

The question of waiting periods or instant background checks is a hot topic right now. Few in Congress on either side of this debate have bothered to look at the real problems inherent to any sort of mandatory background check system.

Mandatory Background Checks Don't Reduce Crime and Violence

The state of California has had far more experience with a system of waiting periods and background checks than most states. Yet the Atlanta Journal and Constitution reported on May 29, 1990 that Fred Wynbrandt, assistant director of the state's Department of Justice "can't answer" the question of whether the measures have slowed the rate of violence.

California's firearms restrictions were repeatedly tightened between 1979 and 1988, the Journal and Constitution reported, yet the number of handgun-related killings grew 21 percent.

The time allotted for background checks doesn't seem to matter either. California's 14-day waiting period for background checks failed to prevent Patrick Purdy, an insane career criminal who killed five children and wounded 29 others in Stockton, from purchasing the pistol he used to take his own life.

America's Criminal History Records Are Not Accurate

The notion that the citizens of this nation or any particular state can be made safer so long as every prospective firearm owner is investigated for a possible criminal record is undermined by the absolute inadequacy of the nation's criminal history records. The Report to the Attorney General on Systems for Identifying Felons Who Attempt to Purchase Firearms, issued in October, 1989 by the federal Task Force on Felon Identification in Firearm Sales, states, on pages 9-10:

Given these data systems, the law enforcement official who wants immediate access to felony convictions data has two basic options: to access directly the automated records maintained by his own or another State or to access interstate and Federal records through the NCIC system. He may, of course, do both. The problem, however, is that the conviction records accessed through these computerized methods are not complete.

These conviction records are incomplete for two distinct reasons. First, . . . many records at both the State and Federal levels are not automated. Among states recently surveyed, an average of about one-third of criminal history records were not automated; at the FBI the

proportion is about one-half. . . . Second, and equally important, convictions, as well as other final dispositions, are often not reported to the State central repository or to the FBI even when an automated record exists of the individual's arrest. The FBI, for example, estimates that approximately one-half of the arrest charges in their records do not show a final disposition. Data from the 1984 survey of State repositories cited above show that about 34% fewer final dispositions than arrests were reported to the repositories in 1983. (Ideally, each arrest should be matched by a final disposition.) In several States the proportion of underreporting was as high as 70-80%.

Any person who has had contact with the criminal justice system has a 50% chance of being unfairly denied a firearm under this system. A person who is arrested is not necessarily guilty of a crime, after all. A rape victim who shot and killed her attacker in self-defense may well be arrested on the scene but not indicted by a grand jury. Yet the arrest is likely to follow her the rest of her life.

This problem exists no matter whether the background check is done instantly or as part of a waiting period. Virginia's instant system, after a year of operation, now only initially disqualifies six out of every 100 purchasers. But four of the six who are initially rejected are later determined to be in fact legally eligible to purchase firearms.

Maryland, a state with a seven-day waiting period, has been found in court to be simply disqualifying any applicant with an arrest on his record and leaving it up to the rejected applicant to prove himself worthy of firearms ownership. This practice was found to violate Maryland law, which specifies that only convictions can be used to disqualify potential firearms purchasers.

Few Hardened Criminals Submit to Background Checks

The Virginia "instant check" system of investigating firearms purchasers suffers from the same fatal flaw as all other attempts to regulate the transactions of honest citizens in a firearms shop: the dangerous people these laws attempt to disarm seldom present themselves to be investigated at legitimate retail outlets in the first place.

The National Institute of Justice's July, 1985 research report, *The Armed Criminal in America: A Survey of Incarcerated Felons*, indicated, on page 36, that only one out of 14 handguns (7%) whose "use in crime was somewhat or very important" involved a "cash purchase from a usual retail outlet," according to the 1,874 prison inmates serving time in 10 states. Up to 70% of the most recent handguns owned by these criminals were stolen.

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This data, which has remained uncontradicted since its publication, indicates that Virginia's instant background check system will do little, if anything, over time to solve the crime problem. This view was confirmed within the first month of the Virginia law's operation, a time when ineligible persons who were unaware of the new law would be most likely to be caught.

