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Bureau of Justice Statistics Bulletin

A National Estimate

February 1997, NCJ 162787

Presale Firearm Checks

By Don Manson
Bureau of Justice Statistics

Gene Lauver
Regional Justice Information Service

On average each month an estimated 6,600 firearm purchases were prevented by background checks of

potential gun buyers during the 28 months after the effective date of the Brady Handgun Violence Prevention Act. The checks revealed purchasers' ineligibility under Federal or State laws to buy a handgun or other firearm. Over 70% of the rejected purchasers were convicted or indicted felons.

Between March 1994 and June 1996, for all States together, there were almost 9 million applications to purchase firearms and an estimated 186,000 rejections. The data does not indicate whether rejected purchasers later obtained a firearm through other means.

Highlights

Presale firearms checks: Estimates of inquiries and rejections

	Bureau of Alcohol, Tobacco and Firearms ^a				Bureau of Justice Statistics ^b	
	3/1/94-12/31/94		1/1/95-12/31/96		1/1/96-6/30/96	
	All States	Original Brady States ^c	All States	Original Brady States ^c	All States	Original Brady States ^c
Inquiries and rejections						
Inquiries/applications	3,679,000	1,696,000	4,009,000	1,884,000	1,308,000	570,000
Rejected	92,000	42,000	60,000	28,000	34,000	16,000
Rejection rate	2.5%	2.5%	1.5%	1.5%	2.6%	2.8%
Reasons for rejection						
Felony indictment / conviction	135,000	30,000	43,000	20,000	24,000	13,000
Other	26,000	12,000	17,000	8,000	9,000	3,000

Note: All estimated counts are rounded. Percentages were calculated from unrounded data. Detail may not add to total because of rounding. Information was provided by the Bureau of Alcohol, Tobacco and Firearms. The

estimates include all types of guns.

^aBased on 176 sources in 44 States. The estimates reflect only applications for purchase of handguns.

^bOriginal Brady States are the 32 States required to follow presale review procedures set out in the Brady Act when it became effective on February 28, 1994. (See the table on page 3.)

• Presale background checks of persons applying to buy a handgun or long gun resulted in about 6,600 rejections each month. This estimate, covering the period between March 1, 1994, and June 30, 1996, includes both States operating under the Brady Handgun Violence Prevention Act (Brady States) and States with comparable statutes

preventing gun sales to prohibited persons (Brady-alternative States).

• More than 7 in 10 of the rejections occurred when potential buyers were found to have had a felony conviction or to be under felony indictment.

On average each month, an estimated 3,100 applications were rejected in the 32 States that followed the review procedures set forth in the Brady Act when it became effective in February 1994 ("original Brady States"). During the period from March 1994 through June 1996, there were 86,000 rejections from a total of about 4.2 million applications or inquiries.

These are the first BJS statistics from an ongoing survey to assess the impact of presale checks on preventing sales of handguns and long guns to persons in prohibited categories. The categories are defined in the Federal Gun Control Act of 1968 or related State legislation. (See *Background* on this page.)

In the most recent 6 months for which national data were collected, January to June 1996, gun dealers made more than 1.3 million inquiries about the eligibility of potential buyers of handguns. About 34,000 ineligible customers were identified, a rejection rate of 2.6%. For the original Brady States during the most recent period, 570,000 inquiries or applications resulted in 16,000 rejections. This represented a 2.8% rejection rate.

During the first half of 1996, almost three-fourths of the rejections of a handgun purchase were based on a finding of a felony conviction or indictment. Although not all States have the capability to check nonfelon categories, fugitives from justice (6%), persons who violated State laws (4%), and persons under court restraining or protective orders (2%) accounted for the next largest categories of rejections.

Rejected applications, States) 1/1/96-6/30/96	100%
Felony (convicted/indicted)	72
Fugitive	6
State law prohibition	4
Restraining order	2
Mental illness or disability	1
Other*	15

*Includes persons addicted to illegal drugs, juveniles, aliens, violators of local ordinances, those who have renounced citizenship, persons dishonorably discharged, and unspecified.

As of midyear 1996, 14 States reported that presale checks included a check of outstanding restraining orders; 11 States reported that checks of mental health records are made in connection with presale firearm checks.

When only those States that reported searching data bases for reasons other than felony status are considered, rejections for such reasons accounted for the following:

Nonfelony reason	Percent of rejections in States which search records for specific nonfelony reasons
Fugitive	6%
Restraining orders	4
Mental illness	2

Sources of data

The findings are based on data collected by the Bureau of Alcohol, Tobacco and Firearms (ATF) and BJS. Data for 1994 and 1995, provided by ATF, were calculated using the number of firearm-coded inquiries to the FBI's criminal history database. The percentage of denials used for ATF estimates was based on the experiences of jurisdictions that had implemented presale firearms check procedures prior to the Brady Act.

Data for the first half of 1996 were collected under the BJS Firearm Inquiry Statistics (FIST) program. The results were from a survey of 600 law enforcement agencies, of which 176 in 44 States responded.

Background

The provisions of the Federal Gun Control Act (18 U.S.C. §§ 922 (g) and (n) as amended) prohibit the sale of firearms to an individual who —

- is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than 1 year;
- is a fugitive from justice;
- is an unlawful user of a controlled substance;
- has been adjudicated as a mental defective or committed to a mental institution;

- is an alien unlawfully in the United States;
- was discharged from the armed forces under dishonorable conditions;
- has renounced U.S. citizenship;
- is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child; or
- is a person convicted of domestic violence.

Brady Act

The Brady Act was enacted in November 1993 and became effective in February 1994.* The interim provisions of the act require that licensed firearm dealers request a presale check on all potential handgun purchasers from the Chief Law Enforcement Officer (CLEO) in the jurisdiction where the prospective purchaser resides.

The CLEO must make a reasonable effort to determine if the purchaser is prohibited from receiving or possessing a handgun. The Federal firearms licensee must wait 5 business days before transferring the handgun to the buyer unless earlier approval is received from the CLEO. These interim procedures will terminate no later than November 30, 1998.

The "interim provision" also permits States to follow a variety of alternatives to the 5-day waiting period. These alternatives include States that issue firearm permits, perform "instant checks," or conduct "point-of-sale" checks. To qualify under these alternatives, State law must require that before any licensee completes the transfer of a handgun to a nonlicensee, a government official verify that possession of a handgun by the transferee would not be a violation of law. Example of Brady-alternative States include California ("point-of-sale check"), Virginia ("instant check"), and Missouri (permit).

After November 1998 instant background checks will be required for

*Data collection began after the effective date of the Brady Handgun Violence Prevention Act (P.L. 103-159) on February 28, 1994.

(7) To evaluate properly the application and rejection rates for purchasing populations within a given area, the appropriate CLEO was identified.

(a) If cities within a participating county CLEO were acting as their own CLEO's, their populations were subtracted from the county population.

(b) If a municipal CLEO was discovered to be providing services for other selected municipalities, then populations for those municipalities were added to the population of the city having the CLEO.

(c) Those CLEO's selected to participate in the study but found to be relying on other jurisdictions to conduct background checks were replaced by those other jurisdictions (for example, a town being replaced by a county).

(8) Maine has local CLEO's; however, Maine's data came from the State police that serve 40% of the State's population. The State police data were split into A and B categories based on the proportion of the Maine population in each category.

(9) Connecticut did not submit any data in time for this study. Connecticut has both local and State CLEO's, but for the purposes of this study, Connecticut was classified as a State CLEO.

(10) National estimates exclude the District of Columbia and U.S. territories. Sales of firearms are prohibited in the District of Columbia except to law enforcement officers.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Bulletins present the first release of findings from permanent data collection programs. Don Manson, BJS Program Manager, and Gene Lauver, manager of the Firearm Inquiry Statistics program, Regional Justice Information Service (REJIS), wrote this Bulletin under the supervision of Carol Kaplan, Chief, National Criminal History Improvement Programs, BJS. REJIS of St. Louis, MO, collected and analyzed the FIST data presented. The Bureau of Alcohol Tobacco and Firearms assisted with background and analysis. Darrell Gilliard provided statistical verification. Tom Hester produced and edited the report. Marilyn Marbrook, assisted by Yvonne Boston and Jayne Pugh, administered final report production.

