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Comment

Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9)

I. Introduction

On July 9, 1992, Barbara O'Dell arrived home to a very unpleasant surprise. Her husband, from whom she was legally separated and against whom she had a restraining order, was in her garage - waiting for her. "I've left the other woman and want to return home," he said.¹ Apparently, however, she had had enough. She did not want him back and asked him repeatedly to leave.² Rodolfo O'Dell's wife's response to his plea made him angry, then violent. He grabbed her by the neck and began to choke her.³ She could feel her bones cracking, she could not breathe, and she could hear herself gurgling.⁴ She was terrified, but her husband's attack did not end there. He raped her four times, biting her as he attacked her.⁵

Rodolfo O'Dell was first charged with four counts of felony rape,⁶ but the case resulted in a mistrial. Rodolfo subsequently pled no contest to a one count charge of spousal battery, a misdemeanor. Rodolfo was a police officer at the time of the horrific ordeal. Now he is a detective.⁷

1. Hector Tobar, *Officer's Expunged Conviction Angers Ex-Wife*, LOS ANGELES TIMES, May 26, 1997, at B-1.

2. *See id.*

3. *See id.*

4. *See id.*

5. *Id.*

6. *See Tobar, supra* note 1, at B-1.

7. *See id.*

The Lautenberg Amendment⁸ is the first step towards stopping the type of horrific ordeal endured by Barbara O'Dell and preventing the subsequent "slap in the face" from the criminal justice system which allowed Rodolfo to plead to a misdemeanor. Pursuant to this law, officers, such as Rodolfo O'Dell, will no longer be law enforcement officers because the law takes from any person convicted of a misdemeanor crime of domestic violence the privilege of possessing a firearm - even law enforcement officers.

II. Background

A. Legislative History

On March 21, 1996, Senator Frank Lautenberg (D-N.J.), introduced S-1632, a bill aimed at curbing domestic violence by taking firearms and ammunition out of the hands of anyone convicted of a misdemeanor crime of domestic violence. The proposed bill was slightly altered and then, on July 25, 1996, incorporated into the proposed anti-stalking legislation by voice vote.⁹ Because the House of Representatives did not act on the anti-stalking bill, Senator Lautenberg offered his bill as an amendment to the Treasury, Postal Service, and General Government Appropriations Bill of 1997. Lautenberg offered his amendment as part of the Omnibus Consolidated Appropriations Act of 1997 because the Treasury and Postal bill was pulled from the floor.¹⁰ The Lautenberg Amendment was overwhelmingly approved by the Senate on September 12, 1996, by a vote of 97-2.¹¹ Nevertheless, the bill was characterized as controversial because of its content, because it was never de-

8. See 18 U.S.C. § 922(g)(9) (1998).

9. See 142 CONG. REC. S11,872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg); Frank Lautenberg, *Lautenberg Offers Amendment to Treasury, Postal Service Appropriations Bill That Takes Guns Out of the Hands of Wife Beaters and Child Abusers*, GOV'T PRESS RELEASES, Sept. 12, 1996, available in 1996 WL 11124929.

10. See 142 CONG. REC. S11,872-01 (Sept. 30, 1996) (statement of Sen. Lautenberg).

11. See *id.*; see also Frank Lautenberg, *Lautenberg Offers to Treasury, Postal Service Appropriations Bill that Takes Guns Out of the Hands of Wife Beaters and Child Abusers*, Sept. 12, 1996, available in 1996 WL 11124929.

bated on the House floor,¹² and because it was just a very small portion of a huge spending bill that was finalized in the early morning hours of September 28, 1996.¹³

On September 30, 1996, the Lautenberg Amendment became law. The Amendment states that:

[i]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence,¹⁴ to ship or transport in interstate or foreign commerce, or possess in or affecting interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.¹⁵

Before September 30, 1996, law enforcement officers were exempt from any disabilities provided for in the Gun Control Act of 1968.¹⁶ Another amendment, however, declared law enforcement would not be exempt from the new law:

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

12. See Rep. Helen Chenoweth, *Domestic Violence is a Serious Issue, But Amendment is not the Solution*, IDAHO STATESMAN, Aug. 11, 1997, at 6a.

13. See 142 CONG. REC. S11872-01 (Sept. 30, 1996) (statement of Sen. Lautenberg).

14. 18 U.S.C. § 921(33)(A) (1998) defines a misdemeanor crime of domestic violence as any offense that "is a misdemeanor under federal or state law" and

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.

Thus, the offense charged need not include domestic violence as part of the offense, but need only have, in the underlying facts, an element of domestic violence. For example, a basic assault as defined by federal and individual state jurisdictions, does not include, as an element, that it be perpetrated upon one of the categories of victims described by 18 U.S.C. § 921(33)(A) above. If, however, an assault is perpetrated upon such a victim, the offense is within the realm of 18 U.S.C. § 922(g)(9).

15. 18 U.S.C. § 922(g)(9).

16. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

thereof or any State or any department, agency, or political subdivision thereof.¹⁷

The Lautenberg Amendment has touched, and indeed amended, other laws. It has been associated with the recently enacted Violence Against Women Act of 1994 (VAWA)¹⁸ because of its stated purpose of combating domestic violence.¹⁹ Additionally, the law has amended both the Gun Control Act of 1968 and the Brady Handgun Law.²⁰

17. 18 U.S.C. § 925(a)(1) (emphasis added).

18. Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 42 U.S.C.). The Lautenberg Amendment is one of five federal domestic violence statutes. The statutes passed under VAWA include: 18 U.S.C. § 2261 (Interstate Domestic Violence); 18 U.S.C. § 2261A (Interstate Stalking); and 18 U.S.C. § 2262 (Interstate Violation of a Protective Order). The other two statutes were passed as amendments to the Gun Control Act of 1968 and include the statute at issue herein, 18 U.S.C. §§ 922(g)(9) and (g)(8), which prohibits anyone subject to a court order that “restrains such person from harassing, stalking, or threatening an 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 includes a finding that the person represents a threat to the physical safety of the partner or child, or prohibits the use, attempted use, or threatened use of physical force against the partner or child, from shipping, transporting or possessing any firearm or ammunition. Two corollary amendments to §§ 922(g)(8) and (g)(9) are §§ 922(d)(8) and (d)(9), which prohibit anyone from selling or otherwise disposing of a firearm or ammunition to anyone subject to a protection order or to anyone who has been convicted of a misdemeanor crime of domestic violence.

19. “I believe that [the Lautenberg Amendment] will save the lives of many battered wives and abused children. And it will send a message that, as a nation, we are determined to take the problem of domestic violence seriously.” 142 CONG. REC. S11,872-01 (Sept. 30, 1996) (statement of Sen. Lautenberg).

20. The Brady Handgun Law requires background checks and waiting periods for people seeking to purchase a firearm. The Lautenberg Amendment amended the Brady Law to require that chief law enforcement officers (“CLEOs”) in “Brady states” “shall make a reasonable effort to ascertain within 5 business days” whether a prospective buyer’s receipt of a handgun would be in violation of the law. 18 U.S.C. § 922(s)(2); see also Open Letter to All State and Local Law Enforcement Officials, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 3 (Nov. 26, 1996) (on file with the U.S. Dept. of Justice Office of Public Affairs). The reasonable effort standard is to be determined by each law enforcement agency based upon their individual circumstances such as “availability of resources, access to records, and the law enforcement priorities of the jurisdiction.” *Id.* at 3; see also *Gun Ban for Domestic Violence Offenders Means Cities Must Take New Steps*, NATION’S CITIES WEEKLY, Jan. 13, 1997. The United States Supreme Court held § 922(s)(2) unconstitutional in *Printz v. United States*, 117 S. Ct. 2365 (1997), however, because “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” [(Citations omitted)]. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.” *Id.* at 2383.

B. Law Enforcement Reacts

On the federal level, the Department of Justice (“DOJ”)²¹ reacted to the passage of the new statute by first establishing a working group led by the Office of Investigative Agency Policies (“OIAP”) and consisting of representatives of the FBI, EOUSA, BOP, OIG, USMS, DEA, INS, the Justice Management Division, the Criminal Division, the Office of Intergovernmental Affairs, and the Office of Policy Development.²² The purpose of the group was to determine the implications of the new law. The first project of the OIAP working group was to determine the best way to identify law enforcement agents who had been convicted of a misdemeanor crime of domestic violence and enable affected agencies to both “retrieve any agency-issued firearms and ammunition” and “rescind any agency-issued authority to carry privately owned firearms and ammunition as part of an agent’s official duties.”²³

A letter was issued by the Deputy Attorney General on December 5, 1996, to the directors of affected DOJ agencies. The agencies, upon recommendation of the OIAP working group, were given forty-five days to certify that they had identified affected agents in their ranks and were told to report to the Deputy Attorney General the management steps that were taken, such as termination or reassignment of the agents so affected. Each agency was instructed to issue a memorandum that explained the new law to all employees authorized to carry government issued firearms and ammunition.²⁴ Attached to the

21. Federal agencies within the Department of Justice that have employees affected by the new law include the Federal Bureau of Investigation (“FBI”), the Executive Office of United States Attorneys (“EOUSA”), the Bureau of Prisons (“BOP”), the Office of the Inspector General (“OIG”), the United States Marshals Service (“USMS”), the Drug Enforcement Administration (“DEA”), and the Immigration and Naturalization Service (“INS”).

22. See Memorandum From the Deputy Attorney General, Office of the Deputy Attorney General 2 (Dec. 5, 1996) (on file with the U.S. Dept. of Justice, Office of Public Affairs).

23. *Id.*

24. See *id.* A sample of the memorandum to be issued to “All Employees Authorized to Possess Government-Issued Firearms and Ammunition” was attached to the Deputy Attorney General’s letter and read as follows:

There has been a recent change in the law pertaining to possession of firearms or ammunition. On September 30, 1996, Title 18, United States Code, Section 922(g)(9) took effect, making it illegal for anyone who has been con-

memorandum was a qualification inquiry that each employee was to complete and return to an immediate supervisor.²⁵ The qualification inquiry was to serve as the employee's certification that he or she either has or has not been convicted of a misdemeanor crime of domestic violence.²⁶ Compliance by federal

victed of a misdemeanor crime of domestic violence to possess any firearm or ammunition. "Misdemeanor crime of domestic violence" is generally defined as any offense - - whether or not explicitly described in a statute as a crime of domestic violence - - which has, as its factual basis, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by the victim's current or former domestic partner, parent, or guardian. The term "convicted" is generally defined in the statute as excluding anyone whose conviction has been expunged, or been set aside, or has received a pardon

This provision applies to persons *convicted at any time prior to or after the passage of the September 30, 1996 law*. Moreover, there is *no* exemption for law enforcement officers and agents. If you have ever been convicted of a misdemeanor crime of domestic violence within the meaning of the statute, continued retention of any firearm or ammunition, whether Government-issued or privately owned, may subject you to felony criminal penalties, including a sentence of imprisonment of up to ten years and a fine of up to \$250,000, as well as administrative action.

If you are affected by this statute: (1) you may not possess *any* firearm or ammunition; and (2) you must return any Government-issued firearm or ammunition to [your immediate supervisor]. Furthermore, since the statute makes it illegal for you to possess any firearm or ammunition, any previously issued authorization to possess a firearm or ammunition is revoked. Attached to this memorandum is a qualification inquiry, which you must complete and return to [your immediate supervisor,] within ten (10) working days of receipt. If you have any questions, you may contact [your immediate supervisor, agency ethics officer, union representative], or private attorney.

Id. at attachment, sample letter.

25. *Id.* at attachment, sample qualification inquiry.

26. The qualification inquiry form was a one-page document that agents were required to complete within ten working days. See Memorandum from the Deputy Attorney General, Office of the Deputy Attorney General, at attachment, sample qualification inquiry (Dec. 5, 1996) (on file with the U.S. Dept. of Justice, Office of Public Affairs). The form informed the agents as follows:

(a) The purpose [of this form] is to obtain information which will assist in the determination of whether personnel reassignment and/or administrative action are warranted.

(b) You have a duty to complete this form. Agency disciplinary action, including dismissal, may be undertaken if you refuse to answer or if you fail to reply fully and truthfully.

(c) Neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal prosecution for a violation of Title 18, United States Code, Section 922(g)(9). However, the answers you furnish and any information or evidence resulting therefrom

agents authorized to carry government issued firearms was mandatory and virtually 100% of the agents from each affected agency cooperated.²⁷

In addition to self regulation, the DOJ, through the Director of the Office of Intergovernmental Affairs, issued a letter to all State Attorneys General on December 6, 1996.²⁸ The letter explained the new law, its implications on law enforcement officers, explained the role of the OIAP working group and explained the procedures implemented in the DOJ.²⁹ In addition, the letter added:

These procedures and the forms associated with them are not binding on other law enforcement agencies. How other agencies

may be used against you in a prosecution for knowingly and willfully providing false statements or information , and in the course of agency disciplinary proceedings.

Id. at attachment 2. Agents then had to respond by checking either “yes” or “no” to the question of whether or not they had ever been convicted of a misdemeanor crime of domestic violence. If the answer was yes, information had to be provided concerning the jurisdiction in which the conviction occurred, the docket or case number, the statute under which the agent was charged, and the date of the sentencing. *See id.* At the bottom of the inquiry was a certification that read as follows:

I hereby certify that, to the best of my information and belief, all of the information provided by me is true, correct, complete, and made in good faith. I understand that false or fraudulent information provided herein may be grounds for adverse action, up to and including removal, and is also criminally punishable pursuant to federal law, including 18 U.S.C. § 1001.

Id. Agents then had to sign and date the form and return it to their immediate supervisors. *See id.*

27. Pursuant to a table issued by the United States Department of Justice, Office of Public Affairs, the following statistics represent agencies’ compliance with the Qualification Inquiry and the number of agents affected by the disability to date:

Employees Agency	% of Employees Surveyed	Number of Employees Contacted	Number of Employees Disqualified
FBI	99.90	10,870	0
EOUSA	100.00	81	0
BOP	99.90	28,485	64
OIG	100.00	127	0
USMS	100.00	7,029	0
DEA	100.00	3,752	0
INS	99.20	14,470	19

28. Memorandum for All State Attorneys General, Office of Intergovernmental Affairs, United States Department of Justice, at attachment, table (Dec. 6, 1996) (on file with the U.S. Dept. of Justice, Office of Public Affairs).

29. *See id.*

comply with this new law is a matter within their discretion. However, these procedures and the forms associated with them are the product of a great deal of considered and deliberate work and legal analysis. Law enforcement therefore may find these procedures and forms useful.³⁰

Finally, the letter noted that chief law enforcement officers (“CLEOs”) of state, county, and local law enforcement agencies would be asked to certify, using forms similar to those described above, that any officers deputized by any DOJ law enforcement agency are still eligible, pursuant to the new law, to carry a firearm and ammunition.³¹

Statutorily, federal agencies are not required to seek out agents or deputized officers who are adversely affected by this new law. The only time agencies must act, according to the statute, is when they become aware of an agent or officer who has been convicted of a misdemeanor crime of domestic violence, because those persons affected are in violation of the law when possessing a firearm or ammunition. According to the statute, agencies have no obligation to implement any procedures to find any affected law enforcement officers. Even so, however, all federal and many state agencies continue to act prospectively.

