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Legal Sidebar

Gun Control: Federal Prohibitions on Domestic Abusers Possessing Firearms and the "Boyfriend Loophole"

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The Department of Justice recently announced the establishment of a "Domestic Violence Working Group" to explore challenges in prosecuting domestic abusers who violate federal firearms laws, with the goal of "using the tools of federal prosecution to stop and prevent domestic violence" by "keeping guns out of the hands of convicted domestic abusers." Separately, in March 2019, the House of Representatives passed legislation reauthorizing the Violence Against Women Act (VAWA), and part of that legislation would amend 18 U.S.C. § 922, the primary statutory "tool" on which the Justice Department relies to prosecute domestic abusers who possess firearms. Among other things, Section 922 prohibits certain categories of persons from possessing firearms, and two of the categories relate to domestic violence: (1) persons convicted of a "misdemeanor crime of domestic violence," and (2) persons subject to a restraining order with respect to an "intimate partner" or child. One or both of these categories have been viewed by some to contain a so-called "boyfriend loophole" that allows certain abusive dating partners to continue possessing firearms under federal law when a similarly situated spouse could not. The VAWA amendments would, in part, seek to close the purported loophole by expanding the domestic violence provisions of Section 922 to dating partners and would also add persons convicted of a "misdemeanor crime of stalking" to the list of those who may not possess a firearm. To place the VAWA amendments and the Justice Department's contemplated working group in context, this Legal Sidebar provides an overview of the domestic violence prohibitions of Section 922 and representative state laws, explores the House-passed proposal that would supplement the relevant Section 922 provisions, and briefly addresses constitutional questions that the proposal may implicate.

Federal Domestic Violence Firearm Prohibitions

Misdemeanor Crime of Domestic Violence

In addition to prohibiting firearm possession by convicted felons, 18 U.S.C. § 922(g) prohibits a person "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm. "[M]isdemeanor crime of domestic violence" is separately defined as including certain federal,

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state, or tribal crimes committed by (among others) a current or former spouse, one who shares a child in common with the victim, one who cohabits or has cohabited with the victim "as a spouse," and one "similarly situated to a spouse." The Supreme Court has held that the requisite domestic relationship must be established beyond a reasonable doubt in a § 922(g)(9) prosecution, but it need not be "a defining element of the predicate offense." In other words, any misdemeanor that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"—such as a "run-of-the-mill misdemeanor assault [or] battery"—may qualify as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9) so long as the government separately proves that the crime was committed by someone in one of the specified domestic relationships with the victim. With respect to those relationships, the statute does not further define the terms "cohabiting . . . as a spouse" and "similarly situated to a spouse," though Bureau of Alcohol, Tobacco, Firearms, and Explosives regulations include "e.g." parentheticals describing "cohabiting . . . as a spouse" as "the equivalent of a 'common law' marriage even if such relationship is not recognized under the law" and "similarly situated to a spouse" as "two persons who are residing at the same location in an intimate relationship with the intent to make that place their home."

Thus, one who commits a domestic violence misdemeanor against another with whom he lives and has an ongoing romantic relationship will likely be considered to have the requisite domestic relationship for purposes of Section 922(g)(9). Whether and to what extent the statutory prohibition applies to other romantic relationships, however, is less certain. In particular, at least one federal appellate court (in a since-vacated opinion) determined that the term "similarly situated to a spouse" does not extend to *former* boyfriends or girlfriends, as the category "only covers present relationships, not past ones." Yet another court reached a contrary conclusion. Additionally, though federal courts tend to recognize that a person who is in a "long-time close and personal" romantic relationship that does not involve cohabitation may be "similarly situated to a spouse," one state court concluded that evidence of a seven-month sexual relationship, standing alone, was insufficient to establish such a relationship under an identical state provision. Thus, although there is fairly limited authority interpreting the provision, case law suggests that more casual or short-term romantic relationships could fall outside the scope of Section 922(g)(9).