Further information about the Firearm Inquiry Statistics (FIST) program may be obtained from Carol Kaplan, BJS, or Gene Lauver, REJIS, 4255 West Pine Blvd., St. Louis, MO 63108.

February 1997, NCJ-162787

This report and others from the Bureau of Justice Statistics are available through the Internet—

<http://www.ojp.usdoj.gov/bjs/>

Firearm Inquiry Statistics program

The FIST program was established under the NCHIP to develop data on the impact of presale firearm checks on the identification of prohibited firearm purchasers. None of the FIST information provided from agencies to BJS contains or reveals the identity of individual applicants.

Information requested for the survey does not include data traceable to an applicant, and the computer program that some agencies use to collect FIST data transmits only the appropriately aggregated or categorized responses. The computer program also assists agencies in purging records after the delay times specified in law.

An initial report describing State background check procedures, *Survey of State Procedures Related to Firearm Sales* (NCJ-180763), was released in May 1996. Data summarizing the number of inquiries, rejections, and reasons for rejections are collected regularly and will be summarized and released semiannually.

Applicable State legislation

When the Brady Act became effective on February 28, 1994, 32 States and Puerto Rico were required to follow presale review procedures set out in the act. The remaining States were Brady-alternative States. Since then, 10 more States have enacted legislation to become Brady-alternative States (Colorado, March 1994; Georgia, January 1996; Idaho, June 1994, Louisiana, May 1996; Minnesota, August 1994; New Hampshire, January 1995; North Carolina, December 1995; Tennessee, May 1994; Utah, March 1994; and Washington, June 1996).

Methodology

The following presents the approach used to derive the 6-month estimate (for the period January to June 1996) from a sample of law enforcement offices charged with determining eligibility to purchase a firearm.

Data collection

For those States with local chief law enforcement officers (local CLEO's), CLEO's were randomly selected within each of the population size categories, based upon 1990 Census data: categories A (under 10,000 residents), B (10,000 to 100,000), C (over 100,000). The sample was also stratified between Brady States and Brady-alternative States.

A total of 176 CLEO's submitted data in time for this survey: 63 in category A, 55 in B, 36 in C, and 22 statewide CLEO's. Some agencies carried out presale determinations for other agencies or had determinations done for them by other agencies. The populations accorded these agencies were adjusted, based on the number of residents they actually served.

Calculation of estimates

(1) Census data for 1990 were used to calculate relative weights of samples from local and State CLEO's. The estimated 1990 population for the 50 States was 248,102,973.

(2) At least some data were received from 44 States. The general procedure to estimate all 50 States was —

(a) For each size category the populations for those agencies that submitted data and for all agencies of that size were totaled. A factor was computed from these two numbers.

(b) The raw number of applications and rejections (in sum and for each rejection category) were totaled for each size group.

(c) For the estimated number of applications and estimated number of rejections, the totals were multiplied by the factor computed in (a) for each size group.

(d) The totals for all size groups were added together to get the totals for the numbers of applications and rejections.

(e) To get the estimated number in each reason-for-rejection category, the percentage of the total raw rejections was calculated, and that percentage was multiplied by the estimated total number of rejections.

(3) New Jersey submitted data for total applications and rejections, but no reasons for rejections or breakdowns for its local CLEO's. Data for local CLEO's in New Jersey were ignored. Alaska submitted data for most of that State's CLEO's. This study categorized both States as State reporting agencies.

(4) Of the three States that changed from Brady to Brady-alternative States after 1995, Georgia (1/1/96) was considered a Brady-alternative State, and Louisiana (5/7/96) and Washington (6/6/96), Brady States.

(5) Two large cities were analyzed separately because of their high rejection rates; their averages were not used to estimate the overall rejection rates. Their numbers of rejections were included in the final total, however.

(6) Agencies for the following States reported data for applications and rejections but no data for reasons for rejection: Alaska, Indiana, New Hampshire, New Jersey, Ohio, and West Virginia.

purchasers of all firearms. The background check will determine, based on available records, if an individual is prohibited under the Federal Gun Control Act or State law from receiving or possessing firearms.

Under the "permanent provisions" of the Brady Act, presale inquiries will be made through the National Instant Criminal Background Check System (NICS). The act requires the NICS, which will be operated by the FBI, to be established no later than November 1998. At that time the procedures related to the waiting period of the interim system will be eliminated.

Under the FBI's proposed NICS configuration, State criminal history records will be provided through each State's central repository and the Interstate Identification Index. The Index, maintained by the FBI, points instantly to criminal records that States hold. In addition, the FBI will provide records of Federal offenses, Federally maintained State data, and Federal data on nonfelony disqualifications. States responding to NICS inquiries for nonfelony prohibitions will provide their records directly.

The National Criminal History Improvement Program (NCHIP)

To ensure immediate availability of complete and accurate State records, the Brady Act established a grant program authorized at \$200 million. The program is to assist States to develop criminal history record systems and improve the interface with the NICS.

A major goal of the grant program is the interstate availability of complete State records when the NICS is implemented. Toward this goal, over \$112 million was awarded in direct awards to States during fiscal years 1995 and 1996. NCHIP program funds have also supported direct technical assistance to States, evaluation, and related research.

Gun purchaser background checks, by State, 1996

State	Brady State (N)		Number of law enforcement contacts responsible for record checks*	State data bases being accessed			
	Original (3/1/84)	8/30/96		Criminal histories	Wanted fugitives	Restraining orders	Mental health
Alabama	Y	Y	87				
Alaska	Y	Y	35	Y	Y		
Arizona	Y	Y	1	Y	Y		
Arkansas	Y	Y	1	Y	Y		
California			1	Y	Y		
Colorado	Y		1	Y	Y	Y	Y
Connecticut			1	Y	Y	Y	
Delaware			1	Y		Y	
Florida			1	Y	Y		Y
Georgia	Y		1	Y	Y	Y	
Hawaii			4	Y	Y		Y
Idaho	Y		1	Y	Y	Y	
Illinois			1	Y	Y		Y
Indiana			1	Y			
Iowa			99	Y	Y	Y	Y
Kansas	Y	Y	123	Y	Y		
Kentucky	Y	Y	1	Y	Y	Y	
Louisiana	Y		59	Y			
Maine	Y	Y	128	Y	Y		
Maryland			1	Y	Y		
Massachusetts			270	Y	Y		
Michigan			825	Y	Y		Y
Minnesota	Y		668	Y	Y		
Mississippi	Y	Y	263				Y
Missouri			115	Y	Y		
Montana	Y	Y	59	Y	Y		
Nebraska			85	Y	Y		
Nevada	Y	Y	1	Y	Y		
New Hampshire	Y		1	Y	Y		
New Jersey			490	Y	Y	Y	Y
New Mexico	Y	Y	112	Y			
New York			58	Y	Y		
North Carolina	Y		98	Y	Y		
North Dakota	Y	Y	63	Y	Y		
Ohio	Y	Y	1	Y	Y		
Oklahoma	Y	Y	440	Y			
Oregon			208	Y	Y		
Pennsylvania	Y	Y	67	Y			Y
Rhode Island	Y	Y	39	Y	Y		
South Carolina	Y	Y	1	Y	Y		
South Dakota	Y	Y	88	Y	Y	Y	
Tennessee	Y		96	Y		Y	
Texas	Y	Y	991	Y	Y		
Utah	Y		1	Y	Y		
Vermont	Y	Y	22	Y	Y	Y	
Virginia			1	Y	Y	Y	
Washington	Y		291	Y	Y		
West Virginia	Y	Y	1	Y	Y	Y	
Wisconsin			1	Y	Y		
Wyoming	Y	Y	40	Y	Y		Y
Total	32	22	5,802	49	41	14	11

*In the Brady States contacts are the chief law enforcement officers (CLEOs); in Brady-alternative States these contacts are identified according to criteria of each State. Source: Survey of State Procedures Related to Firearm Sales, BJS, May 1996 (NCJ-180763).

