Guns and Intimate Violence: A Constitutional Analysis of the Lautenberg Amendment

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GUNS AND INTIMATE VIOLENCE:* A CONSTITUTIONAL ANALYSIS OF THE LAUTENBERG AMENDMENT**

The Lautenberg Amendment,1 ("the Amendment") an amendment to the Gun Control Act of 1968,2 makes it illegal for any person "convicted in any court of a misdemeanor crime of domestic violence" to ship, receive or possess firearms or ammunition affecting interstate commerce.3 Unlike other firearm regulations, this Amendment has been applied to law enforcement officers and military personnel.4 Congress intended the Amendment to protect victims of domestic violence from further harm by removing guns from the hands of individuals who have demonstrated a propensity toward violence against an intimate partner.5 Although domestic violence has always existed in our society, its magnitude as a serious public health problem has been increasingly recognized in recent years.6 The breadth of the

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** At the time of the publication of this Note there were no other challenges to the Lautenberg Amendment, however, there were cases pending in the United States Court of Appeals addressing the issues raised in this Note.

5 See Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646 Before the Subcomm. on Crime, 102nd Cong. 2646, 2 (1996) (statement of Sen. Frank Lautenberg, sponsor of the Amendment) (stating that purpose of § 922(g)(9) was to protect victims of domestic violence from further harm); Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646, Before the Subcomm. on Crime, 102nd Congress 10379, 1-2 (1996) (statement of Mrs. Murray) (providing statistics to endorse removing guns from homes of domestic violence offenders); id. at 3-5 (statement of Sen. Diane Feinstein) (referring to necessity of legislation at misdemeanor level due to factors that many domestic violence offenders are never convicted of felonies, victims are reluctant to cooperate for fear of more violence and plea bargains result in misdemeanor conviction for what are felony crimes).
6 See Susan Wilt & Sarah Olson, Prevalence of Domestic Violence in the United States, 51 JAMWA 77, 77 (May/July 1996) (discussing domestic violence as serious public health problem that has increased in recent years).
problem spans both racial and socioeconomic boundaries. To-

day, domestic violence seems to have reached epidemic propor-
tions. The Lautenberg Amendment is a much needed response
which "may help reduce the lethality of violence against women" by requiring known domestic violence misdemeanants to relin-
quish firearms in their possession.

Law enforcement officials and members of the military have
questioned the constitutionality of the Lautenberg Amendment
on several levels. Initially, they assert that the new federal law
violates the Equal Protection Clause on three grounds: (1) it un-
fairly applies to domestic violence misdemeanants as opposed to
other misdemeanor crimes; (2) it applies only to domestic vio-
lence misdemeanors and not to felonies; and (3) it singles out law
enforcement officials, specifically, as a particular class of indi-
viduals. Secondly, they suggest that the Amendment exceeds

7 See id. at 81 (finding domestic violence more common among couples of lower socio-
-economic status, but no significant differences among racial and ethnic groups).

CRIM. L. & CRIMINOLOGY 46, 46 (1992) (recognizing half of all married women will be
beaten by their husbands at least once and U.S. Surgeon General found battering by hus-
bands, ex-husbands or lovers accounts for one-fifth of all hospital emergency room visits
for women and is single largest cause of injury to women in United States). See generally
Nikki R. Van Hightower & Susan A. McManus, Limits of State Constitutional Guarantees:
Lessons from Efforts to Implement Domestic Violence Policies, 49 PUB. ADMIN. REV. 269
(1989) (setting forth statistics indicating instances of domestic violence are reaching epi-
demic proportions).

9 See NANCY A. CROWELL & ANN W. BURGESS, UNDERSTANDING VIOLENCE AGAINST
WOMEN 26 (Nat'l Academy Press 1996). Incidents of domestic violence constitute the larg-
est group of calls received by police every year. Id. Women are most likely to be murdered
with a firearm: 75 percent of all homicides in the United States in 1997 were committed
with a firearm. Id. The risk of homicide in the home by a family member or intimate
partner for both women and men is seven and eight times higher if a gun is kept in the
home. Id.

10 See e.g., Why Give Wife Beaters Guns?, N.Y. TIMES, May 31, 1996, at A24 (stating
that purpose of bill is to prevent domestic abusers from using guns to injure spouses).

rev'd, 152 F.3d 998 (D.C. Cir. 1998) (challenging constitutionality of § 922(g)(9) by union
1564, 1569 (N.D. Ga. 1997), aff'd, 155 F.3d 1276 (11th Cir. 1998) (claiming unconstitu-
tionality of Lautenberg Amendment by law enforcement officials agency); see also Guns
and Domestic Violence Change to Ownership Bar Before the Subcomm. on Crime, 105th
Cong. (1997) (testimony of Kenneth Lyons, National President International Brotherhood
of Police Officers), available in, 1997 WL 101020 (F.D.C.H.) (challenging unconstitu-
tionality of Lautenberg Law by law enforcement official); id. (claiming Lautenberg Law violates Ex-Post Facto
Clause of Constitution). See generally Bobb Barr, Barr's Bill Stops Retroactive Use of Do-
mestic Violence Law, Congressional Press Release, Jan. 8, 1997 (stating Lautenberg
Amendment is unconstitutional because it applies retroactively).

12 See Gillespie v. City of Indianapolis, 13 F. Supp.2d 811, 822-23 (S.D. Ind. 1998) (al-
leging Lautenberg Amendment violates Equal Protection Clause); Fraternal Order of Po-
lice, 981 F. Supp. at 4-5 (challenging constitutionality of § 922(g)(9) on equal protection
grounds); National Ass'n of Gov't Employees, 968 F. Supp. at 1572-73 (claiming Lauten-
Congress' powers under the Commerce Clause. Thirdly, the Amendment is criticized as being retroactive and thus violative of the Ex Post Facto Clause. Finally, the Amendment is said to constitute a bill of attainder by virtue of its ability to inflict punishment.

The constitutionality of the Lautenberg Amendment has been upheld in the District Court for the Northern District of Georgia and in the Eleventh Circuit Court of Appeals in National Association of Government Employees, Inc. v. Barrett, Fulton County.

Other district courts, similarly to the Eleventh Circuit, have upheld the Amendment's constitutionality. However, the District of Columbia Circuit Court of Appeals reversed the lower court's ruling that the Lautenberg Amendment was constitutional in The Fraternal Order of Police v. United States of America.

This Note demonstrates why the Lautenberg Amendment is necessary legislation and will probably be amended to include domestic violence felons in order to withstand further constitutional challenges. It compares the community notification and registration laws (Megan's Laws) which are challenged on
similar grounds, with the exception of the Commerce Clause challenge. Both attempt to correct social evils (domestic violence and child abuse) and necessarily restrict certain individual rights in order to achieve their respective legislative goals. By applying the constitutional analysis used in scrutinizing Megan's Laws, the Lautenberg Amendment will also withstand constitutional challenge.

Part I of this Note, provides a discussion of the Lautenberg Amendment's legislative aims. Part II explores the constitutionality of the Amendment, with respect to the Equal Protection, Commerce and Ex Post Facto Clauses. Finally, Part III of this Note concludes that the Lautenberg Amendment is necessary legislation that may need to be amended to include felons convicted of domestic violence in order to withstand further constitutional challenges.

I. THE LAUTENBERG AMENDMENT - A GENERAL OVERVIEW

In September 1996, Congress enacted what is commonly termed by her neighbor who was convicted twice of sexual assault. Along with the registration provisions of Megan's Law, there exists a three-tier notification procedure. All "repetitive and compulsive" sexual offenders after serving their sentence, are required to register with their local law enforcement agency. They must provide their name, current legal address of residence, social security number, height, weight, date of birth, hair color, sex, age, and date and place of employment. They must confirm their address every ninety days, notify the law enforcement agency if they move, and re-register with the new local law enforcement agency.

There are also notification provisions to Megan's Law. The prosecutor of the county in which the registrant live determines whether the registrant is a low, medium or high risk reoffender and places them in tiers one, two, or three (tier three is the highest risk offender category). Under the lowest tier, (tier one) the county prosecutor notifies any law enforcement agency that may come into contact with the registrant. Under tier two, schools, day care facilities, and any organization related to child care or abused women are notified. The highest tier notifies members of the public, who may come into contact with the sex offender, with the registrants personal information given. See generally Artway, 81 F.3d at 1243-44. Failure to comply with these registration requirements is a fourth degree crime.