The Bureau of Alcohol, Tobacco and Firearms (“ATF”), an agency within the United States Department of the Treasury, has jurisdiction over and is responsible for enforcement of gun control laws.³² In response to the passage of the Lautenberg Amendment, the director of the ATF, John W. Magaw, issued an “Open Letter To All State And Local Law Enforcement Officials” on November 26, 1996.³³ The purpose of the letter was to

30. *Id.* at 1.

31. *See id.* at 2.

32. Bureau of Alcohol, Tobacco and Firearms home page, *Mission Statement* (last modified October 24, 1997) <<http://www.atf.treas.gov/about/mission.htm>>.

33. Attached to the letter was a document titled “Questions And Answers Regarding Misdemeanor Crime Of Domestic Violence” to assist officers in understanding how the new law was to be applied. The document was written in a question and answer format:

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 or ammunition?

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

notify law enforcement officials of the passage of the Lautenberg Amendment and specified that there is no exemption in this law for law enforcement officers. The letter further notes that the law applies to people convicted of misdemeanor

Q. X was convicted of the same crime on September 20, 1996, 10 days before the effective date of the new statute. He possesses a firearm on October 10, 1996. May X lawfully possess firearms?

A. No. If a person was convicted of the crime at any time, he or she may not lawfully possess firearms or ammunition on or after September 30, 1996.

Q. Officer C was charged with felony assault on her child in 1989. She pled guilty to a misdemeanor and the felony charge was dismissed. She was suspended from the police force and ordered to undergo counseling. After successful completion of the counseling, she was reinstated. May Officer C lawfully possess firearms or ammunition?

A. No. Officer C may no longer lawfully possess firearms or ammunition either on or off duty.

Note: For one who has been convicted of a misdemeanor crime of domestic violence, the prohibition on the possession of firearms and ammunition does not apply if the individual has received a pardon for the crime, the conviction has been expunged or set-aside, or the person has had civil rights restored (if there was a loss of civil rights) AND the person is not otherwise prohibited from possessing firearms or ammunition.

Open Letter to All State and Local Law Enforcement Officials, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, at attachment, Questions and Answers Regarding Misdemeanor Crime of Domestic Violence (undated) (on file with the U.S. Dept. of Justice, Office of Public Affairs).

In addition to the letter issued to all state and local law enforcement officials, ATF Director John Magaw issued similar letters to the public and to all federal firearms licensees informing them of the new law. The letter to the public noted that if anyone had ever been convicted of a misdemeanor crime of domestic violence, they should "immediately lawfully dispose of their firearms and ammunition." Open Letter From the Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 2 (undated) (on file with the U.S. Dept. of Justice, Office of Public Affairs). The letter to federal firearms licensees explained the amendments to the Gun Control Act, specifically 18 U.S.C. § 923(j), concerning the sale of curio or relic firearms, and § 922(g)(9), concerning persons convicted of misdemeanor crimes of domestic violence. The letter defined the misdemeanor crime of domestic violence and explained the retroactivity of the statute, as well as the prohibitions made by the statute. Of greatest concern to the federal licensees is the prohibition of knowingly selling a firearm to a person convicted of a misdemeanor crime of domestic violence. Thus, the ATF informed the licensees that applicable forms were being amended to reflect the new provisions and would be distributed as soon as possible. In the meantime, however, the ATF stated that licensees should inquire of customers "whether they have been convicted of a disqualifying domestic violence misdemeanor and avoid any firearm or ammunition transfers to such persons." Open Letter to All Federal Firearms Licensees, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 3 (undated) (on file with the U.S. Dept. of Justice, Office of Public Affairs).

crimes of domestic violence, even if the conviction occurred before the effective date of the law, unless the conviction “has been expunged, set aside, pardoned, or the person has had his or her civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) AND the person is not otherwise prohibited from possessing firearms or ammunition.”³⁴ Director Magaw made clear to the officials that this disability applied to firearms and ammunition issued by governmental agencies, purchased for use in performing official duties, and possessed for personal use.³⁵

Pursuant to the Tenth Amendment to the United States Constitution,³⁶ state and local law enforcement agencies are not, and indeed cannot be required to proactively seek out law enforcement officers in their ranks with misdemeanor convictions of domestic violence and disarm them.³⁷ This is reflected not only in the amendment to the Gun Control Act and other firearms statutes,³⁸ where the law is silent as to any agency’s obligation to find such persons, but also in Director Magaw’s letter, where he writes “your department *may* want to determine if any employee who is authorized to carry a firearm is subject to this disability and what appropriate action should be taken.”³⁹ Even if the agency becomes aware of one of its employees being subject to the “disability,” the language of the letter merely states that “we *recommend* that such persons be *encouraged* to relinquish all firearms and ammunition in their possession.”⁴⁰ The language only becomes commanding, however, when speaking to the obligation of the individual subject

34. Open Letter to All State and Local Law Enforcement Officials, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 2 (Nov. 26, 1996) (on file with the U.S. Dept. of Justice, Office of Public Affairs) (emphasis in original); see also 18 U.S.C. § 921(33)(B)(ii) (1998).

35. See Open Letter to All State and Local Law Enforcement Officials, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 2 (Nov. 26, 1996) (on file with the U.S. Dept. of Justice, Office of Public Affairs).

36. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

37. See *infra* Part III(B).

38. See generally 18 U.S.C. § 925; see also 18 U.S.C. §§ 921-944.

39. Open Letter to All State and Local Law Enforcement Officials, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms 2 (undated) (on file with the U.S. Dept. of Justice, Office of Public Affairs) (emphasis added).

40. *Id.* (emphasis added).

to the disability: "Employees subject to this disability *must immediately* dispose of all firearms and ammunition in their possession" or face the possibility of criminal penalties.⁴¹

Because the law does not require law enforcement agencies to act prospectively, state agencies' reactions have varied. Some police departments, such as the New York City Police Department,⁴² have reacted by implementing a procedure similar to that implemented by the U.S. Department of Justice. In Denver, one patrol officer and one detective have been reassigned to desk jobs as a result of the Lautenberg Amendment's passage.⁴³ In Los Angeles, three sheriff's deputies have been disarmed,⁴⁴ and it was expected that of the 8,300 active duty deputies and 9,400 police officers, some forty deputies and thirty to forty officers would be affected by the new law.⁴⁵ Other agencies, however, are more skeptical of the law and believe that it is unconstitutional.⁴⁶ Thus, they have refused to implement any policies until they "see what happens in court."⁴⁷

In proactively implementing procedures to seek out officers in their ranks with misdemeanor convictions of domestic violence, the New York City Police Department issued Operations Order Number 39 on April 21, 1997, to "All Commands" and informed them of the Lautenberg Amendment. The Order directed commanding officers "[t]o identify members of the service affected by this legislation . . . by ensur[ing] that all uniformed members, regardless of their duty status, and civilian members under their command, when their duties require possession of a firearm and/or ammunition, complete the DO-

41. *Id.* (emphasis added).

42. See New York City Department, Operations Order Number 39, at 1 (Apr. 21, 1997) (on file with the New York City Police Dept., Office of Public Information).

43. See Jillian Lloyd, *Police Up In Arms Over Revised Federal Gun Law*, CHRISTIAN SCI. MONITOR, Dec. 18, 1996, at 4.

44. See Kenneth Reich, *Dozens of Officers Could Lose Weapons Under New Domestic Violence Law*, LOS ANGELES TIMES, Dec. 28, 1996, at B-1.

45. See *id.*

46. Lloyd, *supra* note 43, at 4.

47. See *id.*

MESTIC VIOLENCE INQUIRY”⁴⁸ Members of the Department

who disclose or who are found to have a qualifying conviction for which they have not been pardoned, the conviction has not been expunged, or their civil rights have not been restored, shall be placed on modified assignment by their commanding officer, by authority of the First Deputy Commissioner, pursuant to Patrol Guide procedures 118-10,⁴⁹ “Cause For Suspension or Modified Assignment,” and 118-12,⁵⁰ “Modified Assignment,” shall have their firearms removed pursuant to Patrol Guide procedure 120-09,⁵¹ “Removal and Restoration of Firearms,” and, shall be referred to the Early Intervention Unit.⁵²

Additionally, applicants to the Department are now screened to determine whether or not they have committed a misdemeanor crime of domestic violence: “[Applicants, whether for] uniformed or civilian [positions], whose duties would require they possess a firearm, rifle or shotgun will complete DOMESTIC VI-

48. New York City Police Department, Operations Order Number 39, at 1 (Apr. 21, 1997) (on file with the New York City Police Dept., Office of Public Information).

49. New York City Police Department Patrol Guide Procedure 118-10 describes who has the authority to suspend or place on modified assignment a uniformed or civilian member of the police department. Further, 118-10 explains under what conditions uniformed or civilian members of the police department may and must be suspended and under what conditions a uniformed member may be placed on modified assignment. See New York City Police Department Patrol Guide Procedure 118-10, “Cause for Suspension or Modified Assignment” (on file with the New York City Police Dept., Office of Public Information).

50. New York City Police Department Patrol Guide Procedure 118-12 describes the procedure for placing a uniformed member of the department on modified assignment. It includes removing from the officer, apparently in all situations of modified assignment, his firearm, shield, identification card, and any other department property. On the next business day, the officer must go to the Personnel Orders Section where he apparently receives his new assignment. See New York City Police Department Patrol Guide Procedure 118-12, “Modified Assignment” (on file with the New York City Police Dept., Office of Public Information).

51. New York City Police Department Patrol Guide Procedure 120-09 explains the procedure by which the department removes all firearms from a uniformed officer. See New York City Police Department Patrol Guide Procedure 120-09, “Removal and Restoration of Firearms” (on file with the New York City Police Dept., Office of Public Information).

52. New York City Police Department, Operations Order Number 39, at 1 (Apr. 21, 1997) (on file with the New York City Police Dept., Office of Public Information).

OLENCE INQUIRY - APPLICANT . . . as part of the application process.”⁵³

The New York City Police Department’s Office of Public Information was unable to disclose the number of officers affected by the enactment of the Lautenberg Amendment to date.

Similarly, in Los Angeles, the Los Angeles Police Department has acted proactively in seeking out affected officers. There, Special Order Number 7 was released by the Office of the Chief of Police on July 28, 1997.⁵⁴ Initially, the order sets forth the background of the Lautenberg Amendment, when it was enacted, what it stands for and how it effects officers.⁵⁵ Additionally, it explains that domestic violence need not be the actual crime charged for a qualifying offense; it need only be an element of the crime with which an affected person was charged.⁵⁶ The stated purpose of Special Order 7 is to establish a uniform procedure to identify “employees prohibited from possessing, shipping, transporting, or receiving a firearm and/or ammunition under the federal law.”⁵⁷ The remainder of the Order explains the procedure to be followed by an affected officer, his commanding officer and an internal affairs commanding officer.⁵⁸

Once law enforcement personnel review Special Order 7, they are required to complete the “Acknowledgement of Receipt” form on the last page of the Order which, unlike the more detailed federal and New York City Police Department forms, asks only whether the officer reviewing the Order has ever been convicted of a misdemeanor crime of domestic violence as defined by 18 U.S.C. § 921(33)(A)⁵⁹ and is then directed to check “yes,” “no,” or “I am not sure” and then sign the form as an acknowledgment of receipt of the Order and affirmation that he answered the question truthfully.⁶⁰

53. *Id.*

54. Los Angeles Police Dept., Special Order No. 7 (July 28, 1997) (on file with the Los Angeles Police Dept.).

55. *See id.* at 1-2.

56. *See id.* at 1.

57. *Id.* at 2.

58. *See id.* at 2-7.

59. *See supra* note 14.

60. *See* Los Angeles Police Department, Special Order No. 7, at 9 (July 28, 1997) (on file with the Los Angeles Police Dept.).

If an officer answers affirmatively, pursuant to the Order, it is then his responsibility to notify his commanding officer and submit a report that includes a brief summary of the facts of the case, the approximate date of the filing of the criminal complaint, the booking charge, the arresting agency, the approximate date of conviction, the docket number, the nature of the charges, the disposition of the case and whether the incident was investigated by the Los Angeles Police Department.⁶¹ Once the commanding officer becomes aware of such a conviction, he is responsible for retrieving from the employee all city-owned firearms and ammunition in the employee's possession in a discrete manner so as not to embarrass the officer, completing an equipment/firearms receipt, reassigning the officer to a position that does not require possession of a firearm, and notifying the Internal Affairs Division of the situation.

At the time of the retrieval, the commanding officer must advise the officer that the retrieved city-owned firearms and department-issued ammunition will be held by the commanding officer, that privately owned firearms should immediately be turned over to a third party, and that written confirmation of such action should be given to the commanding officer within seventy-two hours after receiving the advisement.⁶² Further, the commanding officer is responsible for notifying the officer that a preliminary inquiry will be performed within ninety days of the date of that officer notified his commanding officer of the situation.⁶³ Once the preliminary inquiry is performed, the commanding officer is then responsible for determining whether or not a personnel complaint investigation should be initiated.⁶⁴ Finally, the commanding officer must complete the "Employee Notification - Prohibition from Possessing, Shipping, Transporting or Receiving a Firearm and/or Ammunition"⁶⁵ form and

61. *See id.* at 4-5.

62. *See id.* at 5.

63. *See id.*

64. *See id.*

65. *See* Los Angeles Police Dept., Special Order No. 7 at 5. The form, as its name states, notifies an officer that he is prohibited from possessing, shipping, transporting, or receiving a firearm and/or ammunition pursuant to 18 U.S.C. § 922(g)(9). The form directs the officer to surrender city-owned weapons and ammunition and to refrain from possessing, shipping, transporting or receiving them until further notice and directs him to surrender privately owned weapons to a third party. Additionally, if confronted with a situation where police action is re-

presenting the same to the affected officer for his signature.⁶⁶ At this point, the officer is effectively disarmed and reassigned to a position that does not require a firearm unless and until the conviction is expunged or set aside. If the conviction is not expunged or set aside, or if there is no determination regarding a possible violation of § 922(g)(9) within ninety days of the officer being notified, an administrative investigation will be initiated by the commanding officer's forwarding a Personnel Complaint form to the commanding officer of the Internal Affairs Division.⁶⁷ The Legal Division of the Los Angeles Police Department was unable to reveal the number of officers affected by the enactment of the Lautenberg Amendment to date.

C. *Resulting Case Law*

Since the enactment of the Lautenberg Amendment on September 30, 1996, a growing number of cases have been published that challenge its constitutionality.⁶⁸ The first case,

quired while either on or off duty, the officer is advised to consider alternatives to affecting an arrest himself without a weapon, where the risk is too great to the unarmed officer. Pursuant to the form, permission to engage in outside employment that requires the officer to carry a firearm is revoked. The order becomes effective upon its presentation to the officer and remains in effect until the officer is otherwise advised by his commanding officer. *See* Los Angeles Police Department, Employment Notification - Prohibition from Possessing, Shipping, Transporting or Receiving a Firearm and/or Ammunition, form 70-01 88 2 (June 1997) (on file with the Los Angeles Police Dept.).

66. *See id.*

67. *See id.* at 7.