Applications for purchases of handguns and reasons for rejection, by Brady and Brady-alternative States, Bureau of Justice Statistics estimates, 1/1/96-6/30/96

These tables present detail for the overall estimates reported in *Press Release: Firearm Checks*, BJS Bulletin (NCJ-162787). Some of the details in the tables remain unpublished because the statistics are sensitive to the sample design; reporting from the sample must cover a longer period before reliable conclusions can be drawn.

See *Highlights*, page 1 of *Press Release: Firearm Checks*.

	Estimates* — 1/1/96 - 6/30/96		
	All States	Original Brady	Brady-alternative
Inquiries/applications			
Received	1,308,000	570,000	738,000
Rejection	34,000	16,000	17,000
Rejection rate	2.6%	2.8%	2.4%
Reasons for rejection			
Past felony conviction	24,000	13,000	9,000
Other	9,000	3,000	8,000

Note: Because of the estimation procedure, columns for reasons for rejection are not additive. All estimated counts are rounded. Percentages were calculated from unrounded data. Detail may not add to total because of rounding.
*Based on 176 sources in 44 States. The estimates reflect only applications for purchase of handguns.

Original Brady States are those that were required to follow press release review procedures set out in the Brady Act when it became effective on February 28, 1994. Some of these States are now Brady-alternative States.

Alabama	Alaska
Arizona	Arkansas
Colorado	Georgia
Idaho	Kansas
Kentucky	Louisiana
Maine	Minnesota
Mississippi	Montana
Nevada	New Hampshire
New Mexico	North Carolina
North Dakota	Ohio
Oklahoma	Pennsylvania
Rhode Island	South Carolina
South Dakota	Tennessee
Texas	Utah
Vermont	Washington
West Virginia	Wyoming

Detailed data on reasons for rejection: See discussion, page 2 of *Press Release: Firearm Checks*.

Reasons for rejection	Estimated percentages — 1/1/96 - 6/30/96		
	All States	Original Brady	Brady-alternative
Total	100.0%	100.0%	100.0%
Felon	71.8	81.5	62.2
Fugitive	5.7	6.9	3.2
State law	4.2	.8	11.0
Restraining order	2.3	2.3	2.5
Mental illness or disability	1.0	.2	2.8
Local ordinance	.8	.3	1.8
Addict of illegal drugs	.8	.9	.2
Juvenile	.4	.2	.8
Alien	.2	.2	.2
Dishonorable discharge	—	—	—
Renunciation of citizenship	—	—	—
Other*	12.9	6.7	25.4
Number of rejections	34,000	16,000	17,000

Note: Because of the estimation procedure, columns are not additive. Forty-four percent of all rejections had no specified reason for rejection. The estimation procedure distributed the number of such rejections according to the "known" percentages from rejections with reasons. This procedure created estimates for the Nation, original Brady States, and Brady-alternative States. These estimates are sums of the "known" reasons and the "distributed" reasons.
—Less than 0.05%.

*A single State in the original Brady and Brady-alternative State categories accounts for the large percentage for "Other reasons." Without each State, about 2.4% of the rejections in the original Brady States and 6.8% in Brady-alternative States would be categorized as "Other." Removing both of these States' data reduces the "Other" category (all States) from 12.9% to 3.7%.

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Study #4889—page 1

PETER D. HART RESEARCH ASSOCIATES, INC
 1724 Connecticut Avenue, NW
 Washington, DC 20009
 (202) 234-5570

Interviews: 403 voters
 Dates: April 16, 1997

FINAL

Study #4889
 Houston, Texas
 April 1997

40 Male
 51 Female
 [5]

AREA		TYPE	SAMPLE POINT			FORM	DATE	
[6]	[7]	[8]	[9]	[10]	[11]	[12]	April	[13] [14] 1997

1. Are you registered to vote in the city of Houston?

Registered.....	100	CONTINUE	[15]
Not registered.....	-	TERMINATE AND DO NOT	
Not sure	-	COUNT TOWARD QUOTA	

2. Thinking back over the past several years, do you think the problem of handgun violence in Houston has been getting better, getting worse, or staying about the same?

Getting better	9	[16]
Getting worse	49	
Staying about the same	38	
Not sure	4	

3. Would you say that the current gun control laws here in Houston that deal with the sale and possession of handguns (a) go too far and are more restrictive than they should be, (b) are about right, or (c) do not go far enough and need to be strengthened?

Go too far/more restrictive than they should be...	10	[17]
About right	23	
Don't go far enough/need to be strengthened ..	57	
Not sure	10	

Study #4869--page 2

4. As you may know, the U.S. Congress passed the Brady Law in 1993, which requires a five-day waiting period before a person can buy a handgun, and required law enforcement officials to perform a criminal background check during that period. What is your reaction to the Brady Law -- very favorable, somewhat favorable, somewhat unfavorable, or very unfavorable?

Very favorable	57	[18]
Somewhat favorable	22	
Somewhat unfavorable	9	
Very unfavorable	8	
Not sure	4	

- 5a. The Houston Police Department decided last year not to enforce the provision of the Brady Law that requires criminal background checks on potential handgun buyers. Before I just mentioned this to you, were you aware of this situation?

Yes, aware that Police Dept. does not enforce background check	42	[19]
No, not aware that Police Dept. does not enforce background check	58	
Not sure	-	

- 5b. What is your reaction to the Houston Police Department's decision not to perform criminal background checks on potential handgun buyers, as required by the Brady Law -- do you strongly approve, somewhat approve, somewhat disapprove, or strongly disapprove?

Strongly approve	9	[20]
Somewhat approve	7	
Somewhat disapprove	16	
Strongly disapprove	63	
Not sure	5	

6. Finally, there is a possibility that the U.S. Supreme Court might decide that the decision on whether to perform criminal background checks on potential handgun buyers should be left up to each locality, and not required by the federal government. Under this circumstance, do you think there should or should not be a requirement to perform criminal background checks on potential handgun buyers in the city of Houston? (IF RESPONDENT TAKES A POSITION, ASK) And do you feel strongly about that, or not?

Houston should have background checks -- feel strongly	81	[21]
Houston should have background checks -- do not feel strongly	9	
Houston should not have background checks -- do not feel strongly	2	
Houston should not have background checks -- feel strongly	5	
Not sure	3	

FACTUALS: These last few questions are for statistical purposes only.

- F1. In what age group are you--(READ LIST)?

18-24	9	[22]
25-29	6	
30-34	5	
35-39	7	
40-44	9	
45-49	9	
50-54	11	
55-59	8	
60-64	8	
65 and over	28	
Refused	2	

Mayor Bob Lanier agreed Friday, saying he expected a recommendation from Bradford on the matter within two weeks.

"My instincts are probably more in favor of doing the background checks," Lanier said, adding he "would give great weight to the recommendation of the chief."

Should the U.S. Supreme Court uphold the 5th Circuit and make the checks unnecessary altogether, Bradford said, "I will probably continue doing it based on the amount of success we're having."

Bradford said the success of the checks will be hard to determine "because if you take one or two or three off the streets that shouldn't be out there, it's going to be hard to say what's the value of doing that."

"I don't want to see that we're doing that 350 per week and we're only getting one or two (rejected applications)."

"But," he added, "if we're getting ... some measurable number, I think we should continue doing it. It shouldn't take the federal government mandating us to do certain things."

Houston Chronicle, Sunday April 13, 1997, page 37A (first page of Metropolitan Section)

Dealers still send gun applications to police

By Eric Hanson, Houston Chronicle

Even though the Houston Police Department stopped making background checks a year ago on people buying pistols as required by the federal Brady law, some local firearms dealers said Saturday they have continued to send applications to the department.

"We are still following the same procedures we always have," said Terry Mustachio, who works at Collector's Firearms, 3301 Fonder.

Mustachio said that when someone wants to buy a pistol, his store sends the paperwork by fax to the police department.

"What they do with that we don't know. We send them like the law requires," he said.

The department stopped making the checks after the 5th U.S. Circuit Court of Appeals ruled in March 1996 that it is unconstitutional for the federal government to require local law enforcement agencies to conduct the checks.

The law calls for a five-day waiting period when authorities can determine whether the potential gun buyer has a criminal record or other disqualifying factors.

