

# The Debate Over Criminal Record Checks

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The debate over criminal record checks of firearm purchasers centers on how to implement existing Federal law. Convicted felons are legally proscribed from purchasing or possessing firearms. It is assumed that felons cannot be trusted to truthfully complete firearm purchase forms; therefore, it is argued, some means is needed to check the criminal records of purchasers to ensure that they qualify for purchase. Viewed thusly, the debate focuses on methods to conduct criminal record checks in a timely, accurate, cost-effective way.

This report narrowly addresses criminal record checks of firearm purchasers. However, record check issues relate to the larger debate over guns in America and the facts and value judgments that drive these debates. First, there are already an estimated 200 million firearms in the United States (excluding the police and military).<sup>33</sup> The majority of these are legally owned by an estimated 70 million persons.<sup>34</sup> This is about 2.5 times the total criminal offenders in the FBI's criminal identification file.<sup>35</sup> An estimated 7.5 million new or used firearms are sold by licensed dealers annually in the United States.<sup>36</sup> Gun owner groups are concerned that record checks will excessively burden law-abiding citizens in order to identify the small percentage of criminal purchasers. Gun owner groups generally believe that waiting periods for conducting record checks impose an unfair burden by delaying lawful firearm purchases and eroding the constitutional rights of law-abiding citizens.

Opinion polls suggest that a large majority of gun owners, like the general public, support criminal record checks and a waiting period to conduct the checks.<sup>37</sup> Personal views and State laws differ on the preferred or required length of waiting periods—ranging from no wait to a few minutes to a few hours, days, or weeks.

Second, the right to keep and bear arms is cherished by many gun owners (and, opinion polls suggest, by the general public).<sup>38</sup> One point of view holds that the second amendment to the U.S. Constitution establishes the right of American citizens to possess firearms, and was intended by the framers to protect the people from the possibility of government tyranny. Another view is that the second amendment simply reaffirmed a preexisting right to keep and bear arms. Both of these views are based on analysis of Anglo-American law and English and colonial history that documents the pivotal role of firearms in the struggle for freedom and liberty. The outcome of the American Revolutionary War could have been different had the colonials not been armed. A third perspective suggests that the second amendment was intended to affirm the right of the States to raise and maintain militias, presumably for use in defending the nation from foreign adversaries. Some argue that this included defending the States from an oppressive central government, and that at the time the Bill of Rights was drafted, militias were mustered from citizens who supplied their own firearms. Thus, the right to keep and bear arms is

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<sup>33</sup>BATF estimate.

<sup>34</sup>Assumes an average of two to three firearms per owner.

<sup>35</sup>The FBI criminal history file included records on about 24 million persons, as of January 1991.

<sup>36</sup>BATF estimate; based on a 10-year average of domestic firearms production (adjusting for imports and exports) plus used gun sales (estimated at about 50 percent of all sales of new firearms). Some gun owner groups estimate total sales to be at least double, when private sales of used guns are included.

<sup>37</sup>A 1988 Gallup poll found that 91 percent of the general public and 90 percent of gun owners supported a national law refit? a 7-day waiting period before a handgun could be purchased, in order to determine whether the prospective buyer has been convicted of a felony or is mentally ill. See George Gallup, Jr., *The Gallup Report*, report No. 280 (Princeton, NJ: The Gallup Poll, January 1989), p. 26, reprinted by permission in T.J. Flanagan and K. Maguire (eds.), *Sourcebook of Criminal Justice Statistics* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 1990), p. 180. This and other polls have found broad support across the demographic and political spectrum (see R.S. Shinn, *Guns and Gun Control: National Public Opinion Polls*, CRS report for Congress (Washington DC: Congressional Research Service, Nov. 26, 1990). These results are not inconsistent with surveys indicating that high percentages of gun owner group members are opposed to waiting periods. James Baker of the National Reassociation has testified, for example, that the majority of NRA members oppose waiting periods, but that NRA members represent only a small percentage of all gun owners (testimony at a Mar. 21, 1991, hearing of the House Committee on the Judiciary, Subcommittee on Crime and Criminal Justice). The NRA is supporting so-called "instant checks" of criminal records at the point-of-sale. For other gun owner group views, see Gun Owners of America, *Background Checks: Gun Owner Harassment in Disguise*, issue brief, no date; and Citizens Committee for the Right to Keep and Bear Arms, *Point Blank* vol. 19, No. 9, p. 7, September 1989, and vol. 20, No. 1, pp. 4-5, January 1990.

