

# INDEPENDENCE

INSTITUTE

Golden,  
Colorado

## ISSUE PAPER

# WHY GUN WAITING PERIODS THREATEN PUBLIC SAFETY

153751

U.S. Department of Justice  
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by  
Independence Institute

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

BY

**DAVID B. KOPEL**

153751

Sept. 21, 1993

# WHY GUN WAITING PERIODS THREATEN PUBLIC SAFETY

153751

By David B. Kopel

APR 12 1995

## Executive Summary

## ACQUISITIONS

"Honey, I forgot to duck." Remember the day Ronald Reagan was shot? The President, grinning up from his hospital bed on March 30, 1981, was able to joke about a gunman's attempt on his life. But his press secretary, James Brady, fared much worse; shots from the same pistol left him permanently disabled. The nation was shocked, the gun control movement galvanized.

More than a decade later, gun control lobbyist Jim Brady and former President Reagan are working together to require that any retail purchase of a handgun be preceded by a waiting period, during which a background check on the purchaser's criminal and mental record could be conducted.

A waiting period has strong initial appeal. The tradeoffs appear positive: relatively small costs in exchange for significant gains in public safety.

But an exhaustive study of the issue by attorney and gun control expert David Kopel concludes that this perception is misleading. When all the evidence is dispassionately weighed, all the consequences traced, Kopel finds that there is a very real possibility that gun waiting periods *threaten* public safety.

The reason: law enforcement resources diverted and law-abiding citizens disarmed. Proponents are doubtless right in saying that a federally imposed waiting period would save at least one life somewhere, the author concedes. But he says that is beside the point if America as a whole would be marginally less secure against crime, violence, and fear as a result of the new restriction. Kopel's research and analysis show why the waiting period's vast cost is likely to more than cancel its apparent benefits.

Advocates of the waiting period use the Hinckley case as a symbol, opinion polls to suggest momentum, criminological studies and state experience for empirical validation. None of the four stands up to scrutiny, however. The proposed law would not in fact have halted purchase of the gun used to shoot Reagan and Brady. Polling results turn out to be flawed and mixed. No criminologist has shown that waiting periods work. California and other states with waiting periods show only a minuscule arrest rate and widespread unfairness to the law-abiding.

There is shock value in the scenario of guns "too easily bought" by drug dealers, psychotic killers, persons bent on killing a spouse or themselves, or purchasers intending to use them in hot blood. Yet hard data and common sense show little benefit from a waiting period even in such lurid situations.

Against the meager-to-nil impact of waiting periods on crime control must be set their clearly negative impact on the average American's ability to count on police protection or protect himself.

Specifically: Is it desirable to have law enforcement agencies bogged in a vast new paperwork morass, especially when most rank-and-file are harried with lawsuits over insufficient background checks? To have a threatened person face dangerous, sometimes indefinite, delays in obtaining a self-defense gun? To set in place a mechanism for *de facto* universal gun registration and a political steppingstone to outright gun prohibition? To legislate in disregard of the "no prior restraints" and "least restrictive means" principles that should safeguard not only the Second Amendment, but the whole Bill of Rights? All these are foreseeable effects of the proposal.

Alternatives to the waiting period proposal might include a Virginia-style instant phone check on the purchaser's background, creation of a firearms owner ID card, or adding one's fingerprint to a computerized driver's license (the so-called "smart card"). These measures are preferable in many respects, since they are at least as effective as waiting periods at disarming criminals, and are less likely to be used to disarm citizens. Yet these alternatives, like the waiting period, are subject to evasion by criminals and abuse by government administrators, and create serious risks of privacy violations.

Ultimately, the Kopel study concludes, practicality and constitutionality are best served by strategies that aim to cut gun crime not by targeting the legitimate retail firearms trade, but instead by aiming at the black market where most criminals get most of their guns.

Copyright © 1993 - David B. Kopel

INDEPENDENCE INSTITUTE is a nonprofit, nonpartisan Colorado think tank. It is governed by a statewide board of trustees and holds a 501(c)(3) tax exemption from the IRS. Its public policy focuses on economic growth, education reform, local government effectiveness, equal opportunity, and the environment.

TOM TANCREDO is President of the Institute

CHUCK ASAY is the political cartoonist for the (Colorado Springs) *Gazette-Telegraph*, and drew most of the cartoons reprinted with permission herein.

DAVID B. KOPEL is Director of the Firearms Research Project at the Independence Institute, and editor of the Institute's papers dealing with firearms issues. His book *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Buffalo, NY: Prometheus Books, 1992) was chosen to receive the Comparative Criminology Book Award by the American Society of Criminology's Division of International Criminology.

PERMISSION TO REPRINT this paper in whole or in part is hereby granted, provided full credit is given to the Independence Institute.

# TABLE OF CONTENTS

I. JOHN HINCKLEY .....	3
II. PUBLIC AND POLICE OPINION .....	11
A. POLICE .....	11
B. PUBLIC OPINION POLLS .....	17
III. CRIMINOLOGICAL STUDIES .....	22
IV. THE WAITING PERIOD (IN)ACTION .....	28
V. PARTICULAR TARGETS OF WAITING PERIODS .....	36
A. DRUG DEALERS .....	36
B. HOMICIDAL MANIACS .....	37
C. SUICIDES .....	37
D. DOMESTIC HOMICIDES .....	38
E. PEOPLE IN NEED OF "COOLING-OFF" .....	39
F. SUMMARY: WHAT BENEFITS CAN BE EXPECTED FROM A WAITING PERIOD? .....	39
VI. PROBLEMS CAUSED BY A WAITING PERIOD .....	43
A. THE DRAIN ON POLICE RESOURCES .....	43
B. LAWSUITS AGAINST THE POLICE .....	44
C. COVERT REGISTRATION .....	45
D. PRIVACY OF MEDICAL RECORDS .....	46
E. DENIAL OF ABILITY TO OBTAIN A GUN .....	46
F. FINANCIAL HARDSHIPS .....	53
G. THE DATA QUALITY PROBLEM .....	54
H. A STEP TOWARDS PROHIBITION .....	56
VII. CONSTITUTIONAL ISSUES .....	66
A. PRIOR RESTRAINTS ON CONSTITUTIONAL RIGHTS .....	66
B. BALANCING TESTS .....	67
C. FEDERALISM .....	68
VIII. ALTERNATIVES .....	72
A. "INSTANT" CHECKS .....	73
B. FIREARMS OWNERS IDENTIFICATION CARDS .....	75
C. SMART CARDS .....	76
D. DRIVER'S LICENSE IDENTIFICATION OF VIOLENT FELONS. ....	77
E. ANTI-CRIME ALTERNATIVES THAT DO NOT INFRINGE CIVIL LIBERTIES .....	79
IX. CONCLUSION .....	82

## INTRODUCTION

Waiting periods: Many states already have them; most national police organizations, most people, and most gun owners are for them. In the 1970s, even the National Rifle Association supported the idea of a carefully-crafted state waiting period. So who could be opposed?

This paper suggests that sometimes a majority of NRA members, a majority of gun owners, and even a majority of all the people may not always be right.

Waiting periods come in two basic shapes. The "limited" waiting period is a relatively short wait for retail handgun purchases. Proposals for such a law have attracted many co-sponsors in Congress. The wide support for a limited handgun waiting period in Congress reflects the growing influence of Handgun Control, Inc., the anti-gun lobby.

The more comprehensive waiting period applies to all guns, including long guns, and applies to all transfers, including gifts between family members. The wait itself is much longer. The comprehensive wait is also supported by Handgun Control, Inc. (HCI). HCI has persuaded legislatures in California, Connecticut, and Rhode Island to adopt a comprehensive wait, supplanting the existing limited handgun wait in those states.

Although HCI backs the new comprehensive waits in California and other states, the ultimate goal is an even stronger comprehensive wait. In 1990, Colorado State Senator Pat Pascoe introduced a waiting period bill which HCI Chair Sarah Brady called "everything on my wish list."<sup>1</sup> The bill provided:

- As in California, a comprehensive background check and waiting period on both handguns and long guns, for all transactions, including intra-family gifts.<sup>2</sup>
- Each gun purchase would require a background check of up to two weeks, *followed* by a waiting period of one week. An applicant would then be given a permit to purchase, good for 60 days.
- The applicant would pay a fee of up to \$20 for each purchase permit.
- There would be no exception for a person who needed a firearm for self-defense. In fact, even if the police strongly wanted the citizen to acquire a gun because of imminent deadly threats, a one week delay would still be mandatory.<sup>3</sup>

Presently the only state with a law that is about as severe as Colorado's very strict proposal is New Jersey.

The waiting concept (both limited and comprehensive) reflects the belief that there should be a police check before a person buys a gun. In the form of an instant telephone check, the National Rifle Association accepts the police assent principle, providing the system is structured properly. The instant check is currently in effect in Virginia, Illinois, Wisconsin, Florida, and Delaware. Handgun Control, Inc. accepted the instant check in Virginia, and opposed it in Ohio.

Since the instant telephone check is sometimes offered as an alternative to the waiting period, the telephone check is discussed in this paper. Other regulatory alternatives to a waiting period are also considered.

The paper discusses the following issues: Would a waiting period have stopped John Hinckley? What do the polls of police and of citizens say about waiting periods, and what implications should be drawn from the results? What have the criminologists learned about waiting periods? What good have they done in states where they already exist? If a waiting period could save at least one life (and it certainly could) isn't it a good idea? What are the disadvantages and risks of waiting periods and other police permission systems like the instant telephone check? Are there meritorious alternatives to waiting periods? The paper also offers suggestions about how a waiting period should be structured, if a legislature elects to enact one.

The views of Handgun Control, Inc. on waiting periods and gun control are discussed throughout, because, as HCI puts it, the waiting period is the group's "flagship" bill and HCI is by far the most important gun control lobby.

## I. JOHN HINCKLEY

*Synopsis: Handgun Control, Inc. claims that a waiting period and background check "certainly" would have stopped John Hinckley, who attempted to assassinate President Reagan. Yet Hinckley had no felony record, and no public record of mental disability. HCI asserts that Hinckley was not a resident of Texas, the state where he bought the gun, and that a background check would have revealed that he was illegally buying a handgun in state where he was not a resident. The evidence indicates that Hinckley was a legal Texas resident. In any case, HCI's proposed bill involves only an option criminal and mental records check, and not an address check. Accordingly, it is very unlikely that the "Brady Bill" would have affected Hinckley.*

The national waiting period is commonly known as "the Brady Bill." Its supporters named it after Sarah Brady, the Chair of HCI. To many people, the fact that a waiting period would have stopped John Hinckley from shooting President Reagan and crippling his Press Secretary Jim Brady is reason enough to enact such a law.

Both the perpetrator and the main victim of Hinckley's attack agree that a waiting period would have prevented the crime. Currently under indefinite commitment to St. Elizabeth's mental hospital in Washington, John Hinckley has petitioned to be allowed access to reporters so that he can speak out for handgun control and for a waiting period. Hinckley explains that he was in "a valium depression" when he acted, and a waiting period might have given his better self time to reassert control. But in fact, Hinckley bought the assassination gun in October 1980, months before the assassination attempt. A wait would obviously have had no impact.

Legislators usually pay little attention to the policy suggestions of the criminally insane. The more persuasive spokesperson for the waiting period is Sarah Brady, wife of the man crippled by Hinckley. "Had a waiting period been in effect seven years ago, John Hinckley would not have not have had the opportunity to buy the gun he used," claimed Mrs. Brady.<sup>4</sup>

Mrs. Brady bemoans the fact that Hinckley was able to buy the gun with no waiting period to see if he had a criminal or mental illness record.<sup>5</sup> But Hinckley had no public record of mental illness; hence a mental records check would have done no good.<sup>6</sup>

As for a criminal records check, a police background check was run on Hinckley a few days before he bought the gun, and nothing turned up. Hinckley was caught trying to smuggle a gun aboard a plane on October 9, 1980, in Nashville. His name was run through the National Crime Information Center, which reported, correctly, that he had no felony convictions in any jurisdiction. He was promptly released after paying a fine of \$62.50 and pleading guilty to a misdemeanor.<sup>7</sup>

Although Mrs. Brady complains about the lack of a criminal/mental check on Hinckley, she does not explicitly affirm that such checks would have affected him. Instead, Mrs. Brady's

## WAITING PERIODS

---

detailed explanation involves Hinckley's residence status.

On October 13, 1980, John Hinckley walked into Rocky's Pawn Shop, in Dallas, Texas, and walked out shortly thereafter with two .22 caliber RG revolvers. As with the retail purchase of any firearm, the gun dealer was required to complete a federal form which listed Hinckley's address. Because Hinckley was buying two handguns in the same five-day period (in fact, at the same moment), the dealer also filled out another federal form. That federal form was sent to the local office of the Bureau of Alcohol, Tobacco and Firearms.

By federal law, the dealer was required to verify that Hinckley was a resident of Texas, the state in which he was buying the handgun. When asked for identification, Hinckley offered his Texas driver's license.<sup>8</sup>

Mrs. Brady details how a background check might have helped: "He lied about his address and used an old Texas driver's license to purchase that revolver. He was not a Texas resident. A police check would have stopped him from buying a handgun in Texas."<sup>9</sup> As she puts it, "He lied on his purchase application. Given time, the police could have caught the lie and put him in jail."<sup>10</sup>

*"Hinckley had no public record of mental illness; hence a mental records check would have done no good. As for a criminal records check, a police background check was run on Hinckley a few days before he bought the gun, and nothing turned up."*

Accordingly, Mrs. Brady states: "A simple check would have stopped him...John Hinckley might well have been in jail instead of on his way to Washington."<sup>11</sup> Indeed, her assurance that the waiting period would have stopped Hinckley is often unequivocal: "There's no doubt that he would not have been able to purchase that gun."<sup>12</sup> Or, "John Hinckley would never have walked out of that Texas pawnshop with the handgun that came within an inch of killing Ronald Reagan."<sup>13</sup>

But the result is hardly as clear-cut as Mrs. Brady asserts.

Hinckley moved around a great deal, from one Texas address to another. The Lubbock address he listed on his federal gun form (the address for a rooming house) was different from both his driver's license address and his address in the then-current Lubbock phone book.<sup>14</sup> Of course moving frequently is not a federal crime. Because the only purpose of the driver's license is to prove residence in the state, there is no federal requirement that a handgun purchaser reside at the street address shown on his license, as long as the address is in the same state. Even if Hinckley had deliberately made a false statement about his address, the act would not have been



illegal; a false statement on the federal form is illegal only if it relates to the purchaser's eligibility.<sup>15</sup> While a person's state of residence does relate to eligibility, address within that state does not.

In other words, Hinckley's purchase would have been illegal under federal law only if he was not a resident of Texas. Merely offering a Texas driver's license with a street address that was no longer current and was different from the address put on the federal form was not in itself illegal.

Was Hinckley a Texas resident? Contrary to what Handgun Control implies, it has never been determined that Hinckley was not. During the previous summer, he had attended both summer sessions at Texas Tech in Lubbock. According to federal rules, a university student is considered a resident of the area where he attends school, and may purchase firearms there.<sup>16</sup> Notably, when Hinckley was arrested in Nashville (a few days before he bought the handguns), he identified himself as a Texas resident.

Significantly, Hinckley, after the assassination attempt, was the subject of an intensive federal investigation. The federal government used every resource possible to convict Hinckley. Yet, Hinckley was not charged with illegally purchasing the handguns in Texas. Had the prosecutors believed that Hinckley was guilty of an illegal gun purchase, the charges would likely have been brought. The case could have been prosecuted before a conservative Dallas jury, rather than a liberal Washington one. Further, Hinckley would then have had to convince the Texas jury that he was insane not just on the day of the assassination, but six months beforehand.

If the full resources of the Department of Justice did not find enough evidence even to charge Hinckley with an illegal gun purchase, it is not realistic to claim that a 5 government working day background check would have found the exact same transaction illegal.

On the other hand, it is possible that the entire team of federal prosecutors simply overlooked a major felony for which they almost certainly could have convicted Hinckley. If a team of federal prosecutors investigating a Presidential assassination attempt simply overlooked Hinckley's alleged offense, it seems unlikely that a lone Dallas police officer, wading through a mountain of paperwork and background checks for hundreds of gun buyers, would have uncovered a criminal offense that a team of federal prosecutors missed.

In any case, law enforcement authorities already had an opportunity to run a check on Hinckley. Because Hinckley bought two handguns on the same day, his purchase was immediately reported to the Bureau of Alcohol, Tobacco and Firearms, as required by federal law. BATF reportedly runs name checks as standard procedure, but does not run detailed background checks on multiple handgun purchasers (such as Hinckley) even though it has the legal authority to do so. Perhaps BATF has concluded that the expense of running the checks

exceeds the likely benefits.

Let us hypothesize the fact that Mrs. Brady assumes (but for which the Justice Department apparently had no evidence): Hinckley was no longer a Texas resident. Would the assassination have been prevented by a background check? Almost certainly not.

How would the police have found Hinckley's "lie"? If they had looked in the phone book, they would have seen Hinckley listed as a Lubbock resident. To ascertain that Hinckley did not reside in Texas, the police would have had to visit his purported residence at least once. Since many police departments do not have the time to visit the scene of residential burglaries, it is not realistic to assume that they would have bothered to verify the address listed as Hinckley's residence.

Most importantly, **the police never would have found the "lie" about Hinckley's address, because they would not be checking addresses.** Under the Brady Bill (and the similar state proposals), the police would not be verifying anyone's address. The Brady Bill does not discuss any kind of address/residence check. As one of Handgun Control's key Congressional supporters explicitly insisted during the debate on the 1988 proposal, "The 'investigation' is limited to the review of police and court records."<sup>17</sup>

Thus, at the same time that Handgun Control's Congressional forces were reassuring Congress that the "Brady bill" involved solely a criminal/mental records check, and not an address or other check, Mrs. Brady was imploring the public to support her bill because an address check would have stopped John Hinckley.

Assume that, despite the evidence to the contrary, Hinckley actually was not a Texas resident, and further assume that the Texas police would have found it worthwhile to do what the federal BATF did not, and run a background check; and further assume that although the background check was intended to be run according to HCI's description, and to apply only to criminal/mental records, the Texas police would have expanded the background check and tried to verify Hinckley's address; and additionally assume that the police would have committed the manpower necessary to verify that Hinckley was not a Texas resident. If all these assumptions are valid (and if any one of the assumptions were incorrect, Hinckley clearly would not have been stopped), would Hinckley have been stopped? Perhaps.

Assuming the police found that Hinckley was trying to make a purchase without the proper residency status, would they have arrested him for that offense? Would he have been imprisoned for more than a day, if that long? Only a few days before Hinckley bought the Texas guns, he had been caught attempting to smuggle a gun onto a plane, and had been released from custody almost immediately, having pleaded guilty to a misdemeanor. Unless Hinckley were imprisoned for a term of years for the out of state gun purchase, he would have speedily been back on the streets. He could have taken any of the other handguns which he already owned,

and gone on to Washington for the assassination with one of them. (Among the guns he could have used was the .38 special he bought in Colorado, in full compliance with the law. Had he used that gun, rather than the .22 from Texas, President Reagan and Mr. Brady would likely have been killed.)<sup>18</sup>

Handgun Control, Inc.'s version of the assassination is false in other details as well. For example, one Handgun Control, Inc. advertisement depicts Mrs. Brady saying "A \$29 dollar handgun shattered my family's life."<sup>19</sup> Actually, Hinckley's gun cost \$47.<sup>20</sup> The difference is of no real importance, except that it shows the Handgun Control copywriters to be unwilling to offer a truthful presentation of even the most basic facts of the case.<sup>21</sup>

Handgun Control, Inc. and Sarah Brady have garnered substantial press support by claiming that the "Brady Bill" would have stopped John Hinckley.<sup>22</sup> Indeed, the strength of the push for the waiting period is very largely based on Sarah Brady and her assassination story. Sarah Brady heads Handgun Control, Inc., and HCI's fund-raising letters are mostly personal testimonies by Mrs. Brady and her husband. The image of a man crippled by an assassin, but who could have been saved by "The Brady Bill" is compelling to press and politicians alike.

To say the least, the evidence suggesting that a waiting period would have stopped John Hinckley is underwhelming. Yet Mrs. Brady insists: "[T]his shooting could have been prevented if legislation such as that proposed here had been in force in 1981."<sup>23</sup> The unequivocal assertion is, in light of the facts, quite close to a fraud. Only a very unlikely set of events would have enabled police armed with a "Brady Bill" to stop John Hinckley. It is perfectly proper for victims of gun crimes to campaign for gun control. They should do so accurately.

## Endnotes

1. "Sarah Brady said Pascoe's bill is 'everything on my wish list that I've been wishing for a federal level.'" Gary Massaro, "Bradys Appeal for Gun-Control," *Rocky Mountain News*, Jan. 26, 1990.
2. The California waiting period does exempt some transfers among families members who are related by blood, but not among other family members (e.g. a transfer between brothers-in-law would have to be accomplished via a licensed gun dealer).
3. Senate Bill 90-93, Colorado Senate, 57th General Assembly, Second Regular Session (1990).
4. Mrs. Brady quoted in Sam Meddis, "Petitioners Taking Aim at Gun Laws," *USA Today*, July 20, 1988.
5. Mrs. Sarah Brady, Testimony before House of Representative Judiciary Committee, Oct. 28, 1985, quoted in *Congressional Record*, Feb. 5, 1987, p. S.792.
6. James Brady, Fund-raising letter for Handgun Control, Inc., "Wednesday morning" (summer 1990), p. 1: "John Hinckley—a man with a history of mental problems—purchased an easily concealed handgun." Most recipients of the fund-raising letter were not aware, as Mr. Brady surely must be, that no background check could have discovered Hinckley's entirely private record of consultation with mental therapists.  
The fund-raising letter, which includes substantial portions of Mr. Brady's standard testimony before Congressional committees, is hereinafter cited as "James Brady Fund-raising letter."
7. Hinckley trial transcript, pp. 1489-1559; Opposition to Defendant's Motion for Bail. He also forfeited the guns he had been attempting to carry onto the plane.
8. Texas driver's license #9457099, issued to John W. Hinckley, Jr., 1612 Avenue Y, Lubbock, Texas. Hinckley trial, pp. 1751-52.
9. Sarah Brady, "How to Deter Future Hinckleys," *New York Times*, Nov. 8, 1985. Also: Barbara Lautman, HCI Communications Director, "Only the Criminals Are Hurt By Waiting," *USA Today*, May 26, 1987, p. 12A; Handgun Control, Inc., "Briefing Paper on the Brady Amendment" (1988): "Had a waiting period been in effect and a background check undertaken, it could have been determined that Hinckley committed a felony by lying about his address on the federal forms and he could have been stopped."  
Ohio Senator Metzenbaum (the lead Senate sponsor of the waiting period) claims that Hinckley submitted "a defective driver's license." Sen. Metzenbaum, *Congressional Record*, Feb. 4, 1987, p. S792.
10. Advertisement, "A \$29 handgun shattered my family's life." *The New Republic*, July 18, 1988, inside front cover. Also, same advertisement, *New York Times*, August 1, 1988, p. 1.  
Former Rep. Edward Feighan (House sponsor of waiting period), "Feighan Introduces Bill to Deter Criminals and Save Lives," Press Release, February 4, 1987: "One check would have told a Texas dealer that John Hinckley was using a false address and could have prevented him from purchasing a handgun."
11. Mrs. Sarah Brady, Congressional testimony, quoted in "Flagship Bill Introduced," *Washington Report* (Handgun Control, Inc. newsletter), Spring 1987, pp. 1-2.
12. "Brady Backs a Wait on Handgun Sales," *USA Today*, June 17, 1987, p. 2A.
13. Advertisement, "A \$29 handgun shattered my family's life." *The New Republic*, July 18, 1988, inside front cover. Also, same advertisement, *New York Times*, August 1, 1988, p. 1.

14. Southwestern Bell, *Lubbock-Slaton Telephone Directory* (November 1979) (listing "John W. Hinckley...409 University Av.").

15. 18 United States Code § 922(a)(6).

16. ATF Rul. 80-21, reprinted in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, (*Your Guide to Federal Firearms Regulation 1988-89*, ATF P 5300,4 (6-88), p. 73.

17. Rep. James Sensenbrenner, Jr. (R-Wisc.), "Fact Versus Fiction on the Brady Amendment," August 11, 1988 (part of "Dear Colleague" letter titled "NRA Shoots Self in Foot"), p. 2.

18. Shots from a .38 caliber are almost twice as likely to kill as .22 calibre attacks. Franklin Zimring, *The Medium is the Message: Firearms Caliber as a Determinant of Death from Assault*, 1 JOURNAL OF LEGAL STUDIES 97 (Jan. 1972).

The campaign Mrs. Brady and HCI wage against "Saturday Night Specials" (cheap handguns like the RG .22) is particularly odd in light of the fact that Hinckley owned guns more powerful than a "Saturday Night Special," and had a ban on "Saturday Night Specials" been in effect, Hinckley would not have been able to buy the cheap handguns in Texas, and probably would have used the higher-quality (and deadlier) handguns.

19. Advertisement, "A \$29 handgun shattered my family's life." *The New Republic*, July 18, 1988, inside front cover. Same advertisement, *New York Times*, August 1, 1988, p. 1. See also James Brady Fund-raising letter, p. 1: "That shot—from a \$29 Saturday Night Special—changed my life..." Also, Sarah Brady: "Nine years ago, I got thrown into the issue when John Hinckley bought a \$29 handgun in Dallas," in Peter Nye, "National Gun-Control Position," *The National Voter* (League of Women Voters), October/November 1990, p. 5.

20. "Gun Used to Shoot Reagan called a \$47 'Saturday Night Special'," *Baltimore Sun*, March 31, 1981 (reporting testimony of federal agents based on their examination of the purchase record for the transaction involving Hinckley). See also, Pele Earley, "The Gun: A Saturday Night Special From Miami," *Washington Post*, March 31, 1981: "[W]hen model RG14 finally reaches the public, its price tag is about \$47.50—one of the cheapest pistols available." (article about model of gun used by Hinckley).

