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*Gun Ban for Persons Convicted of Misdemeanor Crime of
Domestic Violence: Ex Post Facto Clause and Other
Constitutional Issues*

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December 30, 1996

Abstract. This report explores issues concerning the constitutionality of the gun ban on domestic violence misdemeanors, with an emphasis upon possible ex post facto clause issues. It seems likely that the new law will survive constitutional attacks as applied to persons who consummate the federal offense after the change in the law takes effect. The law may be vulnerable to an ex post facto challenge if prosecution is attempted against a person in lawful possession of a firearm before the effective date who merely continues possession of the same firearm after the effective date without any notice of the change in the law.

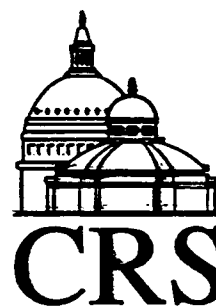
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Gun Ban For Persons Convicted Of Misdemeanor Crime Of Domestic Violence: Ex Post Facto Clause And Other Constitutional Issues

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December 30, 1996



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GUN BAN FOR PERSONS CONVICTED OF MISDEMEANOR CRIME OF DOMESTIC VIOLENCE: EX POST FACTO CLAUSE AND OTHER CONSTITUTIONAL ISSUES

SUMMARY

The omnibus appropriations act for fiscal 1997, P.L. 104-208, amended the Criminal Code to disqualify a ninth category of persons from acquiring or possessing any firearm or ammunition under federal law. The new gun ban applies to persons who have been convicted of a "misdemeanor crime of domestic violence," as defined in an amended 18 U.S.C. §921(a).

Two new federal firearms offenses are created by amendment of 18 U.S.C. §922(d) and (g). Section 922(d)(9) makes it unlawful for any person knowingly to sell or otherwise dispose of any firearm or ammunition to a person convicted of a misdemeanor crime of domestic violence. Section 922(g)(9) prohibits the domestic violence misdemeanant from shipping, transporting, receiving, or possessing any firearm or ammunition that has moved in interstate or foreign commerce. Law enforcement officers are not exempt from the gun ban.

Federal law has long disqualified felons from acquiring or possessing firearms (except when their civil rights have been restored and provided state law does not expressly prohibit firearm possession by the convicted felon). The new gun ban extends that disqualification to persons convicted of a crime of domestic violence, even if the predicate conviction is a misdemeanor at state law.

The new law gives the domestic violence misdemeanant two new statutory defenses to the validity of the predicate conviction. The misdemeanor conviction cannot serve as the predicate for the federal firearms offense unless 1) where a jury trial was available, the case was tried to a jury or the right to a jury was knowingly and intelligently waived, and 2) the person was represented by counsel or knowingly and intelligently waived the right to counsel.

The misdemeanor conviction can serve as the predicate for the federal firearms offense only if the crime includes an element requiring proof of "the use or attempted use of physical force, or the threatened use of a deadly weapon."

This report explores issues concerning the constitutionality of the gun ban on domestic violence misdemeanants, with an emphasis upon possible *ex post facto* clause issues. It seems likely that the new law will survive constitutional attacks as applied to persons who consummate the federal offense after the change in the law takes effect. The law may be vulnerable to an *ex post facto* challenge if prosecution is attempted against a person in lawful possession of a firearm before the effective date who merely continues possession of the same firearm after the effective date without any notice of the change in the law.

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GUN BAN FOR PERSONS CONVICTED OF MISDEMEANOR CRIME OF DOMESTIC VIOLENCE: EX POST FACTO CLAUSE AND OTHER CONSTITUTIONAL ISSUES

The Omnibus Consolidated Appropriations Act for Fiscal 1997, P.L. 104-208, amended the Criminal Code to add a ninth category to the list of persons disqualified by federal law from shipping, transporting, receiving, or possessing any firearm or ammunition that has moved in interstate or foreign commerce.¹ The new category consists of persons who have in the past been convicted of a "misdemeanor crime of domestic violence," as defined in an amended Section 921(a) of title 18 U.S.C. (hereafter: "domestic violence misdemeanants"). It is also unlawful for any person knowingly to sell or otherwise dispose of any firearm or ammunition to a domestic violence misdemeanant.

This report explores issues concerning the constitutionality of the gun ban placed on domestic violence misdemeanants, with an emphasis upon the constitutionality of retrospective application to persons who lawfully acquired firearms before the effective date of P.L.104-208, but continue to possess the same firearm after the new gun ban came into effect.