Shortly after the ruling came down then-Police Chief Sam Nuchia suspended the background checks.

"Based on that (ruling)," Nuchia said Friday, "I stopped spending the taxpayers' money on it."

The decision to stop doing the checks means that thousands of request sent in by gun dealers have been ignored.

"We were shocked and dismayed when we found out about this," said Dave Smith, president of the Houston chapter of Texans Against Gun Violence.

"A lot of folks got guns who should not have got one," he said.

Without the background checks, a felon could purchase a pistol by merely swearing on the application that he was not a felon.

The Harris County Sheriff's Department as well as police departments in Dallas, San Antonio, Austin and New Orleans are still doing the checks.

The 3-year-old law requires gun dealers to ask for the checks, but about a year ago then-Police Chief Sam Nuchta suspended them in the wake of a federal appeals court decision. In March 1996, the 5th U.S. Circuit Court of Appeals ruled it is unconstitutional for the federal government to require local law enforcement agencies to conduct the checks -- though it left in place the requirement that dealers ask that the checks be made.

"Based on that (ruling)," Nuchta said, "I stopped spending the taxpayers' money on it." The ruling by the 5th Circuit, which covers Texas, Louisiana and Mississippi, is supposed to be reviewed by the U.S. Supreme Court this year.

The Harris County Sheriff's Department -- as well as police departments in New Orleans, Austin, Dallas, and San Antonio -- are still doing the checks.

Jim Faulkner, head of legal services at the Sheriff's Department, said, "We discussed not doing them anymore." The Sheriff's Department had to move three full-time employees from other positions to handle the gun dealer's requests.

"But we had put everything in place," Faulkner said. "And we felt it was a worthwhile thing to do."

Police Chief C.O. "Brad" Bradford said Friday he may resume the checks.

"I take the position that it's a good thing to do," Bradford said. "The police Department started complying with that part of the law when it went into effect in 1994, and we did, in fact, find a number of people that were denied their applications.

Between Feb. 28, 1994 -- when the Brad Handgun Violence Protection Act went into effect -- and Feb. 19, 1995, the Houston Police Department received 29,762 request for background checks. Of those, 2,350 were rejected.

The legislation was named for former White House press secretary James Brady, who was severely wounded in a 1981 assassination attempt on President Reagan. Its central provision is a five-day waiting period before a dealer can sell a handgun.

The law urges authorities to use those five working days to make a "reasonable effort" to determine whether the potential handgun purchases has a criminal record or other disqualifying factors.

The 5th Circuit Court ruling came in a lawsuit brought by the sheriffs of Val Verde County, Texas, and Forrest County, Miss., who said the law violated the 10th Amendment by compelling local police agencies to enforce federal law.

Many law enforcement agencies across the country complained that they could not afford to conduct the checks required by the unfunded federal mandate.

"I can tell you there is tremendous cost involved," Bradford said. "We get something like 350 inquiries per week." The chief said it would take at least 60 hours a week to review and respond to that many requests.

"So I can see why some departments, including this one, made the decision" to stop the checks in the wake of the 5th Circuit ruling, Bradford said. "from a fiscal standpoint it was the shrewd thing to do.

"But I can tell you to the extent that I can possibly do it, review those applications and get a response in place, I'm going to start back doing that," Bradford said.

Bradford said although the checks are a burden, large departments are better able to absorb the cost than small departments.

Bradford said he views the checks as a chance to stop certain people from buying a handgun.

Bob Arwady, who works at the Ammo Dump, 11117 Post Oak Road, said the store has never received any official notification from the department that the practice has been discontinued.

"We heard it through the grapevine a couple of months ago. But we still go through all the paperwork and send them in," he said.

The applications are sent to the law enforcement agency that has jurisdiction over the residency of the buyer.

Arwady said that in the past when an application was rejected they would receive notice by registered mail. The dealers would then inform the customer the purchase had been denied and to contact the agency.

If no response was received then dealers assumed the police found no reason to halt the sale, Arwady said.

Before the city stopped doing background checks, Arwady said numerous customers reported their purchase was held up by the city not for being a felon but for having outstanding parking tickets or unpaid city licenses.

"They were pretty mad about it," he said.

Between Feb. 28, 1994, when the Brady Handgun Violence Protection Act went into effect, and Feb. 19, 1995, the Houston Police Department received 29,762 request for background checks. Of those, 2,350 were rejected.

The ruling by the 5th Circuit Court, which covers Texas, Louisiana and Mississippi, is supposed to be reviewed by the U.S. Supreme Court this year.

Meanwhile, Police Chief C.O. "Brad" Bradford said he might resume the checks because it is a way to stop certain people from buying a pistol.



The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY- SIX

An Act

REGARDING CERTAIN INJURIES FROM FIREARMS

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1.

Massachusetts general laws chapter 140 is hereby amended

by inserting after section 131J the following new section:-

Section 131K. Liability for firearms

Any manufacturer, importer, dealer, or distributor of a firearm or assault weapon shall be liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death results from the discharge, within the Commonwealth of Massachusetts, of the firearm or assault weapon, with the exception that if such firearm or assault weapon employs a mechanism or device which is designed to prevent anyone except the registered owner from discharging the firearm or assault weapon, including but not limited to radio frequency tags, automated fingerprint identification systems, or mechanical locks, the manufacturer, importer, dealer or distributor shall not be subject to the provisions of this section.

NOTE. — Use ONE side of paper ONLY. DOUBLE SPACE. Insert additional leaves, if necessary.

(1) For the purposes of this section, the term "firearm" shall mean a pistol, revolver, or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than sixteen inches or eighteen inches in the case of a shotgun as originally manufactured.

(2) For the purposes of this section, "assault weapon" shall include all versions of the following, including all rifles, shotguns, or pistols sold under the designation provided in this section, and rifles, shotguns, or pistols which are substantially identical thereto sold under any designation:-

(a) Avtomat Kalishnikov, also know as AK-47 semi-automatic rifles; UZI semi-automatic rifles, including UZI Carbine, Mini-Carbine and Pistol; AR-15 semi-automatic rifles; Fabrique Nationale, FN-FAL, FN-LAR, and FN-FNC semi-automatic rifles; Steyr AUG semi-automatic rifles; SKS semi-automatic rifles; Shotguns with revolving cylinders known as the Street Sweeper and the Suiker 12; Algimec Agmi; Armallite AR-180; Australian Automatic Arms SAP Pistol; Auto-Ordinance Thompson type; Barrett Light-Fifty model 82A1; Beretta AR-70; Bushmaster Auto Rifle and Auto Pistol; Calico models M-900, M-950 and 100-P; Chartered Industries of Singapore SR-88; Daewoo K-1, K-2, Max 1 and Max-2; Encom MK-IV, MP-9 and MP45; FAMAS MAS 223; Feather AT-9 and Mini-AT; Federal XC-900 and XC450; Franchi SPAS-12 and LAW-12; Galil AR and ARM; Goncz High-Tech Carbine and High-Tech Long Pistol; Heckler & Koch HK-91, HK-93, HK-94 and SP-89; Holmes MP-83; MAC-10 and MAC-11 Carbine type; Intratec TEC-9, DC-9 and Scorpion; Iver Johnson Enforcer model 3000; Ruger Mini-14/SF folding stock model only; Scarab Skorpion; SIG 57 AMT and 500 series; Spectre Auto Carbine and Auto Pistol;

Springfield Armory BM59, SAR-48 and G-3; Sterling MK-6 and MK-7; USAS-12; Weaver Arms Nighthawk; Wilkinson "Linda" Pistol;

(b) any other semi-automatic rifle with a fixed magazine capacity exceeding ten rounds;

(c) any other shotgun with a fixed magazine, cylinder, drum or tube capacity exceeding six rounds; and

(d) any semi-automatic firearm which is a modification of a rifle or shotgun described in this subsection; that is, having the same make, caliber, and action design but a shorter barrel or no rear stock.