21. Mrs. Brady also offers diverse stories about her own involvement in the anti-gun crusade. In a November 1985 *New York Times* op-ed, she explained her involvement as directly triggered by NRA's attempt to repeal federal gun control through the McClure-Volkmer bill:

*Last July, the Senate passed the McClure-Volkmer bill, which would make it even easier for the kind of tragedy that struck down my husband to happen again. This bill would severely undermine federal gun laws by allowing anyone to buy a handgun across state lines, by limiting Government inspections of gun dealers' records and by repealing certain handgun record-keeping requirements. I decided I had to do more than think about the problem.*

Sarah Brady, "How to Deter Future Hinckleys," *New York Times*, Nov. 8, 1985 (emphasis added).

As a *New York Times* reporter described it:

*Mrs. Brady first enlisted in the fight for gun control in the summer of 1985 when it appeared that the Senate was about to adopt a measure backed by the NRA that was designed to weaken the 1968 Gun Control Act.*

*"It just enraged me," she recalled of the effort to alter the comprehensive law...*

Barbara Bamarekian, "Fighting the Fight on Gun Control," *New York Times*, Feb. 10, 1987, p. B10.

But another newspaper states that Mrs. Brady has actually been an anti-gun activist since 1973, not since 1985, as she twice claimed in the *New York Times*. According to a *USA Today* profile, "Sarah Brady has spent

WAITING PERIODS

nearly a third of her life arguing for tougher gun laws...Brady, daughter of an FBI agent, *began her fight for stronger gun laws in 1973*, when she tried to ban Saturday Night Specials..." "Brady Backs a Wait on Handgun Sales," *USA Today*, June 17, 1987, p. 2A (emphasis added).

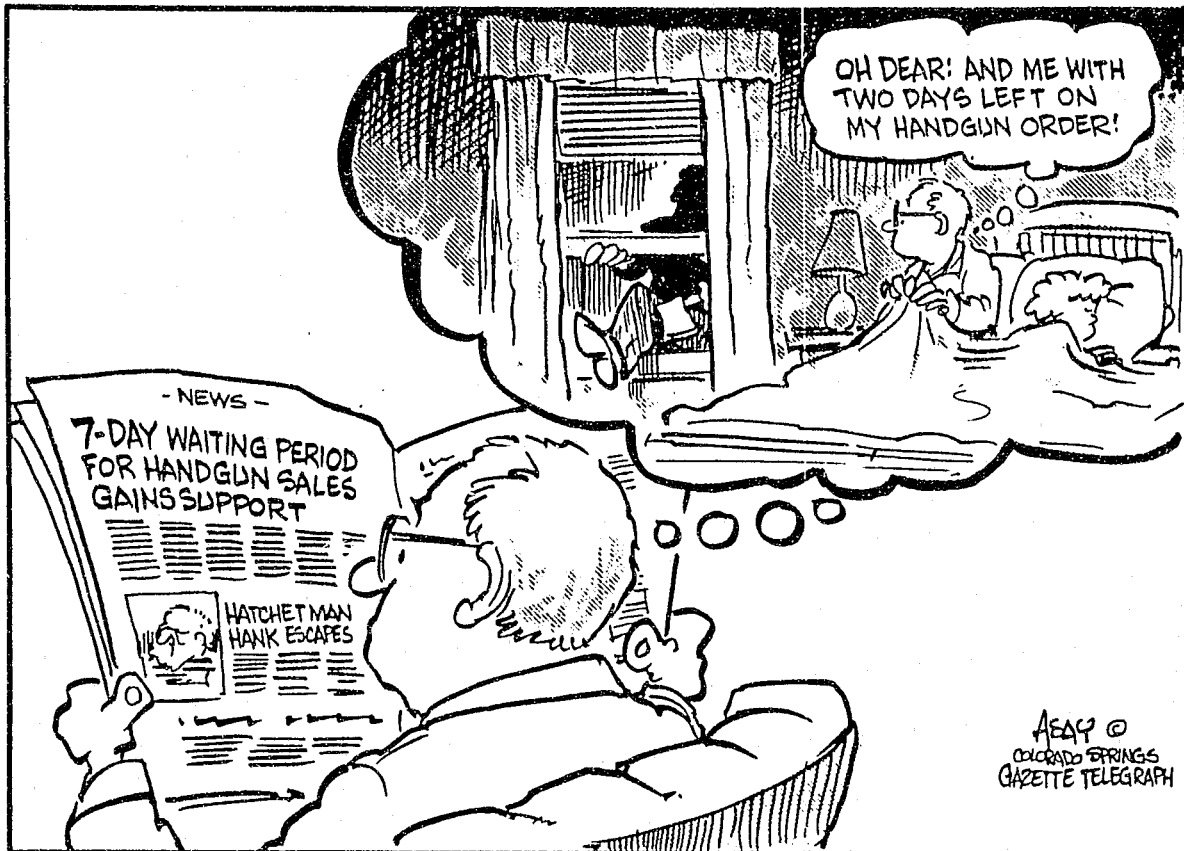
It is also ironic that Mrs. Brady congratulates herself: "I have tried very hard not to make it an emotional issue because I think that is what the gun lobby has done." *New York Times*, Feb. 10, 1987. A reader of Handgun Control's late 1990 fund-raising letter might find the rhetoric somewhat emotional:

[Y]ou are at risk. You are in danger of also becoming a victim of the senseless handgun violence...[S]top our insane national handgun war...Frankly, what makes me livid is that the NRA opposes the Brady Bill because they claim it's an inconvenience...For their convenience, I experience pain—sometimes so intense I cry...I need help getting out of bed, help taking a shower, help getting dressed and, damn it, even help going to the bathroom...The NRA lobbyists can go to hell!...[T]he NRA lobbyists scream FOUL!...But the mighty NRA roars NO! And the cowards in Congress cringe!...I desperately need your help.

James Brady Fund-raising letter (emphasis in original).

22. For example, Hank Johnson, Executive Editor, "Making a Case for Gun Control," *Athens Daily News* (Georgia), September 16, 1990 ("Had such a waiting period been in effect when John Hinckley walked into a Dallas pawn shop...he could have been stopped.")

23. Sarah Brady, Vice Chair, Handgun Control, Inc., Statement (press release), February 4, 1987, p. 1. Presumably she meant to say "1980."



## II. PUBLIC AND POLICE OPINION

*Synopsis: Polling data show that large majorities of American citizens, as well as of big-city police chiefs, favor a waiting period. Polls of street-level police find them skeptical about waiting periods. In any case, polls are poor guides to public policy, particularly when Constitutional rights are involved. The reflexive hostility of some police officials towards the Second, Fourth, and Fifth Amendments to the Constitution should not be entitled to much weight in the deliberative process.*

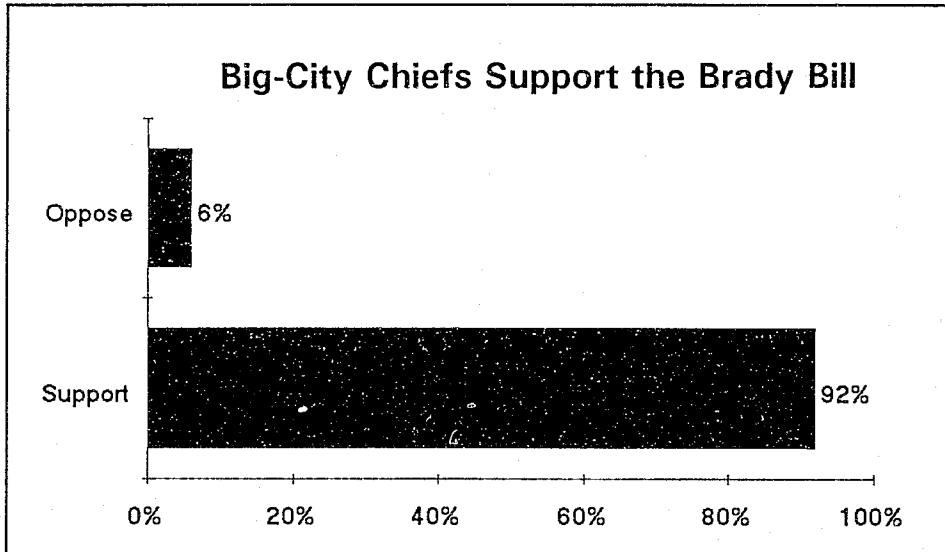
### A. POLICE

Handgun Control, Inc. and its Congressional allies claim that a waiting period is supported by "every major police organization" in the country.<sup>1</sup> The assertion is based on a selective definition of "major police organization." The American Federation of Police, with 103,000 members, is the second-largest rank and file police organization in the United States. The American Federation of Police opposes a waiting period. The National Association of Chiefs of Police, with 10,000 members, is the second-largest command rank organization in the United States. It opposes a waiting period. Apparently neither of these organizations, being merely the second-largest in their field qualifies as a "major police organization."<sup>2</sup>

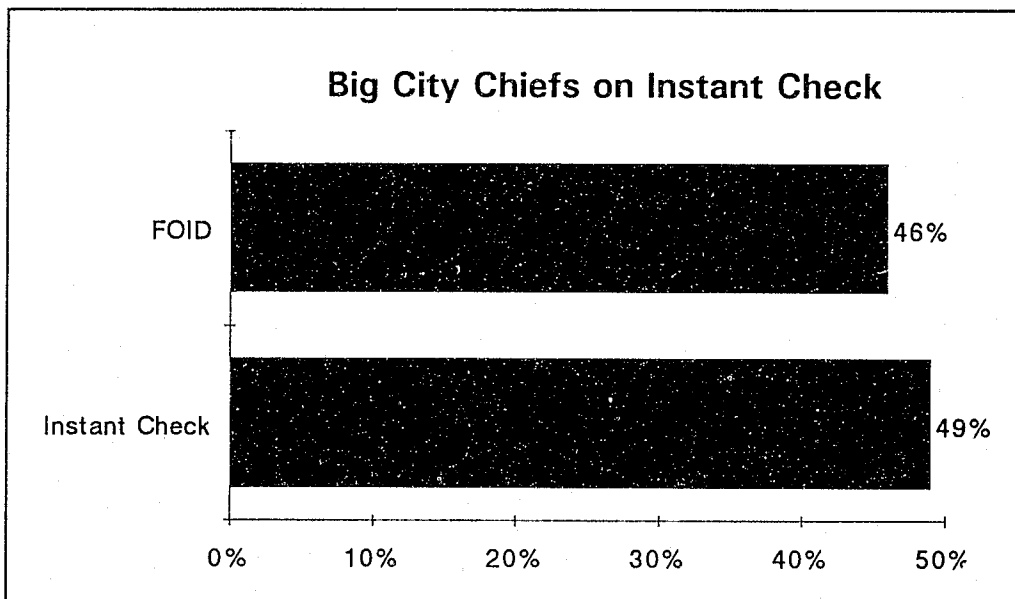
Many important police organizations *do* support a waiting period.<sup>3</sup> Yet only one of these police organizations have actually bothered to ask the police what they think. The group that did ask was the Police Executive Research Forum (PERF), a Washington think tank comprising about 500 present and former big-city police executives. PERF's membership poll found 92% in favor of a national seven-day waiting period for handguns, and 6% opposed.<sup>4</sup> Thus, among big-city police chiefs, support for a waiting period is nearly unanimous.

In 1993, the Southern States Police Benevolent Association surveyed its 10,614 members about gun control. PBA President Jack Roberts explained that the survey was conducted because "We simply had enough of every special interest group, including a number of national police organizations, claiming they spoke for rank and file officers on the subject of gun control....What our members told us may be quite an eye-opener for some people, but it won't be to anyone who is in touch with rank-and-file cops." Asked about the Brady Bill, 86.5% of the Southern officers said it would affect only law abiding citizens, and would not prevent criminals from getting guns. An instant check on gun buyers at the point of sale was supported by 63.8%, while only 23.1% supported a waiting period for handgun purchases. In addition,

## Big-city Chiefs on Gun Control



The Police Executive Research Forum found that big-city chiefs, if asked to choose between no new gun laws and the Brady Bill, overwhelmingly support the Brady Bill.



Big-city chiefs narrowly prefer an instant check to a firearms owners identification card.



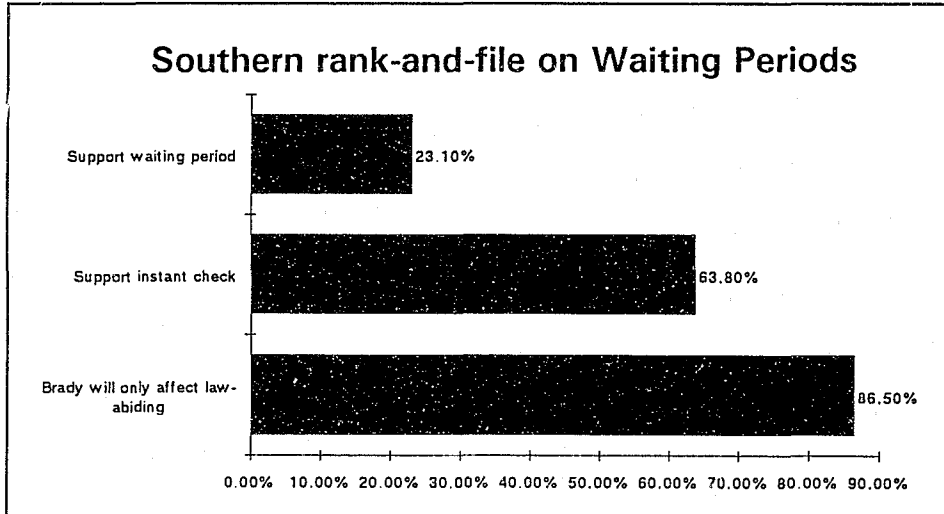
96.4% strongly supported firearms ownership for self-protection, and 90.1% thought the United States Constitution guarantees the right of law-abiding citizens to own guns. Strict gun control laws as a way to cut violent crime were considered effective by 34.7%.<sup>5</sup>

*Police* magazine, the largest-circulation magazine for police officers conducted its own poll of police attitudes. Asked "Do you support the Brady Bill, including a waiting period and background check before a handgun can be sold?" 23% of *Police* readers said "yes," and 77% said "no." Results were similar on other questions. An "assault weapon" ban was opposed by 85%, the same figure which thought that gun ownership by civilians increased public safety. Ninety percent thought that gun ownership by citizens did not negatively affect their job.<sup>6</sup>

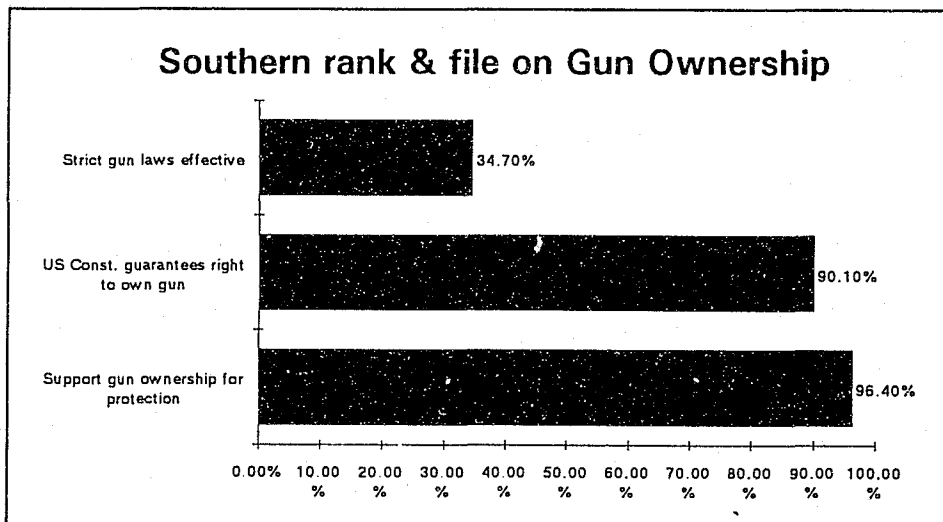
*Law Enforcement Technology* magazine also conducted a poll, with the following results: A computerized background check of gun buyers was supported by 78.5%, while a waiting period was supported by 44.2%. Seventy-seven and four-tenths percent of respondents thought that gun control infringed the right to bear arms; 84.6% thought that gun control did not lessen crime. An "assault weapon" ban was opposed by 78.7%. A ban on concealed weapons was opposed by 62.5%. Overall, police chiefs, sheriffs, and top managers were more likely to support gun control than middle managers, while street officers were least likely to support controls.<sup>7</sup>

*"Willis Booth, a former police chief, and Executive Director of the Florida Police Chiefs Association: 'I think any working policeman will tell you that the crooks already have guns. If a criminal fills out an application and sends his application. . . he's the biggest, dumbest crook I've ever seen.'"*

## Southern Rank and File on Gun Control

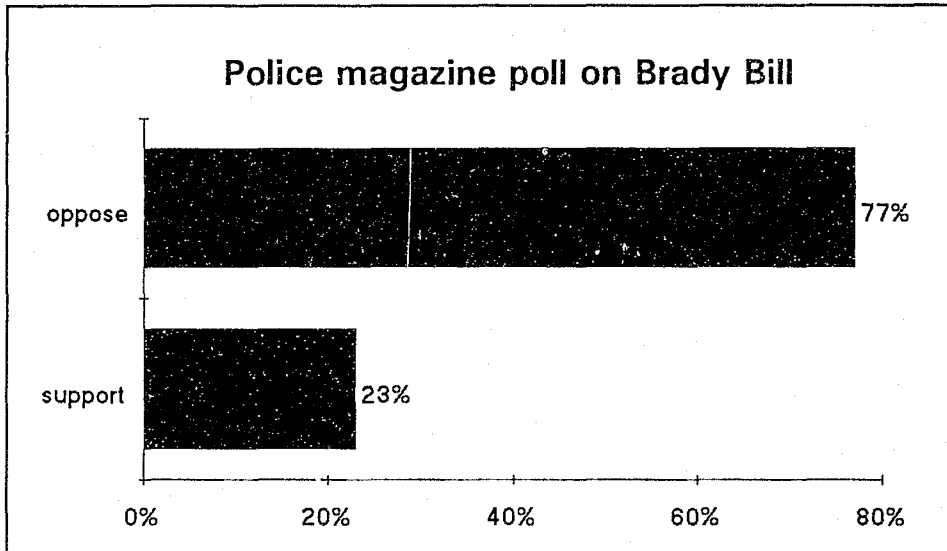


The Southern States Police Benevolent Association found that most members thought the Brady Bill would not work, and that an instant check would be preferable.

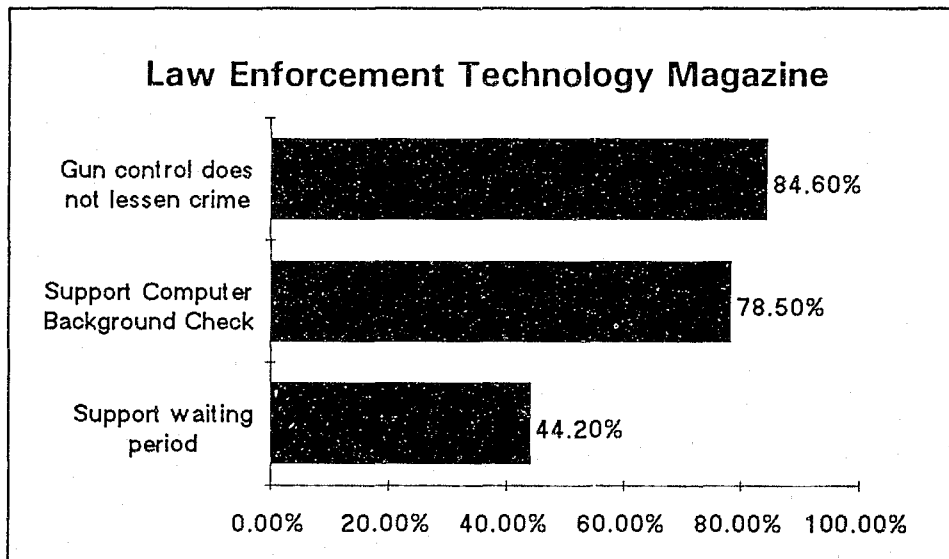


The Southern PBA found strong support for individual gun ownership, and skepticism about the efficacy of strict gun controls.

## National Police Polls



*Police* magazine found its readers strongly opposed the Brady Bill.



*Law Enforcement Technology* magazine readers generally favored a computer check, and were split on a waiting period.

## WAITING PERIODS

---

All of the polls discussed above, with one exception, suffer from a common weakness: they were conducted by mail, and the results are based on respondents who chose to mail in a response. Since the sample was, therefore, non-random, it is not certain that the population which chose to respond to the poll was representative of police as whole. The one police poll that was conducted by random sample, using the professional polling firm Spectrum Resources of Tallahassee, Florida, was the Southern States Police Benevolent Association poll. (That poll found southern rank-and-file police strongly opposed to gun control in general, and the Brady Bill in particular.)

A large number of working officers seem to agree with Willis Booth, a former police chief, and Executive Director of the Florida Police Chiefs Association: "I think any working policeman will tell you that the crooks already have guns. If a criminal fills out an application and sends his application. . . he's the biggest, dumbest crook I've ever seen."

Put aside the evidence regarding police opinion, and hypothesize that every police chief in the United States supported a national waiting period. Should their position determine the law? **The opinion of police chiefs is not the arbiter of our Constitutional rights.** Some police executives criticize the exclusionary rule; they claim that a strong Fourth Amendment causes crime. Some police executives criticize the *Miranda* decision, and claim that a strong Fifth Amendment causes crime. Many police executives say that a strong Second Amendment causes crime. In every case the executives are wrong.<sup>8</sup> Police chiefs are, after all, not generally renowned for their regard for the Constitution.

Likewise, self-proclaimed allies of law enforcement have eroded their credibility by supporting bans on "plastic guns" (which do not exist) or by claiming that a law which lets a Pennsylvania hunter drive to Maine without obtaining a New York gun permit would threaten the lives of police officers.<sup>9</sup>

In short, the reflexive hostility of some police officials towards the Second, Fourth, and Fifth Amendments is not entitled to much weight in the deliberative process.

Why does the waiting period have nearly unanimous support among big-city police executives? While it is true that some big-city chiefs (such as former chiefs Ari Zavaras of Denver and Joseph McNamara of San Jose) are ardent enemies of the right to bear arms, not all chiefs are out to destroy gun ownership. One reason for supporting the waiting period is its intuitive appeal; at first glance, it seems like a way to interdict at least some criminals, without interfering with legitimate gun owners.

Perhaps another reason that some police chiefs favor the waiting period is that police chiefs, like any other administrators of large government offices, often seek to expand their official power. From the perspective of a police administrator, more power may mean more officers performing administrative tasks and supervising more transactions by the citizenry. The

same mentality leads to the creation of paperwork empires in the Pentagon or in the Hubert H. Humphrey building, even if the emphasis on paperwork hinders the agency's performance of its assigned mission.

## B. PUBLIC OPINION POLLS

The Gallup Poll reports: "91% of Americans Favor Brady Amendment."<sup>10</sup> If the polls are for it, who can be against it?

One reason to be cautious about polls is that the bias of the pollster can skew the poll. By modifying the wording of a question, "You can come up with any result you want," says Peter Hart, pollster for the Dukakis campaign.

The Gallup poll about waiting periods posed the question in a way that assumed the waiting period really would help the police keep guns away from illegitimate persons: "Would you favor or oppose a national law requiring a seven-day waiting period before a handgun could be purchased, in order to determine whether the prospective buyer has been convicted of a felony or is mentally ill."<sup>11</sup> As discussed below, the criminological and real-world evidence on waiting periods shows that they do virtually no good in keeping illegitimate users from getting guns; criminals do not buy guns in gun stores.

Most people are for something that works. If the question assumes that a waiting period would work, it is bound to receive nearly unanimous support.

Similarly, a 1993 Lou Harris poll warmed the respondents up with a long parade of "questions" designed to illustrate the horrors of gun ownership. Respondents were presented with facts such as "In 1988, one in every six pediatricians treated a young person who was the victim of a gunshot wound." The respondents were then asked if such facts made them feel more urgently about the problems of guns and children. After the battery of advocacy, respondents were then asked if they supported the Brady Bill, and 89% said "yes."

Real-world verification of the Lou Harris poll casts serious doubt on its basic methodological competence. Harris reported "The percentage of people who say they are NRA members has declined from 14% in 1987 to 7% today."<sup>12</sup> According to the National Rifle Association, the number of NRA members was about 2.7 million in 1987, and is about 3.2

*"Quite plainly, a large majority of Americans want a background check on handgun buyers. Just as plainly, they prefer a mandatory instant check to an optional instant check plus waiting period."*

million in July 1993. Accordingly, the number of NRA members has never remotely approached 7% or 14% of the adult population (as Harris wrongly reported), nor has the number of NRA members dropped by 50% since 1987, as Harris also wrongly reported.

Lou Harris's 1993 claim to have found a "sea-change in public attitudes" in favor of gun control was rendered somewhat less credible by the fact that Harris claimed to have found the same thing in 1975, when he told a Senate committee that "There is as clear a national mandate for this committee, for the House, and for the Senate as any you have ever had...I think we will see in 1976, if someone takes national leadership on the gun control issue, you will see some casualties on the other side, that those who dared to oppose gun control will be casualties as opposed to those who dared to stand up for gun control being casualties. That is how radically, I think, the American people are changing."<sup>13</sup>

*"Lou Harris's 1993 claim to have found a 'sea-change in public attitudes' in favor of gun control was rendered somewhat less credible by the fact that Harris claimed to have found the same thing in 1975..."*

Notably, pollsters such as Gallup and Harris, who use their organizations to promote whatever happens to be the current agenda of the gun control lobbies, studiously avoid asking respondents about the actual issue before Congress: which is better, a mandatory instant check, or the Brady Bill? In May 1991, Lawrence Research asked Americans whether they preferred a waiting period with an optional check (the Brady Bill proposal) or a mandatory instant telephone check, with no waiting period (the NRA alternative). By a 78% to 14% margin, the public chose the instant check.<sup>14</sup>

In 1993, Luntz Weber Research & Strategic Services, the firm which had conducted candidate Ross Perot's polling, asked the same question; 93% of the public chose the instant check. The Luntz Weber firm also asked respondents what they knew about the Brady Bill. Twenty seven percent knew nothing about it; 30 percent could only identify it as a "gun control" bill. Significantly, 57% thought the Brady Bill mandated a background check, which it does not.<sup>15</sup> Quite plainly, a large majority of Americans want a background check on handgun buyers. Just as plainly, they prefer a mandatory instant check (the NRA proposal) to an optional instant check plus mandatory waiting period (the Brady Bill).