BACKGROUND

The gun ban for persons convicted of a misdemeanor crime of domestic violence, although enacted as part of the omnibus appropriations act for fiscal 1997, originated with a similar proposal introduced by Senator Lautenberg, March 21, 1996 (S. 1632). Representative Torricelli introduced a companion bill on May 14, 1996 (H.R. 3455). No hearings were held on either bill. The operative phrase in those bills ("crime involving domestic violence") was defined somewhat differently than the key phrase of the provision as enacted, but its general intent was to expand the federal list of persons disqualified from firearms possession, to include persons convicted of a crime of domestic violence, whether or not that crime is technically classified as a felony or a misdemeanor.

Federal law, of course, has long disqualified felons from acquiring or possessing firearms (except when their civil rights have been restored after any sentence has been served, and provided also that state law does not expressly prohibit firearms possession by the convicted felon after restoration of civil rights). The common purpose of S. 1632, H.R. 3455, and the new gun ban

¹ SEC. 658 of P.L. 104-208.

enacted by the appropriations act was to bring certain misdemeanants within the federal gun ban.

Unlike the law enacted, S. 1632 and H.R. 3455 would have also extended the gun ban to persons **under indictment** for a crime involving domestic violence. The law enacted is also narrower than the original proposals in other respects: the new law expressly requires, as an element of the predicate offense of a misdemeanor crime of domestic violence, the "use or attempted use of physical force, or the threatened use of a deadly weapon." Also, the law creates two statutory defenses to the validity of the predicate misdemeanor conviction (concerning availability of a jury and of counsel, or knowing and intelligent waiver of each) not proposed in the original bills.

SUMMARY OF THE DOMESTIC VIOLENCE MISDEMEANANT GUN BAN LAW

SEC. 658 of P.L.104-208 amends 18 U.S.C. §921(a)(new definition of "misdemeanor crime of domestic violence"), 18 U.S.C. §922(d) (prohibiting knowing sale or other disposition of any firearm or ammunition to domestic violence misdemeanor), and 18 U.S.C. §922(g) (prohibiting any person convicted of a misdemeanor crime of domestic violence from shipping, transporting, receiving, or possessing a firearm that has moved in interstate or foreign commerce).

Governmental entities (and their law enforcement officers) are specifically not exempted from the application of the new gun ban. 18 U.S.C. §925(a)(1).

Persons Disqualified from Gun Possession

The new law bans gun acquisition and possession by the new category of domestic violence misdemeanants. The federal firearms disqualification also applies to persons convicted of any crime punishable by imprisonment for more than one year (and, in the case of Section 922(d) offenses, persons indicted for such crimes); fugitives from justice; addicts or unlawful users of controlled substances; persons adjudicated as a mental defective or who have been committed to a mental institution; illegal aliens; persons dishonorably discharged from the military; former citizens who renounced United States citizenship; and persons under domestic violence or stalking restraining orders.

Removal of the Disqualification

If the misdemeanor conviction has been expunged or set aside, or if the person has been pardoned or has had civil rights restored, the firearms disqualification is removed, unless the pardon, expungement or restoration of civil rights expressly bans the person from shipping, transporting, possessing, or receiving firearms. Restoration of civil rights for felons has spawned substantial appeals of criminal convictions for firearms violations. Since few, if any, jurisdictions deprive misdemeanants of civil rights, this exception to the

gun ban presumably has less significance for the new category of misdemeanor offenders than for felons.

New Statutory Defenses

The new gun ban creates two new statutory defenses, which are designed to extend procedural protections normally available to those charged with felonies to persons charged with a misdemeanor crime of domestic violence.² As a defense to the validity of the predicate misdemeanor conviction, the new law provides that the prior misdemeanor conviction cannot be used as a predicate to the federal firearms offense unless 1) where a person was entitled to a jury trial, the case was tried by jury or the person knowingly and intelligently waived the right to a jury, and 2) the person was represented by counsel or knowingly and intelligently waived the right to counsel.

Since few misdemeanor offenses carry a right to a jury trial, the first statutory defense may not have much impact, although the availability of the defense may lead to innovative arguments about the constitutional necessity for jury trials for misdemeanor crimes of domestic violence.

The statutory defense concerning representation by counsel could serve to narrow significantly the persons subject to the gun ban for misdemeanor crimes of domestic violence. Since there is no constitutional right to counsel in misdemeanor cases, many misdemeanor defendants likely appeared without counsel and likely were not asked if they "waived" counsel. This defense should therefore significantly blunt the retrospective application of the misdemeanor gun ban.