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20 See Artway, 81 F.3d at 1246-47 (setting forth similar constitutional arguments as cases challenging Lautenberg Amendment); Abraham Abramovsky, Megan's Law: Is it Constitutional? And is it Moral?, N.Y.L.J., July 11, 1995, at 3 (stating that Artway validated Tier one provisions of Megan's law but not Tier three or Tier two provisions); Justice Kahn, People v. Patrick Griffen, N.Y.L.J., Dec. 22, 1996, at A29, (citing cases in which courts held that community notification laws do not violate Ex Post Facto Clause).

21 See generally Artway, 81 F.3d at 1247 (providing statute attempts to protect society from repeat sexual offenders); National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1567 (N.D. Ga. 1997) (setting forth Lautenberg Amendment to protect families from further intimate abuse).
known as the Lautenberg Amendment to the Gun Control Act of 1968.\textsuperscript{22} The Lautenberg Amendment, proposed by Senator Frank Lautenberg, makes it unlawful for "any person . . . who has been convicted of a misdemeanor of domestic violence"\textsuperscript{23} to ship, transport, possess, or receive firearms in or affecting commerce.\textsuperscript{24} Congress enacted this legislation to protect women from domestic violence by keeping firearms out of the hands of individuals who are prone to violence in an attempt to reduce the risk of fatal injury.\textsuperscript{25}

In the past two decades, law enforcement officials in domestic violence situations have moved away from non-arrest, non-intervention and avoidance policies due to increased awareness and repugnance for intimate violence.\textsuperscript{26} Accordingly, legislative actions have encouraged the implementation of "mandatory arrest or pro-arrest policies, improve[d] tracking of cases involving domestic violence, centralize[d] and coordinated police enforcement, prosecution, and judicial responsibility for domestic violence cases."\textsuperscript{27} All of these efforts reflect a shift in philosophy

\begin{itemize}
\item \textsuperscript{22} 18 U.S.C. § 922(g)(9) (1997).
\item \textsuperscript{23} 18 U.S.C. § 921(a)(33)(A) (1997). A "misdemeanor crime of domestic violence" is defined in The Act as any misdemeanor that has as an element the use or attempted use of physical force or the threatened use of a deadly weapon committed by the victim's current or former domestic partner, parent, or guardian. \textit{Id.}
\item \textsuperscript{24} 18 U.S.C. § 922(g)(9) (1997).
\item \textsuperscript{25} See Lautenberg, supra note 5 (stating that purpose of § 922(g)(9) was to protect victims of domestic violence from further harm by removing firearms from known offenders); see also \textit{Guns and Domestic Violence Changes to Ownership Ban: Hearings on S 2646, Before the Subcomm. on Crime, 102nd Cong.} (1997) (testimony of William Johnson, General Counsel, National Association of Police Organization Inc.) (agreeing with goal of Amendment, which is taking firearms out of households that have history of domestic violence, but disagreeing with method of Amendment); \textit{Guns and Domestic Violence Changes to Ownership Ban: Hearings on S 2646, Before the Subcomm. on Crime, 102nd Cong.} (1997) (statement of Rep. William McCollum) (noting his agreement with plans that prevent those convicted of violent crimes from possessing firearms). But see \textit{Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646, Before the House Subcomm. on Crime, 102nd Cong. 5 (1997)} (testimony of Bernard H. Tedorski, National Vice President of Fraternal Order of Police) (arguing that Lautenberg Amendment will not serve its stated purpose of preventing domestic violence fatalities).
\item \textsuperscript{26} See \textit{Domestic Violence: Violence Between Intimates, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS}, U.S. Dept of Justice, Nov. 1994, at 5 (citing statistics demonstrating shift from non-intervention to pro-arrest policies in domestic violence cases).
\item \textsuperscript{27} See William G. Bassler, \textit{The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?}, 48 RUTGERS L. REV. 1139, 1145 (1996). The Violence Against Women Act of 1994 ("VAWA") was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. \textit{Id.} at 1141. VAWA establishes a National Commission of Violent Crime against Women to promote a national policy to combat and reduce such crimes, and make federal grants available for law enforcement agencies and prosecutors to develop state and local strategies. \textit{Id.}
aimed at holding the perpetrator, not the victim, accountable for the violence. The Lautenberg Amendment reflects a substantial step in prioritizing the rights of victims.

The Lautenberg Amendment is different from other gun control laws because it applies to misdemeanants rather than felons and it does not exclude law enforcement officials or military personnel. Due to this departure from prior federal gun control laws, the Lautenberg Amendment has been subjected to criticisms by the media, members of Congress and law enforcement officials.

An analysis of state and federal laws, recognizing instances of violence towards women, can be described as “the leftover bones thrown to a starving dog.” Although focusing on anti-stalking legislation in particular, similar descriptions can be made of past laws related to domestic violence. Such laws usually come after a highly publicized case of abuse towards women, such as the O.J. Simpson case. See generally National Committee for Injury Prevention and Control, Injury Prevention: Meeting the Challenge, 5 THE AMERICAN JOURNAL OF PREVENTIVE MEDICINE 223 (Supp. Oxford Univ. Press 1989) (indicating recent shifts in philosophy towards holding perpetrator not victim responsible).


See Jonathan Kerr, Critics Say Anti-Domestic Violence Amendment Takes Shot at Police, available in, 1996 WL 684742 (stating that for first time in history of United States gun control legislation, there is no longer exemption for police, military personnel and government officials).
groups across the country. Recently, bills that provide exemptions for law enforcement officials and military personnel have been introduced in Congress. Many of these groups seek to rescind the Lautenberg Amendment entirely alleging it is unconstitutional.

A. Proposed Exemptions for Law Enforcement Officers and Military Officials

The Amendment, in its application to law enforcement officials, has forced many police officers to turn in their weapons. In

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32 See New Domestic Violence Gun Law Includes Cops, NEWSDAY, Dec. 19, 1996, at 9 (rejecting applicants to Police Departments with records of domestic discord due to new federal gun law); see also John C. Ensslin, More Denver Officers Will Have to Surrender Their Guns: New Interpretation of Law Adds Violation of City Ordinances to List That Precludes Ownership, ROCKY MOUNTAIN NEWS, May 29, 1997 at 3 (indicating as new federal gun control law is interpreted more police officers will have to turn in their weapons); R. Joseph Gelarden, New Federal Weapons Law Puts Police Under the Gun, Officers Convicted of Domestic Abuse May Lose Jobs Because They Can't Carry Their Weapons, THE INDIANAPOLIS STAR, Dec. 6, 1996 at A1 (asserting hundreds of police officers nationally will be affected by new domestic violence law); Susan Sward, New Gun Law Could Disarm Police Officers - Weapons Banned for Cops Guilty of Misdemeanor Family Violence, S.F. CHRON., Jan. 13, 1997, at A1 (noting nation's law enforcement agencies scrambling to see how many officers may have to lay down weapons); Hector Tobar, 3 Deputies Go to Court, Regain Right to Carry Guns: Law, Domestic Violence Convictions Expunged, They No Longer Fall Under Federal Firearms Control Statute, L.A. TIMES, May 1, 1997 at B1 (examining situation where sheriff's deputies who lost rights to carry firearms had their misdemeanor convictions expunged).

33 See H.R. 1009, 105th Cong. (1997). This is a bill to repeal the Lautenberg Amendment. Id. The rationale behind this bill is that the Amendment is unconstitutional because a nexus between domestic violence and interstate commerce has not been established, essentially violating states' rights. Id. The bill also states that the Amendment violates the Tenth Amendment as well as the Commerce Clause. Id. Also, supporters of the bill contend that the Amendment imposes a penalty on crimes committed before its enactment, and thus is violative of due process and constitutes an ex post facto law. Id.


35 See, e.g., NEWSDAY, supra note 32, at 9. In attempting to comply with the new law, police departments are beginning to reject applicants based on their domestic violence misdemeanor status where previously they only screened for felonies. Id. According to police, a misdemeanor domestic violence conviction is now considered an automatic disqualifier for applicants. Id. Also, the law now precludes misdemeanor offenders from the ability to possess a firearm thus preventing them from satisfying one of the essential criteria of the position of police officers. Id. Approximately ten percent of the 700,000 law enforcement officers in America will have their firearms revoked if the Lautenberg Amendment is adhered to. Id.
many cases, a police officer or member of the military will be unemployed if they are stripped of their weapons. Exemptions have been proposed to eliminate the application of the Lautenberg Amendment towards law enforcement officials and military personnel. It is important to examine the policies and goals the new law attempts to achieve when addressing these proposed exemptions.

