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## The Federal Government's Role in Securing Justice in Domestic Abuse Cases

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# THE FEDERAL GOVERNMENT'S ROLE IN SECURING JUSTICE IN DOMESTIC ABUSE CASES

*Margaret Groban*

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## THE FEDERAL GOVERNMENT'S ROLE IN SECURING JUSTICE IN DOMESTIC ABUSE CASES

*Margaret Groban\**

### I. INTRODUCTION

I want to thank Chip Loewenson and Dean Conway for the gracious introductions. Seems like only yesterday that Chip and I were baby prosecutors in Manhattan. In fact, Chip was the first of many impressive Coffin laws clerk I have met over the years, so I really appreciate his travel north to be here. In addition, if I remember correctly, early on in our tenure at the United States Attorney's Office, Chip brought a racketeering case, before most of us knew what that meant, against defendants who were exploiting and prostituting women brought to the US illegally. He was championing violence against women way before me!

I am thrilled, honored, and humbled to be selected as this year's Coffin lecturer. It was also an honor earlier today to meet Judge Coffin's wife, Ruth, and their children.

I was fortunate to have met Judge Coffin. As Chip recalled, we were Assistant United States Attorneys (AUSAs) in Manhattan together before I moved up here with my husband and three children in 1996. My last trial was before Judge Danny Parker. When I stopped in to say goodbye to Judge Parker and he learned I was moving to Maine, he said that I had to meet the legendary Judge Coffin. He had befriended Judge Coffin through their involvement in the Governance Institute, a nonprofit organization concerned with the nexus between law, institutions, and policy. He raved about Judge Coffin as a scholar, judge, gentleman, friend, and extraordinary man. Luckily, I got to experience some of these qualities myself. Soon after I moved to Yarmouth, I arranged to meet with Judge Coffin. He could not have more gracious and agreed to spend time with a new lawyer in Maine. I can't remember all of our conversation in his chambers, but I vividly remember his advice and guidance: make sure that I contribute to social justice in Maine and appreciate the importance of public service. I guess I took his advice to heart, since I continued as an AUSA and have dedicated my career to the pursuit of justice. The Department of Justice ("DOJ") means just that to me—a commitment to providing justice for all.

The more I read about Judge Coffin, the more impressed I am. Justice Breyer's description of him in the *Maine Law Review* as "thoughtful, intelligent, learned, kind, and decent" is just the beginning, as he goes on to comment that Judge Coffin's work "reflects an understanding of, and sympathy for, the human problems that underlie the cases that make their way to courts of appeals." It is the human problems that are so important to me as a federal prosecutor.

From previous Coffin lecturers, it is evident that there is no one way to achieve Judge Coffin's pursuit of social justice and public service. The path for justice that brings me here tonight is the dedicated DOJ effort to keep firearms out of the hands of domestic abusers and save lives of domestic violence victims. This quest has

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lasted twenty years and involved AUSAs in U.S. Attorney's Offices around this country, and particularly in Maine, as well as lawyers at DOJ in our Criminal Appellate Division and our Solicitor General's Office—the office that represents all U.S. Attorney's offices before the Supreme Court and rules on our appeal authorizations. It has taken this national village of prosecutors to achieve the success that we have achieved—one case at a time, one brief at a time, one appeal at a time, and one legal issue at a time. We are anchored by our law enforcement partners—ATF, FBI, and local law enforcement officers—who refer the cases to us. I want to give a shout out to the ATF and FBI branch offices in Maine, whose dedication to prosecuting domestic violence abusers and keeping victims safe is without comparison in the country, although I admit my bias.

## II. BACKGROUND

### *A. Why is the Federal Government Involved in the Fight Against Domestic Violence?*

DOJ is resolved to reducing violence in our communities. But safety in our communities must begin with safe homes. We know that home is not a safe place for too many people. Domestic violence is a national crime problem that knows no boundaries—it impacts people of all races, colors, creeds, nationalities, religions, and sexual orientation. It impacts the rich and the poor and the middle class. It is clearly an equal opportunity crime.

### *B. Why Focus on Domestic Violence?*

Here is a sampling of the dramatic statistics documenting the scope of the domestic violence problem. Tragically, women are killed by people they love.

#### 2015 FBI Crime Data

- 1,719 women were murdered
- Relationship to the offender:
  - 509 Wives
  - 496 Girlfriends
  - 58% Intimate partners

### *C. Why Focus on Domestic Violence and Firearms?*

From 1980-2008, over two-thirds of victims murdered by a spouse or ex-spouse were killed by guns. In 2008, 53% of these victims were killed with guns. When a gun was in the house, an abused woman was six times more likely than other abused women to be killed.

The domestic violence problem in Maine is equally stark and tragic and presents one of our most obstinate crime problems. This has been reinforced during my years on Maine's Domestic Violence Homicide Review Panel, where we confront the "human face" behind domestic violence and strive to improve Maine's response. Unfortunately, like the rest of the country, women in Maine are far more likely to be killed by someone who claims to love them.

Domestic violence in Maine

Over the last ten years, domestic homicides accounted for 47% of Maine's total homicides.

