Fordham Urban Law Journal

Volume 29
Number 1 *Conference - Revolutions Within Communities: The Fifth Annual Domestic Violence Conference*

Article 8

2001

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Cover Page Footnote
J.D., Fordham University School of Law, 2001; B.A., College of Letters and Women's Studies, High Honors, Wesleyan University, 1998. I would very much like to thank Ann Moynihan, Associate Clinical Professor at Fordham University School of Law, for her invaluable assistance in the development and writing of this Comment. I would also like to thank Mary Ann Forgey, Assistant Professor in the Fordham University Graduate School of Social Services, for her aid, inspiration, and support. Finally, I would like to thank the editorial board and staff of the Fordham Urban Law Journal for their invaluable time and assistance.

EXAMINING THE LAUTENBERG AMENDMENT IN THE CIVILIAN AND MILITARY CONTEXTS: CONGRESSIONAL OVERREACHING, STATUTORY VAGUENESS, EX POST FACTO VIOLATIONS, AND IMPLEMENTATIONAL FLAWS

*Jessica A. Golden**

INTRODUCTION

Imagine a court reducing a domestic violence felony to a misdemeanor because the judge does not want to give a "noncriminal"[1] male a felony conviction *merely* for attacking his wife.[2] Imagine further that as a result of this judicial reluctance, the court sentences the defendant to serve his time only on weekends. The defendant is then released. Subsequently, he goes home and attacks his wife again. This time he attacks her with a gun. This time he kills her. Now imagine this man is a police officer or soldier who has sworn an oath to protect you,[3] or perhaps a next door neighbor, or a stranger you pass on the street.

When Congress passed the Lautenberg Amendment[4] to the Gun Control Act of 1968 ("Lautenberg Amendment" or "the Amend-

* J.D., Fordham University School of Law, 2001; B.A., College of Letters and Women's Studies, High Honors, Wesleyan University, 1998. I would very much like to thank Ann Moynihan, Associate Clinical Professor at Fordham University School of Law, for her invaluable assistance in the development and writing of this Comment. I would also like to thank Mary Ann Forgey, Assistant Professor in the Fordham University Graduate School of Social Services, for her aid, inspiration, and support. Finally, I would like to thank the editorial board and staff of the *Fordham Urban Law Journal* for their invaluable time and assistance.

1. 104 CONG. REC. S10378 (1996) [hereinafter Statement of Sen. Lautenberg] (proposing to Congress the Lautenberg Amendment to the Gun Control Act on September 12, 1996), *available at* 1996 WL 517928.

2. *Id.* The Record also states that in thirty states it is only a misdemeanor to beat one's wife or child. *Id.*

3. *See generally* Ashley G. Pressler, Note, *Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment*, 13 ST. JOHN'S J. LEGAL COMMENT 705, 711 n.32, 712 n.39 (1999). Law enforcement officials are a primary resource for abused women. Therefore, a woman cannot feel safe if those who are sworn to protect her are exempted from culpability for the same violent crimes from which she suffers. *Id.* at 712.

4. 18 U.S.C. § 922(g)(9) (2000).

ment") in September 30, 1996, it was with the express purpose of reducing scenarios like this one, of preventing that police officer, soldier, neighbor, or stranger from committing gun-related domestic violence.[5]

The Lautenberg Amendment states that:

> it shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[6]

Citing national domestic violence statistics including the percentage of domestic violence homicides involving firearms each year,[7]

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5. The Lautenberg Amendment passed by a vote of ninety-seven to two in the Senate. S. 1632, 104th Cong. (1996) (enacted). President Clinton signed the Amendment into law four months later as part of the 1997 Consolidated Omnibus Appropriations Act, Pub. L. 104-208, 110 Stat. 3009, 3009-3172 (1999).

6. 18 U.S.C. § 922(g)(9). A "misdemeanor crime of domestic violence" is defined as a crime constituting a misdemeanor under federal or state law that:

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

18 U.S.C. § 921(a)(33)(A)(i)-(ii) (2000). A person is considered "convicted" of the misdemeanor offense if:

> the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and . . . [where applicable,] the case was tried by a jury, or . . . the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise . . . . A person shall not be considered to have been convicted of such an offense . . . if the conviction has been expunged or set aside, or is an offense for which a person has been pardoned or has had civil rights restored . . . unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

8 U.S.C. § 921(a)(33)(B)(i)-(ii) (2000).

7. A woman is beaten every fifteen seconds by her husband or boyfriend. 104 CONG. REC. S12341 (statement of Sen. Dodd quoting FBI crime statistics). *See generally* KAREN BROCK, MPH, VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 1997 HOMICIDE DATA 1 (1999), *available at* http://www.vpc.org (stating that fifty-two percent of female homicides were committed with firearms in 1997); NANCY A. CROWELL & ANN. W. BURGESS, UNDERSTANDING VIOLENCE AGAINST WOMEN 26 (1996); James Bovard, *Disarming Those Who Need Guns Most*, WALL ST. J., Dec. 23, 1996, at A12 (stating that an estimated 100,000 to 150,000 Americans are convicted of domestic violence each year). This is a higher percentage than homicides committed with all other weapons combined. Seventy-seven percent of firearm homicides were committed with handguns. OFFICE OF WOMEN'S HEALTH REPORT, DOMESTIC VIOLENCE FACTS, http://www.bhpc.hrsa.gov/omwh/#3 (last vis-

Senator Lautenberg intended to close a dangerous loophole in the Gun Control Act enabling domestic violence offenders to evade an additional felony conviction for gun possession by getting domestic violence felony charges reduced to misdemeanors.[8] Senator Lautenberg sought to secure the same protection for the family of a domestic violence misdemeanant as was theoretically provided the family of a domestic violence felon through existing law.[9] The Lautenberg Amendment, therefore, subjects domestic violence misdemeanants to the same restrictions[10] faced by prior convicted felons, making it a felony for domestic violence misdemeanants to ship, transport, or possess a weapon in or affecting interstate commerce.[11]

However, while the Lautenberg Amendment mirrors the Gun Control Act in making gun possession a felony, its scope is broader. The Lautenberg Amendment precludes the Gun Control Act's public interest exception[12] exempting governmental agencies

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ited Apr. 18, 2001) (stating that firearms are frequently the "weapons leading to mortality rates of women killed by their spouses, boyfriends or others").

8. Statement of Sen. Lautenberg, *supra* note 1.

9. Prior convicted felons cannot ship, transport or posses a weapon in or affecting interstate commerce. 18 U.S.C. § 921 (2000); Statement of Sen. Lautenberg, *supra* note 1, at S10379. Senator Wellstone (D. Minn.) spoke in support of the Lautenberg Amendment, emphasizing the need to correct the flawed state of the law prior to Lautenberg that imposed a harsher sentence on a defendant who committed a crime of violence against a stranger, than on a defendant who committed that same crime against a family member: "If you beat up or batter your neighbor's wife, it's a felony. If you beat up or batter or brutalize your own wife or your child, it is a misdemeanor." *Id. See generally id.* (stating that two-thirds of domestic violence murders involve firearms, and that a gun is present in 150,000 cases of abuse). Senator Lautenberg claimed that "all too often, the only difference between a battered woman and a dead woman is the presence of a gun." *Id.* at S10378.

10. The maximum statutory sentence for possessing a firearm after being convicted of a misdemeanor crime of domestic violence is ten years. This sentence may accompany a fine of up to $250,000. 18 U.S.C. §§ 922(g)(9), 924 (a)(2) (1994).

11. 18 U.S.C. § 921 (2000). As discussed later in this Comment, no law suits have successfully challenged the constitutionality of the Lautenberg Amendment through a commerce clause argument, but the matter is still hotly debated.

12. 18 U.S.C. § 925 (a)(1) (1968) (amended 1997). The exception exempted "any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof." *Id.* However, it is not entirely clear if Senator Lautenberg intended to preclude this exception. The preclusion may have been introduced by opponents of the bill in the effort to weaken the legislation prior to the vote in Congress. Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 838 (2000); David Pace, ASSOCIATED PRESS POL. SERV. (1997), 1997 WL 2492802 (stating that "Lautenberg charged . . . that Republicans acted 'in the dark of the night' during negotiations last fall to remove the exemption so the new law would contain a 'poison pill' that would generate public opposition and give them a chance to later repeal it.").

from the Gun Control Act.[13] Therefore, the Amendment applies to, and has great potential to impact both police and the military.[14]

With the Lautenberg Amendment, Congress rightly prioritized the need to reduce gun-related domestic violence nationwide. However, while this underlying idea is fundamental to domestic safety, the Lautenberg Amendment is possibly unconstitutional.[15]

Congress may have impermissibly abused its Commerce Clause authority in passing the Lautenberg Amendment.[16] This conclusion is supported by the United States Supreme Court's recent de-

13. Such governmental agencies include the military and the state police. Captain E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, 2000 ARMY LAW. 3, 3 (2000). Police and the military have traditionally been exempt from federal gun control laws due to the need to foster public safety. *Id.* The Lautenberg Amendment is the first to preclude such an exception.

14. As discussed later in this Comment, many challenges to the constitutionality of the Lautenberg Amendment have come from police or military personnel who believe that the Amendment was passed directly to affect their jobs and that the Amendment disproportionately affects their job security. Jonathan Kerr, *Critics Say Anti-Domestic Violence Amendment Takes Shot at Police*, WEST'S LEGAL NEWS, (Dec. 2. 1996), 1996 WL 684742; *see also LA Cops Challenge New Domestic-Abuse Gun Ban*, WEST'S LEGAL NEWS, (Jan. 2, 1997), 1997 WL 706.

15. The primary challenges to the Amendment have been on grounds of violating the Commerce Clause, U.S. CONST. art. I, § 8; the Ex Post Facto Clause, U.S. CONST. art.1, § 10; and the Fifth, Tenth, and Second Amendments, U.S. CONST. amend. II, V, IX. The applicable portion of the Fifth Amendment, passed in 1791, states that "no person shall be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. The Equal Protection Clause of the Fourteenth Amendment impliedly present in the Fifth Amendment also applies to this analysis. U.S. CONST. amend. XIV. The Tenth Amendment, passed in 1791, states that "[t]he 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. The Second Amendment, passed in 1791, states "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. This comment will not discuss a Second Amendment challenge, however, because "[i]t is well established that the Second Amendment does not create an individual right . . . [but] 'preserves a collective, rather than individual, right.'" United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000) (citing Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995)). The *Napier* court further stated that "[e]very circuit court which has had occasion to address the issue has upheld § 922 generally against challenges under the Second Amendment." *Id.* (citing United States v. Chavez, 204 F.3d 1305, 1313 N.5 (11th Cir. 2000)); United States v. Waller, 218 F.3d 856, 857 (8th Cir. 2000); Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999); Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir. 1999); United States v. Smith, 171 F.3d 617, 624 (8th Cir. 1999); United States v. Mack, 164 F.3d 467, 473 (9th Cir. 1999). All constitutional challenges under the Ex Post Facto Clause and the Fifth, Tenth, and Second Amendments have thus far failed.

16. Under Article 1, § 8 of the United States Constitution, Congress has the authority to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8.

cision in *United States v. Morrison*,[17] where the Court struck down the civil remedies provision of the Violence Against Women Act[18] due to an impermissible overstepping by Congress under the Commerce Clause.[19] In light of *Morrison*, a rebirth of suits challenging the constitutionality of the Lautenberg Amendment could occur.