Violent Nature of Predicate Misdemeanor

The misdemeanor conviction can serve as a predicate for the federal firearms offense only if the misdemeanor crime includes an element requiring proof of "the use or attempted use of physical force, or the threatened use of a deadly weapon." The required attempted use of physical force or threats with a deadly weapon should significantly narrow the class of persons who are subject to the new gun ban, at least until state laws are possibly amended to add the federal language to misdemeanor offenses. Of course, attempted use of physical

² Although persons charged with committing a felony are entitled to counsel, in accordance with the Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court has held that convicted felons cannot challenge the validity of the predicate conviction as a defense to firearms charges under 18 U.S.C. §922(g), even though the offender was not represented by counsel during the predicate felony proceeding. *Lewis v. United States*, 445 U.S. 55 (1980). The felon must challenge the validity of the predicate conviction in a collateral proceeding, or otherwise have the federal disability removed before taking possession of a gun. In allowing a statutory challenge to the predicate misdemeanor conviction during the firearms violation proceeding, the new law actually grants misdemeanants a defense not available to felons in possession of firearms.

force or threats with a deadly weapon presumably could have led to felony charges under state law. It seems possible, however, that some of those convicted of lesser misdemeanor offenses may not have been charged with offenses that satisfy the federal language for a misdemeanor predicate to a federal firearms violation.

Domestic Relationship of Victim and Offender

For the misdemeanor to serve as a predicate offense, it must be committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child; by a person who is or has cohabited with the victim as spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim. These categories seem broadly to cover virtually all domestic relationships except that children cannot be offenders if they committed a misdemeanor against parents or guardians.

CONSTITUTIONAL ISSUES

Ex Post Facto Clause

The new law is silent about retrospective application except that the offender must have been convicted of a misdemeanor crime of domestic violence as a predicate to being charged with a Section 922 federal firearms offense.

The Congress apparently intends that misdemeanor convictions that predate the new law can serve as the predicate for the federal offense. This interpretation of Section 922 offenses would be consistent, for example, with the application of the law to felons in possession of a firearm. The courts have ruled that 18 U.S.C. §922 does not punish or increase the penalty for the earlier felony, but regulates possession of firearms after the effective date of the act.³ Therefore, felony convictions that predate the effective date of the relevant law can be used as predicates for federal firearms offenses.

Both the Congress and the states are prohibited by the U.S. Constitution from legislating any *ex post facto* law.⁴ A law violates the *ex post facto* clause if it "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."⁵

³ *United States v. Matassini*, 565 F.2d 1297 (5th Cir. 1978)(interpreting 18 U.S.C. §1202(a)(1), the predecessor to §922(g)(1)).

⁴ "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. Art. I, §9, cl. 3. "No State shall pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..." U.S. Const. Art. I, §10, cl. 1.

⁵ *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1867).

The Supreme Court has identified two critical elements that must be present for a law to be held an *ex post facto* law: the law applies to events occurring before its enactment; and the law disadvantages the offender affected by it.⁶ "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."⁷

Under these standards, a misdemeanor crime of domestic violence can serve as the predicate conviction even though the crime was committed before the effective date of the new §922(d)(9) and §922(g)(9) firearms offenses. The law does not increase the penalty for the misdemeanor conviction. It regulates firearms acquisitions and possession that occur after the new law took effect.

It also seems clear that any violation of new §922(d)(9) and (g)(9) consummated after the effective date of these amendments can be prosecuted without transgressing the *ex post facto* clause. If a domestic violence misdemeanant ships, transports, or receives a firearm after the effective date of the new law, the *ex post facto* clause is not implicated, since the crime is clearly consummated after the effective date.

Gun possession is considered a continuing offense.⁸ Possession after the gun ban takes effect consummates the offense ordinarily.⁹ Felons are presumed to know their status as felons and are generally held liable if they possess a gun in violation of federal law.

Will domestic violence misdemeanants be held liable for gun possession that began before §922(d)(9) and (g)(9) took effect but continues after the effective date of the new law? While the answer is not clear, misdemeanants would seem better positioned than felons to invoke the *ex post facto* clause as a defense.

Unlike felons, there is no tradition in United States or English law of depriving misdemeanants of civil rights or barring misdemeanants from gun possession.¹⁰ The courts have identified a felon-in-possession of a firearm as

⁶ *Weaver v. Graham*, 450 U.S. 24 (1981).

⁷ 450 U.S. at 30.

⁸ *United States v. Waters*, 23 F.3d 29, 36 (2d Cir. 1994).

⁹ *United States v. Brady*, 26 F.3d 282, 291 (2d Cir. 1994) ("Regardless of the date of [defendant's]...conviction, the crime of being a felon in possession of a firearm was not committed until after the effective date of the statute under which he was convicted.")