68. In Los Angeles, three law enforcement officers, known only as Doe 1, Doe 2, and Doe 3, were the first law enforcement officers in the country to file a complaint challenging the Lautenberg Amendment. *See* Complaint for Declaratory and Injunctive Relief at 12-15, Association for Los Angeles Deputy Sheriffs v. Block, No. 96-9054 (D. Cal. 1996) (complaint for declaratory and injunctive relief). In the past, two of the three had pled no contest to domestic violence charges and the third had been convicted of a misdemeanor crime of domestic violence. *See Deputies Sue to Bar Enforcement of Gun Possession*, ASSOCIATED PRESS, Dec. 26, 1996. The complaint challenged the Lautenberg Amendment as a violation of Congress's power under the Commerce Clause, as an equal protection violation under the Fourteenth Amendment, and as a violation of the Ex Post Facto Clause. *See Block*, No. 96-9054 at 12-15. The complaint sought a declaratory judgment and both preliminary and permanent injunctions prohibiting the defendants from depriving the individual plaintiffs from their positions as deputy sheriffs. *See id.* at 17-18. According to the attorney for the plaintiffs, Richard Shinee of Green & Shinee, Encino, California, the court dismissed the complaint finding that the Association for Los Angeles Deputy Sheriffs had no standing to bring a cause of action, and because the three deputies each had their records expunged, thus

United States v. Smith,⁶⁹ was a criminal case brought by the government against a civilian defendant, charging him with, *inter alia*, a violation of § 922 (g)(9).⁷⁰ On November 17, 1996, the defendant shot his wife with a gun that he had purchased under false pretenses by making false statements to a gun dealer in connection with his purchase.⁷¹ In 1994, he had pled guilty to a misdemeanor assault upon his wife,⁷² and at the time of his purchase of the firearm, November 15, 1996, he was under indictment for another crime punishable by a term of imprisonment exceeding one year.⁷³ The defendant was thus prohibited from, *inter alia*, possessing or receiving a weapon.⁷⁴

In his motion to dismiss the indictment, the defendant raised four issues, two of which are relevant here.⁷⁵ First, the defendant argued that the simple assault to which he pled guilty in 1994, does not have as an element the use or attempted use of force nor the existence of a domestic relationship.⁷⁶ Because the Iowa statute,⁷⁷ under which he was charged in 1994, could be violated in a non-violent manner, for example

rendering the issue moot. Telephone Interview with Richard Shinee, Partner in the Green & Shinee law firm (Dec. 3, 1997).

69. 964 F. Supp. 286 (N.D. Iowa 1997).

70. *See id.* at 288.

71. *See* 18 U.S.C. § 922(a)(6). Smith, only twenty-one years of age as of November 1997, had assaulted the victim of this instant case many times, the first of which was as early as 1993. In the instant matter, Smith shot his wife in the back, the bullet passed through her chest, had come close to both her heart and aortic artery, broke one of her ribs and punctured one of her lungs. Mrs. Smith nevertheless survived the incident. *See* U.S. Department of Justice, United States Attorney's Office for the Northern District of Iowa, Press Release, *Cedar Falls Man Sentenced in First in the Nation Conviction Under New Federal Law* (Nov. 21, 1997) at 1.

72. *See Smith*, 964 F.Supp. at 288. On September 13, 1994, Smith pushed his wife, then grabbed her by the neck and threw her to the ground. *See* U.S. Department of Justice, United States Attorney's Office for the Northern District of Iowa, Press Release, *Cedar Falls Man Sentenced in First in the Nation Conviction Under New Federal Law* (Nov. 21, 1997) at 1.

73. *See Smith*, 964 F. Supp. at 288; 18 U.S.C. § 922(n).

74. 18 U.S.C. §922(h).

75. *See Smith*, 964 F. Supp. at 288. The defendant also claimed that (1) counts 2, 3, and 4 of the original indictment were multiplicitious and (2) he was not under indictment for a crime punishable by more than one year and thus not in violation of § 922(n). *See Smith*, 964 F. Supp. at 288.

76. *See id.*

77. The statute to which the defendant pled guilty in 1994, Iowa Code, § 708.1, provides that a person commits the crime of assault if he does any of the following:

offensive touching, the defendant argued that the statute had no element of the use or attempted use of physical force and thus his underlying conviction was not violative of 18 U.S.C. § 921(a)(33), the portion of the code that defines a misdemeanor crime of domestic violence.⁷⁸ Accordingly, the defendant argued, there was no violation of § 922(g)(9) because there was no underlying misdemeanor crime of domestic violence.⁷⁹ The court noted that because the 1994 assault, the predicate offense, “clearly involved the use of force, it may qualify as a ‘misdemeanor crime of domestic violence’ despite the fact that [the Iowa statute] does not require the use of force as an element.”⁸⁰

Further, the defendant claimed that § 921(a)(33)’s language was ambiguous in that the “as an element” language modified both the use or attempted use of force and a domestic relationship thereby calling for the predicate crime to have as elements the use or attempted use of force as well as a domestic relationship.⁸¹ The *Smith* court found that the language modified only the force element, and thus the underlying predicate crime need not have a domestic relationship element in the statute itself.⁸²

The court also noted that pursuant to the legislative history, it was clear that the legislators, in enacting the law, intended it to have broad application.⁸³ If the law mandated both the elements of the use or attempted use of physical force and a domestic relationship, as was brought to the *Smith* court’s attention in amici briefs, “only seventeen of the fifty states and

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- 1) Any 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, coupled with the apparent ability to execute the act.
 - 2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
 - 3) Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Smith, 964 F. Supp. at 289.

78. *See supra* note 14.

79. *See Smith*, 964 F. Supp. at 290.

80. *Smith*, 964 F. Supp. at 290. The 1994 assault involved the defendant grabbing his wife by the throat, pushing her down, and restraining her. *See Smith*, 964 F. Supp. at 290.

81. *See id.* at 291-92.

82. *See id.* at 292.

83. *See id.* at 293.

Puerto Rico have a law that would qualify under section 921(a)(33).⁸⁴ Further, the court noted Senator Feinstein's statement regarding the Amendment: "[t]his amendment looks to the type of crime, rather than the classification of the conviction. Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm."⁸⁵ Finally, the court looked at the fact that the earlier version of the law did not include the language "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"⁸⁶ Thus, the court concluded that the newly added "as an element" language was not intended to apply to the domestic relationship element.⁸⁷

Second, the *Smith* defendant contended, in his motion to dismiss the indictment, that "section 921(a)(33) is unconstitutionally vague."⁸⁸ Here, the defendant claimed that if the predicate offense, Iowa statute 708.1, "can constitute a misdemeanor crime of domestic violence, [then] §921(a)(33) is unconstitutionally vague"⁸⁹ because a person of reasonable intelligence does not have fair notice that his conduct is forbidden by statute, it fails to establish minimal guidelines to govern law enforcement, and it invites arbitrary and capricious enforcement.⁹⁰ The *Smith* court rejected the defendant's argument and upheld the statute, stating that the language employed by the statute, the use or attempted use of physical force, is used in everyday language and is thus readily understandable.⁹¹ Moreover, the list of people against whom the force needs to be directed to render the conduct illegal is "clear and straightforward."⁹² The only possible difficulty the court acknowledged was related to the defendant's first argument, the possibility that § 921(a)(33) might be understood to require both the use or attempted use of violence and a domestic relationship as elements.⁹³ However, the

84. *Id.* at 293.

85. *Smith*, 964 F. Supp. at 293 (citations omitted).

86. *Id.*

87. *See id.* at 293.

88. *Id.* at 288.

89. *Id.* at 294.

90. *See Smith*, 964 F. Supp. at 294.

91. *See id.* at 294.

92. *Id.*

93. *See id.*

court held that the fact that a statute may be interpreted in two ways does not render it void for vagueness.⁹⁴

Additionally, the court rejected the defendant's argument that § 922(g)(9) was void for vagueness because it did not establish guidelines for law enforcement in enforcing the law.⁹⁵ Based on many factors, including the statute's plain language, the legislative history, and the ATF's interpretation of the statute, it is clear that the statute should be applied to anyone convicted of a misdemeanor crime involving the use or attempted use of force against persons listed in § 921(a)(33).⁹⁶ This, the court held, "provides a bright line for law enforcement, and does not encourage arbitrary and erratic arrests and convictions."⁹⁷ Thus, the statute was rendered constitutional by the *Smith* court and the motion to dismiss the indictment was denied.⁹⁸ Ultimately, the defendant was the first person in the nation to be tried, convicted and sentenced for a violation of the Lautenberg Amendment.⁹⁹

Similarly, in *United States v. Meade*,¹⁰⁰ a defendant charged with, *inter alia*, a violation of § 922(g)(9), filed a motion to dismiss count one of the indictment pending against him, contending that (1) his past conviction under Massachusetts law does not qualify as a crime of domestic violence and (2) that § 922 (g)(9) violates the Ex Post Facto Clause of the U.S. Constitution.¹⁰¹ The district court denied the defendant's motion.¹⁰²

94. *See id.* at 294 (quoting *Williams v. Brewer*, 442 F.2d 657, 660 (8th Cir. 1971)).

95. *See Smith*, 964 F. Supp. at 294.

96. *Id.*

97. *Id.*

98. *See id.* at 295.

99. *See* U.S. Department of Justice, United States Attorney's Office for the Northern District of Iowa, Press Release, *Cedar Falls Man Sentenced in First in the Nation Conviction Under New Federal Law* (Nov. 21, 1997). *Smith* was sentenced to a term of fifty-one months in prison, with three years supervised release upon his completion of his jail time. He was convicted of a federal crime, therefore there is no possibility for parole. He was also required to pay restitution in the amount of \$4,619.31 and was ordered by the court to have no contact with the victim. *See id.*

100. 986 F. Supp. 66 (D. Mass. 1997).

101. *See id.* at 67.

102. *See id.*

In 1994, the defendant was convicted of the crime of assault and battery against his wife.¹⁰³ On May 15, 1997, local police received a 911 call and, as a result, arrested the defendant while he was in front of his wife's home and in possession of a handgun.¹⁰⁴ At the time of the arrest, the defendant was subject to a restraining order that prohibited him from having any contact with his wife.¹⁰⁵ As a result of this arrest, he was charged with many state offenses, but two months later, the state charges were dismissed and the defendant was indicted in federal court pursuant to § 922(g)(9).¹⁰⁶

The defendant challenged count one of the indictment, charging him with a violation of § 922(g)(9), on two grounds.¹⁰⁷ First, he contended that the 1994 offense could not be a predicate offense of a misdemeanor crime of domestic violence because the Massachusetts statute under which he was charged and convicted does not require proof of a domestic relationship between the defendant and the victim.¹⁰⁸ Similar to the argument put forth by the *Smith* defendant, this defendant also argued that the "as an element" language of § 921(a)(33) modifies both "the use or attempted use of physical force" and the domestic relationship language.¹⁰⁹ The court felt that the plain language of the statute demonstrated that Congress intended the "as an element" language to modify only "the use or attempted use of physical force" because "element" was written in singular form was intended to modify only the element immediately following.¹¹⁰

Further, as in *Smith*, the *Meade* court noted that from the legislative record, it could be determined that Congress, in enacting the Lautenberg Amendment, intended to broaden the category of individuals barred from possessing a firearm, not limit it, as the defendant's interpretation would do.¹¹¹ Finally, the *Meade* court also noted that the "as an element" and "the

103. *See id.*

104. *See id.*

105. *See Meade*, 986 F. Supp. at 67.

106. *See id.*

107. *See id.* at 67.

108. *See id.*

109. *See id.*

110. *See Meade*, 986 F. Supp. at 67-8.

111. *See id.* at 68.

use or attempted use of physical force” language was added to the statute just before it was passed, indicating that the “as an element” language was intended to modify only the “use or attempted use of physical force” element.¹¹²

The defendant also challenged the constitutionality of § 922(g)(9) on the grounds that it is an ex post facto law in violation of the U.S. Constitution.¹¹³ He argued that the statute increased the punishment of his 1994 conviction by penalizing his ability to possess a firearm and thus violates the Ex post Facto Clause of the Constitution.¹¹⁴ The court declared that in order for a law to be ex post facto, it “must be retrospective — that is, it must apply to events occurring before its enactment and it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment for the crime.”¹¹⁵ However, the court, relying on *United States v. Brady*,¹¹⁶ held “that section 922(g)(9) penalizes the possession of the firearm after the date of enactment of the statute” and therefore does not violate the Ex post Facto Clause of the U.S. Constitution.¹¹⁷ The possession was not prohibited until after the date of the enactment of the Lautenberg Amendment.¹¹⁸ Based on the foregoing, the *Meade* court denied the defendant’s motion to dismiss.¹¹⁹

In *National Association of Government Employees, Inc. v. Barrett*,¹²⁰ by letter dated January 10, 1997, Jacqueline Barrett, Sheriff of Fulton County, Georgia, notified William Hiley that he was dismissed from his position of seven years as deputy sheriff effective at the close of business on January 14, 1997.¹²¹ The dismissal was “for cause,” pursuant to Barrett’s receipt of ATF Director John Magaw’s “Open Letter to All State and Local

112. *See id.* at 68-9.

113. *See id.* at 67.

114. *See id.* at 69.

115. *Id.* (citing *Lynce v. Mathis*, 117 S. Ct. 891, 896 (1997)).

116. 26 F.3d 282 (2d Cir. 1994), *cert. denied*, 513 U.S. 894 (1994). Without much detail, the court claims that the “Second Circuit’s decision in *Brady* is instructive for its ex post facto analysis.” *Meade*, 986 F. Supp. at 69.

117. *Meade*, 986 F. Supp. at 69.

118. *See Meade*, 986 F. Supp. at 69.

119. *See id.* at 66.

120. 968 F. Supp. 1564 (N.D. Ga. 1997).

121. *See id.* at 1568.

Law Enforcement.”¹²² The letter informed Hiley that “[i]f an employee authorized to carry a County-issued firearm and ammunition is affected by [§ 922(g)(9)], the employee may not possess any firearm or ammunition and must return any County-issued firearm or ammunition in accordance with Departmental policy.”¹²³ The letter noted that Hiley had a misdemeanor conviction of domestic violence and further notified him that such a conviction justified his being fired.¹²⁴

Hiley first appealed his dismissal to the Fulton County Personnel Board and then he, with the National Association of Government Employees, Inc. (“NAGE”), commenced this action.¹²⁵ Plaintiffs sought to enjoin enforcement of § 922(g)(9), claiming that the law was unconstitutional pursuant to six different theories.¹²⁶

First, the plaintiffs asserted that in enacting § 922(g)(9), Congress exceeded its power pursuant to the Commerce Clause.¹²⁷ The plaintiffs raised this challenge under *United States v. Lopez*,¹²⁸ which involved a statute enacted by Congress that was held unconstitutional because it regulated the mere possession of a firearm in a school zone.¹²⁹ The *Barrett* court did not agree with plaintiffs’ contention because, unlike the statute in *Lopez*, § 922(g)(9) has a jurisdictional element that requires the firearm to be “possessed ‘in and affecting commerce’ or received after having ‘been shipped or transported in interstate or

122. *See id.*; *see also supra* note 33 and accompanying text.

123. *Barrett*, 968 F. Supp. at 1568 (quoting Hiley ATF, Attachment A).

