show that an accused knew his constitutional rights and expressly

misdemeanor assault cases, these records are sometimes destroyed within a few years.<sup>283</sup> In the absence of a transcript, some federal judges have proven reluctant to rely on “advice of rights” forms as proof that a *pro se* defendant knowingly and voluntarily waived his right to counsel in a misdemeanor assault case.<sup>284</sup>

Further, federal courts’ judgments about the adequacy of counsel waivers are highly subjective, and are unlikely to achieve the uniform enforcement that Congress intended when it passed the Lautenberg Amendment.<sup>285</sup> Three decisions, *United States v. Akins*,<sup>286</sup> *United States v. Bethurum*,<sup>287</sup> and *United States v. Smith*,<sup>288</sup> exemplify the inconsistent application of 18 U.S.C. § 921(a)(33)(B)(i) in the evaluation of counsel waivers. In *Akins*, a defendant charged under the Lautenberg Amendment moved to dismiss the indictment on the ground that he had not knowingly and intelligently waived his right to counsel in the predicate misdemeanor proceeding.<sup>289</sup> He had signed a written waiver of his right to counsel, stating, “My plea of guilty is a knowing and intelligent waiver of my right . . . to an attorney, even at public expense, unless I am already represented by one.”<sup>290</sup> The form also explained the consequences of a guilty plea.<sup>291</sup> It did not, however, focus on the specific advantages and disadvantages of proceeding without counsel.<sup>292</sup> There was no record of a colloquy between the court and the defendant regarding these matters.<sup>293</sup> The Ninth Circuit held that under these facts, there was inadequate proof that the defendant knowingly and intentionally waived his right to counsel, so the federal indictment under section 922(g)(9) must be dismissed.<sup>294</sup>

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waived them where such entries are prepared for the particular case before the court.

20A CAL. JR. 3d, *Criminal Law: Pretrial Proceedings* § 755 (2002) (internal citations omitted).

283. Memorandum from Representative Bill McCollum, Chairman, Subcommittee on Crime, House Judiciary Committee, to other members of Subcommittee (March 4, 1997) (on file with author) (announcing hearings on proposals to reform 18 U.S.C. § 922(g)(9) and explaining reports of problems with enforcement of this law).

284. *E.g.*, *Akins*, 276 F.3d at 1149 (executed waiver form reciting right to court-appointed counsel not sufficient to establish voluntariness of counsel waiver in prosecution under section 922(g)(9)).

285. *See supra* notes 274–84 and accompanying text.

286. 276 F.3d 1141.

287. 213 F. Supp. 2d 679 (N.D. Tex. 2002).

288. 171 F.3d 617 (8th Cir. 1999).

289. *Akins*, 276 F.3d at 1144.

290. *Id.* at 1145.

291. *Id.*

292. *Id.* at 1149.

293. *Id.*

294. *Id.*

In *Bethurum*, the defendant, a co-owner of a gun shop, was charged with possessing firearms after a conviction for a misdemeanor crime of domestic violence.<sup>295</sup> The defendant asserted that his waiver of counsel in the predicate proceeding was not knowing and intelligent because he was not aware that his conviction could result in a firearms disability.<sup>296</sup> He made this claim even though his plea hearing took place on June 9, 1997—nine months after the Lautenberg Amendment took effect.<sup>297</sup> He signed a written waiver of counsel with the following recitation:

I have been advised by the Court of my right to representation by counsel in the trial of the charge pending against me . . . . Understanding my right to have counsel appointed for free of charge if I am not financially able to employ counsel, I wish to waive that right and request the Court to proceed with my case without an attorney being appointed for me.<sup>298</sup>

Reviewing this record to determine the adequacy of the counsel waiver under section 921(a)(33)(B)(i), the federal district court found that the government had not met its burden of proving that the waiver was knowing and intelligent.<sup>299</sup> In particular, the government had not proven, as it must, that the defendant understood that his misdemeanor conviction carried the consequence of forfeiting his gun rights.<sup>300</sup>

By contrast, in *Smith*, the Eighth Circuit found that 18 U.S.C. § 921(a)(33)(B)(i) was satisfied under circumstances that arguably cast more doubt on the sufficiency of the counsel waiver than in the *Akins* case.<sup>301</sup> The defendant in *Smith* moved to dismiss his indictment under section 922(g)(9) on the ground that he had not knowingly and voluntarily waived counsel when he pled guilty to a misdemeanor assault charge in state court.<sup>302</sup> He had been represented by counsel in the assault case, but his counsel never showed up for the plea hearing.<sup>303</sup> The court waited for counsel to appear, and then

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295. United States v. Bethurum, 213 F. Supp. 2d 679, 681–82 (N.D. Tex. 2002).