Restraining Order

18 U.S.C. § 922(g)(8) prohibits firearm possession by a person who is subject to a court order that restrains the person from harassing, stalking, threatening, or engaging in other intimidating conduct against a child or "intimate partner." To fall within the scope of Section 922(g)(8), the underlying order must, first, have been issued after a hearing of which the person had notice and an opportunity to participate. Second, the order must either: (1) include a finding that the person represents a credible threat to the physical safety of the child or intimate partner; or (2) explicitly prohibit the use (actual, attempted, or threatened) of physical force against the child or intimate partner "that would reasonably be expected to cause bodily injury." Specific orders need not precisely track the language of the statute to meet these content requirements, however; the requirements may be satisfied through the inclusion of "terms similar—if not identical—in meaning."

The term "intimate partner" is separately defined by statute as a current or former spouse, a co-parent of a child, or a current or former cohabitant. An underlying restraining order need not make an express finding or set out facts supporting a finding of "intimate partner" status, so long as the government proves beyond a reasonable doubt in the Section 922(g)(8) prosecution that the defendant who was the subject of court order and the victim were "intimate partners" within the meaning of the statute.

Whether a person lives with or has lived with the victim for purposes of the cohabitant definition of "intimate partner" is a fact question, and the term appears to encompass a broader range of relationships than those involving cohabitation "as a spouse" for purposes of Section 922(g)(9). Thus, for example, the Fifth Circuit concluded in *United States v. Ladouceur* that evidence of a relationship "beyond casual

dating," in which the defendant spent most or often all days of the week at his girlfriend's apartment and "rarely visited" his own, was sufficient to establish the cohabitation element of Section 922(g)(8). Nevertheless, because the definition of "intimate partner" is limited to spouses, co-parents, and cohabitants, current and former significant others who have never lived together and do not share a child appear to be excluded from the statutory definition.

State Domestic Violence Firearm Provisions

Some states have enacted domestic violence firearm provisions that are broader in certain respects than the current federal prohibitions. For instance, Texas prohibits persons subject to several kinds of restraining or protective orders, including orders related to "family violence," from possessing firearms, with the phrase "family violence" defined to include violence against a victim "with whom the actor has or has had a dating relationship." Oregon also prohibits firearm possession by persons who have been convicted of qualifying misdemeanors committed against "family or household member[s]," a term that encompasses persons "who have been involved in a sexually intimate relationship." Additionally, some states have explicit statutory procedures and requirements for removing firearms from persons prohibited from possessing firearms under the states' domestic violence provisions. Because Congress has provided that federal domestic violence firearm prohibitions do not preempt (or supersede) non-conflicting state laws, residents in jurisdictions with such laws must comply with the more stringent state standards.

Domestic Violence Provisions of H.R. 1585

As noted above, legislation has passed the House that would amend and expand the domestic violence provisions of 18 U.S.C. § 922. Among other things, H.R. 1585 would amend the definition of "intimate partner" for purposes of Section 922(g)(8) (the restraining order provision) to include (1) "a dating partner or former dating partner" and (2) "any other person similarly situated to a spouse" who is protected by state domestic or family violence laws. Qualifying restraining orders under Section 922(g)(8) would, under H.R. 1585, also include *ex parte* orders (i.e., orders entered outside of the presence of the person being restrained) so long as notice and opportunity to be heard are provided "within a reasonable time" that is "sufficient to protect the due process rights of the person." Additionally, H.R. 1585 would add the term "intimate partner" to the definition of "misdemeanor crime of domestic violence," extending the prohibition on firearm possession by convicted domestic abusers to (among others) dating partners.

Beyond the changes to the existing Section 922 domestic violence categories, H.R. 1585 would also add a new prohibition on firearm possession by a person convicted of a "misdemeanor crime of stalking," defined as a misdemeanor crime that "is a course of harassment, intimidation, or surveillance" that places another in reasonable fear of harm to themselves or a family/household member or causes emotional distress. Finally, the bill would require the Attorney General to report to state law enforcement officials when a background check reveals that a person who is attempting to purchase a firearm is prohibited by the domestic violence provisions of Section 922 from doing so. The Attorney General would additionally be given authority to cross-deputize state and local officials to enhance the investigation and prosecution of persons who violate Section 922's domestic violence provisions.

Constitutional Issues

Defendants in Section 922(g)(8) and (g)(9) prosecutions have sometimes challenged the statutory provisions on several constitutional grounds, arguing (among other things) that the provisions (1) are unconstitutionally vague or deprive them of liberty or property without due process of law in violation of the Fifth Amendment, or (2) deprive them of the right to keep and bear arms in violation of the Second Amendment. These challenges have largely been unsuccessful in federal court. However, the amendments

to existing law in H.R. 1585 could prompt additional constitutional challenges in the future should the bill become law.

