

# Firearms and Tribal Policy

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# Guns and Domestic Violence

- The presence of guns increases the risk of a survivor of violence being killed by 500%.
- Domestic violence often escalates in severity over time and the presence of firearms increases the likelihood that it will escalate to homicide.
- When a gun is in the house, an abused woman was 6 times more likely than other abused women to be killed.
- All too often, as one Senator noted during the debate over §18 USC 922(g)(9), “the only difference between a battered woman and a dead woman is the presence of a gun.”

## A quick review of federal firearms laws

- Persons subject to a qualifying protection order may not possess or purchase firearms or ammunition (18 U.S.C. 922(g)(8))
- Persons convicted of a qualifying misdemeanor crime of domestic violence may not possess or purchase firearms or ammunition (18 U.S.C. 922(g)(9))

# Gun Control Act

## 18 U.S.C. 922(g)(8)

- It is a federal crime to possess a firearm and/or ammunition while subject to a valid qualifying Protection Order issued by a state or Tribe.
- Federal, State, and local law enforcement officers are not subject to this law while on duty - “Official Use Exception” to prohibitor. 18 U.S.C. § 925(a).
- Tribal law enforcement officers are subject to this prohibition.

## Relationship requirement (*Civil*)

Under 18 U.S.C. §921(a)(32)

the protected party must:

- be a spouse or former spouse;
- cohabit or have cohabited with respondent;
- have a child in common;
- be the child of the intimate partner OR
- be respondent's child.

\*Relationship requirement is different than that required under g(9)

# **Restraining orders in Criminal Cases and 922(g)(8)**

- Restraining orders issued in criminal cases can trigger 922(g)(8)
- Provided all requirements of that section are satisfied
- Regardless of whether they include a specific gun prohibition

# The Lautenberg Amendment

## 18 U.S.C. 922(g)(9)

- Persons convicted of qualifying misdemeanor crimes of domestic violence are prohibited under federal law from possessing or purchasing firearms or ammunition
- The prohibition is for life (unless conviction is expunged or pardoned)
- How far back in time the conviction occurred does not matter
- Must be a “misdemeanor crime of violence” committed against a current or former spouse or certain intimate partners

# Historical Overview

- In 1996, Lautenberg Amendment amended Gun Control Act, which had firearms prohibition for felons, to include persons convicted of misdemeanor domestic violence, closing loophole in the law.
- 18 U.S.C. §922(g)(9) prohibits the possession of firearms by anyone convicted of a misdemeanor crime of domestic violence.
- VAWA 2005 expanded the firearms prohibition to include tribal law convictions by amending the federal code to include under the term “misdemeanor crime of domestic violence” any offense that is a misdemeanor under tribal law.



## Note:

- Neither the protection order ban ((g)(8)) nor the Lautenberg Amendment ((g)(9)) cover dating violence, sexual assault, or stalking.
- Only crimes of domestic violence trigger these federal firearms prohibitions.

# Relationship between federal and state/tribal laws

- Many states and some tribes have enacted laws regarding firearms and DV; these laws can differ quite significantly from (and even contradict) the federal laws we've discussed
- State/tribal laws may be more restrictive or less restrictive than the federal laws
- Both sets of laws are applicable in a particular case; federal law generally does not preempt state/tribal law, so both apply.
- The federal prohibitions apply even if they are inconsistent with state or tribal laws.

# Role of U.S. Attorneys and ATF

- Gun violations should be reported to respective District U.S. Attorney
- For investigation of violations and for removal of firearms from prohibited person, contact local ATF
- ATF will process a background check through the National Instant Criminal Background Check System (NICS)
- Build your relationships with U.S. Attorney's office and ATF now to speed enforcement later

# U.S. Supreme Court

## March 26, 2014



- Held that federal ban on gun possession by those who have been convicted in state and tribal court of misdemeanor crimes of domestic violence included convictions where state law did not require proof of violent acts or physical injury

## *U.S. v. Castleman*: Good News for Victims of Domestic Violence

- Unanimous (!) outcome, with 6 judges on the opinion of the court.
- The Lautenberg Amendment (18 U.S.C. 922(g)(9)) remains good law.
- The Court adopts a broad definition of “domestic violence” that is informed by the work of the field.
- *United States v. Castleman*, 572 U.S. \_\_\_\_\_, 134 S.Ct. 1405 (2014), Opinion of the Court, Sotomayor, J., March 26, 2013.