According to statistics printed in the Washington Post on December 5, 1989, fewer than one in one hundred purchasers were denied firearms (43 out of 4,320). Of the 43 who were denied, only one was deemed worthy of arrest, according to a State Police spokesman at the time.

Individuals who are denied firearms under systems like Virginia's or more traditional forms of waiting periods tend to be persons who are not the threat to society that the sponsors of this legislation might suppose.

Certain traffic violations, securities crimes, and other "white collar" offenses by the nature of the penalties which can be imposed ("is under indictment for or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," [27 CFR section 178.32 (d)(1)]) render persons convicted of such offenses ineligible to purchase firearms.

Such persons are often unaware of their loss of rights and will attempt to purchase firearms for legitimate purposes such as home defense or sport. Denying firearms to this class of persons, while required by federal law, will have little fundamental effect upon public safety.

Consider a person who plea bargained on a felony or disqualifying misdemeanor years or decades ago. Since the potential penalties for many crimes have increased over time, and the current penalty for a given crime in the state in question is often used to determine eligibility for firearms purchasers in that state, there are many "convicted felons" today who were not felons at the time of their conviction.

An individual who committed a disqualifying offense many years ago is scarcely the same threat to society as a drug dealer convicted yesterday. But since both individuals are legally disqualified, it is easy to see how aggregate statistics can be used to lead fair-minded people to believe that everyone denied firearms by a background check falls into the latter category instead of the former.

A report in the April 22, 1991 Los Angeles Times gives some anecdotal evidence in support of this contention. California's new gun control law prohibits anyone convicted of certain misdemeanor crimes from purchasing or owning a firearm for 10 years. An officer of the Los Angeles Police Department had to be reassigned to a job in which possession of a firearm was not required because under the new law he was legally barred from doing so.

Frank Grimes, vice president of the Los Angeles Police Protective League was said by the Times to have "argued that peace officers charged with a misdemeanor eight or 10 years ago had no way of foreseeing that a plea of guilty or no-contest might affect their jobs years later."

Thus, it is essential that those who evaluate the efficacy of the Virginia background check system bear in mind what is the proper measure of this system's success. The measure of the success of any background check system is not whether some number of disqualified persons are prevented from purchasing firearms.

The test of success is instead whether Virginia's crime rate declines, both in absolute terms and relative to national and regional trends. One year is scarcely enough time to make such a determination. Therefore, it is premature at best to brand the Virginia system a success, let alone seek to impose it upon the rest of the nation.

Instant Check Invites Abuse by Government Employees

The Virginia "instant background check" is just as susceptible to abuse as any other system which relies on government employees to investigate their fellow citizens. Regulations adopted to administer the new law merely state the need to "insure the . . . privacy of criminal histories used in such records checks."

While this language expresses a commendable ideal, it lacks the teeth of specific punishment for violators of a citizen's privacy. The Department of Justice's Bureau of Justice Statistics 1985 study, Data Quality of Criminal History Records points out this is a major flaw of criminal record keeping statutes generally on page 39:

Another often-cited problem is the absence of penalties in state legislation. Statutes in only 21 jurisdictions impose penalties for violation of data quality and other types of provisions in state criminal history record statutes. Customarily, statutes in these 21 jurisdictions make a willful

failure to comply with provisions in the criminal history statute a misdemeanor. . . . [R]esearch for this report failed to find a single reported decision in which a criminal justice official was prosecuted for failing to report a disposition.

State governments and their agencies have been traditionally reluctant to take strong action against state employees. Most Americans would reluctantly agree that government officials are far more likely to use state employees for improper tasks than to prosecute those same employees for impropriety.

Government records invite government abuse. How else could Maryland Governor Schaefer use the state police to find a citizen at 10:00 p.m. on a Saturday and have another citizen traced through her license plate number for the "crime" of criticizing their state's chief executive?

Even a system of paper-only records can be abused despite legal prohibitions. The Bureau of Alcohol, Tobacco and Firearms has been sued in federal court (Brown et. al. v. Higgins) for compiling an illegal list of gun owners from dealer records for over two years despite the explicit prohibition of Section 926 (a) of Title 18 of the United States Criminal Code. The abuse of computer records all conveniently kept in a central location would be much easier for a government agent or agency.