In any case, opinion poll results are not always an appropriate guide to public policy because **the Constitution does not depend on polls**. Violating the Constitution can be a popular thing. By huge majorities, Americans would favor all of the following:

- Banning use of civic auditoriums by atheists, or by people denouncing the

government, or by patriotic groups advocating war against a foreign enemy.

- Using a federal censorship board to decide which television shows are permissible.
- Infiltrating non-violent dissident groups with FBI agents.<sup>16</sup>

Every one of those popular ideas would violate the Constitution. The precise reason for putting certain fundamental rights in the Constitution is to protect them from transient majorities.<sup>17</sup>

No measure could have been more unconstitutional than herding American citizens of Japanese descent into concentration camps during WWII. Public opinion and the press almost unanimously favored this repression, despite the total lack of evidence that these Americans were disloyal.

**Even though the public sometimes backs unconstitutional measures, the public still has the common sense to know that the Constitution is more important.** One survey asked: "Suppose the President and Congress have to violate a Constitutional principle to pass an important law the people wanted. Would you support them in this action?"

- 28% said yes, "because the Constitution shouldn't be allowed to stand in the way of what the people need and want."
- 49% said no, "because **protecting the Constitution is more important to the national welfare than any law could possibly be.**"<sup>18</sup>

Finally, while the majority of the public does favor a waiting period (although probably by less than the 91% majority found by Gallup's biased question), **the public opposes "a law giving police the power to decide who may or may not own firearms" by a 68% to 29% margin.**<sup>19</sup> Accordingly, if a waiting period were conducted within the limits implied in the Gallup poll (every legitimate owner got the gun in no more than seven days), the public might well support a waiting period. But if waiting periods turned out to give police the opportunity to interfere with citizens' right to buy firearms, the large majority of the public would oppose a waiting period. As detailed below, waiting periods in practice often lead to the kinds of police abuses which the public overwhelmingly opposes.

## Endnotes

1. Handgun Control, Inc., "Briefing Paper on the Brady Amendment" (1988); Rep. Feighan (sponsor of waiting period), remarks, *Congressional Record*, September 15, 1988, p. H7636.
2. The National Sheriffs Association, which currently supports the waiting period, certainly qualifies as a major law enforcement organization, since it is the largest group of sheriffs in the United States. Interestingly, Handgun Control, Inc. claimed in 1988 to have the support of "every major law enforcement organization," even though in 1988 the NSA had not voted to support a waiting period. Apparently when the NSA later changed its mind and supported Handgun Control, the NSA then qualified as a "major police organization."  
Both the National Association of Chiefs Of Police and the American Federation of Police are for-profit organizations, and are associated with retired police chief Gerald Arenberg, who is also associated with other for-profit organizations. Handgun Control, Inc., sometimes announces this fact as if it somehow delegitimizes the NACOP and AFP—although the more than 100,000 law enforcement officers who have joined these organizations apparently do not agree. Perhaps no major law enforcement organization has been more tainted by financial impropriety than has the International Association of Chiefs of Police, a strong supporter of the waiting period; the questionable financial practices of IACP's former leadership should certainly not disqualify it as a voice for its members. *A fortiori*, the for-profit status of NACOP and AFL, untainted by any hint of scandal, should not disqualify these groups as police voices.
3. The Federal Law Enforcement Officers Association, Fraternal Order of Police, International Brotherhood of Police Officers, International Association of Chiefs of Police, Major Cities Chief Administrators, National Association of Police Organizations, National Organization of Black Law Enforcement Executives, National Sheriffs Association, National Troopers Coalition, Police Executive Research Forum, Police Foundation (a think-tank), and Police Management Association. *Congressional Record*, Sept. 15, 1988, p. H 7639; Handgun Control, Inc., "Briefing Paper on the Brady Bill," p. 2.
4. "What PERF Members Think About Police Education, Assault Weapons, Toy Guns, Etc." *Subject to Debate* (PERF newsletter) March/April 1989, p. 1. It cannot be said that PERF has done an outstanding job of informing its members of the technicalities of the firearms debate. Ninety-four percent of PERF members favored a ban on nondetectable weapons, apparently unaware of testimony from the Bureau of Alcohol, Tobacco and Firearms and from the Federal Aviation Administration that there was no such thing as an undetectable weapon currently in existence or technologically feasible in the foreseeable future.
5. Steve Glasser, "Southern Police Survey Shows Little Gun Control Support," July 9, 1993 (UPI Atlanta Bureau); Scott Marshall, "Poll: South's Police Leery of Strict Gun Control," *Atlanta Constitution*, July 13, 1993.
6. "Funny You Should Ask," *Police*, April 1993, p. 56.
7. "The Law Enforcement Technology Gun Control Survey," *Law Enforcement Technology*, July/August 1991, pp. 14-15.
8. Regarding the criminal procedure amendments to the Constitution, only a small percent of cases are not prosecuted or are reduced to lesser charges because of the rules against illegally seized physical evidence and coerced confessions. Peter F. Nardulli, "The Societal Cost of the Exclusionary Rule: An Empirical Assessment," 1983 *American Bar Foundation Research Journal* (1983): 585-610; Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) about the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests," 1983 *American Bar Foundation Research Journal* (1983): 611-90; "Legal Safeguards Don't Hamper Crime-Fighting," *National Law Journal*, December 12, 1988, p.5: Six-tenths of one percent to 2.35% of cases are dismissed because of bad searches; in a survey of prosecutors, 87% said that 5% or less of their cases were



dismissed because of Miranda problems.

9. See for example the remarks of Rep. Mel Levine (D-Calif.), *Congressional Record*, April 10, 1986, p. H1746 (allowing interstate transportation of handguns for sporting purposes will cause "mayhem...on our streets...and further handicap law enforcement efforts to control handgun crime."); remarks of Rep. Howard Wolpe (D-Mich), *ibid* ("[T]he police in my district are concerned that the Volkmer substitute would add considerably more peril to their job than already exists.")

10. "91% of Americans Favor Brady Amendment," *Subject to Debate*, Nov./Dec. 1988, p. 10.

11. *Subject to Debate*.

12. The Joyce Foundation, *News Release*, June 3, 1993; LH Research, *A Survey of the American People on Guns as a Children's Health Issue*, prepared for the Harvard School of Public Health under a grant from the Joyce Foundation, study 930018.

13. Testimony of Louis Harris, Public Opinion Pollster, Before the U.S. Senate Committee on Government Operations at Hearings on Presidential Protection, Oct. 24, 1975, reprinted in *Handgun Crime Control—1976-1976*, "Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Comm. on the Judiciary of the Senate, 94th Cong., 1st Sess., Vol. I, pp. 800 & 803.

14. Gary W. Lawrence, "Results of a National Telephone Survey of Registered Voters on Waiting Period and Immediate Check Legislation," May 1991. The penultimate question had been preceded with a number of questions which, while accurate, all served to highlight weaknesses of the Brady Bill. Accordingly, the public opinion in favor of the instant check might not have been quite as strong as Lawrence reported.

15. Luntz Weber Research and Strategic Services, "A National Survey on Crime, Violence, and Guns," June 1993.

16. Polling data from Herbert McClosky & Alida Brill, *Dimensions of Tolerance: What Americans Believe About Civil Liberties*. (New York: Russell Sage Foundation, 1988).

17. "It established some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of." Albert Gallatin, Congressman and Cabinet officer of the early American Republic, quoted in Richard E. Gardiner, "To Preserve Liberty: A Look at the Right to Keep and Bear Arms," 10 *NORTHERN KENTUCKY LAW REVIEW* 63, 79n. (1982).

18. McCloskey and Brill.

19. James D. Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime, and Violence in America* (Hawthorne, NY: Aldine, 1983), pp. 223-35.

### III. CRIMINOLOGICAL STUDIES

*Synopsis: Criminologists of every persuasion have examined waiting periods, and not one has found statistically significant evidence that waiting periods are effective. Studies of felony prisoners show that virtually none of them obtain crime guns by personal, over the counter purchase, the only kind of criminal gun acquisition that a background check could stop.*

"Virtually every study ever conducted proves that where there are local or state laws requiring a waiting period and background check, handguns are harder to obtain by those who are prone to misuse them," claims Handgun Control, Inc.<sup>1</sup> The claim is false. Every study of waiting periods has found no evidence that they are effective. **There is not a single study published in any academic journal which concludes waiting periods are effective.** The results show just the opposite.

Professor Matthew DeZee states: "I firmly believe that more restrictive legislation is necessary to reduce the volume of gun crime." Yet his comparative study of state laws, including waiting periods, found "The results indicate that not a single gun control law, and not all the gun control laws added together, had a significant impact...in determining gun violence. It appears, then, that present legislation created to reduce the level of violence in society falls short of its goals...**Gun laws do not appear to affect gun crimes.**"<sup>2</sup>

Professors Joseph P. Magadinno and Marshall H. Medoff, both of California State University, Long Beach, performed two studies of waiting periods at the state level. The first study, using data from 1979 and previous years, compared the 1979 robbery and homicide rates in states that had waiting periods with states that did not. The study also looked at changes in the robbery and homicide rates in states which had recently changed their laws regarding firearms sales. Both aspects of the study found that there was **no correlation between waiting periods and lower homicide or robbery rates.**<sup>3</sup>

The second Magadinno-Medoff study analyzed state gun laws and rates of homicide, robbery, and aggravated assault in 1960 and 1970. The results were consistent with the hypothesis that **stricter state gun control laws have no impact on crime.**<sup>4</sup>

When the U.S. Senate Judiciary Committee investigated the issue, the Committee found no evidence that waiting periods affect crime. There was no correlation between a waiting period and lower crime rates.<sup>5</sup>

Duke University's Philip Cook, who is generally supportive of gun control, explains why there is no apparent statistical impact:

[W]e suspect that most felons and other ineligible who obtain guns do so not because the state's screening system fails to discover their criminal record, but rather because these **people find ways of circumventing the screening system**

entirely...Under these circumstances, developing a more intensive and reliable screening process is probably not worth the additional cost...It is known that such screening systems are widely circumvented and, furthermore, that state criminal record files are sufficiently incomplete that a felon who did choose to submit to the required police check before buying a handgun would have a sporting chance of having his application accepted.<sup>6</sup>

Former Assistant Attorney General John Bolton observes, "Those persons with a criminal record who are prohibited from purchasing a handgun are the ones most likely to obtain false identification documents to support a new name."<sup>7</sup>

The most thorough study of waiting periods was performed by Florida State University Professor of Criminology Gary Kleck. Analyzing data from every US city with a population over 100,000, and controlling for social variables such as race, income, and religion, Kleck found no statistically significant effect from waiting periods.<sup>8</sup>

Of course the Kleck, Magadinno-Medoff, Senate Judiciary, and DeZee studies do not completely destroy the case for a waiting period. It might be that state waiting periods have a small impact on crime, even if that impact is too small to be statistically significant. Moreover, even if state waiting periods were acknowledged as demonstrable failures, it might be that a federal wait would be effective.

Under the Carter Administration, the National Institute of Justice offered a grant to the former president of the American Sociological Association and two colleagues to survey the field of research on gun control. Peter Rossi and his coauthors Jim Wright and Kathleen Daly began their work convinced of the need for strict national gun control. Indeed, Wright had already written about the need for more control. After looking at the data, however, the three researchers found no convincing evidence that gun control curbs crime.<sup>9</sup>

A few years later, Wright and Rossi conducted another National Institute of Justice study, this one of the gun use patterns of criminals. They interviewed prisoners in ten state systems. The study confirmed that many criminals are indeed frightened of armed citizens.<sup>10</sup> Notably, the second National Institute of Justice study discovered that felons in states with strict laws found

*"The most thorough study of waiting periods was performed by Florida State University Professor of Criminology Gary Kleck. Analyzing data from every US city with a population over 100,000, and controlling for social variables such as race, income, and religion, Kleck found no statistically significant effect from waiting periods."*

## WAITING PERIODS

---

obtaining a gun no more difficult than in states with more moderate laws. Almost all felons, regardless of the severity of their state's laws, reported that they would have little or no difficulty obtaining a gun soon after release.

Wright and Rossi asked the prisoners where they obtained their last handgun, and 21% replied at a gun store. Hence, HCI argues, a waiting period and background check would affect a significant figure of gun crimes. But Wright and Rossi disagree with HCI's interpretation of their data. They write:

One might as a matter of federal policy require that every firearms transaction be reported to the cognizant authorities, and the appropriate criminal records check undertaken; but one quickly senses that **this measure would have little or no effect on the criminal users whom we are trying to interdict and a considerable effect on legitimate users...**The ideal gun crime policy is one that impacts directly on the illicit user but leaves the legitimate user pretty much alone.<sup>11</sup>

Careful analysis of the Wright-Rossi data shows that far less than 21% of criminal gun users would be affected by a background check. The 21% who obtained their last crime handgun at a gun store included 5% who had obtained the gun by theft, rather than by purchase. Of the 16% who had obtained the gun by purchase, at least some likely did not have a disqualifying criminal record at the time of purchase.

Further, not all of the guns acquired by criminals are acquired for crime. (Many criminals live in neighborhoods with other criminals, and hence own guns for defense.) The more likely a felon was to be a serious gun criminal, the less likely he was to have acquired a retail gun. For example, of the criminals who specialized in unarmed crime, 30% obtained their most recent handgun at a store (by purchase or by theft). Of the "handgun predators" who specialize in handgun crime, only 7% had gotten a handgun from a store. For criminals as a whole, of the guns that had been obtained "to use in a crime," 12% came from a store.<sup>12</sup>

Since about one-fourth of the handguns from stores were stolen from stores, only about 9% of handguns obtained to use in a crime, (and about 5-6% of handguns obtained by handgun predators) came from a retail purchase. Nine percent or even five percent still seems to be a significant number of criminals buying guns in gun stores. But Wright and Rossi explain that their data:

does not imply that the men in question themselves simply walked into a gun shop and bought themselves a gun, in direct defiance of the Gun Control Act of 1968. **In many cases, these purchases would have been made in the felon's behalf by friends or associates with "clean" records, which is, to be sure, still quite illegal.** Although we asked these men where and how they had obtained their

most recent guns, we did not ask who, exactly, had obtained them.<sup>13</sup>

Assuming that only half the purchases were made by legal surrogates, the background check is entirely irrelevant to 95-98% of crime gun acquisitions.

The large majority of all gun acquisitions are by people who already own a gun. If the pattern also holds true for criminals, then the background check would impact only a fraction of the already tiny percentage of criminals who personally buy guns at retail. In other words, of all guns acquired for crime, only about 0.5% to 2% are personally bought at a retail outlet by a person with an existing criminal record who does not already have another gun.<sup>14</sup>

*“...of all guns acquired for crime, only about 0.5% to 2% are personally bought at a retail outlet by a person with an existing criminal record who does not already have another gun.”*

The basic problem with waiting periods is shown by a Bureau of Alcohol, Tobacco and Firearms study of gun dealer sales in Des Moines and Greenville. The study found that about one to two percent of sales were to dangerous criminals.<sup>15</sup> In short, waiting periods have no statistically noticeable impact on any type of crime because only a tiny fraction of crime guns are purchased at retail by ineligible buyers. And no matter how intense the checking process on gun buyers, almost every criminal will still know one person with a clean record who could make a purchase for the criminal.

Waiting periods have existed in some states for over half a century. Yet after all this time, there is not a single criminological study ever published which shows waiting periods to have any beneficial impact. While the researchers who have studied waiting periods have very diverse views on the gun debate in general, *all* researchers have concluded that there is no evidence that waiting periods cause any statistically significant benefits.

## Endnotes

1. Sarah Brady, Fund-raising letter for Handgun Control, Inc., "Wednesday," (no date, 1988).
2. Matthew DeZee, "Gun Control Legislation: Impact and Ideology," *Law & Policy Quarterly* 5 (July 1983): 363-79. Although DeZee stated that he supported stricter gun laws, he did not offer any proposals.
3. "Homicides, Robberies and State 'Cooling-Off' Schemes," in ed. Donald B. Kates, *Why Handgun Bans Can't Work* (Bellevue, Wash: Second Amendment Foundation, 1982), pp. 101-12.
4. "An Empirical Analysis of Federal and State Firearms Control Laws," in *Firearms and Violence: Issues of Public Policy* (Cambridge, Mass.: Ballinger, 1984): 225-58 (the study also found no perceptible impact on crime or gun acquisition from the federal Gun Control Act of 1968).
5. *Report on the Federal Firearm Owners Protection Act*, S. Rep. no 3476, 97th Cong., 2d sess. (1982), pp. 51-52.
6. Philip J. Cook & James Blose, "State Programs for Screening Handgun Buyers," *Annals of the American Academy of Political Science* 455 (May 1981), pp. 88-90. Although skeptical about screening systems as a panacea, Cook and Blose still favor screening since it might increase the marginal price or time needed to obtain a gun for inexperienced criminals (such as teenagers), and might keep weakly-motivated criminals from obtaining guns at all. *Ibid.*, pp. 90-91.

Although Cook and Blose do not offer evidence, their intuition about possible benefits is not implausible. But since waiting periods and other screening systems do not show any statistical effect, it must be that the number of criminals actually affected is fairly small. Parts IV and V below discuss how the potential benefits of a waiting period compare to the potential harms.

One study I have cited in earlier works (Cato Institute and Senate Testimony, both 1988) for the inefficacy of gun control is Douglas Murray, (1975). My citation to Murray was an error. As Wright, Rossi, and Daly point out, Murray's statistical model has a design flaw which minimizes any possible relationship between gun laws and gun crime.
7. Assistant Attorney General John R. Bolton, Letter to House Judiciary Chairman Peter Rodino, March 19, 1986.
8. Gary Kleck, *Point Blank: Guns and Violence in America* (Hawthorne, New York: Aldine, 1991), table 10.5.
9. James Wright, Peter Rossi, and Kathleen Daly, *Under the Gun: Weapons, Crime and Violence in America* (Hawthorne, N.Y.: Aldine, 1983).
10. James Wright and Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (New York: Aldine, 1986). Three-fifths of the prisoners studied said that a criminal would not attack a potential victim who was known to be armed. Two-fifths of them had decided not to commit a crime because they thought the victim might have a gun. Criminals in states with higher civilian gun ownership rates worried the most about armed victims.
11. *The Armed Criminal in America*, p. 46 (report to National Institute of Justice; later republished as *Armed and Considered Dangerous*).
12. Wright & Rossi, pp. 181-87.
13. *Ibid*, p. 188, n. 3.

14. There is of course some value in keeping a criminal from obtaining a second gun or a better gun, but the process would be unlikely to stop a criminal from perpetrating a given armed crime.

15. Bureau of Alcohol, Tobacco and Firearms, Assistant Director of Criminal Enforcement, Memorandum to Director, July 10, 1975 (Greenville survey. Of 20,047 names submitted to FBI for record checks, 68 had felony convictions; of those, 41 had not been represented by counsel at their conviction or had committed crimes in the distant past; twenty-seven buyers were prosecuted. Of the 1.3% of buyers selected for prosecution, .9% had non-violent felony convictions, and .4% had violent convictions). Bureau of Alcohol, Tobacco and Firearms, Assistant Director for Criminal Enforcement, memorandum to Director, May 8, 1975 (of 374 records checked, 39 were purchasers with felony records who were not appropriate for prosecution because of age or non-violent nature of felony; six purchasers were prosecuted).

HOW A WAITING PERIOD FOR GUN PURCHASES WOULD AFFECT CRIMINALS... (I'M SURE)



## IV. THE WAITING PERIOD (IN)ACTION

*Synopsis: No evidence ties waiting periods to reduced crime rates. The experience of states with waiting periods shows only a tiny percentage of retail gun buyers are denied because of criminal records. Of these, about 1% are deemed worth arresting. The number of people who are illegally or arbitrarily denied their right to bear arms by abuse of a background check system is about as large as, and sometimes far larger than, the number of criminals denied.*

Although the academics have never found any statistically significant effect from waiting periods, it would be incorrect to conclude that waiting periods accomplish nothing. The following section reports results in several jurisdictions that already have waiting periods. The particular jurisdictions discussed were selected because: 1. The police have compiled and released data for that jurisdiction; and 2. The jurisdiction is cited as a success story by Handgun Control, Inc; and 3. Data is available to test the veracity of the figures from the police or HCI. The data show that: 1. Some people with criminal or mental records do attempt retail gun purchases, and are stopped by a background check; 2. Handgun Control, Inc. consistently overstates the efficacy of the background check in its model jurisdictions.

*California:* Officials state that their background check for handguns interdicted 1,900 illegal purchases in 1989.<sup>1</sup> California has no appeals process, so it is impossible to determine how many of the denials are proper. An analysis by researcher Clayton Cramer of California handgun murders rates from 1923 until the present shows no discernable impact of the waiting periods, even as they grew from one day for handguns to 15 days for all guns.<sup>2</sup> As discussed below, the California waiting period forms have been used to build a government data-base of gun owners.

About 10% of California's 300,000 "assault weapon" owners have registered their weapons, as required by law. The group that complied with the retroactive registration law surely qualifies as a highly law-abiding set of people. Yet this group of highly law-abiding gun-owners, when they attempt to buy a new rifle or pistol following California's 15-day waiting period, find that the California Department of Justice has put a 1 to 4 month hold on their application, because they are registered "assault weapon" owners.<sup>3</sup>

A Los Angeles City Councilman, noting the thriving market in stolen Rolex watches, suggested that all Rolex watches be registered, and a five-day waiting period be imposed on transfers of second-hand Rolexes. The Rolex waiting period was ridiculed by most other Los Angeles politicians, and written up in the national press as another instance of California silliness. It might be asked why so many people who dismiss the idea that registration and a waiting period would affect the criminal sale of Rolex watches think that registration and a waiting period would affect the criminal sale of firearms.

*Broward County, Florida:* Handgun Control correctly notes that in 1984-85, 37 persons were kept from buying guns by the county's ten waiting day period (which has since been



preempted by state law).<sup>4</sup> Handgun Control fails to point out that nearly half of the rejections were for unpaid traffic tickets or similar offenses which do not legally disqualify Floridians from gun ownership.<sup>5</sup> Moreover, gun suicides actually increased after the waiting period was implemented.

*"The New Jersey licensing system is so expensive that it costs \$4,442.13 (more than the salary of a state trooper for one month) for each denial based on criminal, mental, or alcohol abuse records."*

*Columbus, Georgia:* HCI claims that the city's 3-day wait catches two felons a week trying to buy handguns.<sup>6</sup> HCI exaggerates the rate four-fold, and implies that the numbers relate to arrests, rather than merely to denials.<sup>7</sup>

*Illinois:* Prospective gun purchasers must obtain a Firearms Owners Identification card (FOID), which is valid for five years. There are about 5,000 applications every week for the card. Over the weekend, a list of applicants is run through the state Department of Mental Health,

revealing about 10 applicants who are ineligible to buy because of mental disability.<sup>8</sup> Illinois' automated licensing system often takes 60 days to authorize a clearance.<sup>9</sup>

Illinois issues FOID cards to about 78% of applicants. Another 17% are issued a card after following up an initial rejection, for a total of about 200,000 FOID cards issued annually. Around 5% of applications are ultimately rejected. In 1988, there were 2,470 persons (about 2.5% of applicants) denied an FOID card on the basis of felony convictions, and 779 previously-issued cards were revoked due to felony convictions.<sup>10</sup>

The most thorough study of the Illinois system was conducted by Professor David Bordua. Happily, "the system was run with real attention to due process protections for firearms owners." Unfortunately, "even its administrators were not convinced it was effective." The system, which costs over a million dollars a year to administer, was summarized as "inherently weak."<sup>11</sup>

*Maryland:* About 700-800 of every 20,000 applicants a given year are denied. (The waiting period/police permission applies to all handguns and to long guns considered "assault weapons.") According to state police testimony before a Congressional subcommittee, the hundreds of denials typically lead to only a handful of prosecutions.<sup>12</sup>

Notably, 78% of appeals result in a reversal of the initial denial by the police.<sup>13</sup> The success rate on appeals likely understates the police error rate in initial denials. Many people who have been improperly denied may have neither the finances nor the energy to pursue an appeal. (Similarly, the ACLU points out that only a minority of people improperly denied welfare benefits appeal.)

## WAITING PERIODS

---

Although the waiting period is by statute supposed to last only one week, the police may take longer, and gun shops will not release the firearm until the police have completed their review.

*New Jersey:* Firearms laws in New Jersey are the strictest of any American state. Handgun Control states that "10,000 convicted felons have been caught trying to buy handguns."<sup>14</sup> The cost to legitimate gun owners has been severe. The number of New Jersey citizens arbitrarily denied the right to possess arms under the New Jersey law is almost as large as the number of persons with criminal records identified by the system.<sup>15</sup> About one-quarter of the rejections in New Jersey are based on the hunch of police that it would not be a good idea for a person to own a gun, rather than on any specific disqualifying criterion.<sup>16</sup>

Although New Jersey law requires that the authorities act on gun license applications within 30 days, delays of three to four months are standard; some applications are delayed for years, for no valid reason.<sup>17</sup>

The cost to the non-gun-owning citizens of New Jersey has also been severe. The New Jersey licensing system is so expensive that it costs \$4,442.13 (more than the salary of a state trooper for one month) for each denial based on criminal, mental, or alcohol abuse records.<sup>18</sup> It might be that the resources diverted into the licensing system would have saved far more lives if they had been spent on putting state troopers on patrol, instead of putting troopers behind a desk.

The overall crime rate and the gun crime rate in New Jersey has remained consistent with the rate in other states in the region, even though none of them imposes gun controls as strict as New Jersey's.

*Pennsylvania:* In Pennsylvania, handgun buyers face a 48 hour waiting period (72 hours in practice), during which local police or sheriff may conduct a check.<sup>19</sup> After the buyer picks up the handgun, the transaction record is sent to the state police firearms unit, which checks the name against a list of violent felons. Data for the first check by local police is kept at the county level, so there are no comprehensive figures available.

In addition to checking the approximately 130,000-150,000 handgun transfers that occur in a year, the state police are also automating their old records of firearms transfers (which date back to 1931), and checking the old names against the same list of violent felons. In 1988, the state police performed about 230,000 total records checks, resulting in about 80 "hits."