- Period of 2014-2015:
  - 24 domestic abuse homicides
  - 52% of total homicides
  - 16 homicides were reviewed, 56% were committed with a firearm.
- Maine Coalition to End Domestic Violence
  - 2015:
    - 13,280 used services (12,781 adults and 499 children)
    - Legal advocates and attorneys provided 17,170 hours of legal advocacy on behalf of 3,900 people statewide.

Against these staggering statistics, isn't it imperative that DOJ play an important role in keeping firearms out of the hands of domestic violence abusers to keep our victims safe?

Fun fact: there are ninety-three U.S. Attorney's Offices around the country and the Executive Office for United States Attorneys ("EOUSA") is the umbrella agency for all these offices. My litigating days are behind me and I now work for EOUSA as a subject matter expert on domestic violence and firearms. Most importantly, my role is to ease the burden on AUSAs prosecuting domestic violence and firearm cases, and to encourage and facilitate the prosecution of these cases. In a way my job is part Air Traffic Controller/consigliere/domestic violence advocate. I keep track of all the cases, encourage and support AUSA efforts in any way possible, even when faced with overwhelming odds against our success. I connect AUSAs facing similar issues and encourage consistent national litigative positions. I console when we lose, rejoice when we win, and try to get everyone home safely! I provide training, guidance, legal updates, webinars, briefs, investigative strategy and any other support that will advance our commitment to fight domestic violence and also facilitate engagement with the local domestic violence community within each district. And, if this job doesn't sound cool enough, at least to me, I have the luxury of fulfilling my responsibilities while actually sitting in the Maine U.S. Attorney's Offices.

My commitment began soon after the Violence Against Women Act—known as VAWA—was passed in 1994, when I worked on one of the first criminal VAWA prosecutions. I had prosecuted many different crimes, from drug trafficking, to organized crime, to fraud, but it was my exposure to the tragedy of domestic violence that charted my future career path. After I moved to Maine, I was appointed as the national domestic violence coordinator for EOUSA, a position I still hold today.

When I am asked why the federal government is involved in what is primarily a state, local, and tribal matter, the answer begs another question—why weren't we involved sooner? The basis for jurisdiction is neither novel nor creative and relies upon traditional interstate commerce or travel. We prosecuted interstate transportation of stolen property, but not interstate travel to commit domestic violence. Given the scope of the national domestic violence problem, did this make

sense? VAWA closed this gap. Now it was up to the U.S. Attorney's Offices to ensure that federal domestic violence cases, admittedly involving unusual terrain for AUSAs, were prosecuted. I recognize that the vast majority of domestic violence crimes will be prosecuted in state, local, and tribal courts, but now at least we have specific domestic violence dedicated statutes to supplement, *not* supplant, the state remedies.

The specific domestic violence statute I want to discuss tonight is an amendment to the Gun Control Act that prohibits the possession of a firearm or ammunition after conviction of a misdemeanor crime of domestic violence.

It is a federal crime to possess a firearm and/or ammunition after conviction of a qualifying Misdemeanor Crime of Domestic Violence ("MCDV").<sup>1</sup>

#### MCDV Restrictions

Must be a "qualifying" misdemeanor:

- Misdemeanor under federal or state or tribal law.
- Misdemeanor has as an element the use or attempted use of physical force or threatened use of a deadly weapon committed by a current or former spouse, parent, or cohabitant.

[18 U.S.C §] 922(g)(9) is the ninth category of persons deemed by Congress to be too dangerous to possess firearms. Other categories include felons, persons involuntarily committed to mental institutions, and persons subject to qualifying protection orders.

This statute was passed in 1996, coincidentally the year I moved to Maine, at a time when bipartisan legislation was still possible. It passed in the Senate by a vote of 97-2, with one abstention: unheard of in today's world and speaks to the importance of this statute in addressing one of our nation's persistent crime problems. One advantage of this prohibition is that it may not require the testimony of the domestic violence victim. Possession of a gun and a qualifying conviction are sufficient to convict. This can remove the complicated dynamics that surround these cases. It is difficult enough to be a trauma victim, but imagine if the offender is your spouse, boyfriend, or intimate partner, with whom you've enjoyed, at times, a loving relationship.

Upholding the viability of this statute has been a professionally consuming twenty-year effort, but this effort also speaks to the dedication of our community to protect domestic violence victims. This includes the Victim Witness Coordinators, like our amazing Heather Putnam, in each office who work directly with domestic violence victims to offer them the support they need. In particular, the Maine U.S. Attorney's Office has used this tool aggressively to fight our local crime problem and, despite being one of the smallest U.S. Attorney's Offices, population-wise, we are perennially among the leading offices in raw numbers of domestic violence cases prosecuted. I hope that my presence in the office has contributed in some part to this achievement, although I do see people running the other way from me from time-to-time! Almost every AUSA in Portland or Bangor has prosecuted a domestic violence case, and those who haven't certainly won't admit it to me!

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1. 18 U.S.C. § 922(g)(9).