The Virginia system's implementing regulations set up an elaborate mechanism of specific data collection. Each dealer receives from the Department of Criminal Justice Services an assigned set of sequentially numbered forms which are tracked along with his specific Dealer Identification Number (DIN). Each transaction is assigned a unique number as well.

Dealers are barred by regulation from using another dealer's VFTR form for any transaction. A dealer who calls in a check using a form not assigned to him will have the transaction rejected.

This emphasis on unique numbers suggests that there are those who see no reason why the mechanism should not be ready to set up a complete state firearm (or firearm owner) registration scheme. Never mind that this is clearly contrary to the legislative intent of the Virginia General Assembly as expressed in Section 18.2-308.2:2.3 of the original law.

The operation of the Virginia "instant background check" law should remind us of a basic principle. When we allow the government to get into the business of approving our rights before

we exercise them, the government seldom errs in the direction of laxity.

Legal Govt. Record Keeping Often Breeds Illegal Record Keeping

If anything, government record keeping on individuals traditionally breeds more record keeping on individuals. California resident Mike Smith learned this the hard way in January of 1991.

Smith was stopped by the police after three hours of shooting practice near the Santa Rosa Mountains. The area he had chosen for his practice turned out to have been an unmarked game reserve in which any shooting was banned.

The Bureau of Land Management Officer involved in Smith's arrest took an interest in his Springfield SAR-48 rifle. Under a new California law, the rifle in question had to be registered. He called in the make, model and serial number of the rifle.

It turned out that the rifle was not registered. But the police had on file who the rifle was sold to, when it was sold, and from what store it was sold. Evidently, the BATF had illegally transferred to the police already illegally obtained data from California gun stores.

Gun Owners Legal Assistance Program is aware that BATF has attempted to compile a list of names of those who have purchased firearms covered by the state's new gun law. BATF has gone to individual gun stores and copied the names and addresses of those who bought "assault rifles." This "forward tracing" is illegal under federal law.

An Instant Check is Not as Easy to Do as it Sounds

There are other problems with a national "instant background check." What is a misdemeanor in one state can be a felony in another, simply on the basis of a fine of an additional dollar or a possible maximum penalty of an additional day in jail. Which state's legal standard will prevail on the federal level?

In Maryland, a person cannot legally obtain a handgun if he has ever been convicted of a crime which is presently a felony under Maryland law. The person may have been convicted of something which wasn't close to a felony many years ago but is still denied legal firearms

ownership in Maryland.

Furthermore, plea bargains often enable the notorious criminal to avoid a fair punishment for his many crimes. Yet a citizen who has led an exemplary life ever since a conviction for a youthful fist-fight may find himself still considered a felon in the eyes of the law. Such people can have their rights restored but many do not. These are the "criminals" who comprise the great bulk of those which background checks detect.

The studies conducted by the Justice Department on criminal records check systems also remind us that many innocent people can be unfairly branded criminals. "Name only searches also produce a good many false positives--that is, a record is found but the record does not relate to the individual who is, in fact, the subject of the request. The release of the wrong record may do serious harm to the subject of the search."

This "serious harm" may seem an abstract issue. The issue takes on concrete meaning when you know a victim of this kind of mistaken identity.

A member of Gun Owners of America, Thomas Cook, asked for our help last year when the New Hampshire police refused to renew his gun permit. Their records showed he was under indictment in Arlington County, Virginia on drug charges. It turned out that another New Hampshire man used Mr. Cook's name when he was arrested. This other individual had no identification, so the police simply took his word for what his name was.

Despite Mr. Cook's forwarding of his own fingerprints and pictures of both himself and the other individual to the Arlington County Sheriff, no action was taken to clear Mr. Cook's name. Gun Owners Legal Assistance Program intervened on Mr. Cook's behalf and the matter was finally resolved.

An innocent man was unable to restore his good name (and protect his right to possess any firearms at all, let alone carry one) without outside legal help. A national system of background checks can only multiply this kind of needless suffering and anxiety many times over.

