

Virginia State Crime Commission

Gun Show Loophole

2008

GUN SHOW LOOPHOLE

Background

During the 2008 session of the Virginia General Assembly, Senator Henry L. Marsh, III, introduced Senate Bill 109, which would have required that a criminal background check be performed prior to the completion of any firearms sale conducted at a gun show. This bill was referred to the Senate Courts of Justice Committee. The Committee referred the general subject matter of the bill to the Crime Commission for study. The bill was then put to a vote, and failed to report by a vote of 6 Yeas to 9 Nays.

A formal Mission Statement was adopted by the Crime Commission to govern the parameters of the study:

Commission staff is directed to conduct a legal analysis of federal and state law relating to the private sales of firearms at gun shows (the gun show "loophole") and to review any applicable studies and data. The purpose of this study is limited to promoting a better understanding of the complicated legal issues and statistical limitations involved so that the legislators will be better equipped as they consider and devise policy.

In accordance with this Mission Statement, staff conducted a review of applicable federal and Virginia law, briefly examined the law in the other forty-nine states as pertains to the sale of firearms at gun shows by private citizens who are not federally licensed firearms dealers, and reviewed recent studies on the topic of illegal sales of firearms at gun shows.

Federal Law

The Federal Gun Control Act prohibits any person from engaging in "the business of . . . dealing in firearms" unless they have a federal firearms license ("FFL"). The term "engaged in the business of" is further defined as:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive

purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

The phrase "with the principal objective of livelihood and profit" is defined, in turn, as:

that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: Provided, that proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

In short, it is illegal for a person to regularly sell firearms for profit, or as a means of livelihood, unless they have applied for and received an FFL.

Once a person has received an FFL, one of the requirements of their licensure is that they request a criminal background check on potential purchasers prior to selling them a firearm. This is to ensure that the transfer of the firearm to the buyer will not violate a federal or state law, such as the prohibition on felons from possessing firearms.

However, this requirement for a background check only applies to licensed dealers who possess an FFL. If a person who is not a licensed dealer sells a firearm, there is no requirement under federal law that a criminal background check be performed. As long as the seller is not "engaged in the business of selling firearms," which would require that he be licensed, no federal law is violated.

State Laws

Individual states are free to pass their own laws governing firearms sales. Some states currently require background checks on all firearms sales, including private sales, i.e., those made by a person who is not a licensed dealer. Seventeen states require background checks on at least some private sales (such as sales of handguns by a person who does not have an FFL),

while thirty-three states do not have any requirements at all for background checks when private sales are involved. Of the seventeen states that do have at least some requirements for background checks, two states, Oregon and Colorado, have requirements for background checks of private sales only when the sale occurs at a gun show.

Virginia is one of thirty-three states that do not require any criminal background checks to be performed on private sales. Therefore, as long as no federal or state laws are being violated, such as knowingly selling a firearm to a convicted felon, private sales of firearms may lawfully take place in any private or public location, including at an organized firearms show, without any background check.

Published Studies

The main question that confronts policy makers is, how often do convicted felons purchase guns at firearms shows from private sellers? Unfortunately, this is an extremely difficult question to answer, as private sellers are not required to keep records of their sales. A number of studies have been published in recent years that examine this topic. None of the studies are able to provide a conclusive answer, due to inherent problems of trying to calculate or estimate a definitive number in a situation where precise data are not recorded for such sales. The studies reviewed by staff all had inherent methodological issues, limiting the usefulness of the findings. Often the sample size was small, there were potential biases in the data, or the study was limited by a focus on a specific geographic region, with results not necessarily generalizable to Virginia.

While there can be no doubt that some felons obtain firearms from private sales conducted at firearms shows, it is not known what percentage of felons obtain their guns in this manner, as opposed to private sales outside of firearms shows, the use of straw purchasers, sales from corrupt licensed dealers, or theft.

Preemptive Federal Legislation

In 2007, two bills were introduced in Congress that would mandate criminal background checks be performed for every firearms sale conducted at a gun show. Senate Bill 2237, the “Crime Control and Prevention Act of 2007,” introduced by Senator Joseph Biden, was referred to the Senate Judiciary Committee, where no further action was taken. House Resolution 96, the “Gun Show Loophole Closing Act of 2007,” introduced by Congressman Michael Castle, was referred to the House Judiciary Committee’s Subcommittee on Crime, Terrorism and Homeland Security, where no further action was taken. While neither of these bills were acted upon nor taken up for a vote, they are a reminder that Congress could potentially act to require background checks at gun shows, thus preempting state law. If such a federal law were upheld as constitutional by the courts, Virginia might accommodate such a requirement by enacting legislation similar to that passed by Colorado and Oregon.

District of Columbia v. Heller

Recently, the United States Supreme Court brought a constitutional dimension to this issue. In the case of District of Columbia v. Heller, the United States Supreme Court struck down a D.C. law that imposed very strict limitations on the ownership of firearms—essentially banning all handguns, and requiring rifles and shotguns to be disassembled or have a trigger lock installed at all times, even inside a private residence. In its opinion, the Court expressly stated that the Second Amendment creates not just a collective right to gun ownership, dependant on membership in a militia, but creates an individual right. While the Court did state that some limitations on firearms are acceptable, such as “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” it is at this time uncertain which restrictions will be allowed by the federal courts, and which will not.

The United States Supreme Court did note, though, that the level of scrutiny that will be applied in the future to gun restriction laws will

not be the deferential standard of “rational basis,” i.e., as long as some rational reason can be articulated for the law in question, it will be upheld by the courts. This means that any future gun restriction legislation passed by Virginia, or Congress, will have to survive the more difficult hurdles of either intermediate scrutiny or strict scrutiny.

The full ramifications of the Heller opinion likely will be litigated in federal courts over the next few years, and may prove to have a determinative bearing on this issue.

Conclusion

At the January 13, 2009, meeting, the Crime Commission deliberated on what policy changes, if any, it would recommend in regards to private sales of firearms at firearms shows. One proposal was to require background checks be performed for all sales at firearms shows. This proposal was voted upon, and, due to a tie vote of 6 to 6, failed to pass. The Commission then considered a proposal to require that the organizer of a firearms show ensure that agents of the Virginia State Police be present while the show is taking place. The organizer would be responsible for reimbursing the Commonwealth of Virginia the cost for the State Police’s presence. This proposal was voted upon and was unanimously approved. It was agreed that a bill requiring State Police presence at firearms shows would be introduced during the 2009 General Assembly Regular Session.