*D. Why is 922(g)(9) So Important?*

922(g)(9) prohibits persons from possessing firearms who have already shown a propensity for violence by a misdemeanor domestic violence conviction. It also, hopefully, acts as a deterrent to prevent these persons from either keeping or obtaining firearms. The statute is called the Lautenberg Amendment after Frank Lautenberg, the New Jersey Senator who sponsored this legislation.

The legislative history includes comments by Senator Feinstein: “[P]lea bargains [in domestic violence cases] often result in misdemeanor convictions for what are really felony crimes.”<sup>2</sup> Domestic violence escalates, and it is “only a matter of time before the violence gets out of hand, and the gun results in tragedy.”<sup>3</sup>

And from Senator Lautenberg: “This amendment, very simply, would establish a policy of zero tolerance when it comes to guns and domestic violence . . . . There is no margin of error when it comes to domestic abuse and guns.”<sup>4</sup>

This statute closed a dangerous firearm possession loophole for domestic violence offenders who were historically convicted of misdemeanors. It is a sad fact that criminal conduct between strangers was, and still can be, treated more seriously than criminal conduct between intimate partners.

While the statute seems straightforward—keeping victims safe by preventing their abusers from possessing firearms—implementation and prosecution has been anything but. It has required a tireless fight against constitutional and statutory challenges.

The irony of our enforcement effort is a common refrain from some outside of DOJ, challenging our enforcement efforts of existing firearm laws. This refrain ignores the reality of how difficult it can be to enforce existing gun laws—and 922(g)(9) is a perfect example. It has taken years of diligent perseverance to combat litigation on almost every word of this statute. Fortunately, by 2016, the statute has been litigated not to death but to life and now creates an opportunity for all U.S. Attorney’s Offices to implement nationwide.

*E. What are the Bases For the Challenges?*

While I don’t want to get too far into the legal weeds, and I apologize in advance to the non-lawyers in the audience, these legal challenges go to the heart of our ability to prosecute these cases. Let’s begin with the Second Amendment challenge. This amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>5</sup>

Until 2008, the right to bear arms was considered a collective and not an individual right. That changed in 2008, when the United States Supreme Court decided *District of Columbia v. Heller*, and found an individual Second Amendment right to bear arms.<sup>6</sup> This core right extends to the defensive use of guns by “law-abiding, responsible citizens.”<sup>7</sup> The *Heller* Court, however, specifically recognized

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2. 142 CONG. REC. 22986 (1996) (statement of Sen. Dianne Feinstein).

3. *Id.*

4. 142 CONG. REC. 22986 (1996) (statement of Sen. Frank Lautenberg).

5. U.S. CONST. amend. II.

6. 554 U.S. 570 (2008).

7. *Id.* at 635.

and made clear that the right was not unlimited, and that certain categories of regulation are presumptively lawful.<sup>8</sup>

Not surprisingly, Second Amendment challenges to the constitutionality of 922(g)(9) followed *Heller*. The seminal case was a 2010 *en banc* decision by the Seventh Circuit in *U.S. v. Skoien*.<sup>9</sup> *Skoien* was argued by the Deputy Solicitor General, who normally represents us before the Supreme Court but who chose to argue this appeal before the Circuit court.

In 2003, Steven Skoien pushed his wife down on a gravel driveway, injuring her hands. He can be heard on a 911 call threatening to kill her. In 2006, after Skoien's fiancée believed he was attempting to run her car off the road, he ran up to her outside their house and pushed her down, causing her to hit her head on her car.<sup>10</sup>

In constitutional cases, the important question is what standard of analysis governs challenges. In *Skoien*, the court held that “intermediate scrutiny” governed this Second Amendment challenge, meaning that the government must prove a substantial relationship between the statute charged on the one hand and an important governmental objective on the other.<sup>11</sup> The *Skoien* court wrote: “No matter how you slice [the data], people convicted of domestic violence remain dangerous to their spouses and partners.”<sup>12</sup>

The court went on to uphold the constitutionality of 922(g)(9): “[N]o one doubts that the goal of §922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between §922(g)(9) and this objective.”<sup>13</sup>

A year later, the First Circuit also weighed in, agreeing with the *Skoien* analysis and rejecting a Second Amendment challenge. In *U.S. v. Booker*, the court wrote: “The presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide.'”<sup>14</sup> Additionally, “removing guns from the home will materially alleviate the danger of intimate homicide by convicted abusers.”<sup>15</sup>

The *Booker* court expressed “no doubt” of a substantial relationship between the government's objective of 922(g)(9) and the statute.<sup>16</sup> This is not surprising, in either the First or Seventh Circuits, based on all the data establishing the dangerous connection between convicted domestic abusers and firearms.

So, while the Second Amendment challenges around the country failed and were fairly straightforward, battle was joined on the qualification of the misdemeanor crime of domestic violence. It is this statutory fight that has consumed the efforts of U.S. Attorney's Offices around the country.

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8. *Id.*

9. 614 F.3d 638 (7th Cir. 2010).

10. *Id.*

11. *Id.* at 646.

12. *Id.* at 644.

13. *Id.* at 642.

14. 644 F.3d 12 (1st Cir. 2011).

15. *Id.* at 26.