(3) For the purposes of this section, "assault weapon" shall not include:

(a) a rifle or shotgun which does not employ fixed ammunition; (b) a rifle, shotgun, or pistol which was manufactured prior to the year eighteen hundred and ninety-eight. (c) a rifle or shotgun which operates by manual bolt action; (d) a rifle, shotgun, or pistol which operates by lever action; (e) a rifle or shotgun which operates by slide action; (f) a rifle, shotgun, or pistol which is a single shot weapon; (g) a rifle, shotgun, or pistol which is a multiple barrel weapon; (h) a rifle which is a revolving cylinder weapon (i) a rifle which employs a fixed magazine with a capacity of ten rounds or less; (j) a shotgun which is a rimfire weapon that employs a tubular magazine with a magazine capacity of six rounds or less; (k) a rifle or shotgun which cannot employ a detachable magazine or ammunition belt with a capacity greater than ten rounds; (l) a rifle, shotgun, or pistol which has been modified so as to render it permanently inoperable or so as to make it permanently a device which may not appropriately be designated as an assault weapon; or (m) a rifle, shotgun, or pistol which is an antique or relic firearm, movie prop or other weapon not capable of firing a projectile and not intended for use as a functional weapon and which cannot be

readily converted through a combination of available parts into an operable assault weapon.

The term "large capacity ammunition belt" shall mean a belt or strip holding more than ten rounds of ammunition to be fed continuously into a semi-automatic rifle, shotgun or pistol.

The term "large capacity magazine belt" shall mean a box, drum or other magazine container which holds more than ten rounds of ammunition to be fed continuously into a semi-automatic rifle, shotgun or pistol.

The term "semi-automatic" shall mean the capability of firing a shot with each depression of the trigger without additional slide, bolt or other manual action.

The term "high damage ammunition" shall mean any ammunition as defined in section one hundred and twenty-one of chapter one hundred and forty, which is capable of piercing or penetrating armor or bullet proof vests.

(4) This section shall not apply to firearms or assault weapons originally distributed to officers of law enforcement agencies, members of the armed forces of the United States, or the organized militia of the commonwealth or of any other state, to the extent that any such person is authorized to acquire, possess or carry a firearm or an assault weapon and is acting within the scope of his duties.

(5) This section shall not apply where the injury or death results from the intentional self-inflicted use of a firearm or assault weapon or where the person discharging a firearm or assault weapon is injured by such while committing a crime, or where the person discharges a firearm in self-defense.

(6) This section does not serve to limit any cause of action, other than that provided by this section, available to a person injured by a firearm or assault

weapon. Any defense that is available in a strict liability action shall be available as a defense under this section.

(7) This section shall only apply to the discharge of a firearm or assault weapon which is manufactured, imported, or distributed after the effective date of this act.

(8) For the purposes of this section, "direct and consequential damages" shall include but not be limited to reasonable and necessary medical expenses, diminution of earning capacity, pain and suffering including mental suffering and emotional distress, loss of consortium, and in the case of death those damages enumerated in section 2 of chapter 229 as amended.

SECTION 2. Section 3 of chapter 258B is hereby amended by inserting after subsection (l) the following new subsection:-

(m) for victims, and in the case of a homicide, the family members of the victim, to be notified of the provisions of section 131K of chapter 140 where bodily injury or death results from the discharge, within the commonwealth of Massachusetts, of a firearm or assault weapon as defined in section 131K.

SECTION 3. This act shall take effect upon its passage.

The Boston Globe

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Demands for safer guns . . .

A 2½-year-old is killed when a gun in the hand of his half-brother goes off. Another child dies in New Bedford while playing with a gun he thought was empty. In Springfield, a 14-year-old is killed by a 13-year-old firing his grandfather's gun.

These are just three of the 200 youngsters killed nationwide each year in handgun accidents. Mayor Thomas M. Menino has proposed an intriguing bill that would hold gun manufacturers liable for injuries and deaths caused by their weapons, but exempt so-called "smart guns" that are equipped with safety devices. Instead of reflexively fighting this, manufacturers would be better advised to develop a system that, at a minimum, protects youngsters from these tragic accidents.

A spokesman for Smith & Wesson in Springfield - a leading gun manufacturer - said the company has not yet devised a position on Menino's proposal. The spokesman doubted that technology exists to prevent illicit gun use while allowing the gun owner to fire the weapon quickly.

Stephen Teret, a professor at Johns Hopkins

University in Baltimore, said that from 1888 to 1937, Smith & Wesson built a gun that could not be fired by young children. With gun deaths on the rise, it makes sense to revive this design.

Manufacturers seem more interested in other issues than safety. Thirty years ago, much the same could be said of automobile companies, which had to be forced by government to install safety devices - one of the reasons that deaths in auto accidents have declined by 14,000 since their peak.

Guns are far simpler machines that last much longer than cars. But the technology to make them safer is not as straightforward as the installation of seatbelts or airbags. Still, the Massachusetts Legislature would do well to hold extensive hearings on Menino's bill and pin down manufacturers on what they will do to make their weapons safer. If they refuse to act, legislation may well be necessary. Those three youngsters would be alive today if handguns could not so easily become deadly toys.

The Importance of the Brady Bill

February 1997 marked the third anniversary of the enactment of the Brady Law, which mandates a five-business-day waiting period for handgun purchases. When President Clinton signed the Brady Handgun Violence Prevention Act into law, it represented the successful culmination of a history of gun-related positions and activities undertaken by the IACP since the 1920s.

Early resolutions focused on establishing uniform laws concerning the sale, carrying and use of revolvers, pistols, etc. A 1922 resolution stated, "We feel that the great number of shocking crimes, which are of almost daily occurrence, has increased to such an alarming extent as to point to us clearly our duty to ask for the enactment of laws in our states which will regulate the carrying of weapons which make such crimes possible."

More recent resolutions called for mandatory sentencing of persons convicted of crimes involving handguns; mandatory training and demonstration of proficiency in the lawful use and security of firearms by the permit holder; a mandatory waiting period; a mandatory check by local police agencies of all applicants' state and federal fingerprint and criminal records; and a national system to allow us to accurately and speedily identify felons who attempt to purchase handguns. With these positions on record, the IACP embraced the provisions of the Brady Bill.

After nearly seven years of heated debate with representatives of the gun lobby, we—along with other law enforcement groups and concerned citizens—celebrated our victory with Sarah and Jim Brady when the Brady Bill became law during the latter part of 1993. Now, three years after its implementation, we are pleased to report that it already has a successful track record of keeping guns out of the hands of potential purchasers with criminal records, a history of mental illness or other disqualifying records.

The DOJ's Bureau of Justice Statistics published the first statistics assessing the impact of background checks on preventing sales of handguns to prohibited persons last month, and the results are impressive. Between March 1994 and June 1996, for all states combined, there were almost nine million applications to purchase firearms and an estimated 186,000 rejections. Over 70 percent of the rejected purchasers—130,200 people—were convicted or indicted felons. On the average, an estimated

6,600 firearm purchases were prevented each month by background checks.

From my perspective, it also appears that the Brady Law is making America safer from violent crime. Statistics in the FBI's Uniform Crime Report covering changes from 1994 to 1995 demonstrate this as fact:

- Murders with firearms decreased 11.6 percent.
- Aggravated assaults with firearms fell 5.8 percent.
- Armed robberies fell 7.6 percent.

The FBI's report states that the decrease in the use of firearms during robberies and aggravated assaults may help explain the overall decline in the murder rate, because injuries from firearms are more often lethal than injuries from other weapons.

Unfortunately, the background checks required by the Brady Law have become a contentious issue for some. In November 1996, the Supreme Court heard arguments by two sheriffs who challenged the constitutional validity of the requirement to conduct background checks. Their written filings claim that Congress has no power to force them to be part of the gun control policy, and refer to a 1992 ruling based upon the 10th Amendment that prevents the

federal government from requiring states to enact laws and regulations to further federal programs. The sheriffs also stated that the time consumed by background checks means less time for deputies' investigative duties. They have the backing of the National Rifle Association and other gun owners' groups.