*"The number of New Jersey citizens arbitrarily denied the right to possess arms under the New Jersey law is almost as large as the number of criminals who were prevented from law-abiding transactions."*

When a "hit" occurs, state troopers are sent to confiscate the gun, and the local district attorney may bring charges for unlawful gun possession by a felon. Ms. Sharon Crawford, head of the state police firearms unit, recalled only one case in her memory where a person had committed a crime in the two to three week interval between taking possession of the gun and the arrival of the state trooper, or had refused to hand the gun over to the trooper. In the one case, the person had shot (not fatally) someone else during an argument.

*"...where a permission system is in effect, about 1 in 10,000 applicants turns out to be a criminal who is arrested."*

The explanation for the generally peaceful behavior of the persons caught with illegal guns is that the purchases were not with the intention of use in a crime, but rather were self-defense and/or hunting purchases by persons who did not realize they were ineligible or who hoped to slip through the system.<sup>20</sup>

Indeed, it should be recognized that many of the "felons" who are "caught" by background checks are persons who have never committed any act of violence. Their felony conviction may stem from having cheated on their income taxes, or having been convicted of possessing a small quantity of drugs a decade ago in college. The attempted purchase of a firearm by such persons is hardly a serious threat to public safety. Yet the advertising of the anti-gun lobbies trumpets the number of "felons caught attempting to purchase guns" as if every person caught were a bank robber caught procuring the tools of his trade (and as if the real criminals did not how to buy black market guns anyway).

The Pennsylvania data validates the findings by Wright and Rossi: **there are many attempted and/or completed firearms acquisitions by ex-felons that are unrelated to any effort to use the gun in a crime.** Accordingly, the number of crimes prevented by a system that keeps ex-felons from buying guns in stores is likely to be significantly less than the number of ex-felons who are caught buying guns. (All this is not to say that the "felon-in-possession" cases should not be prosecuted or taken seriously; the point is simply that most attempted acquisitions were not for a criminal purpose.)

It would not be correct to use the Pennsylvania state data to conclude that background checks are pointless. The data above refers only to the state police check of names against violent felony convictions. The data do not show what impact the first check, by the local police, has had. It might be that most felons buying guns for crime are stopped at the local level, and are hence never checked by the state system.

*Virginia:* In 1989, Virginia enacted an instant telephone check, with the consent of both HCI and the NRA. About 16 to 20% of phone applications result in a "hit," requiring the rejected applicant to submit fingerprints to the police to prove his non-criminal identity.<sup>21</sup> The

## WAITING PERIODS

ultimate denial rate of about 1/2% to 1% is the same as in other states with longer waiting periods. The first year the check was in effect, there were 540 denials, leading to arrest of 7 fugitives, including one wanted for murder.<sup>22</sup> (There was also at least one false arrest.) The Virginia system required 16 new full-time state employees, and \$391,000 in annual operating costs.<sup>23</sup> Because the Virginia system is considered by many to be working reasonably well, it is touted as model by many right-to-bear-arms advocates.

In sum, the evidence from around the country shows that a permission system does result in some denials, at least half of which turn out to be incorrect. Even for the denials that are correctly applied to ineligible purchasers, it is not correct to assume that the denial has thereby prevented a crime. Virtually no-one who intends to commit a gun crime buys from a gun store. Ineligible people do sometimes attempt retail transactions, but that act is hardly proof that they intended a crime.

Of the people who are rejected by permission systems, a mere 1% are arrested.<sup>24</sup> In other words, where a permission system is in effect, about 1 in 10,000 applicants turns out to be a criminal who is arrested. A success rate of one true "hit" for every 10,000 searches is, literally, not much better than the odds of finding a needle in a haystack—and is not a cost-effective method of catching needles.



---

## Endnote

1. Douglas A. Blackmon, "Gun Sale Limits Don't Cut Crime, Experts Say," *Atlanta Journal & Constitution*, May 29, 1990, p. A-9. The numbers for previous years were: for 1981, 1365; for 1982, 1008; for 1983, 1148; for 1984, 1349; for 1985, 1413; for 1986, 1515. Anita Lagunas, Supervisor, Firearms Control Unit, California Attorney General, Letter to Richard Gardiner, National Rifle Association, March 23, 1987.
2. Clayton E. Cramer, "Waiting for a Gun," *San Jose Mercury News*, June 20, 1993.
3. William Davis, "Gun Law Backfires," *Los Angeles Daily News*, Mar. 4, 1991 (letter to the editor from law enforcement officer and licensed federal firearms dealer whose application was put on hold).

There are also reports that all "assault weapon" registrants have been placed in police computer lists of persons who pose a special hazard. California's practice of enforcing its laws with special severity against persons who are especially law-abiding makes the registrants seem naïve, and seems to vindicate the intuitive distrust of gun registration felt by most gun-owners.
4. Handgun Control, Inc., "Briefing Paper."
5. "Gun Control: It Threatens the Right People," *Tallahassee Democrat*, February 1, 1985 (In six month period since waiting period went into effect, 37 of 1,425 applicants were denied; of the 37, 14 were denied for outstanding arrest records for traffic offenses and other misdemeanors).
6. Handgun Control, Inc., "The Case for a Waiting Period."
7. In response to a letter from the NRA requesting information about the Columbus waiting period, the police department analyzed its records and found that in the period January 1, 1985 through July 22, 1985, thirty of the 1,419 handgun purchase applications had been refused. Due to man-hour limitations, the department was not able to provide data for other periods. G.J. McCain, Major, Bureau of Support Services, Columbus Police Department, letter to Richard Gardiner, National Rifle Association, September 12, 1985. Of the 32 denials, seven were because of outstanding warrants, four were due to marijuana cases, three for other drug cases, thirteen were for felony convictions other than marijuana, and five were due to age.
8. Bureau of Justice Statistics, *Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms: A Feasibility Study* (May 1990) (report performed under contract by Enforth Corporation, Cambridge, Massachusetts), p. 25.
9. Pete Shields, *Guns Don't Die--People Do* (New York: Arbor House, 1981), p. 83.
10. Task Force on Felon Identification System, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (Washington: Department of Justice, October 1989), p. 86.
11. David Bordua, "Operation and Effects of Firearms Owners Identification and Waiting Period Legislation in Illinois," (University of Illinois: unpublished paper, 1985).
12. Sgt. R.G. Pepersack, Sr., Maryland State Police, Commander, Firearms License Section, written testimony and oral questioning before United States Senate Committee on the Judiciary, Subcommittee on the Constitution, regarding S. 466, "Handgun Violence Prevention Act," June 16, 1987 (In 1986, there were 20,704 applications, 1,102 initial disapprovals, 370 approvals granted upon appeal, and 14 currently active cases involving an applicant who had a conviction of a crime of violence, of which 5 or 6 had been selected for prosecution for attempting an illegal purchase.)

## WAITING PERIODS

---

13. Peppersack, p. 2 (of 471 appellants in 1986, 370 [78%] were ultimately approved).

Because so many initial denials are overturned, it is misleading for Handgun Control, Inc. to characterize the entire total of initial denials as "people who were trying to purchase handguns illegally." Handgun Control, Inc., "The Case for a Waiting Period."

14. "The Case for a Waiting Period." Also, "Flagship Bill Introduced," *Washington Report* (Handgun Control, Inc. newsletter), Spring 1987, p. 1.

15. From 1966 (when current controls were enacted) until June 1988, there were 1,153,400 applications for either a permit to purchase a handgun or a firearms identification card. Of those applications, 28,850 (2.5%) were denied. According to reporter Eugene Kiley, of the *Bergen Record*, the state police conducted a random survey of 507 applicants in 1985. Applying the percentages from the 1985 survey to the data as a whole leads to the following breakdowns for the denials:

Reason	Percent	Number
Criminal Record	29%	8,366
Falsifying Application	35%	10,097
Public Health, Safety & Welfare	20%	5,770
Mental or Alcoholic	7%	2,020
Insufficient Reason to Issue	6%	1,731

In other words, the total denials for actual danger (8,366 criminal record, plus 2,020 mental or alcoholic = 10,386) comes uncomfortably close to the number of denials for patently arbitrary reasons (5,770 public health, plus 1,731 insufficient reason = 7,501). If the denials based on falsifying application (10,097) are also considered arbitrary (since the category does not include falsifications relating to criminal, mental, or alcoholic ineligibility), the number of arbitrary denials significantly exceeds the number of legitimate denials.

16. Ibid.

17. Ron Marsico, "Senator Pushes for U.S. to Follow Virginia's Lead in Handgun Control," (Newark) *Star-Ledger*, July 8, 1993 (According to Sgt. 1st Class Robert Zupko, head of the state police firearms unit, stated that the application process generally takes three to four months); Statement of Robert F. Mackinnon, on behalf of the Coalition of New Jersey Sportsmen, before the House Committee on the Judiciary, on *Legislation to Modify the 1968 Gun Control Act*, part 2, serial no. 131, 99th Congress, 1st and 2d sess., Feb. 27, 1986 (Washington: Government Printing Office, 1987), p. 1418.

For an example of the New Jersey law in operation, see W. Peter Haas, Chairman, Public Safety Committee, Borough of Mountain Lakes, letter to Police Chief Joseph Spinozzi, July 29, 1968 ("it is my opinion that you as Chief of Police of our Borough deny any applications for any type for weapons permits. You may accept the application and fully process that application to the point of approval or disapproval, then disapprove and notify the applicant of your decision and their recourse through the County Court...Article 4 Section 2A: 151-33

(d)...authorizes the disapproval of any person where the issuance would not be in the public interest or welfare. It is my belief that it is not in the public interest to issue permits...")

18. Each application takes about four hours to process. Colonel Clinton Pagano, testimony before the New Jersey Assembly Law and Public Safety Committee, hearing on A. 594, February 1988. If one assumes that each man-hour costs the state of New Jersey ten dollars, the licensing system has cost New Jersey \$46,136,000. (The figure is in 1988 dollars, and based on the figure of 1,153,400 total applications in 1966-88, cited in the previous endnote.) There have been 10,386 denials based on criminal, mental, or alcohol records (see endnote 15), and dividing that number into the total dollar cost yields the cost per denial of \$4,442.13.

19. The dealer must report the sale to local police within 6 hours. The police have 48 hours to veto the sale, but in practice dealers generally wait 72 hours, to be sure to avoid liability for a sale in an ineligible person. Weekends and holidays do not count for purposes of the 48 hour computation.

Police believe that the law requires all private transfers to be routed through retail dealers, so that police can perform the check, but the requirement, if it exists, is widely ignored.

All information regarding Pennsylvania comes from the author's August 28, 1990 telephone conversation with Ms. Sharon H. Crawford, head of the state police firearms unit, in Harrisburg.

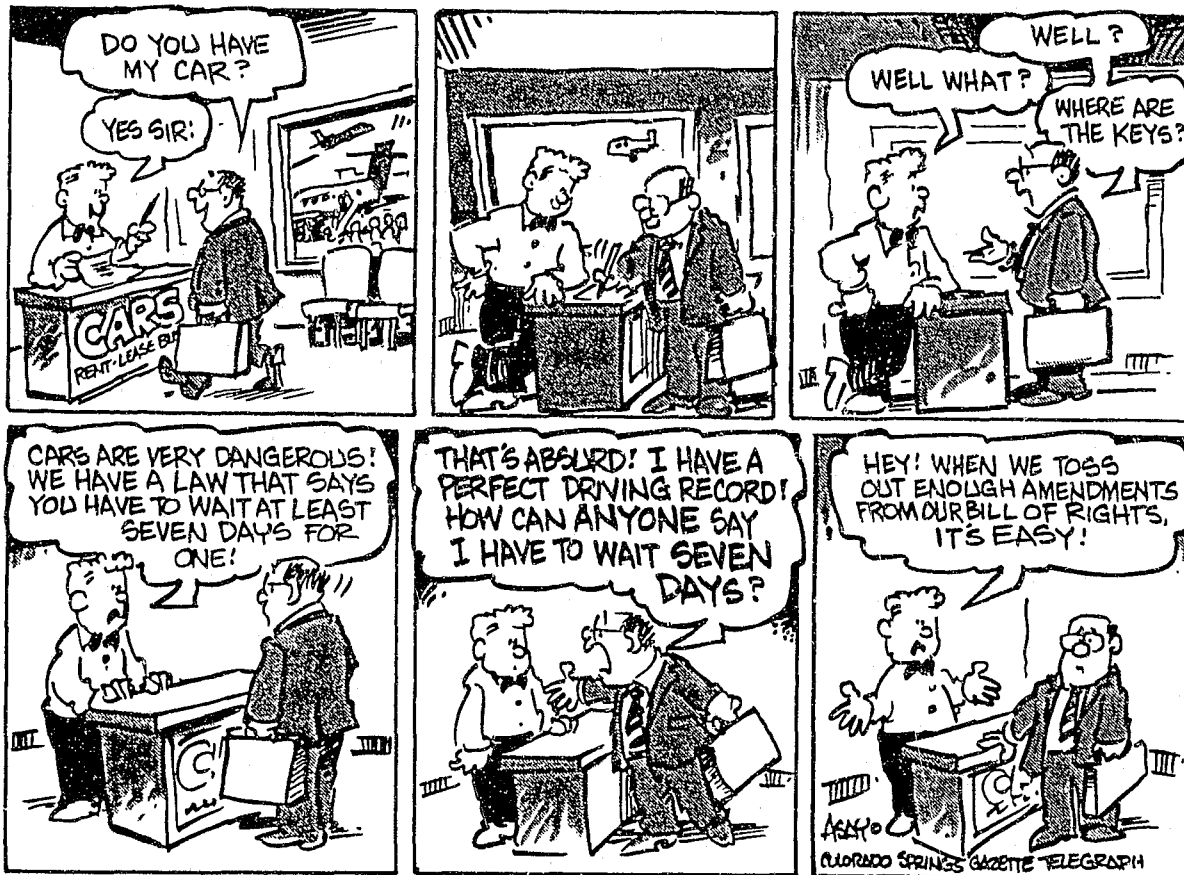
20. A good number of "hits" are based on felony convictions from many years before, or on a conviction of aggravated assault, which some people (negligently) do not realize is a disqualifying felony.

21. Task Force, p. 87.

22. Blackmon.

23. Task Force, p. 89.

24. In Virginia, 8 of 673 ineligibles (1.2%) were arrested. Handgun Control, Inc., "The Case for a Waiting Period" (1990). See also the Maryland data discussed above.



## V. PARTICULAR TARGETS OF WAITING PERIODS

*Synopsis: The suggestion that people who transact in illegal drugs could be denied firearms under any gun control system is patently silly. Nor would waiting periods disarm psychotic mass murderers, who have repeatedly bought guns in states with waiting periods. There is no evidence that waiting periods prevent suicides or domestic homicides. Hardly any crimes could even theoretically be prevented by a "cooling off" period. A perfect waiting period or other permission system would not stop criminals from getting even retail guns (let alone black market guns). After all, false identification is not hard to procure. And although a fingerprint or other biometric check would defeat false identification, most criminals would still likely know someone without a felony record. The surrogate buyer could still buy a gun for a criminal at retail.*

Although waiting periods might have little impact on the average street criminal, it is sometimes suggested that waiting periods might deter particular kinds of gun misusers.

### A. DRUG DEALERS

In 1988, Handgun Control, Inc. attempted to hang its national waiting period on the drug bill, under the theory that the waiting period would disarm narcotics distributors. HCI still continues to promise that a waiting period will help take guns away from drug dealers.<sup>1</sup>

It stretches credulity to promise that *any* kind of gun legislation, including a waiting period, would have the slightest impact on drug dealers. Dealers, being expert in the black market, would have the readiest access to false identification, and to underground supplies. They are the last people gun control could impact.

Drug dealers obviously cannot count on the police or the courts for protection from violence. Because of this, and because dealers are a valuable robbery target, it would virtually be suicide for them not to carry a gun.<sup>2</sup>

In addition, drug dealers cannot use normal legal and social commercial dispute resolution mechanisms. Like the gangsters of alcohol prohibition days, drug dealers need guns to protect their business's income and territory. Thus, many drug dealers must own a gun for their lives and their livelihood.

No matter how scarce guns become for civilians, there will always be one for a criminal who can pay enough. Street handguns now sell for less than \$100. If the price went up to \$2,000, dealers would still buy them, because dealers would have to. Spending a few hours' or days' profits on self-protection is the only logical decision for a dealer. Can anyone really believe that an individual who buys pure heroin by the ounce, who transacts in the highly illegal chemicals used to produce amphetamine, or who sells cocaine on the toughest street-corners in



the worst neighborhoods will not know where to buy an illegal gun?

## B. HOMICIDAL MANIACS

Patrick Purdy, who killed five children in Stockton, California, bought five guns over the counter in California, despite the state's strict 15-day waiting period. Laurie Dann bought a handgun and shot up a second grade classroom in Illinois, killing one child, wounding five, and then killing herself despite that state's requirement that all gun owners be licensed, and still undergo a waiting period before each firearm acquisition.<sup>3</sup> Mark David Chapman, John Lennon's assassin, bought a handgun in Hawaii, a state with one of the strictest waiting periods in the nation. Canada has a nationwide licensing system, yet a deranged man was able to buy a rifle with which he shot and killed 14 women in December 1989.<sup>4</sup> Criminals like Eugene Thompson (a felon and a cocaine addict who shot up a Denver suburb in March 1989) do not buy guns legally; they steal them. The criminally insane are criminally insane day after day for years and years, not just for the three weeks covered by a waiting period.

*“Can anyone really believe that an individual who buys pure heroin by the ounce, who transacts in the highly illegal chemicals used to produce amphetamine, or who sells cocaine on the toughest street-corners in the worst neighborhoods will not know where to buy an illegal gun?”*

Typical of the misleading approach sometimes taken by the gun control lobby was the claim that a waiting period would have stopped a mental patient who bought a gun in an Atlanta suburb without a wait, shot up shoppers at Atlanta's Perimeter Mall, killed one of them, and wounded four others. DeKalb County promptly approved a 15 day waiting period.<sup>5</sup> Handgun Control's national fund-raising claims that the killer would have been stopped had a waiting period been in effect.<sup>6</sup> The claim is false; the killer's record of mental disorder was entirely private, and he had never been adjudicated mentally incompetent, or involuntarily committed.

## C. SUICIDES

There are simply too many other ways for people to kill themselves. After Canada implemented a national licensing system in 1978, its gun suicide rate did drop<sup>7</sup>; but the overall suicide rate remained the same.<sup>8</sup> Japan almost totally bans guns, but suffers a suicide rate twice the U.S. level.<sup>9</sup>

## D. DOMESTIC HOMICIDES

Many handgun control advocates assume that a waiting period would prevent "impulse killings."<sup>10</sup> But most domestic killings occur at night, when gun stores are closed. Most perpetrators are intoxicated with drugs and alcohol, and thus legally forbidden to buy a gun anyway. The image of a murderously enraged person leaving home, driving to a gun store, finding one open after 10 p.m. (when most crimes of passion occur), buying a weapon, and driving home to kill is implausible.<sup>11</sup>

### What do criminals think of the Brady Bill?

After the Brady Bill passed the House of Representatives in 1991, Reilly Johnson, a prisoner serving a life sentence in New Mexico, asked some of his fellow convicts what they thought:

- "Where do I get a gun? That's easy. I steal it or I buy one from someone who stole it."
- "Once I'm outta' the joint, it'll take me maybe an hour to get a gun. If you know a junkie, you know where to buy one. Junkies are the residential burglars."
- (When told that California's waiting period law had caught felons trying to buy guns in gun stores) "You gotta be kiddin'! Somebody that tried to buy a gun from a place where you have to give your real name has taken one too many pulls on the Krylon silver. Can you picture me goin' in some Straight John's gun shop with all these tatoos? Hey, the guy runnin' the shop is gonna bust himself callin' the cops. He takes one look at me and he won't think I'm there to buy. He'll think I'm there to rob him."
- "You know what my worst nightmare is? I bust into someone's living room and I find Joe Citizen in his lazy boy with his gun."
- "This is just more magic from Washington. Just like no more taxes was supposed to cure poverty, no more guns is supposed to cure crime. Guns are only the tip of the iceberg. Gun control is cosmetics, a band-aid on a broken leg."

Reilly Johnson, "Brady Bill' Gets Guffaws from Guys Behind Bars," *Sante Fe New Mexican*, June 30, 1991.

In any case, husbands who kill wives rarely use guns. Wives who kill husbands do often use guns, and are usually defending themselves or their children against felonious attacks.<sup>12</sup>

### **E. PEOPLE IN NEED OF "COOLING-OFF"**

Criminologist Gary Kleck points out that for a "cooling-off" period to prevent homicide, a number of conditions must be fulfilled: 1. The gun the killer used was the only one he owned, or the only one he could have used in the crime; 2. The killer acquired the gun from a source that would be expected to obey gun control laws (a licensed dealer); 3. The gun was purchased and used in the homicide in a time period shorter than the "cooling-off" period. Reviewing an analysis of 1982 Florida homicides, Kleck found that 0.9% (about 1 in 100) homicides fit all three criteria. He estimated that nationally about 0.5% (1 in 200) would fit all three criteria.

Nevertheless, Kleck suggested that a waiting period would not prevent even 1 in 200 homicides. For the homicide to actually be prevented, several other conditions would all have to be fulfilled:

1. The killer was the kind of person who would not have been willing to kill even after waiting; in other words, the killing was an isolated act, rather than the culmination of a long history of assaults by the killer
2. The killer would not have acquired and successfully used a gun that did not require cooling off (such as a long gun, in most states)
3. The killer would not have been able to complete the homicide with any weapon other than a gun
4. The killer would not have been able or willing to obtain a gun from a non-retail source.

Considering all the necessary criteria, Kleck did not find any Florida homicides which a cooling-off period clearly would have prevented.<sup>13</sup> While supporting a background check, Kleck concluded that a cooling-off period would in itself do no good. Hence, he thought the waiting period to offer no advantage over the instant check.

### **F. SUMMARY: WHAT BENEFITS CAN BE EXPECTED FROM A WAITING PERIOD?**

New York City Mayor David Dinkins asserts that "The Brady Bill could save thousands of lives in its first year."<sup>14</sup> Although many credulous New Yorkers believed their Mayor, and flooded House of Representative Speaker Tom Foley's office with phone calls demanding passage of the waiting period, there is not a serious criminologist in the United States who thinks the Mayor's assertion has any basis in reality.

## WAITING PERIODS

---

Even a perfect waiting period or other permission system would not even stop criminals from getting retail guns. False identification is not hard to procure. And although a fingerprint or other biometric check would defeat false identification, most criminals would still likely know someone without a felony record. The surrogate buyer could still buy a gun for a criminal at retail.

When pressed for whether the waiting period will deprive criminals of guns, HCI demurs, but expresses confidence that a waiting period will make gun acquisition more troublesome for criminals.<sup>15</sup> Likewise, the federal Task Force which studied background checks acknowledges that "[E]ven a perfect felon identification system would not keep most felons from acquiring firearms"<sup>16</sup>; the Task Force nonetheless supported a permission system, hoping that forcing some criminal buyers onto the black market would leave them less able to obtain high-quality firearms.<sup>17</sup>

But would a waiting period or other permission even inconvenience criminals, considering that few of them obtain crime guns through dealers anyway? Moreover, the current black market supplies even fully automatic firearms, which have been under a strict federal licensing system since 1934, and have been illegal to manufacture for civilians since 1986. If the black market can supply machine guns, it is doubtful that it cannot supply other high-quality weapons.

Still, as Professors Cook and Blose point out, there must be at least a few inexperienced or impecunious criminals for whom even a porous permission system would delay gun acquisition for at least some period. Moreover, the waiting period, simply because it will reduce gun sales to legal purchasers (see below) would reduce the number of guns in circulation. It seems likely that one of those unbought guns might one day have been part of a suicide or homicide or accident that might not otherwise have occurred.

Proponents of permission systems say that they will be successful if they save a single life.<sup>18</sup> It seems clear that **a waiting period or other permission system would, inevitably, prevent at least one firearms fatality.** Even if a waiting period would have no discernable impact on crime in general, it would save at least one life. Is it therefore a good idea? The next Part discusses that question.

## Endnotes

1. James Brady, Fund-raising letter for Handgun Control, Inc., "Wednesday morning" (summer 1990), p. 3: "Seven days to help police thwart a purchase by a drug dealer."
2. As Sterling Johnson, New York City's former special narcotics prosecutor acknowledged, "You either have to protect yourself with a gun or get out of the [drug] business." Anthony M. DeStefano, "City Teens: Armed and Dangerous," *New York Newsday*, Sept. 24, 1990, p. 30.
3. Douglas A. Blackmon, "Gun Sale Limits Don't Cut Crime, Experts Say," *Atlanta Journal & Constitution*, May 29, 1990, p. A-9.
4. "Killer Fraternized with Men in Army Fatigues," *The Globe and Mail*, December 9, 1989; "Killer's Letter Blames Feminists," *The Globe and Mail*, December 8, 1989.  
In 1978, Canada implemented a national law which required police permission for every handgun purchase, and a one-time license (good for five years) for long gun purchases. The license application requirement served, in effect, as a waiting period for most first-time gun purchasers.
5. Blackmon.
6. James Brady Fund-raising letter.
7. Elisabeth Scarff, Decision Dynamics Corporation, *Evaluation of the Canadian Gun Control Legislation* (Ottawa: Canadian Government Publishing Centre, 1983) (prepared for the Solicitor General of Canada), pp. 5, 29.
8. A study of Toronto indicated that the gun laws decreased firearms suicide by men, but "the difference was apparently offset by an increase in suicide by leaping." Charles L. Rich, James G. Young, Richard C. Fowler, John Wagner, Nancy A. Black, "Guns and Suicide: Possible Effects of Some Specific Legislation," *American Journal of Psychiatry*, 147 (no. 3, March 1990), p. 342.
9. World Health Organization, *World Health Statistics, 1984* (Geneva: W.H.O., 1984), pp. 183, 189; United States Bureau of the Census, *Statistical Abstract of the United States, 1989* (Washington: Government Printing Office, 1989), p. 820.
10. "Legislature: Pass Handgun Law," *Denver Post*, January 24, 1975.
11. David Hardy, "Legal Restrictions on Firearms Ownership as an Answer to Violent Crime: What Was the Question?" *Hamline Law Review* 6 (July 1983): 404. It might be wondered if lives would be saved if homicidally enraged husbands "cooled off" while driving around at night look for open firearms dealers willing to sell to drunken and agitated customers, rather than staying home and finding alternative weapons.
12. In a Detroit study, 75% of wives who shot and killed their husbands were legally defending themselves or their children against illegal attacks. The figure for Miami was 60%, and for Houston, 85.7%. "[W]hen women kill, their victims are...most typically men who have assaulted them." Martin Daly and Margo Wilson, *Homicide* (New York: Aldine, 1988), pp. 15, 200.  
Saunders, "When Battered Women Use Violence: Husband Abuse or Self-Defense," *Violence and Victims* 1 (1986), p. 49; Barnard et al, "Till Death Do Us Part: A Study of Spouse Murder," *Bulletin of the American Academy of Psych. and the Law* 10 (1982): 271; Donald T. Lunde, *Murder and Madness* (San Francisco: San Francisco Book Co., 1976), p. 10 (in 85% of decedent-precipitated interspousal homicides, the wife kills an abusing husband); E. Benedek, "Women and Homicide," in ed. Bruce Danto, *The Human Side of Homicide* (New York:

## WAITING PERIODS

---

Columbia, 1982); Donald B. Kates, Jr., *Guns, Murders, and the Constitution* (San Francisco: Pacific Res. Inst., 1990), p. 25.