Due to the definitional vagueness of the terms in the Lautenberg Amendment, the statute may also violate the Due Process Clause of the Constitution.[20] Further, in the military setting, the Lautenberg Amendment possibly constitutes an impermissible ex post facto law because of its solely punitive effects.[21] Even if the Lautenberg Amendment is constitutional, the Amendment's definitional vagueness and inherent structural and implementational flaws render it ineffective.[22]

Part I of this Comment examines the Commerce Clause (and Tenth Amendment) challenges[23] to the Lautenberg Amendment. It provides the history of cases thus far failing to successfully challenge the constitutionality of the Lautenberg Amendment. It then discusses the Supreme Court's decision in *Morrison*, that struck down the civil remedies provision of the Violence Against Women Act ("VAWA" or "VAWA provision") as a violation of the Commerce Clause.[24] Applying the *Morrison* rationale to the Lautenberg Amendment, this Comment concludes that Congress may have violated its Commerce Clause authority by passing the Lautenberg Amendment.

Part II examines the Due Process Clause challenge to the Lautenberg Amendment, discussing case law representing both

17. United States v. Morrison, 529 U.S. 598 (2000).

18. Violance Against Women Act, 42 U.S.C. § 13981 (2000).

19. *Morrison*, 529 U.S. 598, 615 (rejecting Congress's rationale for the civil remedies provision because violence against women lacked the necessary nexus to interstate commerce, which if accepted "would allow Congress to regulate any crime as long as the nationwide, aggregated impact has substantial effects on employment, production, transit, or consumption"). *Infra* Part IB.

20. *Infra* Part II.

21. An ex post facto law makes illegal an action that was legal when taken. Calder v. Bull, 3 U.S. 386, 390 (1798). Ex post facto laws violate the Constitution. *Id.* For a definition of "ex post facto" law, see Part III of this comment. For a discussion of the Lautenberg Amendment as an ex post facto law in the military context, see *infra* Part (III)(B).

22. *Infra* Part V.

23. In this section, the Commerce Clause and Tenth Amendment challenges are discussed together because if a court finds Congress acted within its powers under the Commerce Clause then the action taken by Congress necessarily does not violate states' rights under the Tenth Amendment. United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997); *see also* New York v. United States, 505 U.S. 144, 156 (1992).

24. United States v. Morrison, 529 U.S. 598, 617 (2000).

sides of the issue. Although courts have upheld the constitutionality of the Lautenberg Amendment under the Due Process Clause, the Lautenberg Amendment could be characterized as unconstitutionally vague. Further, as Judge Posner noted in his dissent in *United States v. Wilson*, it may be unjust to convict someone of a crime when that person had no knowledge his actions were wrongful. If this is true, the Lautenberg Amendment violates the Due Process Clause.

Part III of this Comment analyzes the Ex Post Facto Clause challenge to the constitutionality of the Lautenberg Amendment. It examines this challenge in both the civilian and military settings and concludes that while the Lautenberg Amendment may not be characterized as an impermissible ex post facto law in the civilian context, it could be so construed in the military context. Therefore, this Part argues that the Lautenberg Amendment should be amended to except the military from its reach.

Part IV provides the history of cases raising an Equal Protection Clause challenge to the Lautenberg Amendment — cases which have thus far failed. Part V examines further weaknesses with respect to the Amendment's implementation and enforcement. This part argues that flaws inherent in the Amendment's language render the Lautenberg Amendment incapable of reducing nationwide gun-related domestic violence in either civilian or military settings.

This Comment concludes that to successfully reduce domestic violence incidents involving firearms, Congress needs to reexamine and rework the Lautenberg Amendment. Even if the Lautenberg Amendment is constitutional, Congress needs to provide further guidance in how the Amendment should be implemented. In addition, Congress must increase public awareness of the Amendment for it to be effective. If Congress does not take these steps, the Lautenberg Amendment will fail to achieve its intended goals.

I. COMMERCE CLAUSE (AND TENTH AMENDMENT) CHALLENGES TO THE LAUTENBERG AMENDMENT

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress has the authority to "regulate Commerce with foreign Nations, and among the several States."[25] In 1995, in *United States v. Lopez*, the Supreme Court elaborated on the power of

25. U.S. CONST. art. I, § 8, cl.3 .

Congress under the Commerce Clause.[26] The *Lopez* Court identified three categories of activity Congress can permissibly regulate under its commerce power:

> First, Congress may regulate the use of the channels of interstate commerce . . . . Second, Congress is empowered 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 . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.[27]

In *Lopez*, the Court struck down the Gun-Free School Zones Act (the "Act"),[28] finding the Act an impermissible overextension of Congress's Commerce Clause authority.[29] First, the Court concluded the Act was a "criminal statute that . . . has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[30] Thus, the "noneconomic, criminal nature" of possessing guns in school zones was key to the Supreme Court's decision to strike the Act down.[31] Second, the statute lacked the requisite "jurisdictional element"[32] necessary to connect possessing firearms in a school zone with interstate commerce.[33]

In *Lopez*, the Supreme Court rejected the government's attempt to link gun-related violence in school zones with interstate com-

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26. United States v. Lopez, 514 U.S. 549 (1995).

27. *Id.* at 558-59.

28. *Id.* at 567. The Gun-Free School Zones Act of 1990 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." 18 U.S.C. § 922(q)(2) (2000). *See also* 18 U.S.C. § 921(a)(25) (2000) (defining "school zone" under the statute); 18 U.S.C. § 922 (q)(1)(A) (describing the nationwide pervasive gun problem).

29. *Id.* at 561. The *Lopez* decision marks the first time the Supreme Court struck down Commerce Clause legislation since 1936. Eric Andrew Pullen, *Guns, Domestic Violence, Interstate Commerce, and the Lautenberg Amendment: "Simply Because Congress May Conclude that a Particular Activity Substantially Affects Interstate Commerce Does Not Necessarily Make it So,"* 39 S. TEX. L. REV. 1029, 1040 (1998).

30. *Lopez*, 514 U.S. at 561. The government unsuccessfully argued that gun possession leads to violent crime and that violent crime effects the national economy in two ways: (1) there are substantial costs of violent crime, which the population must account for through insurance costs; and (2) violent crime reduces the willingness of people to travel within specific areas perceived to be unsafe. *Id.* at 563-64. The government also unsuccessfully argued that allowing guns in a school zone would adversely impact the educational process, thus producing a "less productive citizenry." *Id.* at 564.

31. *Morrison*, 529 U.S. 598, 610 (2000).

32. *Lopez*, 514 U.S. at 561-62.

33. *Id.*

merce. The Court found the government's "costs of crime" and "national productivity" arguments would "permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[34] To allow such arguments, the Court reasoned, would eliminate any limitation on federal power under the Commerce Clause.[35] The Supreme Court thus struck down the Act, concluding that the Act's legislative history and congressional findings were insufficient to demonstrate that possessing guns in a school zone effected interstate commerce.[36]

A. Applying *Lopez* to The Lautenberg Amendment

In the context of the Lautenberg Amendment, the relevant portion of the Commerce Clause, as in *Lopez*, relates to Congress's authority to regulate activities having a "substantial relation" to interstate commerce.[37] To prevail in a Commerce Clause challenge, the government need only demonstrate a slight effect of a particular activity on interstate commerce.[38] Therefore, a Lautenberg Amendment convictions will be upheld where the government can show the firearm possessed by a domestic violent misdemeanant at the time of arrest was, at some point, in or affecting interstate commerce.[39]

Opponents of the Lautenberg Amendment have attempted to use *Lopez* to prove that the Lautenberg Amendment violates the Commerce Clause because there is no substantial relation between firearms possessed by domestic violence misdemeanants and interstate commerce.[40] So far, such challenges have been unsuccessful.[41]

In *Gillespie v. Indianapolis*,[42] the Seventh Circuit distinguished the Lautenberg Amendment from the Gun-Free School Zones Act struck down in *Lopez*. The court held the Lautenberg Amendment to be constitutional because, unlike the Gun Free School Zones

34. *Id.* at 564.
35. *Id.*
36. *Id.* at 567-68.
37. *Id.* at 559.
38. United States v. Farnsworth, 92 F.3d 1001, 1006 (10th Cir. 1996).
39. 18 U.S.C. § 922(g)(9) (2000).
40. *E.g.*, Nat'l Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1572 (N.D. Ga. 1997), *aff'd sub. nom* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998); Fraternal Order of Police v. United States, 981 F. Supp. 1, 4 (D.D.C. 1997).
41. *E.g., Barrett*, 968 F. Supp. at 1572; *Fraternal Order of Police*, 981 F. Supp. at 4.
42. Gillespie v. Indianapolis, 185 F.3d 693 (7th Cir. 1999).

Act, the Amendment contains a jurisdictional element requiring a domestic violence misdemeanant to have a firearm "in or affecting commerce."[43] Given this requisite jurisdictional element, the court ruled Congress did not violate the Commerce Clause in enacting the Lautenberg Amendment.[44]

The *Gillespie* Court therefore concluded the defendant's Tenth Amendment claim also failed because Congress had acted within its Commerce Clause authority[45] and the Lautenberg Amendment "works no change upon state laws concerning domestic violence . . . [but] simply attaches a new federal consequence to a state conviction with respect to the possession of firearms in or affecting interstate commerce."[46] Similar Tenth Amendment challenges to the Lautenberg Amendment have also failed.[47]

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43. *Id.* at 704.

44. *Id.* A majority of Lautenberg cases discussing the Commerce Clause challenge have also reached this conclusion. Fraternal Order of Police v. United States, 173 F.3d 898, 907 (D.C. Cir. 1999); United States v. Smith, 101 F.3d 202, 215 (1st Cir. 1996); United States v. Gateward, 84 F.3d 670, 672 (3d Cir. 1996); United States v. Wells, 98 F.3d 808, 810-11 (4th Cir. 1996); United States v. Rawls, 85 F.3d 240, 242 (5th Cir. 1996); United States v. Turner, 77 F.3d 887, 889 (6th Cir. 1996); United States v. Lewis, 100 F.3d 49, 52 (7th Cir. 1996); United States v. Barry, 98 F.3d 373, 378 (8th Cir. 1996); United States v. Nguyen, 88 F.3d 812, 820-821 (9th Cir. 1996); United States v. McAllister, 77 F.3d 387, 390 n.4 (11th Cir. 1996); United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995); United States v. Bolton, 68 F.3d 396, 400 (10th Cir. 1995); United States v. Boyd, 52 F. Supp. 2d 1233, 1236 (D. Kan. 1999), *aff'd*, 211 F.3d 1279 (10th Cir. 2000) (rejecting defendant's reliance on *Lopez* and concluding that the jurisdictional element present in the Gun Control Act defeats the Commerce Clause challenge).

In *United States v. Meade*, 175 F.3d 215 (1st Cir. 1999), the court further emphasized this conclusion, stating, "It is true . . . that courts regularly have upheld the use of a case-by-case jurisdictional element . . . as a means of satisfying the required nexus with interstate commerce, and, thus, bringing federal legislation within the shelter of the Commerce Clause." *Id.* at 224; *see also* United States v. Joost, 133 F.3d 125, 131 (1st Cir. 1998); United States v. Pierson, 139 F.3d 501, 502-03 (5th Cir. 1998); United States v. Cunningham, 161 F.3d 1343, 1345-47 (11th Cir. 1998).

45. *Supra* note 23; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); United States v. Wright, 128 F.3d 1274, 1276 (8th Cir. 1997).

46. *Gillespie*, 185 F.3d at 706 n.7.

47. *E.g.*, *Fraternal Order of Police*, 173 F.3d at 907. The Fraternal Order of Police unsuccessfully argued that the Lautenberg Amendment "unconstitutionally restricts states' power to determine police officers' 'qualifications for office,' . . . by prohibiting domestic violence misdemeanants from holding law enforcement positions requiring the use of firearms." *Id.* This argument failed because the *Fraternal Order* court reasoned that the Supreme Court "no longer reads the Tenth Amendment as forbidding such regulation, relegating to the political process the states' protection from undue intrusion in this form." *Id.* (citing South Carolina v. Baker, 485 U.S. 505, 511 (1988); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-54 (1985)).