296. *Id.* at 684.

297. *See id.* at 682.

298. *Id.* at 682.

299. *Id.* at 687–88.

300. *Id.* Of course, the practical effect of this ruling is that the gun ban for misdemeanants would never apply to any defendant whose predicate conviction predated the enactment of 18 U.S.C. § 922(g)(9) on September 30, 1996, because these defendants could not possibly have known about the gun ban when they pleaded guilty to the predicate offenses.

301. United States v. Smith, 171 F.3d 617 (8th Cir. 1999).

302. *Id.* at 619.

303. *Id.* at 621.

presented the nineteen-year-old defendant<sup>304</sup> with a waiver of counsel form so the plea hearing could proceed *pro se*.<sup>305</sup> This boilerplate form was actually for a different crime than the one with which the defendant had been charged.<sup>306</sup> There was no evidence of a colloquy in which the court explained the specific advantages and disadvantages of proceeding *pro se*. The defendant could not have possibly understood the ancillary consequence of a gun ban, because the plea hearing occurred in 1994, two years before the Lautenberg Amendment took effect. The Eighth Circuit found that these facts were not so egregious as to require dismissal of the indictment under 18 U.S.C. § 921(a)(33)(B)(i).<sup>307</sup> The Eighth Circuit's holding in *Smith* is difficult to reconcile with the holdings in *Akins* and *Bethurum*, and the comparison of these cases underscores the subjectivity inherent in the federal courts' evaluations of counsel waivers in misdemeanor cases.

Notwithstanding the above-listed problems with the counsel requirement, there may be some hope for the future. States may strengthen their requirements for appointment of counsel, their requirements for plea colloquies, and their requirements for transcripts in misdemeanor assault proceedings. These changes might result from an interest to facilitate the federal gun ban, or simply from an interest to ensure that misdemeanants fully understand that their guilty plea could result in a federal firearms disability.<sup>308</sup> But any such improvements will come too late to assist with the enforcement of the Lautenberg Amendment in cases involving predicates convicted before September 30, 1996.<sup>309</sup> As to those convictions—

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304. Pleadings filed with the district court showed that Smith was born on April 26, 1975. United States' Resistance to Defendant's Motion to Dismiss at Exhibit 2, United States v. Smith, (N.D. Iowa 1997) (No. CR 96-2140) (on file with author). The plea hearing in the misdemeanor assault case occurred on November 28, 1994, when the defendant was nineteen years old. *Id.* at 10. This information was included in the record submitted to the Eighth Circuit on appeal.

305. *Smith*, 171 F.3d at 621–22.

306. *Id.* at 622 n.3.

307. *Id.* at 622.

308. On the other hand, some states might refuse to make such changes, perhaps because of resource constraints or a desire to thwart the enforcement of the federal gun ban.

309. If, in effect, convictions predating 1996 cannot be used as predicates because they do not meet the counsel requirement in section 921(a)(33)(B)(i), then the critics of the Lautenberg Amendment will have accomplished through the counsel requirement what they could not accomplish through a more explicit proposal: a ban on retroactive enforcement of the gun ban for domestic abusers. H.R. 26, 105th Cong. (1996), (introduced by Representative Bob Barr on January 7, 1997, would have prevented the new gun ban from applying to any conviction that became final before September 30, 1996, the effective date of the Lautenberg Amendment). 143 CONG. REC. H66 (daily ed. Jan. 7, 1997). Hearings were held on this bill. See *Hearing on the Gun Ban for Persons*

which make up the vast majority of the convictions that could possibly be subject to 18 U.S.C. § 922(g)(9)<sup>310</sup>—the counsel requirement will remain a significant obstacle to enforcement.

(4) *Requirement of Jury Trial (or Waiver) in Misdemeanor Proceeding*

Under 18 U.S.C. § 921(a)(33)(B)(i) (2002),

A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless . . .

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

In a statement on the Senate floor, Senator Lautenberg explained that this provision was the result of a compromise. Republican negotiators had sought to limit the application of the gun ban to those cases in which the defendant actually had been entitled to a jury trial. Senator Lautenberg had opposed this proposal, recognizing it “would have rendered the ban close to meaningless, as the vast majority of these cases are heard before a judge, in a bench trial.”<sup>311</sup>

We agreed to include in the final agreement a provision that has no real substantive effect, but that may help to assure some people that nobody will lose their ability to possess a gun because of a flawed trial. This provision, in essence, states that the ban will not apply to someone who was wrongly denied the right to a jury trial. More specifically, the language protects from the ban anyone who has been entitled to a jury trial, but who did not receive such a jury trial, or who did not knowingly and intelligently waive his right to a jury trial.

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*Convicted of Domestic Violence Misdemeanors Before the Subcommittee on Crime of the House Committee on the Judiciary*, 105th Cong. (1997) (statement of William McCollum, Chairman, House Committee on the Judiciary, Subcommittee On Crime). The bill was never approved, however. Senator Lautenberg complained that a ban of retroactive enforcement would exempt the majority of defendants who would otherwise be covered by the law. “By allowing virtually all currently convicted spouse-beaters and child abusers to possess guns, the [bills prohibiting retroactive enforcement] would put at risk the lives of thousands of battered women and abused children.” Fact Sheet: The Lautenberg Amendment Prohibiting Wife-beaters from Owning Guns, and the Current, Ill-Advised Bills that Would Gut it, (February 20, 1997) (on file with Office of Senator Lautenberg) [hereinafter Fact Sheet].

310. Fact Sheet, *supra* note 309.

311. 142 CONG. REC. S11,872 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

Of course, Mr. President, if an offender was wrongly denied the right to a jury trial, he was not legally convicted. And so this language really does not change anything. But, again, as it provided needed reassurance for some, I agreed to it in order to facilitate the final agreement.<sup>312</sup>

Unlike the counsel requirement, the jury trial requirement in the Lautenberg Amendment is co-extensive with pre-existing law. The jury requirement is of no substantive value to defendants, but rather imposes a procedural safeguard that ensures their pre-existing rights will be now protected by two courts instead of one. In this respect, as noted previously, the Lautenberg Amendment is completely out of step with other federal firearms laws such as the felon-in-possession law.<sup>313</sup>

The illusory benefit of the jury trial requirement comes at the cost of a cumbersome procedure that further hinders the enforcement of the Lautenberg Amendment. Whether defendants had a right to a jury trial in the predicate misdemeanor proceeding is not always easy to determine. States employ varying tests, and these tests may depend on in-court statements made by the prosecutor about the amount of prison time she is seeking.<sup>314</sup> Further, it may be difficult to assess whether a defendant's waiver of his right to jury trial was knowing and intelligent. Transcripts are not always available in misdemeanor proceedings, and court records are routinely destroyed in many jurisdictions.<sup>315</sup> At least one federal court has permitted the government to rely on a notation in a state court order to establish the defendant's knowing and intelligent waiver of a jury trial, but whether other federal courts will follow this same approach is uncertain.<sup>316</sup>

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312. *Id.*

313. *See supra* notes 231–36 and accompanying text.

314. *Compare* Deming v. City of Mobile, 677 So. 2d 1233, 1235 (Ala. Crim. App. 1995) (in Alabama, every criminal defendant charged with a misdemeanor has a right to a jury trial) with Marzen v. Klousia, 316 N.W.2d 688, 690 (Iowa 1982) (Under the Iowa Constitution, “there is no constitutional right to a jury in the trial of criminal charges that can be punished by fines not exceeding one hundred dollars or imprisonment for not longer than thirty days.”).

315. Memorandum from Representative Bill McCollum, Chairman, Subcommittee on Crime, House Judiciary Committee, to other members of Subcommittee (March 4, 1997) (on file with author) (announcing hearings on proposals to reform 18 U.S.C. § 922(g)(9) and explaining reports of problems with enforcement of this law).

316. In *United States v. Jackson*, the court found a knowing and intelligent waiver of jury trial based on notation in a state court order that defendant had been fully advised of his constitutional rights. 213 F.3d 644 (9th Cir. 2000).