¹⁰ However, a federal firearms conviction was upheld in *United States v. Ramos*, 961 F.2d 1003 (1st Cir. 1992), even though the predicate offense was a misdemeanor under state law, no civil rights were lost, and gun possession was lawful under state law. Federal law was violated because the misdemeanor offenses were punishable by
(continued...)

a person who poses a substantial risk that physical force will be used unlawfully,¹¹ but this finding has not been made about misdemeanants. One court summed up the reasons why felons who possess firearms pose greater risks than other groups: felons are more likely to use firearms in an irresponsible manner; felons are acutely aware that they are disqualified from firearm possession, making the act of firearm possession a knowing disregard for the law; and felons are more likely to commit crimes, which increases the likelihood that the firearm will be used violently. *United States v. Stinson*, 943 F.2d 1268, 1270 (11th Cir. 1991).

This propensity to criminal and violent behavior has not been attributed to misdemeanants as a class. Nor have misdemeanants had any reason to believe the law would prohibit them from possessing a firearm. Although knowledge of the law is not ordinarily a defense to criminal behavior, when the law departs from the traditional distinction between misdemeanants and felons, the fair notice principle underlying the *ex post facto* clause may apply. An argument can be made, therefore, that some misdemeanants have not been given "fair warning" of the change in federal law¹² that makes gun possession by them criminal under the new law, whereas their gun possession was lawful the day before the new law took effect. This defense, if available, would apply only to gun possession that began before the new law took effect and continued under the new law.

On the other hand, since the gun ban is limited to misdemeanants who committed a violent crime, the prosecution can argue that this category of misdemeanant has exhibited violent behavior similar to that of felons. This propensity to violence should arguably make the misdemeanant aware that the law might regulate their possession of firearms.

In summary, amended §922(d)(9) and (g)(9) would not seem subject to successful challenge in general as an *ex post facto* law, except that a successful challenge might arguably be made to the law as applied to a domestic violence misdemeanant in lawful possession of a firearm before the effective date of the amendment, who engages in no other act after the effective date than continuing possession of the same firearm.

¹⁰(...continued)

more than two years in prison. The defendant had been convicted in state court of assault and battery and violation of a protective order. He was sentenced to concurrent 10 day terms, which were suspended and he was given six months probation. These prior state convictions served as the predicate for the federal firearms offense, even without proof that defendant knew he would violate federal law by possessing a firearm. The government need only prove the predicate offense and knowing possession of a firearm, to convict someone under 18 U.S.C. §922(g)(1).

¹¹ *United States v. O'Neal*, 910 F.2d 663, 667 (9th Cir. 1990).

¹² *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

Equal Protection

Challenges to the federal firearms disqualification statute on the ground of the equal protection component of the Fifth Amendment's Due Process Clause¹³ have been unsuccessful. In *Lewis v. United States*, 445 U.S. 55 (1980), the Supreme Court applied the "rational basis" test in examining the constitutionality under the equal protection doctrine of the predecessor of §922(g) and (h) as applied to a convicted felon in possession of a firearm. The Court held that "Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."¹⁴

The lower federal courts have also resisted equal protection or due process challenges to the federal disqualification of certain persons from shipping, transporting, receiving, or possessing firearms. *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988). In *United States v. Karnes*, 437 F.2d 284 (9th Cir. 1971), the Ninth Circuit applied the rational basis test to uphold the gun ban as applied to someone dishonorably discharged from the military.¹⁵ The Eighth Circuit has rejected an equal protection challenge to the "felon" classification on the ground that the law makes no distinction between felons convicted of violent crimes and felons convicted of non-violent crimes. *Cody v. United States*, 460 F.2d 34, 36 (8th Cir. 1972); *United States v. Synnes*, 438 F.2d 764, 771-172 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972).

¹³ "No person shall ... be deprived of life, liberty, or property, without due process of law...." U.S. Const. Amend V.

¹⁴ 445 U.S. at 66. The Court upheld the felon's conviction of a firearms possession offense, even though the predicate felony conviction was subject to collateral attack through habeas corpus or coram nobis because the defendant had not been represented by counsel. The Court refused to allow a new form of "collateral attack" by permitting a challenge to the validity of the predicate conviction during the firearms prosecution. The defendant should have challenged the validity of the predicate conviction or otherwise removed his firearms disability before obtaining a firearm.