Normally a woman's primary source of help from abuse by an intimate partner is the law enforcement community. For this reason, police officers should be strictly held to this law. A police officer who is a domestic abuser may not have the requisite objectivity to respond to an intimate abuse situation. If a police officer who has also been convicted of domestic violence is called into this type of situation, with whom will he side? Will someone capable of domestic violence and with a documented history of intimate violence possess the requisite neutrality to protect other women from their abusers? Furthermore, since police officers carry firearms while off-duty and bring their guns into their homes, this law should be particularly emphasized in its application to them. It does not seem logical that the drafters of the law could have intended such an exemption for police officers.

36 See Gelarden, supra note 32 at A1 (discussing effect of new federal gun control law may render law enforcement officials unemployed); Sward, supra note 32 at A1 (examining repercussions of new domestic violence law to police officers).
37 See, e.g., H.R. 1009, 105th Cong. (1997) (proposing to exempt military and law enforcement officials from application of Lautenberg Amendment).
38 See, James Bovard, Disarming Those Who Need Guns Most, WALL ST. J., Dec. 23, 1996, at A12. Frank Lautenberg discussed his deep-seeded feeling behind the Amendment that "if you beat your wife . . . you should not have a gun." Id. The presumption behind the Lautenberg law is that men must be disarmed in order to reduce an epidemic of wife killing. Id.; see also Walah, supra note 27, at 1A. Press Secretary for Senator Lautenberg, stated that this legislation was introduced to save lives. Id.
40 See Scott Glover, Domestic Violence Arrests Within LAPD Rise: Sharp Increase has been Seen Since Special Unit Formed in Response to Report Citing Leniency. Six Officers have been Joailed this Year., L.A. TIMES, February 20, 1998, at B1 (citing instances of arrests of law enforcement officers for domestic violence offenses).
41 See id. (indicating possible bias in police officers with prior domestic violence convictions).
42 See id. (suggesting possibility of lack of neutrality in domestic violence situations when involving law enforcement official with past convictions of domestic violence).
43 See Domestic Abuse Records of Officers Checked, L.A. TIMES, Apr. 17, 1997, at B4 (noting due to fact that police carry firearms into homes, one way in which police are being held to Lautenberg Amendment, is departmental background checks of their abusive history).
Excluding police officers would weaken the law's ultimate goals of protecting women and children from the risk of fatal injury by intimates known to be prone to violence.44 Although this law has not yet been implemented with respect to the military, the Pentagon is taking steps to interpret its effects as application begins towards military personnel.45 The Lautenberg Amendment makes it a felony for any person who has been convicted of a domestic violence misdemeanor to receive or possess firearms and ammunition which have moved in interstate commerce.46 It is also a felony to sell or transfer firearms and ammunition to such persons.47 Thus, both the company commander and soldier may have committed a felony when that soldier draws a weapon from the arms room.48

II. THE CONSTITUTIONALITY OF THE LAUTENBERG AMENDMENT

The constitutionality of the Lautenberg Amendment has been challenged on Equal Protection grounds because it applies to specific members of a particular class or group of individuals.49 The

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44 See Gary Fields, Domestic Abuse Gun Law is Disarming Cops, USA TODAY, March 5, 1997, at 10A (indicating spouses of law enforcement officials are reluctant to get help for abuse out of fear that co-worker will protect fellow officer).
45 See Dick Foster, Gun Law Puts Military in Spin; New Rule on Domestic Violence Has Uncertain Impact, Leaving Brass Feeling a Bit Disarmed, ROCKY MOUNTAIN NEWS, Dec. 4, 1996, at 16A. This Amendment has the potential to jeopardize the careers among members of the armed forces where having the ability to carry firearms is a prerequisite to service. Id. Pentagon officials have struggled with the fact that this law would disqualify perhaps hundreds of its 1.5 million troops from serving if they could no longer carry their weapons. Id. Many problems and questions arise in regards to applying the law to the military. Id. Definitions of "firearms" will have to be made: will an F-16 fighter plane or a nuclear submarine constitute a firearm for purposes of the Lautenberg Amendment. Id. Also, it is necessary in some areas of the armed forces that soldiers qualify with a weapon in order to serve in the military. Id. Will this prevent some individuals from qualifying and perhaps rendering them non-deployable since they cannot possess firearms? Id.; see also Gail Gibson, Will New Law Take Guns Out of Some Soldiers' Hands?, THE CHARLESTON GAZETTE AND DAILY MAIL, August 6, 1997, at 3A. Activists are frustrated that the military, to date, has not been able to implement the law as it has not received any direction from the Pentagon. Id. The new law has "fired a volley of confusion into the nation's armed forces, where possessing and using weapons is a profession." Id.
47 See id. § 922(d).
Amendment has also been criticized as exceeding Congress' powers under the Commerce Clause. Finally, it has been opposed for being unconstitutionally retroactive under the Ex Post Facto Clause. In examining the tests and analysis to be used in determining the legitimacy of the Lautenberg Amendment, an in depth discussion of two cases challenging its constitutionality is necessary.

In National Association of Government Employees, Inc. v. Barrett, Fulton County and United States of America, the plaintiff, ("NAGE"), an employee association and "union representative for non-supervisory peace officers," brought suit challenging the constitutionality of the Lautenberg Amendment. NAGE imputed the unconstitutionality of the Amendment under the Commerce, Equal Protection, Due Process, Ex Post Facto and 1276 (11th Cir. 1998).

See National Ass'n of Gov't Employees, 968 F. Supp. at 1572. The court distinguishes this case from United States v. Lopez, because the Lautenberg Amendment, unlike the statute in Lopez, contains a jurisdictional element that requires the government to demonstrate that the firearm was possessed "in or affecting commerce" or has been received after having "been shipped or transported in interstate or foreign commerce." Id.; see also Gillespie v. City of Indianapolis, 13 F. Supp. 2d 811, 821-22 (S.D. Ind. 1998). The plaintiff again compared the Lautenberg Amendment to the statute in Lopez alleging that its jurisdictional nexus was insufficient. Id.

See Gillespie, 13 F. Supp.2d at 825-26 (contending that Lautenberg Amendment does not create retroactive criminal penalties); National Ass'n of Gov't Employees, 968 F. Supp. at 1575-76 (indicating Lautenberg Amendment is constitutional under Ex Post Facto Clause); United States v. Hicks, 992 F. Supp. 1244, 1245 (D. Kan. 1997) (recognizing Lautenberg Amendment as constitutional under Ex Post Facto Clause); United States v. Meade, 986 F. Supp. 66, 69 (D. Mass. 1997) (examining Ex Post Facto claims).

See id. at 1572. The plaintiff is challenging the constitutionality of the Lautenberg Amendment. Id. Plaintiff, William S. Hiley, was a deputy sheriff employed by defendant Fulton County. Id. at 1568. He was issued a firearm which was a requirement to the performance of his employment. Id. In August, 1995 he "ple[d] 'no contest' to a misdemeanor battery that involved a domestic violence charge and was sentenced to a 12-month term of non-reporting probation." Id. When Hiley reported his conviction to the Sheriff's Department, he was not disciplined. Id. However, after the passage of the Lautenberg Amendment, the Bureau of Alcohol, Tobacco and Firearms issued a letter explaining the implications of the law as applied to law enforcement officers. Id. Consequently, Hiley was dismissed 'for cause' from his position. Id. Hiley sought injunctive relief enjoining any member of the National Association of Government Employees from applying the Lautenberg Amendment to its members on the grounds that the Lautenberg Amendment was unconstitutional. Id. at 1568-69. The court rejected six theories underlying plaintiff's constitutional challenges. Id. at 1578. The district court held that the complaint failed to state a cause of action upon which relief could be granted, upholding the Lautenberg Amendment as constitutional. Id.

See id. at 1572 (analyzing Lautenberg Amendment under Commerce Clause).

See id. at 1572-73 (discussing constitutionality of Lautenberg Amendment under Equal Protection Clause).