B. Possible Rebirth of the Commerce Clause Challenge to the Lautenberg Amendment Under *Morrison*

Although the Supreme Court limited Congress's Commerce Clause authority in *Lopez*,[48] subsequent cases have continued to uphold the Lautenberg Amendment as a permissible use of Commerce Clause authority.[49] However, in 2000, in *United States v. Morrison*,[50] the Supreme Court once again emphasized the limits of Congressional authority under the Commerce Clause. In *Morrison*, the Court struck down the civil remedies provision of the Violence Against Women Act.[51] This reemphasis on limiting Congress's Commerce Clause authority may influence courts to reanalyze the constitutionality of the Lautenberg Amendment.

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48. *Lopez*, 514 U.S. at 558-59.

49. *Supra* Part (I)(A). Again, courts have differentiated Lautenberg cases from *Lopez* primarily by pointing to the jurisdictional language in the Amendment limiting its scope to firearms "in or affecting interstate commerce." *Supra* note 44. Such jurisdictional limitation was not present in the Gun-Free School Zones Act of 1990. *Lopez*, 514 U.S. at 561.

50. *Morrison*, 529 U.S. at 598 (2000).

51. 42 U.S.C. § 13981(b) (1994) (providing a federal civil remedy for victims of gender-motivated violence). The stated purpose of the provision was to "protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a). Therefore,

> [a] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(c) (1994).

In defining the statutory provisions, the term "crime of violence motivated by gender" is "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). The term "crime of violence" is defined as:

> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . . and (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom the action is taken.

42 U.S.C. § 13981(2)(A)-(B).

1. *The Facts of* Morrison

The *Morrison* case involved a college student, Christy Brzonkala, who attended Virginia Polytechnic Institute ("VPI" or the "University"), beginning in September 1994.[52] During her first semester, she met two members of the football team, Antonio Morrison and James Crawford.[53] Brzonkala alleged that within thirty minutes of meeting her, the two men assaulted and repeatedly raped her.[54] Brzonkala consequently suffered from severe emotional trauma, stopped attending classes, and withdrew from the University.[55] In 1995, Brzonkala filed a complaint against Morrison and Crawford under the Sexual Assault Policy of the University.[56] The judicial committee found Morrison guilty of sexual assault, but lacked sufficient evidence to punish Crawford.[57]

In July, 1995, Morrison planned to appeal the conviction in a court challenge of the school's sexual harassment policy.[58] The University then held a second hearing under its policy, which at the time of the first hearing had not been widely disseminated to the students.[59] The judicial committee again found Morrison guilty, and he again received a two month suspension from the University.[60] At this second sentencing, however, Morrison was not found guilty of "sexual assault," but only of "using abusive language."[61]

Morrison again appealed,[62] and on August 21, 1995, the University set aside the conviction, finding it excessive in comparison to prior cases prosecuted under the policy.[63] In December 1995, Brzonkala sued Morrison, Crawford, and the University in the United States District Court for the Western District of Virginia.[64] She alleged that the attack on her by Morrison and Crawford violated the Violence Against Women Act.[65] Morrison and Crawford moved to dismiss, arguing that the VAWA civil remedies provision

52. *Morrison*, 529 U.S. at 602-03.
53. *Id.*
54. *Id.*
55. *Id.* at 603.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

was unconstitutional. The United States intervened to argue that the VAWA civil remedies provision was constitutional.[66]

The district court dismissed Brzonkala's case, finding that although Brzonkala had successfully stated a claim against the defendants under VAWA, Congress lacked the authority to enact VAWA's civil remedy provision under the Commerce Clause or Fourteenth Amendment.[67] The United States Court of Appeals for the Fourth Circuit affirmed the Lautenberg district court's conclusion that Congress lacked constitutional authority to enact the VAWA provision, and reversed the district court's decision, recognizing the validity of Brzonkala's VAWA claim.[68] On a rehearing en banc, the United States Court of Appeals for the Fourth Circuit vacated its earlier decision and reaffirmed the district court.[69] Brzonkala appealed and the Supreme Court granted certiorari.[70]

2. *The Supreme Court's Reasoning in* Morrison*: Reaffirming* Lopez

As the Supreme Court stated in *Lopez*, to strike down congressional legislation, there must be a plain showing that Congress exceeded its constitutional bounds.[71] A presumption of constitutionality exists for Congressional legislation.[72] Nevertheless, Congress's regulatory authority under the Commerce Clause is not unlimited.[73]

In challenging the VAWA provision's constitutionality, the defendants in *Morrison* used *Lopez* to argue that Congress failed to demonstrate the substantial jurisdictional tie between violent gender-motivated crime and interstate commerce.[74] The *Morrison* court agreed, finding that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[75] Therefore,

66. *Id.*

67. *Id.* at 604 (citing Brzonkala v. Va. Polytechnic and State Univ., 935 F. Supp. 779, 801 (W.D. Va. 1996)).

68. Brzonkala v. Va. Polytechnic and State Univ, 132 F.3d 949, 974 (4th Cir. 1997).

69. Brzonkala v. Va. Polytechnic and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc).

70. *Morrison*, 529 U.S. at 598.

71. *Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring); United States v. Harris, 106 U.S. 629, 635 (1883).

72. *Lopez*, 514 U.S. at 577-78; *United States v. Harris*, 106 U.S. 629, 635 (1883).

73. *Morrison*, 529 U.S. at 608.

74. *Lopez*, 514 U.S. at 561; *supra* note 30 (discussing the government's arguments attempting to demonstrate the connection between gender motivated violence and interstate commerce).

75. *Morrison*, 529 U.S. at 607.

though the Court was satisfied by the congressional findings showing the serious impact of gender-motivated violence on victims, such findings were not sufficient to "sustain the constitutionality [of the VAWA provision as] Commerce Clause legislation."[76] The Court concluded that in passing VAWA, Congress had not limited itself to regulating economic activities.[77] Therefore, Congress overstepped its authority in enacting the VAWA civil remedies provision.[78]

In *Morrison*, the Court thus reemphasized its conclusion in *Lopez* that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[79] If the Court upheld the VAWA provision, Congress could "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[80] The Court was rightly not willing to accept this overbroad delineation of Congressional authority under the Commerce Clause.

3. *Applying* Morrison *in the Lautenberg Amendment Context*

A notable case applying *Morrison* to the Lautenberg debate is *United States v. Bunnell*.[81] In *Bunnell*, the defendant used *Morrison* to argue, among other unsuccessful claims, that the Lautenberg Amendment is an unconstitutional overreaching of Congressional

76. *Id.* at 608. The government unsuccessfully argued a "but-for" causation analysis; gender-motivated violence affects 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; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

Id. (citing H.R. Rep. No. 103-711, at 385 (1994)).

77. *Id.* at 607.

78. *Id.* at 610.

79. *Id.* at 608 (citing *Lopez*, 514 U.S. at 557 n.2). The Court also feared a complete "obliterat[ion of] the Constitution's distinction between national and local authority" if it accepted the government's rationale for upholding VAWA. *Id.* (citing *Lopez*, 514 U.S. at 564). Further, the government's reasoning would allow Congress to delve into other traditionally state-regulated areas, such as family law. *Id.* at 609. This would open the floodgates to the justification of Congressional regulation in many other areas of law as well. *Id.*

80. *Id.* at 608-09.

81. United States v. Bunnell, 106 F. Supp. 2d 60 (D. Me. 2000) (holding that Congress did not abuse its Commerce Clause authority in creating the Lautenberg Amendement, which prohibits a person subject to a domestic violence restraining order from possessing a firearm).

power under the Commerce Clause.[82] He argued that the *Morrison* decision extended *Lopez*, thus invalidating the statute.[83]

However, the *Bunnell* Court noted that in *Morrison*, the Supreme Court did not address the criminal penalties in VAWA, but only the civil remedies provision.[84] Therefore, the court held, under *Morrison*, the "exten[sion]"[85] of *Lopez* does not apply in a criminal context.[86] Looking to earlier Lautenberg Amendment cases for guidance, the *Bunnell* court concluded the Lautenberg Amendment has "both a specific jurisdictional element as well as a substantial effect on interstate commerce" and therefore is a "constitutional exercise of Congress' power under the Commerce Clause."[87]

As the *Bunnell* court recognized, courts have not, thus far, specifically addressed the "exten[sion]"[88] of *Lopez* in the criminal context.[89] Although the *Bunnell* court found *Morrison* does not apply in the criminal context,[90] this is only one decision from a district court in Maine. Further, the court did not definitively conclude *Morrison* could not apply in the criminal context, but only that the Supreme Court, thus far, had only applied it in a civil context.[91]

Courts, therefore, should recognize *Morrison* as a restatement by the Supreme Court of the limits on Congress's Commerce Clause authority in both civil *and* criminal contexts. Courts should use *Morrison* in the criminal context to find the Lautenberg Amendment a violation of the Commerce Clause.

In a majority of Lautenberg Amendment cases, courts have concluded the presence of the requisite jurisdictional nexus alone is sufficient to overcome the Commerce Clause challenge.[92] In *Lopez*, however, the Supreme Court pointed both to the absence of a jurisdictional nexus *and* the non-economic nature of the regulated activity as constitutional defects causing the Court to overturn the statute.[93] The Court did not suggest the presence of one of these elements alone would satisfy Commerce Clause requirements.

82. *Id.* at 64.
83. *Id.* at 65.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *See id.*
92. *Supra* Part (I)(A).
93. 514 U.S. at 561, 559-68.

Rather, in *Morrison*, the Supreme Court specifically stated the presence of only one element, the data relating to the impact of gender-motivated violence on victims, did *not* satisfy the Commerce Clause in the absence of the other element, the jurisdictional nexus.[94] Based on *Lopez* and *Morrison*, courts cannot determine a statute to be constitutional due to the presence of only one element.[95] In deciding if the Lautenberg Amendment is constitutional, courts are incorrect in concluding the presence of the jurisdictional nexus alone is sufficient to satisfy the Commerce Clause.[96]

Furthermore, the de minimis requisite jurisdictional nexus present in the Amendment perpetuates the overbroad Congressional Commerce Clause authority the Supreme Court sought to limit in both *Lopez* and *Morrison*. Merely adding the words "in or affecting commerce" to a statute should not be sufficient to make the statute constitutional under the Commerce Clause.[97] If all that is required is a de minimis showing of relation to interstate commerce based on possessing a firearm, there is nothing to prevent Congress from also regulating the possession of other items otherwise legally owned.[98]

Congress should not be permitted to use the Commerce Clause as a catch-all provision to pass laws simply by including a de minimis requirement in a statute. To ensure that the Commerce Clause is "not without effective bounds,"[99] courts nationwide should recognize the impact of *Morrison* in the Lautenberg Amendment context and the need to limit Congress's Commerce Clause authority.

Congress should be required to demonstrate a more coherent, viable nexus between the regulated activity and its affect on commerce before having the authority to implement national policy. A mere de minimis showing is not adequate, especially given the Su-

94. United States v. Morrison, 529 U.S. 598 (2000).

95. *Lopez*, 514 U.S. at 561; *id.*

96. Although, in the Lautenberg context, given the breadth of statistics relating to firearms and domestic violence, the presence of this element will not likely be disputed.

97. As previously discussed, the Supreme Court in *Lopez* stated that "'[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Lopez*, 514 U.S. at 557 n.2 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311 (1981)).

98. United States v. Wilson, 159 F.3d 280, 294 (7th Cir. 1998); United States v. Ficke, 58 F. Supp. 2d 1071, 1074 (D. Neb. 1999).