The reality, however, is that the background checks are only a temporary inconvenience. After November 1998, instant background checks will be required for purchases of all firearms through a computer system developed and implemented by the federal government. At present, law enforcement is required only to check the records that are "available" to them. Their efforts need only be reasonable in light of the availability of resources, access to records and law enforcement priorities in their jurisdiction. Further, the Bureau of Alcohol, Tobacco and Firearms—the agency responsible for enforcing the Brady Law—has informed local governments that they may impose a charge on the buyer to cover the costs of the background check. This means that the agency is relieved of the financial burden.

It appears that the challenge to the background check requirement may be motivated more by opposition to gun control than concern for states' rights. If their efforts to defeat the requirement are successful, we must be prepared to quickly develop a legislative remedy that will overcome any potential constitutional question.

Throughout its history, IACP has supported measures to keep handguns out of the wrong hands, and we must continue to take all steps necessary to keep a law like Brady on the books. As we await the ruling from the Supreme Court, we trust that the wisdom of the nine judges will prevail, and the requirement for background checks will remain. If the ruling is negative, it will be imperative for us to pull out all the stops and do everything we can to save this effective crime-fighting tool. ♦

In last month's "President's Message," I incorrectly identified Alice Stebbins Wells as the first woman to have both arrest powers and the title of police officer when, in fact, the first woman to have this distinction was Mary Owens. I want to thank Dr. Dorothy M. Schulz, associate professor at the John Jay College of Criminal Justice, for bringing this to my attention, and for setting the record straight.



Chief Darrell L. Sanders
Frankfort, Illinois

DRAFT

The Court could hold in Mack v. United States that Brady's provision for law enforcement officers to conduct background checks of prospective handgun purchasers violates the Tenth Amendment. If so, and if the Court holds this portion of the law is severable, three elements of the law could still remain standing -- Brady's 5-day waiting period, the requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale, and transfer by gun dealers of the statement to State or local law enforcement officers. In this situation,

- o Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers on a voluntary basis.
- o The decision would apply only to the 24 Brady states, and not to the Brady alternative states (states where state legislatures have established an alternative system that meets federal standards). (List attached.)
- o ATF believes that the vast majority of local chief law enforcement officers would continue to perform background checks. After the Fifth Circuit reversed a portion of the Brady law, ATF believes, based on an informal, incomplete survey, that the vast majority of local chief law enforcement officers in Texas, Louisiana, and Mississippi continue to perform background checks. However, ATF indicates that no checks are being performed for purchases in Houston, Texas.

Options for responding:

1. A statement by the President exhorting law enforcement officials that the Brady law is workable and encouraging them to continue conducting record checks on a voluntary basis.*
2. A letter from Secretary Rubin and Attorney General Reno to law enforcement colleagues, urging continued enforcement of the Brady Act. (Draft attached.) The letter could be sent electronically by ATF to all state and local law enforcement organizations, and also sent to state attorneys general.
3. Telephone calls by the President and/or senior Administration officials including Under Secretary Kelly to the Governors of the 24 Brady states to urge that they support continued enforcement by local chief law enforcement officials.
4. In the event that some local chief law enforcement officers refuse to do background checks, ATF would attempt to identify state or local law enforcement officials who are willing to conduct background checks in those jurisdictions where the checks will not otherwise be performed. *Issue: does this create a disincentive for CLEOS to perform checks, thereby adding burdens to others? Or does this lead to one state CLEO where there wouldn't otherwise be one?*

DRAFT

5. ATF Director Magaw would send a notification to Federal Firearms Licensees explaining the decision and noting that their obligations remain unaffected.

6. The Administration could introduce legislation that would limit an FFL to the sale of long guns in jurisdictions where checks were not being performed. *ATF comment/evaluation needed. Preliminary evaluation: works legally; need to address notice issue -- how ATF to know of CLEO practice and how to inform FFL.*

*The President could make the following points in his statement:

a. While the Court's decision is disappointing, important elements of the Brady law were left intact -- dealer's obtaining background statements from purchasers; dealers' notification to law enforcement officials of the intended purchase of handguns; and the 5-day waiting period prior to delivery.

b. The Court did not "strike down the Brady Act", "declare it unconstitutional" or any one of a number of broad and inaccurate statements that may be heard. Rather, the Court held that State and local officials cannot be required to conduct the checks provided for in the law.

c. The decision need not disrupt the current process of conducting criminal background checks. Enactment of the Brady law was widely supported by the law enforcement community and it is anticipated that law enforcement officials will continue to make these checks. In those few areas where the courts have already held that law enforcement officials need not make Brady checks, the vast majority of those officials have continued to make the checks voluntarily.

d. Background checks on handgun buyers have proved their worth. Approximately [238,000] (BJS Bulletin, March 1997) felons and other categories of prohibited persons have been prevented from obtaining handguns from gun stores since the Brady law took effect.

e. The efforts of law enforcement officials in conducting these checks will not have to continue indefinitely because the national instant criminal background check system will replace the current system in November 1998.

f. Continued record checks under the Brady law are, plainly and simply, good law enforcement. We must not return to the old system under which many states made no effort to verify statements made by felons and other prohibited persons when they bought handguns from gun stores.

THE WHITE HOUSE
WASHINGTON

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DATE: April 4, 1997

REGARDING: Brady Bill Options

The following presents an overview of the various legislative options available to the Administration should the Supreme Court strike down the local law enforcement background check requirements of the Brady Law. As you will note, we have identified both the policy issues and the legal issues that are present in each alternative. The legal analysis can only be preliminary, however, because the constitutionality of any particular legislative proposal will depend on how the Supreme Court crafts its Brady Law decision. For this reason, the Justice Department has strenuously requested that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision.

1. OBJECTIVES

In assessing any possible response to an adverse judicial decision we should consider three separate, and potentially conflicting, objectives.

A. Policy -- advance the substantive policies of the Brady Bill of providing background checks for the purchasers of all handguns.

B. Political -- provide a clear answer to those claiming that the advancement of the policies advanced by the Brady Bill have been derailed.

C. Legal -- propose a legislative solution that is constitutionally sound and minimizes the opportunity for opponents to advance new and potentially damaging legal theories.

II. LEGISLATIVE OPTIONS

A. Quid Pro Quo Funding

This option would condition the receipt of federal monies for crime programs upon state and local communities agreeing to abide by the background check requirements.

1. Policy concerns. This option would provoke resistance in the law enforcement community. There are also some real world questions as to whether there are any programs to which compliance with the Brady Law could be realistically tied. Finally, there may also be a practical problem in that, for a variety of reasons including the normal timings of grant allocation, there may not be any grant monies to use as leverage for the relatively short period between the date of a Supreme Court opinion and late 1998 when the federal government will assume background check responsibilities.

2. Legal issues. Congress is generally free, under the Spending Clause, to use conditions on federal grants to states as a means of encouraging state action in the service of federally defined goals. Recent decisions, however, have identified two potential limitations on conditional spending power legislation. First, the purposes of the grant condition must be related to the purposes of the grant program. The more attenuated the connection between the purposes of Brady Law background checks and the conditional federal grants, the greater the risk of invalidation. Second, some judges have indicated a willingness to hold that legislation which withdraws funding, can under some circumstances, cross the line from encouragement to coercion and thereby violate constitutional principles of federalism. Although under current law a properly drafted spending program should survive constitutional scrutiny, such a law might also be used as a vehicle for opponents to test this 'coercion' principle.

B. Federal Preemptive Regulation in Noncomplying Jurisdictions

This option would impose on non-complying localities regulations which could work as alternatives to background checks in furthering Brady Law policies. Alternatively, imposition of these requirements might encourage non-complying localities to reconsider their options and voluntarily comply with the Brady Law itself.

Examples in this category include mandating a relatively long waiting period for gun purchasers which can only be shortened by completion of a background check. A second possibility is a requirement that guns may not be purchased at all in localities that do not voluntarily adopt background check requirements. A third option is to send all background checks for non-complying localities to federal agencies for whatever reasonable period it might take those federal agencies to complete those checks.

1. Policy concerns. The imposition of restrictions on the purchase of guns in non-complying communities could promote voluntary compliance with Brady; and if a locality

refused to comply, the new strictures could be an effective tool in checking the sale of handguns to persons with problematic backgrounds. On the other hand, the imposition of harsh strictures would impose penalties on those who would be otherwise eligible to purchase guns under Brady. In addition, providing disincentives for persons to buy guns in non-complying localities places the brunt of enforcement on arguably innocent third parties --gun dealers. Affecting third parties in this manner could provoke an unfavorable backlash.