(5) *Exclusion of Indictments as Predicates*

In its present form, 18 U.S.C. § 922(g)(9) does not create a firearms disability for indictments, complaints, or informations—only for final convictions. The original version of Senator Lautenberg's bill applied to indictments, but he deleted this provision at the urging of Republican senators when he needed their support to his amendment to the stalking bill in July 1996.

The reasons for applying the gun ban to charging instruments are similar to the rationale for applying the ban to TROs. Misdemeanor crimes of domestic violence usually come to the attention of the police because the victim files a report or complaint. Thus, the victim is vulnerable to "separation assault" if she files charges against her batterer and he is not incarcerated while awaiting trial. Indeed, the lapse between arrest and trial on a misdemeanor charge is likely to be much greater than the ten- to twenty-day lapse between issuance of a TRO and the hearing on the petition for a permanent restraining order. Victims deserve strong protection during this early period when they are most likely to suffer reprisals for their courage in reporting domestic violence.

Of course, the mere fact that charges have been filed is not tantamount to proof beyond a reasonable doubt that the defendant is a domestic abuser. Yet 18 U.S.C. § 922(n) has long prevented the possession of firearms by any person indicted of a felony offense.<sup>317</sup> It is difficult to argue why a charge for a misdemeanor crime of domestic violence (which necessarily involves the use of force) should be cause for less concern than a felony charge (which may not necessarily involve a violent felony). The fact that domestic violence cases are often undercharged further erodes the distinction between felonies and misdemeanors.

Not all misdemeanants are charged by indictment. Some (probably most) are charged by complaint, information, or some equivalent instrument.<sup>318</sup> An effective gun ban in these circumstances would need to define the charging instrument broadly, in order to minimize inconsistency in the enforcement of the gun ban among the several states.

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317. See *United States v. Napier*, 233 F.3d 394, 398 (6th Cir. 2000) ("Indeed, a legally relevant status under § 922(g) may arise in the absence of any formal proceeding. For example, § 922(g)(3) prohibits an individual addicted to controlled substances from possessing a firearm, yet an individual attains the status of a drug addict without a court proceeding of any kind.") (quoting *United States v. Baker*, 197 F.3d 211, 217 (6th Cir. 1999)). Even under 18 U.S.C. § 922(g)(9), there is no finality requirement for predicate convictions. *Jackson*, 213 F.3d at 644. (under section 922(g)(9), there is no finality requirement).

318. Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 101-03 (1995).

**C. Insufficient Time Period for Background Checks Under Section 922(t)**

Under the present version of 18 U.S.C. § 922(t), law enforcement officers have three days in which to check the background of a prospective gun purchaser. If the check is not completed within this time frame, the applicant will be approved by default.

These strict time limitations do not allow a meaningful background check. In particular, misdemeanor crimes of domestic violence will be difficult to detect and investigate during the three-day period. Senator Lautenberg foresaw such problems when he discussed the Lautenberg Amendment on the Senate floor:

Mr. President, the final agreement does not merely make it against the law for someone convicted of a misdemeanor crime of domestic violence from possessing firearms. It also incorporates this new category of offenders into the Brady law, which provides for a waiting period for handgun purchases. Under the Brady law, local law enforcement authorities are required to make reasonable efforts to ensure that those who are seeking to purchase a handgun are not prohibited under Federal law from doing so.

Mr. President, convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.

Mr. President, I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun. After all, for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death. I am hopeful that law enforcement officials always will keep that in mind as they implement this requirement.

Having said this, Mr. President, I recognize that there are limits to the ability of many law enforcement agencies to conduct in depth investigations of large numbers of applicants for handgun purchases. The law requires that these agencies make a reasonable effort to investigate applicants. What is a reasonable effort depends upon the local law enforcement officials' available time, resources, access to records, and their own law enforcement priorities.

In my view, the reasonable effort requirement should not be interpreted so broadly that it would substantially interfere with the ability of a law enforcement agency to carry out its central mission of apprehending criminals and protecting the public from crime. At the same time, it should not be interpreted so narrowly that it would allow law enforcement agencies to routinely ignore misdemeanor convictions for violent crimes, without further exploration into whether these crimes involved domestic violence.