99. United States v. Morrison, 529 U.S. 598, 608 (2000).

preme Court's concerns about maintaining a distinction between national and state regulatory authority.[100]

Further, the jurisdictional nexus found in the Lautenberg Amendment relates to whether the firearm itself was "in or affect[ed] commerce."[101] This element alone was not sufficient in *Lopez* to uphold the constitutionality of the Gun-Free School Zones Act,[102] and should not be sufficient in the Lautenberg Amendment context. To allow this rationale would perpetuate the overbroad regulatory authority of Congress the Supreme Court seeks to avoid.[103]

II. THE DUE PROCESS CLAUSE CHALLENGE

While several district court cases have found the Lautenberg amendment violates due process requirements of notice and fair warning[104] and have addressed the possible vagueness of the Amendment's statutory terms,[105] circuit courts nationwide have upheld the constitutionality of the Lautenberg Amendment on due process grounds.[106] Nevertheless, it is important to examine the reasoning on both sides of the due process debate because the challenge is frequently raised.

A. Notice and Fair Warning Requirement

In April 1994, defendant Gerald Ficke, appearing pro se, plead no contest to a misdemeanor charge of assaulting his wife.[107] Ficke received six months probation and was ordered to complete anger

100. *Id.* at 1754; *Lopez*, 514 U.S. at 567-68.

101. 18 U.S.C. § 922(g)(9) (2000).

102. *Lopez*, 514 U.S. at 559 (discussing Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968) where the Court emphasized its reservations about "Congress . . . us[ing] a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities").

103. *Id.* Further, consider a case in which the government cannot prove that a firearm was in or affected commerce. As unlikely as this is given the de minimis standard, the statute would not apply, and the domestic violence misdemeanant would not be prohibited from possessing firearms. The statute would then fail to protect this defendant's family from domestic violence, and thus fail to achieve its fundamental objective.

104. *E.g.*, United States v. Ficke, 58 F. Supp. 2d 1071, 1075 (D. Neb. 1999).

105. *E.g.*, United States v. Nason, No. 00-CR-37-B-S, 2001 WL 123722, at *5-6 (D. Me. Feb. 13, 2001); United States v. Weeks, No. CRIM. 00-4-B-H, 2000 WL 1879808, at *1 (D. Me. Sept. 28, 2000); United States v. Costigan, No. CRIM. 00-9-B-H, 2000 WL 898455, at *5 (D. Me. June 16, 2000), *aff'd*, 2001 WL 535734 (1st Cir. Mar. 26, 2001); United States v. Cadden, 98 F. Supp. 2d 193, 195 (D.R.I. 2000); United States v. Smith, 964 F. Supp. 286 (N.D. Iowa 1997), *aff'd*, 171 F.3d 617 (8th Cir. 1999).

106. *Supra* note 15.

107. United States v. Ficke, 58 F. Supp. 2d 1071, 1072 (D. Neb. 1999).

control classes.[108] Four years later, Nebraska police officers arrested Ficke in his home after his wife reported to the police that he had assaulted her.[109] The officers confiscated three firearms from Fiske, which he admitted were shipped in interstate commerce.[110] After being indicted, Ficke moved to dismiss the indictment arguing that the Laudenberg Amendment unconstitutionally violated fundamental due process principles of notice and fair warning.[111]

Ficke argued it was fundamentally unfair to punish him for violating the Amendment when he did not know that federal law prohibited his possession of firearms.[112] Relying on Judge Posner's dissent in *United States v. Wilson*,[113] the court found for the defendant. In *Wilson*, Judge Posner suggested that ignorance of the law can indeed, be an excuse for breaking it:

> [I]t is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime, or even that it was wrongful . . . . We can release him from the trap by interpreting the statute under which he was convicted to require the government to prove that the violator knew that he was committing a crime. This is the standard device by which the courts [would then be able to] avoid having to explore the outer boundaries of the constitutional requirement of fair notice of potential criminal liability.[114]

The *Ficke* court stated that Posner's argument was especially applicable where the conduct consisted of gun ownership, an activity otherwise legal for citizens with no prior felony convictions.[115] Moreover, the defendant did not have a reasonable opportunity to

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1072-73. In the past, the Supreme Court has struck down "criminal provisions which similarly [to the Lautenberg Amendment] snared unsuspecting citizens." Lambert v. California, 355 U.S. 225, 229-30 (1957).

112. *Id.* at 1073; *see also* United States v. Mendoza, 172 F.3d 865, *1 (4th Cir. 1999) (unpublished opinion) (stating "that the term 'knowingly' . . . requires only that a defendant knew he possessed a firearm; not that he knew his possession was illegal or knew where the weapon was manufactured" (citing United States v. Langley, 62 F.3d 602, 606 (4th Cir. 1995)); United States v. Hancock, No. 99-10533, 2000 WL 1593394, at *2 (9th Cir. Oct. 26, 2000), *cert. denied*, 121 S. Ct. 1641 (2001) (stating that the "mental-state requirement for [the statute] is 'knowingly' . . . and refers only to knowledge of possession").

113. United States v. Wilson, 159 F.3d 280, 293 (7th Cir. 1998) (Posner, J., dissenting).

114. *Id.* (referring to Ratzlaf v. United States, 510 U.S. 135 (1994) and Staples v. United States, 511 U.S. 600, 618-19 (1994)).

115. *Ficke*, 58 F. Supp. 2d at 1074.

learn about the statute,[116] because at the time he plead no contest to gun ownership, the Lautenberg Amendment had not yet been passed.[117] The *Ficke* court therefore found that the Lautenberg Amendment violated the notice and fair warning requirements of the Due Process Clause.

In *United States v. Napier*,[118] however, the Sixth Circuit rejected the ignorance of the law defense, arguing it was unreasonable for a domestic violence misdemeanant to expect to possess weapons without regulation. Therefore, the defendant could not claim a lack of fair warning.[119] In *United States v. Beavers*,[120] the Sixth Circuit again adopted this rationale, finding the Lautenberg Amendment constitutional even though it lacks an actual knowledge requirement.[121]

In *United States v. Mitchell*,[122] the Fourth Circuit explained that the only knowledge required by the defendant in a Lautenberg Amendment case is knowledge of possession of a firearm, not knowledge of the law.[123] The *Mitchell* court found the defendant had sufficient notice when he committed the assault upon his wife that led to his domestic violence misdemeanor conviction.[124] Therefore, also in opposition to *Ficke*, the *Mitchell* court concluded that ignorance of the law is not a sufficient defense in a Lautenberg Amendment case.[125]

Although *Ficke* and *Emerson* are still good law, the majority of subsequent case law suggests the ignorance of the law defense will not succeed in striking down the Lautenberg Amendment as an unconstitutional Due Process Clause violation. This case law is

116. *Id.*

117. *Id.* at 1075.

118. United States v. Napier, 233 F.3d 394, 398 (6th Cir. 2000).

119. *Id.* (quoting United States v. Baker, 197 F.3d. 211, 220 (6th Cir. 1999)).

120. United States v. Beavers, 206 F.3d 706 (6th Cir.), *cert. denied*, 529 U.S. 1121 (2000).

121. *Id.* at 709-710 (finding the statute constitutional even though the government does not have to prove the defendant had actual knowledge that it was illegal to possess a firearm). According to the *Napier* court, "every circuit court which has considered a due process challenge similar to Napier's has rejected it." *Napier*, 233 F.3d at 398; *see, e.g.*, United States v. Kafka, 222 F.3d 1129, 1131-32 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1365 (2001); United States v. Reddick, 203 F.3d 767, 770-71 (10th Cir. 2000); United States v. Meade, 175 F.3d 215, 225-26 (1st Cir. 1999); United States v. Bostic, 168 F.3d 718, 722-23 (4th Cir. 1999); United States v. Wilson, 159 F.3d 280, 288-89 (7th Cir. 1998).

122. United States v. Mitchell, 209 F.3d 319 (4th Cir. 2000), *cert. denied* 531 U.S. 849 (2000).

123. *Id.* at 322 (quoting Bryan v. United States, 524 U.S. 184, 192 (1998)).

124. *Id.* at 323-24.

125. *Id.* (citing Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833)).

flawed, however, in its failure to acknowledge misdemeanants who, aside from the Lautenberg Amendment, would be in lawful possession of their guns. Given that the Lautenberg Amendment is fairly new,[126] and that knowledge of the Lautenberg Amendment has not been widely disseminated,[127] it is unreasonable to expect even a convicted domestic violence misdemeanant to know he could not legally possess a gun. This is especially true in parts of the country where gun possession is a commonly accepted practice.[128] Courts could reasonably find the Lautenberg Amendment constitutes a due process violation for failure to adhere to the notice and fair warning requirement.

B. Definitional Vagueness

Certain terms of the Lautenberg Amendment, such as "prohibited person,"[129] "physical force,"[130] and "cohabit[ation] with a spouse,"[131] are not defined by the statute itself.[132] Additionally, even though terms such as "misdemeanor crime of domestic violence" and "convicted" are defined,[133] courts are still grappling with how to apply these definitions.[134]

126. The Amendment was enacted in September 1996.

127. The only means of public awareness is the letter by the Department of Alcohol, Tobacco, and Firearms, *infra* note 221.

128. For example, forty percent of United States households contain guns. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 167 (1997). Further, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." Staples v. United States, 511 U.S. 600, 610 (1994).

129. United States v. Cadden, 98 F. Supp. 2d 193, 195 (D.R.I. 2000) (debating the definition of "prohibited person" in detail).

130. United States v. Nason, No. 00-CR-37-B-S, 2001 WL 123722, at *5 (D. Me. Feb. 13, 2001); United States v. Weeks, No. CRIM. 00-4-B-H, 2000 WL 1879808, at *1 (D. Me. Sept. 28, 2000).

131. United States v. Costigan, No. CRIM. 00-9-B-H, 2000 WL 898455, at *5 (D. Me. June 16, 2000), *aff'd*, 2001 WL 535734 (1st Cir. Mar. 26, 2001), *cert. denied*, 122 S. Ct. 171 (2001). The *Costigan* court debates the definition of "cohabit[ation] with a spouse" in detail. *See infra* text accompanying notes 144-149.

132. 18 U.S.C. § 921 (2000) provides all definitions for Title 18 but does not define any of the above-mentioned terms. These particular terms are mentioned because cases have been based on the inability to define them.

133. *See* 18 U.S.C. § 921(a)(33)(A)(i)(ii), (a)(33)(B)(ii) (2000); *supra* note 6.

134. *Nason*, 2001 WL 123722, at *6 (looking to the Black's Law Dictionary definition of "physical force" because neither the Lautenberg Amendment itself nor relevant Maine case law provided a definition). The *Nason* court also noted that another court in the same district in the same week reached a conclusion on this issue "directly at odds" with the broad definition of "physical force" used by the *Nason* court. *Id.* at *6 (citing United States v. Weeks, 2000 WL 1879808, at *1 (D. Me. Sept. 28, 2000)). In *Nason*, the court defined the terms "bodily injury" and "offensive physical contact:"

Courts are so uncertain about the meaning of the terms in the Amendment that in some cases, courts in the same district have defined the same term differently.[135] If judges are confused about how to define these terms, ordinary people are also likely confused, and might unknowingly violate the law. The Lautenberg Amendment, therefore, is unconstitutionally vague.