2. Legal concerns. In areas where Congress has authority under the Commerce Clause to regulate private activity directly, it also has the authority to offer States a choice between regulating in conformity with federal standards or ceding the field to preemptive federal regulation. However, as with the spending power, noted above, the courts may rule that conditional Commerce Clause legislation might also be so coercive as to violate federalism concerns. Distinguishing permissible encouragement from unlawful coercion in this context is not clear. Although the federal government may impose genuine federal regulation in jurisdictions that fail to perform background checks, regulations designed to force States into assuming the responsibilities that Congress has assigned to them may be invalidated. Thus, mandating longer waiting periods in jurisdictions where local officers refuse to conduct background checks, would be susceptible to coercion claims if the delay were not justified.

C. Federal Operation of the System

This option would turn over the background check operation to the FBI or ATF immediately, or, if that is not feasible, would seek to move up the date that the FBI would assume operations.

1. Policy concerns. DOJ is unable to definitively determine when the FBI would be in a position to take over the background check operation. The time when such an appraisal can be made is also indeterminate. In addition, the cost of placing the responsibility for all background checks in the hands of the FBI at this time may be significant. DOJ is attempting to determine whether ATF may be currently in a position to assume the background check responsibilities.

2. Legal issues. This approach would rely on Congress' well established power to regulate gun sales in or affecting interstate commerce. It would not raise any significant constitutional issues.

D. Requiring Background Checks as a Precondition to Handgun Sales

This option would prohibit federally licensed firearms dealers from selling handguns unless the chief law enforcement official has certified that he/she will conduct a background check.

1. Policy concerns. This option places the brunt of enforcement on arguably innocent third parties -- gun dealers and persons otherwise eligible to purchase guns under Brady.

2. Legal issues. Congressional power to ban handgun sales altogether under the Commerce Clause presumptively includes the power to impose a ban selectively, where States and localities refrain from performing background checks. Absent coercion, as discussed above, a properly crafted provision should pass constitutional muster. In other words, as long as the federal controls are to ensure that prohibited persons are prevented from purchasing handguns, and not to coerce local authorities into conducting the background checks, the legislation would be constitutional.

E. No Legislative Response

1. Policy concerns. While there will undoubtedly be pressure to pursue a legislative response if there is an adverse Supreme Court decision, there are also policy reasons that militate against legislative action. These concerns deserve significant considerations.

a. First, an adverse decision raises essentially only timing concerns. The FBI is scheduled to take over the background check operation in late 1998.

b. Second, the Court's decision would apply only to 24 states (alternative systems that meet federal standards are already in place in the other jurisdictions) and even in those 24 states, many law enforcement officers have announced or are expected to announce that they will continue to voluntarily comply with Brady law requirements.

c. Third, a new legislative proposal is unlikely to pass.

d. Fourth, if a bill does pass it may play into the litigation strategy of the anti-gun control forces who would be free to pick and choose among federal court judges in an effort to obtain a favorable decision and a favorable precedent.

2. Legal issues. Not applicable.

III. TIMING OF A LEGISLATIVE RESPONSE

There has been some suggestion that the Administration propose a legislative response to an adverse Supreme Court decision on the day of that decision. As overriding concern, however, is that a cohesive and meaningful response must necessarily require serious study of the judicial opinion. Moreover, even if the response was well-thought out and adequately anticipated the Court's argument, an immediate cry for legislative intervention would likely be perceived as unduly reflexive and politically driven.

IV. ALTERNATIVES TO A LEGISLATIVE RESPONSE

In lieu of, or in addition to, the Administration could respond to an adverse Supreme Court decision by a communications event bringing together law enforcement officials who would agree to voluntarily enforce the Brady Law's provisions. The President could also issue a statement after the decision was rendered.

Dennis K. Burke 03/17/97 11:02:31 AM

Record Type: Record

To: Michelle Crisci/WHO/EOP, Bruce N. Reed/OPD/EOP
cc: Elena Kagan/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP
Subject: Brady Case

Here is where we are on Brady:

If the Supreme Court finds Brady unconstitutional, it would be because of one element of the law: The Brady law "requires" a state or local law enforcement official to conduct a reasonable background on a potential handgun purchaser. The Court would rule that the Federal Government can not "require" a state or local official to enforce a Federal law because it violates the 10th Amendment to the U.S. Constitution.

The rest of Brady would still be intact. Handgun purchasers would still be required to fill out a 4473 form (the form we just modified w/ our Empire State Bldg announcement) and the Federal Firearms License Dealer (FFL) must still forward that form to the chief law enforcement officer (CLEO) for the jurisdiction. If after five days, the CLEO has not advised the FFL that s/he may not transfer the handgun, the FFL may transfer the handgun to the purchaser. CLEOs could conduct background checks (and most will) but they will not be required to (also, Brady only applies in 22 states now -- the others are exempt because they have instant background checks, licensing requirements, etc.)

So our message could be that the majority of the Brady Law is still intact, but criminals should have no safe haven. This landmark public safety measure is too important to have judicially-created exceptions. The law should be clear -- no background check, no gun sale. We will be sending legislation to Congress this week to fix this Rehnquist Court decision and POTUS urges Congress to move on it quickly.

The 3 steps we are taking:

- 1) Sending legislation to the Hill that will respond to this Supreme Court decision:
- 2) Release a Pledge signed by Chiefs and Sheriffs throughout the nation that they will continue to enforce the Brady Law.
- 3) Release Letter from Reno and Rubin to every police chief and Sheriff in the country urging them to continue their public safety duty to conduct background checks on handgun purchasers.

Legislation:

We had been discussing the approach of conditioning law enforcement funding to states and localities on them passing legislation requiring background checks. The law enforcement groups were adamantly opposed to that approach. So now we are looking at how we can fix Brady by regulating FFLs. Here is the most current form of the idea:

For an FFL to be able to sell a handgun, s/he must now receive a certification from the CLEO that the CLEO will conduct a background check on prospective purchasers. Without this certification, the FFL would be prohibited from selling handguns -- at all.

At first blush, this appears rather heavy-handed but it does put the pressure on the CLEO and not the Federal government. Most CLEOs are going to conduct background checks, those who refuse will have to explain why they don't to their gun owners -- because there will be no handgun sales in their area. It sticks to a simple overall message -- no background check, no gun sale.

Obviously, this approach needs some additional thought but at least the idea of regulating FFLs and not conditioning funding appears to be the right avenue. Handgun Control likes this particular approach but I think they are also trying to think it through.

One of the questions we have to ask ourselves is whether this would ever pass, we come across looking heavy-handed with a DOA bill, and whether that, in itself, harms the Brady legacy?

Based on Elena's suggestion, I have also asked both Treasury and Justice to give us options on what POTUS could do by executive action -- for example, could he, by executive order, prohibit a FFL from selling a handgun w/o a CLEO certification? We will continue to pursue.

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POLICE EXECUTIVE
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CHUCK WEXLER
EXECUTIVE DIRECTOR

MEMO

To: Dennis Burke
From: Martha Plotkin
Subject: Brady Supreme Court Decision
Date: April 21, 1997

As we discussed, to date I have received 15 commitments from police chiefs in 6 of the 22 Brady States to voluntarily conduct background checks, so long as the immunity provisions apply. They have provided me with the names of PIOs and record check staff for press purposes when the decision is released. In addition, I learned that in five states there is a designated agency that conducts the checks for all the PERF police chiefs in those states (about 25 to 30 PERF chiefs).

1. Arkansas State Police
2. Arizona Department of Public Safety
3. South Carolina State Law Enforcement Division
4. Kentucky State Police
5. Ohio Bureau of Criminal Investigations

A PERF chief in each of these states has contacted the state agency requesting a similar commitment. We contacted 64 chiefs and expect more call-backs from other states over the next week. We are trying to prepare a press release and op/ed for next Monday, the earliest we were told a decision could come down. I think you said you received a copy of the draft op/ed. Please feel free to share it with anyone that can identify any critical issues we may have overlooked.