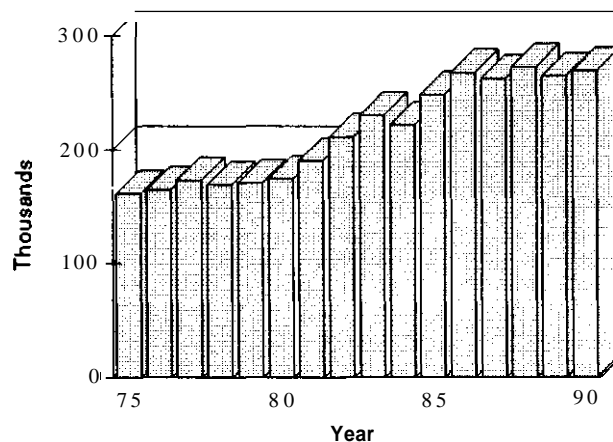
<sup>38</sup>Public opinion polls suggest that about 90 percent of U.S. citizens believe: a) the right to own a gun is protected by the U.S. Constitution; and b) waiting periods and record checks for gun purchasers are appropriate. See Shinn, *Guns and Gun Control*, op. cit., footnote 37.

viewed as key to either a narrow or broad interpretation of the second amendment.<sup>39</sup>

Regardless of one's views on the second amendment, it is an important part of the context of the debate over criminal record checks for firearm purchasers. These concerns raise anxieties that record checks and waiting periods might intimidate, discriminate against, or block law abiding citizens from legally obtaining firearms, thereby indirectly abridging their constitutional rights. Information provided on firearm purchase forms might be used to create lists or indices of gun owners and guns; record checks might place too much discretionary power over firearm purchases in the hands of police. Proponents of record checks and waiting periods assert that the intent is not to prevent law-abiding citizens from legally obtaining firearms, only to enforce firearm laws. They argue that record checks and waiting periods do not erode or challenge constitutional rights. Some also advocate waiting periods for a "cooling off time" to deter spontaneous crimes of passion. Opponents question whether cooling off time would really make a difference.<sup>40</sup>

Third, the criminals obtain firearms from several sources. These include: "black market" transactions between individuals (where guns might be exchanged for drugs or money); thefts from licensed dealers, manufacturers, military bases, and individuals; illegal interstate transportation of firearms (gun-running) from States with lax gun laws to States with strong gun laws; "straw person" or

Figure 2—Number of Federal Firearms Licenses, 1975-90



SOURCE: Bureau of Alcohol, Tobacco, and Firearms, 1991.

"stooge" purchases from licensed dealers (where the criminal has someone else buy the guns); direct but fraudulent purchases from licensed dealers (where the criminal lies about his/her criminal history); and direct but fraudulent purchases from licensed dealers or individuals at gun shows and flea markets. Al Even among licensed dealers, the situation is complex. Of the 270,000 current federally licensed firearm dealers (see figure 2), only about 15,000 operate storefront gun shops, and another 5,000 operate retail gun sections in sporting goods or department stores.<sup>42</sup> The rest are gun collectors gunsmiths, hobbyists, pawnshops, and the like. Most

<sup>39</sup>For general discussion of second amendment issues, see National Rifle Association of America, Inc., "Comments on [the U.S. Attorney General's] Draft Report for Identifying Felons Who Attempt To Purchase Firearms," 1989; S.P. Halbrook, "Police Surveillance and Temporary Suspension of the Exercise of a Constitutional Right: Testimony on S. 1236," Nov. 21, 1989, prepared for the U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution; S.P. Halbrook, "Prior Restraint, Police Surveillance, and the Purchase of Constitutionally Rotected Firearms Testimony on S. 4@" Aug. 2, 1988, prepared for the U.S. Senate, Committee on the Judiciary, Subcommittee on the Constitution; and S.P. Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," *Northern Kentucky Law Review* vol. 10, pp. 13-39, 1982. For contrasting views, see K.A. Ehrman and D.A. Henigan, "The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?" *University of Dayton Law Review* vol. 15, pp. 5-58, 1989, and references cited therein. For a range of viewpoints and analyses, see U.S. Congress, House, Committee on the Judiciary, Subcommittee on Crime, *Handgun Violence Prevention Act of 1989*, hearing, 101st Cong., 2d sess. (Washington DC: U.S. Government Printing Office, 1990); and U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution *The Right to Keep and Bear Arms*, report, 97th Cong., 2d sess. (Washington DC: U.S. Government Printing Office, 1982).