The standard for constitutional vagueness is set out in *United States v. Smith*.[136] A statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and "[the language of the statute] is so indefinite that it encourages arbitrary and erratic arrests and convictions."[137]

In *Smith*, the defendant was convicted of a domestic violence misdemeanor.[138] In 1996, the defendant, in possession of a firearm, shot his wife.[139] Among the issues that defendant raised in his motion to dismiss was that § 921(a)(33), the definitions section of the Lautenberg Amendment, is unconstitutionally vague because it "fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden by statute, fails to establish minimal guidelines to govern law enforcement and invites arbitrary and capricious enforcement."[140]

The court rejected the definitional vagueness argument, stating that the "language of Section 921(a)(33) *appears* to give fair notice

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"[B]odily injury" and "offensive physical contact" involve "the use or attempted use of physical force." *Id.* at *6. Thus, any conviction under Maine's assault statute "has, as an element, the use or attempted use of physical force" and qualifies as a "misdemeanor crime of domestic violence" pursuant to section 921(a)(33)(A) if the victim has the requisite domestic relationship with the assailant.

Id. In *Weeks*, alternatively, Chief Judge Hornby found the assault at issue did not include bodily injury, and thus the defendant had pleaded no contest only to offensive physical contact, which he found, "is not a crime that categorically involves physical force." Weeks, 2000 WL 1879808, at *2.

135. *Compare Nason*, 2001 WL 123722, at *6 *with* Weeks, 2000 WL 1879808, at * 1, giving two opposing definitions of physical force in the same jurisdiction in the same week and causing one defendant to be found guilty of a greater charge than his counterpart.

136. United States v. Smith, 964 F. Supp. 286 (N.D. Iowa 1997), *aff'd*, 171 F.3d 617 (8th Cir. 1999).

137. *Id.* at 294 (citing United States v. Donahue, 948 F.2d 438, 441 (8th Cir. 1991), which found that a person of ordinary intelligence knows that bank robbery is a crime).

138. *Id.* at 288

139. *Id.*

140. *Id.* at 294.

of the conduct prohibited by it"[141] and that the terms were readily understandable.[142] Furthermore, the court found that the statute provided a bright line for law enforcement, and does not encourage arbitrary and erratic arrests and convictions."[143] The defendant's definitional vagueness argument thus failed.

A Maine district court declined to follow the precedent set forth in *Smith*. In *United States v. Costigan*,[144] Chief Judge Hornby offered a different view of the Lautenberg Amendment's definitional vagueness.[145] The defendant in *Costigan* was found guilty of possessing a firearm after being convicted on two previous occasions of misdemeanor domestic violence crimes.[146] Chief Judge Hornby voiced several reservation about a Lautenberg Amendment provision requiring the defendant to have "cohabited" with a spouse in order to have previously committed domestic violence:

> [T]he problems I have outlined with the statute are considerable. Here, for example, because of the second misdemeanor [which took place, as opposed to the first, after defendant and victim started to live together fairly regularly], I have not had to determine the far more difficult question *whether Costigan, who was intimate with Santos, had yet reached the level of 'cohabiting as a spouse' by the time of the first misdemeanor* . . . approximately one month after they met and her legal husband moved out. Such issues will not be resolved so easily in a jury trial, for there the judge must instruct the jury as to what the jury is required to find beyond a reasonable doubt. What standards will the judge give the jury to define 'cohabit as a spouse?' . . . [There is no] customary certainty of definition for [this] federal crime. *I suspect that there are many people previously convicted of assault who are unable to tell from reading the statute whether their assault was 'domestic violence' such that they can no longer possess firearms* . . . .[147]

Chief Judge Hornby rightly believed many people previously convicted of assault would not be able tell from reading the statute whether their prior assault constituted "domestic violence."[148] For

141. *Id.*
142. *Id.*
143. *Id.*
144. United States v. Costigan, No. CRIM. 00-9-B-H, 2000 WL 898455 (D. Me. June 16, 2000), *aff'd*, 2001 WL 535734 (1st Cir. Mar. 26, 2001), *cert. denied*, 122 S. Ct. 171 (2001).
145. *Id.* at *5.
146. *Id.* at *1.
147. *Id.* at *5 (emphasis added).
148. *Id.*

this reason, the statute is unconstitutionally vague because persons of ordinary intelligence would not have fair notice they were committing a crime.[149]

III. THE EX POST FACTO CHALLENGE

Opponents of the Lautenberg Amendment argue the Amendment violates the Ex Post Facto Clause of the Constitution.

An ex post facto law is defined as:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.[150]

Lautenberg Amendment opponents argue the Amendment is unconstitutional because it retroactively imposes a criminal penalty on a domestic violence misdemeanant. In some cases, the misdemeanant's conviction predates the effective date of the statute;[151] in other cases, the Lautenberg Amendment impermissibly punishes the misdemeanant for a conviction that has already occurred.[152]

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149. *United States v. Smith*, 964 F. Supp. at 294. Further, the *Costigan* court convicted the defendant under § 922(g)(9) due to the second misdemeanor conviction, which took place after the defendant had been with Santos for a significantly longer period, had begun to stay at her home, and had helped discipline her children. *Costigan*, 2000 WL 898455, at *1-2. However, had the second misdemeanor conviction not taken place, it would be unclear whether to apply the Lautenberg Amendment in *Costigan*. When the first incident of domestic violence took place, Costigan had been intimate with Santos, but had only been dating her for one month, and her legal husband had just moved out of their home. *Id.* at *5. As Chief Judge Hornby indicated, it is unclear under the statute whether this situation would qualify Costigan as "cohabiting" with Santos under § 921(a)(33)(A)(ii). *Id.*
Chief Judge Hornby recognized the statute is ambiguous in such a case, and does not provide direction definitionally. *Id.* Therefore, such a determination would be left to the jury, and the jury would have to make this determination beyond a reasonable doubt. *Id.* It is unlikely that Congress intended juries to be the ultimate determinants of the meanings of the terms in § 922(g)(9).

150. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). U.S. CONST. art. I, § 10 forbids the passage of any ex post facto law. The court in *United States v. Lominac*, 144 F.3d 308, 311-12 (4th Cir. 1998) stated that:

> to violate the Ex Post Facto Clause, a law must (1) be retrospective . . . and (2) it must disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment of a crime . . . . A law is retrospective if it changes the legal consequences of acts completed before its effective date.

(internal quotations omitted).

151. United States v. Mitchell, 209 F.3d 319, 322-23 (4th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000).

152. See discussion *infra* Part (III)(B) discussing the ex post facto challenge in the military context.

A. The Civilian Context

In the civilian context, circuit courts and district courts have found that the Lautenberg Amendment is not an ex post facto law.[153] The justification for this conclusion is that the Amendment regulates the continuous possession of a firearm by a domestic violence misdemeanant.[154] The intent, then, is *not* to punish a misdemeanant a second time for a prior domestic violence conviction. Thus, the law does not violate the Ex Post Facto Clause.

Therefore, even if the conviction and the purchase of the firearm occurred prior to the enactment of the Lautenberg Amendment, the continuous post-enactment possession of the firearm warrants a felony conviction under the Amendment.[155]

B. The Military Context

In the civilian context, Lautenberg Amendment plausibly serves the crucial remedial function of prohibiting gun possession by those more likely to commit domestic violence crimes involving firearms.[156] The military context is different.

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153. *E.g.*, *Mitchell*, 209 F.3d at 322; United States v. Farmer, 73 F.3d 836, 841 (8th Cir. 1996); McHugh v. Rubin, 49 F. Supp. 2d 105, 108 (E.DN.Y. 1999), *rev'd on other grounds*, 220 F.3d 53 (2d Cir. 2000); United States v. Boyd, 52 F. Supp. 2d 1233, 1236-37 (D. Kan. 1999), *aff'd*, 211 F.3d 1279 (10th Cir. 2000); United States v. Hicks, 992 F. Supp. 1244, 1246 (D. Kan. 1997); United States v. Meade, 986 F. Supp. 66, 69 (D. Mass. 1997), *aff'd*, 175 F.3d 215 (1st Cir. 1999); Nat'l Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997), *aff'd sub. nom* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).

154. *Supra* note 153.

155. *Mitchell*, 209 F.3d at 322-323 (stating that "[i]t is immaterial that [defendant's] firearm purchase and domestic violence conviction occurred prior to 922(g)(9)'s enactment because the conduct prohibited by Section 922(g)(9) is the *possession* of a firearm.") (emphasis added); United States v. Brackett, 163 F.3d 599, 599 (4th Cir. 1998) (concluding that because the possession of the firearm did not take place until after the effective date of the statute, the statute did not violate the Ex Post Facto Clause); United States v. Boyd, 52 F. Supp. 2d 1233, 1236-37 (D. Kan. 1999); Nat'l Ass'n of Gov't Employees, Inc. v. Barrett, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997), *aff'd sub. nom* Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998). The Eastern District of New York in *McHugh v. Rubin* stated that

> [t]he Second Circuit has held that "Congress intended statutes prohibiting felons from possessing firearms to reach 'persons convicted of felonies prior to [the effective date of the statute].' . . . While the case at bar involves a misdemeanor conviction as opposed to a felony, plaintiff has cited no authority to suggest that the same rule relating to felony convictions should not apply in this instance.

McHugh v. Rubin, 49 F. Supp. 2d 105, 108 (E.D.N.Y. 1999), *rev'd on other grounds*, 220 F.3d 53 (2d Cir. 2000) (quoting United States v. Brady, 26 F.3d 282, 291 (2d Cir. 1994) (citation omitted)).

156. *See supra* Part (I)(B).

Domestic violence offenses involving military-issued firearms are extremely unlikely due to strict procedures involving the distribution, use, and collection of military weapons.[157] Military personnel usually do not have access to issued weapons on a daily basis, and some personnel only use weapons during annual training and certification.[158]

Even during the annual training, the weapons are at all times under strict supervision and control.[159] "First, soldiers must check out their weapons from the arms rooms. Next, these soldiers are transported in military vehicles to firing ranges, where they fire the weapons. Finally, the soldiers are transported back to the arms rooms, where the weapons must be returned."[160] Thus, it is very unlikely a soldier would ever have an issued weapon at home, or anywhere but the training grounds, under constant, strict supervision.[161]

Therefore, unlike the civilian context, where the Lautenberg Amendment serves the regulatory and remedial purpose of keeping guns away from domestic violence misdemeanants, the Lautenberg Amendment does not serve this purpose in the military context, because military procedure already performs this function.[162]

If the Lautenberg Amendment does not serve a regulatory and remedial purpose in the military context, it seems only to have a punitive effect.[163] Therefore, any domestic violence misdemeanant in the military is punished a second time for being convicted of the misdemeanor. This result is unconstitutional under the Ex Post Facto Clause.[164] Further, as most military employment involves the use of a weapon, the Lautenberg Amendment may effectively

157. Major Einwechter & Captain Christiansen, Note, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, 1997 ARMY LAW. 25, 27 (1997); Gregory, *supra* note 13, at 10-11.

158. Gregory, *supra* note 13, at 11.

159. *Id.*

160. *Id.* "In fact, the Army's control over the weapons is so complete, one Army legal practitioner has stated that 'weapons issued in the military remain under the constructive control of the commander during training and deployment missions.'" *Id.*; *see* Einwechter & Christiansen, *supra* note 157, at 27 (discussing the great responsibility of the commander to supervise all soldiers under his or her command).

161. Due to the strict supervision of military-issued firearms, it is not surprising no cases involving military personnel were cited in the Congressional record accompanying the proposal of the Lautenberg Amendment. Gregory, *supra* note 157, at 11.