It is sometimes suggested that the abused woman is to blame for not leaving the relationship. Many women do leave, only to be followed and killed by their former mate. See generally Lenore E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: Harper and Row, 1989); Cynthia K. Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* (Columbus: Ohio State University Press, 1989).

13. Gary Kleck, *Guns and Violence* (Hawthorne, New York: Aldine, 1991) chapter 8. The study of 1982 data Kleck reviewed is Ted Mannelli, "Handgun Control," Report to the Executive Office of the Governor, State of Florida (Tallahassee: University of Florida, 1982) (unpublished).

14. "Excerpts from Dinkins's Address: Mobilizing to Fight Crime," *New York Times*, October 3, 1990, p. B2.

15. Eric Stenson, "Laws Limiting Access to Guns Putting Dent in NRA's Clout," *Asbury Park Press*, Aug. 5, 1990.

16. 54 Fed. Reg. 43532.

17. Task Force on Felon Identification System, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (Washington: Department of Justice, October 1989), p. 24.

18. For example, the Lakewood, Colorado, police chief defended the Pascoe 21-day comprehensive wait: "If we can save one life, it's worth it." Also, Richard Boyd, President of Fraternal Order of Police, quoted in "Two Sides Spiritedly Debate Bill on Gun-purchase Waiting Period," *The Capital Times* (Madison, Wisc.), June 18, 1987; Rep. Edward Feighan (House sponsor of waiting period), "Feighan Introduces Bill of Deter Criminals and Save Lives," Press Release, February 4, 1987 ("If this bill can save even one life, which I know it can, Congress should act on it now."); Fraternal Order of Police: "If the seven-day waiting period will save just one life—the life of a law enforcement officer or a citizen—then [Congress's] work will be successful." quoted in Handgun Control, Inc., "Waiting Periods Work."

If the criteria for legislation is whether it will save a single life, legislatures would also want to consider a ban on new private swimming pools and on cigarette lighters, as well as a reduction of the speed limit to 15 m.p.h. There is of course no Constitutional right to swim or light fires or drive at a particular speed; and pools, cigarette lighters, and cars are not usually considered useful for self-defense. Cars kill many more people than guns. Cigarette lighters cause more fatal accidents for children than do guns. (In 1984, the number of accidental deaths from all types of guns for children under the age of 5 was 34, while that same year 90 children aged 0-4 were killed by cigarette lighters. Centers for Disease Control, "Mortality and Morbidity Weekly Report," March 11, 1988, p. 145; *Consumer's Research*, May 1988, p. 34.)

## VI. PROBLEMS CAUSED BY A WAITING PERIOD

*Synopsis: Substantial police resources are inefficiently diverted from street patrol to desk work. A background check consumes at least \$40,000 in police salary for every arrest it produces. Resources may be further consumed by lawsuits regarding allegedly insufficient background checks. Waiting periods prevent a person from acquiring a gun for several days, and if implemented improperly (as they often are) waiting periods may result in total denial of a person's legitimate right to bear arms. The diversion of police resources, coupled with the interference with the acquisition of self-defense guns, may mean that a waiting period would cause a net loss of lives.*

*Problems with the data quality of existing criminal justice records will result in large numbers of false denials, requiring the victims to undergo a lengthy process to prove that they are not criminals. An initial denial stands only a 50% chance of being accurate and proper.*

*Moreover, waiting periods provide a mechanism for gun registration, will erode the confidentiality of medical records, and often work a substantial financial hardship on the firearms dealers and users. Advocates of gun prohibition see waiting periods as a useful first step towards their ultimate goal.*

### A. THE DRAIN ON POLICE RESOURCES

Police resources are finite. The question is not whether a waiting period would save one life, but whether other uses of the police resources spent administering a waiting period might save more lives if used elsewhere.

Under a national comprehensive waiting period, the drain on police resources would be staggering. There are approximately 7.5 million firearms transactions annually.<sup>1</sup> If a waiting period were to be rigorous enough to stop future Hinckleys, it would have to include in-person address verification. (See Part I, above.) How many hours would it take for a policeman to run a national criminal records check, and to visit the home of every person who applied? One hour, at the very least. That would be **7.5 million police hours spent checking up on honest citizens, instead of looking for criminals.** In the haystack of applications by honest citizens, police would search for a few needles left by the nation's very stupidest criminals. Looking for crime, police officers would be directed into a paperwork enterprise particularly unlikely to lead to criminals. Would not all those millions of police hours be better spent on patrol, on the streets instead of behind a desk?<sup>2</sup>

According to the federal Task Force, implementing a national comprehensive permission system would require the FBI to hire 395 additional clerical employees to process the requests for fingerprint card readings for the (approximately) 725,000 citizens who would be denied permission to purchase because they have the same name as a criminal, or because police

records noted an arrest but not a subsequent acquittal.

A national waiting period and background check could cost from tens to hundreds of millions of dollars.<sup>3</sup> Applying the 1 arrest per 10,000 applicant review figure, each arrest would cost approximately 40,000 dollars, or the one-year salary of a full-time, fairly senior police officer.<sup>4</sup>

Such profligate use of police manpower is an impediment to crime control. One useful modification to existing waiting periods would be to exempt persons who already have a gun. (Proof of lawful purchase of another gun might suffice for the exemption.) After all, a person who buys a second revolver is hardly more dangerous than a person with only one gun.

The waiting period is an impediment to effective law enforcement in a more subtle way also: Local politicians who are failing to take effective steps to control crime use the campaign for a national waiting period as a tool to divert the attention to the national scene, away from local law enforcement. For example, after Utah tourist Brian Watkins was stabbed in a New York City subway in the summer of 1990, New York Mayor Dinkins announced that the what was needed to stop New York City crime was a national gun waiting period, or even gun prohibition. The Mayor now makes the call for a national "Brady Bill" the centerpiece of his response to publicized shootings in New York, regardless of whether evidence indicates that a waiting period would have had an effect on the particular shooting.<sup>5</sup>

*"Under the legal doctrine of sovereign immunity, the police have no duty to protect any individual citizen from crime...In cases where the government affirmatively interferes with a person's ability to protect herself (the interval between an application to purchase a firearm and approval), the doctrine of sovereign immunity should not apply."*

## **B. LAWSUITS AGAINST THE POLICE**

At a time when local police resources are already stretched thin, the national waiting period bill imposes substantial paperwork and manpower requirements on most police forces in the country. The 1993 versions of the Brady Bill immunize the police from all lawsuits based on granting or denying a purchase application (more on that below). But in 1988, the bill's prime lobbyist, Handgun Control Inc., announced that its legal defense fund will sue police departments that do not implement the background check.<sup>6</sup> Much to the delight of Handgun Control, a woman won \$350,000 from the city of Philadelphia for not conducting a thorough



enough background check of a man who killed her husband.<sup>7</sup> Accordingly, it is not impossible that a few years after the Brady Bill were enacted, aggressive lawyers and their lobbyists would seek to repeal the police liability exclusion, or avoid it through creative litigation.

### C. COVERT REGISTRATION

Waiting periods and other permission systems can operate as de facto gun registration. Once the police are told who is applying to buy a gun, they may simply add that person's name to their list of gun owners, as is the practice in New Jersey, New York and other states. The California Justice Department has used the waiting period, without statutory authorization, to compile a list of handgun owners.<sup>8</sup> In Oregon, the police are allowed to retain handgun purchase records up to five years.

One attempted solution to the problem of covert registration is to require the police to destroy the purchase application records. But not even the toughest language in a federal bill could compel a state officer to destroy records, because Congress has no authority to compel an act by a state or local officer which is not required by the U.S. Constitution.<sup>9</sup>

Under neither proposed federal nor existing state systems is the pretence of required destruction backed up by meaningful enforcement. Police who keep illegal records are subject to no penalties or civil liability. Significantly, the practice of making daily computer back-up tapes means that even if original records are destroyed, back-up records will still exist.

*"each arrest would cost approximately 40,000 dollars, or the one-year salary of a full-time, fairly senior police officer."*

Precisely because most waiting periods amount to covert registration, many otherwise law-abiding gun owners will resist them.<sup>10</sup> The principal objection of Constitutionalists to gun registration is that it has frequently been a prelude to and a tool for gun confiscation.<sup>11</sup> Additionally, the government has no authority to register people merely for exercising their Constitutional rights.<sup>12</sup>

In states where waiting periods already exist, the legislature should specify liquidated damages against officials who illegally compile registration lists. In cases of intentional wrongdoing, criminal prosecutions, similar to existing criminal prosecutions for federal Privacy Act violations, should be allowed.<sup>13</sup>

## D. PRIVACY OF MEDICAL RECORDS

The vast majority of people with mental illnesses, such as John Hinckley, never enter state treatment systems. Pressure will inevitably build to end the confidentiality of private medical records, so the police can check those records as well. In California, legislators enacting a comprehensive waiting period were told that mental health records would be kept fully confidential. But the same year the law was enacted, the California Department of Justice began ordering public and private mental health clinics to report their clients to the state; the state puts them in a database along with felons that is useable by the police. Included in the database are non-violent persons who have voluntarily checked themselves into private facilities for problems such as anxiety or stress.<sup>14</sup> A number of jurisdictions already require purchasers to waive the confidentiality of their medical or mental health records.<sup>15</sup> Illinois queries, "Are you mentally retarded?"<sup>16</sup> New Jersey asks the McCarthy-style question "Have your ever been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an in-patient or out-patient basis for any mental or psychiatric condition?" The State also inquires, "Do you suffer from a physical defect or sickness?"<sup>17</sup> The mother who consulted a psychiatrist on one occasion because her son had died must confess herself to the New Jersey police, upon pain of criminal prosecution.<sup>18</sup>

*"725,000 citizens would be denied permission to purchase because they have the same name as a criminal, or because police records noted an arrest but not a subsequent acquittal."*

And it is not only the government that can use firearms background checks to disclose private medical information. An employer can conduct inexpensive inquiries into the mental health records and criminal background of prospective or current employees by ordering them to produce proof that they are eligible to buy a gun, and hence have no mental or criminal record. Some employers in Illinois use this tactic.

## E. DENIAL OF ABILITY TO OBTAIN A GUN

A waiting period provides anti-rights police administrators with an easy opportunity for abuse. In New Jersey, the police often simply refuse to process gun purchase applications.<sup>19</sup> In cases of budgetary constraint, firearms applications may suffer inordinate or even permanent delays.<sup>20</sup>

Although a statute may specifically limit the reasons for disqualifying a buyer, police may

disqualify for other, illegal reasons. In Maryland, where an appeals process exists, the police are overruled on 78% of appeals.<sup>21</sup>

Indeed, many of the police departments which most vociferously champion "reasonable" gun controls routinely abuse those controls once enacted. The St. Louis police have denied handgun possession permits to homosexuals, nonvoters, and wives who lack their husband's permission.<sup>22</sup> Although New Jersey law requires that the authorities act on gun license applications within 30 days, delays of 90 days are routine; some applications are delayed for years, for no valid reason.<sup>23</sup> Mayor Richard Hatcher of Gary, Indiana, ordered his police department not to give license application forms to anyone.<sup>24</sup> The Police Department in New York City has refused to issue legally-required licenses, even when twice commanded by appeals courts to do so. The Department has also refused to even hand out blank application forms.<sup>25</sup>

Most police, fortunately, are law-abiding, and would not engage in the abuses typical in New York City and Maryland. Nevertheless, even in law-abiding jurisdictions, the waiting period, by definition, delays for a number of days a citizen's acquisition of a firearm. For a hunter planning a trip next month, the delay is inconsequential. For a young woman being threatened by an ex-boyfriend, the delay may be fatal.

Simply put, five government working days is too long for a woman whose ex-boyfriend is promising to come over and batter her. Five government working days is too long for families when a burglar strikes three homes in a neighborhood in one week, and may strike that night. **Twenty-four hours is too long to wait when a Gainesville-type serial murderer is loose, and every woman is a potential victim.**

The issue is not hypothetical. In September 1990, a mail carrier named Catherine Latta of Charlotte, North Carolina, went to the police to obtain permission to buy a handgun. Her ex-boyfriend had previously robbed her, assaulted her several times, and raped her. The clerk at the sheriff's office informed her the gun permit would take two to four weeks. "I told her I'd be dead by then," Ms. Latta later recalled. That afternoon, she went to a bad part of town, and bought an illegal \$20 semi-automatic pistol on the street. Five hours later, her ex-boyfriend attacked her outside her house, and she shot him dead. The county prosecutor decided not to prosecute Ms. Latta for either the self-defense homicide, or the illegal gun.<sup>26</sup>

In 1985 in San Leandro, California, a woman and her daughter were threatened by a neighbor. Instead of being able immediately to obtain a handgun for self-defense, the woman had to wait 15 days. The day after she finally was allowed to pick up her gun, the neighbor attacked

### ***Killed by a Waiting Period***

On March 5, 1991, Bonnie Elmasri called a firearms instructor, worried that her husband—who was subject to a restraining order to stay away from her—had been threatening her and her children. When she asked the instructor about getting a handgun, the instructor explained that Wisconsin has a 48 hour waiting period. Ms. Elmasri and her two children were murdered by the man 24 hours later.

### ***And One Who Survived***

On June 29, 1993, at three o'clock in the morning, a 21-year-old woman named Rayna Ross was woken by the sound of a burglar who had broken into her apartment and entered her bedroom. The burglar was her ex-boyfriend, a man who had previously assaulted her. This time, having smashed his way into her apartment, he was armed with a bayonet. Miss Ross took aim with a .380 semiautomatic pistol and shot him twice. The burglar's death was classified as a "justifiable homicide" by the Prince William County commonwealth's attorney, which determined that Miss Ross had acted lawfully in shooting the attacker.

Miss Ross had bought her handgun one full business day before the attack, thanks to Virginia's "instant background check." Virginia's 1993 Democratic candidate for Governor, Mary Sue Terry, has proposed that—although the Virginia instant check already checks all handgun buyers—Virginia handgun purchasers should undergo a "cooling off period" of five business days. Had candidate Terry's proposal been law in Virginia in 1993, Rayna Ross would now be undergoing a permanent "cooling off period," as she lay dead in mortuary. "No Duty to Protect," *Washington Times*, July 13, 1993.

No-one knows the name of the next Rayna Ross, Bonnie Elmasri, or Catherine Latta. But if the "Brady Bill" is enacted, it is nearly certain that sooner or later (probably sooner), an American woman whom the American criminal justice system has failed to protect will try to protect herself. Prevented from doing so by a five government working day waiting period, she will be murdered. Her story will not be re-told in the gun control lobbies' press releases.

### ***Another Waiting Period Victim***

"I know a woman whose once pretty face is now disfigured by a steel-plated jaw; it was shattered by her 6-foot 3-inch 200-pound husband. He inflicted the beating while she shielded her infant in her arms...I've seen the blood-stained imprint her head made as it smashed against the wall, complete with rivulets running nearly to the floor....

"The woman tried to press charges after she left the hospital, but sheriff's deputies and county medical health workers persuaded her not to because her husband had promised to attend counseling sessions. After two sessions, his mental health counselor refused to see him again out of terror; he threatened to kill her, and the counselor believes he meant it.

"When his wife tried to reinstitute charges, the deputies told her it was too late to do so. This was untrue...While the police refused to arrest him, he entered her property daily, prowled around the outside of her house, slept on her lawn at night and telephoned persistently, often 30 times a day. He stole her mail repeatedly, once removing her telephone bill and calling every number on it to slander her and threaten those who answered the phone.

"The police wouldn't arrest him for violating the restraining order because information that we had served it had not been entered in their computer. They weren't swayed by the fact that service was acknowledged by the county clerk's office and that we showed them county certified documentation of service.

"Nor would they arrest him unless the district attorney issued a warrant. But the D.A. wouldn't do that because the county file on the case was "temporarily mislaid."

"...the threatened woman knew that the only person who could be relied upon to protect her life was herself. She studied the laws and techniques of self-defense, trained to defend herself and tried to buy a good pistol. But because of the California waiting period, she couldn't have it for 15 days.

"During the waiting period, her life was a living hell. He broke into her house while she and her two children were asleep. Awakened by the barking of the dog, she sneaked outside with the kids and hid in the bushes till he left the next morning. Employed as a housekeeper, she was vacuuming in a client's house one day when he appeared and once again assaulted her. Another time, he hid in her garage as she returned and tried to close her inside with the electric garage door. She managed to drive out of the trap, but not without damage to the car, the garage door, and her psyche.

"She survived to receive the handgun, and he was told of its presence. Although he continues to telephone her and steal her mail, he has not tried to assault her again, and she feels safe enough to have filed for divorce..."

Peter Alan Kasler, "A Victim of Gun Control," *New York Times*, July 13, 1991.

### ***A Victim Who Couldn't Wait Five Government Working Days***

Armed with a knife, Charles A. Grant, Jr., sexually assaulted a 33-year-old woman on a Virginia beach woman one Tuesday in 1991. The assault was videotaped by a tourist who (not having a permit to carry a concealed handgun for protection), could do nothing to help except record the crime.

Wednesday, Charles Grant raped a 12-year-old girl.

News broadcasts of the videotape of Grant's Tuesday assault frightened many people in the nearby Nags Head community.

A young woman named Sonya Miller had been wanting a handgun for a while, and on that Wednesday, her father bought her a .38 special revolver. He gave her the revolver that evening.

At about 9 p.m., Miss Miller went to the post office to pick up her mail. As she stepped into the dimly lit parking lot near the post office, Charles Grant saw her, and she saw Charles Grant. They both screamed. Grant told the young woman he would not hurt her, but when she attempted to get into her car, Grant lunged at the door. He stuck a .25 caliber pistol in her face, began climbing into the car's back seat, and said "I'm going to kill you."

"No," she replied, "I'm going to kill you." Sonya Miller picked up the revolver she had acquired less than 15 minutes before. When she pulled the hammer back, he dropped his gun and fled. Miss Miller drove home; her father called the sheriff's office; and Charles Grant was apprehended.

Regarding the handgun Miss Miller had just acquired, "It's the only thing that saved her life," her father observed. Elizabeth Thiel, "Gift of a Gun Warded Off Attack, Father Says," *Virginian-Pilot*, Apr. 12, 1991, p. D1.

### ***When the Burglar Comes Back***

At the age of 17, Virgen Blanca emigrated to the United States from Spain. By the time she was 23, she had three children, and a divorce. To make ends meet for her family, she had to work two or three jobs, as long as 18 hours a day. In 1993, Ms. Blanca and her three teenage children moved from Mesquite, Texas, to Dallas, in order to be closer to her job as a house painter.

The family moved into a seven-unit apartment building, where they were the sole tenants.

During the night of Saturday, July 24, 1993, a prowler twice attempted to break into the apartment. The second time, Ms. Blanca's 15-year-old son Reel jumped out a second-story window to call the police. By the time they arrived, the prowler was gone, having left behind a message scrawled on a light switch next to the Blanca apartment: "I'll be back."

On Sunday, Mrs. Blanca purchased Bryco semiautomatic pistol.

On Monday night, Mrs. Blanca left the apartment to buy food. Moments later, 15-year-old Reel, 14-year-old Alexandra, and 10-year-old John Paul heard a door creaking outside the apartment house.

Recognizing the man to be the same man who had twice attempted to break in Saturday night, Reel took the Bryco pistol from his mother's room, and aimed it out the window at the man in the courtyard below. Reel yelled "Freeze!" but the man began to open the door to the apartment building. Reel shot the gun three times, wounding the man in the groin.

The man limped two blocks, asked someone to call an ambulance, and claimed that he had merely been looking for a place to urinate. Because Mrs. Blanca could not make a positive identification of the man, police dropped burglary charges. Todd J. Gilman, Olive Talley, "Violent Reactions: Citizens' Growing Use of Force to Fight Crime Stirs Societal Questions," *Dallas Mornings News*, Aug. 1, 1993, p. 1A. Under Handgun Control's, Inc.'s legislative agenda, not only would Mrs. Blanca have been unable to buy a gun the day after the intruder warned "I'll be back," Mrs. Blanca would have been prosecuted for allowing her 15-year-old son access to the gun, and the burglar would have been able to sue her for her "negligence."

## WAITING PERIODS

---

them, and she shot him in self-defense. Had the man attacked 14 days after his initial threat, rather than 16 days after, the woman and her daughter would have been raped. Of course the state of California would have denied liability, as it has repeatedly denied liability for its failure to protect citizens against specific threats from specific criminals.

The national waiting period proposal does allow a waiver of the wait if the locality's chief law enforcement official (or his designee) issues a written order stating that immediate purchase is necessary to protect the life of the gun purchaser or someone in her household.<sup>27</sup> In practical terms, it is very doubtful that a potential crime victim (particularly the poor and minorities who are the victims of most violent

crime), will be able to obtain a rapid appointment with the police administrator who will issue a gun authorization. If the administrator is out of town, or busy, or uninterested, the victim is out of luck. And if the potential victim is receiving threatening phone calls that deal only with rape, aggravated assault, or mayhem, even a sympathetic police chief cannot issue an exemption, since there is no threat to the victim's life.

Some of the people killed by a waiting period could, ironically, be people who have volunteered to defend the United States. Members of the armed forces are allowed to carry personal handguns as sidearms, if they so choose. Many infantry grunts might want a Colt .45 or a Glock 9mm on their hip, in case their government-issue M-16 rifle jams in a firefight. Television stations in Texas and Alabama reported high levels of sales of 9 millimeter handguns to servicemen shipping out to Saudi Arabia. But in states like California, with a minimum wait of 15 days, the short period between notification of call-up and departure date is not enough time for a soldier to be cleared by the firearms control apparatus. As a result, soldiers from California and similar states were placed in greater peril.<sup>28</sup> Happily, the rapid collapse of the Iraqi army reduced the importance of back-up sidearms.

As the Fifth Circuit Court of Appeals has held, "the right to defend oneself from deadly attack is fundamental."<sup>29</sup> A waiting period puts that fundamental right on hold.<sup>30</sup>

A person who is falsely imprisoned by the state can get out of jail a week later, with perhaps no permanent harm done. Newspapers which libel a person by mistake can always publish corrective stories the next day. A person who is denied the right to bear arms for a week may, at the end of the week, be dead. A deprivation of even 24 hours of the means to self-defense may mean a deprivation of life itself.

*"...the right to defend oneself  
from deadly attack is  
fundamental. A waiting period  
puts that fundamental right on  
hold."*



*"Although New Jersey law requires that the authorities act on gun license applications within 30 days, delays of 90 days are routine; some applications are delayed for years, for no valid reason."*

Of course the number of persons who would be killed or injured because of the waiting period would be small, so small as to be statistically unnoticeable. But so would the number of persons saved by a waiting period. Proponents of a waiting period have not carried the burden of demonstrating that a waiting period would be a net saving of lives, taking into account the people who die because they cannot defend themselves, and taking into account the diversion of police resources away from street patrol.

To reduce the abuses and injuries that waiting periods could cause, a number of prophylactic measures make sense: Any waiting period should have an explicit appeals process. At the appeal, the government should have the burden of proving that the citizen is not entitled to possess a firearm. Normal rules of evidence should apply, and citizens should not be victimized by anonymous rumors and other sorts of hearsay evidence. Citizens who are victorious in their appeal should be entitled to attorney's fees.

Moreover, any person injured by the failure of police to properly and promptly approve an application should have a right to sue for damages. When a person is killed because the police failed to act, the survivors would have the right to sue.

Under the legal doctrine of sovereign immunity, the police have no duty to protect any individual citizen from crime, even if the citizen has received death threats and the police have negligently failed to provide protection.<sup>31</sup> In cases where the government affirmatively interferes with a person's ability to protect herself (the interval between an application to purchase a firearm and approval), the doctrine of sovereign immunity should not apply. The government should not be able to strip a person of her right to defend herself, and then assert that it has no responsibility for the consequences.

## F. FINANCIAL HARDSHIPS

Almost all waiting period/permission systems require the firearms purchaser to pay the entire cost of the system. It is Constitutionally odious to make people pay the government so the government can satisfy itself that they are fit to exercise their Constitutional rights. The young woman in a rough neighborhood who needs an inexpensive handgun for self-defense, or the young man in Appalachia who wishes to hunt squirrel with a .22 rifle are not the cause of the crime problem. Even an \$8 fee may drive the cost of their \$50 gun out of reach.

## WAITING PERIODS

---

For all firearms purchasers, not just poor people who need a defense gun, a waiting period requires an additional trip to the firearms store, more time spent by the clerk at the store, lost sales due to people who do not have the time to make repeated trips, and a host of other transaction costs. For a person who lives in a small town, and needs to make a long trip to get to a store with a good selection of merchandise, the inconvenience can be substantial.