See id. at 1575 (discussing substantive due process challenges to Lautenberg Amendment).
Bill of Attainder Clauses.\textsuperscript{58} It also argued that the Amendment violated the Tenth Amendment in that it usurps powers reserved to the states.\textsuperscript{59} The District Court for the Northern District of Georgia reasoned that the Lautenberg Amendment was not a violation of the Commerce Clause as it contained the necessary jurisdictional element that the firearm was possessed "in or affecting commerce" or was received after having "been shipped or transported in interstate or foreign commerce."\textsuperscript{60} Second, the court used a rational basis review\textsuperscript{61} as the appropriate level of scrutiny to determine that the state had a legitimate purpose in classifying domestic violence misdemeanants as "a group of individuals who should be restricted in their access to firearms."\textsuperscript{62} This classification was upheld as being "reasonably related to Congress' purpose of protecting public safety by keeping firearms out of the hands of potentially dangerous or irresponsible persons."\textsuperscript{63} In light of this rationale, the court concluded the Lautenberg Amendment was not a violation of the Equal Protection Clause.\textsuperscript{64} It also survived plaintiff's challenge under the Due Process Clause because the court held that the Lautenberg Amendment was "rationally related to a legitimate governmental purpose."\textsuperscript{65} Additionally, the Amendment was held not to be violative of the Ex Post Facto Clause because it addresses the possession of a firearm, not the misdemeanor crime of domestic violence.\textsuperscript{66} Furthermore, the court found that the Amendment

\textsuperscript{57} See id. at 1575-76 (examining Ex Post Facto claims of unconstitutionality of Lautenberg Amendment).

\textsuperscript{58} See id. at 1576-77 (describing bill of attainder challenges to Lautenberg Amendment).

\textsuperscript{59} But see id. at 1577-78 (holding that Lautenberg Amendment is valid exercise of Congress' commerce authority and therefore cannot violate Tenth Amendment).

\textsuperscript{60} See id. at 1572 (quoting jurisdictional element of § 922(g)(9)).

\textsuperscript{61} See id. at 1573 (using rational basis of review as appropriate level of scrutiny for equal protection challenges because claims do not involve suspect class or fundamental right); see also Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657 (1981) (holding unless fundamental right is implicated, statute will be upheld if it is rationally related to achievement of legitimate governmental interest such that there is reasonably conceivable facts that could provide rational basis for classification).

\textsuperscript{62} See National Ass'n of Gov't Employees, 968 F. Supp. at 1573 (determining state had rational basis for classification of domestic violence misdemeanants).

\textsuperscript{63} See id. (upholding classification as reasonably related to legislature's intent).

\textsuperscript{64} See id. at 1573 (classifying domestic violence misdemeanants as group of individuals is reasonably related to Congress' legitimate interest behind enactment of Lautenberg Amendment).

\textsuperscript{65} See id. at 1576 (obviating need to discuss plaintiff's due process allegations of Lautenberg Amendment in light of Equal Protection analysis).

\textsuperscript{66} See id. at 1576 (stating Lautenberg Amendment withstands constitutional chal-
did not fall within the historical meaning of legislative punishment and that due to its "well-defined goals" it reasonably furthered nonpunitive legislative purposes.\textsuperscript{67} Finally, the court held that because the Amendment "[wa]s a valid exercise of Congress' commerce authority, it \ldots [could not] violate the Tenth Amendment."\textsuperscript{68} The Eleventh Circuit Court of Appeals subsequently affirmed this decision.\textsuperscript{69}

However, the plaintiffs in \textit{The Fraternal Order of Police v. United States}, were successful in challenging the Lautenberg Amendment in the court of appeals. The court of appeals reversed the lower court's holding that the Lautenberg Amendment was constitutional.\textsuperscript{70} This suit was brought on behalf of two police officers with prior domestic violence misdemeanor convictions.\textsuperscript{71} The Fraternal Order of Police brought this claim for fear that the Lautenberg Amendment threatened to deprive police officers not only of their constitutional right to possess firearms, but of their livelihood as well.\textsuperscript{72} The District Court for the District of Columbia upheld the Amendment as constitutional under the Commerce, Equal Protection and Due Process Clauses as well as the Tenth Amendment.\textsuperscript{73} The court reasoned that the statute contained the requisite jurisdictional element to withstand constitutional challenge under the Commerce Clause.\textsuperscript{74} Under the Equal Protection and Due Process Clauses, the court held that the classification of domestic violence misdemeanants was rationally related to the achievement of a legitimate governmental interest of "keeping firearms out of the hands of categories of potentially irresponsible persons."\textsuperscript{75} The Lautenberg Amendment

\textsuperscript{67} See id. at 1576-77 (indicating Lautenberg Amendment is not bill of attainder).
\textsuperscript{68} See id. at 1577 (stressing Lautenberg Amendment is not violation of Tenth Amendment).
\textsuperscript{69} See National Ass'n of Gov't Employees v. Barrett, 155 F.3d 1276, 1276 (11th Cir. 1998) (affirming district court's opinion).
\textsuperscript{71} See 981 F. Supp. at 3.
\textsuperscript{72} See id. at 3.
\textsuperscript{73} See id. at 6 (upholding Lautenberg Amendment as constitutional).
\textsuperscript{74} See id. at 4 (stating Lautenberg Amendment is constitutional under Commerce Clause due to fact it contains language that firearm be possessed "in or affecting commerce" or transported "in interstate or foreign commerce").
\textsuperscript{75} See id. at 5 (indicating Lautenberg Amendment's purpose provides rational basis for classification of domestic violence misdemeanants (quoting Barrett v. United States,
also withstood constitutional challenge under the Tenth Amendment because it "places no requirements on States or state officials."  

On appeal, the court of appeals reversed the district court's ruling, holding that because the Lautenberg Amendment does not address individuals convicted of domestic violence felonies, it imposes a harsher punishment on those convicted of the lesser crime of a domestic violence misdemeanor and was thus violative of the Equal Protection Clause. The court of appeals further held that Section 925, exempting law enforcement officials and military personnel from the Gun Control Act, is unconstitutional as it withholds the public interest exception from those convicted of domestic violence misdemeanors. Although there have only been a few cases to date challenging the Lautenberg Amendment, this law has been highly controversial in its application. It is expected that as other law enforcement officials are forced to surrender their firearms, more cases will soon follow.

A. An Analysis of the Lautenberg Amendment under the Equal Protection Clause

The Lautenberg Amendment has been criticized as violative of

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423 U.S. 212, 220-21 (1976)).

See id. at 6 (explaining § 922(g)(9) places no requirements on States).

See Fraternal Order of Police v. United States, 152 F.3d 998, 1004 (D.C. Cir. 1998) (reversing district court's decision upholding constitutionality of Lautenberg Amendment).

See Fraternal Order of Police, 152 F.3d at 1004 (holding § 925 unconstitutional insofar as it purports to withhold public interest exception from those convicted of domestic violence misdemeanors).


See U.S. CONST. amend. XIV. The Equal Protection Clause is part of the Fourteenth Amendment which provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." Id. See generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 676 (The Foundation Press, Inc. 10th ed. 1980). The Clause has been interpreted to impose a "general restraint on the use of classifications, whatever the area regulated, whatever the classification criterion used." Id.
the Equal Protection Clause of the Fifth Amendment.\textsuperscript{81} Those invoking this argument believe that the Amendment is unconsti-
tutional in three ways.\textsuperscript{82} First, they allege it is unconstitutional because it distinguishes between persons convicted of misde-
meanor crimes of domestic violence and persons convicted of other types of misdemeanor crimes of violence.\textsuperscript{83} Second, they submit that it singles out law enforcement officers as a class of persons.\textsuperscript{84} Third, they argue that the Lautenberg Amendment imposes a harsher penalty on individuals convicted of the lesser crime of domestic violence (misdemeanors) than it does for indi-
viduals convicted of the greater crime of domestic violence (felon-
ies).\textsuperscript{85}

Congress, through the Lautenberg Amendment, has classified
domestic violence misdemeanants as a group that should be re-
stricted from firearm possession.\textsuperscript{86} These domestic violence mis-
demeanants are not a suspect class being denied a fundamental right,\textsuperscript{87} thus, a rational basis review is the appropriate level of

\textsuperscript{81} See National Ass'n of Gov't Employees, 968 F. Supp. at 1578. In this case the plain-
tiffs brought their claim under the Fourteenth Amendment. Id. However, this was incor-
rect because the Fourteenth Amendment only applies to the states and not the federal
government. Id. The Fifth Amendment places the same limits on the exercise of the fed-
eral government as the Fourteenth Amendment places on the states. Id. Therefore, the
court treated the claim as if it were properly brought under the Fifth Amendment. Id.