With respect to vagueness, the Supreme Court has said that federal criminal laws must "give ordinary people fair warning about what the law demands of them." Applying this standard, at least one court has expressed concern about the lack of clarity as to undefined terms in the existing domestic violence provisions—including "cohabiting as a spouse"—but other courts have nevertheless concluded that such terms are sufficiently precise to put a defendant on notice of potential prosecution. H.R. 1585 might prompt additional vagueness challenges were the bill to become law, however. Under the bill, the definition of "misdemeanor crime of domestic violence" would now cover specified misdemeanors committed by persons "similarly situated" to intimate partners, and given that an "intimate partner" would now include a current or former dating partner, this change may leave the outer boundaries of the definition somewhat unclear. That said, because "even laws that easily survive vagueness challenges may have gray areas at the margins," it is difficult to say whether a court would find merit in a vagueness challenge were H.R. 1585 to become law.

With respect to other due process based considerations, the Fifth Amendment requires the federal government to afford persons with adequate procedures when depriving them of a constitutionally protected interest (such as the liberty interest in keeping and bearing arms under the Second Amendment). The particular procedures required in a given context—e.g., the type of notice and the manner and time of a hearing—will vary depending on the interest at issue, the risk of an erroneous deprivation, and the government's interest. Defendants in Section 922(g)(8) prosecutions have sometimes argued Section 922(g)(8) provides inadequate notice that entry of a civil restraining order deprives a person of the right to possess firearms, particularly given that the statute does not facially require an order to be based on a finding of a threat of physical danger. But courts have generally deemed the notice and hearing requirements contained in Section 922(g)(8) to be adequate, recognizing that an order's explicit prohibition on the use or threatened use of physical force must either be uncontested or based on evidence of a real threat of danger.

Future due process challenges related to H.R. 1585 would likely center on its expansion of the restraining order provision to include *ex parte* orders. As noted above, the legislation specifies that notice and opportunity to be heard must be provided "within a reasonable time" that is "sufficient to protect the due process rights of the person." Due process typically requires that a person be given an opportunity to be heard *before* the deprivation of a protected interest may occur, however. As a result, it might be argued that post-deprivation procedures as contemplated by H.R. 1585 are inadequate. Nevertheless, the Supreme Court has recognized that post-deprivation process can satisfy the Due Process Clause where "a State must act quickly, or where it would be impracticable to provide pre-deprivation process." And some state and federal courts have upheld provisions for *ex parte* restraining orders in the face of due process challenges, including in the domestic-violence context, where there was imminent danger and post-deprivation hearings were held expeditiously.

With respect to the Second Amendment, the Supreme Court has recognized that "the right secured by the Second Amendment is not unlimited" and has noted that the existence of the right should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," among other "presumptively lawful" regulations. Based on these principles, lower federal courts have generally concluded that Sections 922(g)(8) and (g)(9) either (1) fall into the category of prohibitions that the Supreme Court recognized as "presumptively lawful," or (2) are sufficiently related to an important governmental interest to outweigh the ostensible constitutional burden.

If H.R. 1585 were to become law, future litigants might argue that it expands Sections 922(g)(8) and (g)(9) to such a degree that they no longer qualify as "presumptively lawful," or litigants might challenge the link between the interest advanced by the legislation (curtailing firearms violence and domestic violence) and the means chosen to advance it (expanding existing domestic violence firearm possession

prohibitions), which could depend on the evidence Congress provides as justification for the law. Given the limited scope of the changes contemplated in H.R. 1585, it is not clear that the legislation would raise material concerns under the largely deferential approach lower federal courts have employed in addressing challenges to the current versions of Section 922's domestic violence provisions. Nonetheless, critics of expanding domestic violence firearm restrictions under federal law have asserted that at least the stalking provision of H.R. 1585 is too broad and thus could deprive persons who engage in relatively insignificant conduct (such as posting an offensive tweet) of their Second Amendment rights. Ultimately, however, any Second Amendment concerns regarding H.R. 1585 may depend on the Supreme Court, which has thus far provided little guidance in this area.

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