# The Facts

- July 2001 - James Castleman pled guilty to a misdemeanor crime of “intentionally and knowingly caus[ing] bodily injury” to the mother of his child, in violation of Tennessee Code § 39–13–111(b).
- As a domestic violence misdemeanant, Mr. Castleman was prohibited from purchasing or possessing firearms or ammunition.
- Castleman, relying on his wife as a straw purchaser, became a dealer in black market guns.
- 2008 Castleman was charged with violating federal gun laws under 18 U.S.C. 922(g)(9) with illegal possession of firearms when he was caught with firearms.
- Castleman moved to dismiss charges arguing his previous 2001 conviction for intentionally or knowingly causing bodily injury to the mother of his child did not qualify as a “misdemeanor crime of domestic violence” because it did not involve the use or attempted use of physical force under 18 U.S.C. 922(g)(9).
- The District Court agreed reasoning that physical force must entail violent contact and that one can cause bodily injury without violent contact, e.g., by poisoning.

# Sixth Circuit Holding

- Degree of “physical force” for a conviction to constitute a “misdemeanor crime of domestic violence” sufficient to trigger the federal firearms prohibition is a “violent felony.”
- The Sixth Circuit affirmed on a different rational holding that the degree of physical force required for a conviction to constitute a misdemeanor crime of domestic violence is the same as a violent felony under the Armed Career Criminal Act and that Castleman could have been convicted for causing slight injury by non-violent conduct.
- The Sixth Circuit Court of Appeals dismissed the charges because the indictment did not contain proof he had “violent contact with the victim.”
- Split among the federal Circuits as to whether “physical force” must rise to the level of a “violent felony” in order to trigger the federal firearms prohibition or whether “offensive touching or bodily injury” was sufficient. *United States v. Castleman*, 695 F.3d 582, 586 (6th Cir. 2012).
- U.S. Supreme Court granted certiorari.

# U.S. v. Castleman:

## Supreme Court Holding

- Addressed meaning of “physical force” in federal firearms prohibition.
- Castleman argued that misdemeanor conviction for “intentionally or knowingly cause[ing] bodily injury to’ the mother of his child” did not meet the requisite “physical force” to trigger the federal firearms prohibition.
- Court held that the Tennessee conviction satisfied that requirement.
- Court held the conviction qualifies as a misdemeanor crime of domestic violence reversing the Sixth Circuit Court of Appeals and remanding the case for further proceedings consistent with the Court’s holding.
- Justice Sotomayor wrote that “Congress incorporated the common-law meaning of ‘force’—namely offensive touching—in §921(a)(33)(A)’s definition of a misdemeanor crime of domestic violence.”



# U.S. v. Castleman: Another challenge

- Castleman case also presented a challenge to the definition of “domestic violence” as professionals in the field employ the term
- The definition of domestic violence as a broad pattern of abusive conduct was recognized, for the first time, by the Supreme Court
- State statutory definitions of criminal acts of domestic violence have evolved over two decades
- “Domestic violence” statutes only addressed serious bodily injury at first
- Some federal definitions of “domestic violence” still require serious violence
- Yet states have adopted complex definitions that include acts that may not have as serious a physical effect, but taken together, may well form a pattern of abusive conduct.



## **Justice Sonia Sotomayor**

Said the nation  
“witnesses more  
than a million acts  
of domestic  
violence, and  
hundreds of deaths  
from domestic  
violence, each  
year.”