16. *Id.*



*F. What is a Qualifying Misdemeanor Crime of Domestic Violence?  
Common Sense Cannot Be Your Guide.*

To begin, does the underlying misdemeanor crime of domestic violence need to be a specifically designated domestic violence offense? Some of you may know that now almost all states have both general assault crimes and also specific domestic violence crimes.

The Supreme Court, in one of three cases in which the court has addressed 922(g)(9), resolved this issue in 2009 in *U.S. v. Hayes*.<sup>17</sup> Randy Hayes had been convicted in West Virginia of battery against his wife. Years later, the police responded to a domestic violence call at his house and discovered firearms. There was an obvious potential for danger not only to the victim, but also to the police. Hayes was indicted under 922(g)(9), and challenged the qualification of his battery conviction since it was not a specific domestic violence crime. When he lost in the district court, he appealed. The Fourth Circuit agreed with Hayes and reversed his conviction, finding that because the West Virginia statute had no domestic relationship element, it did not qualify as a misdemeanor crime of domestic violence. This holding was at odds with decisions of many other Federal Courts of Appeal.

Once an adverse decision is issued, like in *Hayes*, a U.S. Attorney's Office appeal is not a foregone conclusion. Support for an appeal must come from the impacted U.S. Attorney's Office, the Criminal Division at DOJ, and ultimately from the Solicitor General's office. This appeal was authorized, and the Supreme Court accepted the case and faced its first opportunity to address this statute. I attended this argument, having been involved in this case from assisting the U.S. Attorney's Office in the Northern District of West Virginia, and then the Solicitor General's office with compilation of materials and moot court preparation. While you may only remember *Citizens United* being decided in this term—the *Hayes* decision proved influential in its own right.

If the underlying crime must have an “element” that includes both use of force and the domestic relationship, then the statute would be a nullity in two-thirds of the states. In 1996, when the statute was passed, only 17 states had specific domestic violence statutes. In fact, New Jersey, Lautenberg's own state, did not have a domestic violence offense. What we had to keep in mind throughout the 922(g)(9) litigation is that a legislative remedy has never been a realistic option. For many reasons, political and otherwise, we do not expect Congress to revisit and amend this statute to address obvious drafting issues. This leaves the courts as our last resort.

Let's turn to the November 2008 argument:

Justice Scalia: “And this was misdemeanor assault and battery, wasn't it?”<sup>18</sup>

Ms. Saharsky: “Yes, that's right. I mean, I really.”<sup>19</sup>

Justice Scalia: “So it's not that serious an offense. That's why we call it a misdemeanor.”<sup>20</sup>

Ms. Saharsky: “Well, I mean, certainly the offense is this particular case was serious. The charging document reflects that Respondent hit his wife

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17. *United States v. Hayes*, 555 U.S. 415 (2009).

18. Transcript of Oral Argument at 20, *United States v. Hayes*, 555 U.S. 415 (2008) (No. 07-608).

19. *Id.*

20. *Id.*

all around the face until it swelled out, kicked her all around her body, kicked her in the ribs—”<sup>21</sup>

Justice Scalia: “Then he should have been charged with a felony, but he wasn’t. He was charged with a misdemeanor.”<sup>22</sup>

Justice Scalia was right, this case should have been prosecuted as a felony. But misdemeanor prosecutions result from historical under-charging and under-pleading of domestic violence crimes that under-represent the seriousness of the offense.

Justice Ginsburg: “[W]asn’t the statute responding to just that problem, that domestic abuse tended to be charged as misdemeanors rather than felonies? . . . The whole purpose of this was to make a misdemeanor battery count for the statute’s purpose.”<sup>23</sup>

In a 6-3 majority—this harkens back to a time when there were nine justices on the Court—the Court reversed the Fourth Circuit and found that the most sensible reading of the statute would allow both generic and domestic violence-specific statutes to qualify as misdemeanor crimes of domestic violence.<sup>24</sup> Reinforcing the need for the statute, the Court wrote: “Firearms and domestic strife are a potentially deadly combination nationwide.”<sup>25</sup>

This victory closed the door to one challenge to the statute, but the barn door was blown open by additional challenges. We kept on fighting with one goal in mind: keeping victims safe by preventing their abusers from having access to firearms. The most common challenge focused on the words “physical force.” The definition of a misdemeanor crime of domestic violence requires “use or attempted use of physical force.”<sup>26</sup>

### *1. What Does “Physical Force” Mean in This Context?*

In 2001, in *U.S. v. Nason*,<sup>27</sup> the First Circuit, faced with a split among the Maine district judges, in a case prosecuted by the Maine U.S. Attorney’s Office, examined the Maine assault statute to determine if it qualified as a misdemeanor crime of domestic violence.<sup>28</sup> Maine law provides that “[a] person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.”<sup>29</sup> The First Circuit found that both “caus[ing] bodily injury” and “offensive physical contact” necessarily require “use of physical force.”<sup>30</sup>

It is important to note that statutes that prohibit “offensive touching” are using language that is a throwback to our nation’s common law. The actual conduct underlying the offenses is anything but, but the statutory language must guide our analysis.

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 426-27.

25. *Id.* at 427.