162. Gregory, *supra* note 13, at 15-16.

163. *Id.*

164. *Id.* at 16; *supra* note 150 and accompanying text.

terminate the military career of the domestic violence misdemeanant, a further punitive measure.[165]

Given this result, Congress should reconstruct the Lautenberg Amendment, partially reinstating the public interest exception[166] in the military context; this would preclude the military from the reach of the Lautenberg Amendment and the statute would no longer be in violation of the Ex Post Facto Clause.[167]

IV. THE EQUAL PROTECTION CLAUSE CHALLENGE

The Equal Protection Clause of the Fourteenth Amendment states that: "No State shall make or enforce any law which [would] . . . deny to any person within its jurisdiction the equal protection of the laws."[168] The Amendment strives to ensure equality for all under the law.[169] Under traditional equal protection analysis, courts apply one of two levels of scrutiny depending on the specific issues in the case:[170] strict scrutiny or deferential scrutiny.[171]

In determining the appropriate level of scrutiny to apply, courts look at whether the party in the case is a member of a suspect class[172] or whether there is a possible infringement of a party's fundamental rights.[173] If the party is a member of a suspect class or a fundamental right is implicated, the court must apply strict scrutiny

165. Gregory, *supra* note 13, at 16.

166. 18 U.S.C. § 925(a)(1); *supra* note 12. On January 9, 1997, Representative Bart Stupak (D-MI) proposed a bill to the House of Representatives to exempt police and the military from Lautenberg disarmament. H.R. 445, 105th Cong. (1997).

167. Gregory, *supra* note 13, at 18.

168. U.S. CONST. amend. XIV.

169. *Id.*

170. WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 891 (2d ed. 1995).

171. *See infra* text accompanying notes 172 to 177, defining and discussing application of strict and deferential scrutiny.

172. Suspect classes include race, national origin, and alienage. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (applying "strict scrutiny" analysis to strike down, as a violation of the Equal Protection Clause, an Oklahoma state law requiring sterilization of persons convicted of two or more felonies of moral turpitude); Yick Wo v. Hopkins, 118 U.S 356, 366-67 (1886) (holding that a San Francisco ordinance relating to laundry operation violated the equal protection rights of Chinese aliens operating laundries in San Francisco); MURPHY, *supra* note 170, at 893.

173. Fundamental rights include the right to privacy, to procreate, to marry, to vote, and to travel interstate. Loving v. Virginia 388 U.S. 1, 12 (1967) (finding fundamental the right to marry); United States v. Guest, 383 U.S. 745, 757-58 (1966) (finding fundamental the right to travel interstate); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding fundamental the right to privacy); Reynolds v. Sims, 377 U.S. 533, 565 (1964) (finding fundamental the right to vote); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding fundamental the right to procreate).

analysis,[174] and a compelling governmental interest is required to justify the legislation in question.[175] If the party is not a member of a suspect class, and no fundamental right is at stake, the court applies rational basis review,[176] requiring that the law in question be rationally related to a legitimate governmental interest.[177]

Courts examining the Lautenberg Amendment thus far have applied rational basis review.[178] The government therefore is required to demonstrate that singling out persons convicted of domestic violence offenses for the firearms possession felonies is rationally related to a legitimate governmental interest."[179]

A. Under Rational Basis Review, Is the Lautenberg Amendment Underinclusive, Overinclusive, or Both?

Opponents of the Lautenberg Amendment have asserted it is both overinclusive and underinclusive and cannot withstand rational basis review.[180] Proponents of the overinclusivity theory suggest that it is "illogical to preclude all those who have been convicted of domestic violence crimes from possessing a gun, no matter how long ago their offenses may have occurred."[181] This argument was introduced in several cases involving police officers who believe that the Lautenberg Amendment should not have precluded the public interest exception allowing police officers to possess their weapons.[182]

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174. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

175. *Id.* at 227.

176. MURPHY, *supra* note 170, at 891-94.

177. *Id.*

178. *E.g.*, Fraternal Order of Police v. United States, 173 F.3d 898, 907 (D.C. Cir. 1999); United States v. Lewitzke, 176 F.3d 1022, 1025-26 (7th Cir. 1999) (acknowledging that the parties stipulated that rational basis review applied); Nat'l Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1575-76 (N.D. Ga. 1997) (applying rational basis review), *aff'd sub. nom*, Hiley v. Barrett, 155 F.3d 1276 (11th Cir. 1998).

179. *Lewitzke*, 176 F.3d at 1025 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

180. *Lewitzke*, 176 F.3d at 1025.

181. *Id.*

182. Gillespie v. City of Indianapolis, 185 F.3d 693, 709 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000) (stating the Lautenberg Amendment is overinclusive because it prohibits the public interest exception); *see* Fraternal Order of Police v. United States, 981 F. Supp. 1, 4 (D.D.C. 1997), *rev'd*, 152 F.3d 998 (D.C. Cir), *and reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam), *and aff'd on reh'g*, 173 F.3d 898 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 928 (1999). At the district court level, focusing on the preclusion of the public interest exception in the Lautenberg Amendment, the court for the District of Columbia found that Congress had no rational basis to distinguish between police officers who were domestic violence misdemeanants and those who had committed violent conduct resulting in a felony conviction. *Fraternal Order of*

Proponents of the underinclusivity theory argue that Congress acted irrationally in "sing[ling] out those who engage in domestic violence for the firearms ban, when those convicted of other violent misdemeanors may be just as likely to misuse their guns."[183] In countering this argument, however, courts have looked to the established principle that Congress may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[184] Therefore, the underinclusiveness theory has failed to successfully challenge the Lautenberg Amendment on equal protection grounds.

With the exception of *Fraternal Order of Police v. United States*,[185] where the District Court of the District of Columbia initially found an equal protection violation but was reversed,[186] courts nationwide concluded that Congress had a sufficient rational basis to introduce the Lautenberg Amendment.[187] The rational basis for the Amendment lies in Congress's attempt to mend the loophole that has allowed so many violent felons to plea-bargain down to misdemeanors.[188] Prior to the Lautenberg Amendment, felons who successfully plead down to misdemeanors evaded the Gun Control Act's ban on gun possession by convicted felons.[189] The Lautenberg Amendment strives to prevent this evasion and to

Police, 981 F. Supp. at 4-5. On rehearing, the D.C. Circuit reversed the prior decision, recognizing Congress's right to address problems "one step at a time." 173 F.3d at 903 (citation omitted); Gilbert G. Gallegos, *Letters to the Editor: Giving Gun Law Our Best Shot*, WALL ST. J., Jan. 9, 1997, at A13 (stating that the Fraternal Order of Police had reservations about the constitutionality of the statute prior to and after its enactment, and was concerned that police officers might be penalized to "a far greater degree than the general populace" under the statute). The argument relating to the preclusion of the public interest exception was rejected by the court in *Gillespie* reasoning that even if a police officer had a gun for public interest reasons, this would not prevent him from hurting someone in his home. The *Gillespie* court therefore concluded that the reason for having the gun is irrelevant, but the criminal history of the possessor determines his accessibility to firearms. *Gillespie*, 185 F.3d at 709.

183. *Lewitzke*, 176 F.3d at 1025.

184. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955). The *Lewitzke* court concluded that "persons already convicted of domestic violence are [thus] a logical starting, if not ending, point." *Lewitzke*, 176 F.3d at 1027.

185. Fraternal Order of Police v. United States, 981 F. Supp. 1 (D.D.C. 1997).

186. Fraternal Order of Police v. United States, 173 F.3d 898 (D.C. Cir. 1999).

187. *E.g.* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118-19 (1983) (emphasizing the increased risk of grievous harm when firearms fall into the wrong hands); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); *Lewitzke*, 176 F.3d at 1025; Baer v. City of Wauwatosa, 716 F.2d 1117, 1123 (7th Cir. 1983).

188. *See* 104 CONG. REC. S10377-78 (statement of Sen. Lautenberg).

189. Pressler, *supra* note 3, at 719; *supra* text accompanying note 1.

further the government's goal of reducing gun-related domestic violence nationwide.[190]

As the court stated in *United States v. Lewitzke*,[191] persons convicted of such offenses have already employed violence against their domestic partners on one or more occasions.[192] It is reasonable for Congress to believe that such individuals may resort to violence again. If they do, access to a firearm increases the risk they will inflict grave harm, particularly to members of their household who have fallen victim to their violent acts before.[193]

Therefore, the *Lewitzke* Court reasoned that because domestic violence misdemeanants have already been recognized as having a propensity toward violence in the home, Congress rationally concluded that allowing access to firearms would increase the risk of recurrence of such violence.[194]

V. FUNDAMENTAL PROBLEMS OF STATUTORY IMPLEMENTATION

Even if its constitutionality continues to be upheld by courts, the Lautenberg Amendment will not achieve its goals due to inherent flaws in its structure and implementation. These flaws primarily stem from two weaknesses: terms that are definitionally vague[195] and a lack of clarity as to the appropriate method of procedural execution. This obscurity is due to uncertainty in both the civilian and military contexts of whether to look to state or federal law to define the terms of the statute, and from a lack of sufficient guidance from Congress on how the statute should be implemented. Since the Lautenberg Amendment's vagueness has already been discussed, this Part will focus on the Amendment's structural and implementation weaknesses.[196]

A. Whether to Use Federal or State Law in Defining Statutory Terms

One cause of confusion in implementing the Lautenberg Amendment is the uncertainty as to which law should define the

190. Pressler, *supra* note 3, at 719.
191. United States v. Lewitzke, 176 F.3d 1022 (7th Cir. 1999).
192. *Lewitzke*, 176 F.3d at 1027.
193. *Id.*
194. *Id.*
195. In fact, the Fraternal Order of Police believed, when the statute was passed, that its terms were unconstitutionally vague. Gallegos, *supra* note 182.
196. *Supra* Part (II)(B).

terms of the statute.[197] In *United States v. Cadden*,[198] for example, the defendant plead no contest[199] in 1998 to simple domestic assault, a domestic violence misdemeanor.[200] The defendant received and completed a one-year term of probation.[201] A year and a half later, the defendant plead guilty to one count of possession of destructive devices—two pipe bombs.[202] Under the Lautenberg Amendment, pipe bombs are considered "firearms."[203] The issue in the case was whether the defendant would be considered a "prohibited person" in possession of a firearm under the statute, because he had already completed his probationary term.[204]

Looking to the definitions section of Title 18,[205] the court emphasized that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."[206]

The court continued by recognizing, however, that the definition of "misdemeanor crime of domestic violence" does not include reference to state law.[207] Therefore, it reasoned, the presumption is Congress intended federal law to define what constitutes a conviction under the Amendment because "where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . show[s] that a different intention existed."[208] The court therefore found that under federal law, defendant's no contest plea and probation constituted a "conviction" and the defendant was a "prohibited person" in possession of a firearm under the Amendment.[209]

Even though the *Cadden* court concluded that federal law supplies the definitions of the Lautenberg Amendment's terms, the statute itself does not mandate such a conclusion. As the *Cadden* court recognized, § 921 emphasizes that definitions of statutory terms in the Lautenberg Amendment should be determined under

197. *Supra* Part (II)(B).
198. United States v. Cadden, 98 F. Supp. 2d 193 (D.R.I. 2000).
199. "Nolo," or "nolo contendere" means "no contest." BLACK'S LAW DICTIONARY 1070 (7th ed. 1999).
200. *Cadden*, 98 F. Supp. 2d at 194.
201. *Id.*
202. *Id.*
203. 18 U.S.C. § 921(3)(D)-(4)(A)(i) (2000).
204. *Cadden*, 98 F. Supp. 2d at 195.
205. 18 U.S.C. § 921 (2000).
206. 18 U.S.C. § 921(a)(20) (2000).
207. *Cadden*, 98 F.Supp. 2d at 196.
208. *Id.* at 196 (citing 2B NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51.02, at 122-23 (5th ed. 1992)).
209. *Id.* at 197.

the law of the jurisdiction in which the proceedings take place.[210] Only because the court concluded that the term "misdemeanor crime of domestic violence" does not include reference to state law, did the court then define "conviction" under federal law.