So long as an agency makes a reasonable effort to do so, the requirements of the law would be met. However, again, I would strongly urge law enforcement officials to make this a top priority.<sup>319</sup>

The “reasonably thorough” checks urged by Senator Lautenberg have proven even more difficult than he imagined. First, local jurisdictions have adopted inconsistent policies for maintaining computerized records of misdemeanor convictions. Second, the actual court records of misdemeanor cases are routinely destroyed or moved to storage archives in some jurisdictions.<sup>320</sup> Third, the time frame for background checks has actually been reduced from the five-day period in the original Brady Law to the three-day period in the present law.

The consequence of hurried background checks is that batterers will obtain guns. In June 2002, the General Accounting Office released a draft of a study indicating that between 1998 and 2001, at least 3,000 persons subject to firearms disabilities arising from domestic abuse were able to acquire new firearms despite background checks under the Brady Law.<sup>321</sup> These numbers—which exceed by ten-fold the total number of defendants prosecuted under the gun ban for domestic abusers—raise serious concerns about the viability of the current time limits for background checks. The GAO recommended that Congress allow a longer period in which police may investigate the background of prospective gun purchasers.<sup>322</sup>

#### **D. Sentencing Disparity Under U.S.S.G. § 2K2.1**

To date, prosecutions under 18 U.S.C. §§ 922(g)(8) and 922(g)(9) have usually resulted in low sentences. The majority of defendants sentenced under these statutes have received prison terms of less than two years.<sup>323</sup> By contrast, the average sentence in federal weapons prosecutions as a whole is approximately eight years.<sup>324</sup>

The prospect of low sentences under 18 U.S.C. §§ 922(g)(8) and 922(g)(9) is one factor that contributes to the underutilization of these statutes. As a general matter, federal prosecutors are directed to choose carefully which charges they will file. They are encouraged

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319. 142 CONG. REC. S11,878 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

320. Memorandum from Representative Bill McCollum, Chairman, Subcommittee on Crime, House Judiciary Committee, to other members of Subcommittee (March 4, 1997) (on file with author) (announcing hearings on proposals to reform 18 U.S.C. § 922(g)(9) and explaining reports of problems with enforcement of this law).

321. Eggen, *supra* note 11.

322. *Id.*

323. These statistics are set forth in the report that EOUSA prepared in July 2002 at the request of the author. *See supra* note 18.

324. CRIMINAL CASE PROCESSING, 2000, *supra* note 22. Table 6 of this report indicates that in Fiscal Year 2000, the mean sentence in federal weapons prosecutions was 92.2 months.

to prosecute cases in which they will achieve a sentence that is substantially better than what state prosecutors could achieve.<sup>325</sup> Given these considerations, it is no surprise that prosecutors utilize 18 U.S.C. §§ 922(g)(8) and 922(g)(9) less frequently than other statutes yielding higher sentences.

Frustration has arisen over the disparity between the sentencing guidelines for violations of the felon-in-possession law and the guidelines for violations of the gun ban for domestic abusers. The sentencing guideline for illegal possession of firearms, U.S.S.G. § 2K2.1, favors felon-in-possession cases by starting these cases at a much higher base offense level than cases under the gun ban for domestic abusers. The base offense level for a felon-in-possession case is 20 if the predicate offense was a crime of violence,<sup>326</sup> and 14 if the predicate offense was non-violent.<sup>327</sup> By contrast, the base offense level for violations of 18 U.S.C. §§ 922(g)(8) and 922(g)(9) is always 14,<sup>328</sup> no matter what the character of the predicate. An argument could be made that this base offense level is too low, because predicates under 18 U.S.C. §§ 922(g)(8) and 922(g)(9) are virtually always violent. When a defendant with a base offense level of 14 receives a two-level reduction for pleading guilty in a timely manner,<sup>329</sup> his offense level of 12 virtually assures him that he will avoid any substantial prison time, unless he has a lengthy criminal history.<sup>330</sup>

Complicating the picture is the possibility of sentencing reductions that are available to violent misdemeanants but not violent felons. If a defendant demonstrates that he possessed firearms solely for lawful sporting purposes, then his base offense level can be no higher than 6.<sup>331</sup> This adjustment is not available to a felon in possession whose predicate crime was violent,<sup>332</sup> but it is available to a

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325. Memorandum from Mark M. Richard, Acting Assistant Attorney General, Criminal Division, U.S. Department of Justice, to all United States Attorneys 3 (Feb. 12, 1997) (on file with author) (setting forth charging considerations for cases under new federal gun ban for domestic abusers).