26. 18 U.S.C.A. § 921(a)(33)(A).

27. *United States v. Nason*, 269 F.3d 10, 11 (1st Cir. 2001).

28. *Id.* at 12.

29. 17-A M.R.S.A § 207(1).

30. *Id.* at 20.

If only every circuit decision followed *Nason*'s finding that both the "bodily injury" and "offensive contact" prongs, found in many state assault statutes, equals "physical force" in satisfaction of 922(g)(9). Instead, most often *Nason* was either distinguished or rejected. For example, both the Ninth Circuit and the Fifth Circuit in 922(g)(9) cases rejected *Nason*'s analysis and found, respectively, that neither "unlawful touches"<sup>31</sup> nor "causes bodily injury"<sup>32</sup> amounted to physical force. Both courts relied upon hypothetical scenarios that removed physical force from the equation, like offering a poisoned drink or cookie.

The divorce from reality in these cases is the most frustrating. Would a defendant who offered a poisoned drink or cookie be prosecuted for assault? Not surprisingly, the defendants could not present any cases using their scenarios that were actually prosecuted for assault and battery.

In any event, despite strong advocacy and dedication of incredible time and resources by the U.S. Attorney's Offices, we were at the end of our rope and prosecution of 922(g)(9) was effectively dead in the Fifth and Ninth Circuits.

The 2010 Supreme Court decision in *Johnson v. U.S.* complicated the issue. This *Johnson* Court was evaluating the Armed Career Criminal Act ("ACCA"), a federal statute requiring stiff mandatory sentences for persons convicted of three prior "violent felonies."<sup>33</sup> The "violent felony" definition includes the same "use or attempted use of physical force" language as the misdemeanor crime of domestic violence definition.<sup>34</sup> Justice Scalia wrote in *Johnson*: "We think it clear that in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force . . ."<sup>35</sup>

Unresolved in *Johnson* was whether that rigorous standard imposed for violent felonies in the ACCA context would also be applied to the same "use of physical force" language used in the misdemeanor crime of domestic violence context. Do the same words in different statutes have the same meaning? The answer, unfortunately, was "yes" in a number of circuits.

For example, *U.S. v White* was litigated by the Eastern District of Virginia before the Fourth Circuit in 2010.<sup>36</sup> In 2004, William White was convicted of assault and battery in Virginia.<sup>37</sup> His assault of the mother of his child resulted in a split lip. Although the facts are not relevant to statutory construction arguments, the facts are extremely relevant in our exercise of discretion to prosecute so that we focus on prohibiting dangerous abusers from possessing firearms. We want to keep victims safe and save lives. That is our priority. White's criminal history certainly merited prosecution.

His criminal history included multiple domestic violence convictions. After the 2004 assault conviction, defendant was arrested twice more for assaulting the same victim. In the presence of their children, he "grabbed her neck, causing her to lose her breath." In the next offense he pulled her hair, head-butted her, bit her and threw her to the ground while she was pregnant.

31. *United States v. Belles*, 338 F.3d 1063 (9th Cir. 2003).

32. *United States v. Hagen*, 349 Fed. Appx. 896 (5th Cir. 2009).

33. *Johnson v. United States*, 559 U.S. 133, 136 (2010).

34. *Id.* at 143.

35. *Id.* at 140 (emphasis in original).

36. *United States v. White*, 606 F.3d 144, 145 (4th Cir. 2010).

37. *Id.*

Despite outstanding advocacy by another U.S. Attorney's Office, this time the Eastern District of Virginia, the Fourth Circuit, believing it was bound by *Johnson*, held that a Virginia battery conviction could not qualify as a misdemeanor crime of domestic violence because it did not require violent force.<sup>38</sup>

The loss in *White* effectively ended prosecutions of 922(g)(9) in the Fourth Circuit. While we continued to push the envelope, prosecution of 922(g)(9) was effectively dead in some of the most populated states in the country.

It was in this national climate that the U.S. Attorney's Office for the Western District of Tennessee indicted James Castleman in 2008 for violating 922(g)(9), after he was discovered to be selling firearms on the black market after a 2001 conviction in Tennessee. The Tennessee assault statute prohibits: "intentionally, knowingly or recklessly caus[ing] bodily injury to another"<sup>39</sup> It was highly unusual, but state court documents established the offense was committed intentionally and knowingly, so the issue of reckless qualification was not raised in this case.

## 2. What Did James Castleman Do?

He slapped the mother of his child in the face, dragged her into the house and slapped her in the face again. He knocked her on the ground, grabbed her neck and said he was going to kill her and run off with the baby all while she was holding the baby in her arms.<sup>40</sup> He received an eleven-month sentence for this criminal behavior, but the inadequacy of the sentence is an issue for another day.

James Castleman is another in a series of examples of defendants who beat their partners, were convicted of misdemeanors and pose a danger to their victims. The district court dismissed the indictment, finding, as the White court did in the Fourth Circuit, that the "use or attempted use of physical force" definition in 922(g)(9) requires "force in the sense of violent contact." This was affirmed by a divided panel of the Sixth Circuit, holding that because the Tennessee assault statute could be violated without physical contact—again beware the poison cookie!—it certainly falls short of the "violent contact" required.<sup>41</sup>

The U.S. Attorney's Office was determined to remedy this ruling and sought authorization from the Solicitor General's Office for Supreme Court review. Because of the losses in many courts of appeal, I advocated along with the U.S. Attorney's Office that Supreme Court review was necessary to resolve this important issue and keep 922(g)(9) alive.