<sup>40</sup>See, for example, the testimony or statements of Handgun Control, Inc.; Coalition to Stop Gun Violence; International Association Of Chiefs Of Police; National Rifle Association Gun Owners of America; Firearms Coalition; and Citizens Committee for the Right to Keep and Bear Arms; among others, at hearings of the U.S. Congress, House, Committee on the Judiciary, Subcommittee on Crime, "Handgun Violence Prevention Act of 1989," 101st Cong., 2d sess., Apr. 26, 1990, and Subcommittee on Crime and Criminal Justice, "Brady Handgun Violence Prevention Act of 1991," 102d Cong., 1st sess., Mar. 21, 1991.

<sup>41</sup>According to BATF, "[i]here is no national data on the number of firearms entering the criminal community, nor, given the longevity of fii, a basis to estimate such a figure based on production," Mar. 19, 1991, letter and attachments to OTA. BATF does initiate criminal investigations in most of these categories. In fiscal year 1990, BATF submitted cases to U.S. Attorneys for prosecution in the following areas: gun show/flea market (280 cases); strawman purchase (250 cases); stolen firearms trafficker (543 cases); licensee involved as suspect (167 cases); and interstate firearm trafficker (403 cases).

<sup>42</sup>Data from the National Alliance of Stocking Gun Dealers. BATF reports 269,079 Federal firearms licenses in fiscal year 1990, including: 235,684 firearms dealers (no further breakdown available from BATF); 9,029 pawnbroker; 14,287 gun collectors; 7,945 ammunition manufacturers; 978 firearms manufacturers; and 946 firearms importers.

of the BATF's compliance effort is aimed at storefront gun shops that account for the largest share of firearm sales.

The number of illegal firearm sales that could be avoided by criminal record checks is uncertain. One survey of prisoners suggests that perhaps one-sixth of criminals purchase firearms from gun dealers, but statistically valid national data are lacking.<sup>43</sup> The BATF and National Institute of Justice (NIJ) are conducting further studies on sources of firearms.<sup>44</sup> States with criminal record checks have found that about 1 to 2 percent of purchasers have prior felony convictions.<sup>45</sup> Statistics for States without record checks are not available. Firearm thefts and black market transactions are not likely to be reduced by criminal record checks. Some hypothesize that thefts and black marketeering could increase if legal outlets were denied to criminals.<sup>46</sup> The impact on straw person purchases is unclear. Such purchases might be deterred to some degree, to the extent a record check scares stooges off. Straw person purchases might increase, if effective record checks caused more criminals to seek accomplices without criminal records. Controls over illegal purchases might be further tightened if record checks covered even the lowest volume licensed dealers, and dealer and individual sales at gun shows or other organized sales outlets.

Record check proponents believe that the illegal interstate transportation of firearms could be reduced if checks were required uniformly in all States. This could make it more difficult for criminals to purchase firearms in States without checks and transport them to States with mandatory checks. How much more difficult will depend in part on how the criminal justice system treats firearm offenders and how society deals with the violent crime problem. The efficacy of record checks in reducing the criminal use of firearms and firearm-related crime is uncertain and is linked to the Nation's overall anticrime strategy.

Fourth, the criminal record check of firearm purchasers is not a panacea for reducing violent crime. Firearms are involved in about one-fourth to one-third of the most violent crimes (e.g., homicide, aggravated assault), and perhaps one-eighth of all violent crime.<sup>47</sup> The impact of record checks would be greatest if applied to all jurisdictions, assuming that checks are some deterrence. Opinions on the causes of crime in America vary widely.<sup>48</sup> It is evident that the criminal record check is just one weapon in the arsenal for preventing and fighting crime. Record checks can complement—and be complemented by—other anticrime actions.

Fifth, success in using criminal record checks depends on improvements in Federal, State, and local criminal identification and record systems.