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Granted, these false positives can be reduced by fingerprinting all those who apply to purchase a firearm. But a fingerprint search is impossible to conduct instantly at present and any system to do so would be extremely expensive.

Instant Check Just the Beginning--Just Ask the Gun Control Lobby

Few people are aware that the Virginia law also allowed Virginia localities which have more restrictive firearms laws to maintain them. This exemption suggests that there are advocates of the "instant" check who see it as a foundation upon which an edifice of additional gun controls can be built. The exemption further suggests that there are advocates of this law who do not expect it to accomplish the task it has been enacted to accomplish.

The history of gun control laws in other states provides additional confirmation of these views. When the gun control laws on the books at any given time fail to work, the "solution" is always additional gun controls, as has occurred in places like California, as noted above, and New York City.

Twelve months after New York City passed its original handgun permit law in 1911, the murder rate in the city rose 18%, as noted by David Hardy in the November, 1982 issue of Reason. Despite being amended 68 times over the next 70 years, New York's firearms laws have failed to stem the tide of violent crime.

Can we expect an instant background check or a waiting period with background check to reduce the nation's crime rate? Of course not.

Since Sarah Brady and company use America's fear of crime as an excuse to demand "reasonable" gun controls now, can we expect them to admit that they were wrong when crime fails to decrease after some gun control is passed? The example of New York City indicates that such a failure will only fuel their demands for more and stricter gun control.

In 1981, the then-chairman of HCI, Pete Shields, wrote in his book, Guns Don't Die--People Do on pages 47-48:

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It is important to understand that our organization, Handgun Control, Inc., does not propose further controls on rifles and shotguns. Rifles and shotguns are not the problem; they are not concealable.

But last year, HCI asked Congress to ban the AR-15 rifle, whose barrel alone measures 20 inches, the AKS with its 16 2/3-inch barrel and the FN-FAL rifle which weighs 9 1/2 pounds (unloaded) and has a 21-inch barrel.

These rifles are no more concealable than any other rifle. The civilian versions of these firearms work just like any other semi-automatic rifle.

Now HCI says that it only wants these few "non-sporting" rifles banned. But what will they want to ban tomorrow?

After all, HCI has a history of changing its goals. HCI now says they only want to ban a few so-called "Saturday Night Specials" or, as they describe their target in their literature, "snub-nosed handguns."

But when their organization was founded, HCI (then the National Council to Control Handguns) supported a sweeping handgun ban, as Pete Shields admits in his book on page 98:

We supported the Hart-Bingham bill, a bill that would restrict the possession of handguns to the military, law-enforcement officials, licensed security guards, and licensed pistol clubs. Now Pete Shields thinks that was "an inflexible and unworkable position." But what will he and Sarah Brady think once they get what they want in Congress right now?

HCI backs a seven-day waiting period. But when California's 14-day waiting period didn't keep Patrick Purdy from getting a legal handgun, HCI didn't admit that waiting periods don't work but rather fought to impose a waiting period for every firearm and a ban on "assault weapons" in California.

If Patrick Purdy had used a semi-automatic skeet shotgun in Stockton, HCI would have argued that no one needs semi-automatic shotguns. Especially since had Purdy used an ordinary duck

hunter's shotgun, it is likely that more people would have been killed than were killed by Purdy's AKM rifle.

Required Background Checks Before Purchase Infringe Upon the Intent of the Second Amendment

When you get right down to it, both the "instant" system and the waiting period are different forms of the same thing: a police permit to purchase a firearm. For under either system, a person cannot exercise his Second Amendment rights until the police chief or his agent grants permission.

Citizens residing in areas ruled by notoriously anti-gun police chiefs, like Baltimore County Police Chief Neil Behan, Los Angeles Police Chief Daryl Gates or former San Jose Police Chief Joseph McNamara, can expect a long wait for the required permission.

The International Association of Chiefs of Police, a group to which most big city police chiefs belong, is also anti-gun. A citizen's Constitutional rights should not change according to his choice of residence.

We must always remember that our freedoms are more likely to be lost quietly at the hands of a well-intentioned bureaucracy than by the predations of the common street thug.