124. *See id.*

125. *See id.*

126. *See id.* at 1568-69, 1572. Upon commencement of this lawsuit, Fulton County rescinded the termination and reassigned Hiley to a detention officer position; a position that does not require him to possess a firearm. The reassignment was the result of a settlement entered into by Hiley, Barrett, and Fulton County. Hiley dismissed his claims with prejudice against Barrett and Fulton County. *See id.* at 1569. NAGE, however, proceeded in an effort to “assert the claims of its members who are similarly situated to Hiley.” *Barrett*, 968 F. Supp. at 1570. The court found that both Hiley and NAGE had standing to proceed. For a discussion on the standing issue see pages at 1569-71; *see also* Fraternal Order of Police v. United States, 981 F. Supp. 1, 3 (D.D.C. 1997).

127. *Barrett*, 968 F. Supp. at 1572.

128. 514 U.S. 549 (1995). *See Barrett*, 968 F. Supp. at 1572.

129. *Lopez*, 514 U. S. at 549.

foreign commerce.”¹³⁰ This challenge to §922(g)(9) will be discussed at length below.¹³¹

The plaintiffs’ second challenge to the constitutionality of § 922(g)(9) was that it violates the Equal Protection Clause of the Fourteenth Amendment¹³² because:

(1) [it] irrationally distinguish[es] between persons convicted of misdemeanor crimes of domestic violence and persons convicted of other types of misdemeanor crimes of violence; (2) irrationally allow[s] felons, but not domestic violence misdemeanants, to possess a firearm once their civil rights [are] restored under the laws of the relevant state; and (3) discriminate[s] against domestic violence misdemeanants who are law enforcement officers.¹³³

Neither a suspect class nor a fundamental right were involved. Therefore, the *Barrett* court applied the rational basis standard of review.¹³⁴ Because § 922(g)(9) can be reasonably justified by any statement of facts and because “[l]egislation subject to rational basis review is presumptively constitutional,” the *Barrett* court held that the law passed an equal protection challenge and was thus constitutional.¹³⁵ The court noted that domestic violence misdemeanants are certainly set aside by Congress as a class, but the court also found that the purpose of the law, to wit, “protecting public safety,” is rationally related to keeping firearms out of the hands of domestic violence misdemeanants.¹³⁶

Under §922(g)(1) (felon in possession of a firearm) and § 922(g)(9) (domestic violence misdemeanant in possession), both felons and domestic violence misdemeanants may be entitled to possess a weapon if their records are expunged, the conviction is set aside, the defendant was pardoned, or their civil rights were restored.¹³⁷ The plaintiffs noted that in some states, while a felon’s civil rights can be taken away, a misdemeanant’s

130. *Barrett*, 968 F. Supp at 1572.

131. *See infra* Part III(A).

132. *See* U.S. CONST. amend. XIV.

133. *Barrett*, 968 F. Supp. at 1572.

134. *See id.* at 1573 (citations omitted).

135. *Id.* at 1573, 1575 (citing *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

136. *Id.* at 1573.

137. *See id.* at 1574.

rights are not.¹³⁸ Therefore, in these states, it would be possible for a felon to possess a firearm upon having his civil rights restored, but a misdemeanant, who never lost his civil rights, and thus did not have them restored, cannot possess a weapon. This, the plaintiffs claimed, was an unconstitutional anomaly, violative of the Equal Protection Clause.¹³⁹ However, the *Barrett* court did not interpret it that way. Rather, the court noted that because many states' laws are different, there are bound to be anomalies such as this.¹⁴⁰ Indeed, it recognized that the states have different standards for expungement, pardon, and restoration of civil rights and when such acts should be granted to an offender.¹⁴¹ Although "Congress superimposed a patchwork of state law over a broad piece of federal legislation in a manner bound to produce anomalous results . . . [t]he scheme is nonetheless a rational one, notwithstanding its imperfections."¹⁴²

The plaintiffs' final equal protection argument was that police officers were impermissibly discriminated against by § 922(g)(9).¹⁴³ The court found, however, that "[a]lthough the ultimate effect of this facially neutral statute may be to bar certain domestic violence misdemeanants of a career that requires the ability to possess a firearm legally," the seemingly uneven consequences of a rationally based statute are ordinarily of little constitutional concern – unless, of course, a discriminatory purpose for the statute can be demonstrated.¹⁴⁴ For the foregoing reasons, the court found the statute passed constitutional muster under the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁵

The plaintiffs' third contention was that § 922(g)(9) violated their due process rights.¹⁴⁶ Similar to the Equal Protection argument above, because no fundamental right is affected, the

138. *Barrett*, 968 F. Supp. at 1574.

139. *See id.*

140. *See id.*

141. *See id.*

142. *Id.* (quoting *McGrath v. United States*, 60 F.3d 1005, 1009 (2d Cir. 1995), *cert. denied*, 516 U.S. 1121 (1996)).

143. *See Barrett*, 968 F. Supp. at 1575.

144. *Id.* at 1575 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)).

145. *See id.*

146. *See id.*

statute was reviewed on a rational basis level.¹⁴⁷ The statute had already been found to be rationally related to a legitimate governmental interest, as discussed above, and thus, the court held that it survives the plaintiffs' due process challenge.¹⁴⁸

Plaintiffs' fourth challenge attacked § 922(g)(9) as a statute violative of the Ex post Facto Clause of the U.S. Constitution. Similar to the *Meade* court discussed above,¹⁴⁹ the *Barrett* court rejected this challenge pursuant to the Second Circuit's decision in *United States v. Brady*¹⁵⁰ and quoted the same: "[r]egardless of the date of [the defendant's] prior conviction, the crime of being a felon in possession of a firearm was not committed until after the effective date of the statute. . . ."¹⁵¹ Thus, according to the *Barrett* court, a defendant in violation of § 922(g)(9), by the date of his § 922(g)(9) conviction, has more than adequate notice that it was illegal for him to possess a weapon as a domestic violence misdemeanor and as such could have made the decision to conform his conduct with the law and not possess a firearm in violation thereof.¹⁵²

Plaintiff's fifth challenge arose under a Bill of Attainder theory, in that it inflicted a forbidden punishment upon § 922(g)(9) defendants.¹⁵³ The *Barrett* court stated that to determine the validity of this claim it was necessary to determine:

- (1) whether the challenged statute falls within the historical meaning of legislative punishment;
- (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes;"
- and (3) whether the legislative record "evinces a congressional intent to punish."¹⁵⁴

When the court applied these criteria, it found that § 922(g)(9) was not a bill of attainder.¹⁵⁵ Historically, a bill of attainder

147. *See id.*

148. *See Barrett*, 968 F. Supp. at 1575.

149. *See supra* notes 100-19 and accompanying text.

150. 26 F.3d 282 (2d Cir. 1994).

151. *Barrett*, 968 F. Supp. at 1575. (quoting *Brady*, 26 F.3d at 291).

152. *See id.*

153. *See id.* at 1576-77.

154. *Id.* (quoting *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984) (quoting *Nixon v. Adm'n of Gen. Serv.*, 433 U.S. 425, 473, 475-76 (1977))).

155. *See id.* at 1577.

was used to impose the death penalty and lesser offenses were imposed by "bills of pains and penalties," including imprisonment, banishment, and the punitive confiscation of property.¹⁵⁶ The Bill of Attainder Clause of the U.S. Constitution rendered these penalties unconstitutional when imposed upon a group or a specific individual and "outlaws a legislative bar to participation by certain individuals or groups in specific employments or professions."¹⁵⁷ Section 922(g)(9) bars all domestic violence misdemeanants from possessing a firearm; the fact that it may also block domestic violence misdemeanants from pursuing careers as police officers does not rise to the level of being a violation of the Bill of Attainder Clause.¹⁵⁸ Moreover, because Congress had "well-defined goals" and the statute was enacted in furtherance thereof, it can reasonably be described as furthering nonpunitive legislative purposes.¹⁵⁹ Finally, plaintiffs did not allege and nowhere does the legislative history reveal an intent of the Congress in enacting § 922(g)(9) of punishing persons convicted of a misdemeanor crime of domestic violence.¹⁶⁰ Thus, the Bill of Attainder claim, according to the court, failed.¹⁶¹

The sixth, and final claim of the plaintiffs was that the statute violated the Tenth Amendment of the U.S. Constitution¹⁶² as it usurped "powers reserved to the states."¹⁶³ The *Barrett* court reasoned that because § 922(g)(9) was not violative of the Commerce Clause and was thus a valid exercise of Congress' commerce power, it cannot violate the Tenth Amendment.¹⁶⁴

In response to plaintiffs' six claims, the defendants asserted, *inter alia*, that pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6), plaintiffs' action should be dismissed for failure to state a claim upon which relief can be granted.¹⁶⁵ The district court agreed, finding as it must to so agree, that

156. *Barrett*, 968 F. Supp. at 1577.

157. *Id.*

158. *See id.* at 1577.

159. *Id.*

160. *See id.*

161. *See Barrett*, 968 F. Supp. at 1577.

162. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

163. *Barrett*, 968 F. Supp. at 1577.

164. *See id.*

165. *See id.* at 1572.

plaintiffs could prove no set of facts in support of its claim of unconstitutionality.¹⁶⁶ The court dismissed the plaintiffs' complaint and denied their motion for a preliminary injunction as moot.¹⁶⁷ The Eleventh Circuit Court of Appeals affirmed *Barrett*, adopting the district court's "thorough and well-reasoned order."¹⁶⁸

United States v. Hicks,¹⁶⁹ like the *Smith* case, involved a civilian defendant who was charged, *inter alia*, with a violation of § 922(g)(9). Hicks had, prior to the enactment of § 922(g)(9), been convicted of a battery against his own son.¹⁷⁰ He argued that § 922(g)(9) is an *ex post facto* law in violation of the U.S. Constitution and claimed that at the time he committed the battery, he had no notice of the future ramifications on his ability to later possess a firearm.¹⁷¹

The District Court for the District of Kansas held that it was the activity of the post-enactment possession of the firearm that was the crime being punished, not the pre-enactment misdemeanor crime of domestic violence.¹⁷² Relying on the reasoning in *United States v. Brady*,¹⁷³ the court held that the Lautenberg Amendment is not violative of the *Ex post Facto* clause of the U.S. Constitution and that the defendant had adequate notice of the fact that his later actions were indeed criminal.¹⁷⁴ Hicks' motion to dismiss the charge was denied.¹⁷⁵

In *Gillespie v. City of Indianapolis*,¹⁷⁶ a police officer who had been on the force since 1971 brought an action against the City of Indianapolis, the City's police department, and the chief

166. *See id.* at 1572, 1577.

167. *See id.* at 1577.

168. *Hiley v. Barrett*, 155 F.3d 1276-77 (11th Cir. 1998).

169. 992 F. Supp. 1244 (D. Kan. 1997).

170. *See id.*

171. *See id.* at 1245.

172. *See id.* at 1246-47.

173. 26 F.3d 282 (2d Cir. 1994), *cert. denied*, 513 U.S. 894 (1994). *Brady* held that "by [the date of the defendant's conviction under § 922(g)(1), defendant] had more than adequate notice that it was illegal for him to possess a firearm because of his status as a convicted felon, and he could have conformed his conduct to the requirements of the law." *Hicks*, 992 F. Supp. at 1246 (quoting *Brady*, 26 F.3d at 291).

174. *See Hicks*, 992 F. Supp. at 1246.

175. *See id.*

176. 13 F. Supp.2d 811 (S.D. Ind. 1998).

of police in an effort to retain his employment.¹⁷⁷ He faced losing his position on the force due to a misdemeanor domestic violence conviction for a battery offense against his ex-wife and the subsequent firearm restriction imposed by the Lautenberg Amendment.¹⁷⁸ He claimed that the Lautenberg Amendment was unconstitutional and moved for preliminary injunction to keep the City from firing him.¹⁷⁹ The United States intervened and both the City of Indianapolis and United States moved to dismiss Gillespie's complaint.¹⁸⁰

In Count I of his complaint, Gillespie argued that the Lautenberg Amendment "invades state sovereignty in violation of the Tenth Amendment,"¹⁸¹ by supplanting state criminal law by (1) defining what domestic violence is and establishing penalties for crimes of the same, (2) dictating to the states the qualifications for their state and local law enforcement personnel, and (3) forcing the states to regulate a federal law.¹⁸²

First, the court found the federal government was not amending state law, but rather was enacting new federal laws.¹⁸³ States were still able to punish domestic violence crimes as they did prior to the enactment of the Lautenberg Amendment and therefore, there was no "compelled state legislation."¹⁸⁴ Second, because the law regulated private behavior of individuals, it was at the law enforcement agencies' discretion as to what to do with the officers required to surrender their firearms; the federal government has only removed the ability to carry a firearm from convicted officers.¹⁸⁵ Finally, in order to determine whether or not a statute may survive a Tenth Amendment challenge that it forces states to enforce a federal regulatory program, the court must determine that the statute in question is (1) a proper exercise of one of Congress' enumerated powers under the Commerce Clause and whether, (2) as a result of the manner in which Congress created the fire-

177. *See id.* at 814.

178. *See id.* at 814-15.

179. *See id.* at 815.

180. *See id.* at 814-15.

181. *Gillespie*, 13 F. Supp.2d at 819.

182. *See id.*

183. *See id.*

184. *Id.* at 820.

185. *See id.*

arm disability, the states were compelled to do something.¹⁸⁶ The *Gillespie* court found that the statute was indeed a proper exercise and that it placed no requirement on the states or their officials. “[Section] 922(g)(9) regulates the behavior of private individuals, not states, for individuals will be prosecuted for violation of the statute and there is no federal mandate for states to assist in regulation and enforcement.”¹⁸⁷

Finally, Gillespie argued that Congress had previously, pursuant to § 925(a)(1), exempted law enforcement officers from firearms disabilities.¹⁸⁸ To no longer exempt those officials under § 922(g)(9) was an “impermissible invasion of the states’ police power” and was therefore violative of the Tenth Amendment.¹⁸⁹ While the court found this argument intriguing, it noted first that there was no legal support for the argument and second, that to give credence to this argument would be to speculate as to the intent of Congress when it enacted § 922(g)(9) and failed to exempt law enforcement officers.¹⁹⁰ The Court further found that legislative intent would not control anyway as “Congress’ belief regarding the constitutional limits of its own powers is not dispositive as to those limits.”¹⁹¹

Based on the foregoing, the court dismissed Count I of Gillespie’s complaint, holding § 922(g)(9) in accord with the Tenth Amendment.¹⁹²

Count II of Gillespie’s complaint asserted that § 922(g)(9) is unconstitutional in that it exceeds Congress’ power under the Commerce Clause.¹⁹³ Gillespie claimed that there is no jurisdictional element to § 922(g)(9) and it is therefore unconstitutional.¹⁹⁴ The court cited numerous cases holding § 922(g)’s jurisdictional nexus sufficient,¹⁹⁵ and dismissed Gillespie’s Commerce Clause challenge.

186. See *Gillespie*, 13 F. Supp.2d at 820.

187. *Gillespie*, 13 F. Supp.2d at 820.

188. See *id.* at 821.

189. *Id.* at 821.

190. See *id.*

191. *Id.*

192. *Gillespie*, 13 F. Supp.2d at 821.

193. See *id.*

194. See *id.* at 821-22 (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

195. See *id.* at 822, n.7. Each of the cited cases related to § 922(g)(1), the prohibition against felons possession of a firearm.