The news that the Supreme Court granted review in *Castleman*,<sup>42</sup> although welcomed because we desperately needed Supreme Court intervention, was also a scary proposition because we stood to lose the ability to prosecute 922(g)(9) nationwide. And, as I said before, a legislative remedy was not a viable option.

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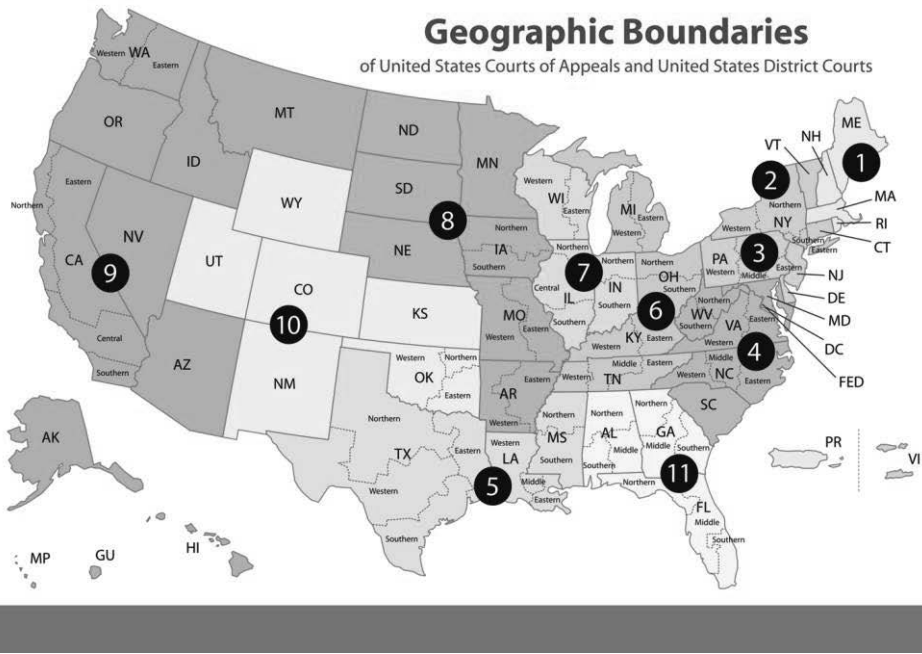
38. *Id.* at 153.

39. Tenn. Code Ann. § 39-13-101 (West).

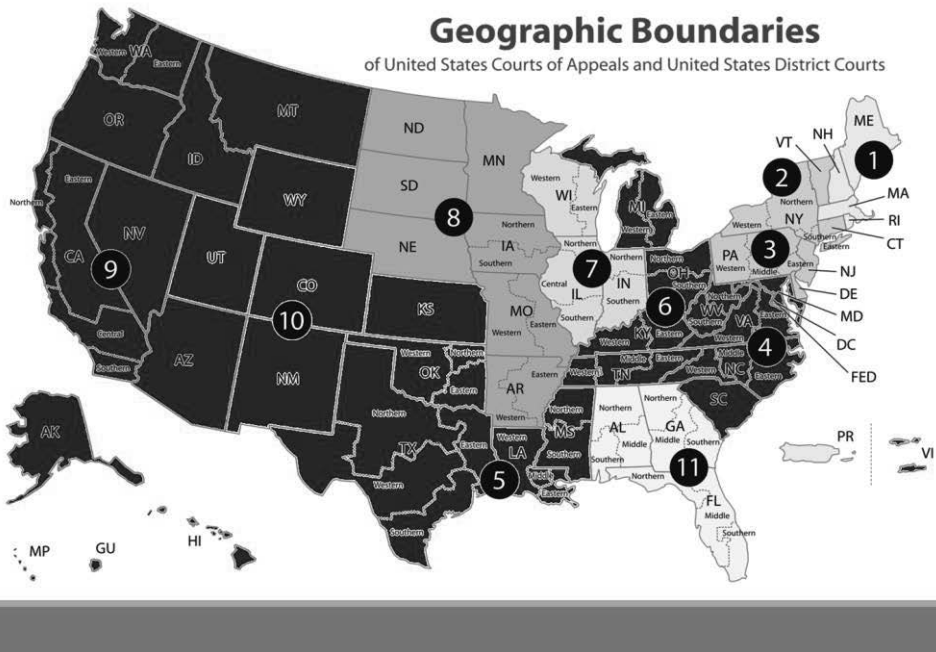
40. *United States v. Castleman*, 695 F.3d 582, 584 (6th Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1405 (2014).

41. *Id.* at 592.

42. *United States v. Castleman*, 134 S. Ct. 1405 (2014).



This map shows the divisions of the U.S. Courts of Appeals.