*"The 1993 version of the Brady Bill flatly prohibits persons who have been denied for improper or malicious reasons from suing the police."*

The waiting period severely impacts firearms dealers and manufacturers. The reason is that most guns are bought by persons who already own guns, often as an impulse addition to a collection. If two trips to the store are required, the buyer often loses interest in the sale. For example, the number of handgun sale records reviewed by the Pennsylvania state police is one-third less than the number of handgun purchase

applications. Most of the drop-off is caused by potential purchasers who, after a few days, decide not to buy the gun.<sup>32</sup>

The waiting period also indirectly impacts government resources. A substantial decline in firearms sales means a substantial decline of several hundred million dollars in firearms excise taxes, and perhaps also a substantial decline in revenue for wildlife commissions.<sup>33</sup>

From a criminal justice standpoint, the loss of gun sales is inconsequential. The fact that a person who already legally owns three guns ends up not buying a fourth does not make him more vulnerable to crime, nor does it make him more dangerous to the public. (There is no correlation between gun density and gun crime.<sup>34</sup>)

The loss in sales, irrelevant to the crime issue, is very harmful to retailers and manufacturers. Automobile dealers, liquor stores, and tobacco outlets all sell products that kill many people, but they are not burdened with a rule that makes lawful users make repeated trips for the same transaction.

It should be emphasized that substantial burdens on firearms owners and the firearms industry might well be justified if tangible benefits resulted. But as the evidence discussed above indicates, waiting periods simply do not prevent guns from coming into the wrong hands.

## G. THE DATA QUALITY PROBLEM

The existing state of criminal records in most jurisdictions is simply too primitive to support a background check that is part of a waiting period (or part of an instant telephone

check).

The FBI "estimates that approximately one-half of the arrest charges in their records do not show a final disposition."<sup>35</sup>

Only 40% to 60% of the nation's felony records are automated.<sup>36</sup> Many states do not have fully automated criminal records name indexes.<sup>37</sup> Many indexes are not currently searchable from the outside, such as telephone lines or computers. In some states, the same master index (such as a fingerprint index) that contains all felons will also include child care workers, various license holders, and firearms permit holders.<sup>38</sup>

*"...the Department of Justice Task Force concluded:  
"[A]pproximately 50% of the cases where persons appear to have a criminal history record based on an initial name search are eventually found to be false hits."*

For citizens regarding whom false information has been incorrectly recorded on a "rap" sheet, there is no remedy. Courts have held that even after an acquittal or dismissal of charges, a person has no Constitutional right to have an arrest purged from his record.<sup>39</sup> (It should be noted that racial minorities are disproportionately victimized by arrests that do not prove worthy of a conviction.)

According to the Department of Justice study, performing a reliable background check under current data quality conditions would take 30 days. The Department found that shorter background checks (such as one week or three weeks) were no more reliable than instant checks.<sup>40</sup>

Because of the severe problems with the existing data quality, the Department of Justice Task Force concluded: "[A]pproximately 50% of the cases where persons appear to have a criminal history record based on an initial name search are eventually found to be false hits...Indeed, in many (perhaps most) cases an initial indication of a criminal record would eventually be shown to be untrue because it resulted from misidentification with someone else with a common name and date of birth." As a result, only 84-88% of gun purchasers would be able to pass an initial check.<sup>41</sup>

If there were a national comprehensive check, approximately 725,000 persons a year would be falsely denied under either the waiting period or the instant telephone check.<sup>42</sup> The 725,000 faced with false denials would then have to prove their innocence by being fingerprinted, and entered in a data base of eligible gun buyers. The "secondary verification process" (proving their non-criminal identity to the police) that would take four to six weeks.<sup>43</sup>

The list of people processed through secondary verification would be another basis for

gun registration.

Accordingly, a minimum condition for any kind of background check system should include the establishment of a data base consisting only of convicted felons and other ineligible.

## H. A STEP TOWARDS PROHIBITION

Why waiting periods? It is understandable why many legislators would be attracted to an idea that, at first glance, seems eminently plausible. Many legislators accept the reasoning "guns don't kill people; people kill people." So instead of controlling guns (through gun registration), why not control people who may abuse guns?<sup>44</sup>

But the anti-gun lobbies, being expert in the issue, know better. They know the facts of the Hinckley assassination. So why do they support a waiting period?

The Coalition to Stop Gun Violence (formerly the National Coalition to Ban Handguns) candidly admits that gun controls do nothing to prevent criminals from obtaining guns.<sup>45</sup> The CSGV believes that criminals are not the issue; handguns have no place in civilian hands. Moderate controls over handguns are a step toward to a ban. Policy statements distributed by the CSGV forthrightly admit as much.<sup>46</sup>

Even in the most academic settings, the question may come down to whether a person is "for" guns or "against" them. At a debate at the American Society of Criminology Conference in November 1989, the participants were asked what number of lives saved would be necessary for them to consider a waiting period worthwhile. Both sides of the debate agreed that the number of lives saved was not determinative of their positions. Dr. Paul Blackman, the National Rifle Association representative, replied that he thought the waiting period might end up with a net cost of lives. He also stated that alcohol Prohibition had saved lives, but still was not a good idea. Darrel Stephens, Executive Director of the Police Executive Research Forum, replied that he would still favor a waiting period even if it were proven not to save any lives. He reasoned that the extra effort required to purchase a gun would convince some people not to buy a gun, and less guns in civilians hands would be good in itself.<sup>47</sup>

What about Handgun Control, Inc., the more powerful of the two major anti-gun lobbies? Their stated motto is merely "Keeping handguns out of the wrong hands." But HCI's founder stated that he favored intermediate control as a waystation to near-total handgun prohibition.<sup>48</sup> The organization supports Washington D.C.'s complete handgun prohibition.<sup>49</sup> As one of HCI's Congressional allies acknowledges, the 7-day handgun wait "is not really enough, but it is a start."<sup>50</sup>

What good does a waiting period do for the goal of handgun prohibition? Waiting periods

facilitate gun registration, which HCI's founder had praised as a prelude to gun prohibition.<sup>51</sup> The 1991 version of the Brady Bill included a subtle provision which could have facilitated prohibition: an anti-gun police chief could indefinitely delay a purchase application by refusing to mail back acknowledgement of receipt of the application.<sup>52</sup> In the 1993 Brady Bill, the definition of "handgun" is elastic enough to include a number of long guns.<sup>53</sup> More importantly, the 1993 Brady Bill flatly prohibits persons who have been denied for improper or malicious reasons from suing the police.<sup>54</sup>

As discussed above, waiting periods sharply reduce gun sales. While there are no anti-crime benefits, HCI sees reduced sales (rather than just reducing uncontrolled sales) as good in itself.<sup>55</sup>

Most importantly, the waiting period is social conditioning. It sends the message that citizens do not possess a right to bear arms, but merely a privilege dependent on police permission.<sup>56</sup> Once the idea of a "right" to bear arms is replaced with a government-granted privilege, a broad range of prohibitions and restrictions become politically viable.

In an August 15, 1993 interview in the *New York Times*, Mrs. Brady set forth the agenda for the controls which she expected that enactment of the "Brady Bill" would make it "easier and easier" to enact.<sup>57</sup> First came a ban on so-called "assault weapons," which Mrs. Brady's organization has defined to include .22 rifles and even BB guns.<sup>58</sup>

Significantly, Mrs. Brady indicated that her organization was prepared to repudiate one of the key compromise provisions in the 1993 "Brady Bill" as soon as it was enacted. The 1993 version of the Brady Bill includes a "sunset" provision, so that the five-government-working-day waiting period would sunset once a national "instant check" of gun buyers becomes feasible. (The "instant check" is discussed below, in part VIII A.) While the NRA has pushed for the instant check to take place by a date certain, Handgun Control, Inc. opposes any effort to specify when the waiting period would actually sunset. In the *New York Times* interview, Mrs. Brady made it clear that her group will fight against *ever* letting the waiting period expire.

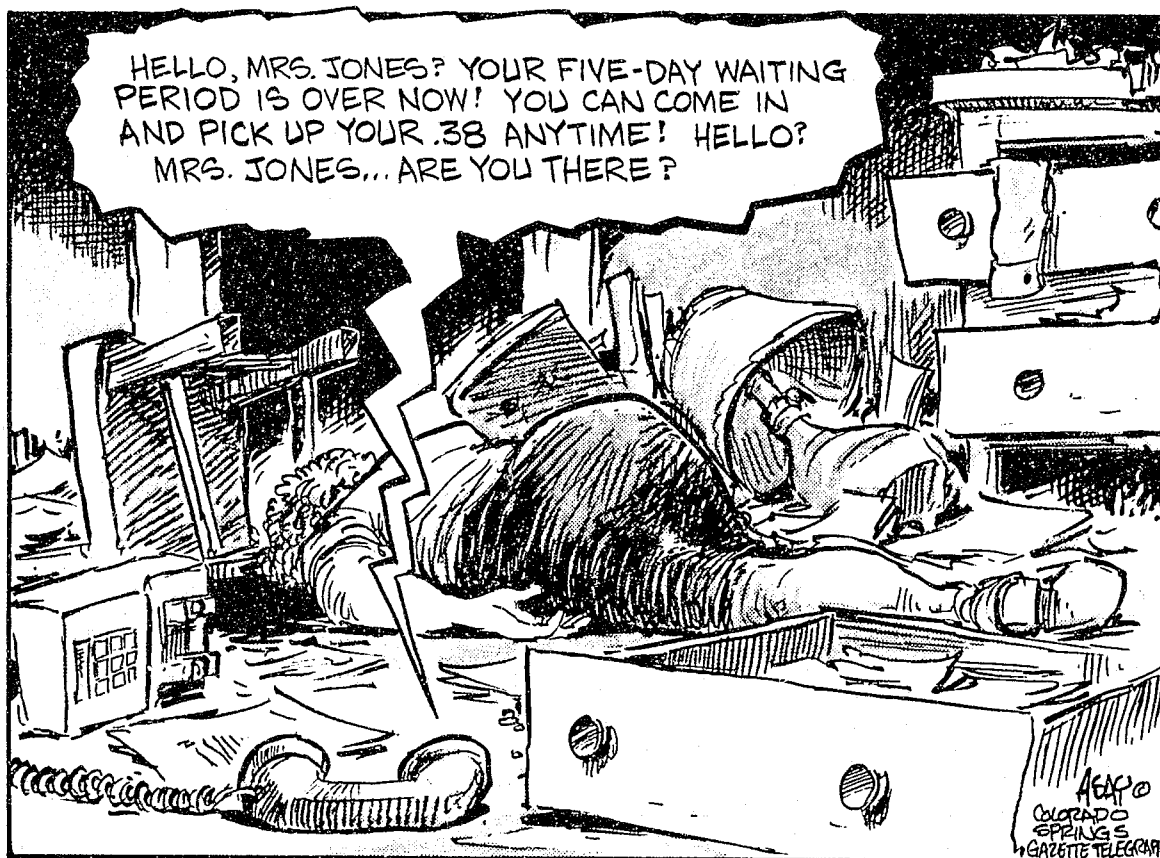
Mrs. Brady pointed to the one-handgun-per-month purchase limit enacted earlier in 1993 by Virginia, similar to an 1975 law adopted in South Carolina. Although such limitations have been enacted by no other state, HCI favors making the one-gun-per-month limit into federal law. And, Mrs. Brady noted, the limit is unenforceable without a waiting period, coupled with computerized registration of handgun buyers, designed to catch persons to attempt to buy one handgun from several stores.

Ultimately, Mrs. Brady proposed a "needs-based-licensing" system, with what the *New York Times* summarized as "different requirements for hunters, target shooters and security guards." A system where a prospective gun-owner must prove to the police her "need" for a particular gun is much stricter than even the gun controls in effect in countries such as Canada

## WAITING PERIODS

and New Zealand. In Great Britain, a country that does have a “needs” system, police abuse of discretion has driven the percentage of lawful gun owners down to a mere 4% of the population.<sup>59</sup> In American jurisdictions where police currently have discretion over “need” (such as New York City for handgun licensing), HCI has supported limitless police discretion, even when such discretion has been used to create a near-prohibition on handgun purchases by citizens.

Conspicuously absent from Mrs. Brady’s list of persons who might “need” a gun is an ordinary person who might need a handgun or long gun for home protection. Of course the abolition of the right to possess guns for home protection would not take place overnight. In countries such as Great Britain, the destruction of the right proceeded in gradual stages; as successive layers of “reasonable” controls was added onto previous layers, what was once an unquestionable right became a privilege dependent on police discretion. And then police discretion became absolute, and the privilege was eliminated. Enactment of the Brady Bill is understandably cheered by HCI and justifiably feared by the NRA as the most important “first step” in making America into a country like Great Britain, where ordinary citizens are forbidden the “barbaric” practice of owning guns for protection.



## Endnotes

1. Bureau of Alcohol, Tobacco and Firearms estimate cited in Task Force on Felon Identification System, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (Washington: Department of Justice, October 1989), p. 34 [hereinafter "Task Force"].

The Task Force was chaired by Assistant Attorney General Richard B. Abell, and included the Bureau of Alcohol, Tobacco and Firearms; the Bureau of Justice Assistance; the Bureau of Justice Statistics; the Federal Bureau of Investigation; the Immigration and Naturalization Service; the National Institute of Justice; and the U.S. Marshals Service.

2. The current federal proposal applies only to retail handgun sales, reducing the number of transactions the police have to check down to "only" two and a half million. Since the gun control lobby has already pushed several states to include long guns in the waiting period, and pushed California to include even gifts between family members in the waiting period, it is appropriate to consider cost estimates for waiting period schemes on the ultimate system that will be implemented, rather than on what is proposed as a "first step."

One way to reduce the number of required checks by the police would be to exempt low-volume firearms dealers (50 or less sales per year) from the required check. Most such dealers sell only to persons they already know (such as members of their shooting club) and therefore, in effect, perform their own background check prior to sales.

The New York City system takes the equivalent of almost 100 full time personnel. Research Associates Inc., *A Preliminary Cost Analysis of Firearms Control Programs* (Silver Spring, Maryland: R.A.I., 1968), prepared for the National Commission on the Causes and Prevention of Violence, pp. 23, 27-28.

In Washington, D.C. the firearms ballistic lab is so underfinanced that it is nearly two years behind in providing ballistic analysis of firearms used in crimes. Sari Horwitz, "Caseload Weighs Down D.C.'s Ballistics Lab," *Washington Post*, March 8, 1989. Given that Washington, D.C. spends more per capita on police than any other city in the United States, and given the utter failure of the police department to meet even minimal standards in protecting public safety, it is disheartening to see Washington, D.C.'s current police chief spending his time lobbying for a national waiting period, which would impose significant manpower and paperwork costs on other police departments.

3. The Department of Justice Task Force did not specifically analyze the cost of a 7-day waiting period, since the Task Force found that such a wait would be no more effective than an instant check. The Task Force did analyze the cost of a Firearms Owner Identification card, under which a card good for three years would be issued, allowing unlimited purchases after an initial background check lasting 30 days. Since the FOID system would not require repeated checks for the same person buying several guns, the FOID system would likely cost significantly less than a waiting period. The Task Force estimated the start-up cost of FOIDs at \$148-153 million, and the annual operating costs at \$136-161 million. Task Force, p. 106.

The cost estimate makes the assumption that most jurisdictions would undertake the "voluntary" background check out of fear of being sued by HCI. If the check were truly voluntary and most police departments declined to perform it, the additional costs of the law would be small.

In any case, the total costs of the "Brady Bill" are nowhere near the "billions" which the NRA cited as the upper cost range in its 1988 campaign against the bill. A figure of billions would only be justified only by combining the costs for several years of operation of the bill. A national check on every gun transfer, retail and private, long gun and handgun, might well cost billions. Even though the comprehensive billion-dollar check seems to be the long-term goal of Handgun Control, Inc., there is no current national proposal to that effect.

For an instant telephone check, the Virginia police had requested an \$8 per transaction fee to cover costs. If costs in other jurisdictions are about the same, a national check for retail handgun sales would cost about \$20 million (\$8 x 2.5 million sales). A national check on all gun transfers would be about \$60 million (\$8 x 7.5 million transfers).

## WAITING PERIODS

---

4. See part V for the 1/10,000 figure. The cost analysis improves if one assumes that in addition to leading to the arrest of one criminal, the 10,000 background checks and cooling off periods prevented several people without criminal records from obtaining guns that they would have used in crime or a suicide attempt. See the discussion in Part III for the expected very small size of those groups.
5. For example, David Seifman, "City's Latest Crime Shocker Fails to Stir Mayor's Anger," *New York Post*, Sept. 5, 1990, p. 4; Donatella Lorch, "Girl is Killed by Stray Bullet in Brooklyn," *New York Times*, Sept. 24, 1990, p. A1 (The Mayor stated: "Her death leaves me griefstricken and outraged...at the failure of our state and federal governments to bring an end to the manufacture and distribution of these tools of death."); "Excerpts from Dinkins's Address: Mobilizing to Fight Crime," *New York Times*, Oct. 5, 1990, p. B2 (The speech concluded "we ache for the protection that only a federal law can give us—the Brady Bill." He implored New Yorkers to call U.S. House Speaker Foley to demand passage of the Brady Bill, "which could save thousands of lives in its first year, including yours.")
6. N.T. "Pete" Shields, fund-raising letter for Handgun Legal Action Fund, "confidential, Wednesday morning" (1988), pp. 2-3. Unfortunately, after police departments begin complying with the paperwork rules, citizens who are victimized by crime will have no right to sue the police chiefs for putting their officers behind a desk, instead of on anti-crime patrol.
7. Eileen Welsome, "Killing Spree Leads to Talk of Gun Control," *Albuquerque Tribune*, n.d.; Shields, fund-raising letter (1988), p. 3.
8. "Background Checks Done Strictly by the Book," *San Diego Union*, February 21, 1990 ("We have an archive where keep all those records, alphabetized by the gun owners' names," said Entricon." [Justice Department official]).
9. *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

Of course Congress could compel destruction of registration records if it made a finding that gun registration violates the Second Amendment. Congress has the power under the section five of the Fourteenth Amendment to outlaw state violations of Constitutional rights. Logical consistency would mandate that the registration ban apply to other state and local gun registration as well.
10. Registration is routinely flouted. In Illinois, for example, a 1977 study showed that compliance with handgun registration was only about 25 percent. Donald B. Kates, "Handgun Control: Prohibition Revisited," *Inquiry*, December 5, 1977, p. 20, n. 1. Compliance with retroactive registration of semiautomatics in Boston and Denver has been about 1%. About 10% of California's 300,000 "assault weapon" owners registered as required by law.
11. Registration lists facilitated gun confiscation in Greece, Ireland, Jamaica, and Bermuda. B. Bruce-Briggs, "The Great American Gun War," *The Public Interest*, (Fall 1976), p. 59; Kates, *Why Handguns Bans Can't Work*, p. 16.

The Washington, D.C., city council considered (but did not enact) a proposal to use registration lists to confiscate all shotguns and handguns in the city. When reminded that the registration plan had been enacted with the explicit promise to gun owners that it would not be used for confiscation, the confiscation's sponsor retorted, "Well, I never promised them anything!" "Wilson's Gun Proposal," *Washington Star-News*, February 15, 1975, p. A 12; Lawrence Francis, "Washington Report," *Guns & Ammo*, December 1976, p. 86.

The Evanston, Illinois, police department also attempted to use state registration lists to enforce a gun ban. Paul Blackman, "Civil Liberties and Gun-Law Enforcement: Some Implications of Expanding the Power of the Police to Enforce a 'Liberal' Victimless Crime," Paper presented at the annual meeting of the American Society of Criminology, Cincinnati, 1984, p. 14. In 1989, the Illinois Legislature considered a proposal to confiscate semi-automatics, using the existing gun registration forms to find out where to round up the guns.

When Illinois Firearms Owners Identification Cards were first issued, persons with a felony conviction were eligible to possess a firearm if the conviction was more than 5 years in the past. Later, the Illinois legislature retroactively changed the bar date to 20 years. Registered owners who had a felony conviction more than 5 years old



and less than 20 had their guns confiscated. Since there are always proposals to expand the class of prohibited persons (such as barring all persons with even single misdemeanor drug or violent offense, no matter how long ago), and always proposals to confiscate various lawfully-acquired types of weapons, many gun-owners are leery of being placed on any kind of government list—even if they are in full compliance with the (current) law.

New York City has used registration lists to confiscate lawfully-purchased firearms, such as M-1 carbine, which the City retroactively classified as "assault weapons." *Daily News*, Sept. 5, 1992.

12. The Supreme Court has ruled that the Constitution prohibits the government from registering purchasers of newspapers and magazines, even of foreign Communist propaganda. *Lamont, DBA Basic Pamphlets v. Postmaster General*, 381 U.S. 301 (1965). The U.S. Post Office intercepted "foreign Communist propaganda" before delivery, and required addressees to sign a form before receiving the items. The Court's narrow holding was based on the principle that addressees should not have to go to the trouble of filling out a form to receive particular items of politically oriented mail. Since the Post Office had stopped maintaining lists of propaganda recipients before the case was heard, the Court did not specifically rule on the list-keeping practices. One may infer that the Post Office threw away its lists because it expected the Court would find them unconstitutional. See also *Thomas v. Collins*, 323 U.S. 516 (1944) (registration of labor organizers).

13. 5 United States Code § 552a(i)(1).

14. Carl Ingram, "Gun Law Forces Mental Hospitals to Name Patients," *Los Angeles Times*, Feb. 7, 1991.

15. For example, Arlington, Virginia, requires handgun applicants to "authorize a review and full disclosure of all arrest and medical psychiatric records." Form 2020-63 (Form 4/88).

16. State of Illinois, Department of Public Safety, Firearm Owners Identification Application, question 9, FOID-1.

17. State of New Jersey, "Application for Firearms Purchaser Identification Card," form STS - 3 (rev. 9-1-79).

18. A number of studies have argued that former mental patients are no more prone to commit violent crimes than is the public as a whole. U.S. Senate Subcommittee on the Constitution, Judiciary Committee, "Hearings on the Constitutional Rights of the Mentally Ill," 91st Congress, 1st & 2d sessions (Washington: 1977), p. 277; B. Ennis, *Prisoners of Psychiatry* (1970), pp. vi, 225; G. Morris, "Criminality and the Right to Treatment," in *The Mentally Ill and the Right to Treatment* (1970), pp. 121-24; Livermore, Malmquist, & Meehl, "On the Justifications for Civil Commitment," 117 *University of Pennsylvania Law Review* 75, 83 n.22 (1969).

Some studies have suggested that committal decisions are often unfair and incorrect. A. Wiley, "Rights of the Mentally Ill," p. 11; Ennis, p. vii.

19. Rep. Marlenee, *Congressional Record*, Sept. 15, 1988, pp. H7643-44.

20. For several months in 1970, the F.B.I. ran out of funds to process state requests for fingerprint checks. Some New Jersey chiefs of police stopped processing firearms permit applications, and told gun applicants to sue in court to obtain a license. J. Edgar Hoover, Director, Federal Bureau of Investigation, Letter to All Fingerprint Contributors, May 21, 1970; Joseph Santiago, "Chief Balks On Permits For Guns," *The Record*, July 10, 1970; John Spencer, "Registration of Guns Becomes Prohibition of Guns," (letter to the editor), *The Record*, n.d. (written Aug. 27, 1970).

21. Testimony of Sergeant R.G. Peppersack, Md. St. Police Commander, Firearms Lic. Sect., before Subcomm. on the Const., June 16, 1987.

## WAITING PERIODS

---

22. Donald B. Kates, "On Reducing Violence or Liberty," *Civil Liberties Review*, (American Civil Liberties Union) August/September 1976, p. 56.
23. Statement of Robert F. Mackinnon, on behalf of the Coalition of New Jersey Sportsmen, before the House Committee on the Judiciary, on *Legislation to Modify the 1968 Gun Control Act*, part 2, serial no. 131, 99th Congress, 1st and 2d sess., Feb. 27, 1986 (Washington D.C.: Government Printing Office, 1987), p. 1418. According to the Department of Justice Task Force, the typical delay in New Jersey is 6 to 10 weeks. Task Force, p. 84.
24. For a variety of cases of lawless enforcement of the gun laws, see *Motley v. Kellogg*, 409 N.E.2d 1207 (Ind. App. 1980) (police chief "denied members of the community the opportunity to obtain a gun permit and bear arms for their self-defense"); *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980) (police determination that self-defense did not constitute "good reason" for gun permit voided by court); *Buffa v. Police Dept. of Suffolk County*, 47 A.D.2d 841, 366 N.Y.S.2d 162 (2d Dept. 1975) (mere "withdrawal of police approval" was insufficient grounds to revoke license); *Storace v. Mariano*, 35 Conn. Sup. 28, 391 A.2d 1347, 1349 (1978) ("in my opinion, he is an unsuitable person to carry a gun" was not a suitable reason for denying a permit); *Salute v. Pitchess*, 61 Cal. App. 3d 557, 132 Cal. Rptr. 345, 347 (2d Dist. 1976) (sheriff's unilateral determination "that only selected public officials can show good cause for a permit" was illegal); *Schwanda v. Bonney*, 418 A.2d 163, 165 (Me. 1980) (voiding police effort to impose criteria not based on statute); *Iley v. Harris*, 345 So.2d 336, 337 (Fla. 1977).
25. For some examples of the New York City Police Department's flagrant abuse of the statutory licensing procedure, see: *Shapiro v. Cawley*, 46 A.D.2d 633, 634, 360 N.Y.S.2d 7, 8 (1st Dept. 1974) (ordering N.Y.C. Police Department to abandon illegal policy of requiring applicants for on-premises pistol license to demonstrate unique "need"); *Turner v. Codd*, 85 Misc. 2d 483, 484, 378 N.Y.S.2d 888, 889 (Special Term Part 1, N.Y. County, 1975) (ordering N.Y.C. Police Department to obey *Shapiro* decision); *Echtman v. Codd*, no. 4062-76 (N.Y. County) (class action lawsuit which finally forced Police Department to obey *Shapiro* decision).  
Also: *Bomer v. Murphy*, no. 14605-71 (N.Y. County) (to compel Department to issue blank application forms for target shooting licenses); *Klapper v. Codd*, 78 Misc.2d 377, 356 N.Y.S.2d 431 (Sup. Ct., Spec. Term, N.Y. Cty.) (overturning refusal to issue license because applicant had changed jobs several times); *Castelli v. Cawley*, *New York Law Journal*, March 19, 1974, p. 2, col. 2 (Applicant suffered from post-nasal drip, and repeatedly cleared his throat during interview. His interviewer "diagnosed" a "nervous condition" and rejected the application. An appeals court overturned the decision, noting that the applicant's employment as a diamond cutter indicated "steady nerves.")
26. Gary L. Wright, "Woman Won't Be Charged: Boyfriend's Slaying Ruled Self-Defense," *Charlotte Observer*, October 3, 1990.
27. S. 414 & H.R. 1025, § 2, proposed 18 U.S.C. § 922 (a)(1)(B).
28. Robert E. McSherly, Jr., letter to the Editor of *Orange County Register*, reprinted in Gun Owner's ACTION Committee, *We The People* (newsletter), September 1990, p. 7.
29. *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).
30. Notably, many gun control activists do not consider self-defense legitimate. The United Methodist Church, which founded the National Coalition to Ban Handguns (now named the Coalition to Stop Gun Violence), and whose Washington office building also houses the NCBH, declares that people should submit to rape and robbery rather than endanger the criminal's life by shooting him. Methodist Board of Church and Society, "Handguns in the United States" (pamphlet); same statement in Rev. Brockway, "But the Bible Doesn't Mention Pistols," *Engage-Social Action Forum*, May 1977, pp. 39-40. The Presbyterian Church, another affiliate of the National Coalition to Ban Handguns, supports a complete ban on handguns because it opposes "the killing of anyone, anywhere, for any reason," including defense of others against a life-threatening attack. Rev. Young, Director of Criminal Justice

Program for Presbyterian Church, testifying in 1985-6 Hearings on Legislation to Modify the 1968 Gun Control Act, House Judiciary Committee, Subcommittee on Crime, vol. I, p. 128. The *Washington Post* condemns "the need that some homeowners and shopkeepers believe they have for weapons to defend themselves" as representing "the worst instincts in the human character." Editorial, "Guns and the Civilizing Process," *Washington Post*, September 26, 1972.

