



U.S. Department of Justice

Federal Bureau of Investigation

Clarksburg, WV 26306

October 30, 2012

Lawrence Tyler
Brady Supervisor
Utah Bureau of Criminal Investigation
3888 West 5400 South
Taylorsville, UT 84129

RE: Request for Guidance Regarding Interpretation of Title 18,
United States Code (U.S.C.), Section 922(g)(9)

Dear Mr. Tyler:

Thank you for your patience while awaiting our response to your request for guidance regarding the application of 18 U.S.C. § 922(g)(9) to Utah offenses. The Legal Research and Analysis Team (LRAT) of the FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section met with M. Drew Crislip, Assistant General Counsel, FBI Office of the General Counsel, regarding your request. At the conclusion of the meeting, the LRAT and Mr. Crislip came to the consensus that your request regarding the application of the physical force element is not an issue on which the FBI is able to give a formal opinion. We are, however, able to provide limited guidance on the methodology the NICS Section uses in order to determine whether the "... use or attempted use of physical force or threatened use of a deadly weapon" element of Section 922(g)(9) has been met.

When making a determination regarding Section 922(g)(9), the NICS Section is guided by the definition of "misdemeanor crime of domestic violence" (MCDV) found in Title 27, Code of Federal Regulations (C.F.R.), Section 478.11. Per regulation, one of the required elements of an MCDV is "... the use or attempted use of physical force or threatened use of a deadly weapon" (hereinafter "force element"). In many instances, whether the force element is met is a complex question that has yet to be addressed by legislatures, courts, or other administrative entities which provide decisions relative to topics such as this. For instance, the LRAT and Mr. Crislip were unable to locate in legislation or in court opinion the definitions of key terms as applicable to Utah statutes.

As you know, the lack of clarity on this issue does not change the fact that the NICS Section and NICS Point-of-Contact (POC) states, such as Utah, are presented with countless cases involving statutes and convictions each day which could reveal a potential purchaser is prohibited under Section 922(g)(9). As I am sure you are aware, the LRAT maintains a chart available to all law enforcement agencies which subscribe to <www.leo.gov> through the NICS Special Interest Group (SIG) under "State-Specific Reference Information." The LRAT seeks to provide assistance through this chart by addressing which statutes meet, do not meet, and are possible for the force element of Section 922(g)(9); it covers the most common offenses

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for all state, territorial, federal, and military jurisdictions. In addition to the chart, the LRAT is available through e-mail at <statutes@leo.gov> to provide assistance with force element questions as they apply to a specific conviction. In applying the force element to these statutes and convictions, the LRAT strives to come to the correct conclusion as it applies to each case. There is, however, no one methodology utilized in order to discern whether a particular offense meets this element. The LRAT instead uses a combination of sources including the court documentation from the conviction, state and federal statutes, and courts' opinions to conclude that a conviction meets, does not meet, or remains possible for the force element.

Because you specifically requested guidance with the Utah assault statute, we will use that statute in the example enclosed. This analysis can be applied to each statute and conviction to determine Section 922(g)(9) applicability.

Additionally, I have also enclosed a State of Connecticut Superior Court Form JD-CR-155, "Report of Misdemeanor Crimes of Domestic Violence Federal Firearms Disqualification." This is a form that Connecticut courts have drafted and implemented with guidance from the LRAT and FBI Office of the General Counsel. Connecticut's goal was to provide clarity as to whether the force and relationship elements of Section 922(g)(9) have been met. I have enclosed this form with the permission of Connecticut as an example of what another state is doing to address similar concerns as you have expressed in your request. The LRAT would be willing to work with the state of Utah should it be interested in implementing a similar solution to this problem.

Again, thank you for your patience on this issue. I sincerely hope this guidance will provide the assistance you need in applying Utah statutes to Section 922(g)(9). Should you have any questions concerning this communication, please contact John Francis Keough, Legal Administrative Specialist, at 304-625-7461.

Sincerely yours,



Paul Wysopal
Section Chief
NICS Section
CJIS Division

Enclosures (2)

The following guidance covers the Legal Research and Analysis Team (LRAT) of the FBI Criminal Justice Information Services (CJIS) Division's National Instant Criminal Background Check System (NICS) Section application of the force element when reviewing 2011 Utah assault statute. This guidance covers the way this element is currently applied by the NICS Section. Please be aware that court decisions, statute revisions, or changes in legal opinion could change the way the NICS Section interprets and applies this element. As used below, statutory language is in bold black, the LRAT analysis is in red.