<sup>43</sup>See Wright and Rossi, *The Armed Criminal in America*, op. cit., footnote 27. This survey of incarcerated felons found that about 20 percent obtained firearms from retail outlets—16 percent by purchase and 3 percent by theft. Retail outlets were defined to include gun shops, pawnshops, and hardware or department stores. The survey found that about 26 percent of felons obtained firearms from the “gray or black market” (11 percent by purchase, 10 percent by theft, 5 percent by trade, borrow, or gift), and 44 percent from family or friends (17 percent by purchase, 10 percent theft, 8 percent borrow/rent, 6 percent gift, 4 percent trade). The study does not state: 1) whether and how gun shows, flea markets, and other less formal sales or trading outlets (in which gun dealers might participate) were covered in the survey; or 2) the extent to which family, friends, and fences obtained firearms for felons through stooge purchases from gun dealers. The study does not purport to be “a nationally representative probability sample” of States, prisons, or prisoners” (Wright and Rossi, op. cit., footnote 27); thus the degree to which the study results are representative of the broader convicted felon, prisoner, or criminal population cannot be determined without follow-up validation research.

<sup>44</sup>BATF continues to analyze traces of firearms used in criminal activities to better understand where and how criminals obtain firearms. NIJ is sponsoring a survey of juveniles in correctional institutions regarding their acquisition and use of firearms. NIJ is not, however, sponsoring a much-needed direct follow-up to the 1985 Wright and Rossi, op. cit., footnote 27, survey of prisoners.

<sup>45</sup>1990 data for California, Delaware, Florida, Illinois, Oregon, and Virginia suggest a confirmed hit range of about 0.6 percent to 3 percent, depending in part on the method of calculation. See, for example, Oregon State Police, *Study of Retail Firearm Sales and Concealed Handgun Licensing in Oregon* (Salem, OR: Oregon State Police, Criminal Investigation Division, 1990). 1991 data for Florida suggest a confirmed hit rate of about 3 percent. See Florida Department of Law Enforcement “First Two Months Operation of the Firearm Purchase Program,” memo from Deputy Commissioner McLaughlin Apr. 3, 1991.

<sup>46</sup>See Wright and Rossi, *The Armed Criminal in America*, op. cit., footnote 27; and J.D. Wright, “The Armed Criminal in America,” research in brief, U.S. Department of Justice, National Institute of Justice, November 1986.

<sup>47</sup>See, for example, Rand, *Handgun Crime Victims*, op. cit., footnote 25.

<sup>48</sup>The roots of criminal behavior have been variously attributed to factors such as economic and social conditions, peer pressures, family instability, mass media violence, and drug addiction. See, for example, U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice* (Washington, DC: DOJ/BJS, March 1988), and references cited therein. For some gun owner perspectives, see, for example, D.B. Kates, Jr., “Gun Laws Cannot Overcome Basic Cultural Values Which Determine Violence,” *Petersen's Handguns*, April 1991, pp. 14-15, and “Anti-gunners Skewing Foreign and Domestic Crime Statistics to Support Their Self-Serving Claims,” *Petersen's Handguns*, January 1991, pp. 16-17; and B.S. Centerwall, “Exposure to Television As A Risk Factor for Violence,” *American Journal of Epidemiology* vol. 129, pp. 643-652, 1989.

Congress recognized this in requiring the U.S. Attorney General (AG) to study and implement a system for the immediate, accurate identification of felons attempting to purchase firearms.<sup>49</sup> Several reports from the AG's study team emphasized that any effective felon identification system—whether on a proapproval, waiting period, or POS basis—requires accurate, automated FBI and State and local record systems.<sup>50</sup>

The Attorney General has endorsed a POS instantaneous criminal record check, and is moving to improve the record systems needed to support such record checks.<sup>51</sup> These improvements should expedite record checks for firearm purchaser waiting periods, firearm owner identification cards, concealed weapons permits, and other preapprovals of firearm purchase or ownership required by some States.

The AG's plan include the following:

1. survey of current record quality and automation in State criminal record systems (completed, will be updated in 1992);
2. development of a voluntary standard for State and Federal reporting and the flagging of felony convictions in criminal history record systems (completed);<sup>52</sup>
3. allocation of \$9 million per year for 3 years for State and local record systems improvements [fiscal year (FY) 1991 grant awards complete—will continue for FY92 and FY93];
4. allocation of \$12 million in FY92 funds to reduce the arrest, disposition, and manual record backlog in the FBI's Identification Division.<sup>53</sup>
5. allocation of an additional \$20 million per year for State/local record system improvements (in response to the Crime Control Act of 1990's requirement for a 5-percent set-aside of Bureau of Justice Assistance block grants for this purpose, beginning in FY92); and
6. support of the revitalization and modernization of the FBI's Identification Division (Congress appropriated \$185 million in FY91 funds for a new site and building near Clarksburg, WV—the automated equipment is estimated to cost several hundred more million dollars, although the President's FY92 budget includes no additional funding).<sup>54</sup>