In Count Three of his complaint, Gillespie challenged the statute under the Equal Protection Clause of the Fifth Amendment.¹⁹⁶ Although Gillespie conceded that law enforcement officers were not a suspect class, he claimed that the statute infringed on his fundamental right to bear arms under the Second Amendment and his fundamental right to employment with the Indianapolis Police Department.¹⁹⁷ Accepting the City's and the United States' argument, based upon *United States v. Miller*¹⁹⁸ and *Lewis v. United States*,¹⁹⁹ the court held that the "right to bear arms guaranteed by the Second Amendment is not a fundamental right for equal protection purposes."²⁰⁰ Further, the court noted that the Second Amendment "does not require [the court] to apply the compelling governmental interest standard."²⁰¹

Gillespie further argued that strict scrutiny was required because the statute effectively "deprives law enforcement personnel of their property interest in their employment where receipt and possession of a government issued firearm is usually mandatory."²⁰² The court rejected this argument, noting that the Supreme Court has held there is no fundamental right to public employment.²⁰³

Finding a strict scrutiny analysis inapplicable, the court analyzed the statute applying the rational basis standard and rejected Gillespie's arguments that the statute singled out domestic violence misdemeanors, thereby giving preferential treatment to all other violent misdemeanor convicts.²⁰⁴ Following the Supreme Court's decision in *F.C.C. v. Beach Communications*,²⁰⁵ the *Gillespie* court held that Congress "must be allowed some leeway to approach a perceived problem incre-

196. See U.S. CONST. amend. V.

197. See *Gillespie*, 13 F. Supp.2d at 822.

198. 307 U.S. 174 (1939).

199. 445 U.S. 55 (1980).

200. *Gillespie*, 13 F. Supp.2d at 823.

201. *Id.* (quoting *Sklar v. Byrne*, 727 F.2d 633, 637 (7th Cir. 1984)).

202. *Id.* (quoting Plaintiff's Preliminary Injunction Brief at 29).

203. See *id.* (citing *United Bldg. & Constr. Trades Council of Camden v. Mayor of Camden*, 465 U.S. 208, 219 (1984)).

204. See *id.* at 824.

205. 508 U.S. 307 (1993).

mentally.”²⁰⁶ The court also rejected Gillespie’s claim that the statute unconstitutionally has a disproportionate impact on law enforcement officers.²⁰⁷ Unless Gillespie could show that Congress had a discriminatory purpose in enacting § 922(g)(9), which he did not, the court held that his rights under the Equal Protection Clause of the Fifth Amendment were not violated.²⁰⁸ The court dismissed the equal protection claim in Count III of Gillespie’s complaint.²⁰⁹

Also in Count III, Gillespie challenged the statute’s constitutionality under due process.²¹⁰ Again, the court found that rational basis, not strict scrutiny analysis applied and, because the statute satisfies the rational basis analysis, held that his substantive due process argument was foreclosed.²¹¹ Turning to his procedural due process argument, the court held that “when the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process.”²¹² Accordingly, Gillespie appears to have had sufficient notice and opportunity for a hearing. This, in conjunction with the fact that Gillespie had specified no failings in the police department’s review process, the court held, warranted the dismissal of the due process claim.²¹³

Finally, Count III challenged § 922(g)(9) as violative of the Bill of Attainder and Ex post Facto Clauses of the U.S. Constitution.²¹⁴ Because Gillespie argued these claims in neither his motion for preliminary injunction nor his reply motion, the court summarily dismissed the claims holding that Gillespie abandoned them.²¹⁵ The court did note that Gillespie no doubt abandoned these claims “because the case law and legislative

206. *Gillespie*, 13 F. Supp.2d at 824 (quoting *Beach Communications*, 504 U.S. at 316).

207. *See id.*

208. *See id.*

209. *See id.* at 824-25.

210. *See id.* at 825.

211. *See Gillespie*, 13 F. Supp.2d at 825.

212. *Id.* (quoting *Brown v. Retirement Comm.*, 797 F.2d 521, 527 (7th Cir. 1986) (quoting J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 556 (1983))).

213. *See id.* at 825.

214. *See id.*

215. *See id.* at 826.

history argue so clearly against [his] position.”²¹⁶ Further, in a footnote, the court noted that even if it were to address Gillespie’s claims on the merits, those claims would indeed fail.²¹⁷

In Count IV of his complaint, Gillespie claimed that his Second Amendment right to bear arms was violated, both individually and in his capacity as a police officer.²¹⁸ Though he conceded in his preliminary injunction brief that there was no personal right to bear arms, Gillespie nevertheless sought to vindicate his right to bear arms “as someone whose possession relates to a state militia, or in the alternative, the collective right of the state to preserve and regulate the militia.”²¹⁹ The court applied a strict scrutiny analysis and found that the statute was narrowly tailored to serve the compelling governmental interest of keeping deadly weapons out of the hands of those persons Congress believes to be dangerous.²²⁰ Moreover, the law prevents victims of domestic violence from being killed by their attackers with a firearm, a concern that Congress found, pursuant to various statistics, to be valid.²²¹ The court accordingly dismissed Gillespie’s Second Amendment claim.²²²

Gillespie argued that § 922(g)(9) “operates to substantially impair [his] oath-based contractual obligations” in violation of Article I, § 10, Clause 1 of the U.S. Constitution.²²³ The court noted that the Clause applies only to the states and does not operate as a restriction on the actions of the federal government.²²⁴ A Contract Clause claim against a federal statute is analyzed under the Due Process Clause of the Fifth Amendment.²²⁵ The party asserting such a claim “must overcome a presumption of constitutionality and establish that the legisla-

216. *Gillespie*, 13 F. Supp.2d at 826.

217. *See id.* at n.11.

218. *See id.* at 826.

219. *Id.* at 826.

220. *See id.* at 827.

221. *See Gillespie*, 13 F. Supp.2d at 827.

222. *See id.*

223. “No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1.

224. *See Gillespie*, 13 F. Supp.2d at 828 (citing *Pension Benefits Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 n.9 (1984)).

225. *See id.* (citing *National R. R. Corp. v. Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451, 472 (1985)).

ture has enacted in an arbitrary and irrational way.”²²⁶ Based on the previous findings that § 922(g)(9) was not violative of his procedural due process rights and not a compelled state legislation, the court dismissed Gillespie’s Contract Clause claim.²²⁷

Finally, Gillespie claimed that § 922(g)(9) violated the Indiana Constitution, which protected the right to bear arms and prohibits both *ex post facto* laws and bills of attainder.²²⁸ Because he did not raise this claim in his preliminary injunction motion or his reply motions, the court deemed the claim abandoned and therefore dismissed it.²²⁹

Having dismissed all of Gillespie’s claims, the court denied his motion for a preliminary injunction as moot and granted the City of Indianapolis’ and the United States’ motions to dismiss.²³⁰ The Lautenberg Amendment survived yet another challenge to its constitutionality.

In *Fraternal Order of Police v. United States*²³¹ (“F.O.P.”), the facts appear to be quite similar to those in *Barrett*. Two police officers, Fidel Ortega and Dennis Meerdter, had to turn in their firearms pursuant to the enactment of § 922(g)(9).²³² They were either “reassigned to positions of lesser responsibility or put on leave.”²³³ Additionally, when off-duty, they had been unable to work as security guards because they could not possess firearms.²³⁴ Further, Officer Ortega faced termination upon the expiration of his leave.²³⁵ Both of these officers, also members of the Fraternal Order of Police, have had prior misdemeanor convictions of domestic violence. Their superiors, in complying with § 922(g)(9), removed their firearms from them. On their behalf, the Fraternal Order of Police sought to enjoin the application of § 922(g)(9) against these and future officers by attacking the constitutionality of the law.²³⁶

226. *Id.* at 828 (citing *National R.R.*, 470 U.S. at 472).

227. *See id.*

228. *See id.*

229. *See Gillespie*, 13 F. Supp.2d at 828.

230. *See id.*

231. 981 F. Supp. 1 (D.D.C. 1997).

232. *See id.* at 3

233. *Id.*

234. *See id.*

235. *See id.*

236. *See Fraternal Order of Police*, 981 F. Supp. at 2.

As in *Barrett*, the *F.O.P.* court rejected the Commerce Clause contention, holding that the jurisdictional element in § 922(g)(9) was present.²³⁷ Therefore, the court held, a *Lopez* challenge was misplaced.²³⁸ The statute, the court held, passed muster under the Commerce Clause.²³⁹

The plaintiffs' next challenge was that the statute violated the Due Process Clause because it (1) infringed upon the *F.O.P.* members' rights to possess firearms; (2) irrationally targeted one class of misdemeanants who had committed crimes of violence; and (3) discriminated against law enforcement officers who had in the past been convicted of misdemeanor crimes of domestic violence.²⁴⁰ The *F.O.P.* court again held, as did the court in *Barrett*, that § 922(g)(9) should receive rational basis review because it neither implicated a fundamental right nor operated to the detriment of a suspect class.²⁴¹ The court noted that the purpose of the statute was, like other gun control statutes, to "[keep] . . . firearms out of the hands of categories of potentially irresponsible persons."²⁴² To pass muster under the Equal Protection Clause, it is required only that a reasonable state of facts could provide a rational basis for the classification.²⁴³ Here, the classification seeks to protect family members or other loved ones from a person who has previously demonstrated a propensity for domestic violence.²⁴⁴ Upon review of § 922(g)(9) by the Senate, Senator Lautenberg cited a study that demonstrated that in households with a history of battery, women were three times more likely to be killed if a gun was present.²⁴⁵ Thus, the *F.O.P.* court determined that § 922(g)(9) was rationally related to a reasonable set of facts, and therefore, did not target a particular group of misdemeanants unconstitutionally.²⁴⁶

237. *See id.* at 4.

238. *See id.*

239. *See id.*

240. *See id.*

241. *Fraternal Order of Police*, 981 F. Supp. at 4-5.

242. *Id.* at 5 (quoting *Barrett v. United States*, 423 U.S. 212, 220-21 (1976)).

243. *See id.*

244. *See id.* at 5.

245. *See id.*

246. *See Fraternal Order of Police*, 981 F. Supp. at 5.

Additionally, the *F.O.P.* court held that § 922(g)(9) did not disproportionately affect law enforcement officers who may be required to carry a gun as a condition of their employment.²⁴⁷ A disparate impact of a law that is neutral on its face, the court noted, is not unconstitutional unless the “uneven effect” has some discriminatory purpose behind it.²⁴⁸ Because no discriminatory purpose was alleged by the plaintiffs, the court held that this claim failed.²⁴⁹

The plaintiffs’ final contention was that § 922(g)(9) violated the Tenth Amendment to the U.S. Constitution.²⁵⁰ The court held that this claim failed because the statute requires no action by the state in the enforcement of the statute.²⁵¹ The only portion of the statute that required action by state officials was already deemed unconstitutional and was invalidated by the U.S. Supreme Court decision in *Printz v. United States*.²⁵² Section 922(g)(9) does not, the *F.O.P.* court held, violate the Tenth Amendment.²⁵³

For all these reasons, therefore, the *F.O.P.* court denied the plaintiffs’ motion for a preliminary injunction and granted the defendant’s motion for summary judgment. The *F.O.P.* decision was reversed by the Circuit Court of Appeals for the District of Columbia (“the D.C. Circuit”).²⁵⁴ After making the initial finding that the Fraternal Order of Police (“the Order”) indeed had standing to bring the instant action, it held 18 U.S.C. § 925 unconstitutional “insofar as it purports to withhold the public interest exception from those [individuals] convicted of domestic violence misdemeanors.”²⁵⁵ In other words, because through § 925, any agent or officer of the “United States or any department or agency thereof or any State or any department, agency or political subdivision thereof”²⁵⁶ are not exempt from

247. *See id.*

248. *Id.*

249. *See id.*

250. *See id.*

251. *See Fraternal Order of Police*, 981 F. Supp. at 5.

252. 521 U.S. 898 (1997); *see also supra* note 13.

253. *See Fraternal Order of Police*, 981 F. Supp. at 5.

254. *See Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998) (“*F.O.P. II*”).

255. *Id.* at 1004.

256. 18 U.S.C. § 925(a)(1).

the restriction of, *inter alia*, § 922(g)(9), § 925 is unconstitutional.

The D.C. Circuit reasoned, on equal protection grounds, that while rational basis is the proper level of scrutiny on which to base its analysis, the “1996 amendments fall into the narrow class of provisions that fail even the most permissive, ‘rational basis,’ review.”²⁵⁷ The court’s difficulty with the statute seemed to be that while the law strips law enforcement officers convicted of misdemeanor crimes of domestic violence of their guns, and subsequently, their jobs, it does not have the same effect on law enforcement officers convicted of domestic violence felonies. “No reason [was] offered for imposing the heavier liability on the lighter offense,” so the court found the statutes defective for their “neglect of more severe crimes of domestic violence.”²⁵⁸ The D.C. Circuit essentially found the statute “underinclusive,” and therefore, unconstitutional.

On April 16, 1999, the D.C. Circuit reversed itself,²⁵⁹ holding that the “challenged provisions do satisfy rational basis review,”²⁶⁰ and denied the Fraternal Order of Police’s arguments that 922(g)(9) violates due process by burdening the fundamental right to bear arms,²⁶¹ that it usurps Congressional power under the Commerce Clause,²⁶² and finally, that 922(g)(9) violates the Tenth Amendment.²⁶³

D. *Proposed Amendments to Section 922(g)(9)*

On January 7, 1997, Representative Robert Barr (R-Ga.) introduced H.R. 26 to the U.S. House of Representatives. The stated purpose of the bill is to amend § 922(g)(9)²⁶⁴ “to provide that the firearms prohibitions applicable by reason of a domestic violence misdemeanor conviction do not apply if the convic-

257. *F.O.P. II*, 152 F.3d at 1002.

258. *Id.* at 1002-03.

259. *See Fraternal Order of Police v. United States*, No. 97cv00145, 1999 WL 218442 (D.C. Cir. April 16, 1999).

260. *Id.* at *1.

261. *Id.* at *6-7.

262. *Id.* at *9.

263. *Id.* at *8.

264. The bill also seeks to amend 18 U.S.C. §§ 922(d)(9), (g)(9), (s)(3)(B)(i). *See H.R. 26*, 105th Cong. (1997).

tion occurred before the prohibitions became law.”²⁶⁵ Thus, according to the proposed bill, if a person committed a misdemeanor crime of domestic violence before September 28, 1996, the crime could not constitute the predicate act for § 922(g)(9). Therefore, a person with such a conviction could legally possess or receive a firearm. Upon being introduced to the House of Representatives, the bill was sent to the House Committee on the Judiciary for review.