\textsuperscript{82} See id. (setting forth plaintiffs' three arguments that Lautenberg Amendment is
unconstitutional under Equal Protection Clause).

\textsuperscript{83} See Fraternal Order of Police, 981 F. Supp. at 5 (arguing that imposing firearm dis-
ability only on those who have committed domestic violence misdemeanors gives irration-
ally preferential treatment to persons convicted of other misdemeanors); National Ass'n of
Gov't Employees, 968 F. Supp. at 1572 (asserting unconstitutionality of Lautenberg
Amendment on equal protection grounds).

\textsuperscript{84} See Gillespie, 13 F. Supp. 2d at 824 (contending Lautenberg Amendment has dispro-
portionate impact on law enforcement officials); National Ass'n of Gov't Employees, 968 F.
Supp. at 1572 (arguing Lautenberg Amendment violates Equal Protection Clause because it
discriminates against domestic violence misdemeanants who are also enforcement offi-
cers).

\textsuperscript{85} See Fraternal Order of Police v. United States, 152 F.3d 998, 1003 (D.C. Cir. 1998)
(holding Lautenberg Amendment unfairly distinguishes between domestic violence misde-
meanors and domestic violence felons); National Ass'n of Gov't Employees, 968 F.Supp.
at 1572 (setting forth argument that Lautenberg Amendment irrationally allows felons,
but not domestic violence misdemeanants to possess firearm).

\textsuperscript{86} See 18 U.S.C. § 922(g)(9) (Supp. 1999). The Lautenberg Amendment to the 1968
Gun Control Act applies to "any person ... who has been convicted in any court of a misde-
meanor crime of domestic violence." Id.; 18 U.S.C. §922(g)(1)-(8). The Gun Control Act
also applies to felons, fugitives from justice, persons unlawfully using or addicted to con-
trolled substances, persons adjudicated as mental defectives, persons who have been
committed to a mental institution, illegal aliens, persons dishonorably discharged from
the armed services, persons who have renounced their citizenship and persons subject to a
court order that restrains them from harassing, stalking, or threatening an intimate
partner or child of such partner. Id.

\textsuperscript{87} See Fraternal Order of Police, 981 F. Supp. at 5. All courts that have reviewed the
The classification, therefore, need only be "reasonably related to the achievement of a legitimate governmental interest." Congress' goal in enacting the Lautenberg Amendment, to reduce the risk of fatal violence by removing firearms from the homes of individuals known to be prone to domestic violence, is a reasonable justification for the classification of persons convicted of misdemeanor crimes of domestic violence. Due to the fact that many intimate abuse cases are pled-down and prosecuted at the misdemeanor level, such a distinction between all misdemeanants and those misdemeanants who have committed domestic violence has a rational basis to achieve the federal government's intended goal.

The Lautenberg Amendment, however, has been held to be violative of the Equal Protection Clause because it imposes a more severe penalty on individuals convicted of the lesser crime of domestic violence than it does on those convicted of the greater crime. Therefore, the Lautenberg Amendment may need to be

Lautenberg Amendment to date have applied a 'rational basis' standard of review. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (explaining that rational basis is appropriate level of scrutiny under Equal Protection analysis if no suspect class is implicated); Association of Civilian Technicians v. Federal Labor Relations Auth., 756 F.2d 172, 177 (D.C. Cir. 1985) (utilizing rational basis of review where no suspect class); see also Price v. Tanner, 855 F.2d 820, 823 n.7 (11th Cir. 1988) (illustrating use of rational basis review in cases where no suspect class is at issue). See generally Rachel A. Brown, Heller v. Doe: The Supreme Court Diminishes the Rights of Individuals with Mental Retardation, 26 LOY. U. CHI. L.J. 99, 123-24 (1994) (discussing constitutional standards of review).

See Department of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (stating test courts use to decide if rational basis standard of review was met).

See Fraternal Order of Police, 981 F. Supp. at 5 (stressing classification was reasonably justified by Congressional intent of reducing fatal violence); National Ass'n of Gov't Employees, 968 F. Supp. at 1573 (classifying domestic violence misdemeanants as reasonably related to legislative intent).

See Guns and Domestic Violence Change to Ownership Ban: Hearings on S. 2646 Before the Subcomm. on Crime, 102nd Cong. 10379, 3-5 (1996) (statement of Sen. Diane Feinstein) (referring to necessity of legislation at misdemeanor level due to fact that many domestic violence offenders are never convicted of felonies because victims are reluctant to cooperate for fear of more violence and plea bargains usually result in misdemeanor conviction for what are felony crimes).

See Fraternal Order of Police v. United States, 152 F.3d 998, 1004 (D.C. Cir. 1998) (holding Lautenberg Amendment unconstitutional under Equal Protection Clause because it unfairly discriminates between domestic violence misdemeanants and felons).
amended so that it will apply to domestic violence felons as well.

The assertion that the Lautenberg Amendment unfairly targets law enforcement officers also appears to be invalid. As long as the classification is rationally based, if such classification has uneven effects upon a particular group, it has been held to be of no constitutional concern. Therefore, it would seem that the fact that some law enforcement officers may lose their current employment status due to the effects of this law does not render the law unconstitutional.

A similar analysis was used in conjunction with the classification of individuals convicted of an analogous societal evil, namely community notification and registration laws ("Megan's Laws"). Megan's Laws involve the classification of 'compulsive and repetitive' sex offenders. These laws have been held valid under the Equal Protection Clause. The goal of protecting vulnerable individuals from sexual offenses is a legitimate state interest that is rationally related to the required registration of convicted sex offenders whose offenses are found to be 'repetitive and compulsive.' Analogously, this Note contends that the Lautenberg Amendment's classification of domestic violence misdemeanants,

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93 See Fraternal Order of Police, 981 F. Supp. at 4-5 (holding that § 922(g)(9) does not discriminate against law enforcement officials); National Ass'n of Gov't Employees, 968 F. Supp. at 1573 (upholding Lautenberg Amendment against Due Process claim).

94 See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 271 (1979). An exception to this rule is available if it can be shown that the classification was due to a discriminatory purpose. Id. at 272.; 142 CONG. REC. S 11227 (1996). Legislative intent clearly demonstrates that there is no such discriminatory purpose with regard to police officers and the military. Id. Senator Lautenberg stated that the purpose of the Lautenberg Amendment was to protect victims of domestic violence from further harm. Id. Therefore, the aim of this legislation is not to single out police officers and others who have committed domestic violence misdemeanors and whose occupation requires the possession of a firearm. Id.; see also Johnson v. Robinson, 415 U.S. 361, 385 (1979). In Johnson, the Court held that equal protection for individuals does not deny Congress the right to treat persons of different classes in different ways. Id. See generally 18 U.S.C. § 922(g)(9) (Supp. 1999). In this particular instance Congress has classified domestic violence misdemeanants as a group of individuals that should have restricted access to firearms. Id.


as opposed to other types of misdemeanants, felons or other members of the population, for the purpose of protecting victims of intimate abuse is similarly constitutional under the Equal Protection Clause.

B. Analysis of the Lautenberg Amendment under The Commerce Clause

The enactment of the Lautenberg Amendment has also been criticized as exceeding Congress' authority under the Commerce Clause. Under the Commerce Clause, Congress has the power to regulate any activity, even intrastate production, if the activity has an appreciable effect, either direct or indirect, on interstate commerce. The Lautenberg Amendment provides, "it shall be unlawful ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm ... which has been shipped or transported in interstate or foreign commerce."" There are limits to Congress' broad authority under the Commerce Clause as was evidenced in United States v. Lopez. In Lopez, the Court held that the Gun-Free School Zones Act of 1990 was unconstitutional as it violated the Commerce Clause. The

97 U.S. CONST. art. I, §8, cl. 3. This Clause states that "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States ..." Id.

98 See Fraternal Order of Police, 981 F. Supp. at 4 (claiming Lautenberg Amendment violates Commerce Clause because it exceeds Congress' authority); National Ass'n of Gov't Employees, 968 F. Supp. at 1572 (asserting claim of unconstitutionality under Commerce Clause because this power should be left to states).