31. See, for example, *Bowers v. DeVito* 686 F.2d 616 (7th Cir. 1982) (no federal Constitutional requirement that police provide protection); *Calogrides v. Mobile*, 475 So. 2d 560 (Ala. 1985); Cal. Govt. Code §§ 845 (no liability for failure to provide police protection) and 846 (no liability for failure to arrest or to retain arrested person in custody); *Davidson v. Westminster*, 32 Cal.3d 197, 185 Cal. Rep. 252; 649 P.2d 894 (1982); *Stone v. State* 106 Cal.App.3d 924, 165 Cal. Rep. 339 (1980); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C.App. 1983); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App 1981); *Sapp v. Tallahassee*, 348 So.2d 363 (Fla. App. 1st Dist.), cert. denied 354 So.2d 985 (Fla. 1977); Ill. Rev. Stat. 4-102; *Keane v. Chicago*, 98 Ill. App.2d 460, 240 N.E.2d 321 (1st Dist. 1968); *Jamison v. Chicago*, 48 Ill. App. 3d 567 (1st Dist. 1977); *Simpson's Food Fair v. Evansville*, 272 N.E.2d 871 (Ind. App.); *Silver v. Minneapolis* 170 N.W.2d 206 (Minn. 1969); *Wuetrich v. Delia*, 155 N.J. Super. 324, 326, 382 A.2d 929, 930, certif. denied 77 N.J. 486, 391 A.2d 500 (1978); *Chapman v. Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753 (Penn. 1981); *Morris v. Musser*, 84 Pa. Cmwh. 170, 478 A.2d 937 (1984).

The law in New York remains as decided by the Court of Appeals the 1959 case *Riss v. New York*: the government is not liable even for a grossly negligent failure to protect a crime victim. In the *Riss* case, a young woman telephoned the police and begged for help because her ex-boyfriend had repeatedly threatened "If I can't have you, no one else will have you, and when I get through with you, no-one else will want you." The day after she had pleaded for police protection, the ex-boyfriend threw lye in her face, blinding her in one eye, severely damaging the other, and permanently scarring her features. "What makes the City's position particularly difficult to understand," wrote a dissenting opinion, "is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her." *Riss v. New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 806 (1958).

Ruth Brunell called the police on 20 different occasions to beg for protection from her husband. He was arrested only one time. One evening Mr. Brunell telephoned his wife and told he was coming over to kill her. When she called the police, they refused her request that they come to protect her. They told her to call back when he got there. Mr. Brunell stabbed his wife to death before she could call the police to them that he was there. The court held that the San Jose police were not liable for ignoring Mrs. Brunell's pleas for help. *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6 (1st Dist. 1975).

32. The 1/3 figure comes from the author's conversation with Ms. Sherman, head of the Pennsylvania state police firearms unit, cited above. Part of the 1/3 drop-off may be caused by people who are disqualified by the local police background check, but (based on data from other states) ineligible buyers only account for, at most, a few percent of buyers. The rest of the 1/3 drop-off, therefore, is best explained by buyers changing their mind, as would buyers of virtually every product, if forced to make two trips for a single purchase.

33. Research Associates, Inc., p. 34 (A firearms control program that substantially reduced gun sales would result in a tax revenue loss, in 1968 dollars, of over one hundred million dollars.)

34. Gary Kleck, "The Relationship Between Gun Ownership Levels and Rates of Violence in the United States," in ed. Donald B. Kates *Firearms and Violence: Issues of Public Policy* (Cambridge, Mass.: Ballinger, 1984): 99-132.

35. Task Force Draft, 54 Federal Register 43528, Oct. 25, 1989.

36. Task Force, p. 10.

## WAITING PERIODS

---

37. Eleven states do not have automated records. Ten other states have less than 65% of their records automated. Task Force, p. 8.
38. "Testimony of Gary L. Bush Chairman, Search Group, Inc., Before the Subcommittee on Crime of the House Judiciary Committee," January 25, 1990, p. 14.
39. *Hammons v. Scott*, 423 F. Supp. 618 (N.D. Cal. 1976); *Rowlett v. Fairfax*, 446 F. Supp. 186 (W.D. Mo. 1978).
40. See also the testimony of David Hall, undersheriff of Lake County, Florida:  
Q. Can't you do one in seven days? Would you be able to do it?  
Hall: It would be a very cursory check.  
Q: Would you be satisfied with that kind of check...?  
Hall: No, sir, I personally wouldn't feel comfortable with it.  
State of Florida, Commission on Assault Weapons, *Report* (May 18, 1990), transcript of hearings on February 5, 1990, p. 9.
41. 54 Fed. Reg. 43545.
42. The figure is based on the BATF estimate of 7.5 million firearms transactions per year, and the Task Force estimate of an initial "hit" rate of 12 to 16% of applicants.
43. Task Force, p. 15.
44. Rep. Dan Lungren, *Congressional Record*, Sept. 15, 1988.
45. As Josh Sugarman, former communications director for the Coalition to Stop Gun Violence, wrote in *The Washington Monthly*: "handgun controls do little to stop criminals from obtaining handguns." Josh Sugarman, "The NRA Is Right: But We Still Need to Ban Handguns," *Washington Monthly* (June 1987): 11-15.
46. National Coalition to Ban Handguns, "Twenty Questions and Answers" (no date), question 8 ("Banning 'Saturday Night Specials' would be a useful first step towards an ultimate solution.")
47. The author was a member of the panel that questioned the two debaters.
48. Founding Chair Pete Shields explained his strategy for prohibition: "The first problem is to slow down the number of handguns being produced and sold in this country. The second problem is to get handguns registered. The final problem is to make possession of all handguns and all handgun ammunition—except for the military, police, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal." Richard Harris, "A Reporter at Large: Handguns," *New Yorker*, July 26, 1976, p. 58.
49. HCI supports the laws in Chicago and Washington, D.C. which prohibit the lawful acquisition of handguns. Handgun Control, Inc., "Fact Card." District of Columbia Code §§ 6-2132(4) and 6-2372.
50. Rep. Trafficant, *Congressional Record*, Sept. 15, 1988, p. H7644.
51. See note 48.

52. H.R. 7, §§ (a)(1)(A)(ii)(I) (a sale may proceed only if “the transferor has received written verification that the chief law enforcement officer has received the statement”); (a)(2) (“Paragraph (1) shall not be interpreted to require any action by a chief law enforcement which is not otherwise required.”)
53. S. 414 & H.R. 1025, proposed 18 U.S.C. § 921(a)(29): “The term ‘handgun’ means—(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand.” The HCI handgun definition could be read to apply to rifles or shotguns that have folding stocks and extended pistol grips.
54. S. 414 & H.R. 1025, § 2, proposed 18 U.S.C. § 922 (s)(7): “A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages...for preventing the sale or transfer to a person who may lawfully receive or possess a handgun.”
55. See note 48. “And most importantly, you’ve helped us hurt the NRA and its friends in the handgun industry in the wallet, where it counts—and a 10-year low in new handgun sales proves it!” Sarah Brady, Fund-raising letter for Handgun Control, Inc., “Monday” (1988), p. 2.
56. Representative Hughes of New Jersey, the leading sponsor of the waiting period, calls himself a sportsman, and claims to protect “the privilege of owning weapons in this country.” *Congressional Record*, Sept. 15, 1988, p. H7654. Of course what makes this country different from other countries is that gun ownership is an explicit right, not a privilege. See generally, David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Buffalo, NY: Prometheus Books, 1992).
57. Erik Eckhom, “A Little Gun Control, a Lot of Guns,” *New York Times*, Aug. 15, 1993, p. B1.
58. For an overview of the “assault weapon” issue, see Eric C. Morgan & David B. Kopel, *The “Assault Weapon” Panic: Political Correctness Takes Aim at the Constitution*, Independence Institute, Issue Paper 10-93 (Golden, Colo., Apr. 10, 1993).
59. For more, see David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Buffalo: Prometheus Books, 1992).

## VII. CONSTITUTIONAL ISSUES

*Synopsis: Waiting periods are a prior restraint on the exercise of Constitutional rights. The very point of basic rights like free speech, or free exercise of religion, or the right to keep and bear arms, is that a person does not need to ask for government approval to exercise those rights. Waiting periods, because of their inefficacy and potential for abuse, are not the least restrictive means of attacking gun crime without interfering with the right to bear arms.*

Is a federal waiting period Constitutional? The issue has been never been directly tested in court. State waiting periods are common, but the prevalence of a practice is no guarantee of its Constitutionality. Racial segregation, after all, was the norm in most of the US for the century after the Civil War, even though the Constitution forbade it.

One view of Constitutional interpretation was articulated by Justice Black. He viewed the Constitution literally. For example, he took the First Amendment's command "Congress shall make no law respecting the freedom of speech..." to mean that Congress could pass *no* law regarding free speech. Justice Black viewed the Second Amendment with a similar literalness: "its prohibition is absolute."<sup>1</sup> The more prevalent view, however, is that no Constitutional provision is absolute.

Regardless of which view is adopted, the most appropriate guide for analysis of the Second Amendment is the First Amendment. Of the entire Bill of Rights, only the First, Second, and Third Amendments guarantee particular substantive rights.<sup>2</sup> Amendments Four through Eight are due process requirements for the government to obey, while Amendments Nine and Ten are non-specific reservations of rights. The Supreme Court has indicated that the First and Second Amendments should be interpreted according to the same principles.<sup>3</sup> Indeed, it is necessary to interpret the Second Amendment with just as much vigor as the First in order to obey the Court's command that all Constitutional rights must be treated with equal respect, with no right being particularly favored or disfavored.<sup>4</sup> And of course all Constitutional rights must be broadly construed.<sup>5</sup>

### A. PRIOR RESTRAINTS ON CONSTITUTIONAL RIGHTS

While the First Amendment protects freedom of speech, there are legitimate debates about what kinds of communication are considered "speech." Pornography, picketing, price-fixing, and perjury are activities which, at least arguably, are not included within the freedom of speech. Likewise, the right to bear "arms" is sometimes said not to apply to machine guns, nunchakus, brass knuckles, switchblades, or anti-aircraft rockets.

For communication that is clearly within the freedom of speech (such as political commentary), the single clearest principle is that prior restraints are virtually never lawful. While the government (through laws against libel or against criminal incitement) may punish

speech after it occurs, the government may almost never impose a prior restraint by requiring a person receive permission before speaking.<sup>6</sup>

The various police permission proposals for firearms destroy the normal presumption of innocence and impose prior restraints. A person is forbidden to exercise her right to bear arms unless the police satisfy themselves that the person is not guilty.<sup>7</sup> Citizens who wish to protect themselves should not have to wait to receive police permission. The very point of basic rights like free speech, or free exercise of religion, or the right to keep and bear arms, is that a citizen does not need to ask for government approval to exercise those rights.<sup>8</sup>

*“...the 5-government-working-day waiting period for every handgun purchase proposed by Handgun Control is more severe than the existing laws in 41 of the 50 states.”*

In the context of abortion, the US Supreme Court in *Planned Parenthood v. Casey* upheld a 24 hour abortion waiting period as not being an “undue burden” on the right to abortion.<sup>9</sup> Subsequent to the Casey decision, a Tennessee court struck down a law requiring a three-day wait for abortion.<sup>10</sup> Precedent would suggest, then, that a five government working day waiting period for exercising the right to arms could be unconstitutional.

## B. BALANCING TESTS

Another principle, originally developed under First Amendment analysis, but now considered to have general applicability, is that of “least restrictive means.” When the government regulates Constitutionally-protected activity (such as speech or interstate commerce), even if the government is pursuing a substantial purpose:

that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same basic purpose.<sup>11</sup>

Courts have applied the “least restrictive means” principle to strike down infringements on the right to keep and bear arms.<sup>12</sup>

Because a waiting period is so patently ineffective, it is not the least restrictive means to achieve the substantial government interest in reducing gun misuse. The waiting period fails the less restrictive means test because it imposes a broad restriction on all firearms purchases (or all handgun purchases for a limited wait) that is not narrowly tailored. There are a large

number of less restrictive methods the government might adopt, discussed below in Part VIII, to reduce gun misuse.

### C. FEDERALISM

Handgun Control, Inc. claims that 22 states have waiting periods. The statement is not completely accurate. The majority of American states impose no major restrictions on firearms purchases in addition to those under existing federal law. Federal law requires the purchaser of any gun to fill out a form which is permanently retained by the dealer, and is available for inspection by federal authorities. Some states require handgun purchasers (or all gun owners) to obtain a license. Once granted a license, the license-holder may obtain an unlimited number of firearms of all types without further approval, for as long as the license is valid (for life, or a term of one or more years).<sup>13</sup> South Carolina runs a background check after the person has picked up the gun.<sup>14</sup> Wisconsin has a two day waiting period.<sup>15</sup>

Only 16 states actually have a system like what is proposed by Handgun Control, Inc. as a federal law, and pushed by HCI in the state legislatures: a statute requiring individual police permission for every single handgun purchase. In four of those states (Pennsylvania, Oregon, Indiana, and Washington), a person who holds a permit to carry a concealed firearm is exempt from the waiting period; the police are statutorily required to grant concealed carry permits to all citizens unless there is a particular legal disability. Connecticut exempts from its wait anyone with a state hunting or local gun license, and allows transfers in less than 14 days if approval is granted earlier.<sup>16</sup> Tennessee also allows an instant transaction if the police approve, and in some rural counties, the waiting period is not enforced. Of the 11 states that require handgun purchasers to receive individual permission for each purchase under all circumstances, 3 have a waiting period shorter than the 5-government-working-day standard commonly proposed.<sup>17</sup> Thus, the 5-government working day waiting period for every handgun purchase proposed by Handgun Control is more severe than the existing laws in 41 of the 50 states. (The "seven-day waiting period" has been relabeled a "five-day-waiting period"—but as the purported length of the wait has declined, the actual wait has increased. The "five days" refer to five government working days, meaning that the wait will be at least 7 days, sometimes 8 days, and occasionally 9 days.)

*"Citizens who wish to protect themselves should not have to wait to receive police permission. The very point of basic rights like free speech, or free exercise of religion, or the right to keep and bear arms, is that a citizen does not need to ask for government approval to exercise those rights."*



Forty-one of the fifty states have decided not to implement laws as severe as the proposed uniform 5-government-working-day wait. Sometimes the federal government, viewing a growing trend in the states, makes the progressive state legislation into federal law. It cannot be said that there is a national trend in favor of waiting periods. It is true that some states that already had waiting periods for handguns have extended them to long guns.<sup>18</sup> Similarly, Florida, which already allowed counties to have limited 3-day waiting periods, voted in November 1990 to make the wait state-wide for handguns. The new Florida law had several provisions which made it more palatable to supporters of the right to bear arms. For example, persons with handgun carry permits (which are required by law to be issued to all qualified applicants) are exempt from the wait. As a state constitutional amendment, the Florida wait may prevent the state legislature from enacting stricter gun laws.

*"The 'seven-day waiting period' has disingenuously been relabeled a 'five-day-waiting period'—but as the purported length of the wait has declined, the actual wait has increased. The 'five days' refer to five government working days, meaning that the wait will be at least 7 days, sometimes 8 days, and occasionally 9 days."*

In states that do not already have waiting periods, there has been no willingness to adopt one. In the last decade, Nebraska has been the only state to add one.<sup>19</sup> Even Ohio, the home state of Senator Metzenbaum, the lead sponsor of the federal waiting period, has repeatedly rejected a waiting period. Indeed, the large majority of states, through preemption laws, have forbidden or abolished local waiting periods.<sup>20</sup>

It is sometimes asserted that the lack of a waiting period in some states makes enforcement of the law impossible in states that have one.<sup>21</sup> But ever since the federal Gun Control Act of 1968, citizens are only permitted to buy handguns in the state where they reside. If a Marylander wished to evade his state's 7-day wait, and buy in a state without a wait (such as West Virginia), he could not do so without providing proof that he was a resident of the other state. Only persons possessing false identification could evade the background check in one state.

## Endnotes

1. Speaking before a New York University Law School audience, Justice Black said: "Although the Supreme Court has held the Amendment to include only arms necessary to a well-regulated militia, as so construed, its prohibition is absolute." Hugo L. Black, "The Bill of Rights," 35 *New York University Law Review* 865, 873 (1960).

In *United States v. Miller*, the Court held that only arms useful to a well-regulated militia were protected by the Second Amendment. Seeing no military utility to a sawed-off shotgun, the Court upheld a strict federal licensing system.

As for the meaning of "a well-regulated Militia," the Court noted that to the authors of the Second Amendment, "The Militia comprised all males physically capable of acting in concert for the common defense. . . . Ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." 307 U.S. 174, 179 (1939).

2. Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment II: "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."

Amendment III: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The Third Amendment, having hardly ever been breached, has developed little case law.

3. In *United States v. Verdugo-Urquidez*, the Court ruled that the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects" applied to the same group protected by the Second Amendment "right of the people to keep and bear arms" and the First Amendment "right of the people peaceably to assemble." In every case, said the Court, the "right of the people" refers to individual citizens of the United States. 110 S.Ct. 1056, 108 L.Ed. 2d 222 (1990).

In *Konigsberg v. State Bar of California*, the Court rejected Justice Black's absolutist approach to Constitutional interpretation. The Court noted that the First Amendment on its face was absolute, and the Second Amendment contained an "equally unqualified command." Nevertheless, both Amendments were subject to reasonable limitations. 363 U.S. 36, 51 n. 24 (1961).

4. "Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or less extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of Constitutional values..." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982).

See also *Ullman v. United States*, 350 U.S. 422, 426-29 (1956): "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion...To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."

5. *Byars v. United States*, 273 U.S. 28, 32 (1927); *Fairbank v. United States*, 181 U.S. 283 (1901).

6. *New York Times v. United States* 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58, 79 (1963); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("Liberty of the press has meant principally, although not exclusively, immunity from prior restraint or censorship.")

7. Rep. Bosco derided the quaint notion that "gun purchasers in America should be considered innocent until they prove themselves guilty." *Congressional Record*, Sept. 15, 1988, p. H7651.

8. The right to bear arms obviously includes the right to purchase them, just as the right to free speech includes the right to purchase printed matter. See *Andrews v. State*, 50 Tenn. 165, 8 Am. Rep. 8 (1871).
9. *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992).
10. *Planned Parenthood v. McWherter*, (Davidson County Cir. Ct., Nov. 9, 1992)(Hamilton Gayden, J.).
11. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See also *Schneider v. State*, 308 U.S. 147, 161, 165 (1939); *American Communications Association v. Douds* 339 U.S. 382 (1950); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama*, 377 U.S. 288, 307-8 (1963); *Talley v. California*, 362 U.S. 60 (1960); *Dean Milk v. Madison*, 340 U.S. 349 (1951).
12. "[T]he legitimate governmental purpose in regulating the right to bear arms cannot be pursued by means that broadly stifle the exercise of this right where the governmental purpose can be more narrowly achieved." *State ex rel. Princeton v. Buckner*, 377 S.E.2d 139, 144 (W.Va. 1988). See also *City of Lakewood v. Pillow*, 180 Colo. 20, 501 P.2d 744, 745 (Colo. 1972) (voiding ban on gun sales within city limits and a requirement that persons carrying firearms be licensed: "Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.")
13. Some states with a license system are Indiana (license for handguns valid for 4 years); Iowa (handguns, 1 year); and Massachusetts (all guns, lifetime).
14. Pennsylvania runs a state records check after the person picks up the handgun following a 48 hour wait. Task Force on Felon Identification System, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (Washington: Department of Justice, October 1989), pp. 82-83.
15. Task Force, p. 83.
16. Rep. Kennelly, *Congressional Record*, Sept. 15, 1988, p. H7650.
17. The states with waiting periods for each handgun purchase are listed below. In some cases, the time period is not a minimum waiting period, but the maximum time the police are allowed to process an application for a permit to purchase a handgun [the time limits are not always observed, see Parts IV and V above]: Alabama (2 days); California (all guns, 15 days); Connecticut (all guns, 14 days); Hawaii (handguns, 15 days); Maryland (handguns and "assault weapons," 7 days); Michigan (handguns); Missouri (handguns, must issue within 7 days); New Jersey (all guns, 30 days); New York (handguns, 180 days); North Carolina (handguns, 30 days); Oregon (handguns, 15 days); Pennsylvania (handguns, 2 days); Rhode Island (all guns, 7 days); South Dakota (handguns, 2 days); Tennessee (handguns, 15 days); Washington (handguns, 5 days); Wisconsin (handguns, 2 days). *Identifying Persons, Other Than Felons*, p. 114, exhibit B.4 (and updated to account for 1990 changes in state laws).
18. California and Rhode Island in 1990. Maryland extended its wait to "assault weapons" in 1989.
19. Nebraska's two-day waiting period for handguns will sunset into an instant check.
20. Forty-one states have some form of preemption. Of the 41, 36 are by statute, and 5 by judicial decree. Some of the preemption states (such as Massachusetts) allow local gun controls if the state legislature approves them; some other preemption states (like Virginia) have grandfathered in restrictive local ordinances.
21. Rep. Hoyer (Maryland), *Congressional Record*, Sept. 15, 1988, p. H7640.

## VIII. ALTERNATIVES

*Synopsis: There a number of alternatives that—while clearly superior to the waiting period—do not represent good policy choices in themselves. The Instant Telephone Check and the 5-government-working-day waiting period/optional background check both use the same (often inaccurate) database. The Instant Check has the obvious advantage of being speedy, and not interfering with expeditious acquisition of a self-defense gun. Firearms Owners Identification Cards take a long time to obtain initially, and serve as a basis for gun-owner registration and overly broad fingerprinting of the general population. Turning drivers licenses into "smart cards" also requires citizens to submit fingerprints to the government in order to exercise their Constitutional rights. A much better approach would be to make all driver's licenses contain a magnetic code indicating whether the person has a violent felony conviction. The most effective way to deal with criminals possessing guns is to better enforce laws regarding criminal gun acquisition and to target the black market trade that supplies the gigantic majority of criminal guns. Researchers from the National Institute of Justice have suggested several possibilities to directly attack the black market; none of the NIJ proposals interferes with Constitutional rights.*

Henny Youngman was once asked how he liked his wife. "Compared to what?" he replied. There are a number of alternative controls on retail gun sales that, compared to a waiting period, are quite attractive.

If the only issue to be decided what kinds of restrictive controls on retail gun sales are best, all of the alternatives detailed below compare favorably to the waiting period. They are just as effective at stopping legal purchases by ineligible buyers as a waiting period would be. Because the alternatives do not give the abusive administrators an easy opportunity maliciously to block every retail transaction, these alternatives are much less likely to result in wholesale denials of the right to bear arms, and hence less likely to threaten public safety. At the same time, they consume police resources at a rate equal to or significantly less than the rate at which a waiting period would consume police resources. Hence, the alternatives are clearly superior to a waiting period from all perspectives.

On the other hand, if the question is not how further to restrict retail gun sales, but instead if any such restrictions would be worthwhile, none of the alternative controls appear satisfactory. Like a waiting period, the alternative controls on legitimate sales can be evaded, and will likely do virtually nothing to disarm criminals. And while the alternative controls are not as dangerous to civil liberties as is a waiting period, the alternatives still pose some danger.

The most effective way to promote public safety and preserve civil liberties is to crack down on the black market that supplies criminal guns. A number of approaches for attacking the

black market are suggested below.

## A. "INSTANT" CHECKS

One alternative to waiting periods is an "instant telephone check." The first state to enact such a check was Virginia; and Florida, Wisconsin, Illinois, and Delaware have followed suit. When a Virginia gun dealer sells any handgun or certain long guns to a Virginia resident, the dealer calls a toll-free number at state police headquarters, to verify that the purchaser has no legal disqualification. If everything proceeds properly, the sale can be consummated with no more delay than a credit card check might entail.

*"The small loss to public safety from the elimination of the 'cooling off' period is more than offset by allowing persons who need a gun for immediate self-defense to get one, and by substantially reducing the numbers of arbitrary denials of firearms"*

Support of an instant check is widespread. Criminologists and legal scholars such as Gary Kleck, Don Kates, and Robert Cottrol who are generally skeptical of gun prohibition support the instant check system. Even big-city police chiefs who generally agree with Handgun Control, Inc., split from that group in preferring the instant check over a national firearms identification card.<sup>1</sup> The National Rifle Association also supported the instant telephone check in Virginia.