U.C.A. 1953 § 76-5-102
Assault

“(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

Subsection (a) is POSSIBLE for the force element of Section 922(g)(9) because the terms “unlawful force” and “violence” have not been defined by the Utah legislature or Supreme Court. A plain language review of these terms would include definitions within and without the definition of “physical force” as used in Section 922(g)(9).

A conviction for this offense would remain possible for the force element until court documentation is provided to explain the actual conduct supporting the conviction.

- Please note that this may not be the same conduct alleged or reported by the prosecutor, police agency, etc.

As an example, this documentation might contain such language as the following:

“John Smith is adjudicated guilty of assault 1953 § 76-5-102 (a) because he attempted to strike Jane Smith on the mouth with the intent of causing her bodily injury.”

In this case, the conviction would MEET the force element because an attempted strike falls within the federal definition of physical force as it is used in Section 922(g)(9).

Another court documentation example:

“John Smith is adjudicated guilty of assault 1953 § 76-5-102 (a) because he yelled loudly at Jane Smith knowing that it would startle her while driving and potentially causing her bodily injury.”

In this example, the act of yelling would not meet the federal definition of physical force as it is used in Section 922(g)(9).

**(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another;
or**

Because a “show” of force or violence is not “the use or attempted use of physical force” and independently, because the “threat” is not the “threatened use of a deadly weapon,” this subsection DOES NOT MEET Section 922(g)(9) force element.

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another . . . ”

As in our above analysis with sub-section (a), this subsection will be POSSIBLE for the force element of Section 922(g)(9).

**REPORT OF MISDEMEANOR CRIMES
OF DOMESTIC VIOLENCE
FEDERAL FIREARMS DISQUALIFICATION**

JD-CR-155 Rev. 9-10
C.G.S. § 29-36f, 18 U.S.C. § 922(g)(9), Pub. L. 110-180

State of Connecticut
Superior Court
www.jud.ct.gov



The information below is being collected and reported to state and federal firearms regulatory authorities in support of Connecticut General Statutes § 29-36f, 18 U.S.C. § 922(g)(9), and Pub. L. 110-180, if applicable.

Offender's last name	Offender's first name	Offender's middle name	Court location	Docket number
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By a judgment of the court, the offender was convicted of the misdemeanor crime(s) below, in a proceeding in which the offender was represented by counsel, or knowingly and intelligently waived the right to counsel, through a jury trial, or if the offender knowingly and intelligently waived the right to a jury trial, through a non-jury trial, or a plea of guilty or nolo contendere.

A.	Conviction date
<input type="checkbox"/> § 53a-61 Assault in the third degree.	
<input type="checkbox"/> § 53a-61a Assault of an elderly, blind, disabled, pregnant or mentally retarded person in the third degree.	
<input type="checkbox"/> § 53a-64cc Strangulation in the third degree.	

B1. Specify the subsection where applicable and whether the court found that an element of the offense includes the use or attempted use of physical force, or threatened use of a deadly weapon.	Conviction date
<input type="checkbox"/> § 53-37b Deprivation of a person's equal rights or privileges by force or threat.	(Note: this offense is a felony if bodily injury or death results)
<input type="checkbox"/> § 53a-73a Sexual assault in the fourth degree.	Specify subsection: (Note: this offense is a felony if the victim is under sixteen years of age)
<input type="checkbox"/> § 53a-96 Unlawful restraint in the second degree.	
<input type="checkbox"/> § 53a-183b Interfering with an emergency call.	
<input type="checkbox"/> § 53a-181 Breach of the peace in the second degree.	Specify subsection: <input type="checkbox"/> (a)(1) <input type="checkbox"/> (a)(2)
<input type="checkbox"/> § 53a-182 Disorderly Conduct	<input type="checkbox"/> (a)(1)

B2.
<input type="checkbox"/> Yes <input type="checkbox"/> No An element of the offense includes the use or attempted use of physical force, or threatened use of a deadly weapon.

C. Offender's current or former relationship to the victim:

- | | |
|---|--|
| <input type="checkbox"/> Spouse of the victim. | <input type="checkbox"/> Parent, stepparent, or guardian of the victim. |
| <input type="checkbox"/> Child in common with the victim. | <input type="checkbox"/> Cohabitation with the victim as a parent or guardian, or a person similarly situated to a parent or guardian. |
| <input type="checkbox"/> Cohabitation with the victim as a spouse or a person similarly situated to a spouse, or intimate cohabitation with the victim. | |
| <input type="checkbox"/> Other (specify): _____ | |

By the Court Name of Judge	Date
Name of Clerk	Signature of Clerk

Instructions to Clerk:

Keep this form with the documents from the file that are sent to the Records Center, and fax this form to the Superior Court Operations Division at (860) 610-0480.