99 See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937). The Court held that when the National Labor Relations Board ordered Jones & Laughlin to cease interfering with its employees' rights of self-organization and collective bargaining, this was an exercise of the congressional power to regulate interstate commerce and did not exceed Congress' authority under the Commerce Clause. Id. It went further to state that Congress has the power to regulate even intrastate acts so long as they bear such a "close and substantial relation to interstate commerce" that control is appropriate for the protection of commerce. Id. at 37.; see also United States v. Lopez, 514 U.S. 549, 549 (1995) (describing Congress' power under Commerce Clause); Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 (1994) (discussing when Congress can use its power under Commerce Clause).


101 514 U.S. 549 (1995) (holding that possession of guns in school zone did not substantially affect commerce and was thus unconstitutional); see also United States v. Disanto, 86 F.3d 1238, 1244 (1st Cir. 1996) (stating how more statutes are now being challenged because of Lopez); United States v. Garcia-Beltram, 890 F. Supp. 67, 70 (D. P.R. 1995) (citing Lopez as break from norm of incredible reach of Congress' power under Commerce Clause); United States v. Saliento, 898 F. Supp. 45, 49 (D. P.R. 1995) (noting that Lopez has changed landscape in which we now view the Commerce Clause).

102 See Lopez, 514 U.S. at 551. The contested legislation in Lopez was the Gun-Free
statute was held not to include explicit findings by Congress that
the activity being regulated, the possession of guns in schools, af-
tects commerce. More significant with respect to an analysis
of the Lautenberg Amendment, is the fact that the statute in Lo-
pez does not contain a "jurisdictional nexus." An appropriate
jurisdictional nexus requires the government to establish that a
firearm was possessed "in or affecting commerce" or was received
after having "been shipped or transported in interstate or foreign
commerce."

In contrast to the Gun-Free School Zones Act of 1990 in Lopez,
the Lautenberg Amendment does contain the requisite jurisdic-
tional element. The Lautenberg Amendment provides that it
will be unlawful for domestic violence misdemeanants to ship,
transport or possess a firearm in or affecting interstate com-
merce. This jurisdictional language in the Lautenberg
Amendment is fatal to any constitutional challenge under the
Commerce Clause. The possession, transportation or ship-
ment of a firearm in interstate or foreign commerce substantially

School Zones Act of 1990, which made it a federal crime "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." See Lopez, 514 U.S. at 551 (stating guns in school zones did not affect commerce).

See Lopez, 514 U.S. at 551 (stating Lopez statute did not contain appropriate jurisdictional
 nexus). See, e.g., United States v. Chesney, 86 F. 3d 564, 565 (6th Cir. 1996) (citing statute
 that prohibits possession of firearm by felon as constitutional under Commerce Clause
as long as government proves it was affecting commerce).

Lopez, 514 U.S. at 561; see also United States v. Kirk, 105 F. 3d 997, 1002 (5th Cir.
1997) (explaining nexus to commerce must be present); United States v. Wells, 98 F.3d
508, 820 (4th Cir. 1996) (distinguishing Lopez because this statute required government
to prove nexus of item to interstate commerce). See generally United States v. Bishop, 66
F. 3d 569, 575 (3d Cir. 1995) (outlining what is required by Commerce Clause).

See 18 U.S.C. §922(g)(9) (Supp. 1999). This section states that "it shall be unlawful
for any person . . . 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." Id.

See id. (providing it is unlawful to ship, transport or possess firearm in or affecting
commerce).

See United States v. McAllister, 77 F.3d 387, 390 (11th Cir. 1996) (holding that jurisdic-
tional element of § 922(g) defeats constitutional challenge of statute); United States
v. Turner, 77 F.3d 887, 889 (6th Cir. 1996) (noting that every circuit faced with constitu-
tionality of § 922(g) has upheld it as containing necessary jurisdictional element that §
922(g) lacked in Lopez, thus sufficiently linking it to interstate commerce); see also United
States v. Gateward, 84 F.3d 670, 671 (3rd Cir. 1996) (holding that § 922(g) contains suffi-
cient jurisdictional element for commerce clause analysis); United States v. Sorrentino, 72
F.3d 294, 296 (2d Cir. 1995) (holding that statute has legitimate nexus to interstate com-
merce which is needed to be constitutional under Lopez); United States v. Collins, 61 F.3d
1379, 1383-84 (9th Cir. 1995) (concluding that § 922(g) is valid exercise of Congress' Commerce power).
affects commerce. Therefore, the jurisdictional element of the Lautenberg Amendment insulates it from constitutional challenges under the Commerce Clause.

C. The Lautenberg Amendment Withstands Challenges Under the Ex Post Facto Clause

The Lautenberg Amendment has also been criticized as being retroactive, and thus a violation of the Ex Post Facto Clause of the Constitution. Critics suggest that the Amendment is retroactive since it prohibits an individual convicted of a misdemeanor domestic violence crime from possessing a firearm even if the date of conviction precedes the effective date of the law.

An ex post facto law is one that has a retroactive punitive effect. The Ex Post Facto Clause is violated if: (1) the law retroactively alters the definition of a crime, so that an act that was not a crime at the time it was committed is later defined as a crime; (2) the law retroactively aggravates a crime, re-defining it so as to make it a greater offense than it was when it was committed; (3) the law increases the punishment for an act that was a crime when it was committed; or (4) the law alters the rules of evidence, by allowing a conviction based on lesser evidence than was required at the time the act was committed.


110 See id. (determining jurisdictional nexus of Lautenberg Amendment sustains its constitutionality under Commerce Clause).

111 U.S. CONST. art. I, §9, cl.3. This clause states “no Bill of Attainder or ex post facto law shall be passed.”


113 See National Ass’n of Gov’t Employees, 968 F. Supp. at 1575-76 (discussing why Lautenberg Amendment as challenged under Ex Post Facto Clause is constitutional).


1. The Possession of the Firearm is the Crime Punished, Not the Commission of a Domestic Violence Misdemeanor

At first glance, the Lautenberg Amendment may appear to be retroactive because it prohibits an individual convicted of a misdemeanor domestic violence crime from possessing a firearm even if the conviction of the domestic violence misdemeanor pre-dates the law.\textsuperscript{116} A law that merely draws on antecedent facts for its function, however, is not retroactive.\textsuperscript{117} The fact that an individual has committed a domestic violence misdemeanor is merely the condition that triggers the Lautenberg Amendment’s application.\textsuperscript{118} The crime for which the individual is being punished is possession of a firearm, not the underlying domestic violence misdemeanor.\textsuperscript{119} Therefore, the Lautenberg Amendment is not retroactive.

This point was illustrated in \textit{United States v. Brady},\textsuperscript{120} which involved an analogous statute applicable to those convicted of a felony.\textsuperscript{121} The Supreme Court held that regardless of the date of the defendant’s felony conviction, the crime of being in possession of a firearm was not committed until after the statute became effective.\textsuperscript{122} In \textit{Brady}, the statute prohibiting firearm possession was prompted by the defendant’s status as a convicted felon.\textsuperscript{123}


\textsuperscript{117} See Landgraf v. USI Film Products, 511 U.S. 244, 269 (1994) (stating that “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment.”); Cox v. Hart, 260 U.S. 427, 435 (1922) (explaining that statute is not made retroactive merely because it draws upon antecedent facts for its operation); see also Strickland v. Rankin County Correctional Facility, 105 F.3d 972, 973 (5th Cir. 1997) (outlining steps necessary for ex post facto analysis); United States v. Allen, 886 F.2d 143, 146 (8th Cir. 1989) (stating that “[s]o long as the actual crime for which a defendant is being sentenced occurred after the effective date of the new statute, there is no ex post facto violation.”).

\textsuperscript{118} See 18 U.S.C. § 922(g)(9).

\textsuperscript{119} See id.

\textsuperscript{120} 26 F.3d 282, 291 (2d Cir. 1994) (examining constitutionality of § 922(g)(1)), \textit{cert. denied}, Brady v. United States, 513 U.S. 894 (1994).

\textsuperscript{121} See id. (discussing statute applicable to felons that is analogous to Lautenberg Amendment).

\textsuperscript{122} See id. (holding that “Ex Post Facto Clause was not violated by the use of a 1951 felony conviction as a predicate for a violation of § 922(g)” because not punishing predicate offense and thus is not retroactive).