326. U.S.S.G. § 2K2.1(a)(4)(A) (2002).

327. *Id.* § 2K2.1(a)(6).

328. *Id.*

329. *Id.* § 3E1.1.

330. *Id.* § 4A1.1 and Ch. 5 part A (sentencing table).

331. *Id.* § 2K2.1(b)(2). The potential for abuse of this guideline in a section 922(g)(9) prosecution is evident in *United States v. Mojica*, 214 F.3d 1169 (10th Cir. 2000) (vacating district court's denial of sentencing reduction under U.S.S.G. § 2K2.1(b)(2) for defendant convicted under section 922(g)(9), where defendant claimed he had acquired a firearm for his brother's sporting purposes, not his own; if on remand the district court found that U.S.S.G. § 2K2.1(b)(2) applied, then sentencing range would be zero to six months).

332. U.S.S.G. §§ 2K2.1(a)(4), 2K2.1(b)(2).

domestic violence misdemeanor whose predicate crime was violent.<sup>333</sup>

In sum, as a result of these various adjustments, a felon in possession whose predicate crime was beating his ex-wife will begin with a base offense level of 20 under the guidelines, whether or not he shows that he possessed the firearm for a lawful sporting purpose. A domestic violence misdemeanor whose predicate crime was beating his ex-wife will begin with a base offense level of 6 under the guidelines if he can show a lawful sporting purpose for his possession of the firearm.<sup>334</sup> The 300 percent difference between these base offense levels is inappropriate and greatly reduces incentives for prosecutors to file charges under the gun ban for domestic abusers.

#### IV. Proposals for Reform

The following proposed revisions to statutes and sentencing guidelines would improve the enforcement of the gun ban for domestic abusers and would provide defendants with clearer notice of their rights and liabilities.

##### A. Broader Application of Section 922(g)(8)

The gun ban under 18 U.S.C. § 922(g)(8) should apply to any person who is subject to a court order that

(A) was issued after a hearing, of which such person received actual notice, and at which such person had an opportunity to participate unless the parties have agreed to waive a hearing; and

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

This revised language<sup>335</sup> offers two principal advantages over existing law. First, the notice and hearing requirement would no

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333. *Id.* §§ 2K2.1(a)(6), 2K2.1(b)(2).

334. *See* United States v. Lewitzke, 176 F.3d 1022, 1029 n.7 (7th Cir. 1999) (noting that in a prosecution under section 922(g)(9), “by specifying a much lower base offense level . . . , [U.S.S.G. § 2K2.1(b)(2)] does significantly reduce the amount of prison time the defendant might serve for the possession.”).

335. Newly inserted language has been italicized. Deleted language has been underlined.

longer exclude *ex parte* orders and stipulated orders. These orders make up a substantial portion of domestic violence restraining orders today, and they are no less reliable as an indication of dangerousness than are the felony indictments that presently create a firearms disability under 18 U.S.C. § 922(n). Second, the formalistic requirements of current Subsection (C) would be deleted entirely. These requirements have led to the exclusion of nonconforming restraining orders in some states and have undermined the uniform enforcement of the gun ban. The limitations of Subsection (C) are unnecessary because any person who falls within the language of Subsection (B) is surely dangerous enough that he should be denied the right to possess firearms, whether or not the express findings required by Subsection (C) have been made.