Representative Helen Chenoweth (R-Idaho), also an opponent to the Lautenberg amendment, seeks its repeal.²⁶⁶ On March 11, 1997, Representative Chenoweth introduced H.R. 1009, titled the “States Rights and Second and Tenth Amendment Restoration Act of 1997.”²⁶⁷ H.R. 1009’s stated purpose is to repeal the Lautenberg Amendment.²⁶⁸

While agreeing with the basic premise that domestic violence is a “very serious problem in the United States,” H.R. 1009 offers many reasons for the repeal of the Lautenberg Amendment.²⁶⁹ Under H.R. 1009, § 2(a), Congressional Findings, it is noted that states do not classify domestic violence crimes uniformly.²⁷⁰ What may be a misdemeanor crime of domestic violence in one state may be a felony in another. Thus, the bill reasons, states are the proper authority, not the federal government, to classify domestic violence crimes.²⁷¹ The bill goes one step further, however, and proposes that where applicable, states should classify domestic violence offenses as felonies.²⁷²

H.R. 1009 also proposes that the Lautenberg Amendment be repealed because Congress has overstepped its bounds in that no nexus has been made between domestic violence and interstate commerce.²⁷³ In a related argument, the bill states that Congress has overstepped its power under both the Tenth Amendment to the United States Constitution, as interpreted

265. H.R. 26, 105th Cong. (1997).

266. See H.R. 1009, 105th Cong. (1997).

267. See *id.*

268. See *id.*

269. See *id.*

270. See *id.* § 2(a).

271. See H.R. 1009 § 2(a)(2).

272. See *id.* § 2(a)(3).

273. See *id.* § 2(a)(4).

by the United States Supreme Court in *United States v. Lopez*,²⁷⁴ and the Commerce Clause.²⁷⁵ Other grounds for repeal under H.R. 1009 include a finding that the Lautenberg Amendment is an unfunded mandate, and the states, as the bill notes, are responsible for the expenses incurred in enforcing the law.²⁷⁶ The bill also calls the law an *ex post facto* law "because it imposes a criminal penalty on crimes which were not subject to that penalty at the time of the Act,"²⁷⁷ and, accordingly, will "result in the disarming of millions of citizens" including battered women, who need their weapons in order to protect themselves from their battering husbands, law enforcement officers, and American servicemen.²⁷⁸ Finally, H.R. 1009 finds that the Lautenberg Amendment "ignores the real problem surrounding domestic violence in that truly violent offenders are allowed to plea-bargain down to misdemeanors."²⁷⁹ H.R. 1009 is currently co-sponsored by thirty-five members of Congress and is now being considered by the House Committee on the Judiciary.²⁸⁰

It is under this background that the validity of the Lautenberg Amendment, 18 U.S.C. § 922(g)(9) is reviewed.

III. Analysis

A. *Congress' Enactment of 18 U.S.C. § 922(g)(9) was a Proper Exercise of Its Power Under the Commerce Clause*

Upon the United States Supreme Court's rendering its decision in *United States v. Lopez*,²⁸¹ the legal community vehemently challenged any Congressional enactment as a usurpation of Congress's power under the Commerce Clause. Law professors asked their students what impact this new case would have on Congress' ability to enact laws, and the truth of the matter is, it really has had no colossal effect on Congress'

274. 514 U.S. 549 (1995).

275. H.R. 1009, 105th Cong. §§ 2(a)(5), (6) (1997).

276. *See id.* § 2(a)(9).

277. *Id.* § 2(a)(10).

278. *Id.* §§ 2(a)(12), (13), (15).

279. *Id.* § 2(a)(16).

280. *See Letter from Helen Chenoweth, et al., Congress of the United States, House of Representatives (May 7, 1997) at attachment, Co-Sponsors on H.R. 1009.*

281. 514 U.S. 549 (1995).

ability. Rather, *Lopez* is a decision that reinforces the constitutional definition of Congress's power under the Commerce Clause.²⁸²

Lopez involved a challenge to the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."²⁸³ Upon being indicted by a federal grand jury, the defendant moved to dismiss the indictment on the grounds that the law was unconstitutional because it was beyond Congress's power to control the public schools.²⁸⁴ The district court denied the motion to dismiss the indictment and, pursuant to a bench trial, found him guilty as charged.²⁸⁵ The Court of Appeals for the Fifth Circuit reversed the district court's decision, finding the law to be beyond Congress's power to regulate commerce.²⁸⁶ The Supreme Court then granted certiorari and affirmed the Fifth Circuit's ruling.²⁸⁷

In defining the extent of Congress's power to regulate interstate commerce, the Supreme Court noted that

the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what

282. See *United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 46, 47 (1996).

283. *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A)(1988)). The challenge arose out of an incident involving a twelfth-grade student who arrived at his high school carrying a concealed .38 caliber handgun with five bullets. School authorities received an anonymous tip to this effect, confronted the student, and the student admitted to possessing the handgun. He was charged with possessing a firearm on school property under Texas state law. The state charges were dismissed and the student was charged in a federal complaint with violating § 922(q)(1)(A). The student was then indicted by a federal grand jury on one count of knowing possession of a firearm in a school zone in violation of § 922(q)(1)(A). See *id.* at 551.

284. See *id.*

285. See *id.* at 551-52.

286. See *id.* at 552.

287. See *Lopez*, 514 U.S. at 552.

is national and what is local and create a completely centralized government.”²⁸⁸

The Supreme Court has “heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”²⁸⁹ The Court then identified three broad categories that Congress could legitimately regulate without usurping its own power. The first was “the use of the channels of interstate commerce;” the second was the power “to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;” and the third includes Congress’s power to regulate those activities that have a substantial effect on commerce.²⁹⁰ Chief Justice Rehnquist cited cases in support of each of the three categories, yet noted that the third category, under which the statute both at issue in the *Lopez* case and herein falls, had a history of case law that was not completely clear.²⁹¹ From the legal precedence, it was unclear whether an activity must simply affect or substantially affect interstate commerce in order to be within Congress’s power to regulate. In a five-to-four decision, the Supreme Court decided that an activity must have a substantial effect, and not merely an effect, on commerce in order for Congress to have the power to regulate it.²⁹²

The quick answer, under the first category of *Lopez*, is that the Lautenberg Amendment passes constitutional muster because, unlike the statute at issue in *Lopez*, the Lautenberg Amendment has a jurisdictional element.²⁹³ The *Lopez* Court noted that § 922(q) “by its terms ha[d] nothing to do with ‘commerce’”²⁹⁴ and “contain[ed] no jurisdictional element which

288. *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)); see also *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942). Both *Darby* and *Wickard* hold that Congress may regulate activity that has a substantial effect on interstate commerce. See *Darby*, 312 U.S. at 119-20; *Wickard*, 317 U.S. at 125.

289. *Lopez*, 514 U.S. at 557.

290. *Id.* at 558-59.

291. See *id.* at 559.

292. See *id.*

293. See *Fraternal Order of Police v. United States*, 981 F. Supp. 1, 4 (D.D.C. 1997).

294. *Lopez*, 514 U.S. at 561.

would ensure . . . that the firearm possession in question affects interstate commerce.”²⁹⁵ The statute at issue herein, however, has such a jurisdictional element;²⁹⁶ it renders illegal for a person convicted of a misdemeanor crime of domestic violence “to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearms or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”²⁹⁷ Thus, as the courts in *Barrett* and *F.O.P.* held, the instant statute has what the statute in *Lopez* lacked and is therefore constitutional under the Commerce Clause.²⁹⁸

Opponents to the Lautenberg Amendment²⁹⁹ also contest Congress’ enactment of the law because in their view, pursuant to the third category in *Lopez*, the act of domestic violence does not have a substantial effect on interstate commerce, and therefore is not within Congress’s power to regulate.³⁰⁰ This argument, however, is incorrect both in fact and in law.³⁰¹ According to a report by the American Medical Association dated October, 1994, it was estimated that each year, domestic violence costs the United States five to ten *billion* dollars in “health care costs, lost productivity, and criminal justice interventions.”³⁰² Each year, domestic violence “is responsible for more than 192,000 assaults, 21,000 hospitalizations, 99,800 hospital days, and 39,900 emergency room visits.”³⁰³

It is likely that a woman who is a victim of a domestic violence incident will miss a day of work, if not more, due to an embarrassing bruise or injuries so serious that she is unable to

295. *Id.*

296. See *Fraternal Order of Police*, 981 F. Supp. at 4.

297. 18 U.S.C. § 922(g)(9).

298. See *National Ass’n of Gov’t Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997) (holding that the statute had a jurisdictional element and was thus constitutional); *Fraternal Order of Police*, 981 F. Supp. at 4 (a jurisdictional element was present which allowed the statute to pass muster under the Commerce Clause).

299. 18 U.S.C. § 922(g)(9).

300. See *supra* Part II(D).

301. See *supra* Part II(C).

302. AMERICAN MEDICAL ASSOCIATION, FACTS YOU SHOULD KNOW ABOUT DOMESTIC VIOLENCE IN AMERICA 1 (1994) (on file in the Pace University School of Law Battered Women’s Justice Center).

303. *Id.*

work.³⁰⁴ If the company for which she works deals in interstate commerce, the incident that caused her to remain out of work has an effect on interstate commerce. If the woman is out of work for any length of time, her superiors are forced to either work with one less person, which affects productivity, or perhaps deal with a temporary employment agency, which would force that particular company to spend additional funds where they had not otherwise intended. Also in support of this statement is a conference report from the U.S. House of Representatives in their consideration of the Violent Crime Control and Law Enforcement Act of 1994:

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products.³⁰⁵

In further support of the claim that domestic violence substantially effects interstate commerce, 1985 statistics from the National Family Violence Resurvey by the Department of Criminal Justice demonstrated that victims of domestic violence

spent twice as many days in bed as other women; reported being in poor health three times as often as other women; had twice as many headaches, four times the rate of depression, and four and a half times more suicide attempts. Among abused women surveyed, 9.3% reported taking time off from their jobs because of domestic violence, with 19% of those who were severely assaulted spending time away from work.³⁰⁶

304. See generally *Senate Hearing 101-939, Part I, Hearing before the Committee on the Judiciary, United States Senate, on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 68-69 (June 20, 1990) (statement of NOW Legal Defense and Education Fund on Violence Against Women).

305. H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N 1839, 1853.

306. *Senate Hearing 101-939, Part I, Hearing before the Committee on the Judiciary, United States Senate, on Legislation to Reduce the Growing Problem of Violent Crime Against Women*, 101st Cong. 68-69 (June 20, 1990) (statement of NOW Legal Defense and Education Fund on Violence Against Women).

From these facts, it is abundantly clear that domestic violence has an impact on interstate commerce.

Moreover, in the many cases that have challenged the validity of the Violence Against Women Act ("VAWA"),³⁰⁷ a statute aimed at ending violence against women by, *inter alia*, fighting the horrors of domestic violence, challenges have been made under *Lopez*, arguing that VAWA is an unconstitutional exercise of Congressional power over interstate commerce. In five district court cases, the courts upheld the constitutionality of VAWA as a legitimate exercise of Congress' power over interstate commerce because they found that domestic violence has a substantial effect on interstate commerce.³⁰⁸

The *Lopez* court also found that, while the government is not required to make formal findings as to the substantial effect of a particular activity on interstate commerce, such findings were clearly lacking in *Lopez*.³⁰⁹ However, as demonstrated above, that is not the case here.³¹⁰ Many of the district court cases in which VAWA was challenged took into account the many congressional findings that explained the substantial effect of domestic violence upon interstate commerce.³¹¹ Indeed, some of the findings quoted above, in support of the proposition

307. 42 U.S.C. § 13981 (1994).

308. See *Doe v. Doe*, 929 F. Supp. 608, 613 (D. Conn. 1996); *United States v. Gluzman*, 953 F. Supp. 84, 88 (S.D.N.Y. 1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1422 (N.D. Iowa 1997), *rev'd in part and vacated in part on other grounds* by Nos. 97-3086, 97-3087, 1998 WL 24118 (8th Cir. Jan. 26, 1998); *Seaton v. Seaton*, 971 F. Supp. 1188, 1193 (E. D. Tenn. 1997); *Anisimov v. Lake*, 982 F. Supp. 531, 538 (N.D. Ill. 1997). One other district court case that held VAWA unconstitutional pursuant to *Lopez* was reversed by the Fourth Circuit court and, like the aforementioned cases, the court found domestic violence to have a substantial effect on interstate commerce. See *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997). On rehearing, however, the Fourth Circuit vacated its decision, holding that in enacting Subtitle C of VAWA, Congress exceeded its constitutional authority. See *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, Nos. 96-2316, 96-1814, 1999 WL 111891, at *73 (4th Cir. March 5, 1999). Two other circuit courts have upheld VAWA's constitutionality, but not pursuant to *Lopez*. See *United States v. Wright*, 128 F.3d 1274, 1276 (8th Cir. 1997) (reversing the district court's decision that VAWA was unconstitutional); *United States v. Bailey*, 112 F.3d 758, 766 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 240 (1997).

309. 514 U.S. 549, 562-63 (1995).

310. See *supra* notes 302-08 and accompanying text.

311. See *Doe*, 929 F. Supp. at 613-14; *Gluzman*, 953 F. Supp. at 88; *Hartz*, 970 F. Supp. at 1421-22; *Seaton*, 971 F. Supp. at 1192; *Anisimov*, 982 F. Supp. at 537-38.

that domestic violence does have a substantial effect on interstate commerce, were findings relied upon by Congress in its hearings regarding the enactment of VAWA and other related statutes.³¹²

For the foregoing reasons, § 922(g)(9) was a proper exercise of Congressional power under the Commerce Clause of the United States Constitution.

B. *The Lautenberg Amendment Does Not Violate the Tenth Amendment*

House Bill 1009 contends that § 922(g)(9) is an “unfunded federal mandate” to the states, requiring them to enforce a federal law at their own expense, which of course is prohibited pursuant to the Tenth Amendment.³¹³ This statement is incorrect, however, because a review of the statute and indeed all of the correspondence from the ATF to all state and local law enforcement agencies show no commanding language with respect to the Lautenberg Amendment.³¹⁴ State law enforcement agencies were notified of the new law, but they were not required to prospectively seek out officers in their ranks with misdemeanor domestic violence convictions; rather the burden of disarming the officers laid with the individual officers.³¹⁵ The statute merely declares that for a person with a misdemeanor conviction of domestic violence, it shall be unlawful to possess a firearm or ammunition.³¹⁶ To the extent that state law enforcement agencies act to remove such officers, it is of their own volition.³¹⁷ Moreover, to the extent that states were required to enforce a federal law, such a requirement was invalidated in *Printz v. United States*.³¹⁸

Additionally, cases have held that where a statute is a valid exercise of Congress’ authority under the Commerce Clause, it is not violative of the Tenth Amendment.³¹⁹ In *United States v.*

312. See *supra* notes 302-08 and accompanying text.

313. H.R. 1009, 105th Cong. (1997).

314. See *supra* notes 36-41 and accompanying text.

315. See *supra* notes 36-41 and accompanying text.

316. See 18 U.S.C. § 922(g)(9).

317. See *supra* notes 42-47 and accompanying text.

318. 521 U.S. 898 (1997); see also *supra* note 20.

319. See *National Ass’n of Gov’t Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1577-78 (N.D. Ga. 1997) (citing *United States v. Collins*, 61 F.3d 1379, 1384 (9th

Collins,³²⁰ the Ninth Circuit rejected a claim that § 922(g)(1), the statute prohibiting felons from possessing a firearm, violated the Tenth Amendment because “the statute encroach[ed] on the authority of [the State of] Montana to decide who shall possess firearms and what effect the state should give to felony convictions from other states.”³²¹ The *Collins* court held, however, that because the statute was a valid exercise of Congress’ power under the Commerce Clause, it was not violative of the Tenth Amendment.³²²

For the foregoing reasons, the Lautenberg Amendment does not violate the Tenth Amendment.