In terms of sorting out ineligible buyers, the instant check is just as effective as a 7-day waiting period, according to the Department of Justice Task Force, and for that reason was supported by Attorneys General Barr and Thornburgh.<sup>2</sup> Unfortunately, in terms of

preventing incorrect denials of the right to bear arms, the instant check is almost as bad as the waiting period. Because the data quality for instant checks is, according to the Task Force, equivalent to that for a one or three week background check, only 84%-88% of applicants will be initially allowed to purchase if there were a national instant check. The unlucky remainder must go through a secondary verification process (such as submitting fingerprints at state police headquarters) that would take several weeks.<sup>3</sup>

Of course a criminal can evade an "instant" check just as easily as he can evade any other check. All he needs is a fake driver's license with another name. Since false social security and alien registration cards may sometimes be bought for as little as \$35,<sup>4</sup> and since those cards are usually sufficient to obtain a driver's license, the instant check is likely to be just as porous as longer checks. The instant check, therefore, like the waiting period, could be evaded by anyone with false identification.<sup>5</sup>

For the purchasers who are rejected initially, fingerprint checks might be required to verify their identity. It is estimated that, if the instant check were national and comprehensive, the FBI would need 395 new clerical employees and 8,000 more square feet of office space to process the fingerprint work.<sup>6</sup> Given the limited efficacy of any police permission system, it might be considered whether 395 additional FBI employees might be better employed at projects focused on criminals, rather than on law-abiding citizens.

An instant check will cost between \$7.07 and \$9.39 per purchase.<sup>7</sup> For a person buying a high-quality target pistol, the cost is hardly noticeable. For a poor person buying a \$40 used revolver for self-defense, the cost is considerable. The cost could be justified, if it yielded important benefits.

Significantly, the instant check is subject to the same problem of creating a gun and gun-owner registration system as is a waiting period. As the Task Force observes, "Any system that requires a criminal history record check prior to purchase of a firearm creates the potential for the automated tracking of individuals who seek to purchase firearms."<sup>8</sup> If a transaction number must be placed on the dealer gun sale form (to prove the dealer made the check), and if the state retains its own record of transaction numbers, the record-keeping could easily be perverted into gun registration.

At the least, any instant check system should include protections to absolutely bar gun-owner record retention, and should specify that if computer or other failure prevents the police from approving the sale, the sale should be delayed no more than 24 hours.

The instant check is clearly preferable to a waiting period. The instant check uses the same criminal/mental data base as would a waiting period, and would therefore be equally effective in denying ineligible buyers. Because the large majority of sales would be approved on the spot, abusive administrators would have much less of an opportunity to interfere with the right to bear arms. It is true that an instant check eliminates the "cooling off" feature of a waiting period; but as discussed above, the number of crimes that could be prevented by "cooling off" is very, very small. The small loss to public safety from the elimination of the "cooling off" period is more than offset by allowing persons who need a gun for immediate self-defense to get one, and by substantially reducing the numbers of arbitrary denials of firearms purchases.

*"Persons exercising their Constitutional right to bear arms should not be forced to pay a special tax to support enforcement efforts against gun criminals, any more than camera owners or magazine readers should be taxed to pay for enforcement of child pornography laws."*

## B. FIREARMS OWNERS IDENTIFICATION CARDS

One suggested alternative to waiting periods for each firearm purchase is the creation of a Firearm Owners Identification Card (FOID). A person applies once for a FOID card and submits her fingerprints to the authorities; after a four to six week review process, the person is granted a card which allows her to make unlimited purchases, with no further approval, as long as the card remains valid. (The card might expire after one year, or three years, or be valid for life.) Massachusetts and Illinois are among the states currently using a FOID system. Faced with the choice between the instant telephone check and the FOID card, Handgun Control, Inc. prefers the FOID card.<sup>9</sup>

The Task Force suggests that each FOID card would cost \$30. Approximately 1,700 new FBI employees would be required to process the necessary fingerprint checks of FBI files. According to the Task Force, the FOID card, taking up to six weeks to process, would be substantially more accurate than an instant check or a short waiting period.

As with the instant check or the waiting period, the list of FOID owners would be a *de facto* registration list of gun owners. The more serious civil liberties problem, however, involves massive fingerprinting.

The National Association of Police Organizations favors the collection of fingerprints of gun owners as the first step towards a comprehensive fingerprint system: "Hence the development of such an integrated national fingerprint system should be considered not merely for its benefits in connection with felon identification concerning firearms purchases but also in connection with improving law enforcement in general."<sup>10</sup>

The American Civil Liberties Union states that "limited criminal history record checks, with fingerprint cards, are justified in certain licensing and employment situations. However, we oppose routine fingerprinting of all individuals who seek to buy firearms as an intrusion into privacy that cannot be justified by the minuscule benefit that may be achieved...."<sup>11</sup> Of course the ACLU's principle should also apply not only to proposed national fingerprint proposals, but also to the current practice in states such as New York and Illinois which routinely fingerprint the large fraction of the population which exercises its right to bear arms.

The same arguments that lead one to reject a national or identity card apply to federal gun licensing through a FOID. A national licensing system would require the collection of dossiers on half the households in the United States (or a quarter, for handgun-only record-keeping).

Implementing national gun licensing would make introduction of a national identity card more likely. Assuming that a large proportion of American families would become accustomed to the government collecting extensive data about them, they would probably not oppose making

everyone else go through the same procedures for a national identity card.

Although the problem of illegal immigration is immense, Congress has repeatedly rejected calls for a national ID card. The same reasons that impelled Congress to reject that national ID card should impel Congress (and the states) to reject large steps towards such a card.

### C. SMART CARDS

Another suggestion for screening of firearms purchasers has been the development of "smart" cards. As the Task Force explains, "every adult would carry an identification card issued by the state of residence, such as a driver's license, that would have electronically imprinted identifying information."<sup>12</sup> An instant fingerprint check in gun stores will within a few years be technologically feasible.<sup>13</sup>

The Smart Card seems to pose no serious problems from a pure Second Amendment viewpoint. There would be no false denials, since the cardholder would not be confused with other people with similar names and birth dates. There would be hardly any delays in purchases, since almost everyone would have a smart card.<sup>14</sup> There would be less risk of creating a gun registration system, although some states would be tempted to include gun registration data directly on the smart card. Some sources have suggested that the Clinton administration's health care "reform" package will include medical smart cards for all Americans; a medical smart card could easily be modified to include all data regard an individual's gun ownership.

Nevertheless, civil libertarians (including those with no interest in the gun issue) should oppose the smart card for the same reason that they oppose a firearms owners identification card (FOID). Both smart and FOID cards are a huge step towards a national identity card. Smart/FOID cards would of course be introduced with the assurance that they would only be used for limited purposes. But the Social Security Number, it was promised, would only be used for Social Security; today, the SSN is in effect a mandatory universal identification number, demanded by all levels of government and by businesses.

The National Rifle Association rejects the idea that persons who fill out the federal gun purchase form (form 4473) should be required to affix a fingerprint: "Exercise of a constitutional right cannot be conditioned on making fingerprints available to the police."<sup>15</sup> Indeed, the Supreme Court has held that the Constitution forbids states to collect fingerprints of people merely because they exercise their Constitutional rights.<sup>16</sup> But the smart card requires a citizen to offer his fingerprint for government approval before exercising his right to bear arms.

The instant driver's license fingerprint scan offers few anti-crime advantages over the instant telephone check. Both can be evaded with false identification. (In the case of the



fingerprint scan, the criminal just makes sure to have someone else's print placed on his fake driver's license.)<sup>17</sup> The instant fingerprint scan proposal would result in every state having a fingerprint of all of its adult citizens. It is questionable whether states currently ought to be fingerprinting citizens who obtain drivers' licenses. It is repugnant to federalism to force states to erode the privacy of their citizens by forcing the states to collect fingerprints.

Like the FOID card, the smart card looks handsome when compared to the waiting period, since it is more effective in denying ineligible buyers, and is less susceptible to repeated abuse by anti-gun administrators. But standing on its own, the smart card fails important civil liberties tests.

#### D. DRIVER'S LICENSE MAGNETIC CODING

Of all the proposals for identifying persons with felony convictions who attempt to purchase guns at retail outlets, by far the best proposal is the one for magnetic coding of drivers licenses. When a person applied for a driver's license, the state department of motor vehicles would run a background check. If the person had a felony conviction, the driver's license would be embedded with a magnetic code indicating the existence of the conviction. If the driving applicant had no felony convictions, the a different magnetic code would be inserted. The department of motor vehicles would send, along with the actual license, a letter informing the person of the information contained in the magnetic code (felon or non-felon). When the person went to a gun store to make a purchase, the store would run the driver's license through a magnetic card reader. If the "not a felon" code appeared on the license, the sale could proceed.

A driver's license coding bill has been introduced in the Ohio legislature by Democratic State Rep. Mark Malone.

Unlike the instant check and the waiting period proposals, the driver's license check does not result in the police being supplied with the names of gun buyers—a practice which will inevitably lead to gun-owners being registered in central police files. The check usually would be just as fast as the "instant check," and on days when the state central computer breaks down, would be even faster.

Unlike with the instant check, there would be no problem of buyers denied their right to buy a gun because the buyers had the same name as someone else with a felony conviction. Any mistaken identification of the person as a felon would be noticed by the person when he received his driver's license, and a correction process could begin at that point. Indeed, the driver's license application process would allow many innocent people to discover that the government has records incorrectly identifying them as felons; the innocent people would then have the opportunity to have their police records corrected.

## WAITING PERIODS

---

To keep driver's licenses up-to-date, any person convicted of a felony would be required to surrender their current (non-felon) driver's license. If the newly-convicted were not being incarcerated, he would be required to obtain a new (felon-coded) license. For persons who do not drive, the state would issue state identification cards, just as states currently do to provide non-drivers with a form of state identification.

The coding program could have other uses as well. In states that prohibit felons from voting, code readers at the polling place would identify felons attempting to vote. (A code-reading program at a polling place would have to be implemented carefully, to avoid making long lines for voting even longer.)

The driver's license coding program is not perfect, however. First of all, it is a step in the direction of turning drivers licenses into universal smart cards, with all the civil liberties dangers discussed in the previous section.

Second, the coding program interferes to some degree with the privacy interests of persons who have felony convictions. Even if the licenses used special types of coding designed to be recognizable only to government-made magnetic code readers, it seems possible that someone would design private code readers capable of deciphering the licenses. Thus, employers might use the private code readers to inquire into the background of prospective employees.

But balanced against the potential privacy infringements on the small fraction of the population with a felony conviction must be weighed the certainty of privacy infringements for half the population that would result from all the alternatives discussed above. Having the government compile a list of the persons who exercise their right to keep and bear arms is a much more widespread privacy violation than having the fact of a person's felony conviction become discoverable by private persons who own magnetic card readers and can cajole or coerce a felon into handing over his driver's license.

One way to reduce the small privacy invasions for persons with felony convictions would be for states and the federal government to re-examine the list of persons prohibited from owning guns. It certainly makes sense to bar persons with violent felony convictions from owning guns. It is rather doubtful that public safety is really enhanced by prohibiting gun possession by persons who took too many deductions on their income tax, or got caught with a small quantity of psychedelic mushrooms in college.

In the long run, the best approach to avoid civil liberties violations in government policing of retail gun sales is for politicians and the gun control lobbies to stop pretending that control of retail gun sales has something to do with crime control. Instead of controlling retail gun buyers, the government should instead focus on controlling criminals. The next section offers some suggestions for such an approach.

## E. ANTI-CRIME ALTERNATIVES THAT DO NOT INFRINGE CIVIL LIBERTIES

If the goal is really to keep felons from obtaining guns (rather than imposing gun control for its own sake), then the focus on retail sales is entirely misplaced. Hardly any felons buy crime guns in stores; almost all of the guns come from the underground market. A system aimed at disarming criminals should aim primarily at the black market.

The National Institute of Justice authors, Wright and Rossi, suggest "stiff penalties for firearms transfers to felons whenever these were detected and, in the same framework, stiff penalties for the crime of gun theft."<sup>18</sup> Enhanced penalties for transfers to felons were added to federal law in 1986, and should be added to state laws as well. To assist prosecutions of gun theft, states should follow Virginia's lead, and make sale of a stolen firearm a special, serious offense.<sup>19</sup> In many states, the theft and sale of a \$75 gun amounts to only petty larceny. Selling a "hot" \$75 pistol should be a more serious offense than selling a "hot" \$75 toaster-oven.

Other ways to keep criminals away from guns include closer monitoring of parolees and probationers, and more intensive crackdowns on fencing operations for stolen firearms. State or federal strike forces aimed directly at gun-runners might be introduced or augmented. To deal with the rare cases of criminals with non-false identification buying guns at retail, police departments could distribute wanted posters and/or gun felon lists to gun stores.<sup>20</sup>

Funding for any of the above programs should come from the same general revenues that support all law enforcement, or from a special assessment on convicted gun felons.<sup>21</sup> Persons exercising their Constitutional right to bear arms should not be forced to pay a special tax to support enforcement efforts against gun criminals, any more than camera owners or magazine readers should be taxed to pay for enforcement of child pornography laws.

## Endnotes

1. Members of the Police Executive Research Forum (a think-tank for major urban police chiefs) supported an instant check over a firearms license card by a margin of 49% to 46%. Task Force, p. 113; Police Executive Research Forum, Comments on Justice Department's "Draft Report on Systems for Identifying Felons Who Attempt to Purchase Firearms," July 26, 1989, p. 2.
2. Former Attorney General Thornburgh believed that any verification system for firearms purchasers be at the point of sale, without further delays; he reasoned that any check that would be significantly more accurate would take a month, and "Such a delay would impose an unreasonable burden on legitimate gun purchasers." Richard Thornburgh, Attorney General, Letter to Dan Quayle, November 20, 1989, p. 2; *Identifying Persons, Other Than Felons*, p. 91.
3. In Florida, a man was denied the right to purchase because the police computer located a 10-year-old outstanding bench warrant. The warrant turned out to be for a lawsuit involving a bad check; the man had never even been told that a lawsuit had been filed against him.
4. "U.S.'s Barriers to Employment Are Not Stopping the Influx," *New York Times*, October 9, 1989, p. A13 (quoting I.N.S. assistant district director for investigation for Los Angeles. Several illegal workers said that a good set of papers cost \$300.)
5. 54 Fed. Reg. 43537.
6. Task Force on Felon Identification System, *Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms* (Washington: Department of Justice, October 1989), p. 40.
7. Task Force, p. 39.
8. 54 Fed. Reg. 43546.
9. Handgun Control, Inc., letter to Walter Barbee, Office of the Assistant Attorney General, July 26, 1989.
10. Comments to the Task Force.
11. Comments to the Task Force.
12. 54 Fed. Reg. 43530.
13. William S. Sessions, FBI Director, "The FBI and the Challenges of the 21st Century," *FBI Law Enforcement Bulletin*, January 1989, p. 3 (near-term feasibility of instant fingerprint readers in police cars).
14. People without driver's licenses or other official identification might face delays if such a card were mandatory for a purchase. Currently, firearms dealers may sell to someone whose identity they have verified, and verification may include personal knowledge. Thus, a small dealer can sell to a friend even if the friend does not present official identification, since the dealer knows the purchaser's bona fides based on personal knowledge.
15. National Rifle Association, "Comments of the National Rifle Association of America, Inc. on Draft Report for Identifying Felons Who Attempt to Purchase Firearms," (July 26 1989), p. 30.

16. In *Schneider v. State*, 308 U.S. 147, 164 (1939), the Court voided a New Jersey law requiring pamphleteers to undergo a "burdensome and inquisitorial examination, including photographing and fingerprinting." New Jersey, noted for its disdain of Second Amendment rights, apparently needs to be repeatedly reminded to obey the First Amendment as well. Despite the plain language of *Schneider*, a New Jersey township enacted a law requiring political canvassers to be fingerprinted. A federal appeals court found the fingerprinting, "stigmatizing, and an inappropriate burden on their right to do political work." *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1262-65 (3d Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).

17. As the Task Force explained, "the biometric card does not solve the problem of individuals using fraudulent 'breeder' documents, such as birth certificates, to obtain the biometric ID card."

18. James D. Wright & Peter Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (Hawthorne, NY: Aldine, 1986) p. 191.

The "McClure-Volkmer" firearms law reform in 1986 enhanced penalties for gun transfers to felons. 18 United States Code § 922(d).

19. Virginia Code § 18.2.-108.1 (1988).

20. The measure would be Constitutional according to the principles of *Paul v. Davis*, 424 U.S. 693 (1976) (distribution of names and photos of "active shoplifters" to retail stores).

21. 18 United States Code § 3013.



## IX. CONCLUSION

One night a man was walking down the street, and saw his friend crawling on the sidewalk, near a lamppost. The friend explained that he was looking for his wallet. The man got down on his knees, and helped the friend look. After about 15 minutes, the man said "I don't think your wallet is anyplace near this lamppost."

"Of course it isn't," the friend replied. "It fell out of my pocket over there, in that dark alley."

"Then why are you looking all the way over here, by the lamppost?" the man asked.

"Because the light is so much better over here."

Where should police officers look for armed criminals? In the dark alleys and black markets where criminals sell guns? Or behind a desk, where the light is better, so they can examine paperwork filled out by law-abiding citizens?

Especially when a legislature is considering laws that impact fundamental rights, it is improper to pass legislation simply because "it might help a little" or "it won't do much harm." Proponents of a new law have the burden of proving that their new law will accomplish a significant positive good. The burden is all the higher when proposed legislation affects a significant number of people, and waiting

periods regulate the 50% of American households that choose to possess firearms. Proponents of a waiting period have failed to carry their burden of persuasion.

The criminological evidence is solidly against the waiting period. Most police do not favor the waiting period, and even if they did, their opinions do not override Constitutional commands. While the Constitutional question is not at all well-settled, analysis of core Constitutional principles suggests that a waiting period cannot pass muster under the bar on prior restraints or the requirement of "least restrictive means."

*"The strongest evidence against a waiting period comes from the copywriters of Handgun Control, Inc. They have chosen to build their case on a misrepresentation—the empirically false claim that a waiting period would have stopped John Hinckley. If Handgun Control, Inc.'s most compelling argument is false, why should legislators or other citizens believe HCI's other assertions?"*

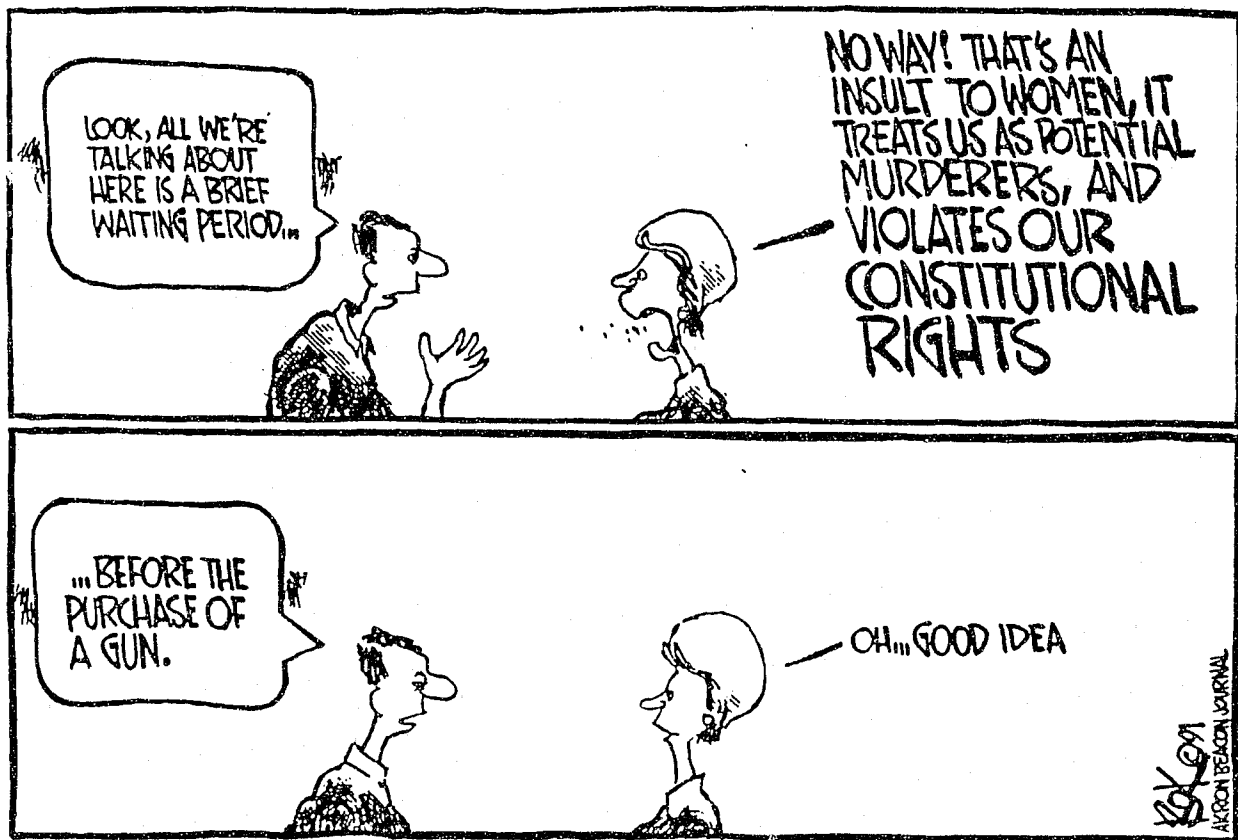
Of all the proposals for increased restrictions on retail firearms sales, the waiting period scores last in terms of disarming criminals, and first in terms of threatening the exercise of the right to bear arms. Alternative restrictions share many of the waiting period's defects. At the federal level, all of the proposals violate the spirit of the Tenth Amendment guaranteeing state autonomy. All of the proposals facilitate gun registration. All of the proposals force a citizen wishing to exercise her right to bear arms to receive, at least once, permission from the government. The waiting period gives abusive administrators a chance to interfere with every firearms transaction, while the alternatives allow interference with some transactions. In terms of fighting crime, all of the proposals are essentially trivial. They will force police officers to carry out a surveillance of ordinary citizens that will almost never result in the arrest of a criminal.

The strongest evidence against a waiting period comes from the copywriters of Handgun Control, Inc., the lead proponent of the bill. They have chosen to build their case on a misrepresentation—the empirically false claim that a waiting period would have stopped John Hinckley. If Handgun Control, Inc.'s most compelling argument is false, why should legislators or other citizens believe HCI's other assertions? Why should the public accept controls like waiting periods which are designed as intermediate steps towards prohibition? Why should Americans accept alternatives like instant telephone checks or smart cards which—although better in every respect than waiting periods—fail to eliminate the civil liberties problem created by forcing people to risk being put on a government list because they exercise their rights.

The premise of the waiting period—and of most suggested alternatives—is that citizens can be required to ask police permission before exercising their rights. But the Constitution does not create a privilege to possess “sporting” guns. The Constitution recognizes a fundamental human right to keep and bear arms.<sup>1</sup> And that is why waiting periods, besides being ineffective, are fundamentally wrong.

Endnotes

1. *United States v. Cruikshank*, 343 U.S. 542, 551-53 (1876). The Court stated that the rights to peaceably assemble and to keep and bear arms were not created by the Constitution, but merely recognized in the document. Those rights, the Court said, were not dependent on the Constitution for their existence, but were found "wherever civilization exists."





## *Curl up with Some Great Reading From the Firearms Research Project*

- “Children and Guns: Sensible Solutions” (90 pages, GBC bound). \$12.00. Covers accidents, suicide, schools, crime, and media violence. Proposes realistic solutions that will protect children and safeguard civil liberties.
- “Why Gun Waiting Periods Threaten Public Safety” (86 pages, GBC bound). \$12.00. A thorough analysis of the why waiting periods don’t work, and how they could cost more lives than they save.
- “Do Federal Gun Traces Accurately Reflect Street Crime?” (11pages). \$6.00. Debunks the claims that Virginia is the major source for New York City crime guns.
- “The ‘Assault Weapon’ Panic: Political Correctness Takes Aim at the Constitution” (94 pages, GBC bound). By Eric C. Morgan & David B. Kopel. \$12.00. Explains what so-called “assault weapons” do and do not have in common with other kinds of guns, how often they’re used in crime, whether the police really support prohibition, and the applicable Constitutional standards.
- “Concealed Carry Permits for Licensed, Trained Citizens: A Policy that is Saving Lives.” by Clayton E. Cramer & David B. Kopel. (36 pages, saddle-stitched). What happened to the murder rates in Florida, Washington, Utah, Georgia, West Virginia, Idaho, Oregon, Montana, and Pennsylvania after those states made it easier for citizens to obtain permits to carry concealed firearms for protection.
- “The Violence of Gun Control,” from *Policy Review* magazine, Winter 1993. (8 pages, saddle-stitched). \$2.00. Summary of current gun control issues, and the steps that supporters of the right to keep and bear arms are taking to enhance public safety.
- *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* \$28.95 + \$4.00 ship. Hardback book. How gun laws work in Japan, Great Britain, Canada, Australia, New Zealand, Jamaica, and Switzerland. Puts gun laws in their broader historical and cultural context, and draws lessons for appropriate US policy. Selected for the Comparative Criminology Book Award by the American Society of Criminology’s Division of International Criminology.



**All revenues from orders and donations will be used for printing and postage costs to mail information to political leaders and the media.**

Title	Price	Total
Children and Guns	12.00	
Waiting Periods	12.00	
Federal Gun Traces	6.00	
The "Assault Weapon" Panic	12.00	
Concealed Carry Permits	6.00	
The Violence of Gun Control	2.00	
The Samurai, the Mountie, and the Cowboy	32.95	
Subtotal		
Colo. residents add 3.5% sales tax		
Publication Total		

Please enter me as a \$50 supporter of the Firearms Research Project. Please send one free copy of "The Violence of Gun Control," "The 'Assault Weapon' Panic," and "Children and Guns."

Please enter me as a \$100 supporter of the Firearms Research Project. Please send me the items for the \$50 contributor, plus a copy of *The Samurai, the Mountie, and the Cowboy*.

Please enter me as a \$250 supporter of the Firearms Research Project. Includes one free copy of each of the publications listed on the order form, including a signed copy of *The Samurai, the Mountie, and the Cowboy*.

Name \_\_\_\_\_

Address \_\_\_\_\_

City • State • Zip code \_\_\_\_\_

Visa/MC

Exp. date

Signature (for credit card orders only) \_\_\_\_\_

**Make checks payable to Independence Institute, Firearms Research Project**

**Mail to:** Independence Institute, 14142 Denver West Parkway, Suite 101, Golden, CO 80401-3134.

**Or fax to:** (303) 279-4176. **Or phone orders to:** (303) 279-6536.