**B. Greater Flexibility in Section 922(g)(9) to Match Requirements of State Law**

The definition of the predicate offense under 18 U.S.C. § 921(a)(33)(A) should be revised to read as follows:

“misdemeanor crime of domestic violence” means an offense that

(i) is a misdemeanor under Federal or State law; and

(ii) *is assault or battery, or is an offense that has, as an element, the use or attempted use of physical force, the threatened use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim; and*

(iii) *is committed by a current or former spouse, parent, guardian or child of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, guardian or child, or by a person similarly situated to a spouse, parent, guardian or child of the victim.*

This revised version would be preferable to existing law for several reasons. First, by listing assault and battery as crimes that will automatically satisfy the “use of force” requirement in every state, irrespective of the precise language used in each state’s statutes, the new version reduces inconsistency in the enforcement of the gun ban among states, simplifies background checks, and is more understandable to defendants. Second, the new language includes the threatened use of physical force within the “use of force” requirement, bringing the definition into conformity with all the other

“use of force” requirements in the federal gun laws.<sup>336</sup> Third, the new language makes clear that the “domestic relationship” requirement includes a situation in which the assailant is the child of the victim. Fourth, the additional substructure eliminates any possibility that section 921(a)(33)(A) might be construed to require that the “domestic relationship” requirement must be an element of the predicate offense.

The best way to reform 18 U.S.C. § 921(a)(33)(B)—which sets forth the counsel requirement and the jury trial requirement—would be to simply delete this provision altogether. The provision is inappropriate for 18 U.S.C. § 922(g) because it requires unprecedented scrutiny of proceedings in the predicate case—scrutiny that is not required for felony predicates under 18 U.S.C. § 922(g)(1), and that far exceeds constitutional requirements.

The language establishing the offense in 18 U.S.C. § 922(g)(9) should be revised to read as follows:

It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, *or who has been charged with a misdemeanor crime of domestic violence by indictment, information, or any other written charging instrument . . .* to possess in or affecting commerce any firearm or ammunition . . .

The italicized language would ensure that the law applies not only to convicted defendants, but also to defendants who have been charged and are awaiting trial. The felony gun ban already includes both charged and convicted defendants, so the misdemeanor gun ban should include both groups as well. This change would achieve more uniform enforcement and would better protect victims at the time when they are most vulnerable to gun-related violence.

### **C. Extension of Time Limits for Background Checks Under Section 922(t)**

The Brady Law, 18 U.S.C. § 922(t), should be revised to allow police up to ten days in which to complete a background check for a prospective gun purchaser. This longer time period would improve the likelihood that police could detect a misdemeanor crime of domestic violence, which may not be as easy to recognize as a felony.

### **D. Revision of U.S.S.G. § 2K2.1 to Eliminate Disparity in Sentencing**

The sentencing guideline for illegal possession of firearms, U.S.S.G. § 2K2.1, should be revised to establish a base offense level of

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336. With this revision the statute will be true to Senator Lautenberg’s intentions: he said “anyone who attempts *or threatens violence against a loved one* has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.” 142 CONG. REC. S11,877 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added).

18 for violations of 18 U.S.C. §§ 922(g)(8) and 922(g)(9), as opposed to the current base offense level of 14. This new base offense level would be closer to the base offense level of 20 that applies in felon-in-possession cases involving violent predicates. Closing the gap is appropriate because every violation of sections 922(g)(8) and 922(g)(9) involves a violent predicate. Further, the “sporting purposes” reduction under U.S.S.G. § 2K2.1(b)(2) should be unavailable in prosecutions under sections 922(g)(8) and 922(g)(9), just as it is unavailable in felon-in-possession cases with violent predicates.

### Conclusion

When Congress debated the gun bans for domestic abusers in 1994 and 1996, the principal sponsors were wary that amendments offered by their opponents would greatly limit the enforceability of these measures. Senator Wellstone expressed his fear that critics would “gut” his legislation. Senator Lautenberg complained that the gun lobby was seeking amendments that would create “loopholes large enough to drive a truckload of wife beaters through.”<sup>337</sup>

While Senator Wellstone and Senator Lautenberg did manage to fend off some of the most worrisome revisions, the bills that became 18 U.S.C. §§ 922(g)(8) and 922(g)(9) were nonetheless burdened with many limitations that have hindered their enforcement. Now that the constitutionality of these measures has been settled, it is time to ask whether they can be adequately enforced as they are written. The answer is that they cannot. Major revisions in the statutory language are necessary in order to realize Senator Lautenberg’s dream that “no wife beater, no child abuser . . . ought to be able to have a gun.”<sup>338</sup>

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337. 142 CONG. REC. S11,227 (daily ed. Sept. 25, 1996) (statement of Sen. Lautenberg).

338. 142 CONG. REC. S11,363 (daily ed. Sept. 26, 1996) (statement of Sen. Lautenberg).

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