Many of the police chiefs are reluctant to make a commitment because of the following concerns. Any information you can share with me that would address these issues would be helpful in garnering necessary support.

1. Some chiefs are concerned that they will not have access to NCIC for voluntary checks if the background provisions of the bill are struck. A New Mexico chief is concerned he won't have NCIC access and is already experiencing similar problems with conducting "school checks." One chief noted that Ohio chiefs cannot currently conduct these checks unless they are doing an official investigation; otherwise the state bureau of investigations conducts them. They fear that they cannot use their terminals to do the checks unless the Ohio rules of operations change or there is a state statute. I don't know much about how other states deal with NCIC access, but thought someone could advise me on whether this is going to be an issue we need to address.

2. Three of the chiefs I spoke to today reflected the comment made by this chief: "I have no means by which to conduct checks without cooperation from local gun shops—which I do not expect to get. [My] agency relies on shops to provide gun purchaser information and shops are uncooperative."

Chiefs are confused about whether gun shop owners will *be required to* request the background checks if the background check provision is struck down.

3. A few chiefs have said they were concerned with sec. 1983 suits if they do the checks. They are afraid the law enforcement immunity provision may still leave them open to litigation. It is not a matter of whether they will prevail, but whether they will have to bear the costs of litigation at all.

4. Several chiefs are concerned about voluntarily conducting the checks when a neighboring police agency does not. They are worried that purchasers will feel they are being discriminated against in their jurisdiction. *disimination suit?*

These seem to be the top four concerns. PERF would be more effective if we had some assistance in responding to these fears. We realize we are all limited by trying to guess what the final ruling will look like, but would like to prepare a substantive press statement that would include the police chiefs' commitment to do the checks. Obviously, we want to ensure that we are not saying anything inconsistent with the Administration's understanding of the issues or omitting any of the police liability issues. Let me know what you think. Thanks for taking the time to address our concerns.

cc: Chuck Wexler, Exec. Dir., PERF



POLICE EXECUTIVE
RESEARCH FORUM

CHUCK WEXLER
EXECUTIVE DIRECTOR

MEMO

To: PERF Members in Brady States
From: Chuck Wexler, Executive Director
Subject: Supreme Court Decision on Brady Law
Date: April 14, 1997

As many of you know, the U.S. Supreme Court will be rendering a decision as early as this week on the constitutionality of the Brady Law—the law that requires that chief law enforcement executives make reasonable efforts to conduct background checks within five days to determine if a purchaser can legally receive a handgun from a federally licensed dealer. A sheriff has challenged the Brady law on a 10th Amendment claim, suggesting that the background check is onerous and commandeers his services as a state official in furtherance of a federal program. The Police Executive Research Forum in congressional testimonies, amicus briefs and press conferences has supported Brady's background check since its first proposal, and does not believe its requirements are unduly burdensome. According to a recent Bureau of Justice Statistics report, an estimated 186,000 illegal sales were preempted in just the first 28 months following the Brady law's enactment. The report further indicated that 72 percent of aborted sales during the reporting period were attempted by convicted or indicted felons.

Because it is possible that the Supreme Court will strike down the background check portion of the law, **we would like to know if you would be willing to conduct these background checks voluntarily—even in the absence of the Brady law requirements. Your state is one of 22 states that is directly affected by the decision, as the remaining states have legislation that serves as an alternative to or similar substitute for the Brady law.**

We are anticipating that the waiting period, immunity for law enforcement personnel conducting the checks and other provisions of the Brady law will remain intact even if the background check is struck down. While we hope that a legislative fix will be proposed if the Supreme Court strikes down the background check provisions, in the interim there will be increased attention on those 22 states whose federally licensed dealers' sales are governed only by the current Brady law. There is some fear that failure to conduct background checks in one state may undermine neighboring states' efforts. **Please fax the attached form as soon as possible to Martha Plotkin at 202/466-7826.**

mp/press/brady22

PERF Members in Brady States

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Name_____

Agency_____

Phone Number_____ Fax Number_____

___ Yes, I will continue to voluntarily conduct background checks if that provision of the Brady law is struck down.

___ No, I will not continue to conduct background checks if that provision of the Brady law is struck down.

Comments:

___ I would like to be a spokesperson on this issue and agree to have PERF refer press inquiries on the subject to me.

Contact person who supervises background checks for your agency:

Name_____

Agency_____

Phone Number_____ Fax Number_____

Please fax as soon as possible to Martha Plotkin, Director of Communications and Legislative Affairs, at 202/466-7826, (phone: 202/466-7820, ext. 232). Thank you for taking the time to respond to this inquiry.

mp/press/brady22

First Draft: Brady Op/Ed NOT FOR DISTRIBUTION

The U.S. Supreme Court's decision yesterday on the Brady law could have devastating effects on efforts to keep guns out of the hands of criminals—that is, if police allow it to happen. While the Court ruled that the federal government could not mandate police chiefs to make “reasonable efforts” to conduct background checks on people who buy handguns from federally licensed dealers, many law enforcement leaders in affected states are already organizing to do the background checks voluntarily. The majority of police chiefs in this country fought hard for the Brady law, background check and all, and disagree that its requirements are unduly burdensome. In Lenexa, Kansas, for example, it takes approximately ____ minutes to conduct a background check; but the time it takes to investigate a shooting can take _____, as well as the immeasurable costs in human suffering and loss of life. That is why the Police Executive Research Forum (PERF) joined several other national law enforcement groups in an amicus brief to the Court in support of the Brady law. Police chiefs know that the Brady law provided the kind of national approach needed to address a gun violence problem that is exacerbated by uneven responses among the states.

There are 28 states that have their own background check laws. So while the decision directly impacts only the remaining 22 states whose gun background checks are governed solely by the Brady law, the decision will have national impact. The Brady law set some national standards to ensure that federal firearms dealers would not transfer handguns to criminals and others who cannot legally possess them, gutting the practice of criminals' shopping for guns in states with no background checks and carrying them to states with stricter gun control provisions. The evidence suggested extraordinary success. According to the Justice Department, in the first 28 months after Brady was enacted, more than 186,000 illegal gun sales were blocked by background checks. More than 70 percent of the estimated 6,600 attempts stopped each month are due to purchasers' being identified as indicted or convicted felons. That success will be undermined if no background checks are done in those 22 “Brady-only” states. While police have often fought the intrusion of the federal government in traditionally state and local crime issues, the Brady law was a shining example of when such a federal role is welcome.

Despite the arguments of those who challenged the Brady law on the narrow 10th Amendment federalism issue—that the Brady law commandeered their services as state officials to carry out federal policy—many police professionals disagree and will conduct these checks voluntarily. The Court did not rule that conducting background checks was unconstitutional, only that police couldn't be mandated to perform them as the Brady law is currently written. Police have few

options: The instant check system, a national computer system for immediate checks on purchasers, is supposed to replace the Brady law in late 1998, but is not yet a reality. In fact, the Department of Justice reports that at the end of 1995 only one-third of the more than 52 million criminal history records were accessible instantly through a national system and complete with court disposition information. Until that system becomes operational, police in affected states will be called on to carry on the successes of the Brady law on their own. Already, ___PERF members in ___ of the 22 affected states have voiced their commitment to voluntarily continue background checks so long as the immunity provisions of the Brady law apply to their conducting these checks.

Opponents of Brady may have prevailed in this case, but cops and citizens everywhere are certain losers in the fight against gun violence if police are unable or unwilling to conduct these checks voluntarily, at least until a legislative fix can be passed that meets constitutional challenges and public safety needs. Brady and background checks generally may not be a panacea for gun violence, but they are a worthy investment of police resources. Police would rather conduct a background check now than a homicide investigation later.

Ellen Hanson
Lenexa, Kansas Chief of Police and
PERF Board Member

Chuck Wexler
Executive Director
Police Executive Research Forum

PERF is a DC-based think tank and membership organization of progressive police chiefs and criminal justice professionals who serve more than 40 percent of the nation's population. The organization is committed to improving police practices through research, national leadership and debate.

Contact: Martha Plotkin, Director of Communications 202/466-7820 x232