¹⁵ The Ninth Circuit even would have upheld the gun ban under the stricter "compelling governmental interest" test. There was an issue about interference with the right to employment, since the defendant was a machinist who repaired firearms. In a footnote, the court noted that the defendant had committed the military equivalent of a felony (desertion) and had been sentenced to 10 years in prison. Therefore, it said "there can be no doubt that absent other evidence the implicit finding that felons have a propensity for violence is clearly supportable." 437 F.2d at 289.

The courts have also upheld the firearms offense convictions of fugitives from justice¹⁶ and of persons adjudicated as a mental defective or formerly committed to a mental institution.¹⁷

On the basis of these precedents, it seems likely that the category of domestic violence misdemeanor would not be held a suspect classification under the equal protection component of the Due Process Clause.

Commerce Clause

The domestic violence misdemeanor gun ban amends two established federal firearms offense provisions that have been upheld in the face of challenges to the authority of the Congress under the Commerce Clause.

Section 922(g) contains an explicit commerce nexus. The government must prove either shipping or transporting "in interstate or foreign commerce," possession "in or affecting commerce," or receipt of any firearm or ammunition which has been shipped or transported "in interstate or foreign commerce." The Supreme Court invalidated the Gun Free School Zones Act (which did not have any commerce clause nexus as an element of the offense) in *United States v. Lopez*, 115 S.Ct. 1624 (1995). All of the federal courts of appeal to consider post-*Lopez* challenges under the Commerce Clause, have found explicit statutory references to "in or affecting commerce" sufficient to uphold the constitutionality of the federal law.¹⁸

Section 922(d), which bans sale or disposal of firearms to someone disqualified from acquiring or possessing firearms, does not contain an explicit reference to "in or affecting commerce." This statutory provision should also survive a post-*Lopez* Commerce Clause challenge because the courts have repeatedly held that selling firearms is an inherently commercial activity and the federal government can regulate even the intrastate sales by federally licensed dealers.¹⁹

¹⁶ *United States v. Ballentine*, 4 F.3d 504 (7th Cir. 1993)(knowledge of status as a fugitive is not an element of the offense of unlawful receipt of a firearm).

¹⁷ *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994).

¹⁸ *United States v. Gateward*, 84 F.3d 670 (3d Cir. 1996); *United States v. Wells*, 98 F.3d 808 (4th Cir. 1996)(citing cases from other circuits).

¹⁹ *United States v. Monteleone*, 77 F.3d 1086 (8th Cir. 1996).

Ninth and Tenth Amendments

It has become fairly common to challenge gun control laws under the residual clauses of the Ninth²⁰ and Tenth Amendments.²¹ Several of the post-*Lopez* decisions, after holding the federal statute valid as an exercise of congressional authority under the Commerce Clause, have also rejected challenges under the Tenth Amendment. *United States v. Collins*, 61 F.3d 1379 (9th Cir. 1995); *United States v. Andaverde*, 64 F.3d 1305 (9th Cir. 1995); *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996). The Fifth Circuit rejected a Ninth Amendment challenge to enhanced punishment for unlawful possession of a firearm. *United States v. Broussard*, 80 F.3d 1025 (5th Cir. 1996).

The Supreme Court has granted certiorari and heard oral arguments in Tenth Amendment challenges to the Brady Handgun Violence Prevention Act. *Printz v. United States* (argued December 3, 1996). The Brady Act has been challenged as an unconstitutional federal mandate to direct the activities of local law enforcement officers. Since the amendments of §922(d)(9) and (g)(9) do not impose any burdens on state or local officials, the Court's decision in the *Printz* case is not likely to have any affect on the constitutionality of the federal disqualification of domestic violence misdemeanants from acquiring or possessing firearms or ammunition.

CONCLUSION

The list of persons disqualified by federal law from acquiring or possessing firearms now includes persons convicted of a misdemeanor crime of domestic violence. The creation of two new federal offenses by P.L. 104-208's amendment of 18 U.S.C. §§922(d) and (g) breaks new ground. The amendments extend the federal firearms ban to misdemeanants who have not historically been deprived of civil rights or prohibited from possessing a gun.

The new gun ban seems likely to survive constitutional challenge generally. The new category of domestic violence misdemeanor does not seem likely to be considered a suspect classification under the rational basis test applied when considering equal protection clause claims. Challenges to constitutionality under the Commerce Clause, the Ninth, or the Tenth Amendment are not likely to succeed. The law also is not likely to be considered an *ex post facto* law, as applied to acquisition or possession of firearms consummated after the effective date. If, however, prosecution is attempted for an act of firearm possession that began before the effective date and continued after the change in the law, it seems possible that an *ex post facto* challenge may be successful

²⁰ "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. Amend. IX.

²¹ "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.

in this narrow case, at least in the case of a defendant without notice of the change in the law.