\textsuperscript{123} See id. at 282; see also James B. Jacobs & Kimberly A. Potter, \textit{Keeping Guns Out of the Wrong Hands: the Brady Bill and the Limits of Regulation}, 86 J. CRIM. L. & CRIMINOLOGY 93, 95 (1995) (stating that Brady Bill expanded category of people considered to be unfit to possess guns to include ex-felons).
The court noted that the defendant in *Brady* had adequate notice of the fact that due to his status as a convicted felon, it was illegal for him to possess a firearm. The statute, therefore, was not a violation of the Ex Post Facto Clause.

Following this rationale, it appears that those convicted of domestic violence misdemeanors receive adequate notice that they may no longer possess firearms in light of the Lautenberg Amendment. Therefore, similar to the statute analyzed in *Brady*, this Amendment should not be held violative of the Ex Post Facto Clause.

a. A Nonpunitive Legislative Goal Validates Seemingly Retroactive Legislation

Another type of law that has been challenged as violating the Ex Post Facto Clause is community notification and registration statutes, otherwise known as Megan’s Laws. This case is an example of how seemingly retroactive legislation can be found constitutional due to the statute’s furthering of nonpunitive legislative goals. The Second Circuit in *Doe v. Pataki*, examined whether these laws “increased the punishment for criminal acts,” thus rendering them unconstitutionally retroactive. The court concluded that application of these provisions to persons who committed their offenses prior to the effective date of the community notification and registration laws, did not violate the Ex Post Facto Clause. The court held that because the law fur-

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124 See *Brady*, 26 F.3d at 291 (stating statute gave defendant adequate notice that predicate offense made it illegal to now possess firearm).

125 See *id.* at 291 (holding statute did not violate Ex Post Facto Clause); see also *Gilbert v. Peters*, 55 F.3d 237, 238 (7th Cir. 1995) (holding that statute that required all incarcerated sex offenders to submit blood specimens to Department of State Police prior to final discharge was not violative of Ex Post Facto Clause because not necessarily punitive). *But see United States v. Elrod*, 682 F.2d 688, 690 (7th Cir. 1982) (holding that enlargement of statute of limitations for perjury enacted before previous statute of limitations ran out on petitioner’s offense did not violate ex post facto clause and that sentencing petitioner under new felony perjury statute did violate ex post facto clause since misdemeanor perjury statute was in effect at time of commission of perjury).

126 120 F.3d 1263 (2d Cir. 1997).

127 See *id.* at 1266 (examining whether laws increased punishment thus rendering them unconstitutionally retroactive).

128 See *id.* at 1285 (affirming district court’s decision to dismiss plaintiffs’ claim that retroactive application of Act’s notification provisions violates Ex Post Facto Clause); *see also E.B. v. Verniero*, 119 F.3d 1077, 1096-97 (3d Cir. 1997) (stating that in reviewing ex post facto law court must decide whether it is punitive in nature, and in case of New Jersey’s Megan’s Law, community notification statute, it was not legislative intent to punish); *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997) (holding that notification
thers legislative goals that are not punishing in nature (the protection of the public from dangerous persons), the fact that it draws upon a prior offense of a convicted sex offender as an element of the law, does not render it a violation of the Ex Post Facto Clause.129

By analogy, the Lautenberg Amendment is not a violation of the Ex Post Facto Clause of the Constitution.130 The Amendment, by forcing misdemeanants to forfeit their firearms, does not increase the criminal penalty for the misdeemeanant crime. It merely draws upon that crime as an element to further nonpunitive legislative goals - the protection of women from domestic abusers.131

2. The Lautenberg Amendment Is Not a Bill of Attainder

Similar to the Ex Post Facto Clause, and frequently mentioned in conjunction with it, is the criticism that the Lautenberg Amendment is a bill of attainder.132 A bill of attainder133 inflicts punishment by virtue of a legislative act that applies either to named individuals or to easily identifiable members of a group without a judicial trial.134 In order to determine whether or not requirements of Megan's law are not punitive and, therefore, not violation of Ex Post Facto Clause).

129 See Doe v. Pataki, 120 F.3d 1263, 1285 (2d Cir. 1997) (discussing fact that law draws upon prior offense does not render new law retroactive).

130 See United States v. Cirrincione, 600 F. Supp. 1436, 1443 (N.D. Ill. 1985) (stating that mark of ex post facto law is imposition of what can be fairly designated punishment for past acts); United States v. Hazard, 598 F. Supp. 1442, 1454 (N.D. Ill. 1984) (holding act compliant with Ex Post Facto Clause because it did not either criminalize conduct that was innocent when done, make punishment for offense more burdensome or deprive defendant of defense); see also Julia A. Houston, Sex Offender Registration Acts: An Added Dimension to the War on Crime, 28 GA. L. REV. 729, 757 (1994) (stating that true test of whether sex offender statutes are ex post facto is whether they are punitive in nature; only applicable prong of definition of ex post facto laws, which states violation for law that changes punishment or inflicts greater punishment). See generally Derek J. T. Adler, Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements, 55 FORDHAM L. REV. 1191, 1191 (1987) (proposing that retroactive application of evidentiary change does not violate ex post facto prohibition unless it acts in such way as to change substantive elements of crime).

131 See 142 CONG. REC. S 11227 (1996). Senator Lautenberg stated that the purpose of the Lautenberg Amendment was to protect victims of domestic violence from further harm. Id.


133 See U.S. CONST. art. I, §9, cl. 1, 3 and 10. The Constitution under these clauses, prevents both the federal and state governments from passing any bill of attainder. Id.

134 See U.S. v. Lovett, 328 U.S. 303, 315 (1946) (explaining bill of attainder as legislative act which inflicts punishment without judicial trial); see also WILLIAM STATSKY,
a law inflicts such a punishment, a court must ascertain: (1) whether the statute comports with what the legislature deemed to be punishment; (2) whether the statute furthers nonpunitive legislative purposes with respect to the 'type and severity of burdens' it imposes; and (3) whether legislative intent reveals Congress' desire to punish by virtue of the statute.\textsuperscript{135} Courts have decided that laws which impose restrictions on a particular group of people, such as those employed in a regulated industry who share a general characteristic, are not necessarily bills of attainder.\textsuperscript{136} The court, however, must consider whether the prophylactic measure was reasonably calculated to achieve a nonpunitive public purpose.\textsuperscript{137} If the law achieves this nonpunitive public purpose, then no attainder may be said to have resulted from the mere fact that a particular group is singled out for the restriction.\textsuperscript{138}

In light of this standard, the Lautenberg Amendment does not

\textsuperscript{135} See SBC Communications, Inc. v. F.C.C., 981 F. Supp 1004, 1004 (N.D. Tex. 1997) (holding that intent of Supreme Court to apply protections afforded under Bill of Attainder Clause to broader group than just individuals is wholly consistent with purpose of clause); see also United States v. Brown, 381 U.S. 437, 447 (1965) (explaining that Bill of Attainder Clause is "not to be given a narrow historical reading," it is "to be read in the light of the evil the framers sought to bar: legislative punishment, of any form or severity, of specifically designated groups."); Dehainaut v. Pena, 32 F.3d 1066, 1071 (7th Cir. 1994) (noting that even where fixed identifiable group is singled out and burden traditionally associated with punishment is imposed, enactment may pass scrutiny under Bill of Attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly product of punitive intent); Springfield Armory, Inc. v. City of Columbus, 805 F. Supp. 489, 493 (S.D. Ohio 1992) (stating that legislative act does not automatically violate prohibition against bills of attainder merely because it places some burden upon identified individual or group).

\textsuperscript{136} See Dehainaut, 32 F. 3d at 1066 (holding that court must look to see if legislative aim was to punish individual or group); see also DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (upholding New York statute which disqualified convicted felons from serving in any office in waterfront labor organization); Schellowy v. U.S. Immigration and Naturalization Service, 805 F. 2d 655, 662 (7th Cir. 1985) (deporting persons who participated in Nazi persecution in order to ensure that United States was not harboring Nazi war criminals); Hornell Brewing Co., Inc. v. Brady, 819 F. Supp. 1227, 1241 (E.D.N.Y. 1993) (allowing prohibition of name 'Crazy Horse' on alcoholic beverages).