C. Section 922(g)(9) is Not an Ex post Facto Law

The ex post facto prohibition of the United States Constitution forbids both Congress and the fifty states to enact laws “which imposes a punishment for an act which was not punishable at the time it was committed.”³²³ By including the Ex post Facto Clause in the Constitution, the Framers sought to ensure that legislative acts would give fair warning as to the effect of a law and would allow individuals to rely upon their meanings until such laws were explicitly changed.³²⁴ In order for a law to be considered ex post facto, it must have two critical elements: (1) it must be retrospective, meaning that it applies to events occurring before its enactment, and (2) it must disadvantage an offender affected by it.³²⁵ The ultimate question is “whether the law changes the legal consequences of acts completed before its effective date.”³²⁶ Critical to the granting of relief to a defendant is not his individual right “to less punishment, but the lack

Cir. 1995), *cert. denied*, 516 U.S. 1000 (1995); *Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995)).

320. 61 F.3d 1379 (9th Cir. 1995), *cert. denied*, 516 U.S. 1000 (1995).

321. *Id.* at 1383.

322. *See id.* at 1384; *see also* *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995) (holding that because the statute was valid exercise of Congress’ commerce power, it did not violate the Tenth Amendment); *Columbia River Gorge United – Protecting People and Property v. Yeutter*, 960 F.2d 110, 114 (9th Cir. 1992), *cert. denied*, 506 U.S. 863 (1992); *Cheffer*, 55 F.3d at 1521.

323. *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1866)).

324. *See id.* at 28-29.

325. *See id.* at 29.

326. *Id.* at 31.

of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."³²⁷

In *United States v. Brady*,³²⁸ which was relied upon by both the *Meade* and *Barrett* courts,³²⁹ a defendant who had a 1951 felony conviction contested the constitutionality of § 922(g)(1), pursuant to the Ex Post Facto Clause of the Constitution, which prohibited anyone convicted of a felony from possessing a firearm.³³⁰ The statute at issue herein, § 922(g)(9), is very similar to § 922(g)(1) in that someone previously convicted of a misdemeanor crime of domestic violence prior to the enactment of the statute, could later be convicted of being a misdemeanor in possession of a firearm. What *Brady* held was that it was not the underlying activity, the predicate offense, that was being punished, but rather the subsequent possession of a firearm.³³¹ The crime of being a "felon in possession" by the *Brady* defendant was not committed until after the effective date of the statute under which he was convicted and hence could not be an ex post facto crime.³³² The same analysis would follow for a defendant, such as *Smith* or *Meade*, who was convicted under § 922(g)(9). It was not the crime of domestic violence that was being further punished, but the possession of a firearm after the date of the enactment of § 922(g)(9) that was being punished. Thus, defendants convicted under §§ 922(g)(1) or (g)(9) are not entitled to relief under the Ex post Facto Clause because they have adequate notice that their possession of a firearm is illegal.

The *Brady* court determined that in enacting the "felon in possession" statute, Congress intended the statute to prohibit felons from possessing firearms, even those whose felony convictions occurred prior to effective date of statute.³³³ Similarly, Congressional intent concerning domestic violence misdemeanants is clear. Congress intended that anyone convicted of a mis-

327. *Id.* at 30.

328. 26 F.3d 282 (2d Cir. 1994), *cert. denied*, 513 U.S. 894 (1994).

329. *See supra* notes 100-68 and accompanying text.

330. *See Brady*, 26 F.3d at 285.

331. *See id.* at 291.

332. *See id.*; *see also* *United States v. Gillies*, 851 F.2d 492, 495 (1st Cir. 1988), *cert. denied*, 488 U.S. 857 (1988).

333. *See Brady*, 26 F.3d at 291.

demeanor crime of domestic violence, both those already convicted and those to be convicted in the future, should be banned from possessing a firearm.³³⁴ Senator Frank Lautenberg, speaking before Congress and discussing one of “three major loopholes” proposed by opponents to his law, noted that

opponents of the gun ban proposed to limit the ban only to offenders who had been notified of the ban when they originally were charged. *This effectively would have exempted all currently convicted offenders from the ban* In effect, gun ban opponents wanted to say that ignorance of the law would be an excuse for wife beaters, even though it is not an excuse for anybody else. Eventually, this proposal, too, was dropped.³³⁵

Clearly, Congress intended for anyone, past or present, convicted of a misdemeanor crime of domestic violence to be affected by the ban. The proposition that this is not violative of the Ex Post Facto Clause of the Constitution is supported by *United States v. Huss*,³³⁶ which, quoting *Cases v. United States*,³³⁷ held that

if a statute “is a bona fide regulation of conduct which the legislature has power to regulate, it is not bad as an ex post facto law even though the right to engage in the conduct is made to depend on past behavior, even behavior before the passage of the regulatory act.”³³⁸

The *Huss* court held that the past conduct must be relevant to the regulated activity and if it is not, it will be assumed that the purpose of the statute is to impose additional punishment.³³⁹

Huss effectively ties both the interstate commerce and ex post facto claims of a defendant together. As discussed above, Congress does have the power to regulate domestic violence because it effects interstate commerce.³⁴⁰ Moreover, domestic violence is perhaps most dangerous when a firearm is involved. A person who has demonstrated violence in the past and who cur-

334. See 142 CONG. REC. S11,872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

335. *Id.* (emphasis added).

336. 7 F.3d 1444 (9th Cir. 1993).

337. 131 F.2d 916 (1st Cir. 1942).

338. *Huss*, 7 F.3d at 1447 (quoting *Cases*, 131 F.2d at 921).

339. See *id.* at 1448.

340. See *supra* Part III(A).

rently possesses a firearm is especially dangerous to his or her potential victim and should therefore be prohibited from possessing a firearm. Thus, it is clear that Congress' enactment of the Lautenberg Amendment was not intended to be punitive to a person with a prior conviction of domestic violence but rather regulatory, with an interest in "sav[ing] the life of another person,"³⁴¹ to wit, a victim of domestic violence. The Lautenberg Amendment does not impose further punishment for prior crimes, but furthers substantial and legitimate interests in preventing the misuse of firearms.

For the foregoing reasons, the Lautenberg Amendment survives any defendant's claim that it is violative of the Ex Post Facto Clause of the United States Constitution.

D. *The Lautenberg Amendment Violates Neither the Equal Protection Clause nor the Due Process Clause of the U.S. Constitution*

Law enforcement officers faced with the prospect of losing their jobs are likely to contest the constitutionality of the Lautenberg Amendment as a violation of either the Equal Protection Clause or the Due Process Clause of the United States Constitution. For the following reasons, either argument would fail and the constitutionality of the statute would be upheld, as it indeed has been with the exception of the D.C. Circuit.³⁴²

As noted by the court in *Barrett*, any equal protection claim by a law enforcement officer contending application of § 922(g)(9) against him, or any organization doing so on behalf of him or others similarly situated to him, would have to do so under the Fifth Amendment's Due Process Clause because it is the Fifth Amendment, not the Fourteenth, that places equal protection limitations upon the federal government.³⁴³ In re-

341. 142 CONG. REC. S11,872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

342. See *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998).

343. See *National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1572 n.10 (N.D. Ga. 1997); *Fraternal Order of Police v. United States*, 981 F. Supp. 1, 4 (D.D.C. 1997) (citing *Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979)). The *Barrett* court noted that a Due Process discussion was unnecessary in light of the equal protection analysis that was made before it. See *Barrett*, 968 F. Supp. at 1572 n.10. The Due Process argument in *F.O.P.*, being very similar to the Equal

viewing an equal protection claim, the court must first determine under which standard of review a classification should be evaluated.³⁴⁴ In order for the court to review a classification under strict scrutiny, the classification must involve the infringement of a fundamental right, or concern a suspect class.³⁴⁵ Any attempt, such as by the plaintiff in *Barrett*, to examine the Lautenberg Amendment under strict scrutiny analysis, however, is incorrect. In *Barrett*, the plaintiff in support of its equal protection claim, attempted to have the classification reviewed under strict scrutiny, claiming that the right to public employment and the right to bear arms were both fundamental rights.³⁴⁶ As that court, and many others before it found, there is no fundamental right to either public employment³⁴⁷ or to bear arms.³⁴⁸

Moreover, under strict scrutiny analysis, suspect classes are those classes which: (1) have been historically subject to discrimination; (2) have an obvious or immutable characteristic which defines the class as a discrete group; or (3) are a politically powerless minority.³⁴⁹ The class involved here includes any person convicted of a misdemeanor crime of domestic violence and the subgroup discussed herein includes all law enforcement officers that fall into that main class. Neither the main group of domestic violence misdemeanants nor the subgroup of police officers can possibly be classified within one of the three categories mentioned above. Indeed, police officers who clearly fall into neither of the first two categories, have a very powerful political voice, the Fraternal Order of Police, which has been characterized as the nation's largest police or-

Protection analysis in *Barrett*, demonstrates that there is no need to go into an extended analysis of both. *See id.* A Due Process claim would be analyzed under the same rational basis review and would yield the same result as the Equal Protection analysis discussed herein.

344. *See* Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986).

345. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

346. *See* *Barrett*, 968 F. Supp. at 1573 n.11.

347. *See* Massachusetts v. Feeney, 442 U.S. 256, 273 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

348. *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980); United States v. Miller, 307 U.S. 174, 178 (1939) (no fundamental right to bear arms unless in furtherance of preserving a well regulated militia).

349. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986).

ganization,³⁵⁰ implying of course that there are other police organizations that give law enforcement officers a public, political voice. Thus, law enforcement does not fall into the third category.

Because the Lautenberg Amendment involves neither a fundamental right nor a suspect class, review of its validity should be done under a rational basis standard.³⁵¹ A classification need only be rationally related to a legitimate state interest to be valid,³⁵² and under rational basis review, there is a strong presumption in favor of the classification's validity.³⁵³ Rational basis review is not a license for a reviewing court to be a "superlegislature," rather the court must merely be able to see a rational relationship between the disparity of the treatment and some legitimate governmental purpose.³⁵⁴ Moreover, "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature . . . actually articulate at any time the purpose or rationale supporting its classification;"³⁵⁵ it is under no obligation to produce empirical data to support the legislation.³⁵⁶ Nevertheless, the classification must rationally advance "a reasonable and identifiable governmental objective."³⁵⁷

No matter what type of equal protection argument is presented by a criminal defendant or civil plaintiff in an attempt to invalidate the Lautenberg Amendment, it would be folly to say that there is no rational relationship between the law and the governmental interest. As articulated by the Senator Lautenberg upon enactment of the statute, the intention of the law is to protect victims of domestic violence and keep firearms out of the hands of offenders who have demonstrated a propensity towards the use of physical force against their family

350. See Jonathan Kerr, *Critics Say Anti-Domestic Violence Amendment Takes Shot At Police*, WEST'S LEGAL NEWS, Dec. 2, 1996, available in 1996 WL 684742, at 1. The Fraternal Order of Police represents more than 270,000 members nationwide. See *Barr and Fraternal Order of Police Slam Lautenberg Gun Ban*, U.S. NEWswire, Sept. 30, 1997, available in WL, U.S. NEWswire database.

351. See *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

352. See *id.*

353. See *Heller v. Doe*, 509 U.S. 312, 319 (1993).

354. See *id.* at 319-20.

355. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

356. See *id.*

357. *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981).

members or other loved ones.³⁵⁸ Clearly protecting victims and removing firearms from people who made these victims into victims is a legitimate governmental interest. To that end, creating the class of misdemeanor domestic violence offenders is not irrational.

Arguably, one contesting the law could inquire as to why the law does not place the ban on any misdemeanant whose predicate offense involves as an element the use or attempted use of physical force. The quick answer is that Congress has the power to implement laws incrementally; that is, first it can start with misdemeanor crimes of domestic violence and then, if it so desires, add different classes of misdemeanants to the ban until ultimately all misdemeanors involving the use of force are effectively banned from possessing a firearm. There is nothing improper in so legislating.³⁵⁹ As the court in *Barrett* stated:

The court need not . . . engage in a debate as to whether Congress should have cast its net wider when it enacted § 922(g)(9) because equal protection principles are not violated when legislative reform "take[s] one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."³⁶⁰

The intent of Congress was to curb the ever growing problem of domestic violence, which as noted from the statistics above,³⁶¹ is a colossal problem both for the victims who live in constant fear and danger, and for the country which ultimately spends billions of dollars in medical, criminal justice and lost productivity to industry costs. Curbing this colossal problem is certainly a governmental interest. As statistics indicate, firearms are used in 65% of fatal domestic violence disputes.³⁶² Thus, Congress' removal of firearms from people with misdemeanor domestic violence convictions is certainly rationally related. Pursuant to the state of the law, Congress' decision to act is constitutional.³⁶³

358. See generally 142 CONG. REC. S11,872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

359. See *National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1573 (N.D. Ga. 1997).

360. *Id.* (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

361. See *supra* notes 302-08 and accompanying text.

362. See *infra* note 419 and accompanying text.

363. See *supra* Part II(C).

When a classification is rationally based, any uneven effect upon particular group within a class is ordinarily of no constitutional consequence.³⁶⁴ A classification may affect certain classes within the classification unevenly though the law treats them no differently from other members of class,³⁶⁵ unless it can be demonstrated by the challenger that Congress had a discriminatory intent when it drafted the classification.³⁶⁶

In *Barrett*, the challengers were law enforcement officers who had lost or faced the possibility of losing their jobs.³⁶⁷ Law enforcement officers are a class of misdemeanants within the general classification. While the impact may be disproportionate, the law enforcement officers are ultimately treated the same as any other person with a misdemeanor crime of domestic violence, which is completely within the bounds of the Constitution.

There is no higher standard being imposed against those law enforcement officers with a misdemeanor conviction of domestic violence. Rather, those officers are being treated like every other member of the classification as indeed they should be. If a person has a propensity towards behavior that includes the use of physical force against his family or other loved ones, how much more dangerous is he if he is permitted to carry a firearm on a daily basis? How much more elevated are the chances that something horrible will happen in his home that involves the use of that gun? A person should not be excluded from the effect of the law because he is a law enforcement officer. "If you hit your wife [husband, child or other loved one] you lose your gun. Guns make any domestic situation more dangerous."³⁶⁸

While a law enforcement officer faces the prospect of losing his job, he is nevertheless being treated equally under the law. The effect is, unfortunately for the affected law enforcement of-

364. See *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271-74 (1979).

365. See *id.*; see also *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that a law can render a disproportionate effect on a class and yet be constitutional under the Equal Protection Clause).

366. See *National Ass'n of Gov't Employees, Inc. v. Barrett*, 968 F. Supp. 1564, 1575 (N.D. Ga. 1997) (citing *Feeney*, 442 U.S. at 272-74).

367. See *id.* at 1568-69.

368. See *Kerr*, *supra* note 350.

ficer, perhaps disproportionate, yet the goal Congress is seeking to achieve warrants such a result.³⁶⁹ There are other classes within the classification of people convicted of misdemeanor crimes of domestic violence who will lose their jobs. This result, however, is not unconstitutional.