Other courts could decide this issue differently, and define "conviction" according to state law. The lack of clarity as to whether federal or state law prevails in the Lautenberg Amendment context could cause courts to apply the Lautenberg Amendment differently and arbitrarily.[211]

The Lautenberg Amendment also excludes from punishment misdemeanants who were deprived of a "knowing and intelligent waiver of a jury trial."[212] As will later be discussed, Senator Lautenberg proposed the Lautenberg Amendment to close the loophole created by numerous judges who knocked domestic violence felonies down to misdemeanors.[213] If judges already tend toward leniency in sentencing domestic violence offenders,[214] nothing would prevent these judges from dismissing charges against domestic violence misdemeanants based on the technicality that such defendants did not knowingly and intelligently waive a jury trial.

Just as violent felons go free on *Miranda*[215] technicalities,[216] domestic violence misdemeanants will go free on waiver technicalities. They will be free to return to their homes, access the very guns from which the Lautenberg Amendment was meant to protect their families, and harm their wives and children, rendering the Lautenberg Amendment moot. Congress should guide the courts as to which law to apply, and reword the statute to reduce empha-

210. 18 U.S.C. § 921(a)(20)(B).

211. Again, if courts are so conflicted about how to apply Lautenberg due to the Amendment's murky wording, it is possible to argue an ordinary person would not understand the Amendment and might unknowingly violate Lautenberg. *Supra* Part (II)(B).

212. 18 U.S.C. § 921(a)(33)(B)(ii); United States v. Akins, 243 F.3d 1199,1205 (9th Cir. 2001) (reiterating that knowing and intelligent waiver is an element of the Lautenberg Amendment but finding the defendant did not waive his rights).

213. 104 CONG. REC. S10377.

214. *Id.*

215. Miranda v. Arizona, 384 U.S. 436, 492-99 (1966).

216. The *Miranda* warnings include the right to remain silent and the right to an attorney. *Id.* at 439. Constitutionally, the warnings must be given to all suspects prior to custodial interrogation. *Id.* at 499. If the warnings are not given, any confessions obtained from subsequent interrogation is inadmissible in court. *Id.* at 492-99. In his dissent in *Miranda*, Justice White emphasized the threat to public safety if the courts returned violent criminal offenders such as killers and rapists to the streets due to *Miranda* violations. *Id.* at 542-43 (White, J., dissenting).

sis on technicalities that will enlarge the loophole Congress sought to close with the passage of the Lautenberg Amendment.[217]

B. Lack of Sufficient Guidance or Awareness to Effectively Implement the Lautenberg Amendment

The Lautenberg Amendment is difficult to realistically implement in both civilian and military contexts. Insufficient guidance as to how to implement the statute may be causing the police and military to ignore the statute or not rigorously enforce it.[218] Lack of public awareness of the Lautenberg Amendment inhibits its ability to achieve its goals of deterrence in both the civilian and military contexts.

1. *The Civilian Context*

In the civilian context, the "knowing" standard only requires a defendant to know he possessed a firearm at the time of arrest, not that he knowingly violated the law.[219] In early 1997, the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms ("ATF") released an "Open Letter to all State and Local Law Enforcement Officials" explaining the Lautenberg Amendment and the recommended procedures for dealing with affected individu-

217. In *United States v. Jackson*, the defendant unsuccessfully argued he had not authorized his attorney to enter a guilty plea for his domestic violence misdemeanor charge. United States v. Jackson, 213 F.3d 644, at *1 (9th Cir. 2000) (unpublished opinion), *cert. denied*, 531 U.S. 914 (2000). The standard of review used by the United States Court of Appeals for the Ninth Circuit in its determination was the clearly erroneous standard. *Id.* The court found Jackson's attorney had fully advised Jackson of his constitutional rights. *Id.* Jackson's attorney testified his normal practice was to advise clients of their constitutional rights prior to pleading on their behalf so the plea would not be without authorization. *Id.* Although his attorney advised him of his constitutional rights in this case, it is not clear from the record that Jackson understood those rights, or that the attorney clearly explained to him the implications of a guilty plea in the Lautenberg context. *Id.* Nevertheless, the Ninth Circuit did not find the district court clearly erroneous in convicting Jackson. *Id.*

218. Memorandum for Secretaries of the Military Departments Chairman of Joint Chiefs of Staff et. al., Issues 2D, 3B-3C at 41, 53-54 [hereinafter Memorandum] (on file with author), *available at* http://www.dtic.mil/domesticviolence/Report.pdf. For a more in depth discussion on the contents of the Memorandum, see *infra* note 247 and accompanying text.

219. *E.g.*, United States v. Mitchell, 209 F.3d 319, 322 (4th Cir. 2000), *cert. denied*, 531 U.S. 849 (2000); *see supra* Part IV.

als.[220] The ATF also released an open letter to the public at this time.[221]

Each letter stated its purpose was to provide the targeted group with "information concerning a recent amendment to the Gun Control Act of 1968."[222] Each letter then described the Lautenberg Amendment, and defined the term "misdemeanor crime of domestic violence."[223]

In its letter to the public, the ATF instructed "individuals subject to this disability" to "immediately lawfully dispose of their firearms and ammunition."[224] The ATF recommended that "such persons relinquish their firearms to a third party, such as their attorney . . . their local police agency, or a Federal firearms dealer."[225]

In its letter to law enforcement agencies, the ATF explained the preclusion of the public interest exception[226] and attendant consequences:

> In view of this amendment's effect on law enforcement officers, your department may want to determine if an employee who is authorized to carry a firearm is subject to this disability and what appropriate action should be taken. Employees subject to this disability must immediately dispose of all firearms and ammunition in their possession . . . . In cases where your agency becomes aware of individuals subject to the disability, we recommend that such persons be encouraged to relinquish all firearms and ammunition in their possession immediately to a third party, such as their attorney, their local police agency, or a firearms dealer.[227]

With these letters, the ATF made the new amendment available to the public. However, the ATF did not explain in detail the method of enforcement to be used by law enforcement in pursuing Lautenberg Amendment cases. The agency recommended newly

220. John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, Open Letter to All State and Local Law Enforcement Officials, http://www.atf.treas.gov/firearms/domestic/opltrleo.htm (last updated Feb. 27, 1998).

221. John W. Magaw, Director, Bureau of Alcohol, Tobacco and Firearms, Open Letter from the Director, http:// www.atf.treas.gov/firearms/domestic/opltratf.htm (last updated Feb. 27, 1998). The ATF also included on its website a page of "Misdemeanor Crime of Domestic Violence Questions and Answers." *See* http:// www.atf.treas.gov/firearms/domestic/qa.htm (as of Apr. 28, 1997).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Magaw, supra note 220.

227. *Id.*

disabled individuals to immediate relinquish their firearms[228] and advised such individuals that criminal consequences existed upon failure to adhere to the new law.[229] The ATF did not, however, sufficiently indicate the likelihood of criminal prosecution for failing to come forward. Further, it did not describe any specific responsibility of law enforcement agencies to actively research or seek out Lautenberg Amendment offenders. If law enforcement agencies were given such responsibility, it could well impede other police activities and become an inefficient and overbearing process. Given these omissions, the ATF did not adequately advise law enforcement or the public about the Lautenberg Amendment.

Furthermore, if a domestic violence misdemeanant discovered his or her conviction was no longer on record, he or she would not likely come forward voluntarily to relinquish firearms. Only in recent decades have criminal records been kept on computers where they are easily available.[230] Any person convicted of a domestic violence misdemeanor prior to the advent of computer records would not likely volunteer such information at the risk of losing his gun. Because the ATF did not explain what penalties would exist for failing to come forward under the Lautenberg Amendment, the agency failed to adequately alert law enforcement and the public of the meaning of the new law. Therefore, the Amendment cannot effectively be implemented.

2. *The Military Context*

Soon after Congress passed the Lautenberg Amendment, the Army released a guide to its implementation.[231] Published in

228. *Id.*

229. *Id.*

230. *E.g.*, Michael V. Saxl, *The Struggle to Make Stalking a Crime: A Legislative Road Map of How to Develop Effective Stalking Legislation in Maine*, 23 SETON HALL LEGIS. J. 57, 100 (1998) (discussing the Maine stalking statute providing officers with "immediate access to criminal records through a statewide computer system").

231. Gregory, *supra* note 13, at 5 n.20 (citing Message, 151100Z Jan. 98, Headquarters, Dep't of Army, DAPE-MPE, subject: HQDA Message on Interim Implementation of Lautenberg Amendment (Jan. 11, 1998) (on file with Headquarters, Department of the Army) (hereinafter HQDA I)). HQDA I reads:

> Commanders will detail soldiers who they have reason to believe have a conviction for a misdemeanor crime of domestic violence to duties that do not require the bearing of weapons or ammunition. Commanders may reassign soldiers . . . where appropriate. No adverse action may be taken against soldiers solely on the basis of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act . . . occurred on or before 30 September 1996. Commanders may initiate adverse action, including bars to reenlistment or processing for elimination

1998,[232] the guide made the unit commander responsible for seeking out and reassigning affected soldiers.[233] It is difficult for a commander to determine, however, to whom the statute applies, because the military does not have a database of soldiers convicted of domestic violence misdemeanors, especially if such convictions took place prior to the soldier's enlistment.[234] In addition, for commanders to take a significant amount of time to probe the history of each soldier under their command would detract from their responsibilities to adequately train their soldiers.[235] Thus, the guide set unrealistic implementational goals.

If a commander has "reasonable cause to believe" a soldier has a domestic violence misdemeanor conviction, the commander must present any available documentation to the Army's legal department.[236] The legal department is then responsible for determining whether the Lautenberg Amendment applies in each individual case.[237] Army legal departments are bound by state law.[238] Therefore, depending on the state where a particular soldier is stationed, the soldier may or may not be subject to the Lautenberg Amendment's prohibition of firearms possession and use.[239] The Army's

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> under applicable regulations against soldiers because of an inability to possess a firearm or ammunition due to conviction of a misdemeanor crime of domestic violence if the act . . . occurred after 30 September 1996 and after providing such soldiers a reasonable time to seek expunction of the conviction or pardon. This policy concerning adverse action is not meant to restrict a commander's authority to initiate separation of a soldier based on the conduct that led to the qualifying conviction.

Gregory, *supra* note 13, at 5 n.20.

The army released HQDA II on May 21, 1999, also relating to the implementation of the Lautenberg Amendment. Gregory, *supra* note 13, at *5 n.21 (citing Message, 211105Z May 99, Headquarters, Dep't of Army, subject: HQDA Guidance on Deployment Eligibility, Assignment, and Reporting of Soldiers Affected by the Lautenberg Amendment (May 21, 1999) (on file with Headquarters, Department of the Army) (hereinafter HQDA II)). HQDA II states that "[a]ll soldiers known to have, or soldiers whom commanders have reasonable cause to believe have, a conviction for a misdemeanor crime of domestic violence are non-deployable for missions that require possession of firearms or ammunition." Gregory, *supra* note 13, at 5 n.21.

232. *Id.*

233. *Id.*

234. Gregory, *supra* note 13, at 5.

235. *Id.* at 16-17. There is no indication what enforcement body, if any, would be monitoring the commanders to ensure effective completion of tasks under HQDA I. Further, it is unclear whether the commanders would pass down responsibility of investigating the criminal histories of the soldiers to sergeants and other lower commanding officers, and if so, what level of investigation they would complete.

236. *Id.*

237. *Id.* at 6.