The AG views firearm purchaser checks as part of a comprehensive approach to crime control that also includes stiffer, mandatory sentences for repeat firearm offenders, especially violent offenders, coupled with intensified criminal investigations of illegal gun and drug trafficking.<sup>55</sup>

<sup>49</sup>The Anti-Drug Abuse Act of 1988, Public Law 100-690, sec. 6213, requires that: a) "The Attorney General shall develop a system for immediate and accurate identification of felons who attempt to purchase 1 or more firearms but are ineligible to purchase firearms by reason of section 922(g)(1) of title 18, United States Code. The system shall be accessible to dealers but only for the purpose of determining whether a potential purchaser is a convicted felon. . . The Attorney General shall begin implementation of the system 30 days after the report to the Congress provided in subsection (b)"; b) "Not later than 1 year after the date of the enactment of this Act, the Attorney General shall report to the Congress a description of the system referred to in subsection (a) and a plan (including a cost analysis of the proposed system) for implementation of the system. . ."; and c) "The Attorney General . . shall conduct a study to determine if an effective method for immediate and accurate identification of other persons who attempt to purchase 1 or more firearms but are ineligible to purchase firearms by reason of section 922(g) of title 18, United States Code. . . Such study shall be completed within 18 months after the date of enactment of this Act. . ."

<sup>50</sup>See U.S. Department of Justice, Task Force on Felon Identification in Firearm Sales, *Report to the Attorney General on Systems for Identifying Felons Who Attempt To Purchase Firearms* (Washington, DC: U.S. Department of Justice, Assistant Attorney General for Justice Programs, October 1989); J.M. Tien and T.F. Rich, Enforth Corp., *Identifying Persons, Other Than Felons, Ineligible To Purchase Firearms: A Feasibility Study* (Washington DC: U.S. Department of Justice, Bureau of Justice Statistics, May 1990); and SEARCH Group, Inc., *Legal and Policy Issues Relating to Biometric Identification Technologies* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, June 16, 1989).

<sup>51</sup>See Nov. 20, 1989, letter from Attorney General Dick Thornburgh to The Honorable Dan Quayle, President, U.S. Senate; U.S. Department of Justice, Office of Justice Programs, *Attorney General's Program*, op. cit., footnote 32; and U.S. Congress, House, Committee on the Judiciary, Subcommittee on Crime, *The Attorney General's Report to Congress on the Option Selected for Identifying Felons Who Attempt To Purchase Firearms*, hearing, 101st Cong., 2d sess. (Washington, DC: U.S. Government Printing Office, Jan. 25, 1990).

<sup>52</sup>See U.S. Department of Justice, Federal Bureau of Investigation and Bureau Of Justice Statistics, "Recommended Voluntary Standards for Improving the Quality of Criminal History Record Information" *Federal Register* 56:5849-5850, Feb. 13, 1991.

<sup>53</sup>See U.S. Department of Justice, *Attorney General's Program*, op. cit., footnote 32; and testimony of Paul J. McNulty, Acting Director, Office Of Policy Development U.S. Department of Justice, and Dennis G. Kurre, Deputy Assistant Director, Identification Division, Federal Bureau of Investigation, before a Mar. 21, 1991, hearing of the House Committee on the Judiciary, Subcommittee on Crime and Criminal Justice.

<sup>54</sup>*Ibid.*; OTA is conducting a separate but related assessment of the FBI's plan for modernization of its fingerprint identification operations. See OTA, *The FBI Automated Fingerprint Identification Program*, op. cit., footnote 14. The FBI does have some identification automation funds available from user fees.

<sup>55</sup>See statement of U.S. Attorney General Richard T. Fromburgh before an Apr. 18, 1991, hearing of the Senate Committee on the Judiciary.

Improvements in Federal, State, and local criminal record systems could facilitate record checks for other purposes in addition to screening felons from purchasing firearms, such as: persons arrested,

booked, charged, or sentenced for criminal offenses; those seeking Federal or State employment and licenses requiring record checks; and applicants for U.S. citizenship or permanent visas.