

N.R.A. Should Not Rejoice: Brady Act Lives On

By Dennis A. Henigan SPECIAL TO THE NATIONAL LAW JOURNAL

THE SUPREME COURT has spoken on the Brady Act, holding unconstitutional the act's mandatory background check for handgun buyers. *Printz v. U.S.*, 95-1478. As expected, the National Rifle Association is rejoicing, treating the decision as if it has erected an insurmountable new constitutional barrier to gun control laws.

The gun lobby and its friends should recork the champagne. In time it will be apparent that whatever the overall significance of the court's decision (especially for issues of federalism) it will have little impact on the future of gun control.

First, consider the effect of the ruling on the Brady Act itself. The statute has been wounded, but not mortally. The court struck down only the provision requiring local police to do background checks of handgun buyers during the five-working-day waiting period. It left the waiting period itself and the rest of the statute, intact. This means that in the 23 states governed by Brady—the other states are exempt as they have their own

background check laws—the checks will be voluntary; that is, local police will decide whether to use the waiting period to screen handgun buyers.

Will most police continue to do the checks? Of course they will. Every major national police organization worked for passage of the Brady Act because police wanted the opportunity to do effective background checks on handgun buyers. As Portland, Maine, Police Chief Michael Chitwood said on the steps of the Supreme Court following the ruling, "We will continue to do background checks because they are sane, rational, useful and an absolutely necessary condition for public safety."

Justice Department figures prove police were right about Brady all along: handgun sales to 250,000 felons and other high-risk gun buyers have been stopped since the act took effect. Most local chiefs and sheriffs will not put their communities at risk by allowing over-the-counter handgun sales to criminals who may prey on innocent citizens.

And for those few police who may be ideologically opposed to gun control, or who simply cannot be bothered, Brady contains another built-in incentive to do background checks. Gun buyers must wait the full five working days, unless the

police do a background check and clear the sale before the waiting period expires. Local police who refuse to do the checks must explain to their gun-buying constituents why they must wait longer for their handguns than citizens in some other jurisdictions where the checks are being conducted and the wait shortened.

Encourage State Action

It is, of course, important that no prohibited buyer be able to buy a handgun over the counter anywhere with no questions asked. To the extent that some local police will allow that to happen, we are all made less safe. But Justice Sandra Day O'Connor's concurring opinion in the Brady case makes it clear that there are constitutionally permissible ways for the federal government to encourage state and local officials to implement federal policy. If needed, Congress can act to strengthen Brady in a way that satisfies constitutional requirements.

What about the impact of the Supreme Court's ruling on other gun control laws? The court's ruling was based on the 10th Amendment, not the Second Amendment. The N.R.A.-supported suits against Brady made no claim that the Brady Act violated the Second Amendment's "right to keep and

bear arms." This was, no doubt, the N.R.A.'s concession to constitutional reality. The Supreme Court has long held that the Second Amendment concerns the protection of armed, state-organized militias, not the personal ownership of guns for private use.

So the gun lobby's legal attack on Brady focused on the mandatory background check, asserting that it was barred by the 10th Amendment's limits on federal power to enforce commands to state and local officials. Those limits should have no effect on current, or future, gun control laws that do not involve such federal mandates.

From the perspective of the national debate on gun control, the real question is: What did the N.R.A. accomplish in three years of litigation against the Brady Act? The gun lobby opposed Brady in Congress because it said a waiting period was unconstitutional and ineffective. Yet the waiting period remains. The N.R.A. always asserted its support for background checks, yet it was the background check provision of Brady that was struck down.

The truth is the N.R.A.'s objective was to destroy Brady and establish a precedent that would threaten other gun laws. Fortunately, it failed. ■

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