238. *Id.*

239. *Id.*

local legal department must undergo a Lautenberg Amendment analysis in each case, determining, for example, whether the soldier had been convicted of a misdemeanor crime of domestic violence under state law, and whether the soldier had knowingly and intelligently waived a jury trial.[240]

If the legal department determines a soldier is prohibited from using a firearm based on a prior domestic violence misdemeanor conviction, the commander must reassign the soldier.[241] As stated in HDQA I, the commander may take no adverse action against a soldier whose conviction took place prior to the passage of the Amendment.[242] Commanders may initiate adverse action, however, against soldiers convicted of a domestic violence misdemeanor subsequent to Lautenberg's enactment.[243] In either scenario, the soldier's conviction likely will hinder career advancement in the military.[244]

Given this result, the military is concerned that the Lautenberg Amendment interferes with military readiness.[245] Not only are commanders significantly hampered by the new investigative responsibility created by the Amendment and the HDQA Guide, but recruitment may also be detrimentally affected by the Amendment.[246]

On February 28, 2001, The Defense Task Force on Domestic Violence established by Congress to review domestic violence in the military, provided its annual report to Secretary of Defense Donald Rumsfeld (the "Memorandum") that included a section on military awareness of the Lautenberg Amendment.[247] In its analysis,

240. It is also unclear which state law would be applied in making these determinations, the state in which the crime took place, or the state in which the soldier is stationed. Each state has its own domestic violence laws, so a soldier could feasibly be convicted in one state, but not the other. *Id.*

241. Gregory, *supra* note 13, at 9.

242. *Id.*; *see* HQDA I, *supra* note 231, at 5 n.20.

243. Gregory, *supra* note 13, at 9-10.

244. *Id.* at 9 (likening a commander's knowledge of a misdemeanor crime of domestic violence to a "constructive dismissal").

245. *Id.* at 16. Gregory's argument is that the Amendment's impact on military readiness is not direct, given that the Amendment effects only .20% of army personnel. *Id.* Nevertheless, he feels that the indirect impact caused by the burden on the commander and the reduced level of recruitment sufficiently hampers military readiness. *Id.* at 17; Bruce T. Smith, *Disarming the Soldier*, FED. LAW., May, 1997, at 16.

246. Gregory, *supra* note 13, at 17 (arguing the Amendment may have a chilling effect because potential recruits may be discouraged from applying for military service if they have any kind of blemish on their records related to a domestic violence offense, even though it did not constitute a conviction).

247. Memorandum, *supra* note 218, at 41, 53-54.

the Task Force recognized there is varying understanding among military commanders and personnel as to their responsibilities under the Lautenberg Amendment.[248]

Further, although the Department of Defense ("DOD") issued policy guidelines when the Lautenberg Amendment was initially passed,[249] the Department has not provided further guidance for determining whether specific personnel are subject to the Lautenberg Amendment.[250] However, the Memorandum did note there have been few Lautenberg Amendment discharges to date,[251] and that military personnel are being allowed to retain their weapons until they are discharged or separated from military service.[252] This practice suggests that the Act has failed thus far to dissuade domestic abuse committed by military personnel.

Further, in response to the concern that the Lautenberg Amendment may hamper recruitment, the Memorandum noted that the military has begun to issue moral waivers[253] to recruits with both felony and misdemeanor convictions.[254] According to the Memorandum, the granting of such waivers is increasing, and includes waivers of those convicted of domestic violence felonies and misdemeanors.[255] In granting these waivers, the military is circumventing the Lautenberg Amendment, allowing convicted domestic violence misdemeanants to maintain and use weapons during military service.

As a result of its findings, the Task Force recommended that the Department of Defense "[e]nsure that the Services are complying with the DOD . . . policy review the appropriateness of waivers issued since the . . . policy went into effect,"[256] and "issue final guidance on implementing the Lautenberg Amendment."[257] The Task

248. *Id.* at 41.

249. The Department of Defense issued interim policy guidance on the Amendment on October 22, 1997 "requiring commanding officers to take immediate steps to retrieve weapons and ammunition from any service member who has a conviction for a misdemeanor crime of domestic violence." *Id.* at 54.

250. *Id.*

251. *Id.*

252. *Id.*

253. These waivers enable recruits with criminal backgrounds to enter military service. Since this policy became effective, a number of waivers have been granted to individuals convicted of various domestic violence offenses. *Id.* at 53.

254. *Id.* The Memorandum clarifies that although mid-level recruiting commanders can waive misdemeanors, only senior level officials can approve felony waivers. Memorandum, supra note 220, at 53.

255. *Id.* at 53.

256. *Id.* at 53.

257. *Id.* at 54.

Force recognized the implementational flaws of the Lautenberg Amendment in the military context, due to confusion and lack of guidance.[258] More guidance must be given before the Lautenberg Amendment can be effectively applied, or achieve its intended purpose of reducing domestic violence in the military.

3. *Policy Concerns*

In both the civilian and military contexts, policy concerns call for a reworking, if not a repealing of the Lautenberg Amendment. Of primary concern is the self-defense of women.[259] While the Amendment may keep guns from male offenders, it also prevents women from possessing firearms as protective devices.[260] This is a principal reason that Representative Chenoweth-Hage (R-ID) proposed House Bill 3444, a bill to repeal the Lautenberg Amendment.[261] House Bill 3444 was co-sponsored by twenty-seven congressmen[262] and was introduced in the House of Representatives on November 18, 1999.[263] Many women's organizations have strongly supported the bill, including Concerned Women for America, the largest women's organization in the United States, the Home School Legal Defense Association, the Law Enforcement Alliance of America, Gun Owners of America, Women Against Gun Control, and Safety for Women and Responsible Motherhood.[264]

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258. *Id.*

259. States' Rights and Second and Tenth Amendment Restoration Act of 1999, H.R. 3444, 106th Cong. (1999) (asserting the risk of disarming battered women who cannot then protect themselves from abusive spouses). In House Bill 3444, Representative Helen Chenoweth-Hage also asserts the Lautenberg Amendment unconstitutionally violates the Second Amendment, the Tenth Amendment, the Commerce Clause, and the Ex Post Facto Clause.

260. *Id.*

261. *Id.* The bill was previously known as the States' Rights and Second and Tenth Amendment Restoration Act of 1997, H.R. 1009, 105th Cong. (1997). Representative Chenoweth-Hage also proposed the earlier bill.

262. http://www.ncadv.org/publicpolicy/novupdate.htm (last visited May 11, 2001) [hereinafter NCADV website]. This is the website of the National Coalition Against Domestic Violence, avid supporters of the Lautenberg Amendment. One such co-sponsor was Representative Mike Simpson (R-ID) who emphasized the risk of disarming women in abusive relationships: "In some instances, this has resulted in the death of the battered spouse because they were not able to defend themselves with a firearm." http://www.house.gov/simpson/currentevents.htm (last visited May 11, 2001).

263. http://www.gunowners.org (last visited May 11, 2001). This is the website of a women's pro-gun organization, who strongly advocates House Bill 3444.

264. *Id.*

In House Bill 3444, Representative Chenoweth-Hage asserts that "[l]aw-abiding citizens use guns to defend themselves against criminals as many as 2.5 million times every year. Of these self-defense cases, as many as 200,000 are by women defending themselves against sexual assault."[265] She therefore calls for a repeal of the entire Lautenberg Amendment in the effort to improve these devastating statistics.[266] House Bill 3444 was referred to the House Judiciary Committee, and then to its Subcommittee on Crime.[267] However, no further action has yet been taken.[268] The strong support for House Bill 3444 and the sound policy concerns which have prompted the proposal of the bill intensify the need to rework the Amendment, and if not to repeal it completely, certainly to reassess its scope.

CONCLUSION

Senator Lautenberg's intent in introducing the Lautenberg Amendment is commendable. Protecting families nationwide from domestic violence is a fundamentally important goal. That is why it is imperative to rework and restructure the Lautenberg Amendment. The Lautenberg Amendment must unquestionably pass constitutional muster to be effectively implemented and achieve its important goal.

As it now stands, the Lautenberg Amendment faces strong constitutional challenges.[269] The statute violates the Commerce Clause under the Supreme Court's decision in *Morrison*.[270] Further, the de minimis standard does not create a satisfactory nexus between gun-related domestic violence and interstate commerce to

265. *Id.*

266. Representatives Barr (R-GA) and Stupak (D-MI) also proposed bills to amend the Lautenberg Amendment, but only Representative Chenoweth-Hage's bill calls for a complete repeal of the Amendment. "To amend title 18, United States Code, to provide that the firearms prohibitions applicable by reason of a domestic violence misdemeanor conviction do not apply if the conviction occurred . . . ." H.R. 59, 106th Cong. (1999) (proposing that the Lautenberg Amendment not be applied retroactively); H.R. 445, 105th Cong. (1997) (exempting police and the military from the reach of the Lautenberg Amendement).

267. NCADV website, *supra* note 262.

268. Further, Representative Chenoweth-Hage will be retiring from the House of Representatives next year, so it is unclear what will happen to the bill if the House Subcommittee on Crime fails come to a decision soon. NCADV website, *supra* note 262.

269. *See* discussion *supra* Parts I-IV.

270. United States v. Morrison, 529 U.S. 598 (2000); *see* discussion *supra* Part (I)(B)(iii).

justify the passage of the Lautenberg Amendment under the Commerce Clause.[271]

The Lautenberg Amendment is also arguably vague, thus violating the Due Process Clause of the Constitution because it "fails to give a person of ordinary intelligence fair notice"[272] that it is illegal to possess a gun after being convicted of a domestic violence misdemeanor. Further, the ignorance-of-the-law defense arguably could defeat a Lautenberg charge in certain scenarios. The statute violates due process, resulting in individuals with no awareness of the law being wrongfully convicted.[273]

In the military context, the statute constitutes an impermissible ex post facto law because it serves only a punitive effect.[274] It punishes an enlisted domestic violence misdemeanant a second time for having been convicted.[275] Even if the Lautenberg Amendment withstands these constitutional challenges, inherent structural and implementational flaws prevent the Amendment from achieving its purpose: the reduction of gun-related domestic violence nationwide. Confusion in the courts whether to define statutory terms through state or federal law risks arbitrary enforcement and reluctance to apply the law. The language of the statute potentially creates a technical loophole, enabling domestic violence offenders to evade conviction by arguing they did not knowingly and intelligently waive their right to a jury trial.[276]

Neither the ATF nor the DOD have sufficiently alerted law enforcement, military personnel, or the public about the meaning and consequences of the Lautenberg Amendment.[277] Such lack of guidance, awareness, and understanding of the law risks arbitrary enforcement; worse, it risks complete disregard of the law.[278] For all of these reasons, Congress should restructure and rework the Lautenberg Amendment to bring it within constitutional bounds, and thus enable its important goal of reducing nation-wide gun-related domestic violence.

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271. *See* discussion *supra* Part (I)(B)(iii).

272. United States v. Smith, 964 F. Supp. 286, 294 (N.D. Iowa 1997), *aff'd*, 171 F.3d 617 (8th Cir. 1999) (citation omitted).

273. United States v. Ficke, 58 F. Supp. 2d 1071 (D. Neb. 1999); *supra* notes 107 - 112 and accompanying text.

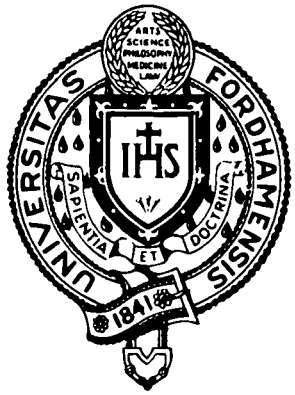
274. *See* discussion *supra* notes 163-165 and accompanying text.

275. *Id.*

276. 18 U.S.C. § 921(a)(33)(B)(i)(II)(bb); United States v. Akins, 243 F.3d 1199 (9th Cir. 2001).

277. *See* discussion *supra* Part (V)(A)-(B).

278. *Id.*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