This map highlights in red the circuits where 922(g)(9) could not be prosecuted going into the *Castleman* argument.

Our *Castleman* team kept a singular focus and understood the importance of this statute in potentially saving victims' lives. With a keen understanding of the stakes, and the possibility of losing even more circuits where we could prosecute 922(g)(9) cases, I attended the *Castleman* argument before the Supreme Court on January 15, 2014. As is always the case, after participating in several moot courts and providing volumes of materials and data, in addition to their own extensive briefing and research, the Solicitor General lawyer could not have been more prepared. She argued: Defendant's argument would "indisputably exclude the assault and battery laws of almost all of the 50 States and the District of Columbia . . . [I]t would leave that dangerous loophole wide open."<sup>43</sup>

Approximately two months after argument, on March 26, 2014, the Supreme Court reversed the Sixth Circuit and held that the Tennessee assault statute qualified as a misdemeanor crime of domestic violence. Justice Sotomayor wrote for a unanimous court and began by reviewing the legislative history and powerful statistics establishing the dangerous connection between firearms and domestic abuse. "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year . . . the presence of a firearm increases the likelihood that it will escalate to homicide."<sup>44</sup> The Court also quoted Senator Wellstone: "All too often, the only difference between a battered woman and a dead woman is the presence of a gun."<sup>45</sup>

The Supreme Court refused to extend the *Johnson* requirement of violent force to the misdemeanor crime of domestic violence context. Context is critical. It makes sense that the Court would not apply to misdemeanors a definition of physical force that applies to violent felonies.

In addition, the court held that "physical force" for 922(g)(9) purposes is satisfied by the force necessary to commit common law battery, which includes both causing bodily injury and offensive touching. Since almost all state assault and battery statutes cover these two prongs, this decision re-invigorated our ability across the country to prosecute 922(g)(9). It recognized that hitting, slapping, shoving, grabbing, pinching, biting, and hair-pulling are typical forms of domestic violence. *Castleman* was also a clarion call to federal prosecutors to use this statute to address the horrifying statistics recounted in the opinion and to keep victims safe. We have continued to heed this call.

While we rejoiced at this decision, our celebration was short-lived. In footnote eight of the opinion, Justice Sotomayor noted that this case did not resolve the issue of whether a statute violated that recklessly could qualify as a misdemeanor crime of domestic violence, because *Castleman* pled guilty to a knowing intentional act.<sup>46</sup> But the footnote noted that every court of appeals, except the First Circuit, had ruled that recklessness in other contexts was not sufficient to establish a "use" of physical force. Why even look at recklessness when the facts establish intentional acts?

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43. Transcript of Oral Argument at 19-20, *United States v. Castleman*, 134 S. Ct. 1405 (2014) (No. 12-1371).

44. *Castleman*, 134 S. Ct. at 1408.

45. *Id.* at 1409.

46. *Id.* at 1414 n.8.

Because the facts or the prong of conviction are usually not included in the charging documents, we have to assume the lowest level of criminal culpability in the statute under challenge. In Maine, the lowest level of culpability amounts to reckless offensive physical contact.

No rest for the weary. In no time, defendants were following the lead of footnote 8 and attacking statutes allowing for reckless commission of the crime.

Despite the Supreme Court wins in *Castleman* and *Hayes* and our Second Amendment victories, it felt like we were back to square one. We were opening up the map again, fighting to preserve 922(g)(9), since it turned out that a majority of states had assault and battery statutes that included reckless conduct. The challenge against statutes that allowed reckless conduct brought us back to the Supreme Court for the third time in eight years. While it is certainly a professional thrill to be intimately involved in three Supreme Court cases, each time the stakes were so high I could barely enjoy the experiences!

In the third Supreme Court case, the underlying prosecutions were brought by our own U.S. Attorney's Office in Bangor.<sup>47</sup> Stephen Voisine was convicted in 2004 of violating Maine's assault statute. He was found in 2009 with a firearm after he admitted that he killed a bald eagle, also a federal offense.

### 3. *What Was Stephen Voisine's Underlying Conduct?*

The victim called 911 because Voisine—her boyfriend and cohabitant for seven years—“slapped her in the face across the . . . cheek.” She said “he was drunk and . . . this was not the first time it happens.” The victim added: “he is not usually like this except when he drinks.” His criminal history spanned twenty-eight years and included fourteen convictions. It included multiple convictions for violation of protection orders. The 2004 assault conviction against the victim was followed by a 2005 domestic assault conviction.

### 4. *William Armstrong Was Also Prosecuted in Bangor. What Did He Do?*

While Armstrong's wife was baking cookies, he “got mad . . . because she didn't have her wedding ring on.” He reportedly pushed her, she told him to stop, the two argued, Armstrong “got mad and slapped” his wife on her leg. He “hit her again, but harder this time.”

Knowing these facts makes firearm disbarment all the more important. The defendants entered conditional guilty pleas and the First Circuit affirmed their convictions.

These cases were consolidated, and after many fits and starts on appeal, Supreme Court review was granted even though there was not a deep circuit split—only between the First and Ninth Circuits. This was not necessarily a positive sign, since the Supreme Court's commitment to allowing reckless misdemeanors to qualify was uncertain based on footnote eight in *Castleman*.