Nevertheless, the D.C. Circuit, in its initial reversal of the district court in *Fraternal Order of Police v. United States*, found the Lautenberg Amendment violative of the Equal Protection Clause to the extent that law enforcement officers, through 18 U.S.C. § 925(a)(1), are not exempt from the mandate of, *inter alia*, § 922(g)(9).³⁷⁰

There is no fundamental right to public employment,³⁷¹ thus no fundamental right is being infringed by the 1996 amendments.³⁷² Additionally, the class affected by this statute, specifically, law enforcement officers with a misdemeanor conviction of domestic violence, is not suspect.³⁷³ The 1996 amendments that “burden” this class, therefore, should be reviewed under a rational basis standard and not strict scrutiny.³⁷⁴

The D.C. Circuit initially found, however, that the “1996 amendments fall into the narrow class of provisions that fail even the most permissive, “rational basis” review.”³⁷⁵ The court apparently believed that the 1996 amendments were underinclusive as individuals convicted of misdemeanor crimes of domestic violence were treated more harshly by Congress than those convicted of domestic violence felonies. Even taking the court’s findings at face value, the D.C. Circuit court has held in the past, following the United States Supreme Court’s lead, that “underinclusiveness analysis is simply to ‘ensure that the proffered state interest actually underlies the law.’”³⁷⁶ “[A] rule is struck for underinclusiveness only if it cannot ‘fairly be said

369. See *supra* Part II(A).

370. See *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998).

371. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

372. See *supra* notes 345-50 and accompanying text.

373. See *supra* notes 345-51 and accompanying text.

374. See *Murgia*, 427 U.S. at 312.

375. *Fraternal Order of Police*, 152 F.3d at 1002 (citations omitted).

376. *Blount v. Securities and Exchange Comm’n*, 61 F.3d 938, 946 (D.C. Cir. 1995) (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 677 (1990) (Brennan, J., concurring)).

to advance any genuinely substantial governmental interest.”³⁷⁷ Here, as demonstrated above, there is clearly a legitimate state interest – curbing domestic violence and its social and economic effects on American society.

To say that the 1996 amendments are not rationally related to a state interest is clearly erroneous – as the D.C. Circuit ultimately held.³⁷⁸ Further, even if it is accepted as true that the misdemeanor domestic violence misdemeanants are treated more harshly than convicted felons pursuant to the 1996 amendments, the D.C. Circuit itself has held in the past that “equal protection of the laws does not require Congress in every instance to order evils hierarchically according to their magnitude and to legislate against the greater before the lesser.”³⁷⁹ Indeed, the United States Supreme Court has noted that if a classification has “some ‘reasonable basis,’ it does not offend the Constitution simply because [it] ‘is not made with mathematical nicety or because in practice it results in some inequality.’”³⁸⁰ Moreover, “the problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific.”³⁸¹ Finally, the Supreme Court noted that a “statutory discrimination will not be set aside if *any state of facts* reasonably may be conceived to justify it.”³⁸² Affording added protection to a person whose spouse has a prior misdemeanor conviction of domestic violence and yet is allowed to possess a firearm on a daily basis is certainly a sufficiently reasonable justification for enacting the laws.

Congress has indeed insured that convicted felons are precluded from possessing firearms.³⁸³ The D.C. Circuit, though holding that sections 922(g)(9) and 925(a)(1) as applied to law enforcement officers are indeed constitutional, still is not com-

377. *Id.* (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 396 (1984)).

378. *See Fraternal Order of Police v. United States*, No. 97cv00145, 1999 WL 218442 (D.C.Cir. April 16, 1999).

379. *United States v. Holland*, 810 F.2d 1215, 1219 (D.C. Cir. 1987).

380. *Bowen v. Gilliard*, 483 U.S. 587, 600-01 (1987) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

381. *Id.* at 601 (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)).

382. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)) (emphasis added).

383. *See* 18 U.S.C. § 922(g)(1).

fortable with the fact that law enforcement officers are, according to § 925(a)(1), exempt from the felon in possession provision but not the misdemeanor domestic violence convict in possession provision.³⁸⁴ Nevertheless, the D.C. Circuit recognized that there may be “nonlegal restrictions” that prevent a firearm from being issued to a felon.³⁸⁵ In fact, it is likely a well-known fact amongst the congressmen who overwhelmingly approved the enactment of the 1996 amendments that a law enforcement officer who is convicted of *any* felony, not just one of domestic violence, is discharged from his position, which of course means that he loses his firearm.³⁸⁶ Such a result is what the 1996 amendments ultimately were enacted to achieve. According to the United States Department of Justice, Office of Public Affairs, if a federal law enforcement officer is charged and convicted of any felony, he loses his job.³⁸⁷ If, after he serves time in prison, is released, reapplies for another federal position that requires him to carry a firearm and his prior felony conviction is discovered, he is automatically discharged.³⁸⁸ The Deputy Commission of Public Information for the New York City Police Department similarly stated that if an officer is convicted of any felony, he is automatically discharged.³⁸⁹ The Media Relations Office for the Los Angeles Police Department expressed that they had the same policy.³⁹⁰

In many cases where a person is convicted of a misdemeanor crime of domestic violence, such conviction is a result of a plea bargain for what would otherwise have been a felony conviction.³⁹¹ If a law enforcement officer is the beneficiary of such a plea bargain, the new amendments act to cure that former loophole in the law. The amendments do not stack the deck against those individuals convicted of a misdemeanor crime of domestic violence as the D.C. Circuit initially found. Rather,

384. See *Fraternal Order of Police*, 1999 WL 218442 at *4.

385. *Id.*

386. See Reich, *supra* note 44, at B-1.

387. Telephonic statement from the United States Department of Justice, Office of Public Affairs (Feb. 24, 1999).

388. *Id.*

389. Telephonic statement from the Deputy Commissioner of Public Affairs for the New York City Police Department (Feb. 24, 1999).

390. Telephonic statement from the Media Relations Office of the Los Angeles Police Department, (Feb. 24, 1999).

391. See *infra* note 396 and accompanying text.

the amendments operate to close the substantial loophole and clearly do "fill a practical gap."³⁹²

For the reasons mentioned above, it is evident that the law passes Equal Protection muster, and that the decision of the D.C. Circuit ultimately holding the amendments constitutional as applied to law enforcement officers was proper.

E. *The Lautenberg Amendment is Good Policy*

The story of Barbara O'Dell is far from over. Ultimately, Rodolfo was able to have his record expunged and thus continue to work as a detective for the Los Angeles Sheriff's Department.³⁹³ Unfortunately, there are still some loopholes that allow misdemeanants convicted of crimes of domestic violence and even ex-felons to again possess firearms.³⁹⁴ However, the Lautenberg Amendment is one more in just a few existing steps taken by Congress to assist in combating the horrors of domestic violence. While the law did not ultimately help Barbara O'Dell, perhaps it helped someone like her.

In evaluating the benefit of the Lautenberg Amendment, perhaps the fundamental question is or certainly should be: Do we want a person such as Rodolfo O'Dell, who has a misdemeanor conviction for domestic violence, that should really be a felony, to be among our law enforcement officers? Do we want such a person to have daily access to a firearm? Clearly any reasonable person would answer those questions in the negative. Most assuredly, Barbara O'Dell does not. Because of the Lautenberg Amendment, people such as Rodolfo O'Dell, whose continued employment as a law enforcement officer offends sensibility, will in some way be affected, if not completely disarmed, by its enactment. Such a result likely will save the lives of many domestic violence victims.

Clearly, there is a long way to go in helping victims of domestic violence. Opponents to the Lautenberg Amendment, indeed, even Senator Lautenberg himself, acknowledged the problem of domestic violence crimes that should have been

392. *Fraternal Order of Police v. United States*, 152 F.3d 998, 1003 (D.C. Cir. 1998).

393. See Tobar, *supra* note 1, at B-1.

394. See *supra* note 34 and accompanying text.

charged as felonies but are pleaded down to misdemeanors.³⁹⁵ The *Smith* court noted that

[u]nder current Federal law, it is illegal for persons convicted of felonies to possess firearms, yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.³⁹⁶

Why should a stranger face a more severe penalty than a family member or intimate partner? It seems that the reverse should be true, for it is the offending family member or intimate partner that knows all too well the effect of his actions on his victim. If the crime should have been a felony, yet was reduced to a misdemeanor for whatever reason, the logic of the Lautenberg Amendment is all the more evident.³⁹⁷ If the offender, ultimately convicted of a misdemeanor, should have been convicted of a felony in the first place, he should not be able to legally possess or receive a firearm.³⁹⁸ The Lautenberg Amendment acts to close a loophole in the law that essentially allowed a felon who “got lucky” and had his offense reduced to a misdemeanor, to possess a firearm when he was at the time perhaps even more of a danger to his victim than he was before.³⁹⁹

Moreover, in law enforcement agencies across the country, a law enforcement officer convicted of a felony loses his job as an officer.⁴⁰⁰ An officer with a misdemeanor conviction of domestic violence, especially if it was a felony charge pleaded down to a misdemeanor, should not only be unable to carry a firearm or ammunition, but should not be a law enforcement officer. Period. It does not matter how long ago the predicate offense occurred. The Lautenberg Amendment works to close this loophole that police officers were previously able to use in ac-

395. See 142 Cong. Rec. S11,872-01 (daily ed. Sept. 30 1996) (statement of Sen. Lautenberg).

396. *United States v. Smith*, 964 F. Supp. 286, 292 (N.D. Iowa 1997).

397. See *supra* Part III(D).

398. See *supra* Part I.

399. See *supra* note 396 and accompanying text.

400. See Reich, *supra* note 44, at B-1.

quiring and maintaining employment that required them to possess a firearm.⁴⁰¹

Opponents say that this statute works against victims, placing them in a more difficult position.⁴⁰² Turning back again to Barbara O'Dell's story, she attempted to contact law enforcement prior to the July 1992 incident to complain about her husband's abusive behavior.⁴⁰³ The officers to which she had to report were not only her husband's fellow employees, but his friends.⁴⁰⁴ Barbara was told by one of Rodolfo's supervisors at the time of his arrest for the July 1992 incident that her case would have been handled better had she been "just an average citizen."⁴⁰⁵ Moreover, because she was the wife of a deputy sheriff, she was told that "they moved slower."⁴⁰⁶

The Lautenberg Amendment removes from the victim the responsibility of turning in her husband or intimate partner to his law enforcement co-employees and friends.⁴⁰⁷ For the victim of a law enforcement officer, the choice of further angering her spouse is no longer present. The responsibility lies with the abuser. If he has a misdemeanor crime of domestic violence conviction and does not refrain from working in a position for which he must carry a firearm, he opens himself up to criminal sanctions.⁴⁰⁸ As discussed above, the majority of law enforcement agencies are cooperating by implementing some sort of program to find affected officers and remove their firearms from them.⁴⁰⁹ Thus, the statute operates in favor of domestic violence victims whose abusers are law enforcement officers and places the burden on offenders.⁴¹⁰

Contrary to the claims of the Lautenberg Amendment's opponents,⁴¹¹ the removal of firearms from those convicted of a misdemeanor crime of domestic violence will save lives.⁴¹² Rep-

401. See *supra* note 17 and accompanying text.

402. See *supra* Part II(D).

403. See Tobar, *supra* note 1, at B-1.

404. See *id.*

405. *Id.*

406. *Id.*

407. See *supra* note 41 and accompanying text.

408. See *supra* note 41 and accompanying text.

409. See *supra* Part II(B).

410. See *supra* note 41 and accompanying text.

411. See *supra* Part II(D).

412. See *infra* notes 416-19 and accompanying text.

representative Chenoweth noted in her letter to the Chairman of the House Committee on the Judiciary and the Chairman of the House Committee Subcommittee on Crime that “a recent study by the Utah Department of Public Safety [found that] firearms were only used in *three percent* of all domestic violence cases . . . [and that] personal weapons, i.e. hands, feet, and teeth, were used in *eighty-six percent* of domestic violence cases.”⁴¹³ They used these very isolated statistics to declare the Lautenberg Amendment a failure at meeting its goal of protecting battered spouses and abused children by banning firearms when they are “used in a minute number of instances.”⁴¹⁴ Respectfully, Representative Chenoweth’s statistics are not representative of the problem posed by domestic violence as related to firearms.⁴¹⁵

In Iowa, where the *Smith* case was prosecuted, Stephen Rapp, the United States Attorney for the Northern District of Iowa stated in the press release announcing Smith’s sentence that since approximately 1991, ninety-one people in the state of Iowa, nine of which were children, were murdered in a domestic violence incident.⁴¹⁶ In *fifty-three* of those cases, firearms were used.⁴¹⁷ Of those cases, many of the defendants had previously been convicted of crimes of domestic violence.⁴¹⁸

Moreover, in a press release, Senator Lautenberg stated that according to FBI data, nearly 3,500 women and children would die in 1996 as a result of domestic violence “at the hands of men who once claimed to love them. *Sixty-five percent* of those women [would] be killed by firearms.”⁴¹⁹ While it is un-

413. Letter from Representative Helen Chenoweth, United States House of Representatives, et al., to Henry J. Hyde, Chairman of the House Committee on the Judiciary, and Bill McCollum, Chairman of the House Committee on the Judiciary, Subcommittee on Crime (Oct. 9, 1997) (on file with the Office of U.S. Rep. Helen Chenoweth) (emphasis theirs).

414. *Id.*

415. See *infra* notes 416-19 and accompanying text.

416. See Press Release from Stephen Rapp, *Cedar Falls Man Sentenced is First in the Nation Conviction Under New Federal Law*, at 2 (Nov. 21, 1997) (on file with U.S. Dep’t of Justice).

417. See *id.*

418. See *id.*

419. Frank Lautenberg, *Lautenberg Offers Amendment to Treasury, Postal Service Appropriations Bill That Takes Guns Out of the Hands of Wife Beaters and Child Abusers*, GOV’T PRESS RELEASES, Sept. 12, 1996 (emphasis added), available in 1996 WL 11124929.

known what percentage, if any, of these offenders were police officers, the statistics are nevertheless relevant to demonstrate the problem. If there is a person who has previously been convicted of a misdemeanor crime of domestic violence, he or she should not be permitted to possess a firearm. Had those offenders been prohibited from possessing a firearm, many victims might either still be alive today or been spared the ordeal of suffering a potentially fatal bullet wound.

VI. Conclusion

Clearly, the Lautenberg Amendment alone "will not prevent or end the problems of domestic violence in this country."⁴²⁰ There is no doubt that opponents to the law are correct in such a statement. Rodolfo O'Dell ultimately had his record expunged and as of May 1997, when his wife's story was published, was working as a detective in the Los Angeles Sheriff's Department.⁴²¹ While this is certainly not the result anyone wants to see, the whole O'Dell story is demonstrative of the need to combat domestic violence, even if it is only one small step at a time. The Lautenberg Amendment is one more step in that long path towards a very important goal of protecting victims of domestic violence.

The Amendment is not a usurpation of Congress' power under the Commerce Clause, it does not force states to enforce a federal regulation in violation of the Tenth Amendment, it is not an *ex post facto* law, and it is not violative of equal protection under the laws pursuant to the Due Process Clause of the Fifth Amendment. Rather, it is, like its sister statute § 922(g)(1), a constitutional enactment aimed at protecting innocent lives from a potentially fatal situation.

While the statute may appear especially harsh to law enforcement officers who are forced to surrender their firearms and consequently lose their jobs if they have misdemeanor convictions of domestic violence, such a result should be applauded not only by the public, but by law enforcement agencies themselves. Law enforcement officers deserve the utmost respect for

420. *FOP Supports Amendment of 'Domestic Violence Gun Ban' Law*, U.S. NEWSWIRE, Mar. 5, 1997, at 1.

421. See Tobar, *supra* note 1, at B-1.

the way they literally dedicate their lives to protecting the public. The Lautenberg Amendment seeks to remove those officers that live a hypocritical life. A law enforcement officer, sworn to serve and protect the public, has no right to work in such a capacity if, rather than protecting his own family or loved ones, he is abusing them in their own home. The Lautenberg Amendment should stand.