# Justice Sotomayor's words

- “‘Domestic violence’ is not merely a type of ‘violence’; it is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context”
- Citing amicus brief of victim advocates:
  - “‘Most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting’”
    - “The accumulation of such acts over time can subject on intimate partner to the other’s control”

# A definition that reflects the experience of the field

- The Supreme Court adopted the definition used by victim advocates:
  - domestic violence is not only violent acts against an intimate partner,
  - also includes a pattern of conduct used by the abuser to coerce, injure, and control the victim,
  - a seemingly “minor” act, in combination with other acts, whether seriously violent or merely harassing, resulting in the complete victimization of an intimate partner.

# Court's holding

- “Physical force” needed to trigger the federal firearms prohibition could be) an abuser’s “offensive touching”
- Even if not enough to cause physical injury, slaps, pushing, and threats can contribute to the continuing abuse of an intimate partner
- Without this broad definition, the federal law would have been useless at the time of enactment, in at least 10 states (consisting of nearly 30 percent of the nation’s population)
- “Physical force” needed to trigger the federal firearms prohibition is any “degree of force that supports a common-law battery conviction” under state law.

## What is “offensive touching”?

- When someone intentionally touches someone else, knowing that the victim will take offense or feel alarm
- Spitting, slapping, shoving, throwing objects
- Committed as part of a pattern of abuse that may also include physical harm or injury
- “Offensive touching” may not result in physical injury

# Does this apply throughout the U.S. code?

- Justice Sotomayor observed, in footnote 4 of the court's opinion, that this broad definition of "domestic violence" does not apply where the statute has defined "domestic violence" as a crime of "violence."
- "[M]ere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence'" (Relying on *Karimi v. Holder*, 715 F. 3d 561, 566–568 (CA4 2013); *Singh v. Ashcroft*, 386 F. 3d 1228, 1233 (CA9 2004); *Flores v. Ashcroft*, 350 F. 3d 666, 672 (CA7 2003); *United States v. Venegas-Ornelas*, 348 F. 3d 1273, 1275 (CA10 2003); *United States v. Landeros-Gonzales*, 262 F. 3d 424, 426 (CA5 2001); see also *United States v. Rede-Mendez*, 680 F. 3d 552, 558 (CA6 2012)(commenting generally that "[i]n the crime of violence context, 'the phrase "physical force" means violent force' ")

## Policy Concerns with Definition of “Domestic Violence”

- “Our view that ‘domestic violence’ encompasses acts that might not constitute ‘violence’ in a nondomestic context does not extend to **a provision like this, which specifically defines ‘domestic violence’ by reference to a generic ‘crime of violence.’**” Castleman
- Section 904 of VAWA 2013, which establishes tribal criminal jurisdiction over persons committing domestic violence, provides the following definition:  
  
“(2) DOMESTIC VIOLENCE.—The term ‘domestic violence’ **means violence** committed by [an intimate partner and certain other persons]”



# Definition of Domestic Violence VAWA 2005

## Sec. 904

- Other federal statutes that define “domestic violence” specifically use the word “violence” to characterize the acts that constitute the crime
- Definition of “domestic violence” in the provision recognizing tribal criminal jurisdiction over non-Indian domestic violence offenders:

“The term ‘domestic violence crime’ means a crime of violence . . . in which the victim or intended victim is the [defendant’s] spouse” or other qualifying relation. 25 U. S. C. A. §1304(a)(2)

# Impact of *Castleman* in future

- Following *Castleman*, misdemeanor convictions of domestic violence based on “offensive touching” may be qualifying convictions for the purpose of triggering the Lautenberg Amendment (18 U.S.C. 922(g)(9)).
- **HOWEVER, for the purposes of exercising tribal jurisdiction over non-Indian domestic violence offenders, it remains unclear whether “offensive touching” in tribal cases is sufficient. This may be an issue for litigation—important to be prepared for it.**

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