This process, like all the other cases that wound their way from the district court to the Supreme Court, required enormous U.S. Attorney's Office resources. Not only by the AUSAs in district court, but also by our appellate lawyers: Mark Terison,

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47. *Voisine v. United States*, 136 S. Ct. 2272 (2016).

who spent too many summers briefing and arguing and prevailing in 922(g)(9) cases before passing the torch to Renee Bunker, who also spent incredible amounts of time briefing and arguing and prevailing in 922(g)(9) cases— all with the support of Appellate Chief, and Coffin clerk, Margaret McGaughey. It reflected both the DOJ and the Maine U.S. Attorney's Office commitment to saving lives by preventing access to firearms by domestic violence abusers.

Once the Supreme Court accepted the case, we all moved into high gear. The *Voisine* team consisted of Renee Bunker, our appellate attorney who briefed and argued *Voisine* and *Armstrong* and other 922(g)(9) cases before the First Circuit; Criminal Appellate at DOJ; an amazing team from the Solicitor General's Office; and me, representing the USAO community. We tracked down every case, every statute and every argument. I also met with the amici—domestic violence, law enforcement and gun organizations—most of who filed very powerful briefs in support of the government.

Oral argument was held on February 29, 2016, within a week after the death of Justice Scalia—his chair was still draped in black. As expected, the argument focused on whether a reckless conduct statute can qualify as a misdemeanor crime of domestic violence. We argued powerfully that whether an assault is committed recklessly or intentionally should matter not. Since Maine defines recklessness as the “conscious disregard of a substantial risk,” that level of intent is consistent with dangerousness and firearm disbarment. The argument did have a surreal moment at the end of the Solicitor General's argument:

Ms. Eisenstein: [Congress] identified [domestic abusers] ... as posing a dramatically increased risk of perpetrating future gun violence against their family. This Court should continue to interpret Section 922(g)(9) in light of that compelling purpose. If there are no further questions.<sup>48</sup>

Justice Thomas: Ms. Eisenstein, one question.<sup>49</sup>

Justice Thomas leaned forward and asked his first question from the bench in ten years. Although it dealt with a Second Amendment issue, which the Court specifically excluded from its review because the issue is well settled, the hush in the courtroom was remarkable.

The Court waited until the last day of the 2016 term in June of this year to issue its decision. It was a resounding 6-2 win for the government and affirmation for the First Circuit. Repeating the findings of both *Hayes* and *Castleman*, Justice Kagan wrote: “A person who assaults another recklessly ‘use[s]’ force, no less than one who carries out that same action knowingly or intentionally.”<sup>50</sup> “Because fully two-thirds of such state laws extend to recklessness, construing §922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision's design.”<sup>51</sup>

Accordingly, the Supreme Court held that the Maine assault statute, even with its reckless component, qualifies as a predicate under 922(g)(9). As if to prove his worth as a prosecutive target, William Armstrong's ongoing domestic criminal

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48. Transcript of Oral Argument at 23-24, *United States v. Voisine*, 136 S. Ct. 2272 (2016) (No. 14-10154).

49. *Id.*

50. *Voisine v. United States*, 136 S. Ct. 2272, 2280 (2016).

51. *Id.*



conduct continued. Judge Woodcock noted in a 2015 opinion, issued in another pending 922(g)(9) case while the *Voisine/Armstrong* appeals were pending, that Armstrong “was arrested and subsequently convicted in Maine state court of yet another misdemeanor crime of domestic violence” after his wife was found hiding in the woods after the assault. As Judge Woodcock wrote:

With people like Mr. Armstrong in mind, it is difficult to argue against the legislative judgment that Mr. Armstrong and people like him who cannot stop assaulting their domestic partners have ceded their constitutional right to possess a firearm and have earned prosecution, conviction and punishment when they possess such weapons.<sup>52</sup>

### III. CONCLUSION

Is the litigation over? Is there more to contest? Hopefully not. We hope that U.S. Attorney’s Offices around that country can take a deep breath and now devote their efforts to prosecuting cases that reap enormous benefits for our victims, their families and our communities. Again, our safe communities and neighborhoods depend on safe homes.

On a personal note, I have been fortunate and I hope the aspiring and young lawyers in the audience will be as well, to find a niche where you can pursue both social and legal justice within your community. This continues to be a learning experience for me as I navigate the complicated and treacherous waters of domestic violence. I no longer question why victims may stay in dangerous situations, having never walked in their shoes; we are in no position to judge. But we can increase their safety by holding abusers criminally responsible and trying to ensure that they do not have access to firearms. If there is a moral to this story, let it be that perseverance and dedication—when combined with passion for a just cause, regardless of the odds or the setbacks—can bear fruit in the long run. It has taken twenty years and amazing contributions of our DOJ village, but we have prevailed challenge by challenge, case by case, defendant by defendant, in our pursuit to make Maine and the country a safer place for domestic violence victims.

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52. *United States v. Hines*, No. CR 1:12-00204-JAW, 2014 WL 1875164 (D. Me. February 19, 2015).