\textsuperscript{137} See Selective Service Sys. v. Minn. Public Interest Research Group, 468 U.S. 841, 852 (1984) (setting standard of determining whether particular act inflicts "punishment"); Brown, 381 U.S. at 447-49 (stating that to be bill of attainder, Court must determine whether challenged law inflicts punishment on specifically designated individuals or groups without benefit of trial); Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 404 (N.D.N.Y. 1987) (holding that although LIPA Act and Used and Useful Act apply exclusively to LILCO, neither act inflicts "punishment" within meaning of Bill of Attainder Clause).

\textsuperscript{138} See United States v. McClain, 61 F.3d 913, 913 (9th Cir. 1995) (holding that because §922(g) does not determine guilt or remove protections of trial, it is not bill of attainder).
appear to be a bill of attainder. The Bill of Attainder Clause precludes penalties that, when imposed on a specific individual or group, bars participation by those individuals or groups in specific employment or professions. Specifically, the Lautenberg Amendment has been criticized as preventing law enforcement officers from participating in their livelihoods. Although such a result may occur, the Amendment is constructed to prevent individuals from possessing firearms who have been convicted of domestic violence misdemeanors. This legislation is not aimed at preventing individuals from employment in the law enforcement arena. Furthermore, in evaluating whether or not the Lautenberg Amendment furthers a nonpunitive legislative purpose, it is important to note that the legislature's intent in creating this law was to protect individuals by keeping firearms out of the hands of potential abusers, not to deprive law enforcement officers of their livelihood. These officials can remain employed in various capacities despite the relinquishment of their firearm. Since these goals are so well-defined, it seems clear that the Lautenberg Amendment does not aim to bar individuals from employment in the law enforcement arena.

139 See National Ass'n of Gov't Employees v. Barrett, 968 F. Supp. 1564, 1573 (N.D. Ga. 1997), aff'd, 155 F.3d 1276 (11th Cir. 1998). The court in Barrett, held that § 922(g)(9) is not a bill of attainder and that defendants were entitled to a dismissal of plaintiffs' claims to the extent they alleged that § 922(g)(9) was such a bill. Id.


141 See National Ass'n of Gov't Employees, 968 F. Supp. at 1576 (holding Lautenberg Amendment is not bill of attainder simply because its effects might render certain law enforcement officials unemployable in that field); see also Fraternal Order of Police v. United States, 981 F. Supp. 1, 3 (D.D.C. 1997) (citing affidavits of two FOP members who argued that application of Amendment will injure police officers by impeding their ability to serve as law enforcement officers), rev'd, 152 F.3d 998 (D.C. Cir. 1998).


143 See id. (indicating nowhere in Amendment does it attempt to single-out law enforcement officers to deprive them of employment).

144 See Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646 Before the Subcomm. on Crime, 102nd Cong. 2646, 2 (1996) (statement of Sen. Frank Lautenberg) (stating that purpose of § 922(g)(9) was to protect victims of domestic violence from further harm).


146 See e.g., DeVeau v. Braisted, 363 U.S. 144, 160 (1960) (rejecting challenge under Bill of Attainder Clause to statute which had effect of preventing convicted felons from
In addition, there is no Congressional intent to punish domestic violence misdemeanants.\(^{147}\)

The argument that the Lautenberg Amendment does not constitute a bill of attainder is further strengthened by drawing an analogy to Megan’s Laws. The Third Circuit in *Artway v. Attorney General of the State of New Jersey*,\(^{148}\) addressed whether the registration provision of Megan’s Law was a bill of attainder.\(^{149}\) In its analysis, the court developed a single test incorporating the Ex Post Facto, Bill of Attainder and Double Jeopardy Clauses in an attempt to streamline a body of law that has caused much disagreement in both federal and state courts.\(^{150}\) The court developed a three-prong analysis to determine what constitutes non-punishment: (1) actual purpose,\(^{151}\) (2) objective purpose,\(^{152}\) and (3) effect.\(^{153}\) The court, through this test, held that Megan’s Law was not a bill of attainder\(^{154}\) because there was no evidence


\(^{147}\) See *Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646 Before the Subcomm. on Crime*, 102nd Cong. 10379, 1-2 (1996) (statement of Mrs. Murray) (expressing getting guns out of homes would make difference - nearly 65 % of all murder victims known to be killed by intimates were shot to death, firearms-associated family and intimate assaults are 12 times more likely fatal than assaults not associated with firearms and in fatal domestic violence situations, 68 % done with firearms); *Guns and Domestic Violence Change to Ownership Ban: Hearings on S 2646 Before the Subcomm. on Crime*, 102nd Cong.10379, 3-5 (1996) (statement of Sen. Diane Feinstein) (referring to necessity of legislation at misdemeanor level due to fact many domestic violence offenders are never convicted of felonies, victims are reluctant to cooperate for fear of more violence and plea bargains result in misdemeanor conviction for what are felony crimes).

\(^{148}\) 81 F.3d 1235 (3d Cir. 1996).

\(^{149}\) See id. at 1263 (determining registrations provisions of Megan’s Law did not constitute bill of attainder).

\(^{150}\) See id. (indicating court developed single test incorporating Ex Post Facto, Bill of Attainder and Double Jeopardy Clauses to facilitate ease in analysis of constitutionality under these provisions).

\(^{151}\) See id. (setting forth first prong of *Artway* test).

\(^{152}\) See id. (examining second prong of *Artway* test).

\(^{153}\) See *Artway*, 81 F.3d at 1263. The first prong of the test looks to whether legislative intent was to punish. *Id.* The second, “objective” prong has three sub-parts: (a) can the law be explained solely as a remedial purpose, (b) does historical analysis show that the law has been traditionally regarded as punishment, and (c) did the legislature intend the law to serve some “mixture of deterrent and salutary purposes.” *Id.* The third part of this prong may be determined by considering two questions: (1) whether its deterrent purpose is necessary to achieve its salutary objective, and (2) whether the measure operates in its historically usual purpose. *Id.* Finally, the third, “effects” prong of the test in *Artway*, looks to whether the repercussions of the law, regardless of their justification, constitute punishment. *Id.*

\(^{154}\) See id. at 1267 (holding registration provision in *Artway* is not bill of attainder).
that legislative intent was of a punitive purpose, the registration provisions did not constitute “punishment,” and the “effects” of the registration provision had little impact since most of the information was already available in the public record.

Similarly, Congress evidenced no punitive intent when enacting the Lautenberg Amendment. The legislature’s “objective” purpose was to protect victims of intimate abuse from the escalation of harm, not to “punish” domestic violence misdemeanants. The legislature’s means also seem to outweigh its “effects.” Therefore, the fact that the Lautenberg Amendment affects a few law enforcement officials who are forced to surrender their weapons, sometimes rendering them unemployed, is substantially outweighed by the salutary objective of protecting women and children from further, potentially fatal, intimate abuse.

CONCLUSION

The Lautenberg Amendment is extremely necessary legislation that may need to be amended to apply to domestic violence felons in order to withstand further constitutional challenge. To allow an exemption for law enforcement officials from the Lautenberg Amendment, as the District of Columbia Circuit Court of Appeals has ruled, would completely undermine the legislature’s intent in enacting this law. The legislature intended this law to protect victims of intimate abuse from potentially fatal violence at the hands of individuals known to be prone to violence. The mere fact that an individual is a member of the law enforcement community or military should not exempt him/her from this law. By

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155 See id. (evincing no punitive purpose in legislative intent).
156 See id. (explaining registration provision did not constitute punishment).
157 See id. (demonstrating little impact because information was already matter of public record).
158 See Murray, supra note 147 (expressing getting guns out of homes would make difference - nearly 65 % of all murder victims known to be killed by intimates were shot to death, firearms-associated family and intimate assaults are 12 times more likely fatal than assaults not associated with firearms and in fatal domestic violence situations, 68 % done with firearms); Feinstein, supra note 147 (referring to necessity of legislation at misdemeanor level due to fact many domestic violence offenders are never convicted of felonies, victims are reluctant to cooperate for fear of more violence and plea bargains result in misdemeanor conviction for what are felony crimes).
159 See Artway, 81 F.3d at 1267 (stating intent of legislature with respect to Lautenberg Amendment).
160 See id. (citing legislative intent behind enactment of Lautenberg Amendment).
allowing the Lautenberg Amendment to apply to both police officers and military personnel, the courts would be furthering the goals of the legislature